

# Microaggressions and Sexual Harassment: How the Severe or Pervasive Standard Fails Women of Color

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## INTRODUCTION

Fighting sexual harassment is a bit like fighting a mythological Hydra every morning when you walk out the door. For every head we manage to chop off through civil rights statutes or litigation, it grows several more, determined to come up with new ways to sexualize and humiliate women who are just trying to go about their lives in peace. Whether we're walking down the street, having drinks with friends, or sitting at a desk, women face the possibility of sexual harassment everywhere we go. Going out for drinks with my friends frequently presents the textbook example of how men sexualize women of color. From "sorry sweetheart I only date Asian chicks" to "who's your spicy little friend?" men's comments sometimes suggest that they think they're ordering takeout in a little black dress. As a biracial woman, I hear how exotic I look at least twice a week, almost as often as I am asked where I am from, because my eyes just have that special "oriental"<sup>1</sup> look about them. In fact, since starting college, I have endured unwelcome advances from passersby on the street, men sitting nearby on airplanes, in coffee shops, and at restaurants. In addition to being unwelcome, their comments consistently include the words "exotic" or "oriental," along with questions about where I am from and, if the speaker is a *How I Met Your Mother* fan, how half-Asian chicks are the hottest. Race is a key component of how these men attempt to sexually objectify me, making the two forms of harassment inextricably intertwined and lending a distinctly sexual undertone to the racist language they employ.

In the past year alone, workplace sexual harassment and gender discrimination have garnered a great deal of media attention, but very little of that attention focused on women of color. News outlets have covered a number of wealthy white women's sexual harassment complaints against senior male executives, including Gretchen Carlson's sexual harassment claim against Fox News, and the complaints filed by associates and partners at Chadbourne & Park.<sup>2</sup> But these cases are not representative of the average American woman's experience with workplace sexual harassment, nor are they demonstrative of the unique ways in which women of color experience sexual harassment. While there has also been minor media coverage of sexual harassment of young women of color by

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<sup>1</sup> The term "Oriental" has been used in the United States and other Western nations to describe Asian imports, particularly rugs, for centuries. See e.g. *Oriental*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, <https://www.merriam-webster.com/dictionary/oriental> [<https://perma.cc/4PUK-64UT>] (defining "oriental" to include "of, relating to or coming from Asia and especially eastern Asia").

<sup>2</sup> Complaint and Jury Demand, *Carlson v. Ailes*, No. 2:16-CV-04138 (D.N.J. July 6, 2016), 2006 WL 4722340; Class Action Complaint, *Campbell v. Chadbourne & Parke LLP*, No. 1:16-CV-06832 (S.D.N.Y. Aug. 31, 2016), 2016 WL 4547501.

their supervisors, it has been limited to smaller publications and has received virtually no television news coverage.<sup>3</sup> This heavy emphasis on the experiences of white women is typical of our legal system's approach to sexual harassment and sex discrimination claims.

## DEFINING SEXUAL HARASSMENT

Like much of American employment discrimination law, sexual harassment law derives from Title VII of the Civil Rights Act of 1964, which reads, "It shall be . . . unlawful . . . for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>4</sup> Sexual harassment is a form of discrimination with respect to the terms, conditions, and privileges of employment based on sex.<sup>5</sup> Under existing Title VII framework, sexual harassment can take one of two different forms: quid pro quo harassment and harassment resulting in a hostile work environment.<sup>6</sup> Quid pro quo harassment is generally defined as the demand of sexual favors in exchange for preferential treatment or protection from adverse employment actions.<sup>7</sup> This type of harassment generally involves supervisors' explicit demands of subordinates. These subordinates are in a precarious position should they rebuff their supervisor's advances, given the potential for adverse employment actions.<sup>8</sup> Consequently, modern sexual harassment jurisprudence provides a high degree of protection for employees facing quid pro quo harassment by limiting employers' affirmative defenses<sup>9</sup> and providing the highest degree of protection available for discrimination by a private party.

Hostile work environment claims, by contrast, are subject to the *Farragher/Ellerth* affirmative defense, discussed below.<sup>10</sup> Further, plain-

<sup>3</sup> See, e.g., Staci Zaretsky, *The Pink Ghetto: Reports of Biglaw Sexual Assault In The Days Following Donald Trump's Election*, ABOVE THE LAW (Nov. 11, 2016), <http://abovethelaw.com/2016/11/the-pink-ghetto-biglaw-sexual-assault-in-the-days-following-donald-trumps-election/?rf=1> [<https://perma.cc/FF3H-GKQE>] (detailing a woman of color's experience with sexual assault at her law firm).

<sup>4</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1991).

<sup>5</sup> See generally CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 9-23 (1979).

<sup>6</sup> *Id.* at 32-47.

<sup>7</sup> See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (defining sexual harassment under Title VII to include quid pro quo and hostile environment harassment). See also *Burlington Inds., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (discussing *Vinson* and the development of the term "quid pro quo harassment").

<sup>8</sup> See MACKINNON, *supra* note 5, at 32 ("This [quid pro quo] category is defined by the more or less explicit exchange: the woman must comply sexually or forfeit an employment benefit.").

<sup>9</sup> *Ellerth*, 524 U.S. at 765 (prohibiting use of affirmative defense when harassment results in tangible employment action against the employee, such as "discharge, demotion, or undesirable re-assignment").

<sup>10</sup> *Farragher v. City of Boca Raton*, 524 U.S. 775, 777-78 (1998) ("The defense comprises two

tiffs face the additional burden of proving to a fact finder that the harassment they experienced was severe or pervasive,<sup>11</sup> a subjective standard that is evaluated in comparison to an imagined neutral, non-hostile work environment. Hostile work environment claims can be premised on a variety of different types of conduct, from coworkers' overt sexual comments, to constant public discussion of coworkers' sexual affairs, to a string of small, consistent, sexually charged comments or actions.<sup>12</sup> That degree of variety gives fact finders a lot of room for interpretation when considering the severity or pervasiveness of the harassment in a particular workplace. In determining whether or not conduct was so severe or pervasive as to alter the terms or conditions of employment, fact finders essentially evaluate what norms apply in that workplace and how far the perpetrator or perpetrators can stray from those norms without altering the terms and conditions of employment. Because the laws governing our workplaces were created by men and are most often measured by men, the evaluation of whether or not conduct is severe or pervasive is often governed by male-centered norms, failing to account for how those norms themselves might alter the terms and conditions of employment for women because of their sex.<sup>13</sup>

The *Farragher/Ellerth* defense protects employers from hostile work environment claims so long as they have a sexual harassment policy and adequately publicize that policy to their employees.<sup>14</sup> The defense is only effective if the plaintiff unreasonably failed to avail herself of the company's sexual harassment policy.<sup>15</sup> The *Farragher/Ellerth* defense incentivizes employers to use best practices to prevent and address sexual harassment by giving them an additional liability shield when those practices are in place. The flip side is that the *Farragher/Ellerth* defense introduces subjective judgments about whether a plaintiff has reacted reasonably to sexual harassment, whether she was unreasonable not to trust her employer enough to report the harassment, and whether the harassment was sufficient to alter the terms and conditions of employment. This is due to the fact that, in evaluating whether or not the plaintiff behaved reasonably, the fact finder may draw upon his or her own experi-

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necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."); *Ellerth*, 524 U.S. at 765 (same).

<sup>11</sup> *Ellerth*, 524 U.S. at 752 (requiring demonstration of severe or pervasive harassment in hostile environment claims).

<sup>12</sup> See MACKINNON, *supra* note 5, at 32-47 (describing explicit exchanges in quid pro quo discrimination and unwanted sexual advances that make the work environment unbearable for women).

<sup>13</sup> See Maritza I. Reyes, *Professional Women Silenced by Men-Made Norms*, 47 AKRON L. REV. 897, 933-38 (2015) (arguing that male values and culture define workplace norms and can result in hidden sexual harassment).

<sup>14</sup> See *Farragher*, 524 U.S. at 778 (stating the elements of the affirmative defense and noting that anti-harassment policies may be addressed when litigating the first element).

