TESTING ONE, TWO, THREE: DETECTING AND PROVING INTERSECTIONAL DISCRIMINATION IN HOUSING TRANSACTIONS

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ABSTRACT

A review of the past fifty years has generated a consensus that the federal Fair Housing Act (FHA), also known as Title VIII, has fared far less well in addressing discrimination than its counterpart in employment, Title VII. Included among these failings is the relative dearth of intersectionality theory in fair housing jurisprudence.

While courts have been willing to recognize and review causes of action by plaintiffs alleging discrimination on the basis of multiple protected classes and the combinations thereof, they are struggling with ascertaining the appropriate evidence for substantiating such claims. Unfortunately, intersectionality scholarship has not yet shed much light on navigating endemic proof problems under the constraints of antidiscrimination doctrine.

Fair housing advocates have long been privy to the challenges of corroborating even a traditional disparate treatment claim. In response, they developed testing, which calls for trained individuals known as "testers" to pose as renters or purchasers in housing transactions, to procure comparative data that can be marshaled to verify or refute a claim of unlawful conduct. As such, this Article mounts a call for revamping testing protocols under the insights of intersectionality theory.

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In essence, this Article argues that such a test would center the experience of White, heterosexual, cisgender men without disabilities and with no children in the household as a base for comparison. The nation's first federal fair housing law, the Civil Rights Act of 1866, addressed racial discrimination by expressly providing for equal contractual and property rights on par with "White citizens." While the law, as currently codified, has been interpreted coextensively with modern legislation to protect all racial groups, the benchmark it set persists and manifests in the different evidentiary frameworks incumbent on members of minority and majority groups for establishing a prima facie case of race-based discrimination.

Thus, the proliferation of additional protected classes, when construed collectively, suggests that the law is designed to ensure equal treatment with those who have and continue to benefit from the American political order predicated on White ableist heteropatriarchy. In addition to this theoretical justification, this Article considers the propriety of this approach in the context of critques of comporability frameworks for identifying discrimination and concerns about the best approach for engaging intersectionality from the prism of Empirical Methods and Critical Race Theory.

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Introduction

The civil rights reforms of the 1960s, outlawing discrimination in employment, voting, and housing, formally opened doors of opportunity that were previously bolted shut to historically oppressed groups.[1] However, none of these measures, either individually or collectively, has successfully addressed the skewed playing field that maintains the nation's engineered hierarchy of humanity.[2] The last of these milestone legislative victories, the federal Fair Housing Act (FHA),[3] recently reached its fiftieth anniversary, which has prompted renewed reflection on the legislation's achievements and the challenges that yet remain with respect to promoting open housing and redressing the adverse consequences of entrenched residential segregation.[4] Though no antidiscrimination provision has proved be a panacea, data accumulated over the past five decades has generated a widespread consensus that the FHA was a "general failure," especially when assessed against its counterparts in voting and employment.[5] While many comparative shortcomings have been noted, this Article is chiefly concerned with the disconcerting lack of intersectional causes of action under the FHA in contrast to doctrinal developments under Title VII of the Civil Rights Act of 1964.[6]

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[1] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1382–83 (1988) [hereinafter Crenshaw, *Race, Reform, and Retrenchment*]. Black and White are capitalized in this piece; for the author's reasoning behind such capitalization, see Melvin J. Kelley IV, *Retuning Bell: Searching for Freedom's Ring as Whiteness Resurges in Value*, 34 Harv. J. Racial & Ethnic Just. 131, 133 n.2 (2018).

[2] *See generally* Stan. Ctr. on Poverty & Inequality, State of the Union (2017) (detailing racial and ethnic gaps in poverty and inequality in the United States across ten key domains, including employment, housing, education, wealth, income, health, incarceration, and mobility and providing comprehensive assessment of gender inequality across these categories).

[3] 42 U.S.C. §§ 3601–3619 (2012).

[4] *See generally* Nicholas Pedriana & Robin Stryker, *From Legal Doctrine to Social Transformation? Comparing U.S. Voting Rights, Equal Employment Opportunity, and Fair Housing Legislation*, 123 Am. J. Soc. 86 (2017) (reviewing and contrasting landmark civil rights laws fifty years after their passage to suggest that their comparative effectiveness is best explained by the extent to which each policy incorporated a "group-centered effects" statutory and enforcement framework).

[5] *Id.* at 88 (acknowledging that historical evidence and the ensuing scholarly consensus confirm that the FHA was a general failure, whereas Title VII achieved a modest degree of success).

[6] 2 U.S.C. § 2000e-2(a)(1) (2012); *see* Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. Rev. 713, 730 (2015) [hereinafter Mayeri, *Intersection-*

Indeed, even beyond the courts, scholars, advocates, and practitioners have only just begun to consider the import of this theoretical paradigm for advancing the cause of fair housing.[7] In its current incarnation, the FHA prohibits disparate treatment on the basis of several characteristics including race, color, national origin, religion, sex, and disability status.[8] In recent years, some federal courts, in accord with previous guidance from the U.S. Department of Housing and Urban Development (HUD), have rendered decisions that interpret the prohibition of sex discrimination as encompassing gender identity or expression, as well as sexual orientation, if the housing provider is employing sex stereotyping rather than discriminating based on a claimant's status.[9] While each vehicle of identity-based discrimination is unique with respect to its historical underpinnings, attendant manifestations, and repercussions for group opportunity, an intersectional framework pushes us to grapple with the reality that these forces operate interactively to the detriment of persons who possess multiple marginalized identities.[10] In ac-

ality] (acknowledging the recognition of intersectional claims, but lamenting the lack of judicial opinions containing thoughtful analysis of intersectional allegations and noting that to date, "there is no robust canon of intersectionality case law").

[7] While studies exist that document the experience of multiple marginalized populations in housing, efforts that employ intersectionality as a paradigm for resistance are rare and the few that do exist are only recent. *See* Griff Tester, *An Intersectional Analysis of Sexual Harassment in Housing*, 22 GENDER & SOC'Y 349, 355–59 (2008) (documenting the trend of landlords leveraging their institutional authority and employing racialized gender stereotypes to exploit a tenant's economic vulnerability and facilitate their sexual coercion); *see also* Denechia Powell, *Eviction and Intersectionality: Why Black Women Need Housing Justice*, FOR HARRIET (Sept. 13, 2014), http://www.forharriet.com/2014/09/eviction-and-intersectionality-why.html [https://perma.cc/W3VW-QP8F] (attesting to the need to amplify and elevate the voices of Black women in ongoing efforts to address displacement and gentrification); Shana Griffin, *What Does Gender Have to do with Housing?*, BRIDGE THE GULF (Feb. 6, 2012), http://bridgethegulfproject.org/blog/2012/what-does-gender-have-do-housing%E2%80%A8 [https://perma.cc/BRA3-V3HH] (suggesting that recognizing the import of intersectional identities enhances the prospects for a wider range of interventions in redressing group oppression). Moreover, some endeavors that purport to employ an intersectional lens have been less successful in wielding this framework. *See* Kaya Lurie & Breanne Schuster, *Discrimination at the Margins: The Intersectionality of Homelessness & Other Marginalized Groups*, SEATTLE UNIV. SCH. OF LAW HOMELESS RTS. ADVOC. PROJECT, iv–vii (May 8, 2015) (presenting separate data sets on disparate rates of homelessness for six marginalized groups that are each defined along a singular axis of identity-based subordination).

[8] Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2012).

[9] Smith v. Avanti, 249 F. Supp. 3d 1194, 1200–01 (D. Colo. 2017); *see also* Zarda v. Altitude Express, Inc., 883 F.3d 100, 122 (2d Cir. 2018) (concluding that sexual orientation discrimination is invariably rooted in gender stereotypes and is thus a subset of prohibited sex discrimination under Title VII), *cert. granted*, No. 17-1623 (U.S. Apr. 22, 2019). *But see* Wittmer v. Phillips 66 Co., 915 F.3d 328, 330 (5th Cir. 2019) (reaffirming prior precedent that construed Title VII as not extending its protections to sexual orientation and gender identity or gender expression).

[10] Kimberlé Williams 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, 140 [hereinafter Crenshaw, *Demarginalizing the Intersection*] (coining the term "intersectionality" in an effort to develop a mode of analysis that could capture the specific contours of subordination experienced by Black women and unearthing the inadequacies of single-axis frameworks in doctrine, theory, and

cord with this insight, as informed by the work of scholars and practitioners, federal courts have recognized causes of action based on a "combination" of characteristics in the Title VII context.[11] However, to date, there is no record of any judicial opinion sanctioning the viability of these claims under the FHA. Ultimately, this Article stages an intervention in this state of affairs by centering the experience of Black women with children in housing transactions to demonstrate the importance of combatting intersectional discrimination and, to this end, offers a new approach for litigators to demonstrate to a court's satisfaction that a plaintiff was the victim of such disparate treatment.[12]

The dearth of intersectional claims under the FHA is likely, at least in part, a reflection of the challenges of substantiating such causes of action with adequate evidence. While the FHA, as supplemented by many state and local laws, prohibits discrimination on the basis of numerous characteristics that have traditionally served as grounds for oppression, proof of disparate treatment in housing on the grounds of an impermissible trait, let alone several in the aggregate, is often elusive.[13] Despite reports indicating a proliferation of hate groups and hate crimes in recent years,[14] by and large, most housing discriminators now operate in subvert modes that make it quite chal-

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politics). This Article refers to the individual identity categories that are banned from consideration under Title VII and Title VIII as "protected characteristics" or "protected classes." While the terms of art are standard practice, the nomenclature has been questioned. *See, e.g.*, christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 490–96 (1998) (contending that the language of "protected classes" distracts from the central inquiry of an inference of discrimination based on disadvantage in the context of disparate treatment claims).

[11] Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1034–35 (5th Cir. 1980).

[12] The emphasis on Black women pays homage to the genesis of the framework as articulated by Crenshaw. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 10, at 140.

[13] *See, e.g.*, Liam Garland, *Reflections on* Housing Rights Center v. Krug, 41 URB. L. 249, 254 (2009) ("[A] housing provider who discriminates does not usually publicize the discrimination . . . .").

[14] According to an article from the Southern Poverty Law Center, which has "compiled data on hate crimes since the early 1970s," the number of hate groups rose from 892 in 2015 to 917 in 2016. Mark Potok, *The Year in Hate and Extremism*, INTELLIGENCE REP. (Feb. 15, 2017), https://www.splcenter.org/fighting-hate/intelligence-report/2017/year-hate-and-extremism [https://perma.cc/3ERS-DWYG] (noting further that in the immediate aftermath of Donald Trump's election to the presidency, a wave of hate crimes and lesser hate incidents totaling over one thousand swept the nation, with more than a third of the matters directly referencing "Trump, his 'Make America Great Again' slogan, or his infamous remarks about grabbing women by the genitals."). A report from the Center for the Study of Hate & Extremism at California State University, San Bernardino also documented a 12.5% increase in the number of hate crimes reported in the nation's ten largest cities from 2016 to 2017. BRIAN LEVIN & JOHN DAVID, CTR. FOR THE STUDY OF HATE & EXTREMISM, REPORT TO THE NATION: HATE CRIMES RISE IN U.S. CITIES AND COUNTIES IN TIME OF DIVISION & FOREIGN INTERFERENCE 3 (2018). While there is noteworthy evidence that Trump's campaign and subsequent election fueled this purported resurgence, some have cautioned that hate has been part and parcel of the nation since its inception and that the spikes may just be attributable to more efficient reporting mecha-

lenging to ascertain whether their conduct was in fact motivated by an unlawful bias.[15] Fair housing advocates have long been privy to this dilemma and in response have developed a key investigative tool known as "testing."[16] Test cases, which deliberately design and orchestrate events for the express purpose of uncovering and challenging practices and policies as unlawful, have long been part of the arsenal of civil rights activists.[17] In essence, testing is an extension of this framework, calling for trained individuals known as "testers" to pose as renters or purchasers in housing transactions.[18] Ultimately, the information they gather in their interactions with housing providers can be utilized to corroborate or refute allegations of discrimination.[19]

The importance of testing is readily apparent when situated in the context of a typical claim of disparate treatment in a housing transaction. Generally, when there is no "direct evidence" of discrimination, the plaintiff's allegation is assessed under the four-part test for establishing a prima facie case adopted in *McDonnell Douglas Corp. v. Green*.[20] This requires the

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nisms and accurate data tracking. *See, e.g.*, MARTHA C. NUSSBAUM, THE MONARCHY OF FEAR: A PHILOSOPHER LOOKS AT OUR POLITICAL CRISIS 99 (2018).

[15] *See* Garland, *supra* note 13, at 254. *But see* JOHN P. RELMAN, *Types of Evidence to Prove Intent*, *in* HOUSING DISCRIMINATION PRACTICE MANUAL § 2:29 (2018) [hereinafter RELMAN, *Types of Evidence to Prove Intent*] (stating that direct evidence of racial animus is rare, but suggesting that it is often available in cases concerning disability and familial status discrimination).

[16] *See, e.g.*, MARGERY AUSTIN TURNET ET AL., U.S. DEP'T OF HOUS. & URB. DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 1–2 (2013), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf [https://perma.cc/NHY8-E98C] (recounting HUD's first national testing study in 1977).

[17] *See e.g.*, Pierson v. Ray, 386 U.S. 547, 552 (1967) (discussing Black plaintiffs who visited a waiting room at a bus terminal to ascertain whether their right to unsegregated public accommodations would be honored); Evers v. Dwyer, 358 U.S. 202, 203 (1958) (discussing that an African American boarded a segregated bus for the sole purpose of instituting litigation); Plessy v. Ferguson, 163 U.S. 537, 538 (1896) (testing constitutionality of state law mandating separate railroad car facilities for Blacks and Whites on trains traveling intrastate).

[18] JOHN P. RELMAN, *Deciding Whether or Not to Use Testers*, *in* HOUSING DISCRIMINATION PRACTICE MANUAL § 4:2 (2017) [hereinafter RELMAN, *Deciding Whether or Not to Use Testers*]; *see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (defining testers as individuals who do not have an intent to rent or purchase a home or apartment, but instead pose as renters or purchasers for the purpose of collecting evidence of discriminatory policies and practices).

[19] Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983) ("It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable . . . . The evidence provided by testers both benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society's continuing struggle to eliminate the subtle but deadly poison of racial discrimination.").

[20] 411 U.S. 792, 802 (1973). The *McDonnell Douglas* analysis applies to cases that are described as entailing "single motive" or "circumstantial" evidence of discrimination and are contrasted with "mixed motive" cases. Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 199 (2009) [hereinafter Sullivan, *The Phoenix from the Ash*]. The Supreme Court formulated an alternative test for the latter group of cases: when a plaintiff produced "direct evidence" of discrimination, the defendant could only escape liability if they demonstrated that the

plaintiff to demonstrate that (1) they are a member of a protected class; (2) they applied to either rent or purchase the property in question and met the requisite qualifications to perform the transaction; (3) they were rejected by the defendant; and (4) the housing opportunity either remained available after the rejection or was sold or rented to an individual who was not a member of the plaintiff's protected group.[21] Thereafter, the burden shifts to the defendant to articulate a "legitimate, nondiscriminatory explanation" for their conduct.[22] Cases that result in a plaintiff's success at this stage are rare, as any reason proffered by the defendant that is not "incredible on its face" is generally accepted in the absence of direct evidence of unlawful discrimination.[23] Thus, the third stage, where the plaintiff must demonstrate that the defendant's purported justification is mere pretext for discriminatory animus, is usually the site of the real contest between the parties.[24] A plaintiff can surmount this final hurdle by showing that the presented reasons either (1) had no basis in fact, (2) were not animating the defendant's conduct, or (3)

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adverse action would have been taken for a legitimate reason even outside the potential discriminatory motivation. Price Waterhouse v. Hopkins, 490 U.S. 228, 230, 244–45 (1989). This approach was later modified by the Civil Rights Act of 1991, Pub. L. No. 102–66, 105 Stat. 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m) (2000)), which established that the application of this analysis was proper when the plaintiff "demonstrates" that discrimination was a motivating factor. *Id*. Subsequently, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Court confirmed that the "direct evidence" threshold had been reduced to a "motivating factor" standard, but limited the reach of its holding to "mixed motive" cases. *Id*. at 92, 94 n.1, 101–02. However, commentators have read *Desert Palace* as eviscerating *McDonnell Douglas* because the lower baseline means that the paradigm for review should apply across the board as all cases will potentially involve both legitimate and illegitimate motives. *See* Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1922, 1925, 1929 (2004). However, courts have hence held that *McDonnell Douglas* remains unscathed. *E.g.*, Suits v. Heil Co., 192 F. App'x 399, 408 (6th Cir. 2006) (declining to view *Desert Palace* as a modification of *McDonnell Douglas*).

[21] *See McDonnell Douglas*, 411 U.S. at 802. *But see, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (cautioning that the *McDonnell Douglas* framework is not an inflexible formulation, but rather is important because of its recognition of the principle that a plaintiff must carry the initial burden of presenting sufficient evidence to warrant an inference of discrimination); Pinchback v. Armistead Homes Corp., 689 F. Supp. 541, 552–54 (D. Md. 1988) (declining to adopt a rigid application of the *McDonnell Douglas* framework because the defendant had an overt policy of refusing housing applications from African Americans and therefore, plaintiff's failure to apply was not fatal to their cause of action as the submission would have constituted a "futile gesture"); Lindsay v. Yates, 578 F.3d 407, 415 (6th Cir. 2009) (acknowleding and applying the modified *McDonnell Douglas* test for housing).

[22] *McDonnell Douglas*, 411 U.S. at 802.

[23] JOHN P. RELMAN, *Order and Burdens of Proof*, *in* HOUSING DISCRIMINATION PRACTICE MANUAL § 2:30 (2018) [hereinafter RELMAN, *Order and Burdens of Proof*]. *But see Price Waterhouse*, 49 U.S. at 253 (clarifying that a defendant must prove by a preponderance of the evidence that it would have made the same decision to escape liability in a "mixed-motive" case where the employer was motivitated by both legitimate and unlawful considerations).

[24] *See* RELMAN, *Order and Burdens of Proof*, *supra* note 23, at § 2:30.

would have been insufficient to justify the adverse action.[25] This is where the testing evidence can be instrumental.[26]

In many respects, fair housing testing is akin to experiments in the sciences that employ controls to assess the import of an isolated variable.[27] Testing usually entails either a "paired" or "sandwich" methodology.[28] In paired tests, two testers, a "protected class tester" ("PT") and a "control tester" ("CT"), are both assigned profiles that enable them to present themselves as qualified for the pertinent transaction (though the PT may be slightly more qualified than the CT).[29] Neither tester is informed whether they are the CT or PT.[30] The idea is to replicate the conditions that gave rise to the allegation of discrimination while holding constant all relevant factors save for the protected characteristic that is believed to be the source of discriminatory animus.[31] The PT and CT, who essentially differ only in whether they are a member in the protected group, then inquire during the same general timeframe about the unit in question (or other similar dwellings within the purview of the housing provider) and carefully document their respective experiences in detail.[32] If done correctly, testing provides "quasi-scientific" evidence of the defendant's intent that can be presented in court to enable a fact finder to draw inferences of discrimination.[33]

A sandwich test expands upon a paired test and simply calls for a third tester, who matches the characteristics of the initial CT, to follow up and verify the availability of the housing opportunity.[34] This approach precludes a defendant from arguing that there was a change in the status of the housing opportunity between the visits of the paired testers that can explain a difference in treatment of the PT.[35] Unfortunately, standard paired and sandwich testing have been ill-suited to ferret out intersectional discrimination pre-

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[25] Chatman v. Toho Tenax Am., Inc., 686 F.3d 339, 349 (6th Cir. 2012).

[26] There is some variance among courts as to precisely when comparative evidence, such as testing, becomes relevant under the governing standard of review. *Compare* Adebisi v. Univ. of Tenn., 341 F. App'x 111, 112 (6th Cir. 2009) (holding that a plaintiff failed to make a prima facie case because they did not demonstrate that a similiarly situated, non-protected person received favorable treatment), *with* King v. Hardesty, 517 F.3d 1049, 1063 (8th Cir. 2008) (reviewing comparative evidence to ascertain whether plaintiff had illustrated that the defendant's justifications were pretextual). Scholars have appropriately commented on the impropriety of insisting on comparative evidence during the prima facie stage. *See* Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 Mo. L. Rev. 831, 839 (2002).

[27] Relman, *Deciding Whether or Not to Use Testers*, *supra* note 18, at § 4:2.

[28] *Id.*

[29] Conn. Fair Hous. Ctr., Where Can We Go From Here? The Results of Three Years of Fair Housing Testing in Connect 2012–2015 7 (2016)

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Relman, *Deciding Whether or Not to Use Testers*, *supra* note 18, at § 4:2.

[34] Nat'l Fair Hous. Alliance, No Home for the Holidays: Report on Housing Discrimination Against Hurricane Katrina Survivors 7–8 (2005).

[35] *Id.* at 8.

cisely because the methodologies were engineered to isolate one variable at a time rather than several protected characteristics or the interplay thereof.[36]

In recognition of the ongoing challenges concerning proving intersectional bias under the confines of current antidiscrimination doctrine,[37] Professor Minna Kotkin has laudably called for casting an expansive evidentiary net to substantiate such claims, including the use of expert testimony on the nuances of intersectional implicit bias.[38] However, this Article cautions that testing should not fall to the wayside in this broad scan for tools that can be harnessed to detect and prove intersectional discrimination. There is a sweeping consensus that the "best example of comparative evidence in a housing discrimination case is testing evidence."[39] Numerous courts have echoed this sentiment in commenting on the value of testing.[40]

Given the reality of this playing field, one distinguished activist, in an attempt to convey just how essential testing is, went so far as to charge "that no organization, public or private, can credibly claim to have a fair housing enforcement program if it does not also have a testing capability."[41] A review of the prevalence of testing suggests that this sentiment is not entirely misplaced. Approximately once a decade since the late 1970s, HUD has conducted testing on a national scale to unearth persistent discrimination against racial and ethnic minorities.[42] While sexual orientation is not expressly denoted as a protected class under the FHA, HUD also commissioned the "first large-scale, paired-testing study to assess housing discrimination against same-sex couples" seeking opportunities to rent in metropolitan markets

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[36] DIANE K. LEVY ET AL., A PAIRED-TESTING PILOT STUDY OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES AND TRANSGENDER INDIVIDUALS 5 (2017) (explaining that paired tests situate two individuals as substantially similar in every way save for the protected class that is the subject of interest and therefore, "[f]rom the perspective of the housing provider, the only difference between the two is the *one* focal characteristic").

