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## **Introduction: What Matters for Black Workers After 2020?**

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# INTRODUCTION: WHAT MATTERS FOR BLACK WORKERS AFTER 2020?

BY MICHAEL Z. GREEN\*

This symposium issue examines concerns arising for Black<sup>1</sup> workers after the transformative events occurring in 2020. Within the year 2020, we saw the senseless killings of George Floyd, Breonna Taylor, Ahmaud Arbery, and Rayshard Brooks as well as so many others that led to national and international protests in support of Black Lives Matter (BLM).<sup>2</sup> Unions and many Black workers joined in further BLM solidarity during the *Strike for Black Lives* held on July 20, 2020.<sup>3</sup> Black athletes have engaged in several prominent acts supporting BLM reforms including kneeling during the playing of the national anthem as started by Colin Kaepernick<sup>4</sup> and continued by other National Football League (NFL) players,<sup>5</sup> the longstanding activism by professional basketball players who are members of the Women's National Basketball Association (WNBA),<sup>6</sup> and the

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<sup>1</sup> Throughout this Introduction, I shall refer to black individuals using the uppercase B while recognizing that others in this symposium issue may use the terms African American and black or Black interchangeably. See Angela Onwuachi-Willig & Anthony V. Alfieri, *(Re)framing Race in Civil Rights Lawyering*, 130 YALE L.J. 2052, 2061 n.23 (2021) (reviewing HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* (2019)); see also Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (referring to how "Black" warrants capitalization as "Blacks like Asians [and] Latinos . . . constitute a specific cultural group and, as such, require denotation as a proper noun").

<sup>2</sup> See Jorge L. Ortiz, *"It's Nothing but Pain": The Latest on the Cases of Violence Against Black People that Sparked America's Racial Reckoning*, USA TODAY (Sept. 11, 2020, 9:28 AM), <<https://www.usatoday.com/story/news/nation/2020/09/09/george-floyd-breonna-taylor-jacob-blake-what-we-know/5753696002>>.

<sup>3</sup> See Aaron Morrison, *"Strike for Black Lives": Workers Protest Racial Inequality on Day of National Strike*, NBC N.Y. (July 20, 2020, 9:57 PM), <<https://www.nbcnewyork.com/news/local/strike-for-black-lives-thousands-to-walk-off-job-to-protest-racial-inequality/2521356>>.

<sup>4</sup> See Patrick Jennings, *Colin Kaepernick: From One Man Kneeling to a Movement Dividing a Country*, BBC SPORT (Oct. 11, 2017), <<https://www.bbc.com/sport/american-football/41530732>>; Jason Reid, *How Colin Kaepernick Became a Cause for Activists, Civil Rights Groups and Others*, THE UNDEFEATED (Aug. 22, 2017), <<https://theundefeated.com/features/how-colin-kaepernick-became-a-cause-for-activists-civil-rights-groups>>.

<sup>5</sup> See Michael Levenson, *N.F.L. Will Allow Six Social Justice Messages on Players Helmets*, N.Y. TIMES (Sept. 6, 2021), <<https://www.nytimes.com/2021/09/05/sports/nfl-social-justice.html>>.

<sup>6</sup> See Connor Garel, *WNBA Players Protested Police Brutality Even Before Colin Kaepernick. Remember That?*, HUFFINGTON POST (Aug. 28, 2020, 6:39 PM EDT),

members of the National Basketball Association (NBA) who conducted a wildcat strike in response to Jacob Blake's shooting.<sup>7</sup> Likewise, Covid-19 disproportionately affected Black individuals in substantial and different ways than other groups, especially given that many of the so-called essential workers were Black.<sup>8</sup>

Divisive political actions have also created many hostilities for Black workers in 2020 including the issuance of a Presidential Executive Order banning discussions of implicit bias and critical race theory in employee training programs conducted by federal contractors.<sup>9</sup> Unfortunately, the purported architect behind the challenges to critical race theory trainings in the workplace and in schools has admitted that his purpose was to create a political weapon that would divide the country in a cultural war on issues related to Black persons.<sup>10</sup> In 2020, white supremacist and militia groups

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<[https://www.huffpost.com/archive/ca/entry/wnba-protest-black-lives-matter\\_ca\\_5f496791c5b697186e35f3a6](https://www.huffpost.com/archive/ca/entry/wnba-protest-black-lives-matter_ca_5f496791c5b697186e35f3a6)>.

