Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990

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INTRODUCTION

The Civil Rights Act of 1990 was introduced in the United States Senate and House of Representatives on February 7, 1990.1 The two companion bills were aimed at overturning a series of 1989 Supreme Court decisions2 that created "roadblocks" for people of color3 and

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The Supreme Court’s decisions on employment discrimination during its 1988 Term (October 1988 through July 1989) were Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (section 1981 applies only to formation and enforcement of contracts, not to performance; thus, racial harassment on the job is not a viable claim under section 1981); Lorance v. AT&T Technologies, 490 U.S. 900 (1989) (statute of limitations on a claim challenging a discriminatory seniority plan begins to run at the time the plan is instituted, not at the time concrete harm occurs); Martin v. Wilks, 490 U.S. 755 (1989) (white firefighters, who failed to intervene during court proceedings authorizing a plan to combat past racial discrimination, could later bring a lawsuit to challenge the plan); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (overruling Griggs v. Duke Power Co., 401 U.S. 424 (1971), and shifting to victims of discrimination the burden of proving an employer had no justification for its exclusionary practices); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion suggesting that employer may be relieved of liability for discriminatory conduct if it can prove that it would have taken the same action in the absence of any prejudicial motives).

3. This Article uses the phrases people of color and women of color to refer collectively to racial groups and groups with national origins traditionally defined as racial minorities in the United States, such as African Americans, Latinos, Native Americans, Asian Americans, and Pacific Islanders. The term minority frequently has negative overtones and is a misnomer in settings where people of color make up more than fifty percent of the whole. Although people of color constitute a minority of the work force in most places of employment, this is not always the case. Thus, the phrases people of color and women of color may be more descriptive of members of racial groups and
women alleging employment discrimination under title VII of the Civil Rights Act of 1964 and section 1981 of the Civil Rights Act of 1866. The 1990 Act was intended to restore the civil rights protection that existed prior to 1989 and to strengthen existing antidiscrimination protection for all employees. Although the Act was ultimately vetoed by President Bush after passing both houses of Congress, the shortcomings of present employment discrimination laws point to the continuing need for such legislation. Congress has responded to this need by reintroducing the Act as the Civil Rights Act of 1991.

Sections 8 and 12 of the 1990 Act are of particular interest to women of color, who are at the intersection of race and gender discrimination in the workplace. Section 8 provided for the mirror image of section 1981 and would have amended title VII to allow employees and job applicants who are victims of intentional acts of employment discrimination to recover compensatory and punitive damages from their employers. The goal of this provision was to correct an anomaly in

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6. The bill, as introduced in the Senate, set out the following findings and purposes:

SEC. 2. FINDINGS AND PURPOSES.
(a) FINDINGS—Congress finds that—
(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and
(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) PURPOSES—The purposes of this Act are—
(1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and
(2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

9. S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1020 (daily ed. Feb. 7, 1990). The version of the Act approved by the conference committee contained an exception to the damages provision. Section 5, which was added to the Act in response to the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), made clear that an unlawful employment practice was established when discrimination "was a motivating factor for any employment practice, even though such practice was also motivated by other factors." S. 2104, 101st Cong., 2d Sess., 136 CONG. REC.
employment law that has existed since the inception of title VII. Under
the present statutory scheme, section 1981 claimants are entitled to the
full range of legal and equitable remedies, whereas title VII claimants—
though victims of similar intentional acts of employment discrimina-
tion—are limited to equitable relief.10

Section 12 of the Act would have added language to section 1981
prohibiting intentional racial discrimination, including, *inter alia*, acts of
racial harassment in the formation and performance of an employment
contract.11 This section was a direct response to the Supreme Court's
ruling in *Patterson v. McLean Credit Union*,12 which placed a restrictive
reading on section 1981. In *Patterson*, the Court held that section 1981
only governs conduct which occurs during the initial formation of the
contract or which impairs the right to enforce contractual obligations
through the legal process.13 The Court therefore concluded that racial
harassment in the course of employment is not actionable under section
1981.

This Article focuses on the status of women of color in the work-
place, on the largely ignored phenomenon of multiple discrimination
against women of color, and on the intersection of race and gender in
employment law.14 Part I discusses the social and economic status of

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10. Compare Swanson v. Elmhurst Chrysler Plymouth, 882 F.2d 1235 (7th Cir. 1989) (sexual
harassment in violation of title VII does not provide a basis for even nominal damages; discharge
unrelated to harassment, therefore title VII equitable relief also unavailable), *cert. denied*, 110 S. Ct.
758 (1990) *with* Jackson v. City of Albuquerque, 890 F.2d 225 (10th Cir. 1989) (termination of
employment based on race, and/or retaliation for filing of discrimination complaint with the EEOC,
violates section 1981; awarding $70,000 compensatory and $70,000 punitive damages and ordering
reinstatement) *and* Flanagan v. Aaron E. Henry Community Health Servs. Cent., 876 F.2d 1231
(5th Cir. 1989) (racial discrimination against white female physician by community health service
in violation of title VII and section 1981; awarding $25,000 compensatory and $20,000 punitive
damages) *and* Cowan v. Prudential Ins. Co., 852 F.2d 688 (2d Cir. 1988) (failure to promote black
male employee discriminatorily under title VII and section 1981; awarding $15,000 compensatory
damages). *See also* 42 U.S.C. § 2000-5(g) (1988) (provision for equitable relief only in title VII
actions).


12. Id. at 176-77.

13. For a fuller discussion of the intersection of race and gender in the law, see Crenshaw,
*Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination
Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (analyzing single-axis
theoretical frameworks, which exclude the multidimensional experience of black women). *See also*
(proposing a category of sex-race discrimination under title VII to address the unique vulnerability
of black women to sexual harassment); Seales-Trent, *Black Women and the Constitution: Finding
Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989) (arguing that black women
should receive the highest level of protection under the Constitution whether they are regarded as a
women of color, both historically and in contemporary society. It then presents three case histories that illustrate the vulnerability of women of color to discrimination in the workplace. Part II addresses the legal rules that govern claims of race-based gender discrimination. It examines the restrictions placed on section 1981 by the Patterson decision and analyzes the response contained in section 12 of the Civil Rights Act of 1990. It also assesses the shortcomings of the existing title VII remedial scheme and considers the expansion of those remedies by section 8 of the Act. Finally, Part III discusses the extent to which present antidiscrimination laws inadequately reflect concerns relating to women of color. It also explores the need for significant change in our legal system's construct for analyzing race-based gender discrimination and evaluates the potential benefits of expanded title VII remedies.

I

WOMEN OF COLOR: AT THE BOTTOM OF THE HEAP

A. Down Low in the Employment, Economic, and Social Matrix of the United States

Historic and economic factors make working women of color more vulnerable to racist and sexist employment practices than either working white women or working men of color. Working women of color have traditionally been concentrated in positions of employment lacking power or prestige. Although women of color have been in the work force longer and in proportionately greater numbers than white women, their status does not mirror that of white women. Women of color still disproportionately occupy the lowest-paying, lowest-skilled jobs in the work force and are in overwhelming proportion employed in jobs segregated by gender. Women of color have often been hired to do the jobs that white women have shunned as beneath them, or to perform work

subset of blacks, a subset of women, or a discrete group); Scarborough, Conceptualizing Black Women's Employment Experiences, 98 YALE L.J. 1457 (1989) (proposing a multi-factor approach under title VII to take into account the special situation of black women).

15. Many of the examples used in this Article refer exclusively to black women, who constitute the largest percentage of working women of color in the United States and who have been in the work force in significant numbers longer than other women of color. I recognize, however, that although women of color have much in common, there are also significant differences in our culture, history, and in how we are treated. The limitations of my research and the scope of this Article are not meant to trivialize or demean any of these differences. I have proceeded on the premise that all women of color are vulnerable to discriminatory treatment in the workplace based on the intersection of our gender and race, and this Article focuses on that phenomenon.

16. See RISKS & CHALLENGES: WOMEN, WORK & THE FUTURE 146-48 (Wider Opportunities for Women ed. 1990) [hereinafter RISKS & CHALLENGES] (giving statistics from the National Commission of Working Women of Wider Opportunities for Women). Ninety-one percent of all working women are employed in jobs considered traditional women's occupations, i.e., sex-segregated jobs. Id. at 147.
considered too arduous or taxing for white women.\textsuperscript{17} Black women as a
group also earn less per year than white women,\textsuperscript{18} and in 1989, black
women experienced unemployment at more than twice the rate of white
women.\textsuperscript{19} Similar disparities exist for working women who are Asian or
Latina.\textsuperscript{20}

Women of color also disproportionately occupy the lower echelons
of the economy. Families headed by women of color constitute a signifi-
cant proportion of all poor families. In the mid-1980s, twenty-three per-
cent of all Latino families were headed by women, and more than fifty
percent of these families had incomes placing them below the poverty
line.\textsuperscript{21} Latino families headed by women have the lowest incomes and
highest poverty rate of all family types, followed closely by black families
headed by women.\textsuperscript{22}

Economically, women of color are worse off as a group than white
women.\textsuperscript{23} Contrary to popular perception, women of color do not benefit

\begin{itemize}
\item \textsuperscript{17} See B. Hooks, \textit{Ain't I a Woman: Black Women and Feminism} 133-35 (1981).
\item \textsuperscript{18} \textit{Risks & Challenges}, supra note 16, at 148 (black women earn over seven percent less
per year than white women).
\item \textsuperscript{19} Id. at 146.
\item \textsuperscript{20} Asian women's employment status has not improved, notwithstanding their higher levels
American women living in the five metropolitan areas with most Asian Americans show that in
1980, the salaries of college-educated Asian American women were significantly below those of
comparable white men; between 8 and 16\% of these native-born Asian women earned $21,000, as
compared to 50\% of college-educated white men. Id.