[37] Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1486 (2009) (crediting intersectionality scholars with enriching our understanding of "complex subjects," but noting that their work does not address the "serious proof issues that arise when litigants attempt to assert their complexity in discrimination litigation").

[38] *See id*. at 1496–99.

[39] RELMAN, *Types of Evidence to Prove Intent*, *supra* note 15, at § 2:29.

[40] *See, e.g.*, Zuch v. Hussey, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975) ("The Fair Housing Act of 1968 was intended to make unlawful simpleminded as well as sophisticated and subtle modes of discrimination. It is the rare case today where the defendant either admits his illegal conduct or where he sufficiently publicizes it so as to make testers unnecessary.").

[41] Fred Freiberg, *A Test of Our Fairness*, 41 URB. L. 239, 240 (2009).

[42] *Paired Testing and the Housing Discrimination Studies*, OFF. POL. DEV. & RES.: EVIDENCE MATTERS (2014), https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html, [https://perma.cc/N6GN-37Y7].

through digital means.[43] In addition, the agency has marshaled testing to document discrimination against individuals with disabilities.[44]

Further still, through its fair housing enforcement program, HUD provided nearly forty million dollars in 2018 to more than 150 national and local fair housing organizations.[45] Over thirty million dollars of that funding was earmarked as grants for Private Enforcement Initiatives, which enabled recipients to undertake their own testing investigations to enforce fair housing laws.[46] To be sure, advocates have long contended that these monies are woefully inadequate.[47] This year, that concern has only been augmented as the funding level appears to have dropped down to 23 million dollars for just 80 organizations. Nonetheless, as limited as they are, these resources have been instrumental in supporting fair housing advocacy endeavors.[48]

Finally, HUD is not the only federal entity to employ testing to identify and challenge housing discrimination; the U.S. Department of Justice (DOJ) and Department of Defense have programs of their own.[49] In light of the foregoing, it would be ill-advised to let testing fall to the wayside as a viable tool for detecting and proving intersectional discrimination. This Article argues that testing should be redesigned under the tenets of intersectionality theory. Practically, this would mean conducting sandwich tests with a PT that matches the various protected characteristics of the plaintiffs and two

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[43] SAMANTHA FRIEDMAN ET AL., AN ESTIMATE OF HOUSING DISCRIMINATION AGAINST SAME SEX COUPLES iv (2013).

[44] *See, e.g.*, DIANE K. LEVY ET AL., DISCRIMINATION IN THE RENTAL MARKET AGAINST PEOPLE WHO ARE DEAF AND PEOPLE WHO USE WHEELCHAIRS: NATIONAL STUDY FINDINGS, v (2015).

[45] *See* Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD Awards $37 Million to Fight Housing Discrimination, HUD No. 18–004 (Mar. 6, 2018) https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_004 [https://perma.cc/7L8K-UNAZ].

[46] *Id.*

[47] NAT'L FAIR HOUS. ALLIANCE, THE CASE FOR FAIR HOUSING: 2017 FAIR HOUSING TRENDS REPORT 12 (2017) ("[F]air housing education and enforcement programs, both public and private, are not a national priority and are severely underfunded. They are not just underfunded by millions of dollars. They are underfunded by hundreds of millions of dollars, perhaps billions.").

[48] Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD Awards $23 Million to Fight Housing Discrimination, HUD No. 18–142 (Dec. 4, 2018), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_142.

[49] *Fair Housing Testing Program*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/fair-housing-testing-program-1 [https://perma.cc/ZVN7-XNPF] (stating that the Civil Rights Division of the Department of Justice established its Fair Housing Testing Program in 1991 and commenced testing the follow year, and noting that 111 cases have been initated based on evidence generated by the program's operation). Since passage of the FHA, the Department of Defense has required military bases under its purview to assist enlisted personnel who report discrimination in the process of seeking off-base housing. Equal Opportunity Off-Base Housing, 32 C.F.R. § 192.5. In investigating these claims, the bases employ military personnel as "verifiers," who play a role that is functionally equivalent to testers. 32 C.F.R. § 192.3.

CTs that are White, heterosexual, cisgender men without disabilities who have no children in their households.[50]

This Article's argument for revamping testing proceeds in three parts. Part I begins with a review of the development of intersectionality discrimination jurisprudence. As noted, the theory has gained scant traction in the context of fair housing cases, so the focus will be on developments under Title VII. This Part traces the role of intersectionality in the passage of the Civil Rights Act of 1964 and its continued significance in informing the contours of enforcement strategies thereafter. It also documents the trend in courts toward heightened receptivity to causes of action alleging intersectional discrimination. It concludes by highlighting the challenges that have been faced by practitioners and courts in ascertaining the appropriate evidentiary basis for substantiating lawsuits claiming discrimination on the basis of one or more protected characteristics of the combinations thereof.

Part II situates the problem of intersectional discrimination under the FHA by reviewing some of the challenges facing Black women as they attempt to access housing opportunities. In order to grapple with their experiences, an examination of the stereoptypical frames of references animating the discriminatiory conduct of housing providers will first be undertaken. From there, the Article offers a brief overview of findings from several studies indicating that Black women must endure distinct barriers, not only stemming from the interwoven mechanics of structural racism and sexism, but also because of the persistence of racially gendered prejudices. Finally, this part concludes by considering the case of *U.S. v. Hylton*[51] where "smoking gun" evidence of intersectional discrimination was readily available.[52] The focus on a case that was not only relatively meritorious, but did not encounter any proof problem may seem quite puzzling indeed, but it reflects a deliberate choice. The case offers a deeply proactive thought experiment concerning how the litigation may have developed—if at all—had the defendants simply been silent about their discriminatory animus, as the majority of discriminatory housing providers are.[53] As such, a review of the fact

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[50] Religious discrimination claims in the United States have historically been centered on redressing anti-Semitic conduct, but in the aftermath of 9/11, discrimination against Muslims has been on the rise. Michael Allen & Jamie Crook, *More Than Just Race: Proliferation of Protected Groups and the Increasing Influence of the Act*, *in* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 57, 59 (2017). Nonetheless, recent national data indicates that religious discrimination constituted the lowest category of complaints under the FHA at 1.3% of all federal claims. NAT'L FAIR HOUS. ALLIANCE, MAKING EVERY NEIGHBORHOOD A PLACE OF OPPORTUNITY: 2018 FAIR HOUSING TRENDS REPORT 52 (2018). Accordingly, the formulation of control testers posited here has not been expanded to capture unlawful bias on this trait. Yet, if so inclined, one could imagine adding "Christian" to the features of this comparative benchmark.

[51] 944 F. Supp. 2d 176 (D. Conn. 2013).

[52] *Id.* at 187.

[53] *See, e.g.*, Fair Hous. Just. Ctr. v. Broadway Crescent Realty, No. 10 Civ. 34 (CM), 2011 WL 856095, at *5 (S.D.N.Y. Mar. 9, 2011) (noting that while the burden of persuasion remains on the plaintiff to demonstrate that a defendant's proffered justification is

pattern speaks volumes about the usual plight of multiple marginalized individuals with detecting and proving claims of discrimination on the basis of one or more protected characteristics or the combination thereof.[54] This reality suggests that testing must be re-engineered to reflect the lessons of intersectionality theory.

Part III offers a theoretical justification for the proposed sandwich test methodology described above. It begins by revisiting the nation's first federal fair housing law, the Civil Rights Act of 1866,[55] which prohibited racial discrimination by providing for equal contractual and property rights on par with "[W]hite citizens."[56] While the law, as currently codified, has been interpreted coextensively with modern legislation to protect all racial groups, the benchmark it set persists and manifests in the different evidentiary frameworks incumbent on members of minority and majority groups for establishing a prima facie case of race-based discrimination.[57] Thus, the proliferation of additional protected classes, when construed collectively, suggests that the law is designed to ensure equal treatment with those who have and continue to benefit from the American political order predicated on White ableist heteropatriarchy. Accordingly, the appropriate measuring stick under the FHA is whether a member of one or more traditionally disfavored groups is being afforded equal treatment on par with a White, heterosexual, cisgender man without a disability who has no children in his household.

Part III also considers the viability this testing approach in light of concerns regarding a seeming overreliance on comparability frameworks for identifiying discrimination. In some accounts, this trend has severely curtailed our capacity to develop other modes of analysis that may offer more promise.[58] Other scholars from a third generation of critical race scholarship known as Empirical Methods and Critical Race Theory (e-CRT) have suggested that intersectionality should not be reduced to a falsifiable hypothesis.[59] In Professor Ange-Marie Hancock's account, this methodology is not fully faithful to the normative recalibration that intersectionality theory purportedly demands, as it expressly challenges the viability of disaggregating

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pretext for discrimination, "courts must carefully scrutinize a defendant's proffered rationale, as defendants often try to conceal their discriminatory intent").

[54] Kotkin, *supra* note 37, at 1458–59, 1463 (examining a sample of summary judgment cases out of the Southern and Eastern Districts of New York over a one-year period from 2006 to 2007 and finding that employers prevail on multiple discrimination claims at a rate of 96%, as compared to 73% in general, which was traced, in part, to augmented problems of proof in substantiating intersectional claims).

[55] Ch. 31, 14 Stat. 27, *reenacted by* Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144, *codified as amended at* 42 U.S.C. §§ 1981, 1982.

[56] *Id.*

[57] Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the* McDonnell Douglas *Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 62–66 (1999).

[58] Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 735–40 (2011).

[59] Ange-Marie Hancock, *Empirical Intersectionality: A Tale of Two Approaches*, 3 U.C. IRVINE L. REV. 259, 259–61 (2013).

components of an individual's identity into distinct modes of inquiry.[60] While the concerns certainly have merit, in the end, the rewards appear to outweigh the risks at present since a dramatic shift in antidiscrimination doctrine jurisprudence is unlikely to be imminetently forthcoming.[61] Finally, the Article concludes with thoughts on the pressing need to develop theoretical and empirical frameworks that will broaden the horizons for successful intersectional complaints.

I. The Development of Intersectionality Under Title VII

The terminology associated with intersectionality has only been on the academic scene for the past three decades, but the foundation for the theoretical paradigm was laid long ago. Indeed, Black and Native women in Antebellum America were painfully cognizant of the material realities imparted on their daily lives as a result of the interlocking dynamics of racial and gender oppression.[62] Some scholars credit Anna Julia Cooper, a former slave who was the fourth Black woman in American history to earn a Ph.D.,[63] with being the first to advance the idea of simultaneously addressing race-based and sex-based discrimination when she advocated for the educational and social advancement of African American women in her 1892 publication, *A Voice from the South*.[64] However, efforts to draw attention to the unique plight of women of color who were ensnared in a web of racialized and gendered domination are in fact even older, having been underway at least six decades prior to Cooper's writing.[65]

In the years leading up to the advent of the Civil Rights Movement of the 1960s, Pauli Murray, a trailblazing African American feminist attorney, was at the forefront of furthering this ongoing intergenerational project grap-

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[60] *Id.*

[61] *Id.* at 275–76.

[62] Harriet A. Jacobs, Incidents in the Life of a Slave Girl 44–49 (1861); Andrea Ritchie, Invisible No More: Police Violence Against Black Women and Women of Color 19–29 (2017) (describing the state-sanctioned and state-condoned violence perpetuated against Black and Native women before the U.S. Civil War).

[63] Vivian M. May, Anna Julia Cooper, Visionary Black Feminist: A Critical Introduction 13 (2012).

[64] *See* Anna Julia Cooper, A Voice from the South 22–32 (Dover Pubs., Inc. 2016) (1892).

[65] Maria Miller Stewart, *Religion and the Pure Principles of Morality, the Sure Foundation on Which We Must Build*, *in* Classic African American Women's Narratives 5 (William L. Andrews ed., 2003) (1831) (providing historical speech that called attention to the plight of African American women). *See also* Hancock, *supra* note 59, at 260–64 (contending that the Black feminist interventions during the 1980s, featuring the work of Kimberlé Williams Crenshaw and Patricia Hill Collins, were part of a larger "Black female intellectual and sociopolitical tradition" that can be traced back to Anna Julia Cooper, Maria Miller Stewart, and Harriet Jacobs). Maria Miller Stewart, a free Black woman from Hartford, Connecticut, is particularly notable, as she "may have been the first African American woman to speak in public about women's rights" with an emphasis on the "daughters of Africa." Beverly Guy-Sheftall, Words of Fire: An Anthology of African American Feminist Thought 25 (1995).

pling with the interconnectedness of discrimination based on race and sex.[66] In a 1947 article, Murray used the term "Jane Crow" to describe the experience of African American women who experienced oppression as a result of both racism and sexism.[67] Murray's work thus served as an intellectual precursor foreshadowing Professor Kimberlé Crenshaw's development of the "intersectionality" framework in the 1980s to describe the unique permutations of discrimination impacting individuals with multiple marginalized identities.[68] More recently, Professor Moya Bailey formulated the term "misogynoir" to denote the intersectional amalgamation of misogyny and anti-Black racism that is specifically directed at Black women.[69]

Despite steady advances in theory and corresponding reverberations in a wide array of social justice advocacy efforts, doctrine has not managed to keep pace, as evidenced by a dearth of judicial opinions employing nuanced intersectional analyses when plaintiffs present claims of discrimination on the basis of more than one protected characteristic.[70] This Part provides an overview of the role of intersectionality in Title VII's passage and the theory's subsequent development in doctrine.

A. The Intersectional Underpinnings of Title VII's Sex Amendment

Whereas the decisions under Title VII may leave much to be desired, the topic has yet to be broached at all under Title VIII.[71] The relative traction of intersectionality in Title VII jurisprudence is perhaps less surprising when one considers the historical context that informed the passage of the Civil Rights Act of 1964. Indeed, since its inception, Title VII has been marred by the intersectional implications of prohibiting discrimination on the basis of both race and sex.[72] While a prevalent and enduring narrative claims that a proposal to include sex as a protected class was effectively advanced as a proverbial "poison pill" that would outright kill the legislation, the myth is entirely unfounded.[73] The legend has attained the status of conventional wis-

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[66] Sarah Azaransky, *Jane Crow: Pauli Murray's Intersections and Antidiscrimination Law*, 29 J. Feminist Stud. Relig. 155, 157 (2013).

[67] Pauli Murray, *Why Negro Girls Stay Single,* Negro Dig., 4–5 (July 1947).

[68] Mayeri, *Intersectionality*, *supra* note 6, at 719.

[69] Moya Bailey, *They Aren't Talking About Me . . .* , Crunk Feminist Collective (Mar. 14, 2010), http://www.crunkfeministcollective.com/2010/03/14/they-arent-talking-about-me [https://perma.cc/B4N7-ZBGX].

[70] Mayeri, *Intersectionality*, *supra* note 6, at 730.

[71] Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601–3606 (2006). *See also* Mayeri, *Intersectionality*, *supra* note 6, at 730 n.106 (observing a scholarly consensus that the "high water mark" for intersectionality doctrine was the Title VII matter of *Lam v. University of Hawaii*., 40 F.3d 1551 (9th Cir. 1994)).

[72] Mayeri, *Intersectionality*, *supra* note 6, at 716–21.

[73] *Compare* Charles Whalen & Barbara Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 234 (1985) (contending that the sex amendment was not a product of strenuous lobbying by women's groups, but "was the result of a deliberate ploy by foes of the bill to scuttle it"), *with* Caruthers Gholson Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law*

dom and has been tactfully wielded by scholars, activists, and even courts to various ends.[74] Its origins lie in the fact that many of the Act's supporters had been hostile to Title VII's earlier ban on race-based discrimination.[75] As a result, many interpreted the legislators' support for adding sex as constituting nothing more than a tactical maneuver designed to foster further opposition to the bill.[76]

Nonetheless, the call to add sex was genuine; for some, however, it stemmed primarily from a concern that White women would be unduly disadvantaged without such protection since both Black men and Black women would benefit from a ban on racial discrimination.[77] Ironically, some who stood in favor of Title VII's ban on race discrimination responded by denouncing the proposed sex amendment as a distraction.[78] Some went further and contended that biological differences between men and women presented a different set of concerns in employment that warranted additional studies before Congress took action.[79] Pauli Murray intervened in the debates that framed the inclusion of sex discrimination as either a contest of Blacks against women or a battle of Black men and Black women against White women and instead situated the sex amendment, not as a wall, but as a bridge between the civil rights and women's rights advocacy camps.[80] In

for Women, 5 VAL. U.L. REV. 326, 336–37 (1970) (debunking the accusation of misogynists that the passage of the sex discrimination provision was just a joke that had been contrived to hurt racial minorities).

[74] *See* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U.L. REV. 995, 1014–16 (2015) (acknowledging that the joke theory now constitutes the standard legislative history of the sex provision and not only have courts and academics of all disciplines followed suit, but the Equal Employment Opportunity Commission has also been a key perpetuator both historically and in the present as its website still reflects this view).

[75] For example, Rep. Howard Smith of Virginia, a staunch opponent of all civil rights legislation, was among the legislators proposing the addition of sex to Title VII. Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 L. & INEQ. 163, 163 (1991). Rep. Smith seems to have been aware that any amendment he introduced would be viewed as suspect because of his open hostility to civil rights, but he had a relationship with the National Women's Party (NWP) and had spoken in favor of equal rights for women since at least 1943. *Id.* at 174–75, 182–83. Ultimately, Rep. Smith was urged to introduce the bill because advocates of the amendment believed that his support would garner at least a hundred Southern votes. *Id.* at 175. Despite the fact that his introduction was delivered in a mocking demeanor that suggested less than earnest support, *id.* at 176, the historical evidence indicates the contrary, *id*. at 183.

[76] *See, e.g.*, Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 791 (1965) ("The bill's history does reveal that, as the debate over racial aspects of the Civil Rights Act grew more heated, foes of its passage drafted an amendment to include sex, presumably designed to defeat the entire act.").

[77] Most assuredly, some leaders of the NWP held racist views. Schultz, *supra* note 74, at 1019. Other prominent figures, including Rep. Martha Griffiths, who purportedly supported the cause of civil rights, nonetheless appealed to racist sentiments to foster support for banning sex discrimination by arguing that White women would otherwise lose out to Black men and Black women if only race was deemed a protected class. *Id*.

[78] For instance, Rep. Edith Green of Oregon abhorred sex-based discrimination, but argued that racial discrimination caused far more suffering and therefore, a law aimed at helping African Americans should not be "cluttered up." Freeman, *supra* note 75, at 177.

[79] 110 CONG. REC. 2578–84 (1964) (Statement of Rep. Cellar).

[80] Mayeri, *Intersectionality*, *supra* note 6, at 719.

April 1964, as the sex discrimination provision faced a precarious fate in the Senate after being approved by the House, Murray circulated a memo to members of Congress and the Johnson administration describing the links between race-based and sex-based discrimination by focusing on the experience of African American women.[81]

Without a ban on sex discrimination, Murray contended, both White women and Black women would share a similar fate of exclusion.[82] Moreover, Murray observed that for women of color, the experiences of both racialized and gendered oppression were so deeply intertwined that it was unlikely for them to be able to decipher whether an individual's discriminatory conduct was motivated by their race or sex, let alone the possibility that both might be factors.[83] Her contextualization of the inseparability of these identity-based vehicles of subordination planted the intellectual seeds that eventually blossomed into intersectionality, and, specifically for African American women, the concept of misogynoir.[84] While such nomenclature was not yet available, Murray was well aware of the substantive implications of misogynoir for African American women and her memo detailed their dire plight in the labor market.[85] Compared to their White counterparts, Black women were more likely to be single or widowed heads of household and to be so for longer periods of time, with more children to support but less educational attainment and earnings.[86]

At the time, sociologist Daniel Patrick Moynihan, then serving as Assistant Secretary of Labor, had been working on a report that was ultimately released in 1965 titled *The Negro Family: The Case for National Action*.[87] The study, popularly known as the Moynihan Report, acknowledged that Blacks had been subjected to over three centuries of injustice, but traced the primary structural manifestation of aggregated oppression to cultural pathologies stemming from the deterioration of stable Black nuclear families.[88] Moynihan bemoaned the matriarchal trend in Black households because it failed to comport with American heteropatriarchy, which valued and rewarded male domination.[89] Moreover, he contended that Jim Crow had

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[81] *Id.* at 718–19; Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex, 20, 23 (Apr. 14, 1964) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, Pauli Murray Papers, MC 412, Box 85, Folder 1485) [hereinafter Murray, Title VII Memorandum].

[82] Murray, Title VII Memorandum, *supra* note 81, at 20.

[83] *Id.*

[84] Mayeri, *Intersectionality*, *supra* note 6, at 719.

[85] Murray, Title VII Memorandum, *supra* note 81, at 21 ("In a more sharply defined struggle than is apparent in any other social group in the United States, [the Black woman] is literally engaged in a battle for sheer survival.").

[86] *Id.*

[87] DANIEL P. MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).

[88] *Id.* at 5.

[89] *Id.* at 29.

been far more detrimental to Black men than Black women because the latter had not been deemed a threat to White dominance and therefore, were not the targets of subordination.[90] Accordingly, in his account, a federal intervention aimed at restoring Black men was essential in order to promote the values and habits that would redress the intergenerational "tangle of pathology" and thereby set Blacks on the path to educational and economic success.[91]

Murray's recommendations stood in stark contrast to Moynihan's analysis, which was buttressed by the ideologies of colorblind racism, naked sexism, and flagrant misogynoir.[92] Instead, she recognized that without the sex amendment, Title VII would primarily redound to the benefit of Black men and thereby offer the prospects of genuine relief from discriminatory conduct to only half of the Black work force.[93] Given the plight of Black women, she knew that civil rights legislation in employment would only have any hope of being effective if it outlawed discrimination on the basis of both race and sex.[94] Further still, her analysis undertook a brief survey of U.S. history to highlight the ramifications of failing to unite movements for racial justice with efforts to promote gender equality.[95] Of particular note, she found that the siloed endeavors to enfranchise Black men and White women in the aftermath of the Civil War neglected the interests of Black women and foreclosed an alliance that might have otherwise been formed to resist the resurgence of racial oppression and its brutally violent enforcement.[96]

In the context of employment, Murray saw similar divisive dynamics at play with respect to the adverse implications of competition for unskilled and semiskilled jobs.[97] In order to resist susceptibility to socio-political distancing and reduce vulnerability to "divide and conquer" tactics, Murray insisted that it would be necessary for all workers to be guaranteed equal access to employment opportunities and, therefore, the ban on both race and sex discrimination was essential to quell the prospects of further turmoil.[98]

Intersectionality continued to shape the terrain for Title VII enforcement after its passage.[99] Unsurprisingly, Murray was at the helm of ushering

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[90] *See id.* at 16.