<sup>7</sup> See Lester Spence, *The NBA Wildcat Strike is How a Revolution Starts*, MOTHER JONES (Aug. 29, 2020), <<https://www.motherjones.com/media/2020/08/nba-strike-black-culture>>; Edward Ongweso Jr., *Why the NBA Wildcat Strike is So Important*, VICE (Aug. 27, 2020, 2:11 PM), <<https://www.vice.com/en/article/ep47pj/why-the-nba-wildcat-strike-is-so-important>>.

<sup>8</sup> See ELISE GOULD & VALERIE WILSON, ECON. POL'Y INST., BLACK WORKERS FACE TWO OF THE MOST LETHAL PREEXISTING CONDITIONS FOR CORONAVIRUS – RACISM AND INEQUALITY (2020), <<https://files.epi.org/pdf/193246.pdf>>; Rashawn Ray, *Why Are Blacks Dying at Higher Rates from Covid-19?*, BROOKINGS (Apr. 9, 2020), <<https://www.brookings.edu/blog/fixgov/2020/04/09/why-are-blacks-dying-at-higher-rates-from-covid-19>>; Tiana N. Rogers, Charles R. Rogers, Elizabeth VanSant-Webb, Lily Y. Gau, Bin Yan & Fares Qeadan, *Racial Disparities in Covid-19 Mortality Among Essential Workers in the United States*, 12 WORLD MED. & HEALTH POL'Y 311 (2020), <<https://onlinelibrary.wiley.com/doi/epdf/10.1002/wmh3.358>> (describing a National Center for Biotechnology Information, U.S. National Libraries of Medicine, and National Institutes of Health study finding that Non-Hispanic Blacks "disproportionately occupied the top nine essential [worker] occupations" which increased significantly the vulnerability of Black workers to be susceptible to Covid-19 exposure during the global pandemic).

<sup>9</sup> See Exec. Order No. 13950, 85 Fed. Reg. 60,683 (Sept. 28, 2020) (providing the exact wording of the Executive Order which is no longer in effect after President Trump left office and President Biden rescinded it); see also Fabiola Cineas, *Critical Race Theory, and Trump's War on It, Explained*, VOX (Sept. 24, 2020, 2:20 PM EDT), <<https://www.vox.com/2020/9/24/21451220/critical-race-theory-diversity-training-trump>> (describing how the Executive Order President Trump initiated was part of a broader political attack on matters of race that UCLA Law Professor Kimberlé Crenshaw and a founder of critical race theory referred to as "lump[ing] everything together: critical race theory, 1619 project [reviewing the impact of slavery in America], whiteness studies, talking about white privilege" all for the purpose of quieting "discourses that refuse to participate in the lie that America has triumphantly overcome its racist history, that everything is behind us"). President Biden immediately rescinded Executive Order 13950 by President Trump when he issued a new Executive Order 13985 on January 20, 2021. Exec. Order 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021); see *President Biden Revokes Executive Order 13950*, U.S. DEPT. OF LABOR, <<https://www.dol.gov/agencies/ofecp/executive-order-13950>> (last visited Jan. 23, 2022).

<sup>10</sup> See Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race*, NEW YORKER (June 18, 2021), <<https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>> (identifying the actions of conservative activist and self-proclaimed architect of the critical race theory attacks, Christopher Rufo, who decided that referring to critical race theory represented the "perfect villain" for conservatives to

openly carried weapons threatening many Black protesters and election workers.<sup>11</sup>

Black persons in 2020 also continued to have lower salaries<sup>12</sup> and levels of employment<sup>13</sup> with greater opportunities to be arrested or imprisoned.<sup>14</sup> Unfortunately, additional losses with the passing of so many Black civil

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fight in its culture wars). Rufo's use of critical race theory as "a promising political weapon" not only led to the Trump Executive Order but also inspired conservatives in various state legislatures to be guided by his language in proposing and passing legislation to ban or restrict its use in any training or instruction in schools. *Id.* Also, Republican leaders including Florida Governor Ron DeSantis and U.S. Senator Tom Cotton from Arkansas tweeted attacks on critical race theory that referred to some of Rufo's phrases. *Id.*

