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## ESSAY

### INTERSECTIONALITY AT 30: MAPPING THE MARGINS OF ANTI-ESSENTIALISM, INTERSECTIONALITY, AND DOMINANCE THEORY

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*2019 marks thirty years since the publication of Kimberlé Crenshaw's groundbreaking article, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. While scholars across the disciplines have engaged intersectionality from a range of theoretical and normative vantage points, there has been little effort to analyze intersectionality in relation to two other enormously influential theoretical frameworks: Angela Harris's critique of gender essentialism and Catharine MacKinnon's dominance theory. This Essay endeavors to fill that gap. Broadly articulated, our project is to map how anti-essentialism, dominance theory, and intersectionality converge and to articulate the places where they do not. In the context of doing so, we advance three core claims. First, scholars erroneously conflate intersectionality with anti-essentialism and thus erroneously perceive a strong opposition between intersectionality and dominance theory on the view that dominance theory is essentialist and that intersectionality is not. In the context of disaggregating intersectionality from anti-essentialism, we contest the view that feminism and critical theory must always avoid essentialism to achieve normative commitments to social transformation. Second, we argue that scholars have largely overlooked the fact that dominance theory and intersectionality share a critique of conceptions of equality structured around sameness and difference. Third, we contend that while there is an affiliation between dominance theory and intersectionality, there is also at least some tension between their respective framings of race and gender. We explore this tension by examining how intersectionality potentially stages a "soft" critique of MacKinnon's defense of dominance theory against charges of essentialism in her provocatively titled essay, From Practice to Theory, or What Is a White Woman, Anyway?*

*Our hope is that the Essay will both challenge the prevailing ways in which many scholars, including some feminists and critical race theorists, frame anti-essentialism, intersectionality, and dominance theory, and underscore the critical importance of attending to how racial power is gendered and gender subordination is racialized. Much is at stake with respect to the theoretical terrain we mean to cover. In addition to taking women's theorizing seriously and facilitating the production of knowledge in historically marginalized areas of legal scholarship, we believe that engagements with anti-essentialism, intersectionality, and dominance theory have profound implications for the substantive form and content of political organizing, civil rights advocacy, and legal reform initiatives. Indeed, underwriting our effort in this Essay is the view that how we theorize social problems, including the subordination of women, necessarily shapes the scope and content of our social justice imaginary — which is to say, our freedom dreams.*

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## INTRODUCTION

2019 marks thirty years since the publication of Professor Kimberlé Crenshaw's groundbreaking article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, which introduced the concept of intersectionality to legal theory.<sup>1</sup> Subsequent to the publication of *Demarginalizing*, scholars across the disciplines began mobilizing intersectionality from a range of theoretical and normative vantage points.<sup>2</sup> Recent scholarship has addressed intersectionality as applied to international humanitarian law,<sup>3</sup> intra-LGBT marginalization in the workplace,<sup>4</sup> African immigrant experiences in the United

<sup>1</sup> Kimberlé 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.

<sup>2</sup> See, e.g., ANNA CARASTATHIS, INTERSECTIONALITY 4 (2016) (discussing how intersectionality constitutes a profound challenge to “cognitive essentialism, binary categorization, and conceptual exclusion”); PATRICIA HILL COLLINS & SIRMA BILGE, INTERSECTIONALITY (2016) (analyzing the emergence and growth of the intersectional framework and its applicability to various topics in human rights, neoliberalism, identity politics, immigration, hip-hop, global social protest, diversity, and digital media); INTERSECTIONALITY & HIGHER EDUCATION (Lindsay A. Greyerbiehl, Donald Mitchell, Jr. & Charlana Y. Simmons eds., 2014) (examining intersectional practices, empirical research using intersectionality frameworks, and theoretical and conceptual chapters on intersectionality in the context of higher education); INTERSECTIONALITY (Patrick R. Grzanka ed., 2014) (charting the development of intersectionality as an intellectual and political movement in sociology and related fields by mapping its origins, reviewing its applications across disciplines and beyond academia, and exploring new directions for inquiry and activism); INTERSECTIONALITY AND SOCIAL CHANGE (Lynne M. Woehrle ed., 2014) (offering a collection of literature on social movements, conflicts, and changes that utilize an intersectional sociological analysis); SITUATING INTERSECTIONALITY (Angelia R. Wilson ed., 2013) (highlighting the work of academics in the field of politics who employ intersectionality to articulate the ways political institutions, policies, and political engagement define, marginalize, and disempower); Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 811 (2013) (challenging narrow scholarly readings of intersectionality by engaging an intersectional analysis of men, masculinity, whiteness, and sexual orientation to demonstrate the ways in which formal equality frameworks produce and entrench normative gender identities); Devon W. Carbado et al., *Intersectionality: Mapping the Movements of a Theory*, 10 DU BOIS REV.: SOC. SCI. RES. ON RACE 303, 304–05 (2013) (identifying six themes that emerged from intersectionality's movements within and across disciplines: its status as a work in progress; its adaptability to various disciplines and subfields; its global dimensionality; its engagement with diverse experiences and power structures; “the generative power of the continued interrogation of Black women's experiences,” *id.* at 305; and its deployment in social movements); Sumi Cho, *Post-Intersectionality: The Curious Reception of Intersectionality in Legal Scholarship*, 10 DU BOIS REV.: SOC. SCI. RES. ON RACE 385, 390–91 (2013) (describing the intellectual and institutional history that gave rise to “post-intersectionality” masculinities literature, *id.* at 391, and critiquing that literature).

<sup>3</sup> See Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 HARV. HUM. RTS. J. 205, 206 (2015).

<sup>4</sup> See Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 DUKE J. GENDER L. & POL'Y 107, 108 (2017).

States,<sup>5</sup> Asian American women,<sup>6</sup> the elderly,<sup>7</sup> intragroup preferencing,<sup>8</sup> and protected classes in discrimination law.<sup>9</sup> Further, scholars have leveled substantive critiques of intersectionality by forwarding other theories, including assemblage theory.<sup>10</sup> Yet there have been few attempts to analyze intersectionality in relation to two other enormously influential theoretical frameworks: Professor Angela Harris's critique of gender essentialism<sup>11</sup> and Professor Catharine MacKinnon's dominance theory.<sup>12</sup> Thus this Essay.<sup>13</sup> Broadly articulated, our project is to map how anti-essentialism, dominance theory, and intersectionality converge and to identify the places where they do not. Theorizing a relationship among anti-essentialism, dominance theory, and intersectionality is no easy task and is unavoidably fraught with controversy.<sup>14</sup> Thus, we are confident

<sup>5</sup> See Bolatito Kolawole, *African Immigrants, Intersectionality, and the Increasing Need for Visibility in the Current Immigration Debate*, 7 COLUM. J. RACE & L. 373, 376–77 (2017).

<sup>6</sup> See Peggy Li, *Recent Developments, Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 BERKELEY J. GENDER L. & JUST. 140, 141–42 (2014).

<sup>7</sup> See Jourdan Day, Note, *Closing the Loophole — Why Intersectional Claims Are Needed to Address Discrimination Against Older Women*, 75 OHIO ST. L.J. 447, 448–49 (2014).

<sup>8</sup> See Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 658–59, 668 (2010).

<sup>9</sup> See Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 102–05 (2017).

<sup>10</sup> Jasbir K. Puar, *"I Would Rather Be a Cyborg than a Goddess": Becoming-Intersectional in Assemblage Theory*, 2 PHILOSOPHIA 49 (2012).

<sup>11</sup> Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

<sup>12</sup> CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 40–45 (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215–34 (1989).

<sup>13</sup> To be clear, ours is not the first article to mark distinctions between anti-essentialist and intersectional views of dominance theory or to note that intersectionality and dominance theory share a critique of liberal conceptions of equality framed around sameness and difference. See Gerald Torres, *Sex Lex: Creating a Discourse*, 46 TULSA L. REV. 45, 55–56 (2010) (noting that “there was a misunderstanding about the critical content of Professor MacKinnon’s methodological intervention . . . rooted in the same critique of essentialism that liberal feminists (and non-feminists) launched,” *id.* at 55, with many readers missing the fact that “Professor Crenshaw’s work . . . was consistent, methodologically, with Professor MacKinnon’s,” *id.* at 56). Professor Cheryl Nelson Butler, citing Professor Gerald Torres, also considers that there is “common ground” between MacKinnon and Crenshaw in that dominance theory and intersectionality “both rely on a critique of power.” Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America*, 27 YALE J.L. & FEMINISM 95, 122 (2015). However, the relationship among anti-essentialism, dominance theory, and intersectionality was not the primary focus of these articles.

<sup>14</sup> For an indication of some of the controversial debates about intersectionality, see Carbado, *supra* note 2, at 811–12; Carbado et al., *supra* note 2, at 303; and Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 SIGNS: J. WOMEN CULTURE & SOC’Y 785, 787–91 (2013). For an example of some of the controversy around anti-essentialism and intersectionality, see Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 21 (1995). There are also numerous examples of the controversy around dominance theory and anti-essentialism. See, e.g., Martha R. Mahoney, *Whiteness and Women, in Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217 (1993); Archana Parashar, *Essentialism or Pluralism: The Future of Legal Feminism*, 6 CAN. J. WOMEN & L. 328, 337 (1993) (arguing that Harris’s critique “must go further than just pointing out that black women’s oppression is

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that the reader — wherever she theoretically or normatively sits — will find something in our analysis with which to disagree. Our hope is that these disagreements will be generative. At a minimum, they can serve as a predicate for clarifying, if not resolving, important normative and conceptual differences that bear on longstanding debates about various forms of inequality.

This Essay advances three core claims. First, intersectionality is often erroneously conflated with anti-essentialism and thus many readers erroneously perceive a strong opposition between intersectionality and dominance theory on the view that dominance theory is essentialist and that intersectionality is not. In the context of disaggregating intersectionality from anti-essentialism, we contest the view that feminism and critical theory must always avoid essentialism to achieve normative commitments to social transformation. Second, we argue that scholars have largely overlooked the fact that dominance theory and intersectionality share a critique of conceptions of equality structured around sameness and difference. Third, we contend that while there is an affiliation between dominance theory and intersectionality, there is also at least some tension between their respective framings of race and gender. We explore this tension by examining how intersectionality potentially stages a “soft” critique of MacKinnon’s defense of dominance theory against charges of essentialism in her provocatively titled essay, *From Practice to Theory, or What Is a White Woman Anyway?*<sup>15</sup> Our analysis here will include a response to MacKinnon’s implicit assertion that Black women might be more politically aligned with Black men than they are with white women<sup>16</sup> and a response to Crenshaw’s assertion that Black women’s critiques of the whiteness of feminism might be significantly more robust than their critiques of the maleness of anti-racism.<sup>17</sup> Assuming the empirical validity of both claims, we explore possible contributing factors as well as some tentative normative implications.

Our hope is that the Essay will challenge the dominant ways in which anti-essentialism is framed, contest the view that feminism and critical theory can avoid essentialism, put dominance theory in conversation with Critical Race Theory (CRT), and broaden and complicate standard conceptualizations of intersectionality.

Before we proceed to elaborate the preceding ideas, two caveats are in order. First, we will not offer a full articulation of anti-essentialism,

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a distinct experience”); Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 288–89 (1999) (laying out a critique of Harris).

<sup>15</sup> Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13 (1991).

<sup>16</sup> See *id.* at 21–22.

<sup>17</sup> See Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151, 154–55 (2010).

intersectionality, or dominance theory. Our paper is not an introduction to these frameworks; indeed, we assume that readers have some familiarity with the ideas at the heart of each. Second, although we have expressed our interventions in the form of “claims,” we do not intend to signal that we are wedded to them. We encourage the reader to read our ideas as provisional rather than as fully worked-out theoretical arguments. We are less interested in persuading the reader that our analysis is right than we are in provoking a more robust and nuanced debate regarding the relationship among anti-essentialism, dominance theory, and intersectionality.

Much is at stake with respect to the theoretical terrain we mean to cover. In addition to taking the ideas of women seriously and facilitating the production of knowledge in areas that the legal academy has historically marginalized, how anti-essentialism, intersectionality, and dominance theory are directly and implicitly understood and mobilized can profoundly shape the substantive form and content of political organizing, civil rights advocacy, and legal reform initiatives. Which is to say, in addition to being relevant to a wide range of academic literatures, these important strands of critical theory are highly salient in contemporary social movements. Consider one recent example: social-movement organizing that supported the Women’s March.

The evolution of the Women’s March in response to the election of Donald Trump to the presidency posed a range of questions, issues, and debates implicating anti-essentialism, intersectionality, and dominance theory. The very concept of a women’s march was contested: Why a *women’s* march? Who were the women called upon to participate?<sup>18</sup> Which women would lead it? On the issue of leadership, some women specifically invoked intersectionality to argue for the inclusion of Black, Latinx, Muslim, and queer activists as leaders.<sup>19</sup>

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<sup>18</sup> See, e.g., Marie Solis, *How the Women’s March’s “Genital-Based Feminism” Isolated the Transgender Community*, MIC (Jan. 23, 2017), <https://mic.com/articles/166273/how-the-women-s-march-s-genital-based-feminism-isolated-the-transgender-community> [https://perma.cc/HC29-6E9A] (reporting that despite the call for inclusiveness and the presence of noted trans activists like Janet Mock, the symbol of the “pussy hat” and its prevalence conveyed to some transwomen that a vagina was essential to womanhood).

<sup>19</sup> The call for the March was initiated by Teresa Shook and other women on Facebook. Perry Stein, *The Woman Who Started the Women’s March with a Facebook Post Reflects: “It Was Mind-Boggling,”* WASH. POST (Jan. 31, 2017), <https://wapo.st/2jnHiVJ> [https://perma.cc/G8VB-QGZX]. As thousands began to respond, there was an effort to consolidate organizing and to address what appeared to be the predominately white cisgender character of the initial conveners. In this context, the call for an intersectional approach was raised. Jenée Desmond-Harris, *To Understand the Women’s March on Washington, You Need to Understand Intersectional Feminism*, VOX (Jan. 21, 2017, 10:00 AM), <https://www.vox.com/identities/2017/1/17/14267766/womens-march-on-washington-inauguration-trump-feminism-intersectionality-race-class> [https://perma.cc/3ET2-Z847] (discussing how the debate around intersectionality was “at the core of criticism of the march, both by would-be participants and by conservative critics”). Debates around race catalyzed a change in

More critically, the terms of coalitional alignment were sharply disputed: What issues, questions, and principles did the movement embrace?<sup>20</sup> What issues are “women’s” issues? Are they defined by reproductive rights or equal employment opportunity? These debates led to the articulation of a broad agenda that included issues like criminal justice reform, anti-police violence advocacy, workers’ rights, immigrants’ rights, and environmental justice.<sup>21</sup>

While the disputes over the Women’s March did not, as best we can tell, specifically invoke dominance feminism or anti-essentialism by name, the ideas and questions that circulated in those disputes track many of the debates about dominance theory and anti-essentialism. In this respect, the politics of the Women’s March is a salient example of the point that we advanced earlier regarding theory and practice,

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leadership to include women of color and queer women, invigorating some participants while alienating others. See Farah Stockman, *Women’s March on Washington Opens Contentious Dialogues About Race*, N.Y. TIMES (Jan. 9, 2017), <https://nyti.ms/2ibJqXv> [<https://perma.cc/8K5X-VY8L>]. Ultimately, the four co-chairs were Linda Sarsour, then Executive Director of the Arab American Association of New York; Tamika D. Mallory, political organizer and former Executive Director of the National Action Network; Carmen Perez, Executive Director of The Gathering for Justice, a political action group; and Bob Bland, a fashion designer who focuses on ethical manufacturing. *National Team*, WOMEN’S MARCH, <https://womensmarch.com/team> [<https://perma.cc/S2PB-S96G>]. Planned Parenthood was an official partner of the March. Kelley Robinson, *Join Us at the Women’s March on Washington and Events Nationwide!*, PLANNED PARENTHOOD ACTION FUND (Jan. 10, 2017, 5:58 PM), <https://www.plannedparenthoodaction.org/blog/join-us-at-the-womens-march-on-washington-and-events-nationwide> [<https://perma.cc/V2GA-B9DC>].

