

INTERSECTIONALITY

*"That man over there say
a woman needs to be helped into carriages
and lifted over ditches
and to have the best place everywhere.
Nobody ever helped me into carriages
or over mud puddles
or gives me a best place . . .*

*And ain't I a woman?
Look at me
Look at my arm!
I have plowed and planted
and gathered into barns
and no man could head me . . .
And ain't I a woman?
I could work as much
and eat as much as a man —
when I could get to it —
and bear the lash as well
and ain't I a woman?
I have born 13 children
and seen most all sold into slavery
and when I cried out a mother's grief
none but Jesus heard me . . .
and ain't I a woman?
that little man in black there say
a woman can't have as much rights as a man
cause Christ wasn't a woman
Where did your Christ come from?
From God and a woman!
Man had nothing to do with him!
If the first woman God ever made
was strong enough to turn the world
upside down all alone
together women ought to be able to turn it
rightside up again."*

A. INTRODUCTION AND OVERVIEW

1. The Nature of Our Study and of This Chapter

We recognized from the outset that gender alone does not define an individual's experiences; each individual has multiple characteristics that affect his or her experiences in society and in the legal system. The intersection of those characteristics provides each person a perspective that influences how that person views and experiences the world. Intersectionality,² in this context, challenges our current way of categorizing, ordering,

dissecting, and resolving situations that involve people's interactions. Intersectionality requires us to examine how commonly categorized characteristics — for example, gender, race, ethnicity, age, disability, sexual orientation, and class — interrelate, how each may affect the others, and how multiple characteristics result in multiple identities, which sometimes compete.

We therefore created a work group to examine issues of intersectionality. To capture the perspectives of more people, we attempted to identify and to address these issues. We did not intend this added focus on

¹ Sojourner Truth, "Ain't I a Woman?" (as adapted to poetry by Erlene Stetson), in *AIN'T I A WOMAN! A BOOK OF WOMEN'S POETRY FROM AROUND THE WORLD* 129-30 (Illona Linthwaite ed., 1993).

² Both the Task Force and the Intersectionality work group discussed at length what to call the concept of one individual's having multiple characteristics and perspectives. The group settled on the term "intersectionality" because it seemed, most accurately, to describe the concept that several characteristics can "intersect" to influence a particular person's experiences.

intersectionality to change the gender-based nature of the study, but rather to ensure a more accurate evaluation of gender fairness in the courts and in the legal profession. Once the Task Force committed itself to the recognition that individuals' experiences are influenced by multiple characteristics, the work grew exponentially. Although recognizing and embracing the concept of intersectionality did not make our work any simpler, it made both our study and this report more inclusive and comprehensive.

Oregon is the first state to address intersectionality issues directly.³ Although academicians have been writing about intersectionality for some years, "fairness" task forces have yet to squarely take on the issues of multiple identities and bias.⁴ Oregon chose to accept that challenge.

This chapter is unlike the other chapters in the report — it does not provide a detailed discussion of the information gleaned from surveys, focus groups, public hearings, or other data-gathering sources. Rather, it sets out the theoretical framework for the concept of intersectionality that we employed and presents a substantive discussion of intersectionality apart from any data analysis. The primary purpose of this chapter is to assist the reader in conceptualizing the term "intersectionality" and to outline the challenges presented by incorporating intersectionality issues into our study.

2. Understanding "Privilege"

Our ability to recognize the experiences of individuals who reside at certain intersectional points may be obscured by what often is called "privilege," such as skin color privilege, gender privilege, and class privilege. Professor Kimberle Crenshaw describes how "multiple identities" render the experiences of black women invisible, thereby not addressing their realities within the current legal framework.⁵ Another way to describe and understand privilege, especially race privilege, is that "white privilege reinforces the existing

racial status quo and overlaps and interacts with other systems of privilege, including those based on gender, sexual orientation, economic wealth, physical ability, and religion. Just as the systems themselves are made invisible by our language, the intersection between the systems is also marked."⁶

The more levels on which privilege exists for a particular individual or group, the more likely it is that the law and society will recognize and meet their needs.⁷ By contrast, the more levels on which privilege is denied to a particular individual, the more invisible the individual becomes to the law and society. Privilege does not manifest itself in exactly the same way with regard to each intersectional point.⁸ The role of intersectionality in this study is to expose those levels of privilege and to recognize and identify the needs of those who are disadvantaged by the lack of two or more privileges.