Though Latina women generally attain a lower level of education than non-Latina women (in
1987, Latina women completed a median of 11.5 years of school compared with 12.6 years of
schooling for all women), the wage gap between them and white women is not attributable to the
difference in education alone. \textit{National Council of La Raza, Hispanics in the Workforce,}
\textit{Part II: Hispanic Women} 5-8 (1988) [hereinafter \textit{La Raza}]. Hispanic women are
overrepresented in the least skilled jobs, which also pay the lowest wage. Id. However, the gap
between the low occupational status of Latina women as compared to non-Latina white women
would be reduced by 27\% for Mexican American women and 57\% for Puerto Rican women if one
were to equalize for levels of educational attainment, language proficiency, and demographic and
residential characteristics. Id. Labor market discrimination may explain why the gap would not be
eliminated. See id.

\item \textsuperscript{21} \textit{La Raza}, supra note 20, at 13.
\item \textsuperscript{22} See Simms, \textit{Black Women Who Head Families: An Economic Struggle}, in \textit{Slipping
Through the Cracks} 141 (M. Simms & J. Malveaux eds. 1989). In the mid-1980s, households
headed by black women accounted for more than 50\% of all black families. \textit{Id.} at 141-42. The level
of poverty experienced by these families is often attributed to higher unemployment, fewer hours
worked, and lower wages earned. See, e.g., \textit{La Raza}, supra note 20, at 14; Simms, \textit{ supra}, at 141-43.

\item \textsuperscript{23} In 1988, the median annual income of all women working full-time was $17,606; the
median annual income of white women was $17,819, while the median annual incomes of black
women and Latina women were $16,538 and $14,845, respectively. \textit{Risks & Challenges}, supra
note 16, at 148. Comparing earnings, black men earned 74.8 cents for every dollar white males
earned, Latino men earned 65.6 cents, and white women earned 65.4 cents. Black women earned
only 60.7 cents and Latina women earned the least, 54.5 cents. \textit{Id.} Women of color are also

substantially from public welfare programs. Rather, they must tena-
ciously cling to their jobs, because they are not wealthy even when
employed and have a greater risk of falling into poverty upon losing a
job. Moreover, if they have families or less education or suffer discrimi-
nation in hiring, they may have fewer opportunities to find replacement
jobs. Since the economic problems confronting women of color make
their employment status a matter of primary importance, this in turn
makes them more vulnerable to, and more tolerant of, racial and sexual
harassment than women who are more economically secure and who
may more readily challenge such practices or seek other employment.

B. The Backdrop: Three Case Histories

The following case histories serve to illustrate the vulnerability of
women of color to discrimination in the workplace and the severe conse-
quences that can result from such discrimination. All three women of
color discussed here suffered debilitating financial, physical, and emo-
tional harm as a result of illegal harassment. Although two of the
women eventually recovered substantial compensation for the injuries
they suffered, the third was not so fortunate. Already a victim of dis-
criminatory harassment, she was victimized a second time by the inade-
quate legal construct that governs the intersection of race and gender in
federal discrimination law.

1. Case History No. 1: Crashing Through the Glass Floor

Ms. Juanita E. Reeder-Baker, a black female, was employed at

overrepresented in service, craft, and operatives job categories: 42.6% of all working black women
and 45.9% of all working Latina women are in these job categories, as compared to 26.7% of all
working white women. Id. at 146.

24. For example, Aid to Families with Dependent Children (AFDC) provides less than 10% of
all income for families headed by black women families. Simms, supra note 22, at 143-45.

25. I refer to a "glass floor" in order to contrast the situation of professional women of color
with that of professional white women. Professional women of color experience gender
discrimination in proportionately greater numbers than white women when they seek to move to
upper levels of management in the corporate setting; thus, they have more difficulty breaking
through the "glass ceiling." Those women of color who, by virtue of education and professional
skills, have broken through the glass ceiling find it an insecure floor to stand on; they are in constant
danger of crashing back through when they fall victim to discrimination at the upper levels of
management.

This "ceiling/floor" analogy is based on Kimberle Crenshaw's discussion of antidiscrimination
law and race and gender hierarchies. Crenshaw, supra note 14, at 151-52. She imagines a basement
in which there are persons of all races, genders, classes, ages, and physical abilities. They are stacked
feet-upon-shoulders, with the most disadvantaged groups at the bottom and those with the fewest
disadvantages at the top. The ceiling for these persons, all of whom are disadvantaged in some way,
is actually the floor for persons who are not disadvantaged by virtue of racial, sexual, or disability
discrimination. Women of color, who are multiply disadvantaged by race and gender discrimination
and, in many instances, by poverty, are not near enough to the ceiling to break through easily, if at
all.
Lincoln National Corporation as a highly skilled production control consultant. She earned more than $27,000 per year in this position and was acknowledged to have superior technical skills. She trained new employees in the Data Processing Department and was frequently called upon to help solve computer-related problems. After discovering that her merit pay increase was substantially smaller than what her similarly situated white coworkers received, she complained to the management. This set in motion a series of events that led to management placing Ms. Reeder-Baker on permanent probation, thereby denying her the opportunity to compete for a promotion for which she was fully qualified. After Ms. Reeder-Baker formally filed a complaint charging the company with racial discrimination, Lincoln placed a trace (an electronic security device that monitors and controls computer functions) on Ms. Reeder-Baker’s computer, making it impossible for her to complete her work. Finally, the company fired Ms. Reeder-Baker for displaying anger and for complaining about the existence of the trace.

Ms. Reeder-Baker suffered severe consequential injuries. She was unable to secure full-time employment for four months after her discharge. She applied for unemployment benefits after being discharged, but her former employer successfully contested her claim. She eventually found a job, albeit one paying only half of what she had been earning at Lincoln. Ms. Reeder-Baker, in addition to this economic harm, suffered extreme emotional distress. Her marriage, which was less than five months old at the time she was fired, ended in divorce. She became dependent upon her mother and father for support, and had to send her two children to live with their grandmother. Her car was repossessed. She developed severe tension headaches and a skin rash which had to be treated with medication. She became deeply depressed, frequently tired, and suffered other severe emotional reactions.

2. Case History No. 2: Falling Off the Bottom Rung

The experience of Beatrice Williamson is similarly instructive about the vulnerability of working women of color. Ms. Williamson, a fifty-two-year-old black woman, had spent her entire career at the Handy Button Machine Company as an unskilled entry-level assembler, even though she had shown that she was able to do higher-paying work. Although Ms. Williamson repeatedly applied for a promotion to the

27. Id. at 650.
28. Id. at 651-52.
29. Id. at 652.
30. Id. at 652-53.
position of inspector, white employees with less seniority were promoted instead. During an economic downturn, the company demoted Ms. Williamson to the even lower-ranking position of sorter, which made her ineligible to earn the $12-per-week bonus she had consistently earned as an assembler.\textsuperscript{32}

Ms. Williamson was the most senior, and also the only black, employee demoted.\textsuperscript{33} As work picked up and white workers with less seniority returned and were placed in assembler positions over Ms. Williamson, she began to have uncontrollable crying spells. Eventually she had to seek medical care and take medication for depression.\textsuperscript{34} A further emotional blow came when she learned that a white employee junior to her had been promoted to fill another inspector's job. Ms. Williamson had not been given an opportunity to apply for the position, in violation of a collective bargaining agreement that required such openings to be posted, and she filed a charge of discrimination with the Equal Employment Opportunity Commission.\textsuperscript{35}

Subsequently, the company denied Ms. Williamson permission to take accumulated unpaid vacation time because she had not given "advance notice," although no company rule required such notice. Nonetheless, a memo relating to the denial was placed in her file and became a blot on her record.\textsuperscript{36} Later, her male supervisor berated her in loud, scatological language for using an upstairs washroom (where the company had assigned her a locker). She left in an emotionally devastated state and was unable to return to work. After she failed to answer a telegram from her employer asking her to indicate when she would return to work, Ms. Williamson was fired.\textsuperscript{37} Her doctor later testified that her state of mind was such that she was unable to read or understand the telegram. Ms. Williamson testified that, although she had been able to read, for years after the incident she could neither read nor understand anything except the Bible.\textsuperscript{38} Ms. Williamson has been unable to work since being fired, and the Social Security Administration has declared her to be completely disabled.\textsuperscript{39}

\textsuperscript{32.} \textit{Id.}

\textsuperscript{33.} \textit{Id.} The decision does not indicate whether the other black workers were men, although Ms. Williamson did file a title VII sex discrimination charge along with her section 1981 and title VII race discrimination claims. However, the court noted that the sex discrimination claim had not been submitted to the jury because it was not cognizable under section 1981. \textit{Id. at 1295.}

\textsuperscript{34.} \textit{Id. at 1292-93.}

\textsuperscript{35.} \textit{Id. at 1293.}

\textsuperscript{36.} \textit{Id.}

\textsuperscript{37.} \textit{Id.}

\textsuperscript{38.} \textit{Id.} Ms. Williamson's doctor informed the company of Ms. Williamson's inability to comprehend and respond to the telegram, but the company refused to reinstate her, even though it had reinstated other employees in analogous circumstances. \textit{Id.}

\textsuperscript{39.} \textit{Id.}
3. Case History No. 3: Falling Through the Cracks

Helen Brooms, a thirty-six-year-old black woman, was employed by the Regal Tube Company in 1983 as an industrial nurse. After working at Regal for sixteen months, Ms. Brooms filed suit in federal district court, alleging that her supervisor had racially and sexually harassed her. During the course of her employment, her male supervisor subjected Ms. Brooms to numerous explicit racial and sexual remarks. This harassment eventually culminated in an incident in which the supervisor, after showing Ms. Brooms a picture of black women engaged in bestiality, grabbed her arm and threatened to kill her. Ms. Brooms managed to escape by throwing coffee on her supervisor, screaming, and running away. As she fled, she fell down a flight of stairs. Ms. Brooms later testified that she remained in traction for six weeks and sustained permanent physical damage from the fall.