[91] *See id.* at 47–48.

[92] EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 2–3 (5th ed. 2018) (juxtaposing Jim Crow racism's account of the social standing of Blacks by reference to innate biological and moral inferiority with the ideology of color-blind racism, which gained dominance in the 1960s and rationalizes racial inequities as the product of market dynamics, group preferences, and culture).

[93] Murray, Title VII Memorandum, *supra* note 81, at 20–21.

[94] *Id.* at 23.

[95] *Id.* at 9–13.

[96] *Id.* at 9–11.

[97] *Id.* at 18–19.

[98] *Id.* at 19.

[99] Mayeri, *Intersectionality*, *supra* note 6, at 721–27 (describing the early efforts of Black feminist lawyers, activists, and public officials who leveraged their multidimensional identities to promote an expansive interpretation of Title VII).

in a new coalition of women's rights and civil rights advocates who strategically wielded the federal law to advance their collective interests in promoting race and gender equality during the 1960s and 1970s.[100]

The proposal for including a ban on sex discrimination under Title VIII, on the other hand, was devoid of intersectionality considerations.[101] Instead, six years after passage of the FHA, Congress would come to include sex as a protected class under the 1974 Housing and Community Development Act.[102] Just two years prior, the National Commission on Consumer Finance had released a report documenting "widespread instances of unwarranted discrimination in the granting of credit to women" in numerous settings, including mortgage applications.[103] Thereafter, a series of congressional hearings revealed further evidence of pervasive discrimination against women in real-estate-related transactions.[104] While the sessions were underway, a statement from the President of the American Bankers Association surfaced in which he was quoted as candidly admitting that banks and other financial institutions considered women less creditworthy.[105] However, the acknowledgment was subject to the caveat that one might deem such practices justifiable, and it was clear that many did.[106]

Alarmingly, it was a standard business practice for lenders to require women to submit "baby letters" attesting to their sterility or use of birth control before their income would be considered.[107] Reportedly, a loan official from the Veterans Administration went further still, declaring it "un-American to count a woman's income" and indicating that he would only have it taken into account if she had a hysterectomy.[108] One women's rights advocate denounced these practices as resting on the "insulting assumption"

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[100] *Id.*

[101] Of course, it may very well be that Murray's intersectional work on Title VII reduced the necessity of revisiting the topic when Title VIII's sex amendment was on the table. Nonetheless, there is no indication that the framework has ever been marshaled to advance the plight of individuals with multiple marginalized identities in their compounded efforts to access housing opportunities.

[102] Pub. L. No. 93-383, § 808(b).

[103] NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES 160 (1972).

[104] *Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93d Cong. (1974); *Economic Problems of Women: Hearings Before the J. Economic Comm.*, 93d Cong. (1973) [hereinafter *Hearings on Economic Problems of Women*]; *see also* Allen & Crook, *supra* note 50, at 60 (recounting the circumstances prompting passage of the FHA's sex amendment); Maureen R. St. Cyr, *Gender, Maternity Leave, and Home Financing: A Critical Analysis of Mortgage Lending Discrimination Against Pregnant Women*, 15 U. PA. J.L. & SOC. CHANGE 109, 109–10 (2011).

[105] Eugene Adams, Speech Before the Florida Bankers Association (1973), *in* AM. BANKER, June 25, 1973, at 22.

[106] *Id.* ("The question then becomes, is that discrimination justified.").

[107] U.S. COMM'N ON CIVIL RIGHTS, MORTGAGE MONEY: WHO GETS IT? A CASE STUDY IN MORTGAGE LENDING DISCRIMINATION IN HARTFORD, CONNECTICUT 23 (1974).

[108] *Hearings on Economic Problems of Women*, *supra* note 104, at 192 (statement of Steven Rohde, Member of Staff, Center for National Policy Review).

that women could not "rationally plan their lives."[109] In response, Congress outlawed such practices under the Equal Credit Opportunity Act[110] in 1973 and, the following year, amended the FHA to prohibit sex-based discrimination.[111] In the years hence, this ban has expanded to cover sex-based stereotyping regardless of the nature of the underlying motivation,[112] sexual harassment in housing,[113] and, in some situations, adverse consequences against the victims of domestic violence.[114] However, the evolving contours of sex-based discrimination have not yet been pushed into the paradigm of intersectionality, notwithstanding the release of studies attesting to the fact that individuals with multiple marginal identities bear the brunt of housing discrimination.[115]

B. The Evolving Contours of Intersectionality Doctrine under Title VII

Though Title VII jurisprudence has fared far better than the FHA in its recognition of intersectional discrimination, there remains much room for improvement.[116] Still, while acknowledging the considerable opportunities for growth, it is important to note that judicial receptiveness to discrimination claims based on more than one prohibited characteristic has drastically

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[109] *Id.*

[110] Pub. L. No. 93-495, § 502 (1974) (codified as amended at 15 U.S.C. § 1691 with additional prohibitions on discrimination based on race, color, national origin, and receipt of public assistance).

[111] Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 728 (1974).

[112] United States v. Reece, 457 F. Supp. 43, 48 (D. Mont. 1978) (finding that landlord's policies of (1) not renting to single women without cars on the grounds that the neighborhood was poorly lit and that walking would enhance susceptibility to sexual assault, and (2) not counting the alimony or child support of divorced women in his tenant-screening criteria, were both violations of the FHA).

[113] Shellhammer v. Lewallen, 770 F.2d 167, 167 (6th Cir. 1985) (per curiam) (upholding magistrate's analogy to Title VII jurisprudence to find sexual harassment claims viable under the FHA if the conduct creates a "hostile environment" or constitutes a quid pro quo proposal where sexual favors are sought in exchange for benefits). *But see* Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,055 (codified at 24 C.F.R. § 100.600) (cautioning that "the home and workplace are significantly different environments such that strict reliance on Title VII case law is not always appropriate").

[114] Bouley v. Young-Sabourin, 394 F. Supp. 2d 675, 678 (D. Vt. 2005) (recognizing that adverse action against a tenant because they were a victim of domestic violence could constitute unlawful discrimination on the basis of sex under the FHA).

[115] Vincent J. Roscigno, Diana L. Karafin & Griff Tester, *The Complexities and Processes of Racial Housing Discrimination*, 56 Soc. Prob. 49, 66 (2009) (finding stereotypes of African American women were influencing the conduct of housing providers and prospective neighbors); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. Rev. 1540, 1544–45 (2012) (exploring "the social dynamics that render low-income [B]lack women vulnerable to racial surveillance and harassment in majority [W]hite communities").

[116] Mayeri, *Intersectionality*, *supra* note 6, at 730.

progressed in recent decades.[117] The landscape used to be far more challenging; indeed, during the early 1980s, an "intersectionality anti-canon" had gained considerable traction in the nation's federal courts.[118] During this era, across jurisdictions, the state of doctrine evinced a universal judicial hostility to allegations of discrimination on the basis of a combination of protected characteristics. By and large, though, the trend has now reversed, with several courts recognizing the viability of such causes of action.[119] On some occasions, their holdings have been explicitly buttressed by reference to the lessons of intersectionality scholarship.[120] This next Part endeavors to trace that evolution, but simultaneously draws attention to the reality that increasing openness to the concept of intersectional subordination has not necessarily translated into relief for victimized plaintiffs. This is because courts have not yet been inclined to provide clear guidance on how traditional mechanisms for proving disparate treatment should be marshaled to substantiate allegations of intersectional discrimination.[121]

1. *The Intersectionality Anti-Canon*

One particularly visceral manifestation of judicial animosity to such causes of action can be found in *DeGraffenreid v. General Motors Assembly Division*.[122] There, a district court was called upon to evaluate whether General Motors's seniority system, which operated on the principle of "last hired, first fired," perpetuated unlawful discrimination on the basis of both race and sex in violation of Title VII.[123] The plaintiffs consisted of a group of Black women who had lost their jobs when General Motors implemented a layoff in the midst of an economic recession.[124] The court declined to entertain their claim in the aggregate and instead held that the Black women could only proceed with a "cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both."[125] In the court's view, the proposed framework was wholly improper because it would permit the plaintiffs to "combine statutory remedies to create a new 'super-

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[117] *Id.* at 727–30.

[118] *Id.* at 727.

[119] *E.g.*, Wittenburg v. Am. Express Fin. Advisors, Inc., No. 04-922, 2005 U.S. Dist. LEXIS 29471 (D. Minn. Sept. 19, 2005) (acknowledging claim for combined sex and age discrimination without discussion), *aff'd*, 464 F.3d 831 (8th Cir. 2006). *But see* Michael Bologna, *Judges Warn Employment Lawyers Against Motions for Dismissal, Summary Judgment*, 19 EMP. DISCRIMINATION REP. 595, Dec. 4, 2002 (quoting U.S. District Court Judge Ruben Castillo of the Northern District of Illinois as criticizing plaintiff's lawyers, who were advancing allegations of discrimination on multiple protected classes, for "throwing spaghetti at the wall to see what sticks").

[120] *See, e.g.*, Lam v. Univ. of Haw., 40 F.3d 1551, 1561–62 (9th Cir. 1994).

[121] Kotkin, *supra* note 37, at 1498–99.

[122] 413 F. Supp. 142, 142 (E.D. Mo. 1976), *aff'd in part, rev'd in part*, 558 F.2d 480 (8th Cir. 1977).

[123] *Id.* at 143.

[124] *Id.*

[125] *Id.*

remedy' which would give them relief beyond what the drafters of the relevant statutes intended."[126] The court further justified its disposition of the matter by noting that "the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raise[d] the prospect of opening the hackneyed Pandora's box."[127] After bisecting the cause of action, the court dismissed the claim of sex-based discrimination on the grounds that GM had a history of hiring White women, but permitted the race-discrimination claim to be consolidated with another pending lawsuit.[128]

While the Eighth Circuit affirmed the decision, it declined to adopt the lower court's reasoning in rejecting the claim of intersectional discrimination.[129] Instead, it referenced a then-recent U.S. Supreme Court case that insulated facially neutral seniority systems from the reach of Title VII, even when they perpetuated racial discrimination that occurred before the effective date of the legislation.[130]

The lower court in *DeGraffenreid* was not alone in demonstrating animosity to intersectional claims.[131] Another noteworthy exemplar of the trend surfaced in the matter of *Rogers v. American Airlines, Inc.*,[132] which upheld an employer's ban on braided hairstyles against a Title VI challenge by an African American woman.[133] Though the court did not mandate the bifurcation of the plaintiff's race and sex claims, it nonetheless proceeded to analyze each cause of action in a distinct vacuum.[134] Thus the policy was held neither to effectuate gender discrimination, because it applied to both men and women, nor racial discrimination, because it was neutrally applied to all races.[135] Not without some measure of irony, at about this same time, courts were simultaneously refusing to certify Black women to represent a class of plaintiffs that included White women because of their racial difference,[136] in addition to precluding them from representing a class that included Black men due to their gender difference.[137] Still, undergirding the contours of the

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[126] *Id.*

[127] *Id.* at 145.

[128] *Id.* at 144–45.

[129] DeGraffenreid v. General Motors Assembly Div., 558 F.2d 480, 484 (8th Cir. 1977).

[130] *Id.* at 484 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)).

[131] Mayeri, *Intersectionality*, *supra* note 6, at 727 (highlighting several cases that developed and employed the "intersectionality anti-canon").

[132] 527 F. Supp. 229 (S.D.N.Y. 1981).

[133] *Id.* at 233–34.

[134] *Id.* at 231–32; *see also* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 377 ("[T]he court treated the race and sex claims in the alternative only.").

[135] *Rogers*, 527 F. Supp. at 231–32.

[136] Moore v. Hughes Helicopter, Inc., 708 F.2d 475, 480 (9th Cir. 1983).

[137] Payne v. Travenol, 673 F.2d 798, 810–12 (5th Cir. 1982).

"intersectionality anti-canon" in these various contexts was the logic "that discrimination is based on either race or gender, but never both."[138]

2. *Unpacking the Genesis of the "Race Plus Sex" Doctrine*

The viability of intersectional claims was first clearly recognized in the matter of *Jefferies v. Harris County Community Action Association*.[139] There, the plaintiff, an African American women, initially brought suit against her non-profit employer alleging, inter alia, that she had been unlawfully denied promotions "because she is a woman, up in age and because she is Black."[140] The age claim was ultimately dropped, but the Fifth Circuit found that not only had the claims of race and sex discrimination been properly raised, but so had the contention of discriminatory conduct on the basis of both race and sex concurrently.[141] The lower court had only addressed the claims separately, pointing to the fact that an African American man had been promoted over Jefferies, in addition to the employer's statistics on Black men and White women on its staff in general, to deny her allegations of both racial and gender discrimination.[142] The Fifth Circuit sharply disagreed that this was an appropriate method for resolving the combination claim because "discrimination against [B]lack females can exist even in the absence of discrimination against [B]lack men or [W]hite women."[143]

The court's holding was built on the foundation of a series of "sex-plus" cases, which had found that treating married women or women with children differently than their male counterparts still constituted unlawful sex-based discrimination in violation of Title VII.[144] The impetus of the "sex-plus" doctrine is typically traced to the matter of *Phillips v. Martin Marietta Corp*.[145] There, the defendant employer refused to hire women with preschool age children for a particular position, but had no such qualms when it came to accepting applications from men with children in the same age bracket.[146] When the matter came before the U.S. Supreme Court, the NAACP Legal Defense Fund (LDF) represented the plaintiff, a White widowed woman, in challenging the policy as outright discrimination on the basis of sex.[147] While Phillips was not a woman of color, LDF nonetheless

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[138] Caldwell, *supra* note 134, at 375.
[139] 615 F.2d 1025 (5th Cir. 1980).
[140] *Id.* at 1029.
[141] *Id.* at 1030.
[142] *Id.* at 1032.
[143] *Id.*
[144] *Id.* at 1033 (citing, among others, In re Consolidated Pretrial Proceedings, 582 F. 2d 1142, 1145 (7th Cir. 1978) (striking down policy that relegated female cabin attendants to ground positions) and Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (holding that a no-marriage rule for stewardesses violated Title VII)).
[145] 411 F.2d 1 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971).
[146] *Id.* at 543.
[147] Brief for Petitioner at 13–14, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (No. 69-1058).

opted to take the case because African American women were twice as likely as their White counterparts to be the heads of household and therefore were disproportionately impacted by the company's policy.[148] The *Phillips* case itself was a product of the new synergy that had been sparked between advocates for civil rights and women's rights following the intersectional insights that were unearthed during passage of Title VII's sex amendment.[149]

While the policy at issue clearly erected different standards for similarly situated men and women, the district court was not convinced that the policy constituted per se sex discrimination.[150] Not only was plaintiff's request for class certification denied, but the lower court granted the defendant's motion for summary judgment, which had argued that women were not treated unfavorably as evinced by the fact that the applicant pool and subsequent hires were overwhelmingly women.[151] In upholding the district court's ruling on appeal, the Fifth Circuit reasoned that the policy could not be construed as discriminatory against women since it entailed a discrimination on two combined grounds, only one of which was statutorily prohibited.[152] From this vantage, the failure to specifically outlaw discrimination on the basis of motherhood was deemed evidence of a congressional intent to permit employers to consider the "normal relationships of working fathers and working mothers to their pre-school age children[.]"[153]

A subsequent request for a rehearing en banc was denied, but not without a vigorous dissent from Chief Judge John R. Brown who characterized the Court's theoretical justification for the policy as "sex plus."[154] Under this view, anytime sex was combined with a non-statutory factor then the employer would be immune from a charge of discrimination on the basis of gender.[155] Judge Brown not only denounced the formulation because of its "intrinsic unsoundness," but further warned that it would enable employers to aggregate non-sex characteristics to effectuate the "rankest sort of discrimination against women."[156] Ultimately, the Supreme Court reversed and held that the distinction between men and women with children required the

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[148] *Id.* at 13 (contending that Black women will suffer "double discrimination" because they tend to be breadwinners for their families, but constitute "the most oppressed group of workers in the society"); Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of* Martin Marietta, 44 VILL. L. REV. 337, 341–42 (1999) (describing the NAACP's interest in the case as part of a coalition of activists combatting racial and gendered stereotypes).

[149] Mayeri, *Intersectionality*, *supra* note 6, at 723.

[150] Phillips. v. Martin Marietta Corp., 411 F.2d 1, 2 (5th Cir. 1969), *rev'd*, 400 U.S. 542.

[151] *Id.* ("[W]hile 70 to 75 percent of those who applied for this position were women, 75 to 80 percent of those holding the positions were women.").

[152] *Id.* at 4.

[153] *Id.*

[154] Phillips v. Martin Marietta Corp., 416 F.2d. 1257, 1260 (5th Cir. 1969) (Brown, C.J., dissenting).

[155] *Id.* at 1258, 1260.

[156] *Id.*

employer to prove that the policy constituted a "bona fide occupational qualification."[157]

Plaintiff's counsel had not sought to challenge the employer's policy under a disparate impact theory.[158] As a result, the question of whether the hiring protocols constituted a neutral practice with a discriminatory effect that had to be justified was never addressed.[159] Thus, the U.S. Supreme Court's holding effectively eschewed any need to demonstrate a statistically significant disparity in the "sex-plus" context before the defendant was required to demonstrate a business necessity.[160] While Justice Marshall concurred in the Court's decision to remand for further proceedings, he would not have left open the prospect of a potential justification for the business's practices, in part, because they were so clearly animated by "ancient canards about the proper role of women."[161]

In his powerful dissent at the Fifth Circuit level, Judge Brown also noted that notwithstanding the import of the "sex-plus" theory, Title VII clearly forbid an employer from collating two or more statutorily protected characteristics to escape liability.[162] In *Jefferies*, the court would circle back and retrieve Judge Brown's observation to reconfigure the "sex-plus" framework as a vehicle for bringing a "sex plus race" claim of discrimination.[163] Still, according to the *Jefferies* court, cases (like *Rogers*) that refused to recognize separate grooming policies for men and women as unlawful discrimination, could be distinguished as beyond the scope of such "sex-plus" prohibition because they did not involve the consideration of sex in conjunction with another "immutable characteristic" or otherwise failed to implicate a constitutionally protected activity such as marriage or child-rearing.[164]

The rationale animating the contours of what constitutes "sex-plus" discrimination has been appropriately critiqued for resting on doctrinal quicksand.[165] Further still, the theory has been called into question because there are scenarios where the paradigm should apply notwithstanding that

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[157] Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971). If the policy had been challenged under the disparate impact theory then after demonstrating a statistical disparity, the employer would have had to justify its policy as a business necessity. *See, e.g.*, Ricci v. DeStefano 557 U.S. 557, 577–79 (2009) (outlining framework for disparate impact liability and tracing its genesis to Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

[158] *See Phillips*, 411 F.2d at 2.

[159] *Id.* at 3.

[160] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (clarifying that in establishing a prima facie case of disparate impact discrimination, "a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern").

[161] *Phillips*, 400 U.S. at 544–45 (Marshall, J., concurring).

[162] Phillips. v. Martin Marietta Corp., 416 F.2d 1257, 1260 n.10 (5th Cir. 1969) (Brown, C.J., dissenting).

[163] Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1034 n.6 (5th Cir. 1980).

[164] *Id.* at 1033–34 (internal citations omitted).

[165] Kotkin, *supra* note 37, at 1468.

neither an immutable characteristic nor a constitutional right is being implicated alongside sex.[166] Nonetheless, from the smoldering embers of "sex-plus," *Jefferies* stoked a torch that shed light on the path toward recognizing intersectional claims of discrimination.

3. *Perils of Proof: Assessing the Prospects for Recovery After a Rocky Start*

Unfortunately, the illumination of *Jefferies* and its progeny has proven rather dim in answering remaining queries about the evidentiary standards that govern proving discrimination on the basis of an intersectional identity.[167] In the absence of direct evidence, plaintiffs alleging disparate treatment on the basis of a protected characteristic will have to demonstrate that any explanation proposed by the defendant to justify their conduct is pretextual.[168] Even if the stated reason is difficult to believe, the plaintiff still bears the burden of persuading a fact finder that the defendant's actions were specifically motivated by discriminatory animus.[169] Accordingly, proof of pretext must be marshaled to sustain the cause of action.

To this end, plaintiffs essentially have four types of evidence available to them: (1) comparisons to similarly situated employees not in the plaintiff's protected class who received better treatment;[170] (2) statistical studies indicating an anomalous underrepresentation of individuals with the plaintiff's protected characteristic;[171] (3) the testimony of experts trained in detecting bias identifying evidence thereof in an employer's treatment of an employee ;[172] and (4) expert testimony to ferret out implicit bias or subtle stereotyping.[173] Thus far, even courts that have accepted the intersectionality doctrine have been loath to establish guidance on how these tools should be wielded when protected classes are considered in the aggregate.[174] While the fourth option retains a measure of promise,[175] its employment is exceedingly rare,

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[166] *See, e.g.*, *id.* (noting that different educational standards for men and women should still be considered even though possession of a degree is not an immutable trait and a requirement for an academic credential would not infringe on a fundamental right).

[167] *Id.* at 1473.

[168] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

[169] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993).

[170] LEX R. LARSON, EMPLOYMENT DISCRIMINATION § 8–67 (2d ed. 1994).

[171] *Id.* at § 9.

[172] *McDonnell Douglas*, 411 U.S. at 804–05.

[173] Price Waterhouse v. Hopkins, 490 U.S. 228, 255 (1989). The court seemed somewhat skeptical of such testimony, noting that "[i]t takes no special training" to detect some kinds of bias, but refers to it as "icing on [the plaintiff]'s cake." *Id.* at 256.

[174] Kotkin, *supra* note 37, at 1473 (noting that courts remain "highly wary" in cases involving intersectional discrimination).