<sup>11</sup> See Larry Bruhl, *Donald Trump's Call to Militia to "Watch" Polling Places Raises Fears of Voter Intimidation*, NEWSWEEK (Oct. 17, 2020, 5:00 AM EDT), <<https://www.newsweek.com/donald-trumps-call-militia-watch-polling-places-raises-fears-voter-intimidation-1539900>> (describing how private militia have been present at anti-racism rallies and other social protests and how President Trump's call for "people" to go to polls and watch them carefully got the attention of militia groups); Ryan Devereaux, *Leaked Documents Show Police Knew Far-Right Extremists Were the Real Threat at the Protests, Not "Antifa"*, THE INTERCEPT (July 15, 2020, 12:15 PM), <<https://theintercept.com/2020/07/15/george-floyd-protests-police-far-right-antifa>> (documenting federal government efforts to pursue left-wing extremist groups as terrorists during President Trump's administration when a host of documents identified right-wing extremist groups with military weapons were more involved in causing trouble at protests); Anna Orso & Ellie Rushing, *White Supremacists and other Extremist Groups Are Using Protests and a Pandemic to Amplify their Message*, PHILA. INQUIRER (June 13, 2020), <<https://www.inquirer.com/news/white-supremacist-extremists-reopen-rallies-black-lives-matter-protests-20200613.html>> (referring to white supremacist attempts to agitate during protests including the acts of a militia group called the Boogaloo boys); see also Joel Burgess, *Asheville Police Looking for White Supremacist Links to Gun-Wielding Counterprotesters*, ASHEVILLE CITIZEN TIMES (June 30, 2020, 12:10 PM ET), <<https://www.citizen-times.com/story/news/local/2020/06/30/asheville-police-look-white-supremacist-links-gun-wielding-counterprotesters/3263847001>> (discussing white supremacist ties of heavily-armed demonstrators openly carrying guns as they arrived to oppose Black Lives Matter protesters in Asheville, North Carolina area); Linda So, *Trump-Inspired Death Threats Are Terrorizing Election Workers*, REUTERS (June 11, 2021, 11:00 AM GMT), <<https://www.reuters.com/investigates/special-report/usa-trump-georgia-threats>> (describing the threats, general terror and menacing tactics of intimidation against lower level election workers for just doing their job that occurred during the last election and how a far-right militia group, the Oath Keepers, had its members appear outside the home of Georgia Republican Secretary of State Brad Raffensperger to influence a voting recount process and more specifically how threats aimed at Fulton County Georgia's primarily Black election workers subjected them to "racial slurs [that] were disturbing and sickening").

<sup>12</sup> See Stephen Miller, *Black Workers Still Earn Less Than Their White Counterparts*, SHRM (June 11, 2020), <<https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx>> (describing study finding that "black men earned 87 cents for every dollar a white man earned" and "black women who work full-time, year-round – they were paid only 63 cents for every dollar paid to white, non-Hispanic men.").

<sup>13</sup> Charisse Jones, *Black Unemployment 2020: African Americans Bear Brunt of Economic Crisis Sparked by the Coronavirus*, USA TODAY (June 5, 2020, 1:06 PM ET), <<https://www.usatoday.com/story/money/2020/06/04/black-unemployment-2020-joblessness-compounds-anguish-over-brutality/3138521001>>.

<sup>14</sup> See Anagha Srikanth, *Black People 5 Times More Likely to Be Arrested than Whites, According to New Analysis*, THE HILL (June 11, 2020), <<https://thehill.com/changing-america/respect/equality/502277-black-people-5-times-more-likely-to-be-arrested-than-whites>> (describing ABC news analysis of data voluntarily reported to the FBI showing in 250 jurisdictions and thousands of city and county police departments over a three-year period ending in 2018 that Blacks were ten times more likely to be arrested than their white counterparts and noting how this data matches previous research showing that Blacks disproportionately are incarcerated, making up 34 percent of the incarcerated population, while only being 13 percent of the United States population).

