

It's Not Just a "Black Thing:" Black Women in the Law and Issues of Double Identity and Discrimination

Introduction

As a country, the United States has had a reputation for race and sex discrimination, based on a continuing history of each. Using the 1975 edition of Webster's New Collegiate Dictionary, Pamela Trotman Reid defines racism as "a belief that race is a primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race."¹ She defines sexism as "prejudice or discrimination against women."² Reid comments on the obvious difference and what she calls the "imbalance" between the two definitions. She notes that the definition of racism includes an "assumption of a belief system that can support or...explain any discriminatory attitudes or behavior."³ In contrast, Reid notes that the definition of sexism does not contain any sort of belief system.⁴ She hypothesizes that this may be because sexism lacks the "history of examination and research" that racism has or because there is an "assumption of a common experience [in sexism] that does not need an explanation."⁵ Historically, blacks and women have been prevented from occupying high-end professional positions, attending schools, and exercising rights such as voting and property ownership. In *Frontiero v. Richardson*, the

¹ Pamela Trotman Reid, *Racism and Sexism: Comparisons and Conflicts*, in CHALLENGING RACISM AND SEXISM: ALTERNATIVES TO GENETIC EXPLANATIONS 93, 94 (Ethel Tobach & Betty Rosoff ed., 1994).

² *Id.* at 94.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Supreme Court found that “throughout much of the nineteenth century the position of women in [American] society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.”⁶ The court also noted that “neither slaves nor women could hold office, serve on juries, or bring suit in their own names.”⁷ Although the two groups share some similar experiences of discrimination, they have not been considered social equals. Ideas of racial superiority created a system of discrimination based on a racial hierarchy, in which whites were placed above blacks. White men were situated at the top of the hierarchy followed by white women, with black men and women at the bottom of the hierarchy often grouped together.⁸ This racial hierarchy necessitates that the examination of race and sex discrimination be treated separately. Similar to how studies of the discriminatory treatment of blacks combine black men and women into one “homogeneous” group, in examining sex discrimination, studies often treat women as one collective group.⁹ The treatment of women as one collective group can be defined as “gender essentialism, the notion that a unitary, essential women’s experience can be isolated and described independently of race, class, sexual, orientation, and other realities of experience.”¹⁰ Such treatments of race and sex discrimination ignore that black women are positioned at the bottom of the racial hierarchy beneath black men, occupying a unique position in society where gender and race intersect, subjecting them to double discrimination.¹¹

⁶ *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

⁷ *Id.*

⁸ “In race research there appears to be an assumption that greater homogeneity exists among blacks than whites.” Reid, *supra* note 1, at 101.

⁹ Angela P. Harris, *Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

¹⁰ *Id.*

¹¹ Reid, *supra* note 1, at 105 (stating that “the possibility that race and sex prejudice may have interactive, even additive results has seldom been considered by social scientists. Similarly, studies of discrimination based on sex often fail to recognize the existence of race as a factor”).

As an ethnic and sex minority, African-American females encounter both gender and race bias. This paper will examine the role that shouldering the burden of both race and sex discrimination has played in forming the experiences and social status of black women in America. The paper will also examine how black women have had to be concerned with both the progression of women's rights, as well as the progression of blacks in America, and the conflict this dual concern creates. Finally, the paper will focus on how these experiences have affected the progress of black female lawyers in America. In conclusion, the paper will then look at the experiences and problems encountered by black female lawyers and discuss what solutions, if any, have been implemented and what more can be done.

Between a Rock and Hard Place: Choosing Sides between Race and Sex Equality

Black women shoulder a double burden, having to deal with both race and sex discrimination. Despite their unique position in society, there has not been a longstanding focus on the plight of black women in America in a racial and gender context. "The experience of black women is apparently assumed, though never explicitly stated, to be synonymous with that of either black males or white females."¹² Such an assumption leads to a mistaken belief that "there is no difference in being black and female from being generically black, or generically female."¹³ Deborah King suggests that understanding the differences between black men and black women, and between black women and white women, is "crucial to understanding the nature of black womanhood."¹⁴

Double Jeopardy and the Conflict between Race and Sex

¹² Deborah K. King, *Double Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 1, 42, 45 (1988).

¹³ Deborah King goes on to state that such an analogy "obfuscates or denies...the profound substantive differences between blacks and women." She continues to discuss the inherent differences, both institutionally and culturally, between racism and sexism. *Id.*

¹⁴ *Id.* at 45-46.

Deborah King uses the term “double jeopardy” to refer to the “dual discrimination of racism and sexism that subjugate black women.”¹⁵ She explains that, while the concept of double jeopardy is viewed as having an additive effect on the subjugation of black women, the effect acts more like a multiplier. Using black women in slavery as an example, she explains that black women, on top of being subject to the same “demanding physical labor and brutal punishments as black men,” as females were also subject to rape.¹⁶ While the rape of black women during slavery separated their experience from black men, it was the role of black women as the “concubines, mistresses, and sexual slaves of white males” that “distinguished [black women’s] experience from that of white female sexual oppression.”¹⁷ This distinction can only exist at the point where race and gender collide.¹⁸ Kimberle Crenshaw contends that the “intersectional experience” of black women, where race and sex discrimination intersect, is “greater than the sum of racism and sexism, and any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”¹⁹ In her influential article, *Race and Essentialism in Feminist Legal Theory*, Angela Harris argues that feminist and legal theory have ignored the experience of black women and the effect that race has had on that

¹⁵ Deborah King adopts this term from Frances Beale, a member of the Women’s Liberation Committee of the Student Nonviolent Coordinating Committee., quoting Beale as saying about black women, that “as blacks they suffer all the burdens of prejudice and mistreatment that fall on anyone with dark skin. As women they bear the additional burden of having to cope with white and black men.” *Id.* at 46.

¹⁶ *Id.* at 47.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Kimberle 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 (1989).

experience.²⁰ In feminist legal theory these basic terms of “essentialism” and “intersectionality” are commonplace, but the problems to which they refer continue to shape black women’s lives and prospects.

The combination of race and sex discrimination has had a profound effect on the status and experiences of black women in America. In the 1980s, studies showed that white men earned the highest salary, followed in decreasing order by black men, white women, and black women.²¹ In terms of education, white men again were at the top of the list, followed in decreasing order by white women, black men, and finally black women.²² Although times have changed in terms of earnings, black women still remain at the bottom of a hierarchy in which white men continue to earn the most money, followed in decreasing order by white women, black men, and black women.²³ Even with the same level of education, men continue to earn more than women, and whites earn more than blacks, placing black women at a clear disadvantage.²⁴ In reaction to the double jeopardy imposed on black women by race and sex discrimination, black women have been forced to adopt and “perform a complex variety of social roles,” lobbying for both sex and race equality.²⁵ The bind for black women exists because equality for black women inevitably involves the achievement of equality for two separate groups, blacks and women.²⁶ Taking suffrage as

²⁰ Harris, *supra* note 9, at 585.

²¹ King, *supra* note 12, at 47.

²² *See id.* at 48 for table detailing the income earnings and educational status.

²³ U.S. Census Bureau, Current Population Survey, 2007 Annual Social and Economic Supplement.

²⁴ King, *supra* note 12, at 48.

²⁵ *Id.* at 49 (stating that black women’s “constellation of attitudes, behaviors, and interpersonal relationships were adaptations to a variety of factors, including the harsh realities of their environment, Afro-American cultural images of black womanhood, and the sometimes conflicting values and norms of wider society.”)