[175] *Id.* at 1495–96. *See also* Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 573 (2001) (noting that expert testimony can be quite influential for either demonstrating the causal links between a defendant's conduct and their unconscious bias or to expose subtle discrimination, but is rarely used, perhaps because of cost or admissibility rules).

likely because the expense of expert witnesses can be prohibitive. Meanwhile, the viability of the first three mechanisms are all contingent on identification of suitable comparators, but deciphering an appropriate base for contrasting experiences requires a deep engagement with intersectionality theory that has not yet been undertaken.

To be sure, the Fifth Circuit in *Jefferies* unequivocally acknowledged that Black women constituted a distinctly protected group under Title VII.[176] Accordingly, the matter was remanded for further proceedings in line with its judgment, but the district court subsequently accepted the employer's contention that the plaintiff lacked experience as a supervisor and was therefore less qualified than the African American man who ultimately procured the promotion.[177] The lower court's dismissal was unanimously upheld by the Fifth Circuit with no guidance about how to evaluate intersectional claims of discrimination through the prism of the "race plus sex" analysis that the Court had constructed on the foundation of the "sex-plus" theory.[178] This outcome was most unfortunate, as it left fundamental questions concerning the governing standards on sufficient evidentiary support in this context unresolved.

Revisiting the origin of the "race plus sex" paradigm further explains why such guidance would have been highly desirable. The analytical framework was constructed as an extension of the "sex-plus" doctrine, but each scenario applying it had involved an explicit policy or practice that targeted women for differential treatment on the basis of their gender in conjunction with a non-protected characteristic.[179] In stark contrast, Jefferies did not contend that her employer maintained or otherwise implemented official company guidelines relegating African American women to non-supervisory positions; rather, she asserted disparate treatment on the basis of her intersectional identity.[180] Thus, the "sex-plus" assessment had little bearing in matters like *Jefferies* where an uncontroverted policy or practice could not be readily identified.[181]

The Court had thus forged a tool that was ill suited for the task at hand.[182] With no doctrinal guidance for proving intersectional discrimination, *Jefferies* opened a vacuum that has not yet been filled. Since then, intersectional jurisprudence has largely developed in a trend that reflects the disposition of *Jefferies*: courts are increasingly receptive to allegations of disparate treatment on the basis of one or more protected characteristics and

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[176] Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1034–35 (5th Cir. 1980).

[177] Jefferies v. Harris Cty. Cmty. Action Ass'n, 693 F.2d 589, 590–91 (5th Cir. 1982).

[178] *Id.* at 590.

[179] *See* Kotkin, *supra* note 37, at 1471–72.

[180] *Jefferies,* 615 F.2d at 1029 ("Jefferies charged that [Harris County] discriminated against her in promotion 'because she is a woman . . . *and* because she is black.") (emphasis added).

[181] Kotkin, *supra* note 37, at 1471.

[182] *See id.*

the combinations thereof, but are loath to offer guidance on applicable proof.[183]

Reluctance to engage with this problem was present from the first cases recognizing the viability of intersectional allegations of discrimination, including in *Jefferies*' early stages. When *Jefferies* came before the Fifth Circuit for the first time, Judge Randall cautioned that the "sex-plus" cases were not dispositive and, moreover, failed to "answer the central question" in the instant matter as to "whether any evidence concerning [W]hite women and [B]lack men is relevant when the alleged discrimination is based on both race and sex."[184] If she had her way, the court would have held off on recognizing Jefferies' intersectional cause of action pending fuller factual development on the remand "[i]n light of the novelty and difficulty of a combination discrimination claim and the serious ramifications that recognition of such a claim would have on the ways in which it would be both proved and defended against."[185]

Judicial hesitancy to fully embrace intersectionality subsequently surfaced in *Judge v. Marsh*,[186] which warned that following the logic of *Jefferies* to its extreme "turns employment discrimination into a many-headed Hydra" as "protected subgroups would exist for every possible combination of race, color, sex, national origin and religion."[187] Accordingly, in the court's account, Title VII's application should be limited to persons whose cause of action rests on the combination of no more than two protected characteristics so as to ensure that the federal law's benefits "will not be splintered beyond use and recognition."[188] Notwithstanding its hostility to future litigants who might seek to advance intersectional claims on the cumulative impact of three or more protected classes, the court was purportedly receptive to this plaintiff's claim, but still found the statistical evidence she introduced insufficient and offered no other guidance on standards of proof.[189] While questions still abound, subsequent courts have not been inclined to follow *Judge*'s admonition pertaining to the extension of Title VII's protection beyond the combination of more than two protected classes.[190]

The Ninth Circuit in *Lam v. Univeristy of Hawaii* disregarded *Judge*'s cautionary tale and permitted an intersectional cause of action alleging discrimination on the basis of three characteristics: race, sex, and national origin.[191] In *Lam*, a woman of Vietnamese and French ancestry was named as

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[183] *See id.*

[184] Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1034–35 n.7 (5th Cir. 1980).

[185] *Id.*

[186] 649 F. Supp. 770 (D.D.C. 1986).

[187] *Id.* at 780.

[188] *Id.*

[189] *Id.* at 781 (proceeding with the analysis without considering factors beyond direct evidence).

[190] *See* Lam v. Univ. of Haw., 40 F.3d 1551, 1554 (9th Cir. 1994).

[191] *Id.* at 1554, 1561 n.16.

one of four finalists in for a position as Director of the Pacific Asian Legal Studies Program at a law school.[192] The hiring committee was unable to reach a consensus as to which candidate should be extended the offer, so a second search was initiated.[193] In that search, Lam did not make it in the pool of the top fifteen candidates, which consisted overwhelmingly of men of U.S. origin.[194] Ultimately, Lam alleged that both searches were conducted in a discriminatorily manner.[195]

The trial court granted summary judgment as to the first search and entered judgment for the University after a trial on the second search.[196] The Ninth Circuit did not disturb the lower court's ruling on the second search, but reversed the grant of summary judgment on the first.[197] While the district court found Lam's intersectional claim lacking in merit because the first pool of four candidates contained an Asian man and a White female, the Ninth Circuit followed the logic of *Jefferies* and held that it was erroneous to examine racism and sexism in individualized compartments because "Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor [W]hite women."[198] Citing Professor Crenshaw's intersectionality scholarship, the court observed that "the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences."[199]

Following remand, the district court entered judgment as a matter of law, but when it came back before the Ninth Circuit it was sent down yet again.[200] This time around, the only question before the circuit court was whether the district court had erred in excluding the testimony of a female professor who was prepared to recount several comments by her colleagues that illustrated gender bias against women, but had not been made in the context of the hiring decision process.[201] The Ninth Circuit found the exclusion improper, as the statements might "demonstrate a pattern behavior indicative of several male faculty members' discriminatory state of mind" and their involvement throughout the process "could have improperly influenced the ultimate employment decision."[202] While the court's announcement provided a measure of guidance on the pervasive proof problem, the court declined to express an "opinion on the weight and value of the proffered evidence."[203]

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[192] *Id.* at 1556–57.
[193] *Id.* at 1557.
[194] *Id.* at 1558.
[195] *Id.* at 1554.
[196] *Id.* at 1558.
[197] *Id*. at 1566–67.
[198] *Id.* at 1561–62.
[199] *Id.* (citing Crenshaw, *Demarginalizing the Intersection*, *supra* note 10).
[200] Lam v. Univ. of Haw., 164 F.3d 1186, 1187 (9th Cir. 1998).
[201] *Id.*
[202] *Id.* at 1188.
[203] *Id.* at 1189.

Nonetheless, *Lam* is quite striking both for its explicit embrace of intersectionality theory in acknowledging that an individual can experience multidimensional oppression on the basis of three protected classes, as well as its underlying suggestion that an expansive inquiry is appropriate to capture such discrimination.[204] Indeed, though it has taken some time, the flagrant hostility to combination claims as embedded in the original incarnation of the anti-intersectionality jurisprudence appears to have more or less run its course.[205] Still, the court in *Jeffers v. Thompson*[206] candidly acknowledged the ongoing challenges with respect to substantiating these causes of action.[207] In that case, a fifty-five-year-old African American woman asserted that she had been denied a promotion with the U.S. Department of Health and Human Services on the basis of her race, gender, race and gender collectively, and age.[208] The court referred to the plaintiff's intersectional allegation as a "composite" claim and noted: "The ultimate burden of persuasion remains always on the plaintiff. . . . And the more specific the composite class in which the plaintiff claims membership, the more onerous that ultimate burden becomes."[209] While the record revealed a direct statement evincing racial discrimination, the court dismissed the age claim for lack of evidentiary support and further found that the statistical sample that had been provided was far too limited to suggest any indication of special bias against African American women in particular.[210]

Despite decisions like *Jeffers*, support for holistic evidentiary evaluation in the context of intersectional discrimination cases seems to be garnering additional support in recent years.[211] Of particular note, the court in *Shazor v. Professional Transit Management*,[212] building on the precedent set by *Lam*, opted to concurrently consider evidence of disparate treatment on the basis of race and sex to find that the plaintiff had established a prima face case of intersectional discrimination.[213] In that matter, an African American woman, serving as the Chief Executive Officer for a regional transit authority, produced disparaging emails from her co-workers that "unambiguously reveal[ed] sexist animus."[214] Ultimately, however, the causal con-

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[204] *Lam*, 40 F.3d at 1561–62.

[205] *But see* Freeman v. Jackson, No. 4:06-CV-516-A, 2007 WL 2219440 at *4 (N.D. Tex. Aug. 1, 2007) (declining to follow *Lam* and dismissing a Black woman's race discrimination claim on the grounds that the individual promoted over her was a Black man, thereby precluding the establishment of a prima facie case).

[206] 264 F. Supp. 2d 314 (D. Md. 2003).

[207] *Id.* at 324, 326.

[208] *Id.* at 319.

[209] *Id.* at 326–27.

[210] *Id.* at 326–28.

[211] *See, e.g.*, Hafford v. Seidner, 183 F.3d 506, 513–14 (6th Cir. 1999) (permitting plaintiff to rely on evidence of religious harassment to buttress a claim for racial harassment, even though the religious harassment claim could not have independently withstood judicial scrutiny).

[212] 744 F.3d 948 (6th Cir. 2014).

[213] *Id.* at 958.

[214] *Id.* at 956.

nection was uncertain because the colleagues could not necessarily be construed as her supervisors and because there was no "iron-clad" indication that they had been involved in the adverse employment decision that was issued a year after their remarks had been made.[215] Still, the court found that plaintiff's sex discrimination claim could not be "untangled from her claim of race discrimination" as those "characteristics do not exist in isolation."[216] Accordingly, the court examined the content of the emails alongside the fact that the plaintiff was replaced by a Latina woman to find that the applicable burden of persuasion had been satisfied.[217] In stark contrast to earlier opinions, the court refused to analyze the allegations in compartmentalized silos and acknowledged that "Title VII does not permit plaintiffs to fall between two stools when their claim rests on multiple protected grounds."[218]

The steady judicial progression toward increasing recognition and heightened engagement with intersectional causes of action in recent years provide cause for cautious optimism. Under Title VII, it is now not only clear that intersectional discrimination claims are viable, but courts are also referencing intersectionality theory to inform their analysis. While courts have failed to offer precise formulas for adapting disparate impact's traditional tools of proof to the intersectional context, the trend toward reviewing all evidence of unlawful treatment in the aggregate suggests that it may yet be possible for the intersectionality doctrine to recover from its rocky start. The remainder of this Article attempts to harness the potential of this doctrinal trajectory by offering a proposal for resuscitating testing as a methodological tool for detecting and proving intersectional discrimination in housing transactions.

II. Situating Intersectional Claims in the Fight for Fair Housing

While structural racism and sexism have shaped the landscape that informs the plight of Black women, the literature indicates that a range of discriminatory practices appear to be anchored in stereotypical constructs that have been imposed upon them.[219] Likewise, the federal courts have cited a recognition that women of color may be subjected to specific prejudices, distinct and apart from their male counterparts or White women, as the grounds for permitting intersectional discrimination causes of action.[220] Notwithstanding prohibitions against discrimination on a number of protected characteristics under federal and state laws, sufficient proof to substantiate a corresponding cause of action alleging such unlawful conduct in housing

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[215] *Id.* at 955–56.
[216] *Id.* at 957–58.
[217] *Id.* at 957–58.
[218] *Id.* at 958.
[219] Roscigno, Karafin & Tester, *supra* note 115, at 66.
[220] *See* Lam v. Univ. of Haw., 40 F.3d 1551, 1561–62 (9th Cir. 1994).

transactions can be difficult to come by.[221] In modern times, this is perhaps particularly true when it comes to discrimination that may be either partly, wholly, or concurrently motivated by racial animus.[222]

For most of the nation's history, express, blatant, and overt racism, as informed by the tenets of White supremacy, has been the *sine qua non* of U.S. social reality.[223] Indeed, generally, the lack of compliance with racist policies and practices would have been unlawful prior to the 1960s.[224] Even if not outright barred by law, the failure to act in accord with prevailing racial customs was often rectified through extralegal measures.[225] After the Civil Rights Movement, explicit White supremacy ideology was delegitimized as a framework for justifying and maintaining the established racial hierarchy,[226] which engineered White dominance both by enabling the accumulation of political, economic, and social benefits by Whites and depriving people of color of the same.[227] In light of this cultural paradigm shift,

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[221] BONILLA-SILVA, *supra* note 92, at 3 (explaining that while residential segregation was previously maintained through overt discrimination, it is now fostered through covert practices such as selectively showing units, steering groups into different neighborhoods, quoting varying rents, and strategic advertising practices).

[222] Avern Cohn, *Fair Housing Testing*, 41 URB. L. 273, 273 (2009) (noting that in the "typical race discrimination case" there is usually no direct evidence of discriminatory animus); *see also* ROBERT CHARLES SMITH, RACISM IN THE POST-CIVIL RIGHTS ERA: NOW YOU SEE IT, NOW YOU DON'T 141 (1997) (contrasting the ease of detecting racism in the late 1950s and 1960s with the difficulties of capturing it after the civil rights revolution, which outlawed discrimination and thereby rendered racism more subvert).

[223] CHARLES MILLS, THE RACIAL CONTRACT 27 (1997) (arguing that by the nineteenth century, conventional White opinion casually assumed the uncontroversial validity of a hierarchy of races, for whom it was obvious that different rules must apply, and thereby laid the foundation for a modern world that was expressly designed to function as a "racially hierarchical polity," dominated around the world by Whites in Europe and the United States).

[224] Crenshaw, *Race, Reform, and Retrenchment*, supra note 1, at 1377 (describing the modes of state-mandated and state-condoned racial oppression experienced by people of color prior to the implementation of legal reforms that were spurred by the Civil Rights Movement).

[225] Tellingly, even White men engaged in the performance of their official duties as federal judges were not immune from the threat of mob violence when they transgressed racial customs. Judge J. Waties Waring of South Carolina issued a dissent in *Briggs v. Elliot*, 98 F. Supp. 529 (E.D.S.C. 1951), one of the five cases that was ultimately heard in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), in which he denounced segregation as an "evil that must be eradicated," *Briggs*, 98 F. Supp. at 547–48 (Waring, J., dissenting). In response, local Whites subjected Judge Waring to "intense local abuse," threatened his life, and slandered his wife. J.W. PELATASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 10 (1961). Ultimately, he was forced to retire from the bench and leave for New York. *Id.*

[226] Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1, at 1378 (discussing the transition from the explicit ideology of White supremacy following the end of Jim Crow to a new paradigm that silently centers Whites as the norm and explains disparities in terms of cultural inferiority rather than inherent racial inferiority); *see also* BONILLA-SILVA, *supra* note 92, at 3 (discussing the same).

[227] *See* Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 201 (2004) (contending that contemporary racial disparities persist as a reproduction of institutional rules that were set by Whites during slavery and Jim Crow to establish their monopoly on access to resources and opportunities).

proverbial "smoking gun" evidence of race-based discrimination is relatively rare.[228] While explicit racial discrimination is certainly not unheard of in recent years, it seems fair to conclude that, in the aggregate, the trend has been moving toward reliance on more discreet measures.[229] In the absence of unequivocal statements, prospective renters and purchasers can never be entirely certain as to whether any adverse interaction with a housing provider may have been motivated by an unlawful bias.

The question is only further compounded for a person with multiple marganilized identitites as the disparate treatment may have been sparked by one of their identity traits either individually or in any number of combinations theoreof. Initial attempts to grapple with the experience of Black women with children were thwarted by this conceptual hurdle, but more recent efforts provide a somber testament to the unique challeges impacting this population as they attempt to procure the housing of their choice. Exploring these dynamics and their manifestations highlights the need for fair housing advocates to consider the import of intersectionality theory in developing tactics for redress.

A. Acessing Housing as a Black Woman with Children

Contrary to the contentions of the Moynhian report, subsequent scholars have had little difficulty in tracing the current challenges facing women of color to the interlocking dynamics of race, class, and gender oppression as

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[228] Freiberg, *supra* note 41, at 243 (suggesting that while past overt discrimination in housing might conjure the image of a "slammed door," modern housing discrimination is more akin to a "revolving door" through which undesired prospective residents are "politely and courteously escorted in, out of, and ultimately away from" housing opportunities) (emphasis omitted); *see also* Rosen v. Thornburgh, 928 F.2d 528, 533 (2d Cir. 1991) (recognizing that "discrimination is often accomplished by discreet manipulations and hidden under a veil of self-declared innocence" rendering it unlikely that perpetrators will leave a "smoking gun").

[229] *Compare* Priya S. Gupta, *The American Dream, Deferred: Contextualizing Property after the Foreclosure Crisis*, 73 Md. L. Rev. 523, 575–76 (2014) (citing Paschal Aff. at 8, Mayor of Baltimore v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847 (D. Md. 2010) (No. JFM 1:08 CV-00062)) (revealing virulent discrimination in U.S. mortgage lending markets as Wells Fargo loan officers referred to Black borrowers as "mud people" while deliberately targeting them for subprime loans that were characterized as "ghetto loans"), *and* Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 189 n.4 (2001) (noting a string of cases involving blatant housing discrimination that was accompanied by racial slurs and other explicitly racist statements), *with* Gregory Squires, *Fair Housing Yesterday, Today and Tomorrow*, *in* The Fight For Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act, *supra* note 50, at 2–3 (citing four national studies conducted by HUD between 1977 and 2012 to suggest that the most brazen manifestations of housing discrimination have declined in recent decades, while pointing to a General Social Survey conducted by the National Opinion Research Center at the University of Chicago to demonstrate that the proportion of White respondents favoring fair housing rose from 37% to 69% between 1972 and 2008).

opposed to cultural pathologies.[230] Nonetheless, the devastating imprint of that argument can not be denied when one considers the current landscape informing the contours of socio-political discourse governing questions on welfare policy.[231] The subjugation of women of color has always relied on a particular set of rationalizations to justify public and private discrimination against this population and those logics persist to this day.[232] This next Part maps the construction of the "welfare queen" identity, which has been imposed upon Black women to justify discriminatory practices against them.[233] From there, a brief overview of case studies is offered to provide some insights into the experience of Black women. Finally, the promise of revamping testing is considered through the prism of *United States. v. Hylton*, a federal case wherein the housing provider candidly admitted to engaging in intersectional discrimination against a Black woman with children.[234]

1. *The Enduring Legacies of Misogynoir*

In Antebellum America, three caricatures of Black women were constructed including (1) the Mammy, a cheerful slave who was eager and happy to provide her services as a surrogate mother to her master's White children; (2) the Jezebel, charactereized by sexual promiscuity and immorality; and (3) the Sapphire, a masculine and domineering figure.[235] Functionally, these contorted visions served to defend the practices embedded in the enslavement of Black women by respectively contending that they (1) consented to their condition and enjoyed taking care of the master's offspring rather than their own children, (2) could not be raped and welcomed sexual assaults providing cover for interests in mobilizing their wombs for the production of additional commodities in the form of slave children; and (3) were well suited to engage in the same physically demanding labor as their male counterparts in the fields.[236] From this vantage point, it becomes clear that the Moynihan report operated as a conduit that enabled thsese longstanding stereoptyes to gain traction in the present through the engineering of the paradigmatic "Welfare Queen."[237]

In Moyhnian's account, households headed by Black women, by viture of their deviations from the American heteropartriachal order, would never

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[230] *See* Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 258 (2016).

[231] *Id.*

[232] Carolyn M. West, *Mammy, Jezebel, Sapphire and Their Homegirls: Developing an "Oppositional Gaze" Toward the Images of Black Women*, *in* LECTURES ON THE PSYCHOLOGY OF WOMEN 287, 288 (Joan C. Chrisler et al. eds., 4th ed. 2012).

[233] Rich, *supra* note 230, at 258–260.

[234] United States v. Hylton, 944 F. Supp. 2d 176, 184 (D. Conn. 2013).

[235] West, *supra* note 232, at 289, 294–96.