<sup>20</sup> The inclusive leadership structure was the product of debate over representation but was also a contestation over the focus and objectives of the March. See, e.g., Neha Thirani Bagri, *A Politically Important Group of Women Feels Completely Unwelcome at the Women’s March on Washington*, QUARTZ (Jan. 20, 2017), <https://qz.com/890798/womens-march-abortion> [<https://perma.cc/CRG9-4LNJ>] (reporting on dispute over whether New Wave Feminists, a group of women who identify as anti-abortion feminists, should be included as official partners, with some prominent feminists rejecting the notion that intersectional feminism required embrace of an anti-abortion agenda). Moreover, it was important to many women of color that the objectives of the March be defined to include more than those typically associated with women’s equality. For example, veteran organizer Alicia Garza of Black Lives Matter expressed her ambivalence about participating in a march organized by women many of whom had neither acknowledged the 1963 March on Washington for Jobs and Freedom as the historical precedent, nor participated in organizing against police killings, homelessness, and mass incarceration. See Alicia Garza, *Our Cynicism Will Not Build a Movement. Collaboration Will.*, MIC (Jan. 26, 2017), <https://mic.com/articles/166720/blm-co-founder-protesting-isnt-about-who-can-be-the-most-radical-its-about-winning> [<https://perma.cc/UFH9-E6EU>]. Nevertheless, she made the decision to participate out of recognizing the urgent “need to build a movement across divides of class, race, gender, age, documentation, religion, and disability.” *Id.* The protest went global and an estimated half-million people marched on the capital, with millions more in cities across the country. See Erica Chenoweth & Jeremy Pressman, *This Is What We Learned by Counting the Women’s Marches*, WASH. POST (Feb. 7, 2017), <https://wapo.st/2jWnXWT> [<https://perma.cc/AVS6-2CDV>]; Tim Wallace & Alicia Parlapiano, *Crowd Scientists Say Women’s March in Washington Had 3 Times as Many People as Trump’s Inauguration*, N.Y. TIMES (Jan. 22, 2017), <https://nyti.ms/2jScWqp> [<https://perma.cc/ZFQ5-3FGM>].

<sup>21</sup> Ultimately, the mission of the March embraced a broad progressive vision. See *Mission and Principles*, WOMEN’S MARCH, <https://womensmarch.com/mission-and-principles> [<https://perma.cc/3QJC-NB43>].

namely, that how we theorize social problems, including the subordination of women, necessarily shapes the scope and content of our social-justice imaginary — which is to say, our freedom dreams.<sup>22</sup>

The remainder of our analysis proceeds in three Parts. We first discuss in Part I the relationship between intersectionality and anti-essentialism. In addition to showing how these two theories overlap in ways that many scholars appreciate, we also demonstrate how they diverge in ways that remain to be articulated. We then in Part II describe the relationship between dominance theory and intersectionality. While scholars have pressed what they perceive to be a divergence between these frameworks, they have failed to mark their sites of convergence. Finally, we discuss in Part III tensions between dominance theory and intersectionality. Whether or not one views dominance theory as essentialist, the tensions we describe transcend that concern.

### I. DISAGGREGATING INTERSECTIONALITY AND ANTI-ESSENTIALISM

Among the central features of modern feminism is a sustained critique of what has been called essentialism in theorizing about women's subordination. Often these criticisms have taken the form of challenging "universalist" claims about women that fail to consider the particular experiences of women who are not raced as white, not economically privileged, not able-bodied, not heterosexual, not immigrant, not gender-conforming, and not Christian. One prominent example is Professor Angela Harris's enormously influential 1990 article, *Race and Essentialism in Feminist Legal Theory*.<sup>23</sup> These critiques have frequently been conflated with Professor Kimberlé Crenshaw's theory of intersectionality,<sup>24</sup> which was first articulated in 1989 in *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*.<sup>25</sup> While both Harris and Crenshaw drew explicitly on Black feminism<sup>26</sup> and challenged the marginalization of Black women,<sup>27</sup> Crenshaw's argument was not primarily rooted in anti-essentialism and the exclusion of particular identities, but rather was focused on how systems of power (re)produced racial and gender subordination by delimiting the scope of

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<sup>22</sup> On the necessity of freedom dreams for social transformation, see ROBIN D.G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* (2002).

<sup>23</sup> Harris, *supra* note 11.

<sup>24</sup> See *infra* notes 50–52 and accompanying text; see also, e.g., Robert S. Chang & Jerome McCristal Culp, Jr., *After Intersectionality*, 71 UMKC L. REV. 485, 490 n.30 (2002).

<sup>25</sup> Crenshaw, *supra* note 1.

<sup>26</sup> See Crenshaw, *supra* note 1, at 139; Harris, *supra* note 11, at 608.

<sup>27</sup> See Crenshaw, *supra* note 1, at 140; Harris, *supra* note 11, at 601.

antidiscrimination law and discourse.<sup>28</sup> Thus, our aim in this Part is to disaggregate intersectionality and anti-essentialism. In pursuing this project, we do not mean to say that these concepts have nothing in common. Our claim is more modest — to wit, that it is a mistake to frame intersectionality and anti-essentialism as one and the same thing. We begin by describing Harris’s intervention in *Race and Essentialism*.

Harris’s *Race and Essentialism* critiques white feminists for essentializing women as white, and for theorizing sexism from the experiences of white women.<sup>29</sup> More particularly, Harris invokes Professor Catharine MacKinnon’s dominance theory as an instance of “gender essentialism” — that is, “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.”<sup>30</sup> Harris is careful to note that categorization is inevitable and that her critique of MacKinnon “is not [seeking] to establish a new essentialism in its place based on the essential experience of black women.”<sup>31</sup> Her project, rather, is to identify the harms of gender essentialism. These harms include the practice of “reduc[ing] the lives of people who experience multiple forms of oppression to addition problems,”<sup>32</sup> in which racism is added to sexism in ways that obscure fundamental realities of Black women’s social experiences.

Harris points to MacKinnon’s analysis of rape as an example of gender essentialism. She notes that “MacKinnon sees sexuality as ‘a social sphere of male power of which forced sex is paradigmatic.’”<sup>33</sup> Importantly, Harris does not accuse MacKinnon of completely ignoring racism in her discussion of rape: MacKinnon points out that racism has “sing[led] out Black men for allegations of rape of white women, [thereby] help[ing to] obscure the fact that it is men who rape women, disproportionately women of color.”<sup>34</sup> But ultimately, Harris contends, MacKinnon’s description of rape elides race by addressing race only once more, through the following claim: “[R]ape comes to mean a strange (read Black) man knowing a woman does not want sex and going ahead anyway.”<sup>35</sup> In this way, Harris asserts, MacKinnon offers “an analysis of what rape means to white women [that] masquerad[es] as a general account; it has nothing to do with the experience of black

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<sup>28</sup> See Crenshaw, *supra* note 1, at 140.

<sup>29</sup> See Harris, *supra* note 11, at 585.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 588.

<sup>33</sup> *Id.* at 598 (quoting Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC’Y 635, 646 (1983)).

<sup>34</sup> *Id.* (quoting MacKinnon, *supra* note 33, at 646 n.22).

<sup>35</sup> *Id.* (alteration in original) (quoting MacKinnon, *supra* note 33, at 653).



women.”<sup>36</sup> Harris points out that not only have Black women been raped by their white owners and employers, but also that what was done to them was not considered a crime as they were presumed “promiscuous by nature.”<sup>37</sup> At the same time, Black men were terrorized and murdered by white men based on allegations that they raped white women.<sup>38</sup> Thus, Black women’s experience of rape renders them “unique[ly] ambival[ent],” Harris maintains; not only are they particularly vulnerable to violence but, as members of the Black community, they are also subjected to the racialized terror mobilized against Black men.<sup>39</sup>

Only one year prior to the publication of *Race and Essentialism*, Crenshaw had published *Demarginalizing the Intersection of Race and Sex*.<sup>40</sup> Drawing explicitly on Black feminism, Crenshaw argues, among other things, that the baseline from which sex discrimination claims are adjudicated and feminist politics enacted privileges white women’s experiences.<sup>41</sup> Her aim, in part, is to unmask the ways in which the experiences of white women, “only a subset” of the experiences of all women, often stood in for the category of women writ large in both antidiscrimination law and feminist politics and theorizing.<sup>42</sup> She further challenges the parallel construction of a gendered racial baseline exclusively focused on Black men as the normative marker of racism in law and antiracist politics.<sup>43</sup>

Although Crenshaw does not employ the language of essentialism, one can read her intervention as an effort to de-essentialize white-centered representations of gender; to disrupt the ease and naturalness with which white women can stand in for all women; and to mark the discursive, political, and doctrinal consequences of the representational practice of treating what happens to white women as the baseline from which to determine what happens to all women — the erasure of Black women’s identities and experiences *as women*.

Simultaneously, Crenshaw indicts the way in which antiracist advocacy treats what happens to Black men as the baseline for defining racism, obscuring Black women’s experience as Black people.<sup>44</sup> She argues that the erasure of Black women from legal and political narratives of

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 598–99.

<sup>38</sup> *Id.* at 599–600.

<sup>39</sup> *Id.* at 601.

<sup>40</sup> Crenshaw, *supra* note 1.

<sup>41</sup> *See id.* at 150–52.

<sup>42</sup> *See id.* at 140.

<sup>43</sup> *See id.* at 152.

<sup>44</sup> *Id.* (“As a result, both feminist theory and antiracist politics have been organized, in part, around the equation of racism with what happens to the Black middle-class or to Black men, and the equation of sexism with what happens to white women.”).

discrimination is related to — and is, in part, a product of — the limitations of antidiscrimination law and discourse that disaggregated race and gender identities and experiences.<sup>45</sup> Thus, not only were Black women's specific injuries invisible within the given structure of antidiscrimination law, but as illustrated by the outcomes in several employment discrimination cases, Black women were deemed unable to represent women in sex discrimination claims or to represent Blacks in race discrimination claims.<sup>46</sup> They were different from how difference had been doctrinally categorized, precisely because their experience could not be marked along a single axis. Which is to say, antidiscrimination implicitly marked racial difference as male and gender difference as white.<sup>47</sup> These framings of difference obscured not only the experience of Black women, but also the interactive and interlocking nature of disadvantage and inequality.

The focus on the subjectivity of Black women in both Crenshaw's and Harris's accounts helps to explain why many understand intersectionality as effectively an argument for anti-essentialism, and anti-essentialism as effectively an argument for intersectionality. Consider again Harris's definition of essentialism, this time juxtaposed against Crenshaw's definition of what she calls the "single-axis" problem. Harris first:

In this article, I discuss some of the writings of feminist legal theorists . . . . I argue that their work, though powerful and brilliant in many ways, relies on what I call 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. The result of this tendency toward gender essentialism, I argue, is not only that some voices are silenced in order to privilege others . . . , but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice of "We the People" . . . .<sup>48</sup>

Now Crenshaw:

With Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. I want to suggest further that this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group.

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<sup>45</sup> *Id.* at 150–52.

<sup>46</sup> *Id.* at 139–50.

<sup>47</sup> *See id.* at 152.

<sup>48</sup> Harris, *supra* note 11, at 585.

. . . When feminist theory and politics that claim to reflect *women's* experience and *women's* aspirations do not include or speak to Black women, Black women must ask: "Ain't *We* Women?" If this is so, how can the claims that "women are," "women believe" and "women need" be made when such claims are inapplicable or unresponsive to the needs, interests and experiences of Black women?<sup>49</sup>

On initial observation, a strong connection exists between the foregoing articulations. Both expressly draw on Black, and women-of-color, feminism; both suggest that white feminist theorizing and politics are often one-dimensionally oriented; both argue that white women too often stand in for women in white feminist theorizing; and both assert that the effect of white women's representational hegemony in feminism is the marginalization of Black women's identities and experiences.

The analytical and normative similarities between Crenshaw's single-axis/intersectional critique and Harris's unitary/essentialism frame help to explain why the scholarly literature often portrays intersectionality and anti-essentialism as traveling partners,<sup>50</sup> often in direct engagement with and in opposition to the asserted essentialism of dominance theory.<sup>51</sup> More to the point, in the literature it is not uncommon to see intersectionality and anti-essentialism portrayed in synonymous terms and even used interchangeably.<sup>52</sup>

Yet, in *Close Encounters of Three Kinds*, Crenshaw is clear that "[she] reference[s] MacKinnon's work favorably in presentations that explore [the relationship between] intersectionality and antidiscrimination law."<sup>53</sup> And nowhere in Crenshaw's body of work on intersectionality will one find a critique of dominance theory, though there are multiple

<sup>49</sup> Crenshaw, *supra* note 1, at 140, 154.

<sup>50</sup> See, e.g., Maneesha Deckha, *Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law*, 16 CAN. J. WOMEN & L. 14, 16 (2004) ("My overall goal is to consider how legal feminists committed to intersectionality and anti-essentialism — that is, to paying attention to how multiple social forces, such as race, class, gender, age, sexuality, and culture, shape our experiences — should approach the question of culture in law." (footnote omitted)); Grillo, *supra* note 14, at 17; Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WIS. L. REV. 655, 659–63 (discussing intersectionality and anti-essentialism within the LGBT movement).

<sup>51</sup> See, e.g., Wong, *supra* note 14, at 280–82; see also Deckha, *supra* note 50, at 30–39; Grillo, *supra* note 14.

<sup>52</sup> See, e.g., Nancy E. Dowd, *The "F" Factor: Fineman as Method and Substance*, 59 EMORY L.J. 1191, 1199 (2010) ("Angela Harris's and Kimberl[é] Crenshaw's critiques of the unexamined racial assumptions of feminists made anti-essentialism a core method of feminist theory."); Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 43–44 (2009) (attributing mandatory arrest laws to the influence of dominance theory and citing Crenshaw as among "[a]nti-essentialists [who] argue that we must instead see women at the intersections of the various identities that construct them: race, sexual orientation, class, disability;" *id.* at 44); see also Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 289 (2008) (describing Angela Harris as an "intersectional" feminist scholar).

<sup>53</sup> Crenshaw, *supra* note 17, at 151.

critiques of white feminism.<sup>54</sup> Nor, in Crenshaw's scholarly corpus, does one find an express embrace of anti-essentialism; indeed, Crenshaw has expressly said that she has not "tended to frame [her] principle critiques [of feminism and antiracism] in the language of 'anti-essentialism.'"<sup>55</sup>

What's going on? How can Crenshaw view dominance theory "favorably" vis-à-vis intersectionality when dominance theory has been subject to a sustained critique from a theoretical position — anti-essentialism — that many scholars understand as a rearticulation of intersectionality? Why does Crenshaw avoid "the language of 'anti-essentialism'" when so many proponents of intersectionality consider anti-essentialism as a useful register in which to advance intersectional claims?