²⁶ *Id.* at 52.

an example, for black women, granting the right to vote to either black men or women instead of both would still “mean [their] disenfranchisement because of either their sex or their race.”²⁷ In the necessary fight to achieve both racial and sex equality, black women often face conflict and are forced to make “bitter compromises between nationalism, feminism, and class politics.”²⁸ The conflicts are inevitable, as “the groups in which they find logical allies on certain issues are the groups in which they may find opponents on others.”²⁹ The differences between black men and black women, as well as black women and white women, have been ignored even in the judicial system, where “courts have taken the position that an employer could defeat a black woman’s racial discrimination claim by showing that it did not discriminate against black men; or a sex discrimination claim by showing that it did not discriminate against white women.”³⁰ Often black women are forced to choose between advancing the interest of blacks over those of women, or vice versa, when the advancement of interests on either side never can or will fully address the interests of black women.³¹

Doctrinal and Legal Treatment of the Dual Identity of Black Women

The tendency to “treat race and gender as mutually exclusive categories of experience and analysis” not only forces black women to “choose sides,” but also diminishes and ignores the “multidimensionality of black women’s experience.”³² The doctrinal reaction to black women’s experience can be examined by looking at how the

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1266 (2000).

³¹ King, *supra* note 12, at 52.

³² Crenshaw, *supra* note 19, at 139.

courts have responded to black women's problem of intersectionality.³³ In her often-cited article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, Kimberle Crenshaw does just that using three Title VII cases: *DeGraffenreid v. General Motors*, *Moore v. Hughes Helicopter* and *Payne v. Travenol*.³⁴

In *DeGraffenreid*, five black women brought a discrimination suit against General Motors, claiming that the GM seniority policy "perpetuated the effects of past discrimination against Black women."³⁵ The district court granted summary judgment for GM, "rejecting the plaintiffs' attempt to bring a suit not on behalf of Blacks or women, but specifically on behalf of black women." The court found that the "plaintiffs failed to cite any decisions which have stated that black women are a special class to be protected from discrimination...The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new super-remedy which would give them relief beyond what the drafters of the relevant statutes intended."³⁶ The district court also noted that GM could not be guilty of sex discrimination because the company had hired women—white women—prior to 1964, although they had not hired any black women.³⁷ The court's decision in *DeGraffenreid*, reflects a belief that "Congress either did not contemplate that black women could be discriminated against as black women or did not intend to protect

³³ *Id.* at 141.

³⁴ *Id.*

³⁵ The plaintiffs produced evidence at trial that showed that GM did not hire black women prior to 1964 and that all of the black women hired after 1970 lost their jobs to seniority-based layoffs during a recession. *Id.* at 141 (citing *DeGraffenreid v. General Motors*, 413 F. Supp. 142, 142 (E.D. MO 1976)).

³⁶ *Id.* (citing *DeGraffenreid*, 413 F. Supp. at 143).

³⁷ *Id.*

them when such discrimination occurred.”³⁸ The court’s dismissal of the plaintiffs’ suit in *DeGraffenreid* and failure to recognize that black women face double discrimination “implies that the boundaries of sex and race discrimination doctrine are defined respectively by white women’s and black men’s experience.”³⁹ Thus, under the law, “black women are protected only to the extent that their experiences coincide with those of either of the two groups.”⁴⁰

In *Moore v. Hughes Helicopter, Inc.*, the plaintiff sued Hughes Helicopter, Inc., claiming that they practiced both race and sex discrimination in promotions to upper-level jobs. There was evidence of a significant disparity between men and women the company’s hiring for management level jobs.⁴¹ The court refused to certify the plaintiff, a black female, as the class representative citing their doubts “as to [her] ability to adequately represent white female employees,” as the basis for their decision.⁴² The decision in *Moore* is not only representative of an institutional failure to recognize the intersectionality affecting black women, but also “the centrality of white female experiences in the conceptualization of gender discrimination.”⁴³ Such reasoning echoes that of essentialist thought within feminist legal theory in which the women’s experience is thought of as “one unitary experience” devoid of influence by race, inevitably discounting the experience of black women.⁴⁴ The court’s reaction in *Moore*, and the emphasis on a unitary experience in feminist legal theory, highlight an important difference between black and white women’s

³⁸ *Id.* at 142.

³⁹ *Id.* at 143.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* (citing *Moore v. Hughes Helicopter, Inc.*, 708 F.2d 475, 475 (9th Cir. 1983)).

⁴³ *Id.*

⁴⁴ Harris, *supra* note 9, at 585.

experiences of sex discrimination; for white women encountering sex discrimination, it simply means that “but for gender, they would not have been disadvantaged.”⁴⁵ White women do not need to “specify discrimination as white females because their race does not contribute to the disadvantage for which they seek redress,” unlike black women who are disadvantaged by both their race and gender.⁴⁶ With a similar ruling, the court in *Payne v. Travenol*, refused to certify two black women as class representatives of all black employees in the company, finding that “black women could not possibly represent black men adequately.”⁴⁷ The court’s decision in *Payne* represents a common dilemma facing black women: fragmenting themselves and choosing between “specifically articulating the intersectional aspects of their subordination, thereby risking their ability to represent black men, or ignoring intersectionality in order to state a claim that would not lead to the exclusion of black men.”⁴⁸

Despite an increase in scholarship on the intersectionality experienced by black women, “federal courts have continued to apply differing standards when black women

⁴⁵ Crenshaw, *supra* note 19, at 144.

⁴⁶ The intersection of race and sex in discrimination also severely disadvantages black women when trying to prove discrimination in a discrimination suit. In *Moore*, the plaintiff was required to provide the court with statistical evidence of discrimination solely against black females. The court found Moore incapable of representing white women or black men, thus preventing her from using statistics on sex disparity or race disparity. Moore instead was forced to prove her discrimination claim using statistics only pertaining to black women, a near impossible task as she was bringing the suit under the disparate impact theory of discrimination. The court further limited Moore’s statistical pool by requiring her to provide statistics that only included black women who were qualified for managerial jobs. With such a small statistical pool, Moore was unable to prove discrimination under a disparate impact theory. *Id.* at 145-146.

⁴⁷ *Id.* at 147 (citing *Payne v. Travenol*, 673 F.2d. 798, 798 (5th Cir. 1982)).

⁴⁸ *Id.* at 148.

bring [Title VII] claims” that allege an interaction of both race and gender.⁴⁹ “Since the statute can be read to set out [characteristics of gender and race] as if each were mutually exclusive,” some courts continue to “deny any claim of discrimination based on a combination of protected characteristics.”⁵⁰ “Other circuits, such as the Seventh Circuit, however, have acknowledged the realities of intersectionality.”⁵¹ In 1982, in *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, a black woman brought a class action, Title VII claim against her employer claiming that she was denied promotions and terminated for “race, sex, and black styles of hair and dress.”⁵² The Seventh Circuit held that the “plaintiff was eligible to represent a class of blacks and women.”⁵³ Although some circuits have recognized that black women can suffer race and gender discrimination simultaneously, others have held that Title VII does not allow black women to create a “super remedy.”⁵⁴

The tendency of the courts, feminist theory, and civil rights movements to only recognize the experiences of black women that coincide with that of white women or black men, places the unique needs and perspective of black women “at the margin of the feminist and black liberationist agendas.”⁵⁵ Thus, the value of both feminist and race theory to black women [are] diminished because they derive from “either a white racial

⁴⁹ Mary Elizabeth Powell, *The Claims of Women of Color under Title VII: The Interaction of Race and Gender*, 26 GOLDEN GATE U.L. REV. 413, 413 (1996).

⁵⁰ *Id.* at 414.