<sup>15</sup> *Id.* (listing an element of the employer's affirmative defense as "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise").

ence as a frame of reference. Unfortunately, the fact finder's experience may not provide context for the reactions of a plaintiff who is a member of a marginalized class(es) and has a lifetime's worth of experience in dealing with oppression and discrimination coloring her reactions, unless the fact finder has had a similar life experience.

During the 2016 presidential campaign, we saw numerous examples of how the public reacts to women's stories of sexual harassment and sexual assault.<sup>16</sup> When men learn that their female colleagues have experienced sexual harassment in the workplace their reactions range from awkward embarrassment to outrage;<sup>17</sup> but as numerous reports from October and November of 2017 demonstrate, men and women tend to define sexual harassment in very different terms.<sup>18</sup> The reports also found that men struggle to define what crosses the line between flirtation or rudeness and sexual harassment, and their uncertainty about how to respond often leads to no response at all.<sup>19</sup> This is particularly striking in light of surveys that suggest as many as one in three American women has been sexually harassed at work.<sup>20</sup> Given significant underreporting of both sexual assault and domestic violence,<sup>21</sup> it is entirely possible that these surveys are under-representative of workplace sexual harassment in the United States. These statistics are far from the only indications that workplace sexual harassment is a significant problem in American employment law.

<sup>16</sup> See, e.g., David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html?utm\\_term=.5c40331bc8bd](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.5c40331bc8bd) [<https://perma.cc/KUM2-D4BU>] (discussing reactions to Donald Trump bragging "in vulgar terms about kissing, groping and trying to have sex with women during a 2005 conversation caught on a hot microphone").

<sup>17</sup> See, e.g., Yuki Noguchi, *Workplace Sexual Harassment: A Threat to Victims, a Quandary for Bystanders*, NPR (Oct. 15, 2016), <http://www.npr.org/2016/10/15/497944137/workplace-sexual-harassment-a-threat-to-victims-a-quandary-for-bystanders> [<https://perma.cc/95Y8-NRY3>] (explaining workers' experiences with harassment in the workplace).

<sup>18</sup> See Eugene Scott, *Some Men Disagree on What Amounts to Sexual Harassment or Assault*, WASH. POST (Oct. 27, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/10/26/survey-shows-how-uninformed-men-are-about-sexual-harassment/?utm\\_term=.aa2dc36afc1d](https://www.washingtonpost.com/news/the-fix/wp/2017/10/26/survey-shows-how-uninformed-men-are-about-sexual-harassment/?utm_term=.aa2dc36afc1d) [<https://perma.cc/6YAC-F3Z7>] (discussing a survey that demonstrated many men are not sure what sexual harassment is); Hilary Lipps, *How Men's Words Affects Women in the Workplace*, FORBES (Oct. 25, 2016), <https://www.forbes.com/sites/womensmedia/2016/10/25/mens-talk-womens-place/#7380f8916f3d> [<https://perma.cc/U2TG-FMW4>] (explaining that women know "all too well" the male-male conversations that demean women and implicitly or explicitly exclude them); Susanna Schrobsdorff, *Men Are Finally Waking Up to Sexual Harassment. But They Still Have a Lot to Learn*, TIME (Nov. 7, 2017), <http://time.com/5012697/men-waking-up/> [<https://perma.cc/9AK9-8MDJ>] (illustrating through examples how many men, even journalists who spent decades covering sexual harassment, have not understood what constitutes sexual harassment).

<sup>19</sup> See Scott, *supra* note 18 (A Washington Post ABC News poll found that "[o]nly 1 in 3 men said they've directly confronted offenders after witnessing harassment or assault, and about a quarter say they regret not doing more").

<sup>20</sup> Lauren Ahn and Michelle Ruiz, *Survey: 1 in 3 Women Has Been Sexually Harassed at Work*, COSMOPOLITAN (Feb. 16, 2015), <http://www.cosmopolitan.com/career/news/a36453/cosmopolitan-sexual-harassment-survey> [<https://perma.cc/VY9W-37F1I>].

<sup>21</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NAT'L CRIME VICTIMIZATION SURVEY, 2010 2014 6 (2015), <https://www.bjs.gov/content/pub/pdf/cv15.pdf> [<https://perma.cc/3QQG-V8SA>] (noting that only 32.5 out of every 100 sexual assaults were reported to law enforcement in 2015).

In 2015, the Equal Employment Opportunity Commission dedicated its entire first board meeting to preventing and addressing workplace harassment, during which the commissioners heard testimony from four different women about their experiences with workplace harassment to better understand how women in the workforce actually experience harassment.<sup>22</sup> This commitment suggests a recognition within the EEOC that sexual harassment has not been eradicated in the American workplace and that perhaps women's experiences with sexual harassment have changed since Mechelle Vinson filed her EEOC complaint in the late 1980s.<sup>23</sup> These are the most recent in a long string of studies and popular culture indicators of women's experiences with harassment in the workplace.<sup>24</sup>

The #NotOkay movement launched in October 2016 highlights the broad impact sexual harassment and sexual assault have on American women.<sup>25</sup> Over one million women tweeted their experiences with sexual harassment and sexual assault using the hashtag #NotOkay, including thousands of stories involving assaults at the hands of coworkers.<sup>26</sup> These stories are indicative of a powerful undercurrent of sex discrimination in the American workplace, which thus far has not been quashed by modern sexual harassment jurisprudence.

## THE HISTORICAL SEXUALIZATION OF WOMEN OF COLOR

Representations of women have been divided into stereotypes of Madonna and the whore for centuries.<sup>27</sup> The objectification of women

<sup>22</sup> U.S. EQUAL EMP'T OPPORTUNITY COMM'N, WOMEN IN THE AMERICAN WORKFORCE, [https://www.eeoc.gov/eeoc/statistics/reports/american\\_experiences/women.cfm](https://www.eeoc.gov/eeoc/statistics/reports/american_experiences/women.cfm) [<https://perma.cc/DQ9T-11G2>].

<sup>23</sup> See *Vinson*, 477 U.S. at 57 ("Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964 . . .").

<sup>24</sup> See Richard L. Wiener et al., *Eye of the Beholder: Effects of Perspective and Sexual Objectification on Harassment Judgment*, 19 PSYCHOL. PUB. POL'Y & L. 206, 206–08 (2013) (studying the impact of sexual objectification in a simulated job interview for women who experience, observed, or predicted objectification). See generally AWARE Sub-Committee on Workplace Sexual Harassment, *Research Study on Workplace Sexual Harassment 2008*, [http://aware.org.sg/wp-content/uploads/AWARE\\_Research\\_Study\\_on\\_Workplace\\_Sexual\\_Harassment.pdf](http://aware.org.sg/wp-content/uploads/AWARE_Research_Study_on_Workplace_Sexual_Harassment.pdf) [<https://perma.cc/ZJZ2-3ERJ>].

<sup>25</sup> See generally Karina Bland, *#notokay: Women Relive the First Time They Were Assaulted, Touched, Groped. I Was 9.*, THE ARIZONA REPUBLIC (Oct. 9, 2016), <http://www.azcentral.com/story/news/local/karinabland/2016/10/09/notokay-women-twitter-first-time-they-were-assaulted-touched-groped-i-was-9/91810758> [<https://perma.cc/7GJJ-6H5H>]; *#NotOkay: Trump Tape Prompts Outpouring of Sex Assault Stories*, BBC (Oct. 9, 2016), <http://www.bbc.com/news/37603217> [<https://perma.cc/WRT8-TPRT>].

<sup>26</sup> Evette Dionne, *Over 1 Million Women Are Tweeting About Their Sexual Assaults. Thanks to Donald Trump*, REVELIST (Oct. 9, 2016), <http://www.revelist.com/politics/not-okay-sexual-assault-trump/5165> [<https://perma.cc/58S8-RVQ2>].