This is a good place to begin thinking about an important difference between intersectionality and anti-essentialism. Intersectionality is not an argument against essentialism per se. Nor is intersectionality committed to anti-essentialism per se. Our view is that judging a particular analysis to be essentialist does not settle normative questions; rather, the important consideration is whether the deployment of essentialism is justified empirically and normatively in a particular context. One could, for example, claim that the grouping of people into the category "African American" is essentialist because that classification might presuppose an essence or singularity to the group. On the other hand, the deployment of the category "African American" might be necessary to describe, organize against, or disrupt the group-based hierarchies on which racism has historically rested. The antiracist uses to which essentialism can be put are precisely why we are suggesting that the crucial question is not *whether* essentialism is at play but *how*, in any given context, the phenomenon is operating. To further elaborate this point, we rely on an influential text on essentialism by Professor Diana Fuss.

According to Fuss, "[e]ssentialism is most commonly understood as a belief in the real, true essence of things, the invariable and fixed properties which define the 'whatness' of a given entity."<sup>56</sup> To the extent that scholars describe essentialism as a theory that posits race, gender, sexual orientation, and other social categories as natural, transhistorical, prehistorical givens — existentially fixed across all time, all space, and all cultures — it is no wonder that the concept is universally condemned.<sup>57</sup> Fuss reasons that this background understanding of

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<sup>54</sup> See *id.* at 152; Crenshaw, *supra* note 1, at 152–60; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991).

<sup>55</sup> Crenshaw, *supra* note 17, at 152 n.3.

<sup>56</sup> DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* xi (1989).

<sup>57</sup> See *id.* at xi, 39.

essentialism has rendered the concept an epithet.<sup>58</sup> No self-respecting progressive or critical theorist is likely to subscribe to a concept that is rooted in the liberal ideal of universality. All too often, commitments to universality are invoked to enforce regimes of sameness under which “different” people are disciplined and punished, exploited and marginalized, forcibly assimilated and displaced, and subjected to state-sanctioned violence, including genocide.<sup>59</sup>

Nevertheless, Fuss does not take the position that essentialism necessarily entails subordination or that anti-essentialism always functions to dismantle or undermine subordination. Instead, Fuss contends that such claims rest upon an essentialized concept of essentialism.<sup>60</sup> Fuss’s project is thus to de-essentialize essentialism. Indeed, Fuss contends that essentialism is neither inherently good nor inherently bad, neither progressive nor reactionary in and of itself.<sup>61</sup> Moreover, to the extent that anti-essentialist critiques challenge the notion of “women,” or “Blacks,” or “Asians,” as predicated on erroneous essentialist assumptions, without a limiting principle, anti-essentialism can collapse into disputes about the coherence, viability, and legitimacy of the categories themselves.<sup>62</sup>

It bears emphasizing here that more particularity is no answer to the fundamental thrust of the anti-essentialist critiques. For example, the same problem of “essentializing” — assuming unitary characteristics — produced by the category “Black” is reproduced (albeit at a more particularized level) in the categories “Black women,” “Black lesbian women,” “Afro-Caribbean lesbian women,” and so on. Thus, under some versions of anti-essentialist discourse, social categories, no matter how particular their articulation, become fictive formations around which it makes little sense to organize. This position, Fuss believes, as do we, is untenable and unproductive.<sup>63</sup> Fuss contends that our normative, political, and intellectual engagements with essentialism should eschew the question of whether a particular intervention constitutes essentialism and focus instead on the ideological motivation for and effects of that essentialism.<sup>64</sup>

Framing essentialism the way that Fuss does, it makes little sense to understand essentialism and anti-essentialism as already oriented or fixed in particular ideological directions — essentialism as conservative and bad and anti-essentialism as progressive and good. Which is to say,

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<sup>58</sup> See *id.* at xi.

<sup>59</sup> See, e.g., ANNIHILATING DIFFERENCE: THE ANTHROPOLOGY OF GENOCIDE 12–23 (Alexander Laban Hinton ed., 2002).

<sup>60</sup> Fuss reasons that “there is no essence to essentialism.” FUSS, *supra* note 56, at xii.

<sup>61</sup> See *id.*

<sup>62</sup> Indeed, this is precisely what explains the articulation of “left” positions against the reliance on social categories. See, e.g., Grillo, *supra* note 14, at 20–21; Wong, *supra* note 14, at 290, 293.

<sup>63</sup> See FUSS, *supra* note 56, at 19–21.

<sup>64</sup> See *id.* at xi.

neither essentialism nor anti-essentialism should be viewed monolithically and located in a political box whose normative commitments are already fully determined. Thus, for example, the essentialized articulations of Black inferiority that underwrote and legitimized Jim Crow should not have the same normative standing as the essentialized articulations of Black power that underwrote and legitimized Black resistance to legalized racial segregation. Mobilizing essentialism as a kind of conversation stopper — via what we call an “essentialism per se” approach — preempts questions such as: To what end is the essentialism being deployed? In what context is the essentialism doing its work? Who is mobilizing the essentialism? And what are its effects?<sup>65</sup> In short, the fact that a particular feminist practice can be described as essentialist ought to begin rather than end the conversation.

Part of the problem with the anti-essentialism literature is that, for the most part, it does not take up the preceding questions. What one gets, instead, is the sense that essentialism is per se bad. Indeed, it is difficult to find scholarly analysis that makes the positive case for essentialism or that expressly demonstrates the progressive uses to which essentialism might be put. There are works that, drawing on Professor Gayatri Spivak, explore the possibilities of “strategic essentialism.”<sup>66</sup> But even these articles presuppose an essentialism that is already problematic against which strategic essentialism is mobilized. Strategic essentialism thus becomes an exceptional state of essentialism normatively outside of the normal and problematic borders of essentialism.

That the anti-essentialism literature has gone down the path towards absolutism — all essentialism bad, all anti-essentialism good — is not directly attributable to Harris. Harris advances a particular critique of essentialism that, according to her, is manifested in the work of MacKinnon. Her claim, if the reader will recall, is that some of MacKinnon’s work erases or marginalizes Black women and their experiences.<sup>67</sup> Our point here is not to suggest that Harris’s assessment and characterization of MacKinnon’s scholarship is fair and accurate, or unfair and inaccurate, but simply to note that her critique of essentialism is a specific one that marks the distributional effects of the essentialism she contests. We note as well that Harris is clear that hers

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<sup>65</sup> See *id.* at 20 (“[T]he radicality or conservatism of essentialism depends, to a significant degree, on *who* is utilizing it, *how* it is deployed, and *where* its effects are concentrated.”).

<sup>66</sup> See Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, in *SELECTED SUBALTERN STUDIES* 3, 13 (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988); see also Grillo, *supra* note 14, at 21 & n.26; Leachman, *supra* note 50, at 661–64; Ian F. Haney López, *Race, Ethnicity, Erasure: The Saliency of Race to LatCrit Theory*, 85 CALIF. L. REV. (JOINT SYMPOSIUM WITH LA RAZA L.J.) 1143, 1188 n.137 (1997); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1241–42 (2004).

<sup>67</sup> Harris, *supra* note 11, at 590–98.

is not an anticategorical argument *tout court*, as “without categorization . . . there can be no moral responsibility or social change.”<sup>68</sup> Harris’s argument is that we should “make our categories explicitly tentative, relational, and unstable.”<sup>69</sup>

While we agree with Harris that it is important and necessary to avoid treating categories as fixed and predetermined, one might still wonder when and how a categorical claim can be advanced without inviting the charge that it is insufficiently attentive to the boundaries of the group. Put another way, in the absence of any limiting principle, anti-essentialism can always be mobilized to challenge the “essentializing” nature of a critique proffered by or on behalf of a social group.<sup>70</sup> *Race and Essentialism* does not offer much guidance on this question. However, an article Harris published four years later, *The Jurisprudence of Reconstruction*,<sup>71</sup> more squarely addresses the possibilities and pitfalls of navigating the boundaries of the anti-essentialist critique.<sup>72</sup>

In *The Jurisprudence of Reconstruction*, Harris maintains that CRT’s anti-essentialist critique of feminism “can be understood in one of two ways”<sup>73</sup>:

Race-crits could be arguing that there is a way to speak for all women, if only the voices of women of color as well as the white women are allowed to be heard. Or, race-crits could be saying that the goal of speaking for all women is an impossible goal to begin with, because all such accounts inevitably and wrongly privilege the experiences of some women over others.<sup>74</sup>

While Harris does not offer a definitive answer to the question of which of the preceding two anti-essentialist claims CRT scholars mean

<sup>68</sup> *Id.* at 586.

<sup>69</sup> *Id.*

<sup>70</sup> Professors Sumi Cho and Robert Westley make a similar observation in an earlier work, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 (2000). Taking respectful but unerring aim at Harris’s *Race and Essentialism*, they note that “what starts as a bold critique of racism or other forms of exclusion within a larger progressive movement ends in Harris’[s] troubling call to reject ‘shared victimization’ in favor of more ‘positive,’ relational, contingent identities.” *Id.* at 1416. The authors persuasively argue that while anti-essentialism correctly calls for the rejection of falsely universal claims, “once set in motion, anti-essentialism *unmodified* has no limiting principles to prevent minority groups from being deconstructed until all that remains are disunited and atomized individuals themselves.” *Id.* This is not a position of strength from which to struggle against the “*formidable political structures*” that undergird racial subordination and exclusion. *Id.* at 1417. Instead, Cho and Westley argue “that the essentialism/anti-essentialism debate represents a false dichotomy that reflects not so much a theoretical problem, but a political one.” *Id.* at 1418. What this means concretely is that the objective is not so much deconstruction of the group-based political formations that have failed to take account of intra-group difference, but rather “insist[ence] on political *accountability* from the unrepresentative group that is speaking for all of us.” *Id.*

<sup>71</sup> Angela P. Harris, Foreword: *The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994).

<sup>72</sup> *Id.* at 754–58.

<sup>73</sup> *Id.* at 755.

<sup>74</sup> *Id.*

to advance, her suggestion seems to be that both claims have circulated in the literature and derive at least in part from CRT's negotiation between and internalization of modernism and postmodernism. For Harris, both modernism and postmodernism have upsides and downsides.<sup>75</sup> To appreciate what she might mean, consider these rough definitions of each. Modernism is committed to foundationalism and determinacy and to corresponding concepts such as objectivity, reason, truth, neutrality, and the stability of subjects.<sup>76</sup> Postmodernism, by contrast, is committed to antifoundationalism and indeterminacy and to corresponding concepts such as subjectivity, power, social construction, contingency, and the instability of subjects.<sup>77</sup> Modernism's investment in the stability of subjects aligns the theory at least somewhat with essentialism; and postmodernism's investment in the destabilization of subjects aligns the theory at least somewhat with anti-essentialism.

According to Harris, CRT has evidenced both modernist and postmodernist tendencies. For example, on the one hand, and in the voice of postmodernism, CRT scholars vigorously question whether there is such a thing as "truth."<sup>78</sup> On the other hand, and in the voice of modernism, those very same scholars, with equal vigor, insist that the United States has yet to own the "truth" about the endemic nature of racism.<sup>79</sup> From Harris's perspective, CRT scholars should embrace both their modernist and postmodernist sensibilities and "live in the tension itself: to continually rebuild modernism in light of postmodernist critique."<sup>80</sup> Harris sees this project of living in the tension as an iteration of what Professor Mari Matsuda calls "multiple consciousness."<sup>81</sup>

<sup>75</sup> Harris states:

If the latter [claim] is the case, this postmodernist critique threatens to dissolve the notion of a distinctive "voice of color" as well. Just as calling upon an essential female condition emptied of racial concerns invites the re-importation of white privilege, calling upon a collective subject called "the person of color" who speaks in a unique and unified voice simply invites the importation of other forms of hierarchy. The postmodernist narrative destabilizes *all* categories, not just the ones that have been historically misused.

*Id.* (footnote omitted).

<sup>76</sup> See *id.* at 744 ("For people of color, as well as for other oppressed groups, modernist concepts of truth, justice, and objectivity have always been both indispensable and inadequate.").

<sup>77</sup> See *id.* at 750, 754–56.

<sup>78</sup> *Id.* at 743, 757, 758.

<sup>79</sup> See *id.* at 743.

<sup>80</sup> *Id.* at 744. Although we think that Harris is right to encourage CRT scholars to inhabit the tension between postmodernism and modernism, and anti-essentialism and essentialism, some guideposts with which to navigate would have been helpful, if only to mitigate the degree to which some scholars continue to read her work as against essentialism per se.

<sup>81</sup> *Id.* at 769 n.134 (citing Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7, 9 (1989)). One might think of CRT's "multiple consciousness" vis-à-vis modernism and postmodernism in the Du Boisian sense of comprising "two souls, two thoughts, two unreconciled strivings; two warring ideals" in one CRT body. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* 3 (Univ. of Mass. Press 2018) (1903). And, indeed, Harris does, building on the work of Mari Matsuda, draw on Du Bois



Not only does Harris find CRT's both/and posture with respect to modernism and postmodernism normatively appealing, her sense is also that CRT scholars may not have any other choice. She writes: "To talk as if one has the choice to 'accept' or 'reject' these world views is certainly misleading. We live in a political and legal world shaped by modernism; we cannot step out of it. Nor can we, as good modernist intellectuals, ignore modernism's discontents."<sup>82</sup> The bottom line for Harris is that CRT should reflect a "commitment to modernism and a willingness to acknowledge its limits."<sup>83</sup>

Harris's argument that CRT scholars should intentionally "inhabit" the tension between modernism and postmodernism is one indication that she believes that CRT's anti-essentialist critique should not be a critique of essentialism all the way down. From her vantage point, and ours as well, critical race theorists have to rely on and at the same time destabilize the articulation and instantiation of subjects, including those that are articulated with reference to race and gender or the combination of the two. Tellingly, Harris references Crenshaw's theory of intersectionality as an example of how CRT scholars navigate the conflict between modernism and postmodernism.<sup>84</sup> According to Harris, "Crenshaw's concept of intersectionality brings a postmodernist skepticism about the transparency of language to bear on legal doctrine and social policy. In demanding a jurisprudence that can recognize women of color

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to elaborate on what she means by a jurisprudence of reconstruction. See Harris, *supra* note 71, at 768–70.