It is often asserted by those who understand the phenomenon of privilege that, even if all discriminatory conduct were eliminated, there still would be inequality based on gender, race, class, sexual orientation, and disability. "[T]he flipside of racial discrimination is racial privilege."⁹ As another writer put it, "[a]ntidiscrimination advocates focus only on one portion of the power system, the subordinated characteristic, rather than seeing the essential links between domination, subordination, and the resulting privilege."¹⁰

An understanding of privilege is essential to understanding the experiences of individuals who interact with the judicial system and legal profession every day. As one writer described it:

"Domination, subordination, and privilege are like three heads of a hydra. Attacking the most visible heads, domination and subordination, trying bravely to chop them up into little pieces, will not kill the third head, privilege. Like a mythic multi-headed hydra, which will inevitably grow another head if all heads are not slain, discrimination cannot be ended by focusing only on . . . subordination and

³ The District of Columbia conducted a study on gender bias and a study on racial and ethnic bias simultaneously, but that study did not synthesize the materials to explore issues of intersectionality.

⁴ To our knowledge, the Second and Third Circuits of the United States Court of Appeals are the only other jurisdictions that have conducted a gender fairness study specifically examining gender fairness from the multiple-identity ("gender plus") perspective.

⁵ Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U CHI LEG FOR 139 (1989).

⁶ Stephanie Wildman, Margalynne Armstrong, Adrienne Davis, and Trina Gullo, *Privilege Revealed: How Invisible Preference Undermines America* xi-xii (1996).

⁷ Privilege can reveal itself in a variety of ways. For example, at the public hearings that we held around the state, the most strongly voiced perspective was that of men who had experiences in divorce and custody disputes. The witnesses who expressed the view that men were disadvantaged in the family law arena were mostly white and male and appeared to be organized. As a result, this Task Force heard many of their needs and suggestions for change in the system.

⁸ Wildman, *supra* note 6, at 19.

⁹ Bill Bradley, *Recognizing Race Privilege*, FOCUS 6-8 (1996) (former United States Senator (D-NJ)).

¹⁰ Wildman, *supra* note 6, at 19.

domination.”¹¹

3. The Intersections that We Examined

We chose to focus on five specific intersections: gender and race/ethnicity,¹² gender and class, gender and age, gender and parental status, and gender and sexual orientation. The model for studying intersectionality issues comes from the recent academic focus on gender and race. During the past decade, in particular, considerable scholarship has been produced concerning how gender and race may intersect to create exponential disadvantage for people who are not members of the socially and economically dominant gender or race.¹³ By choosing to examine intersectionality, we recognized that a focus on only race or only gender may cause the experiences of women of color to drop out of the equation.¹⁴

In 1994, the American Bar Association Commission on Women in the Profession and the Commission on Opportunities for Minorities in the Profession issued a report entitled *The Burdens of Both, The Privileges of Neither* (1994). That report focused on the experiences of women of color in the legal profession. We relied on that report as both an educational tool for grappling with the definition of intersectionality and as a source of information about experiences of women of color. That report made six general findings:

1. *“The combination of being a lawyer of color and a woman is a double negative in the legal marketplace, regardless of the type of practice or geographic region involved”;*
2. *“Multicultural [female¹⁵] lawyers] perceive that they are ‘ghettoized’ into certain practice areas and [that] other options are closed or implicitly unavailable [to them]”;*
2. *“Multicultural [female lawyers] must repeatedly establish their competence to professors, peers and judges”;*

4. *“As evidenced by continuing attitudes and negative stereotypes, multicultural [female lawyers] are invisible to the profession and have more difficulty achieving prominence and rewards within the legal field”;*

5. *“To succeed, multicultural [female lawyers] must choose between race and gender”;* and