Ms. Brooms did not return to Regal, but received disability compensation for two months after her supervisor’s attack. The mother of three children, Ms. Brooms had been happily married for over fourteen years at the time of her employment at Regal. Following the racial and sexual harassment, she suffered severe and debilitating depression.

The jury rejected Ms. Brooms’ section 1981 racial harassment claim, but the trial court found in Brooms’ favor on the title VII sexual

40. Brooms v. Regal Tube Co., 881 F.2d 412, 416-17 (7th Cir. 1989).
41. Id. at 416 & n.1. Most of the incidents consisted of racial slurs or a combination of racial slurs and sexual innuendos, and most took place in the office or at business-related social functions. Id. During one business trip together, the supervisor directly propositioned Ms. Brooms. Id. On several occasions, while making lewd and offensive suggestions about what Ms. Brooms was hired to do, the supervisor showed Ms. Brooms pornographic photographs involving black women or interracial couples engaged in sexually explicit acts. Once, the supervisor “showed Brooms a pornographic photograph depicting an interracial act of sodomy and told her that the photograph showed the ‘talent’ of a black woman. He stated that she was hired for the purpose indicated in the photograph.” Id. at 417. A second incident occurred when Brooms entered the supervisor’s office to obtain his signature on some medical forms. “At that time, he showed her one of several photocopies of a racist pornographic picture involving bestiality. [The supervisor] threatened that the picture depicted how she ‘was going to end up.’” Id.
42. Id.
44. Id. Ms. Brooms testified that:

Before this time, I was a happy and well-adjusted wife and mother. After working at Regal, I was afraid to leave my home and was unable to socialize. I was terrified that my former boss would find me and continue to assault me. I cut off all my hair to disguise myself. I began psychiatric treatment for the first time in my life in August 1984, for over a year, and I was diagnosed as traumatized, phobic and unable to work. Although at my trial in 1987, the company's psychiatrist testified that I still needed at least two years of therapy to heal the wounds of my experience at Regal, I have been unable to afford the treatment. Slowly, in the last six years, and with the love and help of my family, I have healed somewhat.

Id.
The court of appeals found that the conduct of her supervisor was "grossly offensive" and had created a situation that "would cause a reasonable employee in Brooms' position to contemplate immediate departure." The court of appeals affirmed the district court's finding of a title VII violation and awarded back pay. The court, however, also noted the intervening decision by the U.S. Supreme Court in *Patterson v. McLean Credit Union*, which held that a plaintiff could not maintain a claim for racial harassment under section 1981, and consequently the Seventh Circuit declined to address the merits of Ms. Brooms' appeal on this issue. As a result, Ms. Brooms was unable to recover compensatory damages for her physical injuries, the emotional and psychological trauma she sustained, or the medical bills she incurred as a result of those injuries.

II
EVOLUTION OF THE PRESENT LEGAL FRAMEWORK GOVERNING DISCRIMINATION IN THE WORKPLACE

Racial and gender stereotyping in the society at large has deeply affected the employment experience of women of color. In the days of slavery in the United States, both white men and white women often regarded black women as little more than breeding factories for producing free labor. White society created myths to justify their oppression and exploitation, portraying black women as fecund and promiscuous objects, available to satisfy white male sexual desires.

45. *Brooms*, 881 F.2d at 417.
46. *Id.* at 423.
47. *Id.* at 423-24.
49. *Brooms*, 881 F.2d at 424.
50. The racism and sexism that are directed towards women of color operate in tandem and result in a perception of women of color that differs from the perception that sexists have of white women or racists have of men of color. See E. Spellman, Inessential Woman: Problems of Exclusion in Feminist Thought 104-05 (1988) (racism can be a factor in relations between people of the same race, and racism can play a large role in shaping the sexism that exists between such people). The conventional references to "minorities and women" in discussions of antidiscrimination laws illustrate that women of color tend to slip through the cracks in analyses of discrimination based on race or gender. Though some may visualize women of color when using the terms "minorities" and "women," the context of these discussions usually suggests that the terms are intended to distinguish between men of color and white women. Crenshaw, *supra* note 14, at 139 & n.3.
51. See H. Gutman, The Black Family in Slavery and Freedom, 1750-1925, at 75-79 (1976); see also B. Hooks, *supra* note 17, at 51-54 (arguing that the sexual exploitation of black women during slavery devalued black womanhood and shaped their social status in such a way that even after slavery ended, white men and women continued to apply pre-slavery stereotypes to black women).
52. See B. Hooks, *supra* note 17, at 51-68.
Both during and after the era of slavery, white men brutally assaulted and raped black women, with black men often powerless to intercede, often risking death if they did.\textsuperscript{53} Consistent with their myths of black women's overpowering sexuality, white men and women often accused black women of inviting such sexual and physical abuse.\textsuperscript{54} This negative and unwarranted stereotyping continued during the period of Reconstruction, as white men and women accosted black women on the streets and subjected them to obscene remarks.\textsuperscript{55} The efforts of newly free black women to protect themselves by consciously exhibiting behavior patterns and values deemed acceptable by white society were unavailing.\textsuperscript{56} Society continues to exploit black women sexually and to perpetuate the perception that they invite sexual encounters and abuse.\textsuperscript{57}

Other women of color have experienced similar negative stereotyping by white society. Whites in nineteenth-century California often viewed Chinese women as "slave girls" and looked upon them as "merchandise."\textsuperscript{58} The modern American film industry portrays Asian women as stereotypical passive figures whose main purpose in life is to serve either as love interests for white men, or as devious madames and untrustworthy prostitutes.\textsuperscript{59}

White men created these race and gender superstitions out of a need to demonstrate their perceived moral and intellectual superiority in order

\textsuperscript{53} H. Gutman, supra note 51, at 386-87; B. Hooks, supra note 52, at 56-57; see also J. Jones, Labor of Love, Labor of Sorrow: Black Women, Work, and the Family From Slavery to the Present 150 (1985) (relating an incident in which a black man was arrested after confronting a white man who had made sexual advances toward the black man's wife).

\textsuperscript{54} B. Hooks, supra note 17, at 52-54.

\textsuperscript{55} Id. at 55; see also J. Jones, supra note 53, at 150 (for more than 50 years after the Civil War, black women in the South were in constant danger of being attacked by white men).

\textsuperscript{56} B. Hooks, supra note 17, at 55.

\textsuperscript{57} For discussions of stereotyping and sexual exploitation of black women, see All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave: Black Women's Studies 73-75 (G. Hull, P. Scott & B. Smith eds. 1982); P. Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America 86-87 (1984); B. Hooks, supra note 17, at 51-86; J. Jones, supra note 53, at 48-49, 150; R. Logan, The Betrayal of the Negro: From Rutherford B. Hayes to Woodrow Wilson 250 (1965).

For an example of how popular culture perpetuates these myths, see S. Turow, The Burden of Proof 99-100 (1990). In this scene, Turow (the successful, white, Harvard-educated lawyer-turned-novelist whose best-selling novel Presumed Innocent was made into a movie in 1990) places his protagonist, a lawyer, in a convenience store:

Waiting in line, he observed with admiration two young black women who were ahead of him, in halter tops despite the chill of spring, talking high-speed bebop slang, disarmingly casual with their obvious sexuality. He felt again the high-voltage transmission of sensual energy.

\textit{Id.} These are the only women of color in the novel: women in slutty attire, with "obvious sexuality," who lack good sense by being out in the Spring cold in halter tops, and who hardly possess an ability to communicate, except in "high-speed bebop slang."

\textsuperscript{58} Yu, The World of Our Grandmothers, in Making Waves, supra note 20, at 34.

\textsuperscript{59} See Tajima, Lotus Blossoms Don't Bleed: Images of Asian Women, in Making Waves, supra note 20, at 308-14.
to justify exerting economic and political power over people of color and white women. Myths die hard. The modern versions of these superstitions have become entrenched in countless areas of American life, particularly in the workplace, where these attitudes are often manifested as race and gender harassment. This hostility often surfaces in circumstances where women of color occupy nontraditional jobs and are therefore deemed by the harasser not to "know their place." Both white men and men of color engage in aggressive and hostile conduct directed at women of color; white men use such behavior to assert their own sense of power, while men of color use it to affirm their male superiority.

60. Cf. H. Gutman, supra note 51, at 291-96 (racial stereotypes among white slaveholders supported their self-perception of superiority and justified their paternalism; sexual stereotype that all people have untamed passions reinforced whites' belief in black licentiousness, because slave marriages were not recognized as real marriages and black passions were therefore not legitimized); see also B. Bergmann, The Economic Emergence of Women 7-8 (1986) (in the past, sex roles have been accepted by most people as biologically correct and inevitable).


62. B. Bergmann, supra note 60, at 103-04 (discussing male workers' resentment and sexual harassment of women in male-dominated jobs).

63. Id. at 104-05. Women of color also must combat the stereotypes and hostility that often characterize their treatment by men of color, both in the workplace and the home. In their struggle to overcome their own racial oppression by the white power structure and to affirm their manhood, black men have often exhibited chauvinistic behavior towards black women. The tension often centers on the problem of black women's labor. J. Jones, supra note 53, at 311. Black women have been active in the labor force in significant numbers since the days of slavery and have competed with black men for limited employment opportunities—which has led some commentators to suggest that black men have been deprived of their self-respect and their chances for healthy sex roles have diminished. Id. at 312-13 (citing D. Moynihan, The Negro Family: The Case for National Action (1965) (study prepared for the U.S. Dep't of Labor)).