<sup>27</sup> See generally CATHARINE A. MACKINNON, SEX EQUALITY 169–495 (3d ed. 2016).

has been a popular subject for think pieces and documentaries in recent years, but it is rare for these documentaries to address the experiences of women of color specifically.<sup>28</sup> While many aspects of objectification like body shaming or street harassment are common to all women, the failure to analyze the objectification and sexualization of women of color specifically throughout American history further marginalizes the experiences of women of color. This is the exact trap Kimberl. . . Crenshaw describes in her article “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,” whereby the centering of men’s experiences within movements to advance the rights of people of color and the centering of white women’s experiences within feminist movements, doubly marginalizes women of color within these movements.<sup>29</sup>

Social movements or legislative attempts to remedy past discrimination that fail to consider the unique experiences of women of color, or any other group with multiple marginalized identities, fail to root out discrimination against those with multiple marginalized identities by failing to address discrimination that occurs where those two identities intersect. Discrimination at the intersection of two identities will necessarily look different from discrimination based solely on one protected characteristic. Stereotypes about women, people of a particular racial or ethnic background, or persons with disabilities shift when combined with stereotypes about a second marginalized group, making that stereotype or discrimination distinct from the experiences of those who possess one, but not both, of the marginalized identities in question.<sup>30</sup>

### A. Stereotyping of Women of Color as Sexual Objects

The most commonly employed stereotypes about any racial group

<sup>28</sup> See generally Noah Berlatsky, *Women’s Magazines Objectify Women Just as Much as Men’s Magazines Do*, THE ATLANTIC (Mar. 25, 2013), <http://www.theatlantic.com/sexes/archive/2013/03/womens-magazines-objectify-women-just-as-much-as-mens-magazines-do/274330> [<https://perma.cc/L7QD-XHGT>]; Amber Jamieson, *‘I Was Just Flesh with No Face, No Name’: Five Women on Being Objectified*, THE GUARDIAN (June 3, 2016), <https://www.theguardian.com/world/2016/jun/03/five-women-objectified-wendy-davis-jessica-valenti> [<http://perma.cc/WYS3-KJ4P>]; Sam Polk, Opinion, *How Wall Street Bro Talk Keeps Women Down*, N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/10/opinion/sunday/how-wall-street-bro-talk-keeps-women-down.html> [<http://perma.cc/XQ3W-7BZQ>]; Robin Tran, *4 Ways Men Are Taught to Objectify Women from Birth*, EVERYDAY FEMINISM (June 19, 2016), <http://everydayfeminism.com/2016/06/men-taught-to-objectify-women> [<https://perma.cc/6BV8-6LHW>]; IOT GIRLS WANTED (Netflix 2015); MISS REPRESENTATION (The Representation Project 2011).

<sup>29</sup> See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991) (articulating how centering the majority experience within movements leads to the marginalization of individuals with multiple marginalized identities, thereby neglecting the needs of those with intersectional identities).

<sup>30</sup> See, e.g., Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 BERKELEY J. GENDER L. & JUST. 140, 148 (2014) (explaining external forces creating barriers to success for middle-class, educated, Asian-American women and using intersectionality as a framework to analyze the experiences of Asian-American women).

include stereotypes about the sexual habits or appetites of women belonging to that group.<sup>31</sup> Whether those stereotypes are more along the lines of the Jezebel<sup>32</sup> or the Chinese Prostitute,<sup>33</sup> these stereotypes have a direct impact on cultural perceptions of women. This article argues that these perceptions bleed through into the way we talk about women of color and, as a result, how we protect or fail to protect women of color under existing anti-discrimination laws.

Distinct from stereotypes about men of color, which are often motivated by white men's historical desire to prove their own superiority, stereotypes about women of color are often rooted in white men's historical sexualization and objectification of women of color.<sup>34</sup> Throughout American history, Asian-American women have been stereotyped as hypersexual.<sup>35</sup> This stereotype can be traced to the days of the Chinese Exclusion Act and the trafficking of Asian women into the United States.<sup>36</sup> These stereotypes are rooted in the historical treatment of Asian women as sex objects for wealthy white men's enjoyment and profit.<sup>37</sup> This narrative is not limited to Asian-American women; there are similar stereotypes about black women<sup>38</sup> and Latina women,<sup>39</sup> all derived from white men's desire to possess and oppress those women.

<sup>31</sup> See generally Danielle Elyce Hirsch, *Recognizing Race in Women's Programming: A Critique of a Women's Law Society*, 19 BERKELEY WOMEN'S L.J. 106 (2004); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999); Celine Parrenas Shimizu, *Queens of Anal, Double, Triple, and the Gang Bang: Producing Asian/American Feminism in Pornography*, 18 YALE J.L. & FEMINISM 235 (2006).

<sup>32</sup> See David Pilgrim, *The Jezebel Stereotype*, JIM CROW MUSEUM OF RACIST MEMORABILIA (2012), <https://ferris.edu/HTMLS/news/jimcrow/jezebel/index.htm> [<https://perma.cc/Y8W5-4UPD>] (describing how the Jezebel is a stereotype of black women as lewd, beguiling, worldly seductresses, which dates to the pre-Civil War United States and was used to justify the rape of enslaved women by white men).

<sup>33</sup> The Chinese Prostitute stereotype, along with other stereotypes about Asian-American women (as Geisha girls, for example), conjures up images of brothels in the 1800s and the Asian-American women who were trafficked and brought to the United States to work in them at a time when Asian women were not permitted to immigrate to the United States to join their husbands or to work in other industries. This stereotype and the China Doll stereotype presume that Asian-American women are exceptionally submissive. Popular culture examples include *Madame Butterfly*, *Miss Saigon*, and *Ally McBeal's* development of Ling Woo, a character known for her mischievous and seductive manner. See generally JOHN D'EMILIO & ESTELLE FRIEDMAN, *INTIMATE MATTERS: THE HISTORY OF SEXUALITY IN AMERICA* 85–108 (1988); Rachel Kuo, *5 Ways 'Asian Woman Fetishes' Put Asian Women in Serious Danger*, EVERYDAY FEMINISM (Dec. 25, 2015), <https://everydayfeminism.com/2015/12/asian-woman-fetishes-hurtful> [<https://perma.cc/43F7-PCS9>]; GEORGE ANTHONY PEFFER, *IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION* (1999).

<sup>34</sup> See generally D'EMILIO & FRIEDMAN, *supra* note 33, at 85–108.

<sup>35</sup> See generally PEFFER, *supra* note 33, at 73–69, 101–03.

<sup>36</sup> *Id.* at 6–11 (discussing anti-Chinese legislation that allowed government officials to label women as prostitutes and deny entry or deport them from the United States).

<sup>37</sup> See generally *id.* at 102–06.

<sup>38</sup> See Pilgrim, *supra* note 32 (describing the Jezebel stereotype).

<sup>39</sup> Waleska Suero, *"We Don't Think of It as Sexual Harassment": The Intersection of Gender & Ethnicity on Latinas' Workplace Sexual Harassment Claims*, 33 CHICANA/O-LATINA/O L. REV. 129, 130 (2015) (analyzing "how widely held beliefs about Latina sexuality influence Latinas' definition of what constitutes workplace sexual harassment and, in turn, how those beliefs influence how others view the harassment of Latinas").

Despite the pervasive cultural sexualization of women of color, our approach to anti-discrimination law still falls far short of anything that could be called intersectional. For decades, anti-racist theory consistently failed to acknowledge any sexual or gendered component to racial oppression, a failure that continues in much of modern anti-discrimination jurisprudence.<sup>40</sup> Such a one-dimensional view of oppression is destined to fail marginalized groups within the protected classes that anti-discrimination laws are designed to protect.<sup>41</sup> This pattern extends to anti-sexist theory as well, leading to significant disparities in protection against domestic violence for women of color as compared with the protections afforded to white women.<sup>42</sup> These disparities in legal coverage reveal a siloed approach to fighting discrimination, which appears to extend to sexual harassment law as well, despite Title VII's comparatively broad coverage of protected classes.

Despite the ample popular culture and academic documentation of the sexualization of women of color,<sup>43</sup> Title VII's plain language does not acknowledge the variety of stereotypes at play in sex discrimination and their distinct impacts on the people subjected to them. But these stereotypes are not purely theoretical, and they do not exist in a vacuum. They are subject to influence by modern cultural and social factors,

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<sup>40</sup> Hutchison, *supra* note 31, at 7 (“[A]nti-racist scholars often exhibit a misunderstanding of (or a lack of concern for) the relationship between racial oppression and other forms of subordination, particularly heterosexism and patriarchy, and . . . often perpetuate heterosexism and marginalize gay, lesbian, bisexual and transgendered people of color in their work.”).