[236] *Id.*

[237] Rich, *supra* note 230, at 258–60.

obtain sufficient economic standing to preclude their reliance on state assistance.[238] This same vision was later marshalled in the 1980s by President Ronald Regean in a campaign speech that was designed to delegitimize public benefits for the underserving poor by invoking a mthyological "welfare queen" archetype.[239] While there is some variance admist accounts, at bottom, this racialized and gendered construct depicts a fiscally and sexually irresponsible woman of color who threatens the prevailing social order because she refuses to recognize the traditional nuclear family as the foundation for economic stability.[240] Instead of seeking opportunities for upward mobility, her energies are directed at extending claims for state assistance in perpertunity and maximizing the monies that are due to her thereunder either through cunning manipulation or outright fraud.[241] The welfare queen will also fail to transmit the appropriate cultural values to her children and thus, will give birth to a new generation of dependents and criminals.[242]

The manufactured welfare queen sits at the intersection of caricatures that were initially developed to rationalize the abhorrent treatment of Black women during slavery.[243] In accord with the Jezebel, the welfare queen's lack of morals and sexual restraint are contributing to the proliferation of children, which provide yet another vehicle to augment claims for compensation.[244] Yet, as with the Mammy, any attempt by the welfare queen to redirect her mothering toward the well-being of her own children is deemed deviant.[245] Elements of the Sapphire also surface in the welfare queen's apparent inability to step back and play a subservient role to her husband as the American nuclear family demands.[246]

Repurposing these frameworks as the foundation for the construction of the welfare queen identity has permitted the state and the American body politic to refrain from acknowledging its proactive and ongoing role in shaping the plights of poor women of color in particular and the impoverished in general.[247] By racializing and feminizing poverty, the idea of a robust social safety net is rendered repugnant, which in turn percludes engagement with shared class interests among the poor across racial lines as well as an acknowledgment that changing economic conditions appear to have diminished the capacity of traditional marriage to offer a refuge of financial stability for poverty-stricken women.[248] While this turn of events is less than

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[238] *Id.* at 258.
[239] *Id.* at 260.
[240] *Id.*
[241] *Id.*
[242] *Id.* at 260–61.
[243] Rich, *supra* note 230, at 276–77.
[244] *Id.* at 276–77.
[245] *Id.*
[246] *See* Christine E. Eck, *Three Books, Three Stereotypes: Mothers and the Ghosts of Mammy, Jezebel, and Sapphire in Contemporary African American Literature*, 11 CRITERION 12, 19 (2018).
[247] Rich, *supra* note 230, at 286–87.
[248] *Id.* at 288.

supprising, it is nonetheless deeply ironic that poor Black women have been cast as the paradagmitic welfare recipient since history reveals that they were systemically excluded from virtually every incarnation of public benefit programs since their inception.[249] Thus, these enduring stereotypes have and continue to provide the fuel for the promulgation of policies and practices that operate to the detriment of Black women.[250]

2. *Some Troubling Trends*

Early attempts to capture and assess the experience of Black women with children in the housing market were hampered because these scholars struggled with deciphering an appropriate metric for engaging with the multidimensional oppression at issue.[251] In the immediate aftermath of the 1988 amendment outlawing familial status discrimination, a report was formulated by a principal analyst with the U.S. Congressional Budget Office that attempted to outline the barriers to fair housing for Black women who might also have children in their households.[252] The document noted that this group was protected threefold under the FHA, but proceeded to discuss each implicated topic separately, notwithstanding a recognition that the "influences of race, sex, and familial status may not be separable."[253] Based upon limited data samples in each of these categories, the report concluded that discrimination on the basis of race seemed the most salient obstacle that Black women were likely to encounter on the housing market.[254] However, subsequent efforts have fared far better in detecting patterns of discrimination that appear to uniquely impact Black women.

For example, given the advent of the digital age and the proliferation of additional mediums for initiating contact with housing providers, Professors Douglas Massey and Garvey Lundy were particularly interested in gleaning insight about the import of race, gender, and class in shaping the experiences of prospective renters who were exploring housing opportunities through telephonic inquiries.[255] Their working hypothesis was that particular speech patterns would be associated with racially and economically defined groups and that housing providers would rely on these cues to facilitate discriminatory responses through covert measures such as indicating that the unit was

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[249] DEBORAH E. WARD, THE WHITE WELFARE STATE: THE RACIALIZATION OF U.S. WELFARE POLICY 134 (2005).

[250] Ocen, *supra* note 115, at 1565.

[251] Wilhelmina A. Leigh, *Barriers to Fair Housing for Black Women*, 21 SEX ROLES 69, 69–70 (1989).

[252] *Id.*

[253] *Id.* at 73

[254] *Id.* at 82.

[255] *See* Douglas Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 URB. AFF. REV. 455, 455 (2001).

no longer available or failing to return calls after hearing a voicemail message.[256]

To test this proposition, they constructed an audit study of the Philadelphia metropolitan area in the late 90s that called for a multiracial group of men and women to speak in one of three dialects: White Middle-Class English, Black Accented English (associated with affluent Blacks), or Black English Vernacular (affiliated with poor Blacks).[257] Collectively, the participants made 474 actual or attempted contacts with 79 rental agents in the region.[258] The results illustrated that being Black, female, or lower class all independently operated to reduce the likelihood of accessing a rental agent, but the data further revealed that it was the "*combination* of [B]lack race and lower-class origins that [was] most powerful in reducing access to housing, *especially* when they are combined with being female."[259] Compared to White men, Black women had to make twice as many calls just to reach an agent.[260] Upon contact, they were then quoted rental application fees that were on average nearly four times as high as White men and were 16 times more likely to have credit mentioned regardless of class.[261]

In a more recent undertaking, Professors Vincent Roscigno, Diana Karafin, and Griff Tester sought a deeper understanding of the exclusionary and nonexclusionary forms of racial discrimination that were operating to impede people of color from accessing the housing of their choice.[262] The former set of practices entailed outright rejections or refusals to enter negotiations for the housing transaction, while the latter encompassed discriminatory conduct in an established housing arrangement such as racial harassment or different terms and conditions, as well as the uneven application thereof.[263] To this end, the social scientists drew qualitative and quantitative data from a collection of over 750 instances of verified housing discrimination that had come under the purview of the Ohio Civil Rights Commission (OCRC).[264]

In each category, African Americans were "by far the most impacted" group: while they only accounted for 18% of the state's entire population, Black households constituted 90% of substantiated instances of exclusionary discrimination and 81% of nonexclusinonary incidents.[265] However, for all of the racial groups, save African Americans, there were no notable differences in examining the influence of gender.[266] In either setting, Black wo-

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[256] *Id.* at 454–55.
[257] *Id.* at 456.
[258] *Id.* at 459.
[259] *Id.* at 460–61, 464.
[260] *Id.* at 460–61.
[261] *Id.* at 461, 464.
[262] *See* Roscigno, Karafin & Tester, *supra* note 115, at 49–50.
[263] *See id.* at 52.
[264] *Id.* at 53–55.
[265] *Id.* at 57, 62.
[266] *Id.* at 56.

men were represented at rates that were more than twice as high as their male counterparts.[267] The researchers concluded that this stark disparity likely reflected the "conflated reality of race, gender, and social class disadvantage that [B]lack women, especially those with children, face in the housing market."[268]

To anchor this assertion, a few case studies were highlighted that provided a window into the experience of Black women with children. In one instance, a Black woman named "Susan" was planning to leave an abusive relationship with her husband and had been seeking a new housing opportunity for herself and her four children.[269] Pursuant to her search, she entered the office of a small apartment complex to inquire about a unit, but was told that she "had too many kids" and needed to "get your [B]lack ass out."[270] Regrettably, the interaction was far from anomalous.[271] While she was looking for a place to move, she encountered so many rejections that she feared she would end up homeless.[272] In another case, a Black woman named "Anna" was rejected by a landlord because there were "too many in the family."[273] A current resident at the property, who was also a Black woman with a child, witnessed the event and testified that the landlord had denied her request to have a pet because "she had no business taking care of pets when she had her hands full taking care of her child."[274] The investigation not only revealed that White tenants with children were permitted to have pets but also that neighbors had been pressuring the landlord not to rent any more "[n-words]."[275] The social scientists found substantially similar tendencies, albeit sometimes framed in less explicit rhetoric, throughout the case materials prompting speculation that stereotypes about African American women were animating the larger patterns revealed in the datasets.[276]

Disturbingly, the only instances where it seems that Black women are more likely to be included in housing transactions are those occasions where the arrangement has been conducive to exploitation. In another examination of OCRC's database, Griff Tester analyzed cases of sexual harassment.[277] Women filed the vast majority of these cases at 98 percent with an underlying racial breakdown of 58 percent for Black women, 10 percent for other women of color, and 32 percent for White women.[278] A qualitative review revealed that in "almost every case, landlords used their institutional author-

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[267] *Id.*
[268] *Id.*
[269] *Id.* at 59.
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.* at 60.
[275] *Id.*
[276] *Id.* at 59.
[277] Griff Tester, *An Intersectional Analysis of Sexual Harrasment in Housing*, 22 GENDER & SOC'Y 349, 352 (2008).
[278] *Id.* at 355

ity and racialized gender stereotypes to exploit tenants' economic vulnerabilities and sexually coerce them."[279] One woman named "Natasha" was verbally and physically harassed dozens of times by her landlord over the course of a five-year period.[280] When asked why she did not leave sooner, she explained that the landlord had "overlooked" her credit and rental history.[281] Further still, he permitted her to pay less rent than her already reduced rate during the months when she could not afford the full amount.[282] Moreover, the location permitted her children to attend good schools in the area.[283] The last straw, though, finally came when she returned home after an outing with her children and found the landlord on her couch masturbating.[284] The investigation revealed twelve other women who had either previously or were currently renting from the landlord, all of whom provided accounts of their interactions with him that mirrored Natasha's experiences.[285] They were all poor women of color, many with children, but tellingly, they did not fit the demographics of the neighborhood and the landlord typically overlooked applications from White men and women.[286]

There is also evidence that women of color were deliberately subjected to predatory lending campaigns in the context of real estate transactions during the years leading up to the Foreclosure Crisis.[287] To be sure, communities of color—long excluded from mainstream financing opportunities—were left particularly vulnerable to the ravages wrought by the proliferation of subprime lending.[288] Nonetheless, the information on racial disparities resists explanation as merely a function of patterns of racial and economic segregation.[289] Instead, the outcomes also map in predictable ways that correlate with the applicant's race and gender.[290] Indeed, a review of data from 2005 found that, "across all racial and ethnic lines," "women [are] systemically more disadvantaged than men" notwithstanding the associated degree of

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[279] *Id.* at 363.
[280] *Id.* at 357.
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *See* Elvin Wyly & C.S. Ponder, *Gender, Age, and Race in Subprime America*, 21 HOUS. POL'Y DEBATE 529, 531–34 (2011) (reviewing an anecdotal set of cases that suggests that elderly African American women were expressly targeted by brokers for subprime lending and contemplating the propriety of extrapolating broader patterns from these examples).
[288] Gary Dymski et al., *Race, Gender, Power, and the U.S. Subprime Mortgage and Foreclosure Crisis: A Meso Analysis*, 19 FEMINIST ECON. 124, 140 (2013).
[289] *See id.* at 141–43.
[290] *See id.*

segregation at issue.[291] Moreover, women were categorically overrepresented in the population of recipients of subprime mortgages by 29.1%.[292]

While indications of overtly invidious schemes abound,[293] the financial industry also mobilized the constructs of race and gender to serve as institutional proxies for statistical disparate treatment such that these sites of oppression were "transformed into a perceived natural order of risk and return possibilities."[294] Nonetheless, surveys taken between 2005 and 2006 found that between 55% and 61% of those who acquired subprime mortgages could have qualified for conventional loans.[295] During this same interval, nearly half of the subprime mortgages issued to African Americans went to households headed by women who were over four and a half times more likely than White men to receive a high-cost subprime mortgage.[296] The disparities were only more pronounced when comparing affluent African American women with White men who also had high incomes.[297] Activists have recently developed the term "pinklining" to highlight and resist a multitude of policies and practices employed in the financial sector that exploit gendered and racialized economic vulnerabilities.[298]

A post-racial perspective would lean toward interpreting many of the documented inequities as merely the unfortunate vestiges of past eras that were marked by overt discrimination.[299] For instance, a recent inquiry into Milwaukee's poorest Black neighborhoods found that women were being evicted at a rate twice as high as their male counterparts, and nine times as frequently as women from the city's poorest White areas.[300] It seems fair though to acknowledge that such aggregate figures may not provide a clear picture of matters involving intentional intersectional discrimination because of the challenges associated with teasing out the historical and institutional aspects that are likely contributing to the disparities. Nonetheless, time and time again, evidence of unlawful disparate treatment surfaces in settings

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[291] *Id.* at 143.

[292] ALLEN J. FISHBEIN & PATRICK WOODALL, WOMEN ARE PRIME TARGETS FOR SUBPRIME LENDING: WOMEN ARE DISPROPORTIONATELY REPRESENTED IN HIGH COST-MORTGAGE MARKET 3 (2006).

[293] Wyly & Ponder, *supra* note 287, at 559 (concluding that while definitive, uncontestable proof is elusive, there is a "strong circumstantial case that there is something representative and generalizable from stories" of African American women who were saddled with subprime loans); *see also* Justin P. Steil, *The Social Structure of Mortgage Discrimination*, 33 HOUS. STUD. 759, 769–71 (2018) (conducting qualitative assessment of legal documents in fair housing cases to unearth the institutional mechanics employed by loan orgininators to target communities of color).

[294] Dymski et al., *supra* note 288, at 140.

[295] *Id.*

[296] *Id.* at 143; FISHBEIN & WOODALL, *supra* note 292, at 15.

[297] *Id.* at 1, 16.

[298] SUPARNA BHASKARAN, PINKLINING: HOW WALL STREET'S PREDATORY PRODUCTS PILLAGE WOMEN'S WEALTH, OPPORTUNITIES, & FUTURES 5 (2016).

[299] BONILLA-SILVA, *supra* note 92, at 3

[300] MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 98 (2016).

marred by longstanding disproportionalities. Notably, racially biased policies and practices in the criminal justice system have long contributed to the overrepresentation of people of color amid the population of U.S. citizens with a criminal record.[301] Nonetheless, a paired testing investigation in Washington, D.C. revealed that White women with criminal records experienced favorable treatment compared to Black women with criminal records in nearly half of their forty-seven case studies.[302] In light of the foregoing, it seems clear that "stereotypical notions of the single Black mother are playing a part in these relations, shaping landlords' willingness to rent, banks' willingness to provide mortgages, and neighbors' levels of civility."[303]

3. *The Unintended Lessons in* U.S. v. Hylton

Though it is rare to encounter definitive proof of discrimination on the basis of any protected trait, let alone an intersectional identity, the housing provider in *Hylton* unequivocally employed misogynoir in rejecting an African American woman with children.[304] The ensuing review of this matter draws inspiration from one of the late Professor Derrick Bell's influential articles, *The Unintended Lessons in* Brown v. Board of Education.[305] In this work, Bell revisited the case on its fiftieth anniversary and analyzed its historical underpinnings as well as its contemporary import through the prism of his groundbreaking interest-convergence theory.[306] His purpose was to leverage the vantage point offered by a half-century's distance from *Brown v. Board of Education*[307] to glean lessons that civil rights advocates should heed in ongoing efforts to advance racial reforms.[308] The objective here, in circling back to *Hylton*, is similar in that it attempts to mine insights from the decision that might inform the contours of future fair housing enforcement strategies for redressing disparate treatment on the basis of an intersectional identity.

In the leadup to *U.S. v. Hylton*, Ms. DeMechia Wilson, a single African American woman with two children, attempted to sublease a house at 5 Townline Road in Windsor Locks, Connecticut in 2010.[309] The property was occupied at the time by a married couple, Mr. and Mrs. Bilbo, and their three

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[301] EQUAL RIGHTS CTR., UNLOCKING DISCRIMINATION: A DC AREA TESTING INVESTIGATION ABOUT RACIAL DISCRIMINATION AND CRIMINAL RECORDS SCREENING POLICIES IN HOUSING 6 (2016), https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf [https://perma.cc/HUM2-M6PT].

[302] *Id.* at 6, 20.

[303] Roscigno, Karafin & Tester, *supra* note 115, at 66.

[304] United States v. Hylton, 944 F. Supp. 2d 176, 184, 187 (D. Conn. 2013).

[305] Derrick A. Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. SCH. L. REV. 1053, 1053 (2005).

[306] *Id.* at 1056–57.

[307] 347 U.S. 483 (1954).

[308] Bell, *supra* note 305, at 1055.

[309] *Hylton*, 944 F. Supp. 2d at 183–84.

children.[310] Mr. Bilbo was African American and his wife was White.[311] The Bilbos were seeking a long-term subtenant because they had opted to purchase their own home after Mr. Bilbo was approved for a mortgage loan through the Department of Veteran Affairs.[312] Ms. Wilson responded to an advertisement that the Bilbos posted online at Craigslist.com and set up a viewing of the unit.[313]

After touring the home, Ms. Wilson conveyed interest in renting the house, prompting the Bilbos to request permission to sublease the unit from Mr. Hylton, who managed the property on behalf of his wife, who owned the premises.[314] Mr. Hylton initially agreed, but when pressed to put his authorization in writing as required by the lease, he instead inquired about Ms. Wilson's race.[315] Mr. Bilbo advised that she was Black and in response, Mr. Hylton summarily withdrew his consent, directing Mr. Bilbo "to find some good [W]hite people" because neither he nor the neighbors in the vicinity would be inclined to have "too many Black people at the property."[316] He then stated that the sole reason he rented to Mr. Bilbo was "because Mrs. Bilbo is [W]hite and it was a good mix."[317] A few months after the denial, Mr. Hylton also accused Mr. Bilbo of attempting to put "hooligans" in his house.[318]

Mr. Bilbo communicated Mr. Hylton's remarks to his wife and Ms. Wilson, and thereafter contacted a local nonprofit law firm that ultimately filed a housing discrimination complaint with HUD on behalf the victimized parties.[319] In the ensuing administrative proceedings, Mr. Hylton told a federal investigator that "if you rent to a Puerto Rican today, I guarantee there will be ten people here tomorrow."[320] With respect to the instant matter, Mr. Hylton unequivocally conveyed to the HUD agent that if a White man had broken the lease, he would "sit back and relax and just sue them."[321] Thus, he confirmed on the record that he was treating Mr. Bilbo differently because of his race. In light of the foregoing, it seems painstakingly clear that Ms. Wilson and the Bilbos[322] were victims of racial discrimination prohibited by the

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[310] *Id.* at 183.
[311] *Id.*
[312] *Id.*
[313] *Id.* 183–84.
[314] *Id.* at 184. Though Mr. Hylton served as the primary contact for the Bilbos, he consulted with Mrs. Hylton about all of his actions. *Id.* at 191. Ultimately, it was clear that Mr. Hylton was serving as her agent and therefore she was deemed vicariously liable as the owner of the premises. *Id.*
[315] *Id.* at 184.
[316] *Id.* at 181, 184.
[317] *Id.* at 184.
[318] *Id.* at 185.
[319] *Id.* at 184, 186.
[320] *Id.*
[321] *Id.*
[322] Here, both Mr. Bilbo and Mrs. Bilbo were signatories to the lease, *id.* at 183, and therefore were directly impacted by the Hyltons' unlawful conduct. Moreover, the FHA confers broad standing to any person that has been or will foreseeably be injured by a

FHA.[323] Unsurprisingly, HUD's agents determined that there was reasonable cause to believe discrimination had occurred, prompting the agency to charge the Hyltons with violating the FHA.[324] The matter was then removed to federal court for resolution and the district court held the Hyltons liable for several race-based violations of the FHA.

Mr. Hylton had clearly adopted broad, stereotypical frames of reference for engaging with potential tenants. There is also ample evidence that Ms. Wilson's intersectional identity, as opposed to her race alone, was a distinctive factor in triggering Mr. Hylton's discriminatory conduct. Specifically, he concluded that "Ms. Wilson was not going to be able to pay" only after discovering that she was an African American woman.[325] Prior to that, his review of her application materials had already prompted him to accept her as a subtenant.[326] Second, upon learning that she was Black, Mr. Hylton described Ms. Wilson's children as "hooligans."[327]

While the Bilbos had three biracial children, Mr. Hylton ultimately described the household as constituting a "good mix" because Mrs. Bilbo was White.[328] Accordingly, it might seem fair to infer that in Mr. Hylton's mind, children of mixed European American and African American ancestry are, at minimum, at least conceivably likely to be model youths. Tellingly, Mr. Hylton had no idea whether the father of Ms. Wilson's children was White, but based solely on the racial identity of the mother concluded that each of them must be a "hooligan," which is defined as "violent young troublemaker, typically one of a gang."[329] The particulars of Mr. Hylton's conduct reveal that his discriminatory animus operated within an intersectional framework, in which considerations of race, gender, and familial status were deeply intertwined. His asserttions were predicated on longstanding justifications that were established to rationalize the subordination of African American women.

Specifically, Mr. Hylton's intersectional discrimination was buttressed by the same set of ideological constructs that situate Black women as "devi-

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discriminatory practice. 42 U.S.C. § 3602(i) (defining an "aggrieved person"); *see also* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1303 (confirming that the FHA shows that Congress intended for standing to be understood in as broad a sense as possible under the Constitution).

[323] The FHA does exempt some dwellings from its reach, most notably, so-called "Mrs. Murphy" landlords who live on the premises and whose buildings have four or fewer units are removed from coverage, in addition to certain single-family homes that are sold or rented by their owners without the use of advertising or a real estate agent. 42 U.S.C. §§ 3603(b)(1)–(2). Though Mrs. Hylton attempted to avail herself of the latter exemption, the court found it inapplicable because Mr. Hylton served as her property manager. *Hylton*, 944 F. Supp. 2d at 184.

[324] *Id.* at 187.

[325] *Id.*

[326] *Id.*

[327] *Id.* at 185.

[328] *Id.* at 184.

[329] OXFORD DICTIONARY OF ENGLISH 843 (3d ed. 2010).

ant mothers" and "pathological heads of households."[330] Mr. Hylton's declaration that Ms. Wilson's mere presence in the prosperous White community would be objectionable invoked a vision of a single, Black mother not only as a "negative role model,"[331] but as a deleterious source of social pathology.[332] His assumption that she could not pay called upon the stereotype of single Black mothers as people "who like to live off welfare because they are lazy."[333] Her children were also ascribed Black identities by virtue of being produced in her womb, as had been done in the days of slavery.[334] Pursuant to a long-standing tradition, their young Black bodies were then criminalized under the label of "hooligans" to justify further discriminatory treatment.[335] Ultimately, Mr. Hylton demonstrated a degree of hostility to a Black-female-headed household that strikes as reminiscent of the contents of the Moynihan report.

We know, thanks to Mr. Hylton's candid admission, that racism provided a binding glue between the tumultuous experiences of the Bilbos and the Wilsons. Yet, this observation does not forego recognition of the intersectional dynamics that shaped the experiences of their respective households. Indeed, as the court in *Jeffers* put it, a central lesson of intersectionality theory is that characteristics such as race, color, national origin, religion, and sex "often fuse inextricably" and when "[m]ade flesh in a person, they indivisibly intermingle."[336] Notwithstanding his pronounced prejudices, Mr. Hylton did not categorically refuse to rent his properties to persons of color or African Americans in particular. The fact that race played such a decisive role in his final analysis is not particularly surprising. Indeed, this outcome is consistent with a phenomenon that one critical race scholar has dubbed the "empirical primacy of racism," noting that "racist assumptions and practices are often *the* crucial issue when making sense of how oppression operates."[337]

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[330] Ocen, *supra* note 115, at 1565.

[331] Chambers v. Omaha Girls Club, Inc., 629 F. Supp. 925, 951–52 (D. Neb. 1986) (holding that employer's termination of an African American woman for a non-marital pregnancy was justifiable due to a business interest in promoting positive role models), *aff'd*, 834 F.2d 697 (8th Cir. 1987).