rights leaders including John Lewis,<sup>15</sup> C.T. Vivian,<sup>16</sup> and Joseph Lowery<sup>17</sup> occurred in 2020. After the 2020 presidential election, there remains considerable uncertainty about legislative, executive, and judicial actions in response to the political appointments and agendas of the previous four years and whether a new president may effectuate changes that may create significant benefits for Black workers.<sup>18</sup> At least one commentator, Dean Angela Onwuachi-Willig, has asserted pessimism that "lasting social, political, and legal reform in the United States" will occur despite the creation of strong coalitions including many white persons who joined in the protests calling for racial justice after the George Floyd tragedy.<sup>19</sup> According to Onwuachi-Willig's application of critical race theory in assessing the impact of the George Floyd protests from cultural trauma narratives, any connections with the everyday racial traumas facing Black persons have appeared to be only "temporary" responses without any evidence that the "feelings [of white persons] . . . had . . . forever changed by witnessing racialized police brutality."<sup>20</sup>

With these concerns in mind as to whether sustained changes may occur for Black workers after the George Floyd protests, the effects of Covid-19, and all the other aspects of systemic racism that became even more amplified through the events occurring in 2020,<sup>21</sup> this symposium offers three articles

<sup>15</sup> Alana Abramson, *Rep. John Lewis, Civil Rights Icon and "Conscience of Congress" Dies at 80*, TIME (July 18, 2020, 3:49 AM), <<https://time.com/5697668/john-lewis-dies>>.

<sup>16</sup> See Colin Dwyer, *C.T. Vivian, Civil Rights Leader and Champion of Nonviolent Action, Dies at 95*, NPR (July 17, 2020, 2:41 PM), <<https://www.npr.org/2020/07/17/892223763/c-t-vivian-civil-rights-leader-and-champion-of-nonviolent-action-dies-at-95>>.

<sup>17</sup> See Amir Vera & Tricia Escobedo, *Joseph Lowery, Civil Rights Leader, Dies at 98*, CNN (Mar. 28, 2020, 3:49 AM), <<https://www.cnn.com/2020/03/27/us/joseph-lowery-dead/index.html>>.

<sup>18</sup> See Tracy Jan, *The Trump Economy Left Black Americans Behind. Here's How they Want Biden to Narrow the Gaps*, WASH. POST (Jan. 22, 2021, 6:00 AM), <<https://www.washingtonpost.com/business/2021/01/22/black-voters-biden-trump-economy>>

(describing how Black individuals are expecting changes from the Biden administration to target systemic discrimination by enforcing civil rights laws against discrimination in mortgage lending, addressing the wealth gap and unemployment disparities, improving the economy while focusing on Black worker concerns as they are most likely to work low-wage jobs without healthcare insurance or retirement benefits and are more likely to be exposed to Covid-19).

<sup>19</sup> See Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 819, 845 (2021) (acknowledging greater awareness on the part of white individuals about racial concerns that blacks in our society face as a result of the George Floyd killing but suggesting that any shift in understanding by white persons "seems to be temporary" and has not translated into "lasting changes in today's civil rights movement").

<sup>20</sup> *Id.*

<sup>21</sup> Although referring to the events of 2020 here, other key events affecting Black workers extended into 2021 including the January 6, 2021, insurrection when a mob of trespassers breached the United States Capitol, placing confederate flags and using racial epithets while attacking Black Capitol police officers. See Caitlin Dickson, *Pro-Trump Mob Hurling Racial Slurs at Black Officers on Jan. 6, Capitol Police Officer Dunn Says*, YAHOO! NEWS (July 27, 2021), <<https://news.yahoo.com/pro-trump-mob-hurled-racial-slurs-at-black-officers-on-jan-6-capitol-police-officer-dunn-says-170819789.html>>; Emmanuel

that address some of the key matters that Black workers must continue to face. The first two articles<sup>22</sup> consider the challenges in pursuing claims of employment discrimination based on the race of Black workers as well as their intersectionality<sup>23</sup> with other corresponding and unique traits after the Supreme Court's 2020 decision in *Bostock v. Clayton County*.<sup>24</sup> The last article in this symposium examines the legal concerns presented by increasing technological innovations allowing Black workers some job flexibility within the gig economy while also denying certain protections by classifying them as independent contractors instead of employees.<sup>25</sup>

Professor Jamillah Bowman Williams' article, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, gives us some unique and current perspectives on the issue of intersectional discrimination