<sup>41</sup> Crenshaw, *supra* note 29, at 1282 (“With respect to the rape of Black women, race and gender converge in ways that are only vaguely understood. Unfortunately, the analytical frameworks that have traditionally informed both anti-rape and anti-racist agendas tend to focus only on single issues. They are thus incapable of developing solutions to the compound marginalization of Black women victims, who, yet again, fall into the void between concerns about women’s issues and concerns about racism.”).

<sup>42</sup> See generally Geneva Brown, *Ain’t I a Victim? The Intersectionality of Race, Class and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J. L. & GENDER 147, 169 (2012) (arguing that race stereotypes affect the way African-American women seek help from law enforcement and the courts).

<sup>43</sup> See, e.g., *Ally McBeal: They Eat Horses, Don’t They?* (FOX television broadcast Sept. 21, 1998) (introducing Ling Woo, a hyper-sexualized Asian-American attorney who is suing a Howard Stern-esque radio DJ for sexual harassment after he made sexually explicit comments about her. In the course of the episode Ling states that she would like to have sex with the DJ because she would kill him, while the DJ claims that Ling is only suing him because she has that “slutty little Asian thing” going on. Woo’s relationship with Richard Fish throughout the series—including depictions of Oriental massages and her offer of sexual favors in exchange for a job with Fish’s law firm evokes stereotypes about Asian-American women as prostitutes, although Woo’s character does defy stereotypes about Asian women as submissive). See also Jolie Lee, *Kardashian Photo Plays Off Controversial Black Imagery*, USA TODAY (Nov. 13, 2014), <http://www.usatoday.com/story/news/nation-now/2014/11/13/kim-kardashian-photo-black-female-bodies-grio/18962603/> [<https://perma.cc/LXW9-LP3J>] (explaining that Kim Kardashian’s Paper Magazine photo shoot in 2014 was a recreation of a nude photograph Jean-Paul Goude took as part of the 1982 book *Jungle Fever*, which has been widely criticized as a racist depiction of the black female body as always on display); Annie Nakao, *Asian “Ally” Character Puts Stereotypes to Test*, S.F. CHRONICLE (Mar. 3, 1999), <http://www.sfgate.com/news/article/Asian-Ally-character-puts-stereotypes-to-test-3095093.php> [<https://perma.cc/Z5DL-Q9GG>]; POCAHONTAS (Walt Disney Pictures 1995) (portraying Pocahontas as both a noble and subservient savage who helps the white settlers and is prepared to sacrifice her own life to save John Smith, and as a sexy Native American princess with whom John Smith falls in love). See generally Hutchison, *supra* note 31.

which contribute to the hypersexualized nature of stereotypes about women of color.

## **B. Pornography and Its Perpetuation of Stereotypes Historically Applied to Women of Color**

Our tolerance of depictions and treatment of women has a direct impact on the most prevalent stereotypes about that culture, including more subtle representations of those stereotypes through other mediums. With the ready accessibility of pornography online, it has become one of many cultural influences on what we consider acceptable treatment of women.<sup>44</sup> Much of the pornography available online is categorized by race, or in the case of white women, by hair color, age, and sex act.<sup>45</sup> Consumers can also select from categories of films depicting transwomen, interracial sex, and LGBT sex. This is the most recent iteration of white men's actualization of their fantasies and assumptions about women of color's sexual proclivities. The historical roots of sexualized racism and oppression directly impact both how we as a society respond to these depictions of the women in question and how women of color react to pornography from a philosophical, legal, and moral angle.<sup>46</sup> As a result, pornography and feminists' responses to how pornography depicts women from different racial and ethnic backgrounds can serve as an interesting entry point into examining how we sexualize different racial groups.

While there are several different feminist arguments about the merits and demerits of pornography as an art form or a form of speech, underlying all of those arguments is what pornography's very existence can tell us about how the men<sup>47</sup> creating and consuming it perceive women.<sup>48</sup> If the ability to narrow down the type of pornography someone wants to consume based on race, age, and gender identity seem to have infected the way that we approach choosing a date or a one-night stand, it does not seem like much of a stretch to believe that the content of pornogra-

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<sup>44</sup> Judith Kegan Gardiner, *What I Didn't Get to Say on TV About Pornography, Masculinity, and Representation*, 38 N.Y.L. SCH. L. REV. 319, 326–27 (1993) (suggesting that for heterosexual men, the “easiest road to a feeling of satisfying masculinity in contemporary U.S. society is a misogyny that is sexualized,” and that this is the formula of much straight pornography).

<sup>45</sup> See generally Shimizu, *supra* note 31, at 251 (describing classification of pornography by race and other ethnic markers).

<sup>46</sup> See generally *id.* at 238 (“Racialized analyses of pornography demonstrate how the simplifications of sexuality, production, consumption, and fantasy, as well as the rhetoric of gender victimization, register within the context of the lives of women of color.”).

<sup>47</sup> While women also consume pornography, the pornography created for women is generally confined to the singular category of “for women” and is still generally created by men.

<sup>48</sup> Some feminists have argued that pornography can help normalize women's desire for sexual pleasure, and can be a liberating experience for adult film actresses, celebrating their bodies and sexual desires. See Nadine Strossen, *A Feminist Critique of “The” Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1130–34 (1993) (discussing positive imagery about women in pornography and how even violent pornography “may convey liberating messages to feminist women”).

phy featuring women from a particular racial or ethnic background might similarly seep into our cultural expectations and assumptions about women belonging to that racial or ethnic group. It is possible that pornography both reveals and reinforces the most invidious and hypersexualized stereotypes about women of color.

Forcing women to consume pornography would be the most blatant example of how pornography might be harmful to women or, in the workplace context, create a hostile work environment, but there are many more subtle ways pornography can harm women.<sup>49</sup> Pornography can harm women simply by forcing offensive or degrading constructions of sexuality and gender roles upon men and women, and by narrowly constructing how women and men can relate to one another.<sup>50</sup> In the event that pornography creates the framework within which men and women relate to one another, it may be creating a hostile work environment for employees who have never consumed pornography and are unaware of their coworkers' consumption or lack thereof by virtue of the stereotypes it helps create and enforce through its representations of women. In fact, there is evidence that the more pornography men consume, the more extreme and violent they want that pornography to be. In many cases consumption of a large volume of pornography is correlated with abusive, violent behavior toward women in the consumer's life.<sup>51</sup> The men who consume this pornography are often unaware of how it has impacted their behavior and deny that pornography is harmful, despite documented correlations with behavioral shifts.<sup>52</sup>

There are also lines of scholarship devoted to the harmful and hostile effect that pornography has on women specifically and how it impacts women's experiences in male-dominated fields.<sup>53</sup> These scholars argue that as women gain entrance into the workplace, men can no longer derive their sense of masculinity from acting as a breadwinner or even working in a male-dominated industry alone, and instead men are turning to highly sexualized misogyny to bolster their individual feeling of masculinity.<sup>54</sup> This sexualized misogyny often comes from consuming large amounts of pornography and imitating the misogyny found therein.<sup>55</sup> This imitation is not necessarily purely sexual. Instead, men might at-

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<sup>49</sup> *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 HARV. L. REV. 1075, 1077–79 (1993) [hereinafter *Comparative Perspective*].

<sup>50</sup> *Id.* at 1078. See Robin West, *Pornography as a Legal Text*, in FOR ADULT USERS ONLY: THE DILEMMA OF VIOLENT PORNOGRAPHY 108, 117 (Susan Gubar & Joan Huff eds., 1989) (arguing that the "extent to which women accept the descriptions of themselves and of the world generated by pornography is the extent to which they will believe that the 'utopian promises' of patriarchy have been met," and to that extent, patriarchy appears just and good).

<sup>51</sup> Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 799–802 (1991).

<sup>52</sup> *Id.* at 801–02.

<sup>53</sup> See generally *Comparative Perspective*, *supra* note 49; MacKinnon, *supra* note 51, at 793; Kristin H. Berger Parker, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment*, 102 NW. U. L. REV. 945 (2008).

<sup>54</sup> Gardiner, *supra* note 44, at 323–28 (1993).