The Civil Rights movement and Black Power revolt of the 1960s and early 1970s found some black men endorsing such conclusions and insisting on a black male-dominated movement that relegated black and white women civil rights workers to clerical, nonvisible tasks. These men expected black women participating in the movement for racial justice to be less aggressive and domineering in deference to the struggle of black men to cast off the oppressive racist system which made them less than men. See P. Giddings, supra note 57, at 312-16. Allowing women to play a leading role in civil rights organizations would be akin to "'aiding and abetting the enemy, who wanted to see Black men weak and unable to hold their own.' " Id. at 316 (quoting A. Davis, Angela Davis: An Autobiography 181 (1974)).

During this period, the view that their own manhood was threatened by black women working for white men led some black men to advocate that black women "get out of the white man's kitchen and into their own." Id. at 312. These attitudes carried over to the workplace to some extent, and no doubt they were reinforced by black nationalist themes such as those adopted by the Black Muslim organization. Elijah Muhammad, one of the Black Muslim leaders, in his Message to the Black Man, described black women as "property." Black women were to be "'man's field to produce his nation.' " They were to be kept off of the streets because they are "'given to evil and sin.' " Id. at 317-18 (quoting Sizemore, Sexism and the Black Male, Black Scholar, Mar.-Apr. 1973, at 6).

These attitudes, I submit, have gained some currency over the years among working, underemployed, and unemployed black men and may be manifested in the workplace as race-based
The vulnerability of women of color to discrimination in the workplace demands that an adequate remedy be available to redress their grievances. The two principal federal laws that seek to address this need are section 1981 and title VII. In their present form, however, both statutes are inadequate to provide full protection for the interests of women of color.

For over a decade, courts have recognized the right of victims of racial discrimination in the workplace to seek relief under section 1981, title VII, or both. Because of the different procedures and remedies available under the two statutes, most victims of racial discrimination elect to sue under both title VII and section 1981 in order to receive maximum protection of their interests. One way in which the statutes differ is that title VII applies only to employers with fifteen or more employees, while section 1981 applies even to employers with only one employee. Furthermore, title VII remedies are restricted to equitable relief, which includes only injunctive relief, back and front pay, gender hostility and harassment. Further, the situation may be exacerbated by the fact that many men believe that engaging in this type of behavior will have few consequences. Law enforcement statistics suggest that when women of color are the victims of sexual abuse, the law's response falls short. A recent newspaper survey of Dallas County, Texas sentencing statistics concluded that in 1988, rapists whose victims were white received more severe punishment than those whose victims were black or Latina. The rape of a white woman resulted in a median sentence of ten years, the rape of a Latina woman five years, and the rape of a black woman two years. Study in Dallas Finds Race Affects Sentences, N.Y. Times, Aug. 20, 1990, at A13, col. 2 (reporting the results of a newspaper survey conducted by the Dallas Times Herald). If the punishment for rape is less severe if the victim is a woman of color, then men may develop an expectation that certainly the consequences for harassment will be minimal.

64. See Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (stating that title VII and section 1981 clearly provide two distinct remedial paths for the victims of race discrimination in employment; thus, filing a title VII claim with the EEOC does not toll the statute of limitations for a section 1981 claim); see also McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (white employee subjected to discrimination has a claim under both title VII and section 1981). The U.S. Supreme Court has recently reaffirmed that section 1981 applies to private as well as public discrimination. Patterson v. McLean Credit Union, 491 U.S. 164, 171-75 (1989) (Court declined to overrule Runyon v. McCrory, 427 U.S. 160 (1976), which applied section 1981's prohibition against racial discrimination in the making and enforcement of contracts to a private school that refused to admit black students).


66. 42 U.S.C. § 2000e(b) (1988). As originally enacted in 1964, an "employer" was defined as "a person . . . who has 25 or more employees." Civil Rights Act of 1964, § 701(b), Pub. L. No. 88-352, 78 Stat. 241, 253-54 (current version at 42 U.S.C. § 2000e(b) (1988)). In 1972, this definition was modified by Act of March 24, 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103, which redefined an "employer" as "a person . . . who has fifteen or more employees."

reinstatement or hiring, and attorney's fees. In contrast, successful claimants under section 1981 may receive compensatory damages and, in appropriate circumstances, punitive damages in addition to equitable relief. The existence of a claim for damages also permits either party in a section 1981 suit to request a jury trial.

While victims of racial discrimination may decide to sue under title VII, section 1981, or both, victims of gender discrimination are limited to actions under title VII. Because section 1981 was enacted pursuant to the thirteenth amendment and gives to all persons the "same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," it has consistently been found to prohibit only racial discrimination in the contracting process. The Civil Rights Act of 1990 attempted to eliminate the disparity between the remedies available for race-based and sex-based discrimination by adding a damages provision to title VII. Although this provision was in part intended to benefit victims of sex-based discrimination, the need for a title VII damages remedy became especially acute when the Supreme Court deprived an entire class of racial discrimination victims of a cause of action under section 1981.

A. Restoring Section 1981: Section 12 Responds

Civil rights organizations and the principal sponsors of the 1990 Act were determined to correct the Supreme Court's adverse decision in

68. 42 U.S.C. § 2000e-5(g), -5(k) (1988). Thus, a court cannot award compensatory or punitive damages to redress a violation of title VII. See Bohem v. City of E. Chicago, 799 F.2d 1180, 1184 (7th Cir. 1986).

69. See cases cited supra note 10.

70. See U.S. Const. amend. VII (stating in relevant part that "[I]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"). Although this federal constitutional provision does not control the state courts, most state constitutions also protect the right to a jury trial in similar circumstances. J. Friendedenthal, M. Kane & A. Miller, Civil Procedure §§ 11.1, 11.7 (1985).

71. See, e.g., Lowe v. City of Monrovia, 775 F.2d 998, 1010 (9th Cir. 1985); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 932 (D. Neb. 1986) (citing DeGraffenreid v. General Motors, 558 F.2d 480, 486 n.2 (8th Cir. 1977)).

72. U.S. Const. amend. XIII.


74. See, e.g., Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975). The section 1981 prohibition against racial discrimination protects white persons under the same standard as black persons. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). In addition, the concept of what constitutes "racial" discrimination under section 1981 has been expanded in recent years to cover persons who are members of certain religious, ethnic, or national-origin groups that were considered a "race" by 19th-century standards. See St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (Arabs who allege race discrimination may pursue a cause of action under section 1981); see also Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (finding that members of a Jewish congregation are permitted to sue for damages under section 1982); Greenfield & Kates, Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866, 63 Cal. L. Rev. 662 (1975) (detailed discussion of a theoretical basis for including Mexican Americans within coverage of section 1981).
Patterson v. McLean Credit Union and pushed for inclusion of section 12 in the Act. Brenda Patterson was a black college graduate who brought suit against her employer for racial harassment. The district court ruled that Ms. Patterson's claim could not be brought under section 1981 and refused to allow the jury to consider this aspect of her complaint. The Supreme Court agreed with the district court and stated that "postformation conduct by the employer relating to the terms and conditions of continuing employment" could not form the basis of a section 1981 lawsuit. Thus, for the first time since its enactment, section 1981 was limited to causes of actions arising from racially discriminatory conduct during the formation of the contract.

The Patterson decision had an immediate impact, resulting in the dismissal of a large number of pending lower court cases that questioned the meaning and scope of section 1981. The Supreme Court attempted to soften the blow of a limited section 1981 by suggesting in Patterson

75. 491 U.S. 164 (1989).
76. The author, formerly deputy director for public policy at the Women's Legal Defense Fund in Washington, D.C., participated in the civil rights coalition that proposed much of the language incorporated into the version of the Civil Rights Act of 1990 introduced in Congress.
77. Hearings, supra note 65, at 93 (statement of Brenda Patterson). From 1972 to 1982, Ms. Patterson worked as an entry-level file clerk at the McLean Credit Union in Winston-Salem, North Carolina. Id. at 94. During her initial interview, the president of the company told Ms. Patterson that as she was the only black employee, her white coworkers might not like her because of her skin color. Id. Ms. Patterson testified that in fact her employer, and not her coworkers, treated her differently because she was black. Id. She further testified that racist comments made by her employer humiliated and insulted her, that the company never promoted her, and that during her tenure at the credit union, she never earned the same wages as those employees in similar positions. Id.

Ms. Patterson based her complaint on charges of racial discrimination and harassment by her employer. Id; see also Patterson, 491 U.S. at 169. McLean assigned her demeaning tasks that her white coworkers were not assigned, such as dusting and sweeping the office, and he required her to perform tasks like filing, which the white secretaries were actually supposed to do as part of their own job requirements. Hearings, supra note 65, at 94. Eventually, McLean laid off Ms. Patterson while white employees with less seniority kept their jobs. Id. at 95. Believing that she had been discriminated against, overlooked for promotion, racially harassed, and eventually fired because of her race, Ms. Patterson filed a lawsuit claiming that her employer had violated section 1981. Id. at 94; see also Patterson, 491 U.S. at 169.

78. Patterson, 491 U.S. at 169-70. In addition to the section 1981 claim, Ms. Patterson filed a claim for intentional infliction of emotional distress, actionable under North Carolina tort law. Id. at 169.