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Felton, *Black Police Officers Describe the Racist Attacks they Faced as they Protected the Capitol*, BUZZFEED NEWS (Jan. 9, 2021, 3:32 PM), <<https://www.buzzfeednews.com/article/emmanuelfelton/black-capitol-police-racism-mob>>. Another major event regarding the treatment of Black workers included the alleged racist and political meddling at the University of North Carolina in rejecting the tenured appointment to the journalism school of Black female and Pulitzer prize award-winning journalist, Nikole Hannah-Jones, the school's subsequent reversal with an offer of tenure after numerous protests on and outside the campus, and Jones' refusal of the offer and decision to accept a chair position instead in journalism at Howard University. See Jack Brewster, *Nikole Hannah-Jones – "1619 Project" Journalist – Rejects UNC Tenure Offer*, FORBES (July 6, 2021, 9:05 AM EDT), <<https://www.forbes.com/sites/jackbrewster/2021/07/06/nikole-hannah-jones-1619-project-journalist-rejects-uncs-tenure-offer>>; Charlotte Klein, *"It's Just Not Something I Want Anymore": Nikole Hannah-Jones Rejects UNC's Tenure Offer*, VANITY FAIR (July 6, 2021), <<https://www.vanityfair.com/news/2021/07/nikole-hannah-jones-rejects-uncs-tenure-offer>>.

<sup>22</sup> See Henry L. Chambers, Jr., *Bostock, the CROWN Acts, and Possible Right to Self-Expression*, 25 EMP. RTS. & EMP. POL'Y J. 53 (2021); Jamillah Bowman Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, 25 EMP. RTS. & EMP. POL'Y J. 13 (2021).

<sup>23</sup> See 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 (unpacking the dynamics of discrimination for women of color due to the intersection of race and sex); see also Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-) History*, 95 B.U. L. REV. 713, 713-14 (2015) (referring to the "path-breaking article introducing 'intersectionality' to critical legal scholarship" as authored by UCLA Law Professor Kimberlé Crenshaw in 1989 and how Crenshaw highlighted the failure of employment discrimination law to "capture and ameliorate the particular experiences of women of color"). Crenshaw's landmark article has led to a wealth of scholarly analysis and application of intersectionality approaches in addressing many discrimination issues for Black women especially with respect to their hair. See Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1086 (2010); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 378-79 (1991); D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333, 333-34 (2013); D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIA. L. REV. 987, 992 (2017); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?* 79 U. COLO. L. REV. 1355, 1370-76 (2008).

<sup>24</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1742 (2020) (finding discrimination because of sex under Title VII to also include discrimination because of homosexuality and transgender status).

<sup>25</sup> See Michael C. Duff, *Challenges for Black Workers After 2020: Antiracism in the Gig Economy*, 25 EMP. RTS. & EMP. POL'Y J. 103 (2021).

based on race and sex for Black women.<sup>26</sup> Building on the groundbreaking work of Professor Kimberlé Crenshaw from more than thirty years ago,<sup>27</sup> Professor Williams explores the difficulties that Black women still face in establishing employment discrimination claims as a result of the intersection of race and sex. Despite the depths of the #MeToo movement's ability to shape claims of sex discrimination in a manner that has encouraged women to come forward to shine a light on sex discrimination, Williams notes that concerns for Black women subjected to intersectional discrimination appeared to be missing from this discussion.<sup>28</sup>

Williams uses the Supreme Court's *Bostock*<sup>29</sup> decision and its application in the lower courts applying a sex-plus framework in support of discrimination claims as a new first step to developing a more successful approach in asserting intersectional claims for Black women.<sup>30</sup> Williams categorizes the current various approaches being employed by the lower courts to address intersectional claims. Under the sex-plus framework, the analysis requires a Black woman to compare her treatment in the workplace with the employer's treatment of Black men.<sup>31</sup> Williams notes that the courts have been unwilling to endorse a race-plus framework instead. Williams finds this distinction to be a problematic result for a Black women's intersectional claims.<sup>32</sup> As a response, Williams calls for a change in analysis that will recognize race can be a primary characteristic that allows a Black woman to use a race-plus intersectionality analysis to establish a valid employment discrimination claim based upon comparing her treatment in the workplace with how white women are treated.<sup>33</sup>

Williams does not end her analysis there as she then asserts that one of the problems with either a sex-plus or race-plus framework as an intersectional discrimination claim is that both approaches require an overreliance on the use of comparators to establish the claim.<sup>34</sup> Another approach that Williams identifies in lower court decisions is to accept that Black women are a protected class.<sup>35</sup> Then Williams identifies the approach

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<sup>26</sup> Williams, *supra* note 22.