⁵¹ Gregory S. Parks & Quinetta M. Roberson, *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination through the Lens of Title VII*, 20 HASTINGS WOMEN’S L.J. 3, 16 (2009)(referring to *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, 538 F.2d 164, 165 (9th Cir. 1982)).

⁵² *Id.*(citing *Jenkins*, 538 F.2d at 165).

⁵³ *Id.*

⁵⁴ Crenshaw, *supra* note 19, at 148.

⁵⁵ Crenshaw, *supra* note 19, at 150.

context,” or a male context.⁵⁶ Regarding feminist theory, black women are not only unnoticed but their “exclusion is reinforced when...feminist theory attempts to describe women’s experiences through analyzing patriarchy, sexuality, or separate spheres ideology, while overlooking race.”⁵⁷

When women’s experiences are analyzed this way, it not only ignores how race has played a significant role in the subjugation of black women, but also how the race of white women has “mitigated some aspects of sexism and privileged them over other women.”⁵⁸ Furthermore, because feminist insights are often grounded in the experiences of white women, they fail to capture fully, if at all, that of black women.⁵⁹ Using the concept of patriarchy to illustrate how certain feminist insights fail to capture fully the experience of black women, Crenshaw notes that “because ideological and descriptive definitions of patriarchy” are usually based upon the experience of white women, feminists often assume that black women are “exempt from patriarchal norms.”⁶⁰ The inference is that because black women have historically been a part of the workforce at higher percentages than white women, that they are not “burdened by this particular gender-based expectation” of being homemakers and excluded from the workplace that white women experience.⁶¹ Despite the misconception that black women are not burdened by this “gender-based expectation,” the fact that they “must work conflicts with norms that women should not, and often creates personal, emotional, and relationship problems in black women’s lives.”⁶²

⁵⁶ *Id.* at 154.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 155-157.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

Thus, black women are burdened not only because “they often have to take on responsibilities that are not traditionally feminine, but, moreover, their assumption of these roles is sometimes interpreted as black women’s failure to live up to such norms.”⁶³

Similarly, “black women’s particular interests are [often] relegated to the periphery in public policy discussion about the presumed needs of the black community,” because of the belief that racial discrimination is the more pressing matter facing the black community.⁶⁴ To illustrate this point, Crenshaw discusses the controversy that surrounded the movie *The Color Purple*, based on Alice Walker’s novel.⁶⁵ Many people protested against the movie’s portrayal of domestic abuse in a black family, arguing that the “movie confirmed negative stereotypes of black men.”⁶⁶ In protesting the portrayal of domestic violence in the black family, concerns about racism and stereotyping black men “overshadowed the issue of sexism and patriarchy in the black community,” illustrating how the “struggle against racism [often] compels the subordination of certain aspects of the black female experience in order to ensure the security of the larger black community.”⁶⁷

Black Women and Black Men: Conflicts within the Race

Racial discrimination has shaped and influenced the black experience in America and the fight for racial equality has been a long-term struggle and goal for blacks. The fact that the

⁶³ *Id.*

⁶⁴ *Id.* at 163.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

“inerasable physical characteristics of race have long determined the status and opportunities of black women in the United States” has led many black women to claim “that their racial identity is more salient than either their gender or class identity.”⁶⁸ The institution of slavery and segregation are inextricably linked to race and the color of one’s skin, thus black women have often felt that their “interest as blacks should take precedence over their interests as women.”⁶⁹ Furthermore, because the abolition of slavery and the civil rights movement preceded women’s suffrage and the women’s movement, “it is reasonable to expect that most black women would have made commitments to and investments in the race movements such that they would not or could not easily abandon those for later movements.”⁷⁰ However, these factors are only partially responsible for black women feeling as though they had to prioritize their interest as blacks over their interests as women.⁷¹

Although, historically, black women assumed leadership roles in movements toward racial equality, they still experienced sex discrimination within their own race.⁷² Black women were well aware of “sexual politics among blacks,” and “could identify the sexual inequities that resulted in the images of black women as emasculating matriarchs; in the rates of sexual abuse and physical violence; and in black men assuming the visible leadership positions in many black social institutions.”⁷³ In her article, *Taking Sides Against Ourselves*, Rosemary Bray states that the “parallel pursuits of equality for African Americans and for women have trapped Black

⁶⁸ King, *supra* note 12, at 53.

⁶⁹ *Id.* at 53.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Reid, *supra* note 1, at 106.

⁷³ King, *supra* note 12, at 55.

women between often conflicting agendas for more than a century.”⁷⁴ Bray uses the Anita Hill—Clarence Thomas hearings as a platform to demonstrate how black women can become “trapped” between gender and race conflicts.⁷⁵ For many black people, “even those who did not support Clarence Thomas’s politics, Hill’s charges [of sexual harassment] smacked of treachery.”⁷⁶ Even black women criticized Hill and accused her of trying to “bring a black man down.”⁷⁷ For them, Hill had violated a code of black women “who believe that the price of [racial] solidarity is silence.”⁷⁸ In contrast, “feminist leaders embraced [Hill] with enthusiasm.”⁷⁹ Despite being bound to gender and race issues, black women “more often than not choose loyalty to race.”⁸⁰ Bray contends that black women often choose race over gender because they feel guilty over the fact that “a black man’s presence is often feared, while a black woman’s presence is at least tolerated.”⁸¹ Black women feel beholden to black men because “as difficult as the lives of black women are, [they] know [they] are mobile in ways black men are not—and black men know that [they] know.”⁸² Bray asserts that black men “know that black women are nearly as angered as they are about their inability to protect [black women] in the traditional and patriarchal way...and some black men know ways to use [that] anger, sorrow, and guilt against black women.”⁸³

⁷⁴ Rosemary Bray, *Taking Sides Against Ourselves, in VIOLENCE AGAINST WOMEN AND CHILDREN* 361, 362 (Carol J. Adams & Marie M. Fortune ed., 1995).

⁷⁵ *Id.*

⁷⁶ *Id.* at 361.

⁷⁷ *Id.* at 366.

⁷⁸ *Id.* at 362.

⁷⁹ *Id.* at 361.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Despite the stereotype of the dominant, black matriarch, “patriarchal philosophy is alive and strong in the black community.”⁸⁴ Many black men have disregarded the need for a black women’s movement, in the belief that the “black man will [simply] be able to bring the black woman along in a common struggle.”⁸⁵ Black men accused black women of participating in the oppression of black men through working and assuming the roles of both provider and caretaker of the black family.⁸⁶ In fact, during the 1960s and 1970s, “black men used the matriarch issue to manipulate and coerce black women into maintaining exclusive commitments to racial interests and redefining and narrowing black women’s roles and images in ways to fit a more traditional Western view of women.”⁸⁷

While black women and black men share a common interest in advancing racial equality, often black men do not share an interest in sex equality, and in fact may benefit from sexism.⁸⁸ Reid accuses black men of adopting “the dominant white male disease,” and profiting from the subjugation of women, particularly black women “by postponing their liberation, and getting ahead at the expense of black women.”⁸⁹

Black Women and White Women: Choosing between Gender and Race

Despite the fact that both black women and white women share some similar experiences and vulnerabilities to sexual victimization, black women have still been marginalized by the

⁸⁴ King, *supra* note 12, at 55.

⁸⁵ Reid notes that “black men strongly desire the recognition and control that they believe is due to all men...and that black women should restrict their thrust for opportunities and self-determination.” Reid refers to black men’s complaint that black women’s gains have “severely limited the black male’s ability to prevail and compete in a perpetually patriarchal society.” Reid, *supra* note 1, at 107.