[332] Ocen, *supra* note 115, at 1558.

[333] Clay v. BPS Guard Serv., No. 92 C 2127, 1993 U.S. Dist. LEXIS 8399, at *3 (N.D. Ill. June 22, 1993).

[334] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1719 (1993) ("In reversing the usual common law presumption that the status of the child was determined by the father, the rule facilitated the reproduction of one's own labor force. Because the children of Blackwomen assumed the status of their mother, slaves were bred through Blackwomen's bodies.") (citations omitted).

[335] Ocen, *supra* note 115, at 1562 (recounting how Black women have not only been cast as criminals because of their purported reliance on government subsidies, but also have been deemed "incubators of criminal activity through their children").

[336] Jeffers v. Thompson, 264 F. Supp. 2d 314, 326 (D. Md. 2003).

[337] David Gillborn, *Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender, and Disability in Education*, 21 QUALITATIVE INQUIRY 277, 284 (2015).

While the paradigm of intersectionality might appear antithetical to an assertion that one axis of identity can be conceived as taking precedence over another in any context, the claims can co-exist.[338] Since the term was coined in the 1980s, the meaning of intersectionality has been subject to intense contestation, and the ensuing debates have hence left the theory shrouded in "layers of . . . obfuscation."[339] However, the African American Policy Forum (AAPF), co-founded and directed by Crenshaw[340], offers the following overview:

> Intersectionality is a concept that enables us to recognize the fact that perceived group membership can make people vulnerable to various forms of bias, yet because we are simultaneously members of many groups, our *complex identities can shape the specific way we each experience that bias*. For example, men and women can often experience racism differently, just as women of different races can experience sexism differently, and so on. As a result, an intersectional approach goes beyond conventional analysis to *focus our attention on injuries that we otherwise might not recognize*.[341]

Thus, properly conceived, an intersectional framework is broad enough to recognize the importance of the interplay between and among various identity-based modes of discrimination, while acknowledging that the manifestations thereof vary in unique ways that correspond to an individual's collective charactheristics as informd by concurrent membership in multiple groups.

From this perspective, it is worth noting that the court's decision not to award any damages to Ms. Wilson for emotional distress is rather disconcerting.[342] Mr. Bilbo received $10,000 after testifying about the shock and pain he endured for the remainder of the day after Mr. Hylton revealed his racial prejudice.[343] The court took also note of Mrs. Bilbo's suffering as the wife and mother of an African American husband and children;[344] however, she was only awarded $5,000, because it was unclear how much of her anguish stemmed from the discrimination rather than from other anxieties related to breaking their lease.[345] Ms. Wilson herself was "disappointed" that she would have to keep looking for housing, but expressed happiness that she would not be renting from a racial bigot.[346] Yet the court could not see

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[338] *Id.*
[339] *Id.* at 279.
[340] *Our Team*, AF. AM. POL'Y. F., http://www.aapf.org/our-team [https://perma.cc/7S76-XGFG].
[341] AF. AM. POL. F., A PRIMER ON INTERSECTIONALITY 3 (2008) [hereinafter A PRIMER ON INTERSECTIONALITY] (emphasis added).
[342] *Hylton*, 944 F. Supp. 2d at 196–97.
[343] *Id.* at 196.
[344] *Id.*
[345] *Id.*
[346] *Id.* at 196–97.

how these comments may have produced any measure of emotional distress.[347]

Compared to the Bilbos, Ms. Wilson may have seemingly taken the discriminatory rejection in relative stride, but that did not mean that she was not emotionally and mentally afflicted by Mr. Hylton's egregious conduct.[348] Black women, by virtue of the misogynoir they experience throughout their lives, have been reported to exhibit decreased levels of satisfaction and an overall lower sense of well-being than either Whites or Black men.[349] Thus, the lack of a particularly visceral reaction by Ms. Wilson may have been indicative of an expectation that subordination would be part and parcel of her life.[350] This possibility is even likelier because of the fact that she is still haunted by the psychological trauma wrought by the experience;[351] years after the events unfolded, she reported: "In the back of my mind, I remain apprehensive about looking for a home, even though I am intelligent, have good credit and a good job, because I am [B]lack and have two kids."[352] This perspective not only provides an independent testament to the lasting mental anguish but further demonstrates that she may have perceived Mr. Hylton as an avatar of engrained systemic oppression rather than a random outlier. When construed in this light, Mr. Hylton's conduct should be deemed a debilitating confirmation that the system was not designed for women of color to prosper.[353] The ensuing adverse mental health ramifications

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[347] *Id.* at 197.

[348] After finding violations of the FHA, courts have "recognized the severe mental trauma associated with unlawful discrimination and have upheld large compensatory awards for the victims in such cases." Broome v. Biondi, 17 F. Supp. 2d 211, 224 (S.D.N.Y.1997). "The key factors in determining emotional distress damages are the complainant's reaction to the discriminatory conduct *and* the egregiousness of the respondent's behavior." HUD v. Walker, 2012 WL 2951587, at *2 (H.U.D. O.H.A. 2012) (emphasis added). Ms. Wilson's emotional distress claim would have been characterized as "garden variety," as opposed to "significant" or "egregious," because it was not substantiated by evidence of medical treatment or a physical manifestation, but would have still been grounds for an award ranging from $5,000 to $125,000. Parris v. Pappas, 844 F. Supp. 2d 271, 279 n. 9 (2012).

[349] ANGUS CAMPBELL, PHILIP E. CONVERSE & WILLARD L. RODGERS, THE QUALITY OF AMERICAN LIFE: PERCEPTIONS, EVALUATIONS, AND SATISFACTIONS 464 (1976).

[350] *See, e.g.*, THE OXFORD HANDBOOK OF STIGMA, DISCRIMINATION, AND HEALTH 380 (Brenda Major, John F. Dovidio & Bruck G. Link eds., 2018) [hereinafter, OXFORD HANDBOOK OF STIGMA] ("[G]roup membership is important when studying discrimination—groups vary in the frequency, type, and severity of discrimination that they face, as well as in the types of culturally shared coping mechanisms that they employ. At the same time, not every group member thinks, feels, and behaves uniformly.").

[351] Press Release, Federal District Court Awards Over $110,000 for Denial of Housing Based on Race, Connecticut Fair Housing Center (August 5, 2013) www.ctfairhousing.org/wp-content/uploads/Bilbo-Press-Release1.pdf [https://perma.cc/L3JU-KU5M].

[352] *Id.*

[353] *See, e.g.*, Ocen, *supra* note 115, at 1558–59 (discussing the mobilization of the social welfare and criminal justice systems to effectuate the subordination of Black women).

of an affirmation that this is an accurate worldview could be devastating.[354] Thus, by failing to grapple with the import of Ms. Wilson's intersectional identity, the court seems to have missed the possible depth of her injuries. Moreover, to the extent that the successful navigation of intersectional oppression has required that Black woman muster augmented fortitutde, discriminators like Mr. Hylton should not be permitted to collect a windfall.

Regardless of the obfuscation of misogynoir in the judicial opinion, if racism was conceived in a silo, then we would certainly miss its simultaneous yet different impacts on Mr. Bilbo and Ms. Wilson as it interacted with their other identity traits and household characteristics to birth entirely unique housing experiences.[355] This truth is precisely why testing would have been ill-equipped to capture the discrimination that Ms. Wilson experienced as a Black mother. As discussed, current testing methodologies, including the pair and sandwich approaches, are specifically designed to assess the import of one protected characteristic at a time rather than the effect of multiple identity traits simultaneously.[356]

Ms. Wilson was protected under the FHA on three bases as she was (1) African American, (2) a woman, and (3) the head of a household with children.[357] If Mr. Hylton had been silent about the nature of his bias, as is more frequently the case in housing discrimination cases, then testing would have been the best vehicle for Ms. Wilson to glean insight into whether or not she had been the victim of disparate treatment with respect to her membership in the foregoing protected classes.[358] However, the single-axis paradigm of testing would have been unlikely to ferret out the intersectional discriminatory animus that was motivating Mr. Hylton's conduct.

First, it is highly unlikely that a test on race would have ever been conducted in the first place because Mr. Hylton had already rented the property to Mr. Bilbo, who was African American. Thus, chances are slim that a fair housing organization's testing coordinator would have even thought to authorize a test on race-based discrimination.[359] That risk is highlighted in *Hylton* because the defendant, perhaps surprisingly, was not White. Like Mr. Bilbo and Ms. Wilson, the Hyltons were also members of the African dias-

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[354] *E.g.*, OXFORD HANDBOOK OF STIGMA, *supra* note 350, at 381 (reviewing study that found that students who were concerned about rejection on the basis of their social class and felt that their circumstances were unlikely to change, were unlikely to adopt a disposition that success was viable via hard work to the further detriment of their academics).

[355] United States v. Hylton, 944 F. Supp. 2d 176, 184, 186 (D. Conn. 2013).

[356] *See infra* Introduction.

[357] 42 U.S.C. §§ 3604(a)–(d) (2018).

[358] *See, e.g.*, Laudon v. Loos, 694 F. Supp. 253, 254 (E.D. Mich. 1988) (resolving credibility dispute by reference to testing evidence, which unveiled the defendant's racially discriminatory animus).

[359] A PRIMER ON INTERSECTIONALITY, *supra* note 341, at 4 (critiquing the social justice industry for failing to marshal intersectionality as a platform for expanding and deepening advocacy efforts that otherwise fail to address the exclusions of constituents that are subject to overlapping forces of oppression).

pora, but were specifically of West Indian descent.[360] The reality of such intra-racial discrimination, particularly against the ancestors of U.S.-born slaves, is a documented phenomenon that reflects the pervasive impact of White supremacisy ideology.[361] Even still, if the test had been conducted, the results would not have demonstrated an unequivocal pattern of refusing to rent to African Americans. As a result, fair housing litigators would have been wary of taking the case due to limited prospects for success.[362]

Here, a point of comparison would prove helpful in situating the dilemma. Take, for instance, the matter of *Patrick v. Mihaiu*,[363] in which a retired African American serviceman had attempted to procure a home in the Detroit Metropolitan area.[364] Not unlike in *Hylton*, the seller declined to proceed with the sale after learning of the racial identity of the buyer.[365] During a subsequent investigation, a White tester posed as a military veteran, in an effort to precisely mirror the victim—save for the protected characteristic—and inquired about purchasing the property.[366] After having rejected the African American veteran's full-price offer, the property owner (who quite disturbingly was revealed to be a retired state district court judge) stated that the house was still available and that he was willing to negotiate on the price.[367]

When defense counsel learned of the testing evidence, he countered that his client's conduct was a result of Alzheimer's, but, perhaps sensing that the excuse would not hold up in court, opted to settle.[368] In contrast, Mr. Hylton had already rented the property to Mr. Bilbo, so he was not categorically opposed to renting to Blacks as long as it was under circumstances where he perceived there to be sufficient "mitigating" factors. Even if testing had been conducted with a Black woman to mirror Ms. Wilson and there was some indication of adverse treatment, the single-axis paradigm would have put her counsel in the precarious state of arguing that she had been discriminated on the basis of race by a Black man who had already rented the property in question to an African American. In short, the case would have been

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[360] *Hylton*, 944 F. Supp. 2d at 184.

[361] Jennifer V. Jackson & Mary E. Cothran, *Black Versus Black: The Relationships Among African, African American, and African Caribbean Persons*, 33 J. BLACK STUD. 576, 581, 596–97 (2003).

[362] RELMAN, *Order and Burdens of Proof*, *supra* note 23, at § 2:30 (clarifying that the success of a housing discrimination success is largely contingent upon plaintiff's ability to marshal proof that the defendant's justification is pretextual).

[363] Patrick v. Mihaiu, No. CV-70050-RHC (E.D. Mich. filed 2001).

[364] *Id. See also* John Obee, *The Importance of Testing Evidence in Housing Discrimination Sales Transactions: Two Case Studies*, 41 URB. LAW. 309, 314–18 (2009) (recapping the events that transpired in the matter of *Patrick v. Mihaiu*, No. CV-70050-RHC (E.D. Mich. filed 2001)).

[365] Obee, *supra* note 364, at 315.

[366] *Id.* at 315–16.

[367] *Id.* at 316.

[368] *Id*. at 317.

unlikely to see the light of day as a question of race-based disparate treatment.[369]

With the benefit of hindsight, we know that independent testing on the basis of either gender or familial status would not have yielded fruit. Mr. Hylton was ready and willing to rent to not just a woman, but a single woman with children—provided that she was White.[370] Even if a test were constructed to compare the experience of households with children headed by White women and Black women respectively, the vernacular of intersectionality would still be required to explain why Mr. Hylton may have been inclined to rent to a White woman with children and a Black man with children, but not a Black woman with children. Ultimately, Ms. Wilson's experience was shaped by the interactive operation of all three identity traits and therefore, current testing methodologies would have failed Ms. Wilson, who we know with certainty was victimized by intersectional discrimination.

Initial attempts to document the experience of African American women did not incorporate intersectionality and separated race, gender, and familial status to conduct the assessment.[371] Ironically, embedded in this approach, one can see the seeds of a potential testing solution. Under each heading, the report observed what configuration of the household would be most likely to trace any adverse consequences to the specific identity trait at issue.[372] In this regard, a Black woman without children in a household that was headed by a man was deemed most appropriate for detecting race-based discrimination.[373] Essentially, the idea is that ruling out all but one of the identity variables that correlate with the prospects for disparate treatment will enable detection of any unlawful bias stemming from the specific characteristic that is left in play. Building this insight out from an intersectional perspective permits the construction of a tester population that could serve as a benchmark for exposing and proving discrimination on the basis of one or more protected traits whether individually or collectively. Indeed, just as intersectionality provides a framework for capturing the experience of individuals who are subordinated across more than one axis of identity, it simulatenously offers a lens for recognizing the accrual of multidimensional priveleges for persons who belong to several superordinated groups.[374] To this end, data, doctrine, and theory all indicate that a White, heterosexual,

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[369] RELMAN, *Deciding Whether or Not to Use Testers, supra* note 18, at § 4:2 ("[I]n most housing discrimination cases testing evidence is essential for a successful verdict or settlement.").

[370] United States v. Hylton, 944 F. Supp. 2d 176, 184 (D. Conn. 2013).

[371] Leigh, *supra* note 251, at 73.

[372] *Id.* at 73, 76, 81.

[373] *Id.* at 73.

[374] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991) (contending that men of color and White women have not had to address the effects of intersectional disempowerment as frequently because their intersectional identities have set the terms for advancing racial and gender equality respectively).

cisgender man without a disability and with no children in the household is most likely to have a favorable experience.[375] Accordingly, this population is best suited to serve as control testers when a complainant suspects that that the housing provider's conduct was motivated by intersectional bias.

III. Revamping Testing Under Intersectionality Insights

Taking a closer look at *Hylton* revealed the nature of the intersectional oppression that Ms. Wilson experienced and, by extension, laid bare the landscape of hurdles that impact single Black women with children in housing searches.[376] Occasionally, disparate treatment on the basis of an intersectional identity that is intermeshed with racial animus has been detected by courts and deemed a violation of the FHA's prohibition on race-based discrimination.[377] This is not a particularly surprising development in light of the idea that racism, especially in settings like housing, maintains a degree of "empirical primacy."[378] Moreover, this finding is consistent with what social scientists understand about the operation of prejudice insofar as its orientation toward bright line rules in the vein of an "us" versus "them" disposition as opposed to a narrow frame of reference that only is triggered when a specific intersectional configuration is implicated.[379] In other words, the Mr. Hyltons of the world are unlikely to reserve their racial bias only for Black women with children. Nonetheless, an individual with multiple marginalized identities will still experience unique permutations of discrimination stemming from overlapping forces of subordination and targeted stereotypes.[380]

As such, the failure to mobilize an intersectional lens to inform our strategies for intervention in the fight for fair housing will lead us to fail the most vulnerable populations.[381] This Part endeavors to wield intersectionality as a tool for revamping standard testing protocols so that the methodology is conceptually situated to substantiate allegations of discrimination on the ba-

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[375] Roscigno, Karafin & Tester, *supra* note 115, at 55 (contrasting proportion of verification rates by racial groupings and noting a "lower overall verfication of [W]hite cases . . . likely (given neutral investigative criteria) the consequence of limited evidence and frivolous 'reverse discrimination' claims.").

[376] It also worth noting that Ms. Wilson had a measure of class-based privilege and therefore her experience may not be indicative of the full gamut of hurdles that single mothers of color face in their housing searches.

[377] *See, e.g.*, Tolliver v. Amici, 800 F.2d 149, 150–51 (7th Cir. 1986) (finding a race-baced violation of the FHA, prior to the prohibition of familial status discrimination under the 1988 Amendment, when a landlord refused to rent a unit to an African American woman because of her child, but offered the unit to a White woman with children).

[378] Gillborn, *supra* note 337, at 284.

[379] *See* Richard Delgado, *Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 Iowa L. Rev. 1247, 1282–83 (2011) (addressing concepts such as "us vs. them" and citing studies on the social science of race).

[380] *See* A Primer on Intersectionality, *supra* note 341, at 4.

[381] *Id.* at 5.

sis of two or more protected characteristics or the combinations thereof. In such causes of action, this Article contends that the underlying testing investigation should center the experience of a White, heterosexual, cisgender man without a disability who has no children in his household as the CT. This Part provides a theoretical justification for this approach by examining the contemporary import of the nation's first federal housing law, which addressed racial discrimination by providing for equal contractual and property rights on par with "White citizens."[382]

While the law, as currently codified, has been interpreted coextensively with modern legislation to protect all racial groups, the benchmark it set persists and manifests in the different evidentiary frameworks that typically apply when members of minority and majority groups respectively attempt to establish a prima facie case of race-based discrimination.[383] Thus, the proliferation of additional protected classes under the nation's second federal fair housing law, when construed collectively, suggests that the FHA is designed to ensure equal treatment with those who have and continue to benefit from the American political order predicated on White ableist heteropatriarchy. This Part then concludes by considering the concerns regarding the predominance of comparability frameworks in litigation as well as the congruency of this approach with the observations from e-CRT scholars.

A. The Contemporary Reverberations of the Civil Rights Act of 1866

In the aftermath of the Civil War, Congress passed a series of federal laws and constitutional amendments that had been designed to secure the freedom of African Americans, establish their citizenship, and equip them with equal rights under the law.[384] Among these laws was the nation's first federal legislation prohibiting discrimination in housing transactions—the Civil Rights Act of 1866.[385] Enacted on April 9, 1866, two years prior to the

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[382] *See* 42 U.S.C. §§ 1981, 1982 (2012) (originally enacted as Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 and then reenacted as Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144).

[383] *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287–95 (1976) (discussing the legislative history of the Civil Rights Act of 1866 at length and concluding that its language as codified in 42 U.S.C. § 1981 prohibits racial discrimination against Whites); *see also generally* Ryan Mainhardt & William Volet, Note, *The First Prong's Effect on the Docket: How the Second Circuit Should Modify the* McDonnell Douglas *Framework in Title VII Reverse Discrimination Claims*, 30 HOFSTRA LAB. & EMP. L.J. 219, 221–22 (2012) (discussing circuit split concerning whether a "majority plaintiff" must provide additional "background circumstances" to demonstrate a prima facie case under *McDonnell Douglas* and providing recommendations for resolving the question in the Second Circuit).

[384] *See, e.g.*, LAURIE COLLIER HILLSTROM, DEFINING MOMENTS: *Plessy v. Ferguson* 16 (2014) (describing the constitutional amendments and legislation that were passed to promote racial equality during Reconstruction with the support of abolitionists and "Radical Republicans" in the 39th Congress).

[385] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

adoption of the Fourteenth Amendment, this legislation granted citizenship status to all persons born in the United States and declared that all citizens had the same rights to "purchase, lease, sell, hold and convey real and personal property . . . as is enjoyed by [W]hite citizens."[386] Conceptually, the culmination of this radical paradigm shift in the legal landscape bore the potentiality of transitioning Blacks from being the objects of property to being full citizens with the right to own property on the same terms as their former White masters.[387]

Yet, despite its promise, the law remained virtually latent for over a century.[388] Its dormancy persisted until the late 1960s, when the Act was resuscitated by the Supreme Court as a viable vehicle for fair housing enforcement.[389] While its original purpose in securing the rights of African Americans has been duly acknowledged by the courts, the law has been subsequently interpreted to prohibit discrimination against all racial groups, including Whites.[390] Nonetheless, the initial vision for detecting disparate treatment on the basis of race by contrasting the experiences of Blacks against Whites is still intact, as evinced by the different evidentiary frameworks that often apply in a cause of action asserting "reverse discrimination" under Title VII and 42 U.S.C. § 1981.[391]

Building on the pertinent legislative history and ensuing judicial developments that have extended the list of protected classes, this Part contends that the prohibition on "combination" or "composite" discrimination has expanded the scope of comparison to a White, heterosexual, cisgender man without a disability who has no children in his household. Individually, each trait in this list corresponds to a majoritarian group that is demonstrably more likely to receive favorable treatment in housing transactions. When considered in the aggregate, as the recognition of intersectional claims invites, this particular multidimensional configuration of cumulative privileges provides the best point of comparison for detecting disparate treatment on the basis of two or more traits collectively. The Article then explores corresponding implications for testing methodologies in enforcing the FHA.

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[386] *Id.*

[387] The optimism embedded in this depiction was not entirely unwarranted at the time. *See, e.g.*, HILLSTROM, *supra* note 384, at 19–20 ("The political, economic and educational gains of the Radical Reconstruction era led many [B]lacks in the South to hope that they were on the road to true equality.").

[388] Wade Henderson, *Foreword: The Legacy of a Movement*, *in* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT, *supra* note 50, at viii, viii–xix (discussing dynamics that rendered the Civil Rights Act of 1866 ineffective).

[389] Ellen Cummings, Note, *Civil Rights—Protection Under the Thirteenth Amendment—Housing Discrimination*, 20 CASE W. RESERVE L. REV. 448, 448 (1969).

[390] *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 289 (1976).

[391] *See, e.g.*, Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981).