6. *“Minority [female lawyers] face barriers of gender discrimination in minority bar associations and race discrimination in majority bar associations.”¹⁶*

The intersection of gender with characteristics other than race has been much less widely studied than has the intersection of gender and race; thus we were charting new waters as to the other four intersections. Privilege does not manifest itself in exactly the same way with regard to each intersectional point. For example, according to a well-regarded scholar on sexual orientation and the law, “different advantages accrue from society’s privilege of heterosexuality, which generally constitutes gay and lesbian relationships as invisible.”¹⁷ There are three societal assumptions about gay men and lesbians: the sex-as-lifestyle assumption, the cross-gender assumption, and the idea that gay issues are inappropriate for public discussion.¹⁸ Given those societal assumptions, heterosexuals can “function in a world where negative assumptions are not made about their sexuality, and their sexuality may be discussed and even advertised in public.”¹⁹

Two specific points deserve mention. First, as to gender and class,²⁰ we recognize that the disadvantaged have less access to justice than those with resources. The majority of people living in poverty, both in Oregon and in the United States as a whole, are women and

¹¹ Adrienne R. Davis, *Identity Later On: Playing in the Light*, 45 AM U L REV 1 (1996).

¹² We recognize that race, ethnicity, and culture are each distinct concepts.

¹³ See, e.g., Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE LJ 365 (1991); Crenshaw, *supra* note 5; Okianer Christian Dark, *Just My ‘Magination*, 10 HARV BLACKLETTER J 21 (1993); Trina Grillo and Stephanie Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 1991 DUKE LJ 397 (1991).

¹⁴ A common example is the often-used expression “minorities and women.” That expression, by its structure, suggests men of color and white women. Women of color are not included.

¹⁵ That report used the term “multicultural women” to refer to women of color.

¹⁶ “The Burdens of Both, The Privileges of Neither,” Report of the American Bar Association Commission on Women in the Profession and the Commission on Opportunities for Minorities in the Profession (1994).

¹⁷ Wildman, *supra* note 6, at 18.

¹⁸ *Ibid.*

¹⁹ *Id.* at 19.

²⁰ “Class,” as a term, is complicated. It can refer simply to economic resources (that is, income and wealth), or to social status, education, prestige, or other opportunities and advantages. Although each dimension is distinct, many are closely related. For the purposes of this study, we treated class principally in terms of economic wealth, while at the same time acknowledging that our definition represented only one aspect of this term.

children.²¹ Accordingly, we decided that it was important to investigate issues surrounding gender and class.

Second, the topic of the intersection between gender and sexual orientation became a lightning rod in the lawyer, judge, and court personnel surveys. Each survey's demographic section asked the respondent to identify himself or herself as "bisexual," "gay/lesbian," "heterosexual," or "other." That question drew more vitriolic comments than any other question. Responses to that question raise two issues:

(1) In the judge survey, gay and lesbian judges were concerned with identifying themselves as gay or lesbian on the survey, not because they did not wish to identify their sexual orientation, but because the small number of openly gay and lesbian judges in the state would compromise the anonymity of their survey responses.²²

(2) Significant numbers of respondents to both the lawyer and court personnel surveys objected to questions about sexual orientation.²³ Some people said that they felt such questions invaded their privacy; others commented that sexual orientation simply was an irrelevant or inappropriate inquiry. For example, one lawyer wrote a letter to the Task Force, stating:

"My sexual orientation is none of your business. I find it so strange that people who are otherwise so concerned about privacy and making sure people are not discriminated against because of their particular type of bedroom activity would find it even necessary to ask this question. Do you have any legitimate justification that overrides my privacy interests?"

The level of emotion generated by the issue of sexual orientation suggests that the intersection between gender and sexual orientation strikes a nerve and that further examination of this intersection may be warranted.

B. METHODS OF STUDY

We purposefully formed a work group that reflected many intersectional points. Work group members included people who are white and of color; heterosexual, gay, and lesbian; non-disabled and disabled; and lawyers and other professionals. The work group included people of various ages (19 to 50s) but was not as geographically diverse as we had hoped. The work group did not have representation from the eastern or far southern parts of the state.