⁸⁶ King, *supra* note 12, at 48.

⁸⁷ *Id.* at 55.

⁸⁸ Reid, *supra* note 1, at 107.

⁸⁹ *Id.* at 108.

feminist movement.⁹⁰ Reid argues the same about women's rights movements, stating that the "lack of participation of black and other women of color in national and local women's organizations" is a result of the differences in the life experiences between the two groups.⁹¹ Included in the differences between black women and white women are "the conflicting allegiance to race versus sex which black women often experience, but white women do not; the greater level of social acceptability that white women receive compared with black women; and the fact that white women are necessary to the existence of white men, whereas black women are not necessary."⁹² In a society dominated by white men, white women at least have an advantage because they represent "at least their mothers, or their wives or their daughters."⁹³ In contrast, black women "don't have that kind of leverage to get that authority."⁹⁴

Black women's initial resistance or hesitation to be involved with the feminist movement directly stems from the movement's initial failure to take issues of racial oppression into account and to discount the black female experience by promoting its notion of a "unitary women's experience."⁹⁵ In addition to failing to take into consideration issues of racial oppression, some women's movements, such as the suffrage movement, benefitted and traded off of the oppression of black women.⁹⁶ Within the suffrage movement, in the interest of "political expediency," leaders "cooperated with avowed racists in order to gain the southern vote and liberally used

⁹⁰ King, *supra* note 12, at 58.

⁹¹ Reid, *supra* note 1, at 110.

⁹² *Id.* at 110.

⁹³ Nina Burleigh, *Black Women Lawyers: Coping with Dual Discrimination*, 74 A.B.A. J. 64, 65 (1988).

⁹⁴ *Id.*

⁹⁵ Harris, *supra* note 9, at 586.

⁹⁶ This is not meant to ignore or discount the countless efforts of many white women on behalf of the abolitionist movement; simply an example of how in some instances and for some people the interest of white women and black women diverged even in the context of the suffrage movement. King, *supra* note 12, at 59.

racial slurs and epithets arguing that white women’s superior character and intellect made them more deserving of the right to vote than blacks...” Deborah King uses a quote of Barbara

Andolsen to address how racism played a role in the women’s suffrage movement:

The [suffrage movement] had a bold vision and noble principles...but this is a story of a vision betrayed. For the white women who led this movement came to trade upon their privilege as the daughters (sisters, wives, and mothers) of powerful white men in order to gain for themselves some share of the political power those men possessed. They did not adequately identify ways in which that political power would not be accessible to poor women, immigrant women, and black women.⁹⁷

A history of ignoring racial oppression and promoting the idea of one, unitary women’s experience makes essentialist feminism problematic for Angela Harris and others.⁹⁸ For Harris, essentialism effectively “reduces the lives of people who experience multiple forms of oppression into an addition problem,” thus fragmenting “black women’s experience into...race and gender.”⁹⁹ Though not inherently racist, Harris states that feminist essentialism “paves the way for unconscious racism,” by ignoring the voices of black women, effectively making white women “the epitome of woman.”¹⁰⁰

Forced to often choose between two movements that ignore important parts of their identity, black women are placed in the middle of an “adversarial position with black men on one side and white women on the other, and left to decide where they should stand” inevitably fragmenting themselves in order to fit in.

African Americans in the Law

Despite improvements in race relations over the last few decades, blacks continue to struggle for racial equality. Although overt racism has given way to more subtle forms of

⁹⁷ *Id.* at 59.

⁹⁸ Harris, *supra* note 9, at 588.

⁹⁹ *Id.* at 588-589.

¹⁰⁰ *Id.*

discrimination, blacks continue to encounter unequal treatment and remain underrepresented in many professions, especially the legal profession.¹⁰¹ The legal profession has been and continues to be dominated by white males, and historically, blacks have had a notoriously difficult time gaining access to both legal education and employment.¹⁰² After providing some historical context on the progress of African Americans in the law, this section will go on to discuss the unique challenges that black attorneys face as a result of being “tokens” in a profession dominated by white males.¹⁰³

African Americans in the Law: A History

In 1980, despite black people accounting for more than eleven percent of the population, they accounted for fewer than eleven thousand lawyers (less than two percent) of the bar.¹⁰⁴ Out of those eleven thousand lawyers, only fifteen hundred worked in private practice.¹⁰⁵ For blacks, the path to entering the legal profession was wrought with discrimination, including being excluded from law schools.¹⁰⁶ After the Civil War, black law schools, such as Howard

¹⁰¹Though blacks have succeeded in increasing their presence in a number of professions, “minority representation in the bar lags behind that of most other professions. According to the most recent data minorities constituted twenty-five percent of the civilian labor force, twenty-five percent of physicians, twenty-three percent of computer scientists, twenty percent of accountants, and eighteen percent of academics, compared to only ten percent of lawyers.” KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 476 (Aspen Publishers 2010).

¹⁰² Margaret M. Russell, *Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 767 (1996-1997).

¹⁰³ *Id.*

¹⁰⁴ J. Clay Smith, *Career Patterns of Black Lawyers in the 1980s*, 7 BLACK L.J. 75, 75 (1981-1982). The fact that black people account for only two percent of lawyers at the bar is not a significant improvement from the figures calculated in 1934, in which blacks comprised only .007 percent of the lawyer population in America.

¹⁰⁵ Out of those fifteen hundred black lawyers working in private practice, only one hundred were female. The majority of black lawyers in the 1980s worked in government and public interest. This remains true today. *Id.* at 76.

¹⁰⁶ Ralph R. Smith, *Great Expectations and Dubious Results: A Pessimistic Prognosis for the Black Lawyer*, 7 BLACK L.J. 82, 82-85 (1981-1982).

University, were established in order to give black students a chance to enter the legal profession, at a time when white law schools refused to admit blacks.¹⁰⁷ Throughout the twentieth century, blacks fought for the right to be admitted to white only law schools. In 1950 in *Sweatt v. Painter*, the Supreme Court held that a segregated legal education for blacks was not substantially equal.¹⁰⁸

The Supreme Court acknowledged that sending blacks to a black only law school was condemning them to a lower caliber of education. The Court held that few students and no one who has practiced law would choose to study in a vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned...the law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses...with such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas.¹⁰⁹

Sweatt, theoretically, gave blacks the opportunity to apply and attend the nation's white law schools.¹¹⁰ Despite the Supreme Court holding in *Sweatt*, black students' enrollment in law school would not significantly increase until more than a decade later, when the Civil Rights Movement not only encouraged blacks to effect change through the law, but opened up more opportunities for them to do so.¹¹¹ In the nine-year period between 1969 and 1978, black enrollment in law school increased from 2,933 to 9,922.¹¹² In 2003, another great stride for

¹⁰⁷ Howard University Law School is considered to have led one of the first "efforts to attracting blacks to the legal profession." The law school opened in 1869 and "had trained 328 of the 728 black lawyers in the country by 1900." *Id.* at 83 (citing Kellis E. Parker and Betty J. Stebman, *Legal Education for Blacks*, 407 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 144, 145 (1973)).

¹⁰⁸ *Id.* at 86 (citing *Sweatt v. Painter*, 339 U.S. 629, 629 (1950)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ The author acknowledges other societal changes and events that contributed to increased enrollment in law school, including concerns about the quality of American education and juvenile delinquency. *Id.* at 87.