<sup>55</sup> *Id.* at 327.

tempt to subordinate the women around them, or exert dominance over a particular woman or group of women using misogyny, and in some cases racism, to address deep-seated insecurities about the decline of white male power in the world around them.<sup>56</sup>

The harmful effects of this kind of misogyny on both the consumers of pornography and those around them are readily apparent with respect to women as a group. While pornography is not itself the cause of the glass ceiling or workplace discrimination against either women generally or women of color specifically, the power dynamics at play in the creation and marketing of pornography are also at play in our day-to-day lives, contributing to the disparate treatment of women in workplaces throughout the United States. There will also be specific harms particular to women of color based on how their intersectional identities are portrayed in popular culture. These harms become glaring when examined in the context of pornography, where racial stereotypes are magnified, compared to less overt stereotyping of women of color in national advertising campaigns or broadcast television programming. Asian-American women, for example, are subject to the model minority myth<sup>57</sup> and the China Doll myth, which are then sexualized through the portrayal of submissive Asian-Americans in adult film. Stars engage in anal sex or a gangbang scene in which the actress who is initially perceived as child-like or “pure” submits to and is defiled by the (frequently white) men in the scene.<sup>58</sup> The sexualization of defiling an Asian-American woman in particular also plays into the stereotype of Asian women as submissive, seeking to please men and elders without any thought for themselves.<sup>59</sup> While reasonable scholars disagree on whether these performances are empowering the actresses or are simply another form of oppression,<sup>60</sup> they are clearly engaging with well-documented stereotypes about Asian-American women in a highly sexually-charged manner.

This kind of sexualization of stereotypes can contribute to a new

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<sup>56</sup> See *Comparative Perspective*, *supra* note 49, at 1079–81 (1993) (describing the Canadian Supreme Court’s expansion of the definition of “obscenity” to include dehumanizing materials that place women in positions of subordination or servile submission).

<sup>57</sup> Stereotyping Asian-Americans as high achieving and submissive, and attempting to place a wedge between Asian-Americans and other racial and ethnic minorities in the United States. See Lisa Kiang et al., *Moving Beyond the Model Minority*, 8 *ASIAN AM. J. OF PSYCHOLOGY*, Mar. 2017, at 1, 1 (“[T]he model minority stereotype refers to the idea that Asian Americans are relatively problem free, hardworking, and perseverant, and it constitutes a powerful typecast for Asian Americans today.”).

<sup>58</sup> See generally Shimizu, *supra* note 31, at 268–69 (describing an Asian-American pornography star’s experience in an adult film focused on gang-banging).

<sup>59</sup> See generally *id.* at 244–58 (providing examples of the historical patterns of racialization of Asian-American women in pornography).

<sup>60</sup> See generally Bridget J. Crawford, *Toward A Third Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 *MICH. J. GENDER & L.* 99 (2007) (discussing different meanings of pornography and how they apply to women); ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 13–30 (1981) (arguing that pornography perpetuates a system of male dominance and cannot be redeemed); Nan D. Hunter and Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al.*, in *Am. Booksellers Ass’n v. Hudnut*, 21 *U. MICH. J.L. REF.* 69 (1987) (arguing that censorship of pornography is paternalistic and would be inherently harmful to women).

sexually-charged understanding of that stereotype that has implications outside of one pornographic display, thereby exacerbating the forces of white supremacy and racism that led to the creation of the original stereotypes. Given the high demand for pornography featuring women of color, the manner in which consumers search for pornography by race, and the popularity of interracial pornography featuring white men engaging in sexual acts with women of color, it is clear that there is a substantial racial component to how Americans consume pornography.<sup>61</sup> Within the adult film industry, there is even the admission that producers tend to stick to particular racial stereotypes and archetypes because they are popular.<sup>62</sup> These same stereotypes frequently play out in a less graphic form on network television or in blockbuster films, reinforcing the hypersexual stereotypes about women of a particular racial or ethnic group.<sup>63</sup> All of these cultural factors signal a key interplay between race and sex in stereotyping women of color that directly impacts how they might experience workplace sexual harassment.

#### IV. INTERSECTIONALITY AND THE SEXUAL HARASSMENT OF WOMEN OF COLOR

Women of color experience harassment at the intersection of their identities as women and as people of color, and that harassment is often intersectional. Yet, our anti-discrimination doctrine still treats harassment and discrimination as if they exist in the separate silos of race and sex rather than as an experience that might include discrimination on the basis of several different protected characteristics all at once. This has created significant barriers to effectively enforcing anti-discrimination law to protect women of color.

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<sup>61</sup> See generally Keli Goff, *Is the Porn Industry Racist?*, THE ROOT (Apr. 3, 2013), [http://www.theroot.com/articles/culture/2013/04/pornindustry\\_racism\\_whats\\_behind\\_it](http://www.theroot.com/articles/culture/2013/04/pornindustry_racism_whats_behind_it) [https://perma.cc/28VN-7T77] (discussing the popular pornographic phenomenon of white men sleeping with women of color, explaining that interracial pornography is a popular subgenre, and relating a pornographic performer's admission that "white female performers are discouraged from participating in scenes with black men"); Gail Dines, *Yes, Pornography Is Racist*, MS. MAGAZINE (Aug. 27, 2010), <http://msmagazine.com/blog/2010/08/27/yes-pornography-is-racist> [https://perma.cc/GWN8-9YDA].

<sup>62</sup> See generally Goff, *supra* note 61.

<sup>63</sup> Consider, for example, *The Secret Life of the American Teenager*, in which the female characters with the greatest interest in and knowledge about sex were all women of color. The characters played into the model minority stereotype (Alice, a high achieving Asian-American character with an extensive knowledge about statistics on sexual activity in high school), and included an oversexed Latina character with a "bad" attitude (Adrian). These same stereotypes are reflected in *Glee*'s Santana Lopez, *Mean Girls*, *Modern Family*, and in all of the INDIANA JONES and JAMES BOND films, to name a few, frequently in connection with young female characters of color and the white men who desire or conquer them.

### A. Comparing Standards for Harassment and Discrimination Based on Sex and Race

Although discrimination can occur on the basis of several different characteristics all at once, sex discrimination under Title VII is evaluated under a different standard from other forms of discrimination. This creates a high barrier to enforcement for women of color facing sexual harassment. Race discrimination claims under Title VII are not subject to the *Farragher/ Ellerth* defense.<sup>64</sup> These claims are similarly not subject to the same kind of “severe or pervasive” standard that hostile environment sexual harassment plaintiffs are required to satisfy.<sup>65</sup> Although Title VII uses identical statutory language to bar discrimination on the basis of race and sex,<sup>66</sup> sexual harassment jurisprudence has developed an entirely different framework for conceptualizing this type of sex discrimination claim, with additional barriers to enforcement. These judicial standards create opportunities for defendants, attorneys, judges, and jurors to make additional claims or assumptions about whether conduct was “reasonable.”

Furthermore, the stereotyping claims available to plaintiffs in sex discrimination cases have not gotten traction as race discrimination claims. Under *Price Waterhouse* and *Schroer*, plaintiffs in sex discrimination claims can plead discrimination based on sex stereotyping because these actions are inherently based on the plaintiffs’ sex.<sup>67</sup> Although stereotyping is by no means limited to sex, courts have been hesitant to characterize plaintiffs’ race discrimination claims as stereotyping claims.<sup>68</sup> Courts have narrowly construed the definition of race discrimination where stereotypes or other subjective factors were in play. For example, courts have upheld appearance policies prohibiting black women from wearing their hair naturally, or in braids, twists, or dreadlocks, implicating stereotypes about black women’s professionalism and neatness.<sup>69</sup>

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<sup>64</sup> See discussion *infra* Part II.

<sup>65</sup> *Id.*

<sup>66</sup> See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1991).

<sup>67</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (“Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.”); *Schroer v. Billington*, 577 F. Supp. 2d 293, 303-06 (D.D.C. 2008) (“After *Price Waterhouse*, numerous federal courts have concluded that punishing employees for failure to conform to sex stereotypes is actionable sex discrimination under Title VII.”).