1. *Fair Housing as a Function of the Rights of White Citizens*

Prior to the passage of this legislation, the category of "civil rights" that animates our contemporary legal discourse on discrimination was virtually un-cognizable.[392] Though the term had been employed in Antebellum America, it bore no particular connection with the matter of promoting equal rights under law without regard to race or previous condition of servitude. Rather, the classification merely constituted a common law framework that captured the rights of private individuals in their mutual dealings.[393]

While the adoption of the Thirteenth Amendment in 1865 had abolished the institution of African chattel slavery and involuntary servitude more broadly—save for the important caveat as a punishment for crime[394]—it nonetheless failed to provide any further answers concerning the legal status of the newly freed slaves.[395] Republican Senator John Henderson of Missouri remarked that "in passing this amendment we do not confer upon the [N]egro the right to vote. We give him no right except his freedom and leave the rest to the states."[396] The proverbial invitation to specify what rights, if any, would be afforded to African Americans in the newly reconstructed Southern states was immediately accepted. Ultimately, this opportunity was seized upon by many Whites, particularly—albeit not exclusively—in the South, who enacted a series of state laws known as the Black Codes that severely restricted the rights of African Americans with the express objective of reviving antebellum slavery in all but name.[397]

The substance of these state laws appears to have been influenced by provisions of the Oregon Constitution that garnered national attention when Congress decided whether Oregon would be accepted into the union in 1859.[398] Specifically, the relevant portions of the Oregon Constitution prohibited free Blacks from migrating to Oregon, mandated their expulsion, and

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[392] *See, e.g.*, G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RES. L. REV. 755, 770, 772 (2014) (tracing the genesis of "civil rights" to the passage of the Civil Rights Act of 1866, as there had been no such established category in eighteenth- and early-nineteenth-century American law).

[393] *See* GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866 41 (2013).

[394] *See generally* DENNIS CHILDS, SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY (2015) (arguing that chattel slavery legally persists through the incarceration of Black people and other historically oppressed groups courtesy of the Thirteenth Amendment's exception clause, which allows enslavement as "punishment for a crime"); *see also* DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53 (2008) ("[T]he Thirteenth Amendment to the Constitution, adopted in 1865 to formally abolish slavery, specifically permitted involuntary servitude as a punishment for 'duly convicted' criminals. Beginning in the late 1860s, and accelerating after the return of [W]hite political control in 1877, every southern state enacted an array of interlocking laws essentially intended to criminalize Black life.").

[395] *See* RUTHERGLEN, *supra* note 393, at 6.

[396] *Id.* at 30 (quoting Cong. Globe, 38th Cong., 1st Sess. 1465 (1864)).

[397] *Id.* at 46.

[398] *Id.*

denied most of them "the right to 'hold any real estate, or make any contracts, or maintain any suit therein.'"[399] Following the Civil War, many Southern legislatures opted to employ a similar model in fashioning their own Black Codes.[400] In response, Congress wielded its Thirteenth Amendment power to enforce the abolition of slavery by "appropriate legislation" to invalidate the Black Codes with the passage of the Civil Rights Act of 1866.[401] Thus the Black Codes set the terms of the nation's first federal fair housing act

The enumerated rights set forth in the 1866 Act are further testament to the fact that the legislation was designed to be the antithesis of the Black Codes.[402] Broadly, this list entailed guaranteeing (1) equal capacity to make and enforce contracts as well as execute real and personal property transactions, (2) equality in access to courts as litigants and witnesses, and (3) the even application of state-sanctioned punishment. Collectively, these provisions sought to eliminate the oppressive circumstances imposed by the Black Codes.[403] It accomplished these ends by elevating Blacks to be treated in accord with the same standards governing White citizens. President Andrew Johnson vetoed the bill, asserting, quite incredibly, that it unnecessarily interfered with the ability of Blacks and Whites to utilize their "equal power" to bargain over the terms governing capital and labor relationships.[404] Its subsequent passage by Congress was noteworthy, but the law was ultimately ineffective in fulfilling its objectives.[405]

To be sure, deeply engrained and systemic hostility to the cause of civil rights in the aftermath of Reconstruction set the landscape that informed judicial interpretation of the 1866 Act against the backdrop of the Thirteenth and Fourteenth Amendments.[406] Moreover, these dynamics also delineated the practical utilities of any rights that might remain, as even if equipped with the necessary knowledge and resources to bring suit, newly freed slaves would be risking life and limb to challenge discrimination as White Southern Democrats violently re-imposed a system of racial subordination akin to

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[399] *Id.* (quoting Or. Const. of 1857, art. I, §36).

[400] William Wiecek, *Emancipation and Civic Status: The American Experience, 1865–1915*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 78, 96 n.22 (Alexander Tsesis ed., 2010) (listing the pertinent states, but drawing a distinction between those that adopted comprehensive codes from the others that only enacted "fragmentary bits of legislation that were common in the Black Codes of the Deep South").

[401] U.S. CONST. amend. XIII, § 2.

[402] RUTHERGLEN, *supra* note 393, at 46–49.

[403] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified at 42 U.S.C. § 1981(a)).

[404] President Andrew Johnson, Veto of the Civil Rights Act (Mar. 27, 1866), *in* PRESIDENTIAL DOCUMENTS: THE SPEECHES, PROCLAMATIONS, AND POLICIES THAT HAVE SHAPED THE NATION FROM WASHINGTON TO CLINTON 146, 149 (J.F. Watts & Fred L. Israel eds., 2000).

[405] Henderson, *supra* note 388, at xix.

[406] *Id.* at viii–xix.

slavery throughout the South at the end of Reconstruction.[407] Further still, fundamentally, the tension between the exceptionality of federal law and the primacy of state law was also a contributing factor at the inception of the Act and the attending adverse ramifications for civil rights enforcement are still with us today.[408] The culmination of these dynamics shortened the reach of the first fair housing act and left it incapable of addressing all but the most blatant manifestations of state-sanctioned discrimination.

2. *The Same Protections, But Different Standards of Proof*

In the United States, property rights were frequently the featured topic of constitutional litigation and this backdrop provided the context for the 1866 Act to occasionally surface as a tool for fair housing enforcement.[409] Still, not until June of 1968, two months after the FHA was passed, would the 1866 Act be unshackled from the confines of the state action doctrine in *Jones v. Alfred H. Mayer Co*.[410] There, an interracial couple sued a real estate developer in St. Louis, Missouri after the company refused to sell them a home because Mr. Joseph Jones was Black. Their cause of action rested on 42 U.S.C. § 1982 and thus, the Court was once again called upon to answer whether the modern incarnation of the 1866 Act prohibited private discrimination in the sale of property.[411] In reasoning that it did, the Court took note that the Thirteenth Amendment abolished slavery and authorized Congress to enforce that prohibition with appropriate legislation targeting the "badges and incidents" of slavery.[412]

Accordingly, the 1866 Act was designed to address the Black Codes, which had been erected as a legal regime that was tantamount to slavery in all but name.[413] Thereafter, segregation was orchestrated to facilitate the racial subordination of African Americans and as such, was properly deemed a relic of slavery that Congress could and indeed, had, targeted for eradication.[414] Ultimately, the Court held:

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[407] BLACKMON, *supra* note 394, at 51–52, 55–57 (discussing the development of the rationale and coercive practices that linked the era of slavery with the advent of a new regime of involuntary servitude, which relied on the criminaliziton of black life to insulate its operation from an attack under the Thirteenth Amendment).

[408] *See, e.g.*, U.S. DEP'T OF JUSTICE, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 9–11 (2015) (describing contours of federal jurisdiction in prosecuting violations of federal civil and constitutional rights under the Civil Rights Act of 1886).

[409] RUTHERGLEN, *supra* note 393, at 121.

[410] 392 U.S. 409 (1968).

[411] *Id.* at 412. *See also* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA ix–x (2017).

[412] *Jones*, 392 U.S. at 439.

[413] *Id.* at 441–43.

[414] *Id.*

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a [W]hite man can buy, the right to live wherever a [W]hite man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[415]

The result in *Jones* was far from inevitable, but the socio-political climate animating passage of the FHA most assuredly contributed to the successful resuscitation of the 1866 Act and rendered its decision defensible to the broader public.[416]

While there is substantial substantive overlap between 42 U.S.C. § 1982 and the FHA, there are several significant differences.[417] Critically, since the 1988 Amendment, the FHA has provided for meaningful federal support by authorizing HUD and DOJ to enforce the law as a national policy.[418] Yet a key difference is that the FHA addresses a far broader range of discriminatory conduct in housing transactions and expressly extends the list of protected classes beyond race, to religion, sex, disability, familial status, and national origin, while recent decisions increasingly capture sexual orientation as well as gender identity or expression.[419]

Nonetheless, the standard for establishing a prima facie case alleging disparate treatment on the basis of race is the same under either statute.[420] This is not a particularly surprising doctrinal development given the context of the revival of the 1866 Act during the height of the modern Civil Rights Era, which effectively solidified the law's position as a conduit between past, present, and future efforts to advance equality on behalf of historically marginalized groups.[421] Further, despite the persistence of the language in both 42 U.S.C. § 1981 and 42 U.S.C. § 1982 providing for equal contractual and property rights on par with "[w]hite citizens," the statutes have been

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[415] *Id.* at 443.

[416] RUTHERGLEN, *supra* note 393, at 176.

[417] *See* Jones, 392 U.S. at 413–15 (listing several differences between the two statutes); *see also* JOHN P. RELMAN, *The Independence of § 1982 and the Fair Housing Act*, *in* HOUSING DISCRIMINATION PRACTICE MANUAL § 27:2 (2017) (providing overview of differences in substantive coverage and corresponding implications for litigation).

[418] Fair Housing Act, 42 U.S.C. §§ 3610–3614; *see also* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1051 (1989).

[419] *Compare* Civil Rights Act of 1866, 42 U.S.C. §§ 1981(a), 1982 (guaranteeing legal rights such as entering contracts, suing in court, and testifying to all citizens regardless of race; granting property rights to all citizens regardless of race), *with* Fair Housing Act, 42 U.S.C. § 3604(a) (prohibiting discrimination in housing on account of race, color, religion, sex, familial status, or national origin).

[420] *E.g.*, Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989); Selden Apartments v. U.S. Dept. of Hous. and Urban Dev., 785 F.2d 152, 159 (6th Cir. 1986); Fair Hous. Opportunities of Northwest Ohio v. Am. Family Mut. Ins. Co., 684 F. Supp. 2d 964, 966 n.2 (N.D. Ohio 2010); Huertas v. East River Hous. Corp., 674 F. Supp. 440, 454 (S.D.N.Y. 1987).

[421] RUTHERGLEN, *supra* note 393, at 160, 177.

interpreted co-extensively with modern legislation to categorically prohibit all racial discrimination, including adverse conduct against Whites.[422]

The question was first taken up by the Court in *McDonald v. Santa Fe Trail Transportation Co.*,[423] where two White employees alleged disparate treatment on the basis of race after they were discharged for misappropriating cargo from one of the company's shipments, but an African American employee, who had been charged with the same offense, was retained.[424] The cause of action rested on both 42 U.S.C. § 1981 as well as Title VII.[425] Both the district court as well as the Fifth Circuit found that § 1981 was "wholly inapplicable to racial discrimination against [W]hite persons," while the Title VII claims were deemed to have been pursued against the company in an untimely manner.[426] The Supreme Court reversed, finding that the underlying administrative proceedings were sufficient for the Title VII claims to advance and revisited the legislative history of § 1981 to find that it prohibited racial discrimination against Whites.[427]

Senator Lyman Trumbull of Illinois initially introduced the 1866 Act as a bill to "protect all persons in the United States in their civil rights" and described it applying to people of "every race and color."[428] Indeed, while history clearly indicates that the overwhelming purpose of the Act was to address the Black Codes, the congressional record reveals that the specific language situating its antidiscrimination principles as a function of the same rights as "[W]hite citizens" was not Senator Trumbull's idea. Representative Wilson of Iowa, Chairman of the Judiciary Committee, proposed that language to "perfect" the bill.[429]

The wording manifests a congressional effort to act in accord with federalism principles, supplanting state law only to the extent necessary to prohibit discrimination on the basis of race, while allowing localities to determine the terms for exercising contractual and property rights.[430] A narrow construction was also preferred by several congressman because granting federal civil rights too broadly would delegitimize a state's restrictions on the rights of minors, women, and individuals with disabilities.[431] Setting

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[422] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279–85 (1976) (holding that Title VII, 42 U.S.C. § 2000e, and 42 U.S.C. § 1981 prohibit discrimination against all races, including Whites).

[423] *Id.*

[424] *Id.* at 275–76.

[425] *Id.*

[426] *Id.* at 277, 286.

[427] *See id.* at 284–85, 287–88.

[428] CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).

[429] *Id.* at 1115.

[430] *Id.* at 505 (statements of Sens. Johnson, Trumbull, and Fessenden); *id.* at 572, 574 (statements of Sen. Henderson); *id.* at 573–74 (statement of Sen. Williams); *id.* at 158–59 (statement of Reps. Delano, Wilson, and Niblack); *id.* at 1832 (statement of Rep. Lawrence).

[431] *Id.* at 1835–36 (statement of Rep. Lawrence); *see also* Robert J. Kaczorowski, *Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of*

the baseline for protecting all groups by reference to the rights "enjoyed by [W]hite citizens" satisfied proponents of the Act like Senator Trumbull, acknowledged state authority, and quelled already percolating fears that African Americans would become "the special favorite of the laws."[432]

Thus, the Court in *McDonald* concluded that the specific phrasing was designed merely to emphasize that racial discrimination for or against any group was unlawful under § 1981.[433] Yet and still, the particulars of the nation's racial history informed the suitability of that benchmark. Indeed, there was no question that the prior state of law under the Black Codes had operated to the detriment of Blacks and to the benefit of Whites. Thus, equality with Whites provided a suitable frame of reference for prohibiting disparate treatment on the basis of race. This fact was not lost upon the court in *Parker v. Baltimore & Ohio Railroad Co*.[434] as it considered the appropriate evidentiary framework for adjudicating a White plaintiff's allegation of racial discrimination.[435]

There, for three years in a row, a White man unsuccessfully applied to be transferred or promoted to the position of locomotive fireman and alleged that his denials were the result of unlawful presences that were extended to Blacks and female applicants.[436] His cause of action rested on § 1981 and Title VII, but the court found that the *McDonnell Douglas* framework was inapplicable to the facts at hand.[437] According to the court, that framework was "a procedural embodiment of the recognition that our nation has not yet freed itself from a legacy of hostile discrimination."[438] The standard permitted an inference of discrimination because it was predicated on an individual's "[m]embership in a socially disfavored group" and thus enabled a fact finder to draw on "common experience" to deduce impermissible animus as a factor in any adverse action against persons with marginalized identities.[439]

While Whites were a protected group, the court concluded that Parker still had to allege "additional background circumstances" that would suggest that the defendant is the "unusual employer who discriminates against the majority."[440] In *Harding v. Gray*,[441] the D.C. Circuit declared that a White plaintiff can demonstrate background circumstances by either (1) showing

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Runyon v. McCrary, The Review Essay and Comments: Reconstructing Reconstruction, 98 YALE L.J. 565, 572–73 (1988).

[432] Civil Rights Cases, 109 U.S. 3, 31 (1883).

[433] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279–85 (1976) .

[434] Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1016 (1981).

[435] *Id.* at 1016. For a full discussion on all of the potentially applicable evidentiary frameworks in lawsuits under Title VII alleging race-based discrimination by a White plaintiff, see Shirley W. Bi, Note, *Race-Based Reverse Employment Discrimination: A Combination of Factors to the Prima Facie Case for Caucasian Plaintiffs*, 2016 CARDOZO L. REV. DE NOVO 47 (2016).

[436] *Parker*, 652 F.2d at 1013.

[437] *Id.* at 1017–18.

[438] *Id.* at 1017.

[439] *Id.*

[440] *Id.*

[441] 9 F.3d 150 (D.C Cir. 1993).

the defendant harbored racial animus against Whites, or (2) pointing out "fishy facts" that might be suggestive of discrimination.[442] Not all the circuit courts have embraced this approach, but the "additional background circumstances" standard remains the test for a White plaintiff in the D.C. Circuit Court, and the Sixth[443] and Eighth[444] Circuits have followed suit.

A second batch of circuit courts, including the First,[445] Fifth,[446] Ninth[447] and Eleventh,[448] has demonstrated a disinclination to impose any modifications on the *McDonnell Douglas* analysis under these circumstances. These courts simply seem to situate Whites as members of protected classes and then permit inferences of discrimination when a woman or racial minority is hired or promoted.[449] Some of the decisions in the lower courts indicated that the "background circumstances" standard was improper because it imposes an "onerous," inequitable burden on a White plaintiff as compared to other groups.[450] Finally, a third group, consisting of the Third,[451] Fourth,[452] Seventh,[453] and Tenth[454] Circuits, developed an alternative model known as the "sufficient evidence standard," which enables a White plaintiff to move forward if they can produce facts under the totality of circumstances that might support a reasonable probability of unlawful discrimination on the basis of their racial identity. However, the courts adopting this configuration still expressly rejected the propriety of a "protected class" approach when a cause of action asserted disparate treatment on the basis of a White racial identity.[455] Indeed, the Third Circuit found that permitting a White plaintiff to avail themself of a standard that had been traditionally reserved for minorities was "tantamount to eliminating the first prong of the *McDonnell Douglas* frame work *sub silentio*."[456] The only federal circuit court that appears to

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[442] *Id.* at 153.

[443] *See, e.g.*, Romans v. Mich. Dep't of Human Servs., 668 F.3d 826, 837 (6th Cir. 2012).

[444] *See, e.g.*, Schaffhauser v. United Parcel Servs., Inc., 794 F.3d 899, 903 (8th Cir. 2015).

[445] *See, e.g.*, Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 34 (1st Cir. 1998).

[446] *See, e.g.*, Gregory v. Town of Verona, 574 F. App'x 525, 528 (5th Cir. 2014) (noting that defendant conceded that the plaintiff established a prima facie case by satisfying the prong that he was a member of the protected class at the time of the failure to promote).

[447] *See, e.g.*, Vallimont v. Chevron Energy Tech. Co., 434 F. App'x 597, 599–600 (9th Cir. 2011).

[448] *See, e.g.*, Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1325 n.15 (11th Cir. 2011).

[449] *See, e.g.*, Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991).

[450] Ulrich v. Exxon Co., 824 F. Supp. 677, 684 (S.D. Tex. 1993).

[451] *See, e.g.*, Hunter v. Rowan Univ., 299 F. App'x 190, 193–94 (3d Cir. 2008).

[452] *See, e.g.*, Evans v. Tech. Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996).

[453] *See, e.g.*, Rahn v. Bd. of Trs. of N. Ill. Univ., 803 F.3d 285, 289–290 (7th Cir. 2015).

[454] *See, e.g.*, Mitchell v. City of Wichita, Kan., 140 F. App'x 767, 771, 777 (10th Cir. 2005).

[455] Iadimarco v. Runyon, 190 F.3d 151, 163 (3d Cir. 1999).

[456] *Id.*

have refrained from deciding on a governing standard for a White plaintiff is the Second Circuit.[457] From those that have chimed in, a majority of courts have indicated that White individuals, although protected by the 1866 Act and Title VII, must proceed on a different route to establish a prima facie case of race-based discrimination because the group has not been subject to historical oppression, and therefore is not entitled to an inference of discrimination when a racial minority is hired or promoted over them.

Professor Angela Onwuachi-Willig was one of the first to defend the proliferation of these different standards for White plaintiffs, particularly the background circumstances approach.[458] Specifically, she argued that this doctrine was the most consistent with the purpose of Title VII as the legislation was passed with the express objective of targeting systemic discrimination against historically oppressed groups, especially African Americans.[459] Indeed, the same fundamental problem, though different in degree and scope, confronted the nation in 1866 and 1964. The ensuing *McDonnell Douglas* framework was correspondingly designed to answer under what circumstances it might be appropriate to infer unlawful discrimination and under the first prong, the history of disadvantage in the job market and in the workplace provided the context to do so.[460] Onwuchai-Willing also pointed to several statistical studies that demonstrated that this history was still alive as Blacks, notwithstanding some advancements, fared far poorer than Whites by the metrics of income and employment.[461] In addition, there was evidence that employers generally favored Whites over Blacks, who were perceived as "uneducated, lazy, dishonest, and uncooperative."[462]

In light of the foregoing, Onwuachi-Willig effectively concurred with the court's observation in *Parker* that "it defies common sense to suggest that the promotion of a Black employee justifies an inference of prejudice against White co-workers in our present society."[463] While the constitutionality of these different approaches based on the plaintiff's race has been questioned by scholars as a possible violation of the Equal Protection Clause, there is a strong argument that the variation would pass the rigors of a strict scrutiny analysis because the policy (1) furthers a compelling governmental interest by combating racial discrimination, and (2) is narrowly tailored to that objective.[464] Indeed, since affirmative action plans have been

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[457] Aulicino v. N.Y. City Dep't of Homeless Servs., 580 F.3d 73, 80 n.5 (2d Cir. 2009).

[458] Onwuachi-Willig, *supra* note 57, at 71–80.

[459] *Id.* at 61–64.

[460] *Id.* at 65.

[461] *Id.* at 72–74.

[462] *Id.* at 76.

[463] Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981).

[464] *See* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1102–03 (2004) ("Yet, even assuming strict scrutiny, such exacting review is not necessarily fatal to a classification. Read to require background circumstances for [W]hites

justified under the rigors of strict scrutiny, proponents of the "background circumstances" standard also argue that the "protected class" approach would enable Whites to baselessly challenge legitimate affirmative action plans and undermine efforts to promote diversity in the workplace.[465] Additionally, the *McDonnell Douglas* framework has also been justified on the grounds that it promotes judicial efficiency by preventing employers from litigation expenses caused by defending baseless claims.[466] That objective could be frustrated if the "protected class" approach was adopted for White plaintiffs. As it stands, all of these arguments maintain salience when evaluating the experiences of other historically oppressed groups in the housing context.

3. *Transplanting the Insights to Fair Housing Enforcement*

The FHA, Title VII's counterpart in housing, was also designed to address similar societal ills. While initially focused on combating racial discrimination, the FHA was expanded to cover sex in 1974 as well as familial status and disability in 1988.[467] In each of these contexts, Congress was presented with evidence of widespread historical and contemporary systemic oppression. While discrimination against families with children has long-standing roots in the United States,[468] the issue garnered much attention in the 1970s and '80s as social and economic dynamics contributed to an increase in families with children seeking affordable rental opportunities.[469] One particularly influential report on this state of affairs was released in 1983 and found that seventy-five percent of rental opportunities in the United States either outright excluded families with children or imposed restrictions on the number, sex, or age of the children that would be deemed acceptable for tenancy.[470] Congress was also aware of the fact that these policies were sometimes used to directly facilitate race-based discrimination and, even if applied neutrally, could still have an unjustifiable disparate impact on families of color with children.[471] In banning familial status discrimination, the FHA also equipped advocates with a powerful tool for

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only, the statute would still be constitutional were it to be justified by a compelling state interest.").