¹¹² *Id.*

black law students was made when the Supreme Court of the United States in *Grutter v. Bollinger*, held that “a race conscious admissions system was not unconstitutional” because the “law school had a compelling interest in attaining a diverse student body...and that the education’s benefits that diversity was designed to produce were substantial.”¹¹³

Despite an increased enrollment over the decades, on average, black students in law school receive lower scores on the LSAT and lower grades than white students.¹¹⁴ Additionally, the matriculation of black students into law school has steadily declined between 1993 and 2008.¹¹⁵ A Columbia study “found that among the 46, 500 law school matriculants in the fall of 2008,” only 3,392 were black.¹¹⁶ The article proposes that a large number of minority applicants are being denied due to low LSAT scores.¹¹⁷ These scores, however, are not related to the skills tested by the LSAT, but rather to the “race and culture-based barriers faced by [black students] at these law schools.”¹¹⁸ The performance of black students in law school reflects their “limited access to information from other students about the basics of class preparation, exam

¹¹³ In *Grutter v. Bollinger*, Grutter, a white applicant, was denied admission to the University of Michigan Law School and brought suit claiming that the law school used race a “predominant factor, giving applicants belonging to certain minority groups a significantly greater chance of admission.” *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003).

¹¹⁴ Elizabeth M. Iglesias, et. al., *Labor and Employment in the Academy—A Critical Look at the Ivory Tower: Proceedings of the 2002 Annual Meeting of the Association of American Law Schools, Joint Program of the Section on Labor Relations and Employment Law and Section on Minority Groups*, 6 EMPL. RTS. & EMPLOY. POL’Y J. 129, 172 (2002).

¹¹⁵ Tamar Lewin, *Law School Admissions Lag Among Minorities*, N.Y. TIMES, Jan. 7, 2010, at A22.

¹¹⁶ *Id.* The fact that statistics show a decline in the number of blacks and minorities matriculating into law school is especially surprising considering that the Supreme Court of the United States “ruled in 2003, in *Grutter v. Bollinger*, that race can be taken into account in law school admissions because the diversity of the student body is a compelling state interest.” *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003)).

¹¹⁷ *Id.*

¹¹⁸ African Americans scored on average 9.2 LSAT points lower than whites. These statistics “reveal that racial and cultural bias [are] built into the LSAT, bias that leads to the rejection by many, if not most, American law schools of talented and fully qualified applicants of color.” Iglesias, *supra* note 114, at 172.

preparation, exam taking, and study groups.”¹¹⁹ Black students also experience both “overt and subtle racial insults and exclusion,” and in some cases isolation.¹²⁰ Thus, both subtle and overt racism color the experience of black students in law school and inevitably, follows them into their careers as lawyers.

Obstacles Faced by Black Attorneys

Regardless of strides and improvements in the enrollment of black students in law school, black attorneys in the United States remain underrepresented in the legal profession, accounting for only ten percent of lawyers.¹²¹ In her essay, *Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straightjacket of Legal Practice*, Margaret Russell states that the number of black lawyers is “just high enough to undermine claims of white racial exclusivity in the profession, yet far too low to facilitate the comforting sense of belonging or even anonymity that attaches quite naturally to white lawyers.”¹²² Being “tokens” in a profession dominated by white men presents black attorneys with the unique challenge of “behaving as though the legal profession is integrated, colorblind, and even raceless, yet gratefully take on the burdens of role modeling...and otherwise representing their race on the occasional race committee.”¹²³ In addition to the challenges caused by their “token” status, black attorneys encounter discrimination and must navigate and dispel assumptions based on stereotypes.¹²⁴ Margaret Russell argues that in dealing with these obstacles, blacks are restricted to two options rooted in their race: (1) the “assimilationist or sellout” option, which involves claiming the irrelevance of

¹¹⁹ *Id.* at 173.

¹²⁰ *Id.*

¹²¹ BARTLETT & RHODE, *supra* note 101, at 476.

¹²² Russell, *supra* note 102, at 767.

¹²³ *Id.*

¹²⁴ “New York Judicial Commission on Minorities found that fourteen percent of its surveyed litigators asserted that judges, lawyers, or courtroom personnel publicly repeat ethnic jokes, use racial epithets, or make demeaning remarks.” *Id.* at 769.

race, or perhaps even denying so vehemently that racism is at issue;” or (2) “playing the race card,” in which one “raises racism as an issue, thereby risking that one is recklessly pandering to racial tensions.”¹²⁵

Examining the actions of black attorneys under this dichotomy “straitjackets [them] by stereotyping and unnecessarily restricting their choices of potential advocacy strategies.”¹²⁶

Black attorneys are either considered to be avid defenders of their race, or are accused of turning their backs on it. They are automatically expected to be responsible to and representative of their race; and any deviation from that expectation is considered to be “selling out.”¹²⁷ The actions of black attorneys is scrutinized; and their professionalism is often questioned, as they are assumed not to be capable of objectivity and impartiality when it comes to issues and cases concerning race.¹²⁸ In contrast, the professional objectivity of white attorneys is rarely questioned nor is how their experiences as white people may come to bear on their decisions. As a minority in a profession dominated by whites, black attorneys are constantly aware of the high visibility of their race, a concern that their white peers do not share.¹²⁹

Russell proposes that as “tokens,” black lawyers “often face confinement along an extremely narrow continuum of stereotypical identities.”¹³⁰ If black attorneys choose a practice area that is not typically perceived as working towards a goal of racial justice, such as corporate law or criminal prosecution, “dominant popular discourse pigeonholes them as assimilationist,

¹²⁵ *Id.* at 775.

¹²⁶ *Id.* at 774.

¹²⁷ *Id.*

¹²⁸ Russell recounts the experience of Judge Leon Higginbotham in which defendants in *Pennsylvania v. Local Union 542* called for him to recuse himself from a class action suit brought under the Civil Rights Act. The defendants argued that Judge Higginbotham’s “status as a prominent Black civil rights scholar and advocate rendered him unqualified to adjudicate claims of race discrimination in a fair and impartial manner.” *Id.* at 775.

¹²⁹ *Id.*

¹³⁰ *Id.* at 782.

colorblind, mainstream, conservative, or sellouts, all of which reinforce the ideology that such individuals are divorced from their blackness.”¹³¹ At the other end of the continuum are the black lawyers who go into careers such as civil rights or criminal defense, whose ethics and professionalism are perceived as being “compromised” by their race.¹³² Russell refers to these two identities as the “Darden Dilemma and the Cochran Conundrum.”¹³³ The “Darden dilemma,” generally viewed as the “conflict of a black prosecutor’s loyalty to justice versus obeisance to anti-white racism in black communities,” is assumed to be a product of the black community.¹³⁴ Russell instead redefines the “Darden Dilemma,” not as a product of the black community, but as “an unavoidable structural component of a legal system originated and maintained under racial hierarchy.”¹³⁵

In contrast to the “Darden Dilemma,” Russell references the “Cochran Conundrum,” another set of constraints imposed on black lawyers.¹³⁶ The “Cochran Conundrum” pertains to the dilemma facing black attorneys who openly address “issues of racism relevant to a particular case.”¹³⁷ These attorneys are often accused of “playing the race card,” and “unfairly skewing reasonable debate on the merits of a case by insisting that racism is a relevant issue in an

¹³¹ *Id.*

¹³² *Id.* at 783.

¹³³ Margaret Russell is referring to Christopher Darden, the prosecutor in the O.J. Simpson trial, and Johnnie Cochran, the defense counsel in the trial. In reference to the “Darden Dilemma,” Margaret quotes from Christopher Darden’s memoir: “I understand that some black prosecutors have a name for the pressure they feel from those in the community who criticize them for standing up and convicting black criminals. They call it the ‘Darden Dilemma.’” *Id.* at 773, 779 (quoting Christopher Darden & Jess Walter, *In Contempt*, HARPER 472-473 (1996)).