<sup>68</sup> See, e.g., *EEOC v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1144 (S.D. Ala. 2014) (holding that rescinding the charging party’s offer of employment because she refused to cut off her dreadlocks was not discrimination based on race).

<sup>69</sup> See generally *id.*; *Brown v. F.L. Roberts & Co., Inc.*, 419 F. Supp. 2d 7 (D. Mass. 2006) (finding that a man who did not cut hair for religious reasons and was reassigned to a less desirable work environment away from customers may have been reasonably accommodated by his employer); Katherine E. Leung, *Racial Identity Performance and Employment Discrimination Law*, 24 VA. J. SOC. POL’Y & THE LAW 57, 67 (2017) (discussing judicial decisions upholding appearance policies).

The combination of the Court's hesitance to treat plaintiffs' claims as race stereotyping claims and the additional barriers<sup>70</sup> plaintiffs face in sexual harassment cases in pleading and proving a case creates a barrier to many intersectional sexual harassment claims. So long as plaintiffs are forced to choose between the two claims, they will lose access to essential elements of a claim for discrimination based on harassment with deep roots in hypersexualized stereotypes about women from a particular racial or ethnic background. Under these circumstances, plaintiffs could claim race discrimination based on a string of microaggressions combined with an adverse employment action, or sexual harassment based on explicitly sexual comments creating a hostile work environment. However, they would have no clear path to recovery for a consistent string of sexually-charged racist stereotypes.

This effect may be magnified if the harassment is of a less obvious nature. Courts have historically placed a lot of weight on how women are treated in relation to other women of their racial or ethnic background. For example, courts have held what might have been actionable workplace harassment if the plaintiff were a white woman as "friendly" workplace banter when the victim is Latina.<sup>71</sup> Waleska Suero explains that many Latina women draw boundaries differently than white women around sexual harassment. This is a result of the oversexed Latina stereotype and the constant barrage of sexually-charged comments that many Latina women face in the workplace.<sup>72</sup> Because people frequently accept the stereotypes they see in popular culture or other visual mediums as truth,<sup>73</sup> they have a higher tolerance for such conduct. Examples include referring to a Latina woman as "bitch,"<sup>74</sup> discussing how much they like to touch women sexually, or how Latina women in particular like hearing sexual talk.<sup>75</sup> Although the women in both of those cases chose to label their experiences as harassment and pursue claims against their employers, Suero notes that these women define sexual harassment more narrowly. This is in response to the sheer volume of interactions Latina women experience that would likely qualify as harassment to a white

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<sup>70</sup> These additional barriers include subjective evaluations about the severity and pervasiveness of harassment evaluated against the experience of an "ordinary" reasonable woman and how she would have reasonably reacted to the harassment, the affirmative defenses allowing employers to invoke a potentially ineffective sexual harassment policy as an affirmative defense to sexual harassment claims, and evaluations of whether or not a woman was reasonable in distrusting her employer's sexual harassment policy in the event that she failed to avail herself of that policy. *See, e.g.*, Evan D. H. White, *A Hostile Environment: How the "Severe or Pervasive" Requirement and the Employer's Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C.L. REV. 853 (2006) (arguing that "the combination of the 'severe or pervasive' requirement and the employer's affirmative defense makes it difficult for victims to successfully assert a cause of action" in hostile work environment sexual harassment cases).

<sup>71</sup> Suero, *supra* note 39, at 146.

<sup>72</sup> *Id.*

<sup>73</sup> Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 56, 57 (Richard Delgado ed., 1995).

<sup>74</sup> *Castellanos v. Wood Design, Inc.*, No. CIV. 03-3416, 2005 WL 41628, at \*1 (D. Minn. Jan. 4, 2005).

<sup>75</sup> *Andrade v. Kwon*, No. 3:08CV479, 2012 WL 3059616, at \*1 (D. Conn. Mar. 26, 2012).

woman who was not subject to the oversexed Latina stereotype.<sup>76</sup>

While the stereotypes applied to women of color will vary based on their racial and ethnic backgrounds, the sexual nature of those stereotypes is relatively consistent and could have a devastating effect on women of color's ability to use sexual harassment law to protect themselves from hostile work environments if those very stereotypes are considered by fact finders to normalize sexual harassment itself. When the stereotypes in film or television are eventually so normalized that we accept them as fact, they impact our understanding of what interactions with people of particular racial or ethnic backgrounds could look like without violating social norms.<sup>77</sup> In light of the highly subjective severe or pervasive standard used to evaluate sexual harassment claims by measuring them as an ordinary woman's experience and expectations of the workplace, it is plausible that the stereotypes that are accepted as factual in popular culture could bleed into a fact finder's decision making process and color their definition of "normal" when evaluating a complaint.

### B. Measuring Harassment and Discrimination by White Women's and Men of Color's Experiences

The phenomenon whereby discrimination claims are rooted in white women's and men of color's experiences further marginalizes women of color and has the potential to chill enforcement of anti-discrimination law on behalf of women of color. This effect can become exaggerated when we accept stereotypes that normalize the objectification and sexualization of women of color. While the EEOC has made some efforts in recent years to bring more intersectional claims and has even had some small measures of success,<sup>78</sup> the doctrine itself is hostile to intersectional claims. Furthermore, none of these intersectional claims deal with sexual harassment but instead deal with adverse employment actions based on a combination of protected characteristics.<sup>79</sup>

Kimberl. . . Crenshaw's definition of intersectionality specifically calls attention to how women of color, and the unique political and social needs that exist at the intersection of their racial and gender identities,

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<sup>76</sup> See Suero, *supra* note 39, at 129 (arguing that "the societal stereotypes about Latinas not only impact their experiences with sexual harassment but also impact the ways in which Latinas define and confront offensive sexual behavior at work").

<sup>77</sup> See Russell, *supra* note 73, at 57 (using the term "dominant gaze" to describe the tendency of American popular cinema to objectify and trivialize the racial identity and experiences of people of color, even when it purports to represent them).

<sup>78</sup> U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SIGNIFICANT EEOC RACE/COLOR CASES [hereinafter RACE/COLOR CASES], <https://www1.eeoc.gov/eeoc/initiatives/erace/caselist.cfm?renderforprint=1> [https://perma.cc/66RK-U52Z]. See, e.g., EEOC v. Sears Roebuck & Co., No. 79-1957 A, 1980 WL 108 (N.D. Ga. Mar. 14, 1980).

<sup>79</sup> RACE/COLOR CASES, *supra* note 78.

have been left out of conversations about social movements and fighting discrimination.<sup>80</sup> She explains that by centering the experiences of white women and men of color, both the white feminist movement and anti-racism activists marginalize women of color. Crenshaw advocates for an intersectional approach to fighting discrimination that acknowledges and addresses the needs of members of marginalized groups on the basis of all of their identities.<sup>81</sup> In the decades since these articles were first published, intersectionality has become a prominent part of academic conversations in elite university buildings around the country and within many social justice movements. But as much as intersectionality has changed the face of social justice movements in this country, it has not completely permeated civil rights laws like Title VII.<sup>82</sup>

Ultimately, intersectional identities are a fundamental part of how women of color experience the world around them, whether employment discrimination doctrine acknowledges that intersectionality or not. A woman of color's experience of most spaces is impacted by others' perceptions of her racial or ethnic background and by her decision to assimilate to white cultural norms or instead to amplify her cultural backgrounds and experiences.<sup>83</sup> So naturally, intersectional identities play a key role in how women of color are harassed in the workplace and in how they experience sexual harassment, whether sexual harassment laws recognize that role or not. Identity impacts how people experience harassment, how others react to reports of harassment, and even the form the harassment might take.

American anti-discrimination law currently operates in a comparative framework, rather than an equality framework. When dealing with discrimination, the laws compares the plaintiff's experience to the experience of a similarly situated person who does not have that protected characteristic.<sup>84</sup> But as Devon Carbado and Mitu Gulati point out, this does not capture all of the discrimination taking place in American

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<sup>80</sup> Crenshaw, *supra* note 29, at 1244 (discussing the "various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color").

<sup>81</sup> *Id.* at 1244 (explaining that because "of their intersectional identity as both women *and* of color within discourses that are shaped to respond to" either feminism or anti-racism, women of color are marginalized within both).