<sup>27</sup> Crenshaw, *supra* note 23.

<sup>28</sup> Williams, *supra* note 22, at 48 & n.204.

<sup>29</sup> See *Bostock*, 140 S. Ct. at 1742 (determining that discrimination because of sex includes being gay or transgender as a violation of Title VII because "homosexuality and transgender status are inextricably bound up with sex").

<sup>30</sup> Williams, *supra* note 22, at 31.

<sup>31</sup> *Id.* at 32.

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

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 33–34.

of looking at the totality or aggregate circumstances in assessing the intersectional claim.<sup>36</sup> A final approach to intersectionality identified by Williams is one of an inconsistent or essentially an undecided approach in a couple of lower courts.<sup>37</sup> Williams offers a chart that captures all of the frameworks and the lower courts that have accepted these approaches.<sup>38</sup>

In her final recommendations, Williams obviously draws from her considerable scholarly work<sup>39</sup> analyzing discrimination claims for Black women, as well as her completed dataset<sup>40</sup> reviewing all state legislatures from 2016-2020 and finding no attempts to pass laws addressing intersectional claims for workplace harassment.<sup>41</sup> Because of the lack of a cohesive effort to change the law to protect Black women in an approach that gives some voice to intersectional claims based upon both race and sex, Williams recommends that the scope of harassment be broadened to an aggregate approach aimed at making Black women a clearly protected class under both state and federal law.<sup>42</sup> Williams ends her article by appreciating how the issues from #MeToo and racial justice protests have provided an opportunity for recognition of discrimination issues for Black women. But the need for more of a legal change to provide protections for Black women from intersectional forms of workplace discrimination remains a major challenge that Williams will continue to pursue.

In *Bostock, the CROWN Acts, and Possible Right to Self-Expression*, Professor Henry L. Chambers, Jr. looks at the possibilities for protected self-expression<sup>43</sup> that Black workers may pursue as another form of intersectional claim as suggested by expanding principles being applied in defining race

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<sup>36</sup> *Id.* at 35–37.

<sup>37</sup> *Id.* at 37–38.

<sup>38</sup> *Id.* at 39 (providing chart before the start of Section V).

<sup>39</sup> See Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality and the Movement*, 62 B.C. L. REV. 1797 (2021); Jamillah Bowman Williams et al., *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371 (2019); Jamillah Bowman Williams et al., *#BlackLivesMatter – Getting from Contemporary Social Movements to Structural Change*, 12 CAL. L. REV. ONLINE 1 (Jun. 2021).

<sup>40</sup> Williams, *supra* note 22, at 48 n.202.

<sup>41</sup> *Id.* at 47–48.

<sup>42</sup> *Id.* at 48–50.

<sup>43</sup> Many vulnerable employees including workers of color cover their self-expression to combat stereotypes. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 878-905 (2002) (discussing racial covering and assimilation). Several scholars have identified the concerns that self-expression, identity performance, and trait discrimination appear to be unprotected in the workplace. See Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 381-82 (2008); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1142 (2004); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 410 (2006).

and gender discrimination.<sup>44</sup> The first part of Chambers' article focuses on the impact of the Supreme Court's *Bostock*<sup>45</sup> decision and how its analysis may lead to a major change in employment discrimination analysis to allow an employee's race or sex to be linked with self-expression as a protected activity.<sup>46</sup>

In exploring this thesis, Chambers provides a detailed analysis of the majority and dissenting opinions in *Bostock*.<sup>47</sup> Then he uses three issues related to sex to help explain the implications of the different *Bostock* opinions by analyzing pregnancy discrimination, bisexual harassers, and transgender bathroom decisions.<sup>48</sup> To Chambers, the application of *Bostock* would justify finding that pregnancy discrimination is discrimination because of sex without Congress having needed to expressly state such coverage occurs as a result of the Pregnancy Discrimination Act.<sup>49</sup> According to Chambers, even non-pregnant employees who are adversely affected by a rule because of the inability to bear a child would be subjected to discrimination because of sex even if the dissenting opinions in *Bostock* might disagree.<sup>50</sup>

Chambers then shifts to a discussion of a discriminatory treatment of both men and women by a person he refers to as a "bisexual harasser."<sup>51</sup> According to Chambers, before *Bostock*, such behavior may not have been because of sex if the actor was harassing men and women equally.<sup>52</sup> But after *Bostock*, the behavior of the bisexual harasser would result in double liability

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<sup>44</sup> Chambers, *supra* note 22, at 55–56.