¹³⁴ *Id.* at 784.

¹³⁵ *Id.*

¹³⁶ *Id.* at 788.

¹³⁷ *Id.*

otherwise raceless context.”¹³⁸ Thus, whether a black attorney is deemed an “Uncle Tom,” or accused of “playing the race card,” their professional growth and decisionmaking is stifled and called into question by racial pressures and implications that their white peers do not have the burden of shouldering.

Women in the Law

Women, like blacks, have “faced locked doors in every quarter of the legal profession.”¹³⁹ “Most of the women legal pioneers faced a profession and a society that espoused what has been called ‘The Cult of Domesticity,’ a view that by nature” women were more suited for “motherhood and home life,” and therefore unsuitable for the practice of law.¹⁴⁰ As such, women have been repeatedly denied access to the bar.¹⁴¹ In 1875, the Wisconsin Supreme Court denied Lavinia Goodwell admission to the state bar, “declaring that the practice of law was unfit for the female character...and to expose women to the brutal, repulsive, and obscene events of courtroom life would shock man’s reverence for womanhood and relax the public’s sense of decency.”¹⁴² Similarly, in 1869, an Illinois court denied Myra Bradwell admission to the Illinois bar “because as a married woman her contracts were not binding, and

¹³⁸ Russell makes a observation regarding Cochran’s representation of O.J Simpson in the infamous murder trial. That is, “outside the context of race (both Cochran’s and his client’s race), Cochran’s strategy might have been evaluated by his critics in more conventional terms as a zealous defense attorney’s claim that the bias of a key prosecution witness was a highly relevant factor in assessing the prosecution’s case; but because race powerfully affected public perceptions of his lawyering role, he became responsible for representing race itself.” *Id.* at 789.

¹³⁹In this speech, Hon. Ruth Bader Ginsburg recounts some of her personal experiences. She recalls that when she entered law school in 1956, the dean hosted a dinner for the “nine women entering a class of five hundred,” and asked them “why they were in law school occupying a seat that could be held by a man?” Hon. Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 9 (1989).

¹⁴⁰ Sandra Day O’Connor, *Portia’s Progress*, 66 N.Y.U. L. Rev. 1546, 1547 (1991).

¹⁴¹ *Id.*

¹⁴² *Id.*

contracts were the essence of an attorney-client relationship.”¹⁴³ Although women are no longer blatantly denied admission to the bar, they still face gender discrimination and stereotypes that stunt their progress and presence in the legal profession.¹⁴⁴

Statistically, women have experienced great improvements in their acceptance and presence in the legal profession. Since 1960, the number of female lawyers in the United States has experienced a dramatic increase.¹⁴⁵ In 1970, there were thirteen thousand female lawyers, accounting for 4.7% of the profession.¹⁴⁶ By 1980, this number increased to sixty-two thousand accounting for twelve percent of the profession.¹⁴⁷ In 2000, women accounted for twenty-seven percent of lawyers in the United States.¹⁴⁸ In addition to a growing presence in the legal profession, women now account for fifty percent of law students in the nation, and some speculate that they will soon account for fifty percent of the profession.¹⁴⁹

Despite great strides in law school enrollment and admittance to the bar, women are still underrepresented in the legal profession. Female lawyers “are concentrated in low-status practice areas, are underrepresented within the elite of [the profession], even in areas in which women lawyers constitute a majority of practitioners, and are paid less than their male

¹⁴³ Bradwell took her fight to the Supreme Court of the United States, which affirmed the ruling of the Illinois court. *Id.* (citing *Bradwell v. People of State of Illinois*, 83 U.S. 130, 130 (1872)).

¹⁴⁴ Linda Liefland, *Career Patterns of Male and Female Lawyers*, 35 BUFF. L. REV. 601, 601 (1986).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ These statistics contrast sharply with those of the eighteenth century when women were not permitted to practice law. Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2250 (2010).

¹⁴⁹ *Id.* at 2251.

counterparts for comparable positions and work.”¹⁵⁰ Overall, American law schools produce a “relatively equal number of qualified male and female attorneys and firms generally hire women associates in numbers correlative to the talent pool.”¹⁵¹ Regardless of this seemingly “equal representation” in the legal profession, female lawyers do not reach partnership at the same rate as their male counterparts.¹⁵² In 1988, women comprised less than eight percent of partners at large firms.¹⁵³ In 2007, women accounted for only sixteen percent of equity partners, despite comprising fifty percent of the associate class.¹⁵⁴

Obstacles faced by Women in the Legal Profession

The disparity between the amount of men and women in upper-level positions within the legal profession can be attributed to the presence of negative stereotypes, “lack of mentorship and support networks, inhospitable workplace structures, and sexual harassment.”¹⁵⁵ Female lawyers are subject to a number of stereotypes, including but not limited to assumptions that women are incompetent and lack “assertiveness, competitiveness, commitment to the firm and clients, and business literacy.”¹⁵⁶ Furthermore, female lawyers are forced to face the assumption that that “their commitment to their family and children is inconsistent and incompatible with their loyalty to the practice.”¹⁵⁷ Specifically, being a wife and mother is viewed as a weakness that inhibits women from being fully available and responsible to the firm’s clients.¹⁵⁸ “As a result of these exaggerated beliefs, male lawyers, historically the powerful decision makers

¹⁵⁰ *Id.*

¹⁵¹ Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?* 76 *FORDHAM L. REV.* 1941, 1944 (2007-2008).

¹⁵² *Id.*

¹⁵³ *Id.* at 1945.

¹⁵⁴ *Id.* at 1946.

¹⁵⁵ Wald, *supra* note 148, at 2256.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2274.

¹⁵⁸ *Id.*

within large firms, conclude that women lawyers are a poor fit for the firm, have a low likelihood of succeeding, and represent a higher risk of leaving the firm.”¹⁵⁹ Thus, they often focus mentoring and training efforts on the male lawyers, giving them more “quality” assignments.¹⁶⁰ Mentors play a significant role in “advancing a junior associate’s career,” by “providing subject-matter expertise, acting as a reference source, offering informal insight and analysis of the firm’s politics and inner workings, and providing the necessary support and advocacy on behalf of the associate for promotions.”¹⁶¹ Additionally, in trying to navigate these stereotypes, female lawyers face a “double bind” in which female lawyers who adopt an assertive attitude in order to refute assumptions that female lawyers lack assertiveness are seen as being “overly aggressive or masculine, and those that avoid confrontation are seen as “ineffective or weak.”¹⁶² The assumption of these stereotypes inhibits the ability of the female lawyer to advance in the firm and allows the legal profession to continue to be dominated by white males.¹⁶³

This paper will now examine issues facing black female attorneys and the obstacles that they face as a result of the double bind of race and gender discrimination.

Black Female Attorneys

Black Women in the Law: A History

Participating in the workforce is not a new phenomenon for black women. Throughout history, black women have had to assume the role of both provider and caretaker in the black family.¹⁶⁴ Often, as a result of poor education, race, and sex discrimination, black women have

¹⁵⁹ *Id.* at 2275.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Kaye & Reddy, *supra* note 151, at 1955.