<sup>82</sup> Harris, *supra* note 71, at 760.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 767–68. Harris has also drawn on intersectionality in other parts of her work. See Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435, 2447 (2003) ("[C]ritical race theory has helped to pioneer the shift from traditional unidimensional methods of analysis that reduce complicated issues to either/or dichotomies from which judges and policymakers are forced to make a selection. . . . Concepts such as intersectionality, antiessentialism, multidimensionality, and the like have at various times expressed this struggle for definition, a struggle that has reflected both the residual pull of unidimensional categories and the practical and conceptual difficulties — 'tensions' — triggered by efforts to break loose of established jurisprudential habits."); Angela P. Harris, *Building Theory, Building Community*, 8 SOC. & LEGAL STUD. 313, 319 (1999) (suggesting that CRT's affiliation with intersectionality should inform its engagement with the interaction of racial oppression and the oppression of sexual minorities); Angela P. Harris, *From Precarity to Positive Freedom: ClassCrits at Seven*, *ClassCrits VII Symposium Introduction*, 44 SW. L. REV. 621, 625 (2015) (discussing how ClassCrit scholars deploy intersectionality by breaking with Marx-inspired arguments about the primacy of class to instead theorize class, race, and gender as mutually constitutive); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 36 (2011) (advocating for an intersectional approach to understanding gender violence that broadens how it is defined and understood by "shift[ing the] focus from group identities to interlocking practices and beliefs"); Angela Harris & Zeus Leonardo, *Intersectionality, Race-Gender Subordination, and Education*, 42 REV. RES. EDUC. 1, 1 (2018) (assessing the utility of intersectionality as "an analytical framework" and examining its centrality in current social justice activism and academia).

as proper legal subjects in themselves, Crenshaw destabilizes the familiar categories of ‘race’ and ‘gender.’”<sup>85</sup>

Like Crenshaw and MacKinnon, and expressly drawing on the latter, Harris frames her arguments about modernism and postmodernism with reference to debates about sameness and difference.<sup>86</sup> More specifically, she expressly advocates that CRT scholars should embrace what she calls “a politics of difference,”<sup>87</sup> one that pushes back against assimilation, recognizes the contingencies of subjects, and contests the nonneutral baselines on which dominant articulations of sameness and difference are built.<sup>88</sup>

An intertextual reading of *Race and Essentialism* and *The Jurisprudence of Reconstruction* along the lines we have provided reveals that Harris does not subscribe to the view that essentialism is per se bad and anti-essentialism is per se good, even as some readers understand the former piece as instantiating those very ideas. Rather, together these scholarly interventions suggest that CRT scholars should inhabit the tension between essentialism and anti-essentialism as a part of a broader effort to carry forward the liberatory investments of the movement.

To be clear, Harris does not present *The Jurisprudence of Reconstruction* as an elaboration or clarification of *Race and Essentialism*. Indeed, *Race and Essentialism* is relegated to a single footnote in the piece.<sup>89</sup> Thus, what we present here is our reading based on an effort to excavate Harris’s views on essentialism from her work more broadly.<sup>90</sup> In this respect, we wish that Harris had made a more explicit link between the ideas in *The Jurisprudence of Reconstruction* and those she expressed in *Race and Essentialism*. The lack of an intellectual bridge between the two articles may have contributed to scholars reading *Race and Essentialism* along the dichotomy of anti-essentialism as good and essentialism as bad. In other words, our sense is that our intertextual reading of *Race and Essentialism* and *The Jurisprudence of Reconstruction* is not the dominant way in which they are taken up. One indication of what we mean is reflected in the profound difference in the number of times the two articles are cited. While *Race and Essentialism* has been cited almost 1500 times, *The Jurisprudence of Reconstruction* has been cited 274 times.<sup>91</sup> More significantly, whereas

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<sup>85</sup> Harris, *supra* note 71, at 768.

<sup>86</sup> Harris specifically cites to *Difference and Dominance: On Sex Discrimination*, in MACKINNON, FEMINISM UNMODIFIED, *supra* note 12, at 32, 34. Harris, *supra* note 71, at 762 n.102.

<sup>87</sup> Harris, *supra* note 71, at 744.

<sup>88</sup> See *id.* at 761–62.

<sup>89</sup> *Id.* at 745 n.20.

<sup>90</sup> These include the works cited *supra* note 84.

<sup>91</sup> These figures resulted from review of a Westlaw search for citations to *Race and Essentialism* and to *The Jurisprudence of Reconstruction* in law reviews and journals through April 9, 2019

only 150 articles reference *The Jurisprudence of Reconstruction* in relationship to debates about essentialism,<sup>92</sup> roughly 1500 articles that cite *Race and Essentialism* do so in relationship to such debates.<sup>93</sup> Though it would be putting the point too strongly to say that these pieces exist in separate epistemic universes, there is reason to believe that scholars are not rereading *Race and Essentialism* through *The Jurisprudence of Reconstruction*. Consequently, the question of whether or when an anti-essentialist critique can and should be productively mobilized has remained something of an intellectual cliffhanger.

As the preceding discussion suggests, one problem with the anti-essentialism literature is that scholars are not reading *Race and Essentialism* and *The Jurisprudence of Reconstruction* together. Another problem is that scholars are reading the anti-essentialist critique and the intersectionalist critique as one and the same thing. This is inconsistent with some of the basic premises of intersectionality. To elaborate on what we mean, we turn to Crenshaw herself. In several ways, Crenshaw's work contests both the "essentialism is per se bad" claim and the "essentialism can be avoided" claim. These contestations are thus important axes along which intersectionality and anti-essentialism can be differentiated.<sup>94</sup>

As a preliminary matter, we note that Crenshaw has long worried about what she calls "vulgar anti-essentialism,"<sup>95</sup> by which she means "the claims made by some critical theorists that since racial categories are not 'real' or 'natural' but instead socially constructed, it is theoretical and politically absurd to center race as a category of analysis or as a basis for political action."<sup>96</sup> Moreover, Crenshaw has expressly stated that, in some cases, sanctioning essentialism is "beside the point."<sup>97</sup> Her view is that "what is at stake" in debates about essentialism "is less about fidelity to antiessentialism per se, but more about identity-based politics

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(using the search terms ("Race and Essentialism in Feminist Legal Theory" /s Harris) and ("Jurisprudence of Reconstruction" /s Harris), respectively).

<sup>92</sup> This figure resulted from review of a Westlaw search for mentions of *The Jurisprudence of Reconstruction* and essentialism in the same piece in law reviews and journals through April 9, 2019 (using the admittedly imperfect search terms ((race or gender) and essentialism) and ("Jurisprudence of Reconstruction" /s Harris)).

<sup>93</sup> This figure resulted from review of a Westlaw search for mentions of *Race and Essentialism* and essentialism in the same piece in law reviews and journals through April 9, 2019 (using the admittedly imperfect search terms ((race or gender) and essentialism) and ("Race and Essentialism in Feminist Legal Theory" /s Harris)).

<sup>94</sup> These lines of differentiation do not mean that one cannot mobilize intersectionality in the service of anti-essentialism. As we have already stated and want to repeat here, intersectionality can partly be understood as an anti-essentialist intervention. See, e.g., Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905, 927 (2006).

<sup>95</sup> Kimberlé Crenshaw, *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xiii, xxvi (Kimberlé Crenshaw et al. eds., 1995).

<sup>96</sup> *Id.*

<sup>97</sup> Crenshaw, *supra* note 17, at 181.

that reflect very different orientations toward feminism and antiracism.”<sup>98</sup> To put this point another way, people mobilize the essentialism critique not simply as a theoretical or normative commitment to anti-essentialism per se but also as a way of doing politics.

The history of the genesis of CRT is also an indication that Crenshaw did not deploy intersectionality as a wholesale repudiation of essentialism. That history reveals that CRT scholars had to defend themselves from the charge that their work was essentialist. Because intersectionality is itself an articulation of CRT,<sup>99</sup> a brief history of the formation of CRT provides a useful backdrop against which to think about the relationship between intersectionality and anti-essentialism.

In Crenshaw’s account, CRT emerged at least in part from both an alignment and a misalignment with Critical Legal Studies (CLS), a left-leaning, mostly white-male intellectual formation that by the 1980s had a robust presence in American law schools.<sup>100</sup> CRT was aligned with the radicalizing dimensions of CLS, particularly the movement’s trenchant critique of the legal ideology of law’s neutrality, and its conceptualization of law as constitutive, and not simply reflective, of political and social relations.<sup>101</sup> With respect to misalignment, there were significant debates between CLS and CRT over the issue of rights. CLS scholars argued that rights were “alienating,” “indeterminate,” and a vehicle through which to effectuate hegemony.<sup>102</sup> CRT scholars conceded that rights had the foregoing entanglements but noted that rights were also a source of agency, political empowerment, and a vehicle through which to effectuate resistance. Professor Patricia Williams’s articulation of this point remains one of the most powerful. She writes:

To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round — but its opposite. This was the resurrection of life from ashes four hundred years old. The making of something out of nothing took immense alchemical

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<sup>98</sup> *Id.* at 152–53 (footnote omitted).

<sup>99</sup> See Carbado, *supra* note 2, at 815 (expressly discussing intersectionality as an articulation of CRT).

<sup>100</sup> See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1288–89 (2011); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1519, 1541 (1991).

<sup>101</sup> See Crenshaw, *supra* note 100, at 1288–89, 1294; see also Tushnet, *supra* note 100, at 1526.

<sup>102</sup> José A. Bracamonte, Foreword: *Minority Critique of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297, 298 (1987).

fire — the fusion of a whole nation and the kindling of several generations.<sup>103</sup>

The foregoing CRT/CLS controversy over the role of rights in transformative political projects is by now familiar intellectual history.<sup>104</sup> But it was connected to a much less familiar dispute between CRT and CLS over essentialism. A useful starting point for discussing how essentialism figured in CRT/CLS contestations is to foreground the fact that some CLS adherents were resistant to interrogating not only the fact that, as a formation, CLS was primarily white and male but also the extent to which that demographic representation was itself a sign of the pervasive nature of racial power.<sup>105</sup> This dispute over race was particularly pronounced in a CLS conference held in 1987, the “Sounds of Silence” conference, in which scholars of color sought to center race as a set of questions within CLS and highlight the relationship between race and the rule of law as a crucial site of intellectual intervention.<sup>106</sup> The convening produced both further debate and several articles by the emerging race crits about both the salience of race in law and social policy and its erasure in liberal legal ideology.<sup>107</sup> The reaction of some CLS critics reflected their initial “framing of early CRT work as *racialist*.”<sup>108</sup> This framing at least implicitly suggested that CRT was essentialist in that CRT scholarship reduced “complex phenomena” into a “simple reflection of some underlying ‘facts.’”<sup>109</sup>

According to Crenshaw, some CLS scholars launched a more direct anti-essentialist critique of CRT, targeting the literature’s turn to narrative.<sup>110</sup> While this anti-essentialist critique took a variety of rhetorical forms, it “emerged most forcefully in response to Patricia Williams’s now-classic account of being racially profiled ‘shopping while Black’ in New York.”<sup>111</sup> As Crenshaw notes, CLS scholars “challenged the frame of race as a container for the story.”<sup>112</sup> More specifically, they questioned

<sup>103</sup> PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 163 (1991) (footnote omitted).

<sup>104</sup> See, e.g., Tushnet, *supra* note 100, at 1520–21.

<sup>105</sup> Crenshaw, *supra* note 100, at 1290–91.

<sup>106</sup> See *id.* at 1295–96.

<sup>107</sup> *Id.* at 1295–96, 1297 n.148.

<sup>108</sup> *Id.* at 1294.

<sup>109</sup> Crenshaw, *supra* note 95, at xxiv. Crenshaw’s essay explains that as CLS had already debunked the Marxist instrumentalist view of class — that law was simply a reflection of class interests “rooted outside of law,” *id.* at xxiv — it was in a sense primed to interpret early CRT interventions as racialist. *Id.* at xxiv–xxv. Thus, “we might say that racialism is to power what essentialism is to identity — a narrow, and frequently unsatisfying theory . . . . Specifically, the ‘sin’ of racialism is that it presumes that racial interests or racial identity exists somewhere outside of or prior to law and is merely reflected in subsequent legal decisions adverse to nonwhites.” *Id.* at xxiv.

<sup>110</sup> Crenshaw, *supra* note 100, at 1294.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

“how ‘race’ possibly could hold together the story of an elite African American woman’s encounter at a swanky New York store with say, an everyday encounter of an African woman somewhere in Central Africa.”<sup>113</sup> Ironically, the logic underwriting CLS’s anti-essentialist critique of CRT was itself essentialist. As Crenshaw puts it, CLS scholars seemed to believe “that for race to have any explanatory force in the context in which it was invoked, it should presumably find a fixed expression across space and time.”<sup>114</sup>

We provide the foregoing brief account of intellectual history to foreground an aspect of CRT that is often elided: its critical engagement with — and pushback against — anti-essentialist critiques from the left. It is precisely this engagement and pushback that helped to create the normative and theoretical field from which central CRT ideas could grow.<sup>115</sup> Which is to say, CRT’s early repudiation of a certain kind of anti-essentialist critique cleared the ground for the articulation of a range of important ideas, among them these: There *is* something irreducible that we might call race (though the meaning of race shifts over time and place, is historically contingent, and intersects with and is shaped by other axes of social differentiation<sup>116</sup>). There *are* people we might call “Black” (though the content and experiences of blackness are not static but a function of particular social, legal, cultural, and ideological processes).<sup>117</sup> There *is* a social force we might call “racism” (though its content and effects, and the technologies through which it is expressed, are neither transhistorical nor predetermined).<sup>118</sup> And there *is* a phenomenon that we might call whiteness (though its boundaries are never fixed or fully articulated but are constituted and reconstituted in the service of racial power<sup>119</sup>).

Each of the preceding claims reflects some level of essentialism, as does the articulation of *any* subject position (including class) and the invocation of *any* social force (including classism). This is why we think

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> For an articulation of some of the central ideas in CRT, see generally CRITICAL RACE THEORY, *supra* note 95 (collecting seminal works in the field of CRT); Devon W. Carbado, *Afterword: Critical What What?*, 43 CONN. L. REV. 1593 (2011). For a discussion of the institutionalization of those ideas in the establishment of a law school’s Critical Race Studies Concentration and accompanying curriculum, see Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1228–34 (2002).

<sup>116</sup> On the social construction of race, see Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 16–37 (1994); and see also Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633, 686–92 (2009).

<sup>117</sup> See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336, 1369–87 (1988).

<sup>118</sup> *Id.*

<sup>119</sup> On the construction of whiteness, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1724–45 (1993).

critical theorists, including critical race theorists, would do well to focus their attention on the politics and distributional effects of essentialism, rather than whether a particular practice is or is not essentialist per se. Doing so would help to make clear that essentialism is not inherently problematic and avoid what we have been calling the essentialism per se trap.

There is another benefit to challenging the idea that essentialism is per se bad: it invites us to take up the question of whether anti-essentialism is per se good. The CLS critique of Williams is one reason to answer that question in the negative. But there are other examples that invite the same conclusion, two of which we discuss below.

Consider first Justice O'Connor's opinion in *Shaw v. Reno*,<sup>120</sup> one of the most important voting rights cases of the twentieth century. The case concerned the constitutionality of legislative efforts, then required by the Voting Rights Act,<sup>121</sup> to create majority-minority voting districts<sup>122</sup> — political units in which a minority group comprises the majority of eligible voters — as a remedy for entrenched patterns of racially motivated disenfranchisement.<sup>123</sup> Notwithstanding that the Voting Rights Act compelled jurisdictions that engaged in egregious efforts to exclude minority voters from political power to redistrict, white voters in the newly created majority-minority districts sued, alleging that their rights under the Equal Protection Clause had been violated.<sup>124</sup> The Court did not contradict the historical and centuries-long struggle to desegregate Congress and state legislative bodies,<sup>125</sup> nor did it focus on the need to counteract persistent efforts to suppress the Black vote and

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<sup>120</sup> 509 U.S. 630 (1993).

<sup>121</sup> Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

<sup>122</sup> *Shaw*, 509 U.S. at 634–39.