79. Id. at 179.
80. Id. at 171.
81. Joint Hearings, supra note 43, at 143 (statement of Julius LeVonne Chambers, director-counsel NAACP Legal Defense and Educational Fund, Inc.). A study undertaken by the NAACP Legal Defense and Educational Fund determined that within five months of the June 15, 1989, decision, almost 100 cases had been dismissed because of Patterson. Id. at 149. Most of them were dismissed without hearings on the merits. Id. Courts threw out claims that would have been actionable under section 1981 before June 1989, leaving a broad range of persons exposed to discrimination and without a meaningful remedy. Id. at 150-51; see, e.g., Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989); Leong v. Hilton Hotels, 50 Fair Empl. Prac. Cas. (BNA) 738 (D. Haw. 1989); Nolan's Auto Body Shop v. Allstate Ins. Co., 718 F. Supp. 721 (N.D. Ill. 1989).
that title VII provides a satisfactory alternative remedy for victims of racial harassment. Because title VII's prohibition of employment discrimination only applies to employers with fifteen or more employees, however, many victims of workplace discrimination may not sue under its provisions. Thus, the most serious consequence of the narrowing of section 1981 is that many victims of discrimination who no longer have actionable section 1981 claims cannot sue under title VII either. The wholesale dismissal of hundreds of formerly meritorious section 1981 cases and the denial of adequate remedies, or of any remedy at all, is a result that demands corrective legislation.

The principal sponsors of the Civil Rights Act of 1990 responded by fashioning what became section 12 of the Act. Section 12 restores the broad interpretation of section 1981 by amending that section to state explicitly that the right to "make and enforce contracts" without fear of racially discriminatory treatment extends to the "making, performance, modification and termination of contracts," as well as to the "enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." In effect, section 12 of the Act overrules Patterson by barring all race-based discrimination in contracts. Thus, section 12 would restore to victims of proven discrimination the full range of legal and equitable remedies under section 1981 that existed prior to Patterson.

B. Strengthening Title VII

The enthusiasm and determination accompanying the effort to restore the broad scope of section 1981 were tempered by the recognition that overturning Patterson by this legislative initiative would not expand the limited remedies available under title VII. Those victims of illegal employment discrimination not covered by section 1981, such as victims of gender and religious discrimination, would not benefit from the provi-

82. 491 U.S. at 180-82. Attempting to justify the Court's retrenchment in its interpretation of the scope of section 1981, Justice Kennedy wrote:

By reading § 1981 not as a general proscription of racial discrimination in all aspects of contract relations, but as limited to the enumerated rights within its express protection, specifically the right to make and enforce contracts, we may preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws.

Id.


84. Section 12 provides:

Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended

... (2) by adding to the end thereof the following new subsection:

"(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."


85. Id.

86. Id.
sions of section 12. Several women's rights groups recognized that inequities would persist even if section 12 were enacted. They advocated the inclusion of the mirror image of section 1981 remedies for intentional discrimination under title VII. Otherwise, women who experienced harassment and discrimination in the workplace on the basis of gender, but not race, would still be forced to rely on title VII to provide a remedy for their injuries.

1. The Inadequacy of Title VII Remedies

Although the Supreme Court suggested in Patterson that title VII provides a satisfactory remedy for victims of discrimination, those who have litigated title VII employment discrimination cases are acutely aware of how wrong the Court was. Members of all classes protected by title VII who have successfully prosecuted claims of illegal discrimination have obtained only Pyrrhic victories because of the absence of a title VII damages remedy. During eight full days of hearings on the Civil Rights Act, congressional lawmakers from the relevant Senate and House committees were also made aware of the inadequacy of title VII.

Title VII's shortcomings are manifold and manifest. Thousands of people of color who work for small employers are not covered by title VII's guarantee of a discrimination-free workplace. Those employees who have standing to bring a title VII action and who succeed on the merits can obtain only injunctive relief. While an employer may choose to obey a court order to refrain from discriminating, few employers are likely to expend time or effort "fixing" a problem unless they believe they

87. During the months immediately preceding the introduction of S. 2104 and H.R. 4000, representatives of several women's rights organizations met with congressional staff to express their concern about the inequities working women would continue to face in the absence of expanded title VII remedies. The following organizations were among those represented at the meetings: the Women's Legal Defense Fund, the National Women's Law Center, the Black Women's Agenda, the National Organization for Women, the NOW Legal Defense and Educational Fund, the National Council of Negro Women, the Federation of Business and Professional Women, the American Association of University Women, and the American Nurses Association. The leaders of some of these organizations also testified at congressional hearings on the 1990 Act. See Hearings, supra note 65, at 190-93 (statement of Nancy Kreiter, research director of the Women Employed Institute); id. at 215-21 (statement of Judith L. Lichtman, president of the Women's Legal Defense Fund); id. at 228-33 (statement of Marcia Greenberger, managing attorney of the National Women's Law Center).

88. 491 U.S. at 180-82.

89. Title VII protects employees and job applicants from employment practices that discriminate on the basis of race, gender, national origin, or religion. 42 U.S.C. § 2000e-2(a) (1988).

90. The Senate and House committees responsible for reporting out S. 2104 and H.R. 4000 heard considerable testimony on the inadequacy of title VII remedies and the need for compensatory and punitive damages for groups protected by title VII. See, e.g., Hearings, supra note 65, at 155-60 (statement of Prof. Eleanor Holmes Norton); id. at 228-33 (statement of Marcia Greenberger); see also 2 Joint Hearings, supra note 43, at 142-72 (statements of Profs. Theodore Eisenberg and Stewart Schwab).
or their businesses will be seriously harmed—economically or otherwise—by failure to comply. Because title VII lacks a damages remedy, it ignores all the harm that can result from illegal, intentionally discriminatory conduct except lost wages. Thus, title VII as currently enforced does not compensate a victim of proven discrimination for medical expenses stemming from the discriminatory conduct, for extreme emotional distress and accompanying physical consequences, or for discriminatory denials of promotion.

2. Vindication Without Compensation Under Title VII: The Swanson Case

The fate of Ms. Patricia D. Swanson, the plaintiff in Swanson v. Elmhurst Chrysler Plymouth, illustrates the inadequacy of the present legal framework governing discrimination suits brought by victims of sexual harassment. Ms. Swanson brought a title VII suit against her former employer, Elmhurst Chrysler Plymouth. She alleged that the general manager/part-owner of the car dealership had sexually harassed her and fired her for refusing to submit to his sexual demands. Several witnesses testified that he had frequently confronted her with sexually suggestive remarks, humiliating comments in the presence of other people, and discriminatory denials of promotion.

91. In attempting to justify the constriction of section 1981 as a basis for bringing employment discrimination suits, Justice Kennedy asserted that “[b]oth the employee and employer will be unlikely to agree to a conciliatory resolution of the dispute under Title VII if the employer can be found liable for much greater amounts under § 1981.” Patterson, 491 U.S. at 182 n.4.

Justice Kennedy’s view of employer motivation in title VII suits differs markedly from that held by many employment discrimination litigators in the United States. In fact, Eleanor Holmes Norton, the former chair of the U.S. Equal Employment Opportunity Commission, testified that she could not “see how allowing damages . . . would interfere with the prompt resolution of [title VII] cases.” Hearings, supra note 65, at 171. Employers have been quite content to allow complaints of discrimination brought solely under title VII to languish, forgoing any attempt at conciliation precisely because title VII does not threaten them with large damage awards. There is less incentive to settle when there is no possibility of substantial awards for back pay and attorney’s fees. Kotkin, Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy, 41 Hastings L.J. 1301, 1305-06 (1990). Larger employers (those covered by title VII) will generally regard even these remedial costs as part of “doing business” and factor the costs into their balance sheets from year to year.

92. See Brooms v. Regal Tube Co., 881 F.2d 412, 423-24 (7th Cir. 1989) (upholding title VII award of back pay to victim of sexual harassment who suffered injuries requiring medical treatment, but noting that title VII provides for neither punitive nor compensatory damages).

93. See Arnold v. City of Seminole, 614 F. Supp. 853, 871 (E.D. Okla. 1985) (noting that victim of sexual harassment who suffered severe emotional distress is entitled to back pay under title VII, but not compensatory or punitive damages).

94. See Cowan v. Prudential Ins. Co., 852 F.2d 688, 690-91 (2d Cir. 1988) (victim of racial discrimination awarded compensatory damages under section 1981, but not under title VII). Plaintiff Cowan did not even receive an equitable award of back pay under title VII because the court determined, as a factual matter, that he would have earned less with the promotion than without it. Id.

95. 882 F.2d 1235 (7th Cir. 1989), cert. denied, 110 S. Ct. 758 (1990).
and physical contact.\textsuperscript{96} Ms. Swanson testified during the Senate hearings on the Civil Rights Act of 1990 that her employer would regularly sneak up behind her and try to unhook her brassiere, and that he would run up behind her in the hallway, run his hand under her skirt, and grab her between her thighs.\textsuperscript{97} Once, he followed her into the bathroom as she attempted to sponge a coffee stain off her blouse. The spill had resulted from his pursuing her in the hallway. In the bathroom, he attempted to grab the paper towel from her hand and wipe the coffee off her chest himself.\textsuperscript{98}

The district court found that the general manager had indeed sexually harassed Swanson.\textsuperscript{99} The court found, however, that the harassment did not cause the plaintiff’s dismissal.\textsuperscript{100} After stating that title VII does not provide a damages remedy for noneconomic losses,\textsuperscript{101} the district court initially ruled that because Ms. Swanson was no longer an employee, the court could not exercise its equitable powers to enjoin the employer from engaging in present or threatened unlawful conduct.\textsuperscript{102} Upon reconsideration in light of \textit{Huddleston v. Roger Dean Chevrolet},\textsuperscript{103} however, the district court agreed that a title VII claim for sexual harassment had been stated and awarded Ms. Swanson nominal damages of one dollar plus attorney’s fees as the prevailing party in a title VII suit.\textsuperscript{104}

The court of appeals declined to follow \textit{Huddleston} and reversed the lower court’s award of nominal damages for a prima facie showing of sexual harassment. Nominal damages, the court held, do not fall within title VII’s provision allowing equitable relief: “[W]here reinstatement, back pay, and any other sources of compensatory damages are not available, the defendant must prevail.”\textsuperscript{105} Though it acknowledged that “this result may seem harsh since Swanson has proved sexual harassment in