<sup>45</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1742 (2020) (finding discrimination because of sex under Title VII to also include discrimination because of homosexuality and transgender status).

<sup>46</sup> Chambers, *supra* note 22, at 56.

<sup>47</sup> *Id.* at 58–68.

<sup>48</sup> *Id.* at 69.

<sup>49</sup> *Id.* at 70.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 71 & n.117 (citing *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000)); *see also* Ronald Turner, *Title VII and the Inequality-Enhancing Effects of the Bisexual and Equal Opportunity Harasser Defenses*, 7 U. PA. J. LAB. & EMP. L. 341 (2005) (discussing the *Holman* case and similar cases arguing that a harasser who is bisexual is an "equal opportunity harasser" and not acting because of sex in violation of Title VII).

<sup>52</sup> Chambers, *supra* note 22, at 71. Although Chambers relies on the Seventh Circuit's *Holman* decision for this proposition, there are other cases that disagree with the reasoning that bisexual and equal opportunity harassment is not discrimination because of sex. *See* Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535, 544 (2007) ("A growing body of authority now rejects the equal opportunity harasser defense."). An "equal opportunity harasser" does not have to be only bisexual but could also refer to any person who directs harassing behavior at both men and women and the "victims face . . . similar obstacles." *See* Sandra Levitsky, *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1027 n.80 (1996).

for the employer.<sup>53</sup> In his last example of transgender bathrooms, Chambers argues that the dissenting opinion by Justice Alito in *Bostock* would suggest that any transgender discrimination in prohibiting someone from entering a bathroom that does not match the individual's biological sex would not be discrimination because of sex.<sup>54</sup> Although the majority in *Bostock* did not address transgender bathroom issues, Chambers asserts that the majority's analysis would find that but for the biological sex of the user not matching the bathroom to be used, that use would be allowed; thus, the denial would be directly linked to discrimination because of sex without needing comparators.<sup>55</sup>

Next in his analysis Chambers turns to pending state and federal legislation aimed at prohibiting discrimination based on hair texture or particular racially-matched hairstyles, the CROWN Acts.<sup>56</sup> In particular, Chambers notes that a CROWN statute in Virginia arguably redefines race discrimination to also include traits associated with race, including hair, to be part of the protected-from-discrimination class.<sup>57</sup> Accordingly, Chambers argues that if race discrimination could be interpreted to also include traits associated with race such as hair texture, this approach could also justify discrimination based on sex and traits associated with sex.<sup>58</sup>

As a result of the analysis of *Bostock* and the possibilities presented by CROWN act legislation, Chambers asserts that these points open the door to establish protections for employee self-expression at work.<sup>59</sup> A broad interpretation would limit an employer from treating an employee differently based upon a protected characteristic such as race or sex as well as any trait related to that class.<sup>60</sup> Chambers concludes that immutable traits associated with a person's protected class, for example, hair texture, should now be protected by the implications of the definition of discrimination as determined by the Court's analysis in *Bostock* and any CROWN Acts legislation that becomes law.<sup>61</sup> This would further protect workers who have

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<sup>53</sup> Chambers, *supra* note 22, at 72.

<sup>54</sup> *Id.*

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

<sup>56</sup> *Id.* at 73.

<sup>57</sup> *Id.* at 85.

<sup>58</sup> *Id.* at 86.

<sup>59</sup> *Id.* at 90.

<sup>60</sup> *Id.* at 91.

<sup>61</sup> *Id.* at 92.

been forced to cover or assimilate at work, a powerful expansion of rights for a host of workers including Black workers.<sup>62</sup>

The last article in this symposium by Professor Michael C. Duff, *Challenges for Black Workers After 2020: Antiracism in the Gig Economy*, addresses the concerns of Black worker status as employees or independent contractors in the technology-driven gig economy.<sup>63</sup> Professor Duff shines a spotlight on the key loss for Black workers in the gig economy if they are deemed independent contractors; they lose all their rights under employment antidiscrimination laws which only protect employees especially Title VII of the Civil Right Act of 1964.<sup>64</sup> In acknowledging this loss, Professor Duff has mapped out particular alternatives to see if the result can be ameliorated.