<sup>82</sup> See, e.g., Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 710-29 (2001) (arguing that failure to consider discrimination through an intersectional lens under Title VII allows racial identity performance discrimination to persist, particularly so long as claims are evaluated in comparison to similarly situated parties rather than evaluating how one employee's intersectional identity may be subject to very specific forms of discrimination that those comparisons simply do not capture).

<sup>83</sup> See, e.g., Margaret E. Montoya, *Máscaras y Trenzas: Reflexiones un Proyecto de Identidad y Análisis a Través de Viente Años*, 36 HARV. J. L. & GENDER 469, 471 (2013) (explaining how Montoya starts each class and academic talk in Spanish to introduce Brown Space into White Space).

<sup>84</sup> MACKINNON, *supra* note 5, at 22-23 ("The fact that there may be no comparable man is seen not as reason to reexamine the requirement of comparability; it is seen only a reason to provide an exception for a unique and otherwise sympathetic sex-linked need, thereby preserving the sameness/difference approach.").

workplaces.<sup>85</sup> The comparative framework must, by its very nature, center the experiences of some supposedly typical individual outside the protected class and then evaluate whether or not the plaintiff and that “typical” party are similarly situated. This leaves significant room for parties to frame themselves and one another in ways that make it more or less likely that a fact finder will treat the parties as similarly situated. This may even include considerations of whether or not women of color and white women are similarly situated, or downplay racial elements of discrimination and harassment to highlight how women of color and the “typical” white woman are similarly situated. If we know that the judge and jury evaluating a harassment claim will approach it after internalizing stereotypes about women of color that they have seen normalized in popular culture, women of color may choose to frame their complaints in a certain way. For example, they can play up aspects of the harassment that could impact all women, rather than acknowledging that there are racial elements to the claim as well. While this strategy may seem effective to achieve a positive outcome in one specific case, it also fails to create judicial precedent for future intersectional harassment claims to rely upon.

### **C. Sacrificing Elements of Discrimination Claims to Develop a Larger Class of Plaintiffs**

On a very practical level, plaintiffs and attorneys also have to make choices about which claims to pursue and how to define a potential class of plaintiffs. This is a significant and pervasive issue for programming and policy for women in the legal community,<sup>86</sup> which has had a dramatic impact on the development of sexual harassment and sex discrimination law. In an attempt to attract more members and put on programming that is interesting and useful to the largest number of women, women’s law societies and bar associations often neglect to address women of color and their experiences directly.<sup>87</sup> The result is programming that addresses white women’s experiences and needs, treating them as the norm and as universal to all women, while neglecting the challenges women of color specifically face in the workplace.<sup>88</sup> This treatment of women as a homogenous group that does not experience race discrimination as women, or sex discrimination as people of color, may increase the number of people a program or group includes. But, it does this at the expense of not addressing very real intersectional discrimina-

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<sup>85</sup> Carbado & Gulati, *supra* note 82, at 703.

<sup>86</sup> Hirsch, *supra* note 31, at 106.

<sup>87</sup> *Id.* at 107.

<sup>88</sup> *See id.* at 118–19.

tion.<sup>89</sup>

With these undercurrents permeating the legal community, attorneys working to combat systemic discrimination and harassment in the workplace are faced with the decision of whether to address sex discrimination with intersectional legal theories. This does not create law that is the most protective of women with intersectional identities, nor does it focus on a narrower construction of the issue that would allow women to raise a broader class of potential claimants. This is magnified in cases like *Dukes v. Wal-Mart*, where plaintiffs' attorneys tried to build a broad coalition of plaintiffs and combat an entire system of discriminatory practices in a particular corporation.<sup>90</sup> In *Dukes*, the plaintiffs took a race-blind approach to fighting discrimination, instead pursuing a claim based on the amount of discretion given to managers, which resulted in shockingly low promotion rates for women employees.<sup>91</sup> While this resulted in one of the largest proposed classes in American litigation, it also neglected to address experiences of women of color specifically or to explore possible racial disparities in the hiring and promotions at Wal-Mart.<sup>92</sup>

While sexual harassment claims specifically are less likely to be systemic cases, hostile work environment claims have the potential to be class action suits if the harassment is sufficiently ingrained in the corporate culture. As a result, attorneys and plaintiffs may be faced with similar questions in sexual harassment cases. They may have to make determinations about the remedies available to a larger class of plaintiffs, the increased compensation for attorneys in contingency fee agreements as a result of larger classes, and the corresponding increase in settlement offers or damages awards. It would be easy to choose to pursue the higher rate of compensation and the broader class, particularly considering that those class members are likely experiencing a hostile work environment. But that choice comes with a cost in developing good, intersectional sexual harassment and sex discrimination law, and may present an insurmountable barrier to creating intersectional doctrine.

## V. MICROAGGRESSIONS AS HARASSMENT

People with marginalized identities experience microaggressions<sup>93</sup>

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<sup>89</sup> Crenshaw, *supra* note 29, at 1242 (explaining the problems with the erasure of intra-group differences in feminist and anti-racist policymaking).

<sup>90</sup> See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, No. C-01-2252-CRB, 2011 WL 7037084, at \*3-4 (N.D. Cal. Oct. 27, 2011) (containing a complaint brought on behalf of a broad coalition of plaintiffs).

<sup>91</sup> *Id.* at \*8.

<sup>92</sup> *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011).

<sup>93</sup> See Aisha M. B. Holder et al., *Racial Microaggression Experiences and Coping Strategies of Black Women in Corporate Leadership*, 2 QUALITATIVE PSYCHOLOGY 164, 164-65 (2015) (adopting the definition of microaggressions as commonplace verbal, environmental, or behavioral indigni-

every day, and if pervasive enough, modern sexual harassment law might recognize those microaggressions as a form of sexual harassment. Common examples of such microaggressions include coworkers asking, “No, where are you really from?” or making comments such as, “Oh you’re just like the cutest little China Doll.” Other examples include compliments about how well a nonwhite employee speaks English, or how articulate they are. Employers may overlook a woman’s or person of color’s ideas only to gush about how good the suggestion is when a white or male coworker restates the idea as their own, and minority employees may be pushed into “diversity” positions rather than traditional corporate management positions.<sup>94</sup>

All women can experience many of these microaggressions, but some microaggressions, like the comment about looking like a China Doll, are rooted in stereotypes about both race and sex. This means that only women of color, and in this case women of Asian descent, will face them. By their very nature, microaggressions are not obvious, but are instead subtle enough that they may go unnoticed by those who do not possess that marginalized trait. In many cases the perpetrator will not recognize the racist or sexist animus in their actions.<sup>95</sup> As a result, combatting microaggressions has not been a driving force behind the development of sexual harassment law, despite their substantial impact on the terms and conditions of employment for the employees who experience them.

### A. Inherent Sexualization in Racist Comments Targeting Women of Color

Microaggressions have deep roots in stereotypes, which, as established above, include a highly sexualized component with respect to women of color. As a result, many microaggressions contain a distinct sexual component and will be experienced as a form of sexual harassment by women of color subjected to them. Seemingly inconsequential interactions in which women of color are referred to as exotic, oriental,

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ties, whether intentional or unintentional, which communicate hostile, derogatory racial slights often based on stereotypes).

<sup>94</sup> See generally *id.*; Anne Fisher, *How Microaggressions Can Wreck Your Business*, FORTUNE (Nov. 19, 2015), <http://fortune.com/2015/11/19/microaggressions-talent-business> [<https://perma.cc/P7NA-A3K8>]; African American Women, *Microaggressions, and Workplace Bullying*, CONN. HEALTHY WORKPLACE ADVOC. (May 12, 2010), <http://ctbullybusters.blogspot.com/2010/05/african-american-women-microaggressions.html> [<https://perma.cc/N9ER-2CSG>]; Heben Nigatu, *21 Microaggressions You Hear on a Daily Basis*, BUZZFEED (Dec. 9, 2013), [https://www.buzzfeed.com/hnigatu/racial-microaggressions-you-hear-on-a-daily-basis?utm\\_term=.fjypXrdoO#.vuwMLQ8b2](https://www.buzzfeed.com/hnigatu/racial-microaggressions-you-hear-on-a-daily-basis?utm_term=.fjypXrdoO#.vuwMLQ8b2) [<https://perma.cc/5GAG-GGPP>]; Tanzina Vega, *Working While Brown: What Discrimination Looks Like Now*, CNN (Nov. 25, 2015), <http://money.cnn.com/2015/11/25/news/economy/racial-discrimination-work/> [<https://perma.cc/K989-FQ5M>].