[465] *See* Onwuachi-Willig, *supra* note 57, at 80–81 (arguing that applying the *McDonnell Douglas* test would force colleges to defend their affirmative action cases even against baseless claims).

[466] *See id.* at 81–83 (describing a case where an employer was forced to defend a baseless claim).

[467] Fair Housing Act Amendments, H.R. Rep. No. 711, at 2, 3 (1988).

[468] New Jersey was the first state to take action in prohibiting discrimination on the basis of familial status in the 1890s. Pub. L. 1898, ch. 235, p. 794.

[469] *See, e.g.*, George Palmer Schober, Note, *Exclusion of Families with Children from Housing*, 18 U. MICH. J.L. REFORM 1121, 1124 (1985).

[470] James B. Morales, *Use of the Fair Housing Act to Redress Housing Discrimination Against Families with Children*, 17 CLEARINGHOUSE R. 736, 736 (1983).

[471] 134 Cong. Rec. H4688 (1988) (remarks of Rep. Dellums); H.R. Rep. No. 100-711, at 21 (1988).

challenging occupancy standards that served to deny families with children access to suitable housing opportunities.[472]

The segregation of people with disabilities over the course of U.S. history has been so extensive and invidious that Justice Thurgood Marshall described its "virulence and bigotry" as having "rivaled, and indeed paralleled the worst excesses of Jim Crow."[473] With the advent of social Darwinism, medical professionals began denoting people with disabilities as a "menace to society and civilization" and blamed them "in a large degree for many, if not all, of our social problems."[474] In Utah, for example, during the early 1930s, a public institution was established—which remains in operation today—to be the state's Development Center, for the express purpose of facilitating the social and educational segregation of people with disabilities as they were deemed a "defect" that wounded the "citizenry a thousand times more than any plague."[475] In many states, they were considered "unfit for citizenship" and their rights to marry and procreate were revoked, sometimes through forced sterilization.[476] Failure to comply with these mandates could have resulted in both civil and criminal sanctions.[477] Even loved ones, motivated by paternalistic considerations, were complicit in confining people with disabilities to circumscribed lives in the homes of relatives or in institutional settings.[478]

Given this alarming history, amending the FHA to include disability discrimination was meant to provide a "clear pronouncement to end the unnecessary exclusion of persons with [disabilities] from the American mainstream."[479] To this end, the law not only prohibits disparate treatment on the basis of disability, but requires housing providers to waive or alter rules or policies and permit the reasonable modification of premises to accommodate an individual's disability-related needs so they can live in the housing of their choice.[480] In addition, the FHA mandates that multifamily properties constructed after 1991 must have special features designed to enhance accessibility for people with physical disabilities.[481] While the LGBTQIA+ community is not formally recognized as a distinctly protected group under the

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[472] Allen & Crook, *supra* note 50, at 63–64.

[473] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 462 (1985) (Marshall, J., concurring in part and dissenting in part).

[474] *Id.* (citing Henry H. Goddard, *The Possibilities of Research as Applied to the Prevention of Feeblemindedness*, PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 307, 307–12 (1915)).

[475] Timothy M. Cook, *The Americans with Disabilities Act: the Move to Integration*, 64 TEMP. L. REV. 393, 401 (1991) (citing BD. OF TRS. OF THE UTAH STATE TRAINING SCH., BOARD OF TRUSTEES OF THE UTAH STATE TRAINING SCHOOL BIENNIAL REP. 3 (1938)).

[476] *City of Cleburne*, 473 U.S. at 463.

[477] *Id.*

[478] Allen & Crook, *supra* note 50, at 65.

[479] *Id.* (citing H.R. Rep. No. 100-711, at 18 (1988)).

[480] Fair Housing Act, 42 U.S.C. §§ 3604(f)(3)(A)–(B).

[481] *Id.* at § 3604(f)(C).

FHA, the societal ills afflicting this population have been documented.[482] With respect to housing, one study of the area around Boston—a relatively liberal city where legal protections exist under state law—utilized a paired testing methodology and found a sixty percent rate of discrimination against individuals on the basis of their gender identity or expression.[483]

Prior to 1866, per the Court's decision in *Corfield v. Coryell*,[484] civil rights only existed as an indeterminate extension of state citizenship and subject to pervasive regulation on the basis of race in accord with the jurisdiction's policies and customs.[485] The 1866 Act ushered in a new era and marked the genesis of our contemporary understanding of the field of civil rights.[486] It reached into historical conceptions of the common law, pulled out a list of contractual and property rights, and deemed them to be of such import as to preclude state-sanctioned interference with the exercise thereof on the basis of race.[487] To accomplish that end, while still giving substantial leeway to traditional state discretions, it provided for a baseline of ensuring that people of color were afforded the same treatment as their White counterparts—no more, no less.[488] The legislative victories of the Civil Rights Era were built on the foundation that was laid by the 1866 Act.[489] While it took over a century before 42 U.S.C. § 1982 would be construed to reach private conduct under the Thirteenth Amendment, the FHA left no ambiguities in its reach by virtue of its reliance on the Interstate Commerce Clause and from there, ultimately, expressly extended the list of protected characteristics to religion, sex, disability, and familial status.[490]

Outside of these criteria, housing providers otherwise remain at liberty to develop a uniform set of policies and practices for their tenant screening endeavors. In the same vein as the 1866 Act's initial benchmark for racial discrimination, disparate treatment on the basis of any protected characteristic under the FHA is inferred under the *McDonnell Douglas* framework when a member of a socially disadvantaged group is not treated the same as

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[482] Press Release, Nat'l Center for Transgender Equality, Transgender Americans Face Staggering Rates of Poverty, Violence (Feb. 18, 2015), https://transequality.org/press/releases/transgender-americans-face-staggering-rates-of-poverty-violence [https://perma.cc/C73N-E99W].

[483] Jamie Langowski et. al., *Transcending Prejudice: Gender Identity and Expression-Based Discrimination in the Metro Boston Rental Housing Market*, 29 YALE J.L. & FEMINISM 321, 336 (2018).

[484] 6 F. Cas. 546 (E.D. Pa. 1823) (upholding New Jersey regulation that forbid nonresidents of the state from gathering oysters and claims in its jurisdication against a challenge under the priveleges and immunities clause of Article IV).

[485] RUTHERGLEN, *supra* note 393, at 159.

[486] Id.

[487] *Id.*

[488] *Id.* at 49.

[489] *Id.* at 160, 166–67.

[490] *See, e.g.*, Oxford House–C v. City of St. Louis, 77 F.3d 249, 251 (8th Cir. 1996) (holding that "Congress had a rational basis for deciding that housing discrimination against [people with disabilities], like other forms of housing discrimination, has a substantial effect on interstate commerce").

their majoritarian counterpart.[491] Across the chambers of time, then, civil rights manifests as an intervention in the systems of identity-based subordination and mounts a command for historically oppressed groups to be treated the same as those who have been benefited from the nation's engineered hierarchy of humanity as informed by the ideologies of White supremacy, heteropatriarchy, misogyny, and ableism. As it stands, there is no indication that these undue benefits have abated in the present.

Moreover, intersectionality theory has helped to reveal the ways in which our complex identities, consisting of multiple traits in the aggregate, can translate to specific experiences of privilege or disadvantage. The recognition of this principle and the corresponding sanctioning of combination claims in antidiscrimination jurisprudence has made it unlawful to consider prohibited characteristics either individually or collectively. Evidence accumulated from the past through the present indicates that a White, heterosexual, man without a disability who has no children in the household is unlikely to face discriminatory barriers in his attempts to access the housing of his choice. From this premise, it seems most appropriate to situate this group as the touchstone for testing compliance with the FHA.

B. Examining the Risks and Rewards of Empirically Operationalizing Intersectionality as a Falsifiable Hypothesis

This next section draws on the lessons gleaned from a review of the history informing civil rights doctrine to assess the promises of perils of employing intersectional tests. Testing operates on the same principles animating the *McDonnell Douglas* framework as a lens for spotting facts that might give rise to an inference of discrimination. In the absence of direct evidence, a defendant's intentions can never be ascertained with absolute certainty, but as the Supreme Court announced in *Furnco Construction Corp. v. Waters*,[492] "[w]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."[493] Accordingly, "[w]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the [defendant's] actions, it is more likely than not the [defendant], who we generally assume acts only with *some* reason, based [their] decision on an impermissible consideration such as race."[494]

Thus, the logic of the *McDonnell Douglas* test suggests the import of testing evidence as a tool for drawing inferences of discrimination. If a CT receives more favorable treatment than the PT under circumstances where all legitimate factors have been controlled for, then based on the nation's

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[491] Cunningham, *supra* note 10, at 454.
[492] 438 U.S. 567, 577 (1978).
[493] *Id.*
[494] *Id.*

history and our corresponding experiences, fact finders are willing to deduce that any adverse conduct was likely motivated by an unlawful consideration. Judicial insistence on the type of comparator proof that testing offers has been on the rise in recent decades. Some scholars have raised notable objections to the trend, both with respect to its practical implications as well as the attendant conceptual drawbacks.[495] Yet other academics appear more poised to embrace this direction, with the important caveat of seeking adjustments in the doctrine so as to maximize the benefits of focusing on comparisons to prove disparate treatment.[496]

Many of the judicial hurdles that impede marshaling comparator proof to substantiate an allegation of employment discrimination do not appear to similarly impede discrimination allegations in the housing context. For example, Professor Charles Sullivan has criticized judicial opinions under Title VII that unduly diminished the potential pool of comparators by deeming them to be not sufficiently "similarly situated" or outright rejecting the relevance of the proposed analogy.[497] In taking note of these dynamics, Sullivan suggested that the opinions seemed to reflect a judicial retrenchment from the logic that undergirded the *McDonell Douglas* framework.[498] Instead, courts seemed to be growing more inclined to substitute their own world view of the American workplace and, from that vantage, became more inclined to attribute incidents of different treatment to a host of other factors including "downright irrational" conduct rather than as indication of an intent to engage in lawful discrimination.[499] As an alternative to merely relying on the viewpoint of judges, he recommended that comparator proof be anchored by a standard of reasonable care that could be deduced from pertinent industry practices in a given setting. An expert could then offer testimony as to whether the plaintiff might have been subjected to disparate treatment by ascertaining whether a putative comparator would have been more favorably treated by a "reasonable employer."

Like Sullivan, Goldberg also recognized the value of potential "hypothetical comparators" in establishing the probability that the plaintiff may have been the victim of unlawful discrimination.[500] Further still, the challenges associated with comparator proof led her to concur in the call to recast the selection of comparators as a subject that properly falls within the domain of expert analysis "rather than as a matter turning exclusively on the judgment of the court."[501] In her account, this technique could also be useful in expanding the pool of potential individuals who should properly be

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[495] Goldberg, *supra* note 58, at 735–40.
[496] Sullivan, *The Phoenix from the Ash*, *supra* note 20, at 209–10.
[497] *Id.* at 193–95.
[498] *Id.* at 231.
[499] *Id.* at 223, 231 (quoting Forrester v. Rauland–Borg Corp., 453 F.3d 416, 418 (7th Cir. 2006)).
[500] Goldberg, *supra* note 58, at 806.
[501] *Id.* at 804.

deemed "sufficiently similar."[502] Conceptually, yet another benefit might be realized as this move has the potential to open consideration of other heuristic devices for detecting discrimination. For example, Goldberg has discussed the merits of a contextual analysis that would be informed by modern understandings of how an individual act of unlawful disparate treatment might be a manifestation of implicit bias or a product of structural discrimination.[503]

In the context of fair housing testing, the barriers to identifying suitable comparators is not typically a pressing matter and, as such, there is no need to rely on putative or hypothetical comparators. Indeed, the methodology involves the solicitation of actual people who are assigned profiles that are specifically designed to eliminate a host of legitimate variables that might otherwise justify differences in treatment for the express purpose of ascertaining whether the prohibited characteristic is correlated with any adverse consequences in an individual's exploration of a housing opportunity. Testing has proven to be a relatively economical and reliable platform for identifying and proving discrimination, at least insofar as it concerns its application in settings that are exploring the import of one protected characteristic at a time.

While Goldberg has noted that the judicial demand for comparator proof has improperly constricted our conceptions of identity-based subordination and obscured the promise of other heuristic devices, she has also conceded that this trajectory is unlikely to shift.[504] From her perspective, courts are loath to restrict the range of permissible employment decisions, and will only do so when the decision can be legitimated by reference to an extrinsic metric, such as comparator proof.[505] While the underlying rationale that appears to be motivating this judicial sentiment remains debatable, there is a pressing need to develop a mechanism that will permit intersectional claims to advance under the current confines of antidiscrimination doctrine. Thus, this Article contends that it would be better to revamp testing as a tool for substantiating allegations of intersectional discrimination rather than abandon the methodology altogether. To that end, this Article has advanced the argument that dating back to its inception, the field of civil rights has always been and remains conceptualized as a command to treat an identified historically disadvantaged group as though they were members of their comparatively privileged counterpart. In this vein, the recognition of intersectional claims in housing thus translates into a command for individuals with protected characteristics to be treated as well as a White, heterosexual, cisgender man without a disability who has no children in the household.

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[502] *Id.*
[503] *Id.* at 804–05, 808–810.
[504] *Id.* at 812.
[505] *Id.* at 798 n.234.

Accordingly, the proposal for reconstruction advanced herein would consist of a modified version of sandwich testing. As noted in the Introduction, a sandwich test is an expansion of a traditional paired test and simply calls for a third tester whose characteristics match those of the initial CT to follow up and verify the availability of the housing opportunity.[506] This approach precludes a defendant from arguing that there was a change in the status of the housing opportunity between the visits of the paired testers that can explain a difference in treatment of the PT.[507] This Article argues that testing for disparate treatment on the basis of an intersectional identity should entail a sandwich test with a PT that matches the various protected characteristics of the plaintiff and two CTs that are White, heterosexual, cisgender men without disabilities who have no children in their households. If the evidence demonstrates that the CTs received favorable treatment, then this should constitute grounds for inferring that discriminatory animus may have been a contributing factor in any adverse action against the plaintiff.

However, one cautionary note to the implementation of this formulation in the context of fair housing testing merits attention. Recently, a third generation of critical race scholarship has arisen that is seeking to maintain the theoretical orientation established by contemporary critical race scholars while simultaneously embracing the methodologies developed by social scientists.[508] Thus far, a concern of e-CRT adherents has entailed the appropriate empirical operationalization of pertinent concepts embedded in theoretical contributions stemming from Critical Race Theory (CRT).[509] To this end, Hancock has recently critiqued standard approaches that engage with intersectionality as a testable hypothesis.[510] Instead, she suggests the concept demands a complete reorientation to engaging with multidimensional oppression, which should be reflected in our methodology.[511] In her account, a central tenet of intersectionality is that an individual's identity traits cannot be disaggregated.[512] From this perspective then, studies that merely rely on the configurations of the underlying categories to assess their import are problematic.[513]

Specifically, while reliance on quantitative studies ran the risk of missing critical qualitative differences in the relative experiences of groups, even small-scale qualitative studies were not necessarily immune from notable

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[506] *See supra* note 34 and accompanying text.

[507] *See supra* note 35 and accompanying text.

[508] *See, e.g.*, Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183, 185 (2013) (discussing the linking of social science methods and critical race theory, as well as listing other scholars engaged in this practice).

[509] *See* Hancock, *supra* note 59, at 262.

[510] *See id.* at 266–67 (considering the "trade-offs" of the empirical operationalization of intersectionality).

[511] *See id.* at 280–81.

[512] *Id.* at 266.

[513] *See id.* at 277–80.

limitations.[514] First, many of them failed to pay attention to pertinent axes of privilege and the attendant ramifications for individuals as they navigate structural levels of power.[515] Second, any of the findings from such a limited pool would present scalability challenges in developing institutional reform.[516] Finally, a review of these endeavors indicated that they often failed to situate the underlying identity categories in their historical context.[517] In light of the foregoing limitations, Hancock advanced an alternative methodology dubbed the "paradigm intersectionality approach," which was "broadly defined as a justice-oriented analytical framework for examining persistent sociopolitical problems that emerge from race, gender, class, sexual orientation, and other sociopolitical fissures as interlocking, process-driven categories of difference."[518]

Under the prism of empirical methods, fair housing testing is best conceived as a "multiple qualitative formulation" in that it asks: "How did the litigant's race and/or sexuality correspond to the outcome of interest?"[519] The terminology simply reflects that the testers will be collecting non-numerical data on the relevance of various identity traits simultaneously. As a practical matter, none of the general problems that Hancock alludes to are present in this particular context. The intersectional test envisioned here will entail utilizing a PT that matches the characteristics of the complainant with respect to both their privileges and disadvantages across the pertinent axes of identity. Any results would then be utilized for the sole purpose of substantiating a specific allegation of housing discrimination. Finally, since the examination will be underway in the present, there is less risk that the associated socio-political relevance of the identity categories will be outright ignored, particularly since plaintiff's counsel will be leveraging the testing results to bolster an allegation of disparate treatment.

In recognizing the adverse ramifications of rejecting intersectionality as a testable explanation for litigation, Hancock concluded that it should not be abandoned, but cautioned that we should still refrain from ignoring the paradigm approach as it bears potential for engendering societal transformation in the long term. However, beyond the foregoing practical considerations, it is also worth noting that it is not entirely clear that intersectionality, as envisioned by Crenshaw, is in tension with testable formulations. This observation is bolstered when contextualized against the backdrop of Professor christi cunningham's critique of intersectionality and her subsequent advancement of "wholism" theory.[520] "Wholism differs from intersectionality carried to its furthest extreme in that wholism's individual is self-defined

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[514] *Id.* at 279.
[515] *Id. at* 279–80.
[516] *Id*.
[517] *Id*. at 280.
[518] *Id*. at 282.
[519] *Id*. at 269.
[520] cunningham, *supra* note 10, at 500.

while the individual at an exponential permutation of intersectionality is defined by the intersections of oppressive societal constructions."[521]

As such, cunningham contends that intersections are illusory because the social categories that inform those connections are also false and only have meaning when filtered through the experiences of a specific individual.[522] Critical race theorists like Crenshaw have always acknowledged that race is not objectively real, but as a social construct nonetheless remains salient in informing the material conditions of the lives of people of color.[523] While intersectionality was certainly conceived as a concept to describe and engage with the unique manifestations of oppression encountered by individuals with multiple marginalized identities, it did so by mobilizing the underlying socially constructed categories of groups—not eschewing them.[524] Accordingly, intersectionality still operates as a function of macro-oppression even as it acknowledges that these interwoven and mutually reconstituting dynamics will shape the contours of an individual's life in ways that cannot be compartmentalized.[525] Regardless of where one lands on whether an embrace of positivist falsifiability is the most appropriate translation for operationalizing intersectionality, in this particular context, it seems that the rewards far outweigh the risks.

Conclusion

In 1968, the Supreme Court revived the 1866 Civil Rights Act as a viable tool for addressing private race-based discrimination in housing transactions, and Congress passed the FHA. In the years that followed, the FHA was amended and its list of protections was extended to include sex, disability, and familial status. More recently, courts have construed the ban on sex discrimination to prohibit disparate treatment against members of the LGBTQIA+ community. Over the years, the field of civil rights has continued to operate in accord with the principle articulated in the nation's first federal housing law, which banned racial discrimination by mandating equal

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[521] *Id.*

[522] *Id.*

[523] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stan. L. Rev. 1241, 1296–97 ("But to say that a category such as race or gender is socially constructed not to say that the category has no significance in our world. On the contrary, a large and continuing project for subordinated people . . . is thinking about the way power has clustered around certain categories and is exercised against others. This project attempts to unveil the processes of subordination and the various ways those processes are experienced by people who are subordinated and who are privileged by them. . . . And this project's most pressing problem . . . is not the existence of the categories, but rather the particular values attached to them and the way those values foster and create social hierarchies.").

[524] *Id.* at 1296 (raising and dismissing anti-essentialist contentions that would suggest that it makes no sense to reproduce categories like Blacks or women because, as social constructs, they lack an objective basis).

[525] *Id.* at 1298–99.

contractual and property rights on par with "[W]hite citizens." Since then, in adjudicating causes of action alleging discrimination under 42 U.S.C. § 1982 and the FHA, courts have applied the *McDonnell Douglas* analysis, which permits an inference of discrimination when a member of a historically disadvantaged group is treated less favorably than their comparatively privileged counterpart.

While courts were initially hostile to causes of action alleging discrimination on the basis of a "combination" of characteristics, that trend has been markedly reversed in recent decades. Even still, courts are struggling with identifying the bases for proving such a claim. As it stands, paired testing has proven to be a critical vehicle for detecting discrimination in the housing market for both research and enforcement purposes. The methodology operates on the same logic as the *McDonnell Douglas* analysis, as it provides comparative data that enables a fact finder to deduce that a housing provider may have been motivated by discriminatory animus in taking adverse action against a plaintiff who is a member of a socially disfavored group. However, as currently constructed, paired tests are specifically designed to isolate and test for one variable at a time and therefore are an ineffectual metric for ascertaining whether intersectional discrimination has transpired.

When construed against the bar that was established in the genesis of American civil rights and its ensuing reverberations in varying evidentiary frameworks based on the identity of the plaintiff, the recognition of intersectionality under the FHA translates into a directive to ensure equal treatment with the beneficiaries of White supremacy, ableism, and heteropatriarchy. Accordingly, this Article has contended that testing should be revamped to verify compliance with this mandate. Practically, this would entail a sandwich test with a PT that matches the various protected characteristics of the plaintiff and two CTs that are White, heterosexual, cisgender men without disabilities and without children in the household. If the evidence demonstrates that the CTs received favorable treatment, then this should bolster the contention that the plaintiff was a victim of unlawful discrimination based on one or more protected traits. While Mr. Hylton and Ms. Wilson were both victims of racially patterned oppression, the manifestations of their discrimination were different because of their intersectional identities. Yet what remains true in that case, as in others, is that neither was treated the way that he or she would have been as a member of the nation's most privileged intersectional group. The FHA does not require anything more, but it certainly demands nothing less.