<sup>123</sup> For discussions of *Shaw* in relation to voting rights jurisprudence, see Guy-Uriel E. Charles, *Democracy & Distortion*, 92 CORNELL L. REV. 601, 672–74 (2007); Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1216–23 (2003); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 236–46 (2001); and Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1560–66 (2018). For discussions of voting rights and racially conscious districting in relation to representing minority interests more generally, see Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1426–32 (1991); Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1135–50 (1993); and Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1134–52 (1991).

<sup>124</sup> *Shaw*, 509 U.S. at 637.

<sup>125</sup> See Daniel P. Tokaji, *The Sordid Business of Democracy*, 34 OHIO N.U. L. REV. 341, 345–46 (2008); Franita Tolson, *Increasing the Quantity and the Quality of the African-American Vote: Lessons for 2008 and Beyond*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 313, 336–37 (2008).

deny Blacks an effective opportunity to elect representatives of their choice. Instead Justice O'Connor's opinion, written for the five-member majority, expressed deep suspicion of majority-minority political units. In her view, such formations elided differences and reified race as category.<sup>126</sup> She contended:

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.<sup>127</sup>

Justice O'Connor's critique was centered on the notion that race is an essentialist formation. Putting race at the center of the remedial regime:

[R]einforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.<sup>128</sup>

In short, Justice O'Connor mobilized the anti-essentialist critique to question the legitimacy of a remedial effort to counteract racism in the context of voting.<sup>129</sup> Anti-essentialism thus buttressed an outcome that undermined racial justice.

Similarly, in *Regents of the University of California v. Bakke*,<sup>130</sup> Justice Powell's opinion applying strict scrutiny to a race-conscious admissions policy at the U.C. Davis School of Medicine relied on a critique of essentialism to limit the scope of racial remediation. Justice Powell insisted that state racial remediation efforts in the form of college affirmative action admissions policies, like Jim Crow racial discrimination, are presumptively suspicious and deserve "the most exacting judicial examination."<sup>131</sup> His thinking in this respect was classically

<sup>126</sup> See *Shaw*, 509 U.S. at 647.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Jayne Chong-Soon Lee's critique of Professor Kwame Anthony Appiah's treatment of race as a concept without coherent justification or content, offered in Appiah's text, *In My Father's House*, similarly invokes *Shaw v. Reno* as illustrative of a problematic anti-essentialist argument. See Jayne Chong-Soon Lee, Review Essay, *Navigating the Topology of Race*, 46 STAN. L. REV. 747 (1994) (reviewing KWAME ANTHONY APPIAH, *IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* (1992)). Lee argues that Appiah's antifoundational view of race as a category that cannot be legitimately grounded in common biology, history, or tradition can lead to the kind of argument exemplified in *Shaw*, where race is reduced to an irrelevant physical characteristic — a category empty of social significance. See *id.* at 747, 774–76. As she points out, Appiah's conceptual error is that "he fails to recognize that race is defined not by its inherent content, but by the social relations that construct it." *Id.* at 772.

<sup>130</sup> 438 U.S. 265 (1978).

<sup>131</sup> *Id.* at 291.



anti-essentialist. Justice Powell reasoned that “strict scrutiny”<sup>132</sup> applied to both affirmative action and Jim Crow racial discrimination because to treat the two systems differently would be to apply a dual standard, calibrated to whether the rule benefited a white majority.<sup>133</sup> He argued this was untenable:

The concepts of “majority” and “minority” necessarily reflect temporary arrangements and political judgments. . . . [T]he white “majority” itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only “majority” left would be a new minority of white Anglo-Saxon Protestants.<sup>134</sup>

Rearticulated expressly in the register of anti-essentialism, Justice Powell’s argument is that affirmative action is predicated on a majority-minority dichotomy that essentializes whites as a monolithic majority group. This essentialism is particularly problematic for Justice Powell because it obscures the experiences of discrimination some whites historically have had. Moreover, Justice Powell’s concerns were grounded in a sense that racial categorizations are inherently incoherent. For him, there is no neutral metric by which to make distinctions among racial groups. Thus, he argued:

There is no principled basis for deciding which groups would merit “heightened judicial solicitude” and which would not. . . . Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. . . . The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence — even if they otherwise were politically feasible and socially desirable.<sup>135</sup>

There is a lot that one might say about Justice Powell’s analysis, including the discursive move through which Anglo-Saxon Protestants become “a new [racial] minority.”<sup>136</sup> But the reason we quote his arguments about whiteness, and situate those arguments alongside Justice

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<sup>132</sup> *Id.* at 279.

<sup>133</sup> *See id.* at 294–97.

<sup>134</sup> *Id.* at 295–96.

<sup>135</sup> *Id.* at 296–97 (footnote omitted).

<sup>136</sup> *Id.* at 296. Indeed, one of us has noted the profound inversion of social constructionist arguments about race deployed by Justice Powell:

Powell’s argument is a classic invocation of social constructionism: “white” is not a monolithic category fixed by biology; it is a “‘majority’ composed of various minorit[ies].” Powell anticipates the claim that the salient and unifying characteristic of this amalgamation was that it defined itself in relation to what it was not — that at its core white identity was centered on a right to exclude others. He counters this argument by pointing to the history of nativist and anti-immigrant sentiment which meant that, “each [minority] had to

O'Connor's claims about blackness, is to provide concrete examples of the racially regressive uses to which anti-essentialist claims can be put.

This brings us back to our earlier point about the importance of disaggregating intersectionality from anti-essentialism. Doing so enables us to see not only the progressive work essentialism can perform but also the regressive work anti-essentialism can enable. Intersectionality is neither a repudiation of essentialism per se nor a per se embrace of anti-essentialism. The insights at the core of intersectionality cannot be fully captured within the framework of "essentialism." That is why we contend that anti-essentialism and intersectionality are not precisely the same thing. With that understanding, we are in a better conceptual position to examine the relationship between intersectionality and dominance theory, a topic to which we now turn.

## II. THE CONVERGENCE OF DOMINANCE THEORY AND INTERSECTIONALITY

According to the prevailing view, which we critique, not only is intersectionality synonymous with anti-essentialism, but intersectionality also stands in fundamental opposition to dominance theory. This framing misses a core convergence between dominance theory and intersectionality regarding a critique of liberal legalistic conceptions of equality grounded in sameness and difference. As we explain in this Part, both intersectionality and dominance theory challenge conceptions of discrimination that measure inequality by comparing subordinated subjects to baselines that are purportedly neutral but that in fact embody racial and gender hierarchy.

We begin our analysis by offering an account of MacKinnon's theory of dominance. Central to this theory is the view that it makes sense, descriptively and normatively, to speak of women *as women* because society subordinates women *as women*. According to MacKinnon:

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struggle — and to some extent struggles still — to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups . . . ." This history of anti-immigrant bias suffered by many then rebuts the claim that the "glue" of white identity was its exclusion and subordination of others. Thus he argues, "it was said — perhaps unfairly in many cases — that a shared characteristic was a willingness to disadvantage other groups." This is the sole allusion to the linkage between whiteness and racial power, between white racial identity and exclusion. All subsequent references to the white majority "ethnicize" it by deconstructing it into its constituent parts, each of which has suffered its own history of oppression. The white majority then disintegrates into a group of ethnic minorities, each of which has equal moral claim to remediation for historic subordination. . . . No one ethnic group is different from another in ways that matter legally; therefore all distinctions drawn on race must be treated the same.

Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 *FORDHAM L. REV.* 1753, 1771–72 (2001) (footnotes omitted). For a broader interrogation of how Justice Powell minoritizes whites, see Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 *STAN. L. REV.* 985 (2007).

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To speak of being treated “as a woman” is to make an empirical statement about reality, to describe the realities of women’s situation. In this country, with parallels in other cultures, women’s situation combines unequal pay with allocation to disrespected work, sexual targeting for rape, domestic battering, sexual abuse as children, and systematic sexual harassment; de-personalization, demeaned physical characteristics, use in denigrating entertainment, deprivation of reproductive control, and forced prostitution. To see that these practices are done by men to women is to see these abuses as forming a system, a hierarchy of inequality. This situation has occurred in many places, in one form or another, for a very long time, often in a context characterized by disenfranchisement, preclusion from property ownership (women are more likely to be property than to own any), ownership and use as object, exclusion from public life, sex-based poverty, degraded sexuality, and a devaluation of women’s human worth and contributions throughout society. This subordination of women to men is socially institutionalized, cumulatively and systematically shaping access to human dignity, respect, resources, physical security, credibility, membership in community, speech, and power. Comprised of all its variations, the group women can be seen to have a collective social history of disempowerment, exploitation and subordination extending to the present. To be treated “as a woman” in this sense is to be disadvantaged in these ways incident to being socially assigned to the female sex. To speak of social treatment “as a woman” is thus not to invoke any abstract essence or homogeneous generic or ideal type, not to posit anything, far less a universal anything, but to refer to this diverse and pervasive concrete material reality of social meanings and practices such that, in the words of Richard Rorty, “a woman is not yet the name of a way of being human . . . .”<sup>137</sup>

There is, of course, quite a bit more that one might say about dominance theory and the account of “women” upon which it rests. Because this is a matter about which Crenshaw has some views, this is a good place to bring her back into the analysis. Moreover, turning to Crenshaw here allows us to think not only about dominance theory but also about whether and to what extent that theory converges with intersectionality. A productive way to begin our discussion is to invoke an article that Crenshaw wrote in 2010, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*.<sup>138</sup> The article was part of a symposium marking the contributions of MacKinnon’s groundbreaking body of work.<sup>139</sup> Crenshaw makes clear that she wrote *Close Encounters* at least in part “to examine [in writing] the interface between dominance theory and intersectionality.”<sup>140</sup> Crenshaw has been exploring that interface in her courses for more than a decade, and for more than a decade she has found that endeavor to be pedagogically challenging. Crenshaw explains:

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<sup>137</sup> MacKinnon, *supra* note 15, at 15–16.

<sup>138</sup> Crenshaw, *supra* note 17.

<sup>139</sup> Symposium, *Catharine MacKinnon*, 46 TULSA L. REV. 1 (2010).

<sup>140</sup> Crenshaw, *supra* note 17, at 151.

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For some of my students, many of them progressive young women and men who gravitate toward courses such as Intersectionalities and Advanced Constitutional Law, our discussion of MacKinnon's argument profoundly disrupts their expectations. This dissonance is not incomprehensible given that many students step into the discussion fully armed with the well-rehearsed critique that feminism has been built on the erasure of women of color. Moreover, MacKinnon's rhetorical stance and bold confrontation of the racial politics embedded in this debate pose a striking contrast to some white feminists who engage the critique through superficial gestures of inclusion, or who ignore the argument altogether. MacKinnon's unswerving defense of her project makes her stand out as the purveyor of a universalizing, one-size-fits-all feminism that runs roughshod over women of color. Staged as such, for a significant number of these students, my work and MacKinnon's are poised as oppositional rather than synergistic. Intersectionality is one of the many registers through which women of color boldly speak back against their theoretical marginality.<sup>141</sup>

Our experiences teaching dominance theory and intersectionality very much align with Crenshaw's: that is to say, in our classes as well students perceive a strong tension between the two theoretical frameworks. Our aim in this Part is to disrupt that understanding. To do so, we draw on *Close Encounters* to highlight one of the axes along which intersectionality and dominance theory intersect — via their contestation of regimes of sameness and difference and the baseline effects they both produce and obscure.

While many people understand that dominance theory includes an interrogation of sameness and difference, one would be hard-pressed to find a scholar who frames intersectionality as having that entailment. The dominant understanding of intersectionality is that the framework seeks to demonstrate the particularity of Black women's experiences and vulnerabilities — full stop. As we will explain, a Black-woman-particularity conceptualization of intersectionality not only obscures the broader intervention Crenshaw makes in *Demarginalizing*; such a reading also facilitates the perception that dominance theory and intersectionality are incompatible theoretical frameworks.

As one of us notes in another essay, part of Crenshaw's aim in *Demarginalizing* was indeed to mark the fact that courts were sometimes unwilling to recognize discrimination lawsuits that expressly referenced Black women's race and sex.<sup>142</sup> Consider, for example, one of the cases that Crenshaw highlights in *Demarginalizing*, *DeGraffenreid v. General Motors Assembly Division*.<sup>143</sup> That court refused to recognize

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<sup>141</sup> *Id.* at 152 (footnote omitted).

<sup>142</sup> See Carbado, *supra* note 2, at 812–13.

<sup>143</sup> 413 F. Supp. 142 (E.D. Mo. 1976).

Black women as a discrete group whose members' vulnerability to discrimination was shaped by the particular intersectionality of their race and sex.<sup>144</sup> Central to the court's analysis was the view that Black men and Black women experience the same racism and white women and Black women experience the same sexism. In other words, from the court's perspective, if racism is operating within a particular workplace, it will necessarily similarly impact Black men and Black women (because they have the same race); and if sexism is operating within a particular workplace, it will necessarily impact white women and Black women in identical ways (because they have the same sex). The attribution of sameness to Black women meant that if neither Black men nor white women were experiencing discrimination in the workplace, then Black women's negative employment outcomes could not fairly be described as discrimination.<sup>145</sup> We call the logic on which the foregoing reasoning is based the "sameness dimension" of the intersectionality problem.

But Crenshaw also sought to highlight what we call "the difference dimension" of the intersectionality problem.<sup>146</sup> Operating in this dimension, courts denied Black women the opportunity "to represent a class of plaintiffs that included white women or Black men."<sup>147</sup> This refusal was predicated on the view "that Black women were too different" from Black men and white women to represent their interests in litigation.<sup>148</sup> Two cases in point that Crenshaw discusses are *Moore v. Hughes Helicopters, Inc.*,<sup>149</sup> in which the court refused to certify Black women as class representatives for all women in discrimination lawsuits, and *Payne v. Travenol Laboratories, Inc.*,<sup>150</sup> in which the court refused to allow Black women to represent the interests of Black men.<sup>151</sup>

As the reader might already appreciate, solving the sameness dimension of the intersectionality problem in the sense of recognizing the particularity of Black women's experiences would not solve the difference dimension of the intersectionality problem in the sense of permitting Black women to stand in for or represent the interests of white women and Black men in discrimination cases. Which is to say, the difficult doctrinal position in which Black women found themselves did not derive simply from courts preventing Black women from representing themselves; the problem was also that courts were preventing Black

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<sup>144</sup> *Id.* at 143; Crenshaw, *supra* note 1, at 148.

<sup>145</sup> See *DeGraffenreid*, 413 F. Supp. at 144-45; Crenshaw, *supra* note 1, at 142-43.

<sup>146</sup> See Crenshaw, *supra* note 54, at 1242.

<sup>147</sup> See Carbado, *supra* note 2, at 813.

<sup>148</sup> *Id.*; see Crenshaw, *supra* note 1, at 144, 147.

<sup>149</sup> 708 F.2d 475 (9th Cir. 1983).

<sup>150</sup> 673 F.2d 798 (5th Cir. 1982).