¹⁶³ *Id.*

¹⁶⁴ King, *supra* note 12, at 49.

had to work in remedial, low-paying jobs.¹⁶⁵ However, since the 19th century, black women have been slowly, but surely, breaking down walls to enter the legal field.¹⁶⁶

Charlotte E. Ray, the first black female lawyer, graduated from Howard Law School and was admitted to the D.C. bar in 1872.¹⁶⁷ Ray opened her legal practice and built a “reputation for being one of the best lawyers in the area of corporations law.” However, “in spite of her outstanding achievement and recognition...[she] was unable to maintain a law practice...due to racism and sexism.”¹⁶⁸ As decades passed, however, black women built upon Charlotte E. Ray’s legacy and continued to make strides in the legal profession.¹⁶⁹ In 1940, Helen Elsie Austin, along with Henry J. Richardson, opened the first black law firm in the state of Indiana to be headed by a black man and woman; and in 1946, Jane Cleo Marshall, the first black woman to graduate from the University of Michigan Law School, became the “first full-time female law professor at Howard University School of Law.”¹⁷⁰

Despite the great strides that black women have made in the area, they continue to “struggle to overcome both racial and gender discrimination.”¹⁷¹ As a field that is dominated by white males, the legal profession “has been extremely hierarchical in nature, granting women and minorities only very limited access to its more prestigious and remunerative positions.”¹⁷² Thus, black women’s progression in the legal profession has been greatly prohibited by both sex and race discrimination, as they have faced discrimination not only at the hands of white male

¹⁶⁵ *Id.* at 50.

¹⁶⁶ J. Clay Smith, Jr. *Black Women Lawyers: 125 Years at the Bar; 100 Years in the Legal Academy*, 40 HOWARD L.J. 365, 366 (1996-1997).

¹⁶⁷ Ray was also the first black woman to graduate from an American law school. *Id.* at 371.

¹⁶⁸ *Id.* at 371-372.

¹⁶⁹ *Id.* at 376.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 378.

¹⁷² *Id.*

lawyers, but some black male lawyers as well.¹⁷³ Furthermore, “because there have never been more black women lawyers than white women lawyers in the legal profession, it is likely that they also trail their white sisters in several areas in the profession.”¹⁷⁴

Impact of Race and Gender Bias on Black Female Lawyers

The history and struggle of black female lawyers makes it clear that race and sex discrimination have been pervasive in the legal profession. “Black women in the law are, above all, a lonely bunch.”¹⁷⁵ In Washington D.C. in 1948, a law graduate described the “apartheid in the courthouse” in which “young D.C. lawyers put their name on court sanctioned list in order to get business referrals from the court. All the black business went to black lawyers, and the more lucrative white business went to young whites.”¹⁷⁶ Additionally, judges would comment that a case was too big or inappropriate for a black woman.¹⁷⁷ Such discrimination was not uncommon and often forced black women lawyers to change practice areas or leave the profession all together.¹⁷⁸

Even in the present, black women lawyers face challenges on a daily basis, from being mistaken for court reporters, or defendants, or being harassed about their race.¹⁷⁹ As a result of bias and discrimination, black women lawyers often go into lower-paying practice areas or take

¹⁷³ *Id.* at 374.

¹⁷⁴ *Id.* at 379.

¹⁷⁵ Burleigh, *supra* note 93, at 64.

¹⁷⁶ *Black Women Lawyers*, *supra* note 166, at 374.

¹⁷⁷ Referring to an incident in which a judge told Cora Walker, that a woman shouldn't have a case that size after she won a large award for her client. When Cora responded that it was her client's choice the judge cited her for contempt. *Id.* at 378.

¹⁷⁸ *Id.*

¹⁷⁹ Burleigh, *supra* note 93, at 64. Recounting the experiences of Muzette Hill, Paulette Brown, and Joyce Hughes. Muzette Hill, an associate at a Chicago law firm, was mistaken as a court reporter at every deposition that she ever attended. Paulette Brown, a 1976 graduate from Seton Law School quit her second corporate law job after being constantly harassed about her race. Joyce Hughes, a professor at Northwestern University Law, was mistaken for a defendant at her first court appearance.

public interest jobs where there are greater numbers of black women.¹⁸⁰ Additionally, black women lawyers, who remain in the private sector, often work for small firms or become solo practitioners.¹⁸¹ Although black women made great strides since Charlotte E. Ray was admitted to the bar in 1872, in 1987 black women only accounted for .8 percent (less than 6000) of the nation's lawyers.¹⁸² Though the numbers have improved, presently black women account for less than five percent of law firm partners, general counsel, and state and federal judges.¹⁸³ Black women remain represented in low numbers at the higher level of the legal profession, as one in eight black female associates will become partner, and black men account for twice as many partners as black women.¹⁸⁴

The statistics reveal that both race and gender bias are still very pervasive and remain barriers to the success of black women lawyers.¹⁸⁵ Black female attorneys encounter a similar race bias as that experienced by black men, as well as a similar gender bias experienced by white women. However, the black woman carries a double burden, occupying a unique space where they experience both simultaneously. Indeed, the problems faced by black women "are more ingrained than those faced by white women [or black men]."¹⁸⁶ The legal profession is "dominated by white males, so white females to them represent at least their mothers, or their wives or their daughter," and black men at least represent men.¹⁸⁷ Black women do not occupy a

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ BARTLETT & RHODE, *supra* note 101, at 476.

¹⁸⁴ *Id.*

¹⁸⁵ Wilma Williams Pinder, *When Will Black Women Lawyers Slay the Two-Headed Dragon: Racism and Gender Bias?* 20 PEPP. L. REV. 1053, 1058 (1993).

¹⁸⁶ Burleigh, *supra* note 93, at 65.

¹⁸⁷ *Id.*

space where they can call on any type of “sameness” to relate to white males.¹⁸⁸ Black female lawyers often have their “credibility challenged,” under assumptions that they are not “competent” or that affirmative action is the only reason for their academic and professional success.¹⁸⁹ “For black women who train in law school, excel academically, encountering this type of rudeness in the subtle world of law can be devastating,” and results in many cases in the women quitting the profession or leaving private practice to take lower paying government or public interest jobs.¹⁹⁰

Since the 1990s, the American Bar Association has created several commissions focused on the challenges facing minorities and women in the legal profession.¹⁹¹ As a result of declining retention rates of women of color in private law firms, in 2003 the ABA launched its “Women of Color in the Legal Profession Research Initiative, a comprehensive study of the unique experiences and concerns of women of color in private law firms that included a national survey and focus groups.”¹⁹² In 2006, the ABA Commission on Women in the Profession published the results of the research initiative and found that “women of color experience a double whammy of gender and race, face exclusion from informal networks, inadequate institutional support, and challenges to their authority and credibility...and often feel isolated and alienated.”¹⁹³ According to the report, “two-thirds of the women of color but only four percent of white men were excluded from informal and formal networking opportunities...and felt lonely and deprived of colleagues with whom they could share important career-related

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 68.

¹⁹⁰ *Id.*

¹⁹¹ Pinder, *supra* note 185, at 1060.

¹⁹² According to the report, by 2005 “eighty-one percent of minority female associates had left their law firms within five years of being hired.” *Visible Invisibility: Women of Color in Law Firms*, ABA Comm. on Women in the Profession xi (Janet E. Gans Epner, ed. 2006).

¹⁹³ *Id.* at vii.

information.”¹⁹⁴ In addition to feelings of exclusion, “many women of color [in the study] felt they could not be themselves [and] that they downplayed and homogenized their gender and racial identities.”¹⁹⁵ Overall, the ABA report “demonstrates that the combination of being a racial and a gender minority has a particularly devastating effect on women of color’s personal and professional lives.”¹⁹⁶

The fact that the ABA felt the need to report on the unique challenges facing black women suggests recognition of the issue of intersectionality by the legal profession.¹⁹⁷ Additionally, “most major cities now have associations for black women lawyers [that] provide a backbone of support for lawyers who may be the only black women lawyer in the office.”¹⁹⁸ In fact, Chicago has had a support group since 1988, and New York and California at least a decade before then.¹⁹⁹ The existence of these support groups is another indication that the legal profession has recognized the unique needs of black women lawyers and is taking steps to provide them with support in dealing with and overcoming obstacles stemming from the intersectionality of race and gender discrimination.