Professor Duff first explores opportunities to provide independent contractors with antidiscrimination legal rights through the consideration of statutory Section 1981 claims.<sup>65</sup> However, Professor Duff noted the Supreme Court's analysis of Section 1981 claims in 2020 in *Comcast Corp. v. National Ass'n of African American-Owned Media*<sup>66</sup> has made it more difficult for a plaintiff to proceed because of heightened pleading standards and the need to establish but-for causation.<sup>67</sup>

Then Duff examined the status of California legislation and activism aimed at protecting gig economy workers by offering them protections under antidiscrimination laws.<sup>68</sup> Eventually, California voters approved by referendum Proposition 22, which requires that all "app-based transportation (rideshare) and delivery workers" had to be found to not be employees.<sup>69</sup> This approach is contrary to California's liberal case law approach under its ABC test<sup>70</sup> which presumes workers are employees in wage order cases.<sup>71</sup>

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<sup>62</sup> *Id.* at 92 n.238 (citing Kenji Yoshino, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 131-39 (2007)) (discussing Title VII and workplace assimilation).

<sup>63</sup> Michael C. Duff, *Challenges for Black Worker After 2020: Antiracism in the Gig Economy*, 25 EMP. RTS. & EMP. POL'Y J. 103 (2021).

<sup>64</sup> *Id.* at 104-05.

<sup>65</sup> *Id.* at 106.

<sup>66</sup> 140 S. Ct. 1009 (2020).

<sup>67</sup> Duff, *supra* note 63, at 106-07.

<sup>68</sup> *Id.* at 108. After the articles in this symposium, this issue also includes a review by Professor Cynthia Estlund of a recent book edited by Professor Deepa Das Acevedo, containing several commentaries from authors exploring key issues related to worker status in the gig economy as well as the details of the California Proposition 22 referendum. See Cynthia Estlund, *Gig Work from the Ground Up*, 25 EMP. RTS. & EMP. POL'Y J. 113, 114 (2021) (reviewing BEYOND THE ALGORITHM: QUALITATIVE INSIGHTS FOR GIG WORK REGULATION (Deepa Das Acevedo ed., 2020)) (discussing the California referendum and its "codification of the so-called ABC test, the nation's broadest statutory definition of employment").

<sup>69</sup> Duff, *supra* note 63, at 108.

<sup>70</sup> See *Dynamex Operations W. v. Superior Ct.*, 416 P.3d 1, 40 (Cal. 2018).

<sup>71</sup> Duff, *supra* note 61, at 108.

Due to California's demographics, as argued by Duff, Proposition 22 leads to many people of color and immigrants being unable to become employees while working in those gig economy jobs covered by the referendum.<sup>72</sup> However, Proposition 22, as now codified, did create protections against discrimination in the contracting or termination of their contracts.<sup>73</sup> Apparently, these provisions do not offer the full remedies available under Title VII.<sup>74</sup> However, according to the proponents of the referendum, they had to add antidiscrimination protections to make sure the voters would pass it.<sup>75</sup> In his final points, Duff looks at case law under the National Labor Relations Act to find that there is nothing that prevents Congress or a state legislature from requiring that independent contractors have the same rights as employees to sue under antidiscrimination statutes.<sup>76</sup>

Although states and Congress could adopt the ABC test presumption that would offer employee rights against discrimination to the mostly Black and people of color individuals who serve as gig workers, Duff argues instead that the better result for these workers is for antidiscrimination and labor protection statutes to include independent contractors within their coverage without the causation limits imposed by the Supreme Court for Section 1981 claims. Regardless of how this result is obtained, Duff makes us aware of the racial impact the gig economy has on its workers due to its efforts to continue making its industry workers independent contractors instead of employees.

But Duff also provides a way to avoid the deleterious effect of cutting off the rights of many Black gig economy workers to be protected from discrimination in hiring and termination. Duff's solution in his article is to build upon the efforts in California and make all independent contractors have the right to seek recovery for racial discrimination. This approach aligns with the concerns of all the articles in this symposium of identifying major concerns for Black workers after 2020 and proceeding with suggestions to protect the rights of those Black workers going forward.

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<sup>72</sup> *Id.* at 109.

<sup>73</sup> *Id.* at 109–10.

<sup>74</sup> *Id.* at 110.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 111.