<sup>151</sup> See Crenshaw, *supra* note 1, at 143-48.

women from representing the general categories of race and sex.<sup>152</sup> “Too similar to be different and too different to be the same, Black women were ‘impossible subjects’ of antidiscrimination law.”<sup>153</sup>

At this point, one might reasonably ask whether our reading of intersectionality along the lines of sameness and difference set out above is a rereading, if not a rewriting, of the theory. After all, and as we already indicated, our conceptualization of intersectionality is decidedly not the dominant interpretation of the theory. It is, however, consistent with Crenshaw’s account of intersectionality. As she makes clear in *Close Encounters*, she mobilized intersectionality precisely to grapple with “the sameness/difference paradox.”<sup>154</sup> Moreover, the arguments *Demarginalizing* advances speak louder on this point than our words. Crenshaw writes:

Unable to grasp the importance of Black women’s intersectional experiences, not only courts, but feminist and civil rights thinkers as well have treated Black women in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks. Black women are regarded either as too much like women or Blacks and the compounded nature of their experience is absorbed into the collective experiences of either group or as too different, in which case Black women’s Blackness or femaleness sometimes has placed their needs and perspectives at the margin of the feminist and Black liberationist agendas.<sup>155</sup>

All of this is to say that our reading of intersectionality accords with Crenshaw’s reading of the theory. For us, there is no doubt that Crenshaw employed intersectionality to highlight how regimes of sameness and difference have circumscribed the space Black women have had to assert themselves as both particularized and generalizable subjects of discrimination.

That we have described intersectionality in the foregoing way is not yet to connect the theory to dominance theory. That is what we now do by demonstrating that, like Crenshaw’s theory of intersectionality, MacKinnon’s dominance theory examines the constitutive and subordinating effects of sameness and difference.

Consider, for example, MacKinnon’s evaluation of two standard arguments feminists have advanced to effectuate women’s equality: the claim that women are the same as men, and the claim that they are different. She describes a “dialogue [that] has [been] scripted for [women]” which “contains a main theme, ‘we’re the same, we’re the same, we’re the same,’ and a counterpoint theme (in a higher register),

<sup>152</sup> See Carbado, *supra* note 2, at 813–14; Crenshaw, *supra* note 1, at 148–49.

<sup>153</sup> Carbado, *supra* note 2, at 813 (citation omitted).

<sup>154</sup> Crenshaw, *supra* note 17, at 155–56.

<sup>155</sup> Crenshaw, *supra* note 1, at 150.

‘But we’re different, but we’re different, but we’re different.’<sup>156</sup> For MacKinnon, both articulations normalize a male baseline. “Under the sameness standard, women are measured according to our correspondence with man . . . . Under the difference standard, we are measured according to our lack of correspondence from him . . . .”<sup>157</sup>

Note how easily one can map MacKinnon’s arguments about similarity and dissimilarity onto Crenshaw’s intersectional analyses. The point would be that Black women’s discrimination claims are measured based on their correspondence or lack of correspondence with the experiences of white women (as the embodiment of feminism) and Black men (as the embodiment of antiracism). In this respect, Black men and white women (like the “man” in MacKinnon’s analysis) operate as baselines.

With respect to white women, their experiences constitute the sex discrimination benchmark against which Black women’s experiences are the same or different. This baseline position of white women obscures their intersectional subjectivity. One might think of this obfuscation as a manifestation of what one of us calls “colorblind intersectionality” — that is, an “instance[] in which whiteness helps to produce and is part of a cognizable social category but is invisible or unarticulated as an intersectional subject position.”<sup>158</sup> This is how white women figure in the sex discrimination cases Crenshaw describes. They are not white women but simply women, ostensibly unmodified by their race. African American women, on the other hand, figure as something less or more than women.

With respect to Black men, their experiences constitute the race discrimination benchmark against which Black women are the same or different. This baseline position of Black men obscures their intersectional subjectivity. One might think of this obfuscation as a manifestation of what one of us calls “gender-blind intersectionality.”<sup>159</sup> This is how Black men figure in the race discrimination cases Crenshaw describes. They are not Black men but simply African Americans, ostensibly unmodified by their gender. Black women, on the other hand, figure as something less or more than Black people.

Importantly, Crenshaw’s analysis of baselines also includes an interrogation of the white male baseline in antidiscrimination law that

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<sup>156</sup> Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *THE MORAL FOUNDATIONS OF CIVIL RIGHTS* 144, 145–46 (Robert K. Fullinwider & Claudia Mills eds., 1986).

<sup>157</sup> *Id.* at 146.

<sup>158</sup> Carbado, *supra* note 2, at 817; *see also* Crenshaw, *supra* note 1, at 154 (“The authoritative universal voice — usually white male subjectivity masquerading as non-racial, non-gendered objectivity — is merely transferred to those who, but for gender, share many of the same cultural, economic and social characteristics.”).

<sup>159</sup> Carbado, *supra* note 2, at 817.

MacKinnon exposed. But Crenshaw's examination of this baseline links it to a racial frame that has significantly restricted racial remediation efforts — the frame of “preferential treatment.”<sup>160</sup> Specifically, Crenshaw notes that when white men rehearse “reverse discrimination” claims, courts do not frame those claims as ones in which white men are seeking “preferential treatment,” notwithstanding that these men expressly ground their argument in the view that affirmative action disadvantages white men specifically as white men.<sup>161</sup> When Black women assert discrimination claims based on race and sex, in contrast, at least some courts frame those claims as efforts to seek “preferential treatment” in the sense that Black women seek protection on multiple grounds.<sup>162</sup> The baseline of whiteness and maleness in antidiscrimination law means that even when white men advance discrimination claims with intersectional specificity, courts adjudicate their cases as general discrimination claims, asserted by people “unmodified.”

In some ways, Crenshaw understates the significance of her arguments about preferential treatment. Her engagement demonstrates the potential representative capacity of Black women's identity. It is through Black women's intersectional subjectivity that the courts' selective mobilization of the preferential treatment frame comes into sharp relief. Stated differently, Black women's particularity helps to expose and challenge a more general problem that impacts African Americans writ large — courts' deployment of the language of preferential treatment to limit and reframe racial remediation. Understood in this way, what happened to Black women in the cases Crenshaw describes was a window on what was and is happening to Black people as such in racial remediation cases. Against the backdrop of Black women's continued marginalization in Black antiracist practices, highlighting the ways in which Black women can function as the “miner's canary” for racial inequality becomes all the more important.<sup>163</sup>

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We have tried to suggest that one dimension along which intersectionality and dominance theory intersect is their investment in addressing how sameness and difference function in antidiscrimination law. Our claim is that to the extent that scholars understand intersectionality along the sameness/difference lines we have described, they are much more likely to view dominance theory and intersectionality as doing similar, rather than fundamentally different, kinds of work.

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<sup>160</sup> Crenshaw, *supra* note 17, at 167; *see* Crenshaw, *supra* note 1, at 142.

<sup>161</sup> *See* Crenshaw, *supra* note 17, at 168; Crenshaw, *supra* note 1, at 142 n.12.

<sup>162</sup> *See* Crenshaw, *supra* note 17, at 167; Crenshaw, *supra* note 1, at 142.

<sup>163</sup> *See* LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11–14 (2002).



Does this mean, therefore, that no tensions exist between intersectionality and dominance theory? No. Indeed, as we will now show, notwithstanding what we have already said, intersectionality can be mobilized as a critique, less of dominance theory per se, but of some of the ways in which MacKinnon has defended that theory.

### III. THE TENSIONS BETWEEN INTERSECTIONALITY AND DOMINANCE THEORY

As a preliminary matter, it is helpful to remember that Crenshaw's project in *Close Encounters* was to disrupt the prevailing understanding of intersectionality as oppositional to dominance theory and to illuminate their shared commitment to focus both on power and on the analogous constraints of sameness and difference.<sup>164</sup> As Crenshaw portrays them, intersectionality and dominance theory are songs in harmony: Dominance theory critiques how gender equality is articulated through discourses of sameness and difference that are tethered to the white male body as a baseline. Intersectionality critiques how racial and gender equality are articulated through discourses of sameness and difference that are tethered, respectively, to the Black male and white female body as baselines.<sup>165</sup>

Crenshaw's interrogation of the relationship between intersectionality and dominance theory also points to what she identifies as a curious feature of the anti-essentialist critique as it travels across different contexts. According to Crenshaw, while feminists of color regularly mobilize anti-essentialism as a valid contestation of racial essentialism in dominance theory and feminism more generally, they spend considerably less time mobilizing anti-essentialism to contest the gender essentialism of antiracist theory or politics. Across the disciplines, but particularly in law, the "all the women are white" critique is considerably more salient than the "all the blacks are men" critique.<sup>166</sup> In Crenshaw's own words: "My claim here is not that there are no anti-essentialist critiques of antiracist discourse, but that there is significantly more space given to such critiques against feminism than antiracism."<sup>167</sup> Here Crenshaw

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<sup>164</sup> See Crenshaw, *supra* note 17, at 152, 155–57.

<sup>165</sup> To put the point the way Crenshaw does: "[A]nti-discrimination law anchors both race and gender discrimination in the white male imagination. Beginning from that subject position, race discrimination is what it means to be a man who is not white; gender discrimination is what it is to be a white who is not male." *Id.* at 169.

<sup>166</sup> We are obviously here riffing off the classic text, ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES (Gloria T. Hull, Patricia Bell Scott & Barbara Smith eds., 1982). (Note that in 1992, Gloria T. Hull changed her name to Akasha Hull.)

<sup>167</sup> Crenshaw, *supra* note 17, at 154 n.11.

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is making an empirical claim: whiteness in feminism carries considerably more rhetorical weight than maleness in antiracism. In the course of raising these critical questions, she offers the following observation:

To hazard a working framework for this discussion, essentialism captures the view that members of a particular group all possess some set of defining characteristics, universal among group members, and not dependent upon context. Under the essentialist framework, although individual group members may possess characteristics that are not in the bundle of characteristics required for group membership there is nevertheless some bottom line “essence” of experience that is shared amongst all group members.<sup>168</sup>

The background premise of this discussion is that the anti-essentialist critique is somewhat selectively deployed, first as against so-called “identity” formations such as “women” and “Blacks,” as opposed to class formations such as “the working class” or “the poor.” Further, within and between the discourses of antiracism and feminism, the critique is more likely to surface within the latter (feminism) than the former (antiracism).

For her part, MacKinnon has rehearsed a similar set of concerns:

Although many women have demanded that discussions of race or class take gender into account, typically [these demands] do not take the form that, outside explicit recognition of gender, race or class do not exist. That there is a diversity to the experience of men and women of color, and of working class women and men regardless of race, is not said to mean that race or class are not meaningful concepts. I have heard no one say that there can be no meaningful discussion of “people of color” without gender specificity. Thus the phrase “people of color and white women” has come to replace the previous “women and minorities,” which women of color rightly perceived as not including them twice, and embodying a white standard for sex and a male standard for race. But I hear no talk of “all women and men of color,” for instance. It is worth thinking about that when women of color refer to “people who look like me,” it is understood that they mean people of color, not women, in spite of the fact that both race and sex are visual assignments, both possess clarity as well as ambiguity, and both are marks of oppression, hence community.<sup>169</sup>

While Crenshaw and MacKinnon are not saying precisely the same thing, they are both suggesting that contestations over essentialism figure more prominently in feminism than in antiracism. For both of them, there is a kind of anti-essentialism double standard whereby race can travel without gender particularity more freely than gender can travel without racial particularity. Their intervention raises two inquiries.

First, is there in fact more space to critique the racial politics of feminism than there is to critique the gender politics of antiracism? This is

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<sup>168</sup> *Id.* at 153 n.6.

<sup>169</sup> MacKinnon, *supra* note 15, at 18.

an important empirical question that is beyond the scope of our engagement. The second, arguably more provocative question (implicit in Crenshaw's work and explicit in MacKinnon's) is whether Black women are more ideologically aligned with Black men than they are with white women. It is a version of the latter question to which we now turn. Here, we explore why Black women's antiracist interventions into feminism might not be in equipoise with Black women's feminist interventions into antiracism — why, in other words, Black women might expend less political energy challenging the salience of maleness in antiracism than they expend challenging the salience of whiteness in feminism. We begin with an admittedly cursory but necessary discussion of slavery and Jim Crow.

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The historical relationship between the struggles against slavery and racial domination more generally and the struggles against women's oppression is famously fraught.<sup>170</sup> More to the point for our purposes, alliances between Black women and white women were rendered enormously difficult by both slavery and Jim Crow. The particular form of slavery enacted in the United States was chattel slavery in which slavery was both racially defined and a natal condition passed through the matrilineal line.<sup>171</sup> Under this regime, Black people were presumptively slaves and the child of an enslaved Black woman was presumptively a slave.<sup>172</sup> This gendered dimension of slavery allowed slave masters to produce — quite often through acts of sexual violence — their own labor force, without reliance on the trade.<sup>173</sup> U.S.-style chattel slavery also allowed for the accumulation of wealth as slaves were bought, sold, and inherited in a manner similar to other forms of property.<sup>174</sup> Crucially, law endorsed and enabled this system and was a principal instrument of power and control.<sup>175</sup> Indeed, the foundational document of United States law, the Constitution, can be fairly described, as Professor

<sup>170</sup> See, e.g., Evelyn Brooks-Higginbotham, *The Problem of Race in Women's History*, in *COMING TO TERMS: FEMINISM, THEORY, POLITICS* 122, 122–33 (Elizabeth Weed ed., 1989).

<sup>171</sup> See Harris, *supra* note 119, at 1719.

<sup>172</sup> *Id.* at 1719–20.

<sup>173</sup> *Id.* at 1719 & n.37.

<sup>174</sup> See *id.* at 1716.

<sup>175</sup> On the role of law in upholding slavery, see JOHN HOPE FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 54–63, 99–102, 137–39, 204–06 (9th ed. 2011); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 141, 192–236 (Vintage Books ed., Random House 1989) (1956); Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, 17 *SIGNS: J. WOMEN CULTURE & SOC'Y* 251, 256–58 (1992); *Symposium on the Law of Slavery*, 68 *CHI.-KENT L. REV.* 1009 (1993).

Houston Baker once put it, as “a document that . . . writes itself on the enslaved body of the African.”<sup>176</sup>

The figure of the enslaved Black woman is critical to understanding the transatlantic slave system. Slavery as a system of property did not only structure race: it also configured and structured social and legal hierarchies of race and gender. Indeed, and as one of us has observed:

[S]lavery was the primordial site of the production of racial patriarchy. Racial patriarchy describes that social, political, economic, legal, and conceptual system that entrenched the ideology of white supremacy and white male control over women’s reproduction and sexuality. This system operated by subordinating all Black people along lines that were articulated within and through gender, and all women along lines that were articulated within and through race. . . .

The constructions of race and gender that emerged from slavery then were not wholly separate either as lived realities or as analytic categories. The articulation of racial and sexual oppression within the context of slavery spawned ideologies of womanhood that created oppositional images of Black and white women and configured the concept of womanhood along racial lines. . . . [I]n contrast to the image of white womanhood formulated by nineteenth-century ideology — the “delicate, sexually pure [Lady] . . .” — Black women were portrayed (and continue to be portrayed) as dominant, aggressive, and, except for the matriarchal figure, Mammy, sexually promiscuous. Both Mammy and Jezebel . . . are images of deviance: Mammy . . . inverts the norm of male control . . . [and Jezebel is] inherently transgressive of prevailing standards of womanhood.<sup>177</sup>

The short of what we are saying is that the concept of womanhood was deeply wedded to slavery, a system that was structured on racism and patriarchy. Professor Hortense Spillers’s powerful term, “ungendered,” is an effort to describe how Black women were figured in that

<sup>176</sup> Houston A. Baker, Jr., *There Is No More Beautiful Way: Theory and the Poetics of Afro-American Women’s Writing*, in *AFRO-AMERICAN LITERARY STUDY IN THE 1990S* 135, 140 (Houston A. Baker, Jr. & Patricia Redmond eds., 1989). On the slave origins of the U.S. Constitution and constitutional law, see generally Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 *AKRON L. REV.* 423 (1999); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 *U. PITT. L. REV.* 349, 371–84 (1989); Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 *SUP. CT. REV.* 349, 353–57; Paul Finkelman, *Race, Slavery, and Federal Law, 1789–1804: The Creation of Proslavery Constitutional Law Before Marbury*, 14 *U. ST. THOMAS L.J.* 1 (2018); Paul Finkelman, *The Roots of Printz: Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation*, 69 *BROOK. L. REV.* 1399, 1400, 1410–16 (2004).