\textsuperscript{96} \textit{Id.} at 1237.
\textsuperscript{97} \textit{Hearings, supra} note 65, at 186-87.
\textsuperscript{98} \textit{Id.} at 187.
\textsuperscript{99} 882 F.2d at 1238-39.
\textsuperscript{100} \textit{Id.} at 1239. In refusing to disturb the district court’s finding that Swanson’s discharge from her job was not caused by sexual harassment, the appeals court asserted that “[n]othing in the record ties the discharge... with the ongoing hostile atmosphere Swanson describes as existing for most of the year of her employment at Elmhurst.” \textit{Id.} The court found, instead, that excessive absenteeism or an attempt by the general manager to appease Swanson’s superior was responsible for the discharge. \textit{Id.} Ms. Swanson’s attorney had admitted during oral argument that the absenteeism was not attributable to the sexual harassment. \textit{Id.}
\textsuperscript{101} \textit{Id.} at 1237.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} 845 F.2d 900 (11th Cir. 1988). In \textit{Huddleston}, a case presenting a dismissal situation almost identical to that in \textit{Swanson}, the Eleventh Circuit held that a plaintiff alleging discrimination by sexual harassment need not demonstrate tangible economic loss to prove a title VII violation. A “prima facie case for sexual harassment... may entitle [plaintiff] to recover nominal damages and, thus, she could become eligible for an award of attorneys fees.” \textit{Id.} at 905.
\textsuperscript{104} \textit{Swanson}, 882 F.2d at 1237.
\textsuperscript{105} \textit{Id.} at 1240.
the workplace,”106 the court held that because Ms. Swanson failed to show that the harassment led to her dismissal, title VII could not provide equitable relief.107 Consequently, Ms. Swanson was in no sense a “prevailing party,” and the lower court’s award of attorney’s fees had to be reversed. Not only did Ms. Swanson lose her right to recover attorney’s fees, but she also had to pay the court costs of the person who had sexually harassed her.108 Nor was she compensated for the emotional suffering that accompanied her harassment, or for the humiliation of discussing and describing the incidents, and revealing to her colleagues, her community, and the public that she had been subjected to such demeaning and dehumanizing behavior.

3. Ubiquity of Discrimination: Section 8 Provides a Remedy

Ms. Swanson is only one of many women who suffer sexual harassment on the job but who cannot expect full compensation for their injuries. Since 1980, more than 38,500 complaints of sexual harassment have been filed with the Equal Employment Opportunity Commission.109 A survey conducted by the federal government in 1980 and updated in 1988 reveals that forty-two percent of all working women have experienced sexual harassment in the workplace.110 A more recent survey concludes that women have filed sexual harassment suits against more than a third of all Fortune 500 companies.111 More than a quarter of these five hundred companies have been sued more than once.112 Women who are sexually harassed often experience severe emotional distress and may also suffer physical injury requiring medical treatment.113 Yet, title VII provides only limited remedies for women who suffer the consequences of such discrimination.

The prevalence of sexual harassment in the United States and the absence of a damages remedy under title VII provided the impetus for including section 8 in the Civil Rights Act of 1990. Section 8 sought to mirror in title VII the remedies available under section 1981 for intentional employment discrimination. It proposed to amend the remedies section of title VII114 by providing compensatory damages “[w]ith

106. Id.
107. Id.
108. Hearings, supra note 65, at 188 (testimony of Patricia Swanson).
109. See id. at 230 (testimony of Marcia Greenberger).
110. Id. at 230-31.
111. Id. at 231.
112. Id.
113. For examples of harms women suffer from sexual harassment, see supra text accompanying notes 26-30 (discussing Reeder-Baker case); text accompanying notes 31-39 (discussing Williamson case); text accompanying notes 40-49 (discussing Brooms case); text accompanying notes 95-108 (discussing Swanson case).
respect to an unlawful employment practice"\textsuperscript{115} proven to be discriminatory in intent. If the employer or other respondent were to "engage in the unlawful employment practice with malice, or with reckless or callous indifference to the Federally protected rights of others,"\textsuperscript{116} then section 8 would have permitted an award of punitive damages against the employer or other respondents.\textsuperscript{117} This result would serve the dual purposes of title VII: to deter and eliminate discrimination in the

\begin{itemize}
  \item \textsuperscript{115} S. 2104, 101st Cong., 2d Sess., 136 CONG. REc. S1020 (daily ed. Feb. 7, 1990). Section 8 covers all unlawful employment practices except those that would be established by the addition of a new section 703(k) to title VII. \textit{Id.} Section 703(k) defines a "disparate impact" cause of action. Disparate impact cases would not require a showing of intent to discriminate; therefore, a successful disparate impact plaintiff could not recover compensatory or punitive damages under either the amended title VII or section 1981, since they would both apply only to acts of intentional discrimination.
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} Section 8 would have written into title VII the same standard for awarding punitive damages that currently applies under section 1983. \textit{See} Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that punitive damages may be awarded under section 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others"); \textit{see also} Rowlett v. Anheuser-Busch, 832 F.2d 194, 205-06 (1st Cir. 1987) (adopting Smith standard for award of punitive damages in civil rights action under section 1981); Beauford v. Sisters of Mercy-Province of Detroit, Inc., 816 F.2d 1104, 1108-09 (6th Cir.) (Smith standard appropriate for determination of punitive damages under section 1981), \textit{cert. denied}, 484 U.S. 913 (1987). As amended by the conference committee, section 8 reads:

\begin{quote}
SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION

(a) DAMAGES.—Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following new sentences: "With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k)) or in the case of an unlawful employment practice under the Americans with Disabilities Act of 1990 (other than an unlawful employment practice established in accordance with paragraph (3)(A) or paragraph (6) of section 102 of that Act as it relates to standards and criteria that tend to screen out individuals with disabilities)—

"(A) compensatory damages may be awarded; and

"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent; in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include back pay or any interest thereon. Compensatory and punitive damages and jury trials shall be available only for claims of intentional discrimination. If compensatory or punitive damages are sought with respect to a claim of intentional discrimination arising under this title, any party may demand a trial by jury.

(b) LIMITATION ON PUNITIVE DAMAGES.—Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended—

(1) by inserting "(1)" after "(g)"; and

(2) by adding at the end the following:

"(2) The amount of punitive damages that may be awarded under paragraph (1)(B) to an individual against a respondent shall not exceed—

"(A) $150,000; or

"(B) an amount equal to the sum of compensatory damages awarded under paragraph (1)(A) and equitable monetary relief awarded under paragraph (1); whichever is greater."

\end{quote}


\end{itemize}
workplace, and to make whole the victims of such discrimination.118

If enacted, section 8 would give all persons protected by the prohibitory language of title VII a right to seek compensatory and punitive damages for intentional discrimination based on race, gender, national origin, or religion.119 Yet even section 8 would not furnish the protection of section 1981 to all victims of intentional employment discrimination, because it would not alter title VII's minimum requirement of fifteen employees.120

III
AN ANTIDISCRIMINATION LEGAL CONSTRUCT THAT DISADVANTAGES WORKING WOMEN OF COLOR

The Civil Rights Act of 1990 sought to address some of the shortcomings of present antidiscrimination laws by restoring the original broad scope of section 1981 and by adding a damages remedy to title VII. Even these changes, however, do not adequately address the issue of discrimination at the intersection of race and gender.

A. *The Failure of the Law to Recognize the Intersection of Race and Gender*

As the discussion in Part II indicates, present law treats discrimination as falling into discrete categories. This theoretical structure characterizes claims of discrimination as entirely race-based or entirely gender-based, but not both. This framework, however, is insensitive to the concerns of women of color. Working women who are members of racial minorities are frequently victimized by discrimination precisely because

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119. Such a damages remedy under title VII would affect the remedies available to disabled persons under the newly enacted Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (to be codified at 42 U.S.C. § 12101 *et seq.*) [hereinafter ADA]. Much of the early political resistance to section 8 of the Civil Rights Act of 1990 can be traced to unhappiness with undermining an agreement between members of Congress and the Bush administration to give disabled persons suing under the ADA the same remedies as are available under title VII, which had led in large part to passage of the ADA. Telephone interview with Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights, Washington, D.C. (Apr. 12, 1991). The specter of making compensatory and punitive damages available under the ADA by adding them to title VII stimulated great resistance during the course of the debate over the Civil Rights Act of 1990 and eventually led to a modification of section 8. As originally introduced, the bill did not limit the amount of punitive damages recoverable. S. 2104, 101st Cong., 2d Sess., 136 *Cong. Rec.* S1020 (daily ed. Feb. 7, 1990). The conference bill included a cap on punitive damages of $150,000, or the amount awarded in compensatory damages, whichever was greater. H.R. *Conf. Rep.* No. 755, 101st Cong., 2d Sess. 6 (1990).
120. In fact, the damages remedy in section 8 is not remotely comparable to section 1981 except in the context of employment discrimination, since section 1981 prohibits racial discrimination in *all* private and public contracts entered into by persons covered by the 1866 Civil Rights Act. *See* 42 U.S.C. § 1981 (1988). There is no similar statute making gender discrimination unlawful across such a broad spectrum of American life.
they are women of color. Thus, for them, racial and sexual discrimination coexist. When employers act on racial stereotypes that render women of color more vulnerable to sexual harassment, a combination of race and sex discrimination, or race-based gender discrimination, results.\textsuperscript{121}

The law, however, has failed to recognize that women of color are more vulnerable than white women to sexual abuse and demeaning conduct while on the job. Courts and juries have had difficulty conceiving of an underlying racial motivation for conduct that is overtly sexual in nature. When confronted with cases in which women of color experience harassment, courts and juries have tended to focus on the sexual nature of the advances made by employers, supervisors, or coworkers, and to characterize the discrimination as "pure" sexual harassment.\textsuperscript{122} There is frequently no easy way to "unbundle" this type of multiple discrimination, and courts have discounted the phenomenon either by finding that no discrimination has occurred, or by implicitly requiring a choice of one form of discrimination over another at the pleading stage.\textsuperscript{123}