Not only are black female lawyers often extremely underrepresented in the private sector, but the high visibility of both their race and gender often makes them “stick out like a sore thumb,” and subjects them to high levels of scrutiny, which their white and male peers do not encounter.²⁰⁰ The result is an increased pressure to do well, behave a certain way, or over-exert oneself to dispel negative stereotypes and prove one’s professional worth. Some black female

¹⁹⁴ *Id.* at xii.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at ix.

¹⁹⁷ Burleigh, *supra* note 93, at 66.

¹⁹⁸ *Id.* at 65.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

lawyers either leave the practice or their attempts to dispel stereotypes affect their work product negatively.²⁰¹ Although, many firms have increased their diversity efforts and often offer mentor and support groups for female employees, such efforts often suffer from the same inadequacies of essentialism feminism or critical race theory by ignoring the unique experience of black women and how the intersection of both race and gender bias differentiates their experience from that of white women and black men. Thus, although overt racism and gender bias have given way to more subtle discrimination, black female lawyers continue to fall through the cracks, and remain marginalized by a profession dominated by white males.

Conclusion

As gender and race minorities, black women experience both race and sex discrimination. By grouping black men and women into one homogenous group and treating women as one collective group, studies often ignore the unique experience of black women and how double discrimination affects their progress and place in society, and in affluent professions such as the law.²⁰² Since the 19th century, black female attorneys have been denied access to the bar, partner level success, and have experienced blatant discrimination.²⁰³ Although overt racism and sexism have given way to more subtle forms of discrimination, black women still remain underrepresented in the legal profession and struggle against the pressures of negative stereotypes.²⁰⁴ However, as the intersectionality of black women gains more scholarly attention,

²⁰¹ If black women lawyers are worried about being perceived as incompetent, or lazy, they may refuse to ask for help or take on more assignments. This of course may negatively impact their work product, causing their peers to believe that they are incompetent or lazy. Carbado & Gulati, *supra* note 30, at 1266.

²⁰² Harris, *supra* note 9, at 585.

²⁰³ Burleigh, *supra* note 93, at 65.

²⁰⁴ Carbado & Gulati, *supra* note 30, at 1266.

the legal profession has recognized the need for providing black female lawyers with greater support.²⁰⁵

Is There a Solution?

Although statistics continue to show that black females are underrepresented in the legal profession, the future is not dim. “Minority bars and groups, such as the National Association of Black Women,” provide black female attorneys with a support and resource system to deal with gender and race discrimination and pressures they may face as a result.²⁰⁶ Additionally, black female lawyers also benefit from minority commissions such as the ABA’s Commission on Opportunities for Minorities in the Profession.²⁰⁷ The Commission on Opportunities for Minorities focuses on “removing barriers to women and minorities in the profession,” as well as “widening opportunities for ethnic minorities in law school, private practice, and the judiciary.”²⁰⁸ The creation of committees such as the National Association of Black Women Attorneys also works to shed light on the unique issues facing black female attorneys, offer support and mentorship.²⁰⁹ Additionally, states such as California, Georgia, Illinois, New Jersey, and New York, have legal associations solely dedicated to providing resources for black female attorneys.²¹⁰ Many of these associations share a similar mission: “to identify and address issues and concerns unique to African American women lawyers and judges...and increase the

²⁰⁵ Burleigh, *supra* note 93, at 65.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Burleigh, *supra* note 93, at 68.

²¹⁰ California has the Black Women Lawyers Association of Los Angeles; Georgia has the Georgia Association of Black Women Attorneys; Illinois has the Black Women Lawyers of Greater Chicago, Inc.; New Jersey has the Association of Black Women Lawyers of New Jersey; and New York has the Association of Black Women Attorneys. *Minority Legal Associations*, American Bar Association, http://www.americanbar.org/groups/diversity/resources/minority_legal_associations.html.

participation of African American women throughout the legal system.”²¹¹ These associations provide support for black female attorneys through roundtable discussions, social events, fundraisers, law student outreach programs, and networking events, providing black female attorneys not only with an outlet to vent frustrations, but resources that can be used to further their careers as well.²¹² Furthermore, many law firms have begun to develop a “genuine interest in promoting and maintaining diversity in their workplaces.”²¹³

Despite this effort, more can be done not only to increase the presence of successful, black female lawyers in the legal profession, but also target their unique needs in efforts to increase retention and advancement. First and foremost, acknowledgment of the problem is crucial. In order to successfully address the unique problems facing black female attorneys, the legal profession needs to fully acknowledge that the combination of race and gender bias has a profound effect on black female attorneys. In its Commission on Women in the Profession, the ABA suggests that firms should “increase the awareness of issues of women of color through dialogue.”²¹⁴ Firms can increase awareness of the issues facing black female attorneys through “activities that promote dialogue,” as well as by enhancing their diversity training efforts.²¹⁵ Also important is an increase in scholarship on the unique experiences of black female lawyers, which would serve to increase awareness of the problems and challenges facing black female lawyers, and explain their underrepresentation in the legal profession.²¹⁶

²¹¹ Black Women Lawyers’ Association, *Mission Statement*, <http://www.bwla.org/>

²¹² *Id.*

²¹³ Pinder, *supra* note 185, at 1060.

²¹⁴ *Visible Invisibility*, *supra* note 192, at 39.

²¹⁵ *Id.*

²¹⁶ While writing this paper, I found the sources for scholarship specifically on black female lawyers scarce. In recent years, scholarship concerning female lawyers has ballooned, however, it seems that the experience of black women lawyers is once again being assumed to be identical to that of white women.

In addition to increased scholarship, the mentor and support groups that are provided to black female attorneys could also be enhanced. While the construction of mentor and support groups for minorities and women within firms are great advancements in work towards diversity, by grouping the minorities or the women together in these circles, one implies that “it is the responsibility solely of [minorities or females] to eradicate discrimination.”²¹⁷ The ABA recommends that firms should “address the success of women of color as a firm issue,” by “talking specifically about women of color as a category of success being measured in diversity initiatives, giving responsibility to practice group leaders to monitor and advance the careers of women of color in their practice areas, and making sure that women of color are being groomed for leadership positions in the firms the same way their white male counterparts are.”²¹⁸ In addition to the minority and gender based mentor and support efforts, firms may consider taking a more integrative approach, such as involving male attorneys in the mentor and support efforts of black female attorneys, or white attorneys in the diversity efforts for minority lawyers at the firm. Because white males account for a much higher percentage of senior associates and partners, their expertise and professional connections and wisdom are very valuable and could be used to help black female attorneys and other minority groups at the firm navigate the profession. Lastly, efforts to hire, retain, and advance successful, black female attorneys at firms should be instituted in order to increase the presence of black women lawyers, with the hope that “as more black women lawyers come on the scene, they will become commonplace, and although never a majority, less of a phenomenon.”²¹⁹ Through education, scholarship, and joint mentoring

²¹⁷ Russell, *supra* note 102, at 769.

²¹⁸ *Visible Invisibility*, *supra* note 192, at 38.

²¹⁹ Burleigh, *supra* note 93, at 68.

hopefully the day will come when the presence of a successful, black female lawyer is “not news.”²²⁰

²²⁰ *Id.*