<sup>177</sup> Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 *CARDOZO L. REV.* 309, 312–14 (1996) (third alteration in original) (footnotes omitted) (quoting PATRICIA MORTON, *DISFIGURED IMAGES: THE HISTORICAL ASSAULT ON AFRO-AMERICAN WOMEN* 8 (1991)).

system.<sup>178</sup> To put the point another way, Black women were never outside of regimes of gender but rather squarely within them on racially subordinated terms.<sup>179</sup> Slavery racially constructed Black women's gender so that it would fit within the hierarchical social ordering on which the regime was based.

Black women's gendered subjectivity rendered their labor tremendously flexible: Black women as well as Black men performed field work.<sup>180</sup> But Black women also performed domestic labor in the master's house as well and for themselves and their families.<sup>181</sup> Moreover, and as we noted earlier, slave masters sexually violated Black women and fully exploited Black women's reproductive labor.<sup>182</sup> A significant feature of that exploitation was that Black women's children became the property of and a labor source for their masters.<sup>183</sup>

Sojourner Truth's narrative provides a powerful account of the flexible nature and value of Black women's work under chattel slavery. Her owner's boast is particularly relevant: "That wench . . . is better to me than a man — for she will do a good family's washing in the night, and be ready in the morning to go to the field, where she will do as much raking and binding as my best hands."<sup>184</sup> Similarly, the character Patsey, depicted by Lupita Nyong'o in *12 Years a Slave*, is called "queen of the fields" because of her prodigious capacity to work like or in many instances better and harder than men.<sup>185</sup> The positioning of Black women outside the category of normative womanhood was part of a broader social process that facilitated the racialization of normative

<sup>178</sup> See Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 *DIACRITICS* 65, 68 (1987).

<sup>179</sup> These configurations persisted in slavery's afterlife and the system of convict leasing that swept up Black women as well as Black men, as Professor Sarah Haley explains in her groundbreaking book *NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY* (2016). The operation of the carceral regime "exposed and enforced the radical otherness of the black female subject," thereby underwriting a stable gender identity for white women. *Id.* at 5.

<sup>180</sup> See DEBORAH GRAY WHITE, *AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 120–22 (1985); Stephanie M.H. Camp, *The Pleasures of Resistance: Enslaved Women and Body Politics in the Plantation South, 1830–1861*, 68 *J. SOUTHERN HIST.* 533, 560 (2002); Betty Wood, *Some Aspects of Female Resistance to Chattel Slavery in Low Country Georgia, 1763–1815*, 30 *HIST. J.* 603, 607 (1987).

<sup>181</sup> See WHITE, *supra* note 180, at 122–23.

<sup>182</sup> See ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 175 (1981); *supra* pp. 2201, 2227.

<sup>183</sup> See WHITE, *supra* note 180, at 98–103; see also HAZEL V. CARBY, *RECONSTRUCTING WOMANHOOD: THE EMERGENCE OF THE AFRO-AMERICAN WOMAN NOVELIST* 25 (1987) ("[B]lack women gave birth to property and, directly, to capital itself in the form of slaves . . ."); *id.* at 31 ("Internal breeding through slave women became a more crucial addition to plantation capital.").

<sup>184</sup> MARGARET WASHINGTON, *SOJOURNER TRUTH'S AMERICA* 39 (2009).

<sup>185</sup> *12 YEARS A SLAVE* (Plan B Entertainment 2013).

womanhood as white.<sup>186</sup> This racialization is just one of the ways in which racial hierarchy “made up” gender, and not just race, and structured gendered hierarchies, and not just racial ones. The gendered and racialized ordering of racial patriarchy is precisely why women are (and historically have been) differentially intelligible as women. The various legal, political, and social structures that, over time, have produced this difference in intelligibility also circumscribed opportunities for sisterhood across race — and, more particularly, sisterhood between Black women and white women. To make what we are saying a little less abstract, a discussion of the system of racial segregation might be helpful.

The nature of Jim Crow, or formal racial segregation, shaped a whole range of social interactions and carved out a racial geography in which people lived, worked, attended school, socially interacted, politically organized, and formed intimate and familial relationships.<sup>187</sup> In that context, Black women were situated differently with respect to white women than they were with respect to Black men. Racial segregation forced — indeed, legally mandated — racially specific social and intimate relationships. Even following the demise of de jure segregation in the South, de facto segregation persisted,<sup>188</sup> and de facto segregation was similarly sanctioned in the North even without the “explicit, formal imprimatur of state laws.”<sup>189</sup> Consequently, historically, Black women and Black men have quite literally grown up with each other — in the same homes, schools, social settings, churches, and communities — in ways that Black women and white women have not. To observe this much is not to make a normative claim about whether Black women should be as politically and socially aligned with white women as they are with Black men. It is simply to note the differential historical conditions of possibility through which Black women interacted with Black men and white women.

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To bring our discussion back to MacKinnon, we doubt very much that she would fundamentally disagree with the foregoing account. Yet,

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<sup>186</sup> On the racialization of womanhood as white, see CARBY, *supra* note 183, at 20–39; Harris, *supra* note 11, at 586–90; Jean Walton, *Re-placing Race in (White) Psychoanalytic Discourse: Founding Narratives of Feminism*, in FEMALE SUBJECTS IN BLACK AND WHITE: RACE, PSYCHOANALYSIS, FEMINISM 223 (Elizabeth Abel, Barbara Christian & Helene Moglen eds., 1997).

<sup>187</sup> On the spatialization of race, see Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2010); and see also Michael Bennett, *Cities in the New Millennium: Environmental Justice, the Spatialization of Race, and Combating Anti-urbanism*, 8 J. AFR. AM. STUD. 126 (2004); and Michael Bennett, *Manufacturing the Ghetto: Anti-urbanism and the Spatialization of Race*, in THE NATURE OF CITIES: ECOCRITICISM AND URBAN ENVIRONMENTS 169 (Michael Bennett & David W. Teague eds., 1999).

<sup>188</sup> See Boddie, *supra* note 187, at 433–34.

<sup>189</sup> *Id.* at 429.

her analysis of why Black women (and other women) might not embrace the category “woman” as such — unmodified, as it were — focuses on people’s negative perceptions of white women, not on the story of racial patriarchy we articulated above. She writes:

I also sense, though, that many women, not only women of color and not only academics, do not want to be “just women,” not only because something important is left out, but also because that means being in a category with “her,” the useless white woman whose first reaction when the going gets rough is to cry. I sense here that people feel more dignity in being part of any group that includes men than in being part of a group that includes that ultimate reduction of the notion of oppression, that instigator of lynch mobs, that ludicrous whiner, that equality coat-tails rider, the white woman. It seems that if your oppression is also done to a man, you are more likely to be recognized as oppressed, as opposed to inferior. Once a group is seen as putatively human, a process helped by including men in it, an oppressed man falls from a human standard. A woman is just a woman — the ontological victim — so not victimized at all.<sup>190</sup>

We think that Crenshaw should have an intersectional critique of this passage. MacKinnon’s explanation for why women, including Black women, might have a fraught relationship to feminism and white women elides some of our earlier points about the historical role racial patriarchy has played in positioning Black women and white women in separate spheres.<sup>191</sup> We are not saying that those historical forces precluded the possibility of greater identification between Black women and white women. Our claim, in other words, is not that what is and what has been with respect to Black women’s political relationship with white women somehow had to be.<sup>192</sup> We are saying, rather, that the absence of the kind of identification between Black women and white women that MacKinnon might want has more to do with the history of racial patriarchy than with Black women’s perception of white women as “useless . . . wom[e]n whose first reaction when the going gets rough is to cry.”<sup>193</sup>

To better understand why MacKinnon believes that “the issue” with respect to women’s reluctance to articulate themselves as women (without further specificity) is “the white woman,”<sup>194</sup> we turn once more to MacKinnon herself:

<sup>190</sup> MacKinnon, *supra* note 15, at 21–22 (footnote omitted).

<sup>191</sup> As for Black women’s political affiliations with men, we do not think that they derive mostly, or in any meaningful way, from their sense of “dignity in being part of [a] group that includes men,” *id.* at 21. While MacKinnon does not advance this point directly, she does suggest that identifying with men is a structural feature of politics that could explain why women across races might feel pressure not to identify as “women as such.” *Id.* at 20.

<sup>192</sup> Nor, to repeat, are we making a normative statement endorsing the forms those political relationships and alliances have taken over time.

<sup>193</sup> MacKinnon, *supra* note 15, at 21.

<sup>194</sup> *Id.* at 18.

In this connection, it has recently come to my attention that the white woman is the issue here, so I decided I better find out what one is. This creature is not poor, not battered, not raped (not really), not molested as a child, not pregnant as a teenager, not prostituted, not coerced into pornography, not a welfare mother, and not economically exploited. She doesn't work. She is either the white man's image of her — effete, pampered, privileged, protected, flighty, and self-indulgent — or the Black man's image of her — all that, plus the “pretty white girl” (meaning ugly as sin but regarded as the ultimate in beauty because she is white). She is Miss Anne of the kitchen, she puts Frederick Douglass to the lash, she cries rape when Emmett Till looks at her sideways, she manipulates white men's very real power with the lifting of her very well-manicured little finger. She makes an appearance in Baraka's “rape the white girl,” as Cleaver's real thing after target practice on Black women, as Helmut Newton's glossy upscale hard-edged, distanced vamp, and as the Central Park Jogger, the classy white madonna who got herself raped and beaten nearly to death. She flings her hair, feels beautiful all the time, complains about the colored help, tips badly, can't do anything, doesn't do anything, doesn't know anything, and alternates fantasizing about fucking Black men with accusing them of raping her. As Ntozake Shange points out, all Western civilization depends on her. On top of all this, out of impudence, imitativeness, pique, and a simple lack of anything meaningful to do, she thinks she needs to be liberated. Her feminist incarnation is all of the above, and guilty about every single bit of it, having by dint of repetition refined saying “I'm sorry” to a high form of art. She can't even make up her own songs.<sup>195</sup>

We have read this passage several times and find it both powerful and frustrating. Powerful, because MacKinnon productively interrogates the ease with which anti-essentialist critiques of feminism can obscure if not outright deny how white women (across various forms of difference) have been and continue to be marginalized and subordinated. Frustrating, because the passage is not at all clear about when the reader should endorse the representation of white women it depicts and when she should reject it. Clearly, MacKinnon means for us to repudiate the idea that “the white woman . . . is not poor, not battered, not raped (not really), not molested as a child, not pregnant as a teenager, not prostituted, not coerced into pornography, not a welfare mother, and not economically exploited.”<sup>196</sup> But how are we to react to the portions of the passage that suggest that the white woman “puts Frederick Douglass to the lash, . . . cries rape when Emmett Till looks at her sideways, . . . [and] complains about the colored help”?<sup>197</sup> Presenting that entire passage as a way of interrogating “what is a white woman, anyway?” leaves one decidedly unclear about which lines MacKinnon

<sup>195</sup> *Id.* at 18–19 (footnotes omitted).

<sup>196</sup> *Id.* at 18.

<sup>197</sup> *Id.* at 19.



means for the reader to view as problematic representations of white womanhood. This uncertainty is troubling because there is, after all, a “there there” to a representative white woman who is (and historically has been) implicated in racism. Which is to say, white women have been active agents in the private and public regimes of white supremacy.<sup>198</sup> Of course we know that MacKinnon knows that white women don’t stand outside racial hierarchy and have helped to shore up the color line. Her awareness in this respect is precisely why we find *parts* of her “what is a white woman, anyway?” provocation all the more frustrating. In part, it is also curious in that MacKinnon’s intervention here is focused on the content of the category — woman — when MacKinnon’s project as we understand it is more concerned about the social relations and power that constructs the category and enables women’s subordination.<sup>199</sup> In this respect, Crenshaw’s theory of intersectionality might serve as a reminder here of the importance of centering the issue of power over the question of identity, even as the specific experiences of women who are identified and who identify in particular ways are central to productive theorizing.

A final point from MacKinnon’s examination of “what is a white woman, anyway?” that deserves attention is her suggestion that white women might be a particularly useful barometer of gender inequality. Again, we quote her at some length:

Unlike other women, the white woman who is not poor or working class or lesbian or Jewish or disabled or old or young *does not share her oppression with any man*. That does not make her condition any more definitive of the meaning of “women” than the condition of any other woman is. But trivializing her oppression, because it is not even potentially racist or class-biased or heterosexist or anti-Semitic, does define the meaning of being “anti-woman” with a special clarity. How the white woman is imagined and constructed and treated becomes a particularly sensitive indicator of the degree to which women, as such, are despised.<sup>200</sup>

An ungenerous reading of this passage would suggest that it furthers *a version* of the idea of white women as the benchmark for sexism in two respects. First, their experiences have the representative capacity to speak for all women; and, second, our collective inattention to or

<sup>198</sup> On white women and racism, see BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 119–58 (1981); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 *AM. U. J. GENDER & L.* 1, 30–35 (1993); Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 *AM. U. J. GENDER & L.* 171, 174–80 (1994); Pamela J. Smith, Comment, *We Are Not Sisters: African-American Women and the Freedom to Associate and Disassociate*, 66 *TUL. L. REV.* 1467, 1472–80 (1992).

<sup>199</sup> As Professor Vron Ware, feminist scholar, put it: “[T]o be white and female is to occupy a social category that is inescapably racialized as well as gendered. It is not about *being* a white woman, it is about *being thought of* as a white woman.” VRON WARE, *BEYOND THE PALE: WHITE WOMEN, RACISM AND HISTORY*, at xviii (2d ed. 2015).

<sup>200</sup> MacKinnon, *supra* note 15, at 22.

“trivializing” of the precarity of white women signals with “special clarity” our social regard for women writ large. To put the point more provocatively still, one can read the above passage to mean that the *nonintersectional* white woman — the white woman whose identity is (ostensibly) not moderated by race, or disability, or sexual orientation, or class, or religion — is a woman whose gender is *just gendered*.<sup>201</sup> Thus her ability to serve as “a particularly sensitive indicator of the degree to which women, as such, are despised.”<sup>202</sup>

As we have already said and want to emphasize again here, we think the above would be an ungenerous reading. MacKinnon’s point, as best we can tell, seems to be that women whose *subordinating* experiences do not intersect with men’s (and only white women fit this category) do not have an intersectional or coalitional partner in men. Further, because these women are not intersectionally anchored in some other marginalized identity, they can serve as a kind of miner’s canary for women’s position in society more generally.<sup>203</sup> Even on this reading of MacKinnon, we worry about the import of her analysis. For one thing, her claim obscures the intersectionality of whiteness, and more precisely, the structural intersectional relationship between white women and white men.<sup>204</sup> While the racial convergence between white men and white women should not elide how white male patriarchy has systemically subordinated white women (we are not saying that the pedestal for white women has been a pedestal), the privileging dimensions of intersectional whiteness in the lives of white women should be named. Naming that privilege complicates MacKinnon’s account about whose gendered identity might be “a particularly sensitive indicator” of the status of women. Indeed, one might say that precisely because white women are always already intersectionally situated within regimes of whiteness, they lack the representative capacity to serve as “a particularly sensitive indicator of the degree to which women, as such, are despised.”<sup>205</sup>

To put all of what we are saying another way, no woman exists outside an intersectional relationship with men. All women have at least one social identity that intersects with a social identity of a man. MacKinnon’s analysis obscures the intersectionality of whiteness in the lives of white women. This obfuscation situates women of color as being

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<sup>201</sup> To be clear, we do not think that is a nonintersectional subject position. As one of us has written, intersectionality marks the “top” and the “bottom” of discrimination. See Carbado, *supra* note 2, at 814. Under this view, white, heterosexual manhood is an intersectional social identity.