Thus, the judicial treatment of race and gender discrimination in this country frequently requires that victims of discrimination develop an either/or approach to proving their victimization.\textsuperscript{124} This constraint produces unfortunate results for women of color. As plaintiffs in

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  \item \textsuperscript{121} Although this type of discrimination frequently manifests itself as harassing conduct, women of color are also discriminated against in the hiring, promotion, and termination processes. See supra notes 16-20 and accompanying text.
  \item \textsuperscript{122} See, e.g., Brooms v. Regal Tube Co., 881 F.2d 412, 417, 419 n.2 (7th Cir. 1989) (where black, female plaintiff alleged both racial discrimination and sexual harassment, jury found that she had failed to prove her section 1981 claim of racial discrimination, but judge found that she could prove that she had suffered sexual harassment); Munford v. Janes T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977) (although judge found for black, female plaintiff on sexual harassment claim, judge rejected her argument—which was based on statistical evidence that black women are more vulnerable to sexual harassment because of their race—that defendant's sexual advances towards her constituted racial discrimination).
  \item \textsuperscript{123} See DeGraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Miss. 1976) (rejecting "black women" as a subcategory afforded protection under title VII), aff'd in part, rev'd in part on other grounds, 558 F.2d 480 (8th Cir. 1977). But see Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980) (recognizing black females as a protected subgroup under title VII and ruling that "when a title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant").
  \item \textsuperscript{124} See cases cited supra note 122.
\end{itemize}
discrimination cases, they must argue that they were discriminated against on the basis of either race or gender, but not both.

The cost of having to elect one theory of discrimination over the other is vividly illustrated in the employment context. If a plaintiff brings suit under Title VII, she cannot receive compensatory damages even if she prevails, because Title VII grants only equitable relief. Women of color, and black women in particular, have therefore tried to fit their victimization by employers into the intentional race discrimination paradigm of Section 1981 in order to receive compensatory relief. In so doing, however, they may lose the opportunity to present evidence of how race and gender operate in concert to produce or magnify discrimination. If they fail to persuade a judge that the discrimination was based on race, rather than gender, they risk having their cases dismissed.

The case histories discussed in Part I provide an example of the inconsistency of this remedial scheme. Both Ms. Reeder-Baker and Ms. Williamson were able to marshal strong evidence of racial discrimination as the cause of their dismissals and consequential injuries. Thus, both received significant damage awards under Section 1981.125 Ms. Brooms, however, was unable to convince a jury that the discrimination she experienced was racially motivated. Although the court ruled in her favor under Title VII and awarded back pay, the rejection of her Section 1981 claim left her uncompensated for the physical, emotional, and psychological harm she suffered.126

As the fate of Ms. Brooms suggests, the racial aspects of discrimination against women of color may be much more difficult to identify when the discrimination emanates from an intersection of race and gender animus, or from race- and gender-based stereotyping. The case of

125. Ms. Reeder-Baker received approximately $88,500. Reeder-Baker v. Lincoln Nat'l Corp., 649 F. Supp. 647, 661-64 (N.D. Ind. 1986). In addition to the $25,665 back pay award available under both Title VII and Section 1981, Ms. Reeder-Baker received an additional $10,000 to compensate her for the humiliation and emotional distress she suffered. Id. at 661-62. The court awarded $25,000 in punitive damages “to punish Lincoln for its callous disregard of Baker’s right to oppose racial policies which she reasonably believed were unlawful” and “to deter others from engaging in similar conduct.” Id. at 663. Ms. Reeder-Baker also received $26,760 in front pay in lieu of reinstatement, $1044 in prejudgment interest, and an award of reasonable attorney’s fees. Id. at 662-64.

Ms. Williamson received a jury verdict of $250,000. Williamson v. Handy Button Mach. Co., 817 F.2d 1290, 1299 (7th Cir. 1987). Had her cause of action been restricted to Title VII’s back pay remedy, she would have received only $130,000 in damages for “earnings lost and the present cash value of the earnings reasonably certain to be lost in the future.” Id. at 1293. However, because Section 1981 provides for both compensatory and punitive damages, the jury also awarded Ms. Williamson $10,000 for psychological disability and emotional pain, $10,000 for the expenses of medical and psychological treatment, and $100,000 as punitive damages for the egregious nature of the discriminatory conduct. Id. The court added an award of prejudgment interest and court costs. Id. at 1269-99.

DeGraffenreid v. General Motors Assembly Division illustrates that some courts remain unconvinced that the discrimination women of color suffer emanates from an intersection of racial and sexual discrimination. In DeGraffenreid, five black women sued General Motors under title VII for perpetuating the effects of past discrimination against black women. In granting summary judgment against the women and in favor of the defendant employer, the court stated:

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.

Some courts, however, have recognized the intersection of race and gender discrimination as a proper cause of action under title VII and have permitted women of color to allege a combination of race and sex discrimination. Nonetheless, with the exception of straightforward title VII hiring, firing, and promotion cases, where women of color are treated as the protected subclass, courts have developed virtually no analytical construct for evaluating how the two types of discrimination operate to produce the prohibited employment practice. In such cases, courts view women of color primarily as women, and secondarily as women who are additionally burdened by the distinguishing and immutable characteristic of race. This leads to an analysis centered on the "sex plus" rationale, developed in Phillips v. Martin Marietta Corp., which is grounded only in the gender-related aspects of discrimination.

127. 413 F. Supp. 142 (E.D. Miss. 1976), aff'd in part, rev'd in part on other grounds, 558 F.2d 480 (8th Cir. 1977).
128. Id. at 143.
130. See, e.g., Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987).
131. 400 U.S. 542 (1971). In determining that title VII's prohibition against sex discrimination is intended to include practices based on stereotyped characterizations of the sexes, such as the proper domestic roles for each sex, the Court adopted what has become known as the "sex plus" disparate treatment analysis. Using this analytical model, the Court will find that sex discrimination has occurred, even though all males or all females are not treated differently, if the employer treats differently those females or males who possess an additional immutable factor, such as being the parents of preschool-age children.
In *Hicks v. Gates Rubber Co.*, for example, the court of appeals was persuaded that title VII permits evidence of race discrimination to be considered as contributing to the hostile environment giving rise to a sexual harassment cause of action. The court remanded the case, instructing the lower court to evaluate whether the evidence was sufficient to establish the existence of a sexually harassing hostile environment. The court of appeals, however, provided little guidance concerning the weight to be given the racial slurs directed at the black, female plaintiff, even though the lower court had previously rejected the racial incidents as insufficient proof of a racially hostile environment and had therefore found against the plaintiff on the title VII race discrimination claim. The court of appeals did not reverse this finding. It appears that the court could not conceive of race as being a primary or equal basis for the animus directed at a woman of color when the manifestation of that animus appeared sexual in nature.

The theoretical construct adopted by the *Hicks* court would not support a section 1981 action. Under section 1981, a female plaintiff challenging the type of conduct at issue in *Hicks* would have to present sufficient evidence to warrant an independent finding of race discrimination. Yet the *Hicks* court deemed the racial slurs to be relevant only as evidence of a gender-based claim of hostile environment. Under this approach, racial harassment apparently serves only to bolster a claim of sexual discrimination; the reinforcement does not appear to be mutual. Thus, a plaintiff bringing suit under the *Hicks* model would be limited to a gender-based title VII action.

The decision in *Jefferies v. Harris County Community Action Association* provides a broader model that is not limited to a “sex plus” analysis. The *Jefferies* court recognized black women as a protected subclass under title VII and ruled that “when a title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant.” The court permitted a black woman to sue on grounds of both race and sex discrimination, rejecting the approach of the district court, which had “separately addressed Jefferies’ claims of race discrimination and sex discrimination” rather than evaluating the evidence of “discrimination based on a combination of race and sex.” Significantly, the

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132. 833 F.2d 1406 (10th Cir. 1987).
133. Id. at 1415-16.
134. Id. at 1417.
135. Id. at 1416-17.
136. Id. at 1412.
137. 615 F.2d 1025 (5th Cir. 1980).
138. Id. at 1034.
139. Id. at 1032.
court ruled that even though there was no claim of race discrimination because the man promoted over the plaintiff was also black, the plaintiff's claim of race and sex discrimination was not affected.\textsuperscript{140}

The \textit{Jefferies} court thus appears to treat the intersection of race and gender discrimination as a separate and distinct cause of action. The court expressly recognized black women as a discrete class requiring a synthesized consideration of both issues. Under the \textit{Jefferies} approach, moreover, the two elements apparently need not be sufficient to support independent findings of race and gender discrimination; rather, they may bolster each other so that the sum is greater than the parts. While this case is limited on its facts to a title VII setting, it provides a promising model for other courts confronted with cases of multiple discrimination. Its relevance will be even more pronounced if title VII is amended to provide for a damages remedy.