<sup>95</sup> Tori DeAngelis, *Unmasking Racial Microaggressions*, 40 AM. PSYCHOL. ASS’N. 42, 42 (2009).

“spicy,” or “salty,”<sup>96</sup> to name a few examples, carry distinctly sexual undertones for those familiar with the history of sexualization, objectification, and oppression of women using stereotypes about their promiscuity or other sexual attributes.

Despite the sexual nature of the stereotypes about women of color, and the very real impact that microaggressions have on the terms and conditions of women’s employment regardless of their racial background, the closest we have come to acknowledging microaggressions in relation to sexual harassment law is as a “gateway” to sexual harassment.<sup>97</sup> Most sexual harassment cases instead appear to rely on explicitly sexual language, the interpretation of which is not open to debate.<sup>98</sup>

Not all racist comments directed at women of color are explicitly sexual but many of them engage with stereotypes, which are inextricably intertwined with sexualizing women of color. Calling an Asian-American woman a “chink” or “slanty-eyed,” for example, is not a gendered comment, but simply a racist one. Calling her a China Doll, by comparison, invokes stereotypes about Asian-American women specifically, and includes a highly sexualized component.<sup>99</sup> Even the stereotypes that are not about treating women of color as sex objects—for example, the tiger mom, mammy, or angry black woman stereotypes—are about framing these supposed traits as sexually repulsive or completely asexual. Yet, these stereotypes are based on a white conception of other racial groups, and are in many ways the flip side of stereotypes sexualizing women of color based on their fiery tempers or animal sexuality, which are rooted in white men’s desire to tame women of a particular racial background.<sup>100</sup> Despite the clear intersection of race and sex in the stereotypes women of color face, we have yet to conceptualize an intersectional theory of sex discrimination or sexual harassment law.

## B. Microaggressions as a Form of Identity Discrimination

Neither Title VII itself nor sexual harassment jurisprudence explicitly precludes treating microaggressions as a form of sexual harassment if they are pervasive enough to alter the terms and conditions of employment.<sup>101</sup> Plaintiffs would, however, still have to convince a fact finder

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<sup>96</sup> See, e.g., Vega, *supra* note 94 (describing examples of microaggressive phrases used against people of color in workplace settings).

<sup>97</sup> Rachel E. Gartner & Paul R. Sterzing, *Gender Microaggressions as a Gateway to Sexual Harassment and Sexual Assault: Expanding the Conceptualization of Youth Sexual Violence*, 31 *AFFILIA* 491, 491 (2016).

<sup>98</sup> See generally Suero, *supra* note 39.

<sup>99</sup> See generally D’EMILIO & FREEDMAN, *supra* note 33, at 85–108; Kuo, *supra* note 33.

<sup>100</sup> See generally D’EMILIO & FREEDMAN, *supra* note 33, at 85–108.

<sup>101</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1991); *Vinson*, 477 U.S. at 62; *MACKINNON*, *supra* note 5.

that the microaggressions were discriminatory language, that they were severe and pervasive enough to alter the terms and conditions of employment, and that the employer was unreasonable in failing to redress that type of harassment under its anti-discrimination policy.<sup>102</sup> These requirements are so deeply entrenched in our understanding of sexual harassment that, in conjunction with the comparative model upon which sexual harassment law is built, they act as a practical bar to litigation in cases involving sexual harassment through microaggressions.

There are, however, other theories under which microaggressions as a form of sexual harassment could be litigated. Ultimately, microaggressions are an implicit communication of the actor's racist or sexist beliefs, whether or not the actor is even aware of those beliefs. In many ways, this makes microaggressions ripe for the development of an identity performance discrimination theory. Devon Carbado and Mitu Gulati define identity performance discrimination as discrimination on the basis of race, resulting from failure to perform that racial identity in ways that assimilate to whiteness.<sup>103</sup> Identity performance discrimination is in many ways<sup>104</sup> similar to sex stereotyping theories of sex discrimination, which are often rooted in a plaintiff's failure to adhere to certain stereotypes about her sex. This includes, in some cases, gender identity discrimination theories under which plaintiffs have had a significant measure of success.<sup>105</sup>

Combining the sex stereotyping theory of discrimination with identity performance discrimination would give plaintiffs a key entry point to combat microaggressions. The combination is also rooted in existing doctrine, giving courts a concrete jumping off point to expand modern discrimination law to cover this particular form of harassment. While microaggressions may not result in a significant number of adverse employment actions, they do change the terms and conditions of employment. For women of color, this alteration of terms and conditions is amplified even further by the intersection of their identities, as is true of many women of color's experiences with race and sex discrimination more generally.<sup>106</sup>

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<sup>102</sup> See discussion *infra* Part II.

<sup>103</sup> Carbado & Gulati, *supra* note 82, at 701 (“[T]he theory of identity performance is that a person’s experiences with and vulnerability to discrimination are based not just on a status marker of difference . . . but also on the choices that person makes about how to present her difference. . . .”). See generally: Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262–63 (1999).

<sup>104</sup> It is, however, important to note that where sex stereotyping discrimination forces plaintiffs to adhere to the traditional gender norms for the gender with which they identify, identity performance discrimination forces individuals to conform to the racial norms of a race with which they do not identify.

<sup>105</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (recognizing sex stereotypes in a Title VII action); *Schroer v. Billington*, 577 F. Supp. 2d 293, 303–06 (D.D.C. 2008) (same).

<sup>106</sup> See generally: Mark Hansen, *Worst of Both Worlds: Women of Color in the Legal Profession Face Double Whammy of Discrimination*, 92 AMER. BAR ASS’N. J. 62, 62 (2006) (explaining that minority women struggle against gender and race discrimination barriers to advancement in the legal profession).

### C. Implicit Bias as a Barrier to Using Sexual Harassment Law to Stop Microaggressions

Even if our anti-discrimination laws recognized this kind of intersectional identity performance discrimination or harassment claim, plaintiffs would still have to convince fact finders of the merits of these claims. This means that as a practical matter, judges' and juries' implicit bias<sup>107</sup> may act as a barrier to enforcement, even if there were precedent for such an intersectional complaint of harassment or discrimination. Absent such precedent, implicit bias may act as a barrier to ever realizing such an intersectional approach to fighting workplace harassment and discrimination.

## CONCLUSION

Women of color's experiences of sexual harassment in the workplace are incredibly varied, but for many of us, sexual harassment frequently includes a racial component rooted in hypersexualized stereotypes. While modern anti-discrimination law and sexual harassment law have made significant strides toward addressing certain types of discrimination, the different standards of evaluation for race discrimination and sex discrimination claims make pursuit of an intersectional claim difficult and perhaps even impossible. The barriers to pursuing these claims, however, have not altered the reality of the unique forms of discrimination women of color face because of their race and sex, nor the importance of redressing that harm.

Sex discrimination law and sex stereotyping theories of discrimination provide a promising framework for addressing this particular brand of discrimination. The stereotyping theory of discrimination combined with identity performance discrimination theory has the potential to make a significant impact on how we understand workplace discrimination and address the reality of how women of color are harassed and discriminated against because of both their race and sex. Even with this blueprint in place, litigators face an uphill battle as a result of the historic siloing of race and sex discrimination claims.

In light of the reality of how women of color experience discrimination, often through microaggressions in addition to more explicitly hostile acts of discrimination, and of the very real impact that microaggressions can have on the terms and conditions of employment, it is essential that we change how we evaluate intersectional claims of dis-

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<sup>107</sup> See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006) ("Implicit biases are discriminatory biases based on implicit attitudes or implicit stereotypes.").

crimination. By treating race discrimination and sex discrimination as if they are entirely separate from one another and centering the experiences of white women and men of color in developing our anti-discrimination laws, we miss opportunities to address forms of harassment and discrimination that are most frequently deployed against women of color.