<sup>202</sup> MacKinnon, *supra* note 15, at 22.

<sup>203</sup> For a thoughtful discussion of the metaphor of the miner’s canary in the context of race, see generally GUINIER & TORRES, *supra* note 163.

<sup>204</sup> See Carbado, *supra* note 2, at 823.

<sup>205</sup> MacKinnon, *supra* note 15, at 22.

more implicated in the community of men than white women. White women and white men are in a coalition every bit as real as the coalition between Black women and Black men. In this respect, it bears emphasizing that, as a historical matter, by and large, white women have politically aligned themselves with white men.<sup>206</sup> A crude but telling example of what we mean is reflected in the politics of presidential elections. In no recent presidential election has a majority of white women voted for the Democratic candidate.<sup>207</sup> This is true even with respect to Hillary Clinton's historic presidential run.<sup>208</sup> The majority of white women voters in that electoral cycle voted for the Republican candidate, Donald Trump.<sup>209</sup> Which is to say, they voted in line with the majority

<sup>206</sup> See, e.g., PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 51 (1984); HOOKS, *supra* note 198, at 124–53 (on the historical animosity between Black and white women's liberationists and employment activists); BELL HOOKS, *Sisterhood: Political Solidarity Among Women*, in FEMINIST THEORY: FROM MARGIN TO CENTER 43, 45–47, 50–60 (2d ed. 2000).

<sup>207</sup> See Michelle Cottle, *Why White Women Continue to Back the GOP*, THE ATLANTIC (Nov. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/11/white-women-support-gop/507617> [<https://perma.cc/5VT7-YNN4>]; see also RICHARD A. SELTZER, JODY NEWMAN & MELISSA VOORHEES LEIGHTON, SEX AS A POLITICAL VARIABLE: WOMEN AS CANDIDATES AND VOTERS IN U.S. ELECTIONS 6 (1997) (noting that in 1994, “the majority of white women . . . vote[d] Republican”); Jane Junn, *The Trump Majority: White Womanhood and the Making of Female Voters in the U.S.*, 5 POL. GROUPS & IDENTITIES 343, 345 (2017) (“White women have voted in majority support for Republican Party candidates . . . in all but two presidential elections between 1952 and 2012.”); John Cassidy, *What's Up with White Women? They Voted for Romney, Too*, NEW YORKER (Nov. 8, 2012), <https://www.newyorker.com/news/john-cassidy/whats-up-with-white-women-they-voted-for-romney-too> [<https://perma.cc/V8LW-67MU>]; Ilyse Hogue, *Reaching White Women*, DEMOCRACY, Summer 2017, <https://democracyjournal.org/magazine/45/reaching-white-women> [<https://perma.cc/GE2Y-T93B>] (stating that “[t]he majority of white women have been voting Republican in elections for some time — an average of 54 percent going back to 2004”); Julie Kohler, *The Reasons Why White Women Vote Republican — And What to Do About It*, THE NATION (Feb. 1, 2018), <https://www.thenation.com/article/the-reasons-why-white-women-vote-republican-and-what-to-do-about-it> [<https://perma.cc/S9W2-LUN3>].

<sup>208</sup> Junn, *supra* note 207, at 343; Cottle, *supra* note 207; *Exit Polls*, CNN (Nov. 23, 2016, 11:58 AM), <https://www.cnn.com/election/2016/results/exit-polls> [<https://perma.cc/Q6E9-LV3C>] (finding that fifty-two percent of white women voted for Donald Trump); Katie Rogers, *White Women Helped Elect Donald Trump*, N.Y. TIMES (Nov. 9, 2016), <https://nyti.ms/2eDXpXO> [<https://perma.cc/MR8E-ATAD>].

<sup>209</sup> Junn, *supra* note 207, at 343; Lois Beckett et al., *The Real “Shy Trump” Vote — How 53% of White Women Pushed Him to Victory*, THE GUARDIAN (Nov. 10, 2016, 6:00 PM), <https://www.theguardian.com/us-news/2016/nov/10/white-women-donald-trump-victory> [<https://perma.cc/653D-BNQB>]; Cottle, *supra* note 207; *Exit Polls*, *supra* note 208; Tara Golshan, *The Women Who Helped Donald Trump Win*, VOX (Jan. 21, 2017, 11:46 AM), <https://www.vox.com/policy-and-politics/2017/1/20/14061660/women-march-washington-vote-trump> [<https://perma.cc/K2DA-BY56>]; Clare Malone, *Clinton Couldn't Win Over White Women*, FIVETHIRTYEIGHT (Nov. 9, 2016, 7:16 PM), <https://fivethirtyeight.com/features/clinton-couldnt-win-over-white-women> [<https://perma.cc/K88T-5HCQ>]; Aamna Mohdin, *American Women Voted Overwhelmingly for Clinton, Except the White Ones*, QUARTZ (Nov. 9, 2016), <https://qz.com/833003/election-2016-all-women-voted-overwhelmingly-for-clinton-except-the-white-ones> [<https://perma.cc/6FEP-ZBJW>]; Rogers, *supra* note 208.

of white men.<sup>210</sup> Had white women voted for Hillary Clinton at the rate of Black women, we would have had our first female president.<sup>211</sup>

White women's relationship to whiteness calls into question MacKinnon's claim that "[h]ow the white woman is imagined and . . . treated becomes a particularly sensitive indicator of the degree to which women, as such, are despised."<sup>212</sup> More to the point, we think that Crenshaw's theory of intersectionality sits in tension with that idea. White women have long benefitted from and negotiated their lives in ways that reproduce white in-group favoritism.<sup>213</sup> When white men think about their wives, their daughters, their mothers, their aunts, and their grandmothers, they are thinking about white women.<sup>214</sup> And when white women

<sup>210</sup> *Exit Polls*, *supra* note 208; Golshan, *supra* note 209; Lucia Graves, *Why Hillary Clinton Was Right About White Women — And Their Husbands*, THE GUARDIAN (Sept. 25, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/sep/25/white-women-husbands-voting> [https://perma.cc/YP5U-J8TM]; Mohdin, *supra* note 209 ("In the end, it's his white base that most benefited Trump. His most enthusiastic supporters were white men across the board, with 54% of college educated white men and 72% [of] non-college educated white men backing him. These white men and women voted like a minority group, according to one electoral analyst, coalescing on a mission to put him in the White House.")

<sup>211</sup> *Exit Polls*, *supra* note 208 (finding that ninety-four percent of Black women voted for Hillary Clinton); Clare Foran, *Women Aren't Responsible for Hillary Clinton's Defeat*, THE ATLANTIC (Nov. 13, 2016), <https://www.theatlantic.com/politics/archive/2016/11/hillary-clinton-white-women-vote/507422> [https://perma.cc/V5XP-55LR]; Matt Rocheleau, *White Women Supported Donald Trump over Hillary Clinton*, BOS. GLOBE (Nov. 9, 2016), <https://www.bostonglobe.com/metro/2016/11/09/white-women-supported-trump-over-clinton/1eULOYeUX6rJX3l2Ie7RNO/story.html> [https://perma.cc/C29U-NW38].

<sup>212</sup> MacKinnon, *supra* note 15, at 22.

<sup>213</sup> On the relevance of in-group favoritism and implicit bias to questions of antidiscrimination law and policy, see Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISCOURSE 210, 217–23 (2012).

<sup>214</sup> To quote Crenshaw:

Indeed, as subtly suggested by the opening comments of Senator David Boren (D-Okla.) in support of the Violence Against Women Act of 1991, the displacement of the "other" as the presumed victim of domestic violence works primarily as a political appeal to rally white elites. Boren said,

Violent crimes against women are not limited to the streets of the inner cities, but also occur in homes in the urban and rural areas across the country.

Violence against women affects not only those who are actually beaten and brutalized, but indirectly affects all women. Today, our wives, mothers, daughters, sisters, and colleagues are held captive by fear generated from these violent crimes — held captive not for what they do or who they are, but solely because of gender.

Rather than focusing on and illuminating how violence is disregarded when the home is "othered," the strategy implicit in Senator Boren's remarks functions instead to politicize the problem only in the dominant community. This strategy permits white women victims to come into focus, but does little to disrupt the patterns of neglect that permitted the problem to continue as long as it was imagined to be a minority problem. The experience of violence by minority women is ignored, except to the extent it gains white support for domestic violence programs in the white community.

think about their husbands, their sons, their fathers, their uncles, and their grandfathers, they are thinking about white men.<sup>215</sup> MacKinnon's line of argument highlights the racially mediated relationship that women of color have with men of color but disattends the racially mediated relationships that white women have with white men. Conceptualizing whiteness as an intersectional subject position that implicates white women and white men raises a question mark (at the very least) about whether white women are "a particularly sensitive indicator of the degree to which women, as such, are despised."<sup>216</sup>

None of what we have said should obscure our view that MacKinnon's interrogation of "what is a white woman, anyway?" is a powerful intervention. Her critique of the uncritical ways in which people mobilize anti-essentialism arguments against feminism is simpatico with our sense that anti-essentialist claims are not inherently progressive and can be employed to advance various conservative projects. Moreover, against the backdrop of the critiques of her scholarship and of feminism as essentialist, we think MacKinnon was right to take on those criticisms. Whether MacKinnon's responses to those criticisms are fair and accurate is a matter we leave to others to discuss.

Finally, we do not think that MacKinnon's defense of dominance theory rests on her claim about white women as a unique indicator of women's subordination. Indeed, MacKinnon's theoretical method as she articulates it is grounded in specific attention to the experiences of women, which are inherently heterogeneous. Thus, with respect to the anti-essentialist critique of her own work, MacKinnon's rejoinder is specific and direct:

My work, for example, is socially based to the ground and built on women's realities, including those of women of color, from the ground up. . . . Its theory of gender is explicitly non-unitary and non-homogenous. While facing the fact that gender affects all women, it is clear that not all women are affected by male dominance in the same way or to the same

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Crenshaw, *supra* note 54, at 1260 (footnote omitted) (quoting 137 Cong. Rec. S611 (daily ed. Jan. 14, 1991) (statement of Sen. Boren)).

<sup>215</sup> Sumi Cho has written compellingly about the degree to which this phenomenon explains why white women often oppose affirmative action, notwithstanding that the program has benefitted and continues to benefit them. See Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from Brown to Grutter*, 7 U. PA. J. CONST. L. 809, 834 (2005) ("We must continue to search for answers and ask the hard questions, such as why not even a simple majority of white women support affirmative action. We need to interrogate, and white women need to interrogate, the ways in which the racialization of the family and entrenched patterns of segregation may dictate even feminist perspectives on affirmative action." (footnote omitted)); Sumi Cho, *Understanding White Women's Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions*, 71 UMKC L. REV. 399, 408-10 (2002).

<sup>216</sup> MacKinnon, *supra* note 15, at 22. Recall that one of us introduced the concept of colorblind intersectionality precisely to foreground the intersectionality of whiteness as a subject position. See Carbado, *supra* note 2, at 823.

degree. For example, it argues that: “feminism seeks the truth of women’s commonality out of the lie that all women are the same.” It systematically addresses racism and makes point after point that it is said to miss. The least privileged women, not the most, are its center and foundation.<sup>217</sup>

MacKinnon’s brief in *Meritor Savings Bank, FSB v. Vinson*,<sup>218</sup> the case that first established the law of workplace sexual harassment,<sup>219</sup> illustrates this point, noting the particular vulnerability of Black women because of the stereotypes that they are always sexually available.<sup>220</sup> As she argued, that vulnerability did not make Vinson’s a race discrimination case per se, but rather one in which the underlying social structure shaped a racialized conception of gender.<sup>221</sup> In this sense, she contends that the experience of Black women was at the center of dominance theory and was key to the validity of its theoretical approach. As she later described it: “Mechelle Vinson being at the bottom of the group women, distinctively sexualized for denigration based on being Black and a woman both, if equality law doesn’t work for her, it doesn’t work.”<sup>222</sup>

MacKinnon’s response to the anti-essentialist critique of feminism is similarly unequivocal and uncompromising:

Feminism claims not that all women are affected the same by male power or are similarly situated under it. It claims that no woman is unaffected by it. Feminism does not see all women as the same; it criticizes this view. It claims that all women are seen and treated as women in some way under male supremacy.<sup>223</sup>

As we have said, we are not challenging MacKinnon’s pushback against the contention that her scholarship and feminism more generally are essentialist. We have views on those ongoing debates, but do not mean to weigh in on them here. Our quarrel with MacKinnon, if it is that, concerns her twin claims that the anti-essentialist criticism of feminism derives to some meaningful extent from people wanting to disassociate from and disidentify with “her” — the “useless white woman” — and that this distancing from the white woman “is a particularly sensitive indicator” of women’s social standing and regard in society. MacKinnon’s analysis here is contestable, on shaky intersectional ground, and, we think, insufficiently attentive to concerns about the representativeness of white women as the dominant sign for womanhood.

<sup>217</sup> Catharine A. MacKinnon, *Keeping It Real: On Anti-“Essentialism,”* in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 71, 74 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002) (footnotes omitted).

<sup>218</sup> 477 U.S. 57 (1986).

<sup>219</sup> See *id.* at 59, 66.

<sup>220</sup> See Brief of Respondent Mechelle Vinson, *Meritor Sav. Bank*, 477 U.S. 57 (No. 84-1979), 1986 WL 728234, at \*45.

<sup>221</sup> See *id.* at \*45–46.

<sup>222</sup> Catharine A. MacKinnon, *Intersectionality as Method: A Note*, 38 *SIGNS: J. WOMEN CULTURE & SOC’Y* 1019, 1025 (2013).

<sup>223</sup> CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 87 (2005).

## CONCLUSION

Our point of departure for this Essay was that anti-essentialism, intersectionality, and dominance theory are important theoretical frameworks whose points of convergence and divergence scholars have insufficiently explored. Our modest effort in this piece was to begin that project. In the context of doing so, we sought to disaggregate intersectionality from anti-essentialism, articulate, if you like, the intersection of dominance theory and intersectionality, and identify some of the ways in which Catharine MacKinnon's defense of dominance theory — particularly her interrogation of "what is a white woman?" — might be in tension with intersectionality. To remind the reader of a line from the introduction, if we are confident about anything we say in this Essay, it is that the only uncontroversial thing we can say is that the reader — wherever she theoretically or normatively sits — will find something in our analysis with which to disagree. We look forward to learning from those disagreements. We staged our intervention as a provisional effort precisely to generate a broader set of engagements and debates.