\textbf{B. The Need for a Title VII Damages Remedy}

\textit{I. Eliminating Discrimination}

The availability of section 1981 as a cause of action to some, but not all, title VII complainants conflicts with the national policy of eliminating workplace discrimination against women as well as racial, ethnic, and religious minorities. This policy is reflected in the enactment of title VII\textsuperscript{141} and other federal statutes barring discrimination, and is aimed with equal force at eliminating all types of employment discrimination, whether based on race, gender, national origin, age, disability, or religion.\textsuperscript{142} In light of this national policy, it seems both inconsistent and illogical that title VII lacks strong remedial provisions to accomplish its purpose of achieving equality of employment opportunity.\textsuperscript{143}

Stated simply, those who cannot sustain a cause of action under section 1981 should be able to obtain comparable relief under title VII. There is no compelling reason to favor 1981 plaintiffs over other victims of discrimination; indeed, it does a great disservice to all victims of discrimination to attempt to classify racial groups as historically more

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1030, 1034.
\item In addition to title VII, Congress has prohibited discrimination based on race, gender, national origin, age, disability, and religion in the provision of federal financial assistance, employment, and housing. See 20 U.S.C. § 1681 (1988) (sex discrimination prohibited in education programs receiving federal financial assistance); 29 U.S.C. § 621 \textit{et seq.} (1988) (prohibiting arbitrary age discrimination in employment); \textit{id.} § 794 (prohibiting discrimination against the disabled in the provision of federal financial assistance); 42 U.S.C. § 2000d (1988) (race and national origin discrimination prohibited in federal assistance programs); \textit{id.} § 3601 \textit{et seq.} (prohibiting housing discrimination based on race, religion, sex, family status, or national origin).
\end{enumerate}
\end{footnotesize}
deserving of a damages remedy than other victims of intentional employment discrimination. A damages remedy under title VII might benefit women of color more than any other protected group. Thus, the Civil Rights Act of 1990 constitutes both a traditional civil rights issue and a women's rights issue. At present, the limited remedial provisions of title VII fail to recognize the injustice done to persons who belong to more than one disadvantaged group and who therefore suffer multiple injuries. No adequate legal remedy exists for these victims because of the limited analytical construct courts tend to use when race and gender discrimination intersect.

2. Providing an Incentive to Sue

Because courts tend to view sexually oriented discrimination against black women as gender discrimination rather than race-based gender discrimination, title VII has proved to be a more fruitful avenue than section 1981 for women of color brave enough to take legal action. But women who bring title VII suits risk bearing the potential costs of proving a case of gender discrimination without the promise of financial reward. They may succeed on the merits and yet receive no meaningful remedy, especially if the harassing conduct does not culminate in actual or constructive discharge. This risk of Pyrrhic victory exists even in cases where women of color have sustained significant physical injury in addition to emotional or psychological injury.

The risk of vindication without compensation may account for the relatively small number of discrimination suits brought by women of color in spite of these women's relatively high vulnerability to harassing conduct. Without a title VII damages remedy to provide incentive,
only those women of color who have been subjected to the most outrageous conduct feel compelled to seek recourse in the courts. They, like most victims of discrimination, risk retaliation by their employers and ostracism by their coworkers. Furthermore, women of color working in the lowest-paying and lowest-skilled service occupations can least afford to risk losing their jobs for the uncertain gratification of a title VII liability finding.\footnote{147}

Indeed, one can easily conclude, even in the absence of empirical data, that the reluctance of women of color to file suit and risk discriminatory firing and other retaliation is directly related to the harsh consequences these women can suffer from losing a paying job. While most individuals, regardless of race or gender, will suffer devastating consequences if fired or laid off from work, the depressed economic and social status of women of color renders these consequences even more severe.\footnote{148} Because a significant proportion of working women of color live on the edge of poverty, they can least afford to risk complaining about even obvious discriminatory conduct, especially when the likelihood of an adequate remedy is remote or nonexistent.

A title VII damages remedy that includes actual, consequential, and punitive damage awards in addition to equitable remedies such as back pay, reinstatement, and injunctive relief would provide women of color with an incentive to seek redress for meritorious claims of race-based sexual harassment and intentional discrimination suffered in the hiring, promotion, and discharge processes.\footnote{149} Moreover, the availability of a

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\footnote{147} Many of these women consider discrimination a fact of life, and thus view the racially and sexually hostile environment in which they work as one more hardship to be stoically endured. They may consider the idea that governmental agencies or courts will swoop down to protect them to be as farfetched as the notion that the government will guarantee full employment at a living wage or ensure food on the table for themselves and their families.

\footnote{148} See supra notes 16-24 and accompanying text.

\footnote{149} The opponents of the Civil Rights Act of 1990 often cited increased litigation as the only objective of those supporting a damages remedy. Opponents went to great lengths to describe the legislation deprecatingly as a “lawyer’s bonanza.” See, e.g., \textit{136 Cong. Rec.} H6791 (daily ed. Aug. 2, 1990) (statement of Rep. Grandy in opposition to H.R. 4000); \textit{On Civil Rights: No Steps Back}, \textit{N.Y. Times}, Aug. 6, 1990, at A12, col. 1 (editorial criticizing sloganeering by the Act’s opponents); \textit{Regaining Civil Rights Ground}, \textit{Boston Globe}, July 19, 1990, at 14, col. 1 (editorial urging passage of the Act despite Republican opposition); \textit{Rights Bill’s Change Doesn’t Satisfy Bush}, \textit{Chicago Tribune}, May 18, 1990, at 3, col. 1 (describing attempts to modify the Act in response to criticism by opponents). The critics of the legislation fail to recognize or appreciate the quantities of meritorious discrimination complaints that are not filed both because no lawyer is willing to take the cases and because the victims do not have any reason to believe a court order will prevent the discrimination from continuing or recurring.
title VII damages remedy would encourage women of color to present and fully develop evidence of how race and gender discrimination operate in concert to affect the terms and conditions of their employment and to limit their opportunities in the job market. While courts may continue to resist the concept of intersectionality, an evidentiary standard demonstrating that discriminatory conduct may contain elements of both race and gender discrimination would be likely to emerge and gain credence in the legal theory of discrimination under title VII. At a minimum, courts would be likely to have more opportunities to enunciate a standard for evaluating practices in which race and gender discrimination intersect.

A more fully developed race-based gender discrimination standard in the title VII employment sphere might also produce a spill-over effect in other areas of the law. For example, women of color working for employers with fewer than fifteen employees, who are not covered by title VII, might utilize the developing intersection standard to recover damages under section 1981 for race-based gender discrimination. The opportunity to develop a race-based gender discrimination construct might also become available under state antidiscrimination statutes, because Fair Employment Practices agencies operating at the state and local levels generally adopt and apply the legal theories developed in title VII litigation.

CONCLUSION

Neither title VII nor section 1981 provides an adequate, make-whole remedy for victims of sexual harassment. Yet women of color

150. The standard might spill over into areas of law beyond the employment sphere, such as discrimination against women of color in health care services and social services in general, and the growing application of criminal penalties to drug use by pregnant women. This latter aspect of the law disproportionately affects women of color who are dependent upon public clinics and hospitals and who, in order to obtain care, must subject themselves to the scrutiny of public officials and law enforcement officers.

151. Many states and localities have promulgated statutes that prohibit certain employers from engaging in employment discrimination based on race, sex, national origin, or religion. These state laws are generically called fair employment practices and the agencies that enforce them are referred to as FEP agencies. Most of the fair employment laws adopted by states and localities are patterned after title VII. However, some authorize the award of compensatory or punitive damages in addition to back pay and the other forms of relief authorized under title VII. See, e.g., Human Rights Act of 1977, D.C. CODE ANN. §§ 1-2501 (1988) (compensatory damages); Fla. STAT. ANN. § 725.07 (West 1988) (compensatory and punitive damages); Illinois Human Rights Act, ILL. ANN. STAT. ch. 68, § 8A-104 (Smith-Hurd Supp. 1990) (compensatory damages); Mich. COMP. LAWS ANN. § 37.2801 (West Supp. 1985) (compensatory damages); N.Y. EXEC. LAW § 297(4)(e)(iii) (Consol. 1990) (compensatory damages).

152. Those who advocated a title VII damages remedy made this point repeatedly during the hearings on the Civil Rights Act of 1990. See, e.g., Hearings, supra note 65, at 155 (statement of Prof. Eleanor Holmes Norton); id. at 217 (statement of Judith L. Lichtman); id. at 230 (statement of Marcia Greenberger).
who experience race-based gender discrimination usually find their claims treated as predominantly or entirely gender-based. This denies women of color who experience race-based gender discrimination a cause of action under section 1981. Consequently, only title VII causes of action have been available to victims of multiple discrimination. Women of color employed in low-paying, low-skilled, or unskilled jobs, however, are unlikely to risk their jobs, even in the face of severe and injurious harassment, when the maximum remedy available is injunctive relief. Thus, if the objectives of title VII—make-whole relief and realistic curbs on discrimination—are to be achieved, a strong title VII damages remedy is critical.

Members of Congress and the civil rights advocacy community have reintroduced the Civil Rights Act of 1990 as the Civil Rights Act of 1991. Women's rights organizations and other advocacy groups representing women of color continue to view a title VII damages remedy as one of the most important provisions of the proposed legislation. The provision's long-term potential for eliminating intentional discrimination against women of color is particularly promising.

Regardless of whether a title VII damages remedy is eventually enacted into law, the development of a clear and effective legal construct for analyzing race-based gender discrimination remains essential for women of color seeking to vindicate their rights. The reluctance of society to recognize the experiences of women of color as analytically distinct from those of men of color and white women suggests that the development of theories of liability based on the intersection of race and gender will be a long, laborious process. Those who grapple with the issue will have difficulty determining how women of color are viewed by white men and by men of color, and how negative stereotypes of these women influence the discriminatory conduct of the perpetrators of race-based gender discrimination. Furthermore, judges are often reluctant to acknowledge such evidence, even when it stares them in the face. The enactment of a title VII damages remedy, however, may provide the critical initial impetus for the legal recognition of multiple discrimination at the intersection of race and gender.

153. The absence of adequate remedial provisions in title VII also creates a disincentive for white women to bring title VII suits, and the proposed changes of the 1990 Act would address this important concern. I submit, however, that the comparatively more depressed economic and social conditions of women of color, in combination with their low expectations with regard to the government and the courts, necessitate a special effort to create incentives for these women to seek justice when they have been victimized by discrimination.

154. See supra text accompanying note 8.