One or two members from the Intersectionality work group worked with each other work group to assist with intersectionality issues. Liaisons' responsibilities were to:

- become familiar with the work of the assigned substantive work group,
- attend its meetings,
- keep in regular contact with its chair,
- develop questions for surveys and focus groups for the area,
- observe or co-facilitate focus groups conducted by the assigned work group,
- review secondary data or recommend other sources to the assigned work group, and
- help to formulate recommendations.

During the writing process, liaisons also reviewed and commented on drafts of portions of the report.

1. Public Hearings

A member of the Intersectionality work group attended at all but two of the 10 hearings.²⁴ In addition, the work group created a two-person subcommittee to review the records of the hearings and provide additional insights and observations. This process provided additional analysis on intersectionality issues.

2. Survey Design

In focusing on intersectionality, we recognized that the way in which we view the racial, ethnic, gender, socio-economic, and sexual orientation categories to which we assign people is in flux. As a result, we sought significantly more information than many surveys do. For some purposes, gender is a useful category by which to divide people. However, for other purposes the category of "woman" or "man" is insufficient. For example, we may want to find out whether lesbian women would respond the same way as heterosexual women, and African-American men the same way as white men.

3. Focus Groups

The focus groups provided another opportunity to engage in qualitative research and, in particular, to obtain information regarding intersectionality. Work group members facilitated several of those sessions.

²¹ According to the Center for Population Research at Portland State University, the most recent available census data (1990) show that approximately 60% of the Oregon households headed by women with children under age five fall below the poverty line. About 40% of the households headed by women with children under the age of 18 fall below the poverty line. By contrast, only 13.5% of all families (with two parents or headed by men) with children under the age of 18 fall below the poverty line.

²² Several female judges commented, similarly, that they could be identified by their gender and location.

²³ Surveys were anonymous. That is, respondents were not asked to provide their names and written comments were transcribed and reviewed separately from the completed survey.

²⁴ Intersectionality work group members did not attend the Medford and Ontario hearings.

4. Data Analysis

The Intersectionality work group analyzed both quantitative and qualitative information in each of the substantive areas studied. Its goal was to identify examples of experiences of people living at intersectional points.

We were confronted with the difficulty of collecting, through quantitative research, statistically reliable information about the intersections that we studied. As each additional characteristic is added, the number of individuals with the combination of characteristics becomes smaller.²⁵ For example, of the 571 people who completed the lawyers survey, there were four Asian women, no Asian men, three Hispanic men, four Hispanic women, one Native American man, two Native American women, one African-American woman, and one African-American man. By contrast, 375 white men and 154 white women responded to the survey. As a result, it was difficult to draw conclusions that were statistically significant. In fact, the only survey that reflected “statistically significant” numbers of non-white respondents was the inmate survey. Of the 351 male respondents, 32.5% were men of color. Of the 75 female inmates that responded to the survey, more than 25% were women of color.

Focus groups, public hearings, and written comments on the surveys provided us with additional useful information. It is in that narrative form that we found descriptions of the lives of people living at the intersections.

Accordingly, this section of the report reflects a depth of experience more than it reflects a breadth of experience. In other words, it more completely describes the experiences of particular individuals, although it may not reflect the experiences of a large number of people.

C. FINDINGS AND CONCLUSIONS

Intersectionality challenges the closely held notion that we are all the same and that fair treatment necessarily means the same treatment. The concept of intersectionality requires more work to communicate with one another, and it requires more work to understand the complexities of our own experiences and the experiences of others, but it makes our work more reflective of social reality.

By embracing intersectionality as an integral part of the study, we opened topics that are painful to address, let alone to resolve. The discomfort created by these issues is multi-layered. Members of the Task Force found it painful to confront our own exercise of multiple levels of privilege during the course of envisioning the scope of the project and gathering and evaluating data.

Additionally, our specific findings, contained in the substantive chapters that follow, suggest that people at certain intersectional points are treated unfairly in some respects.

The net result of this foray into intersectionality leaves us with as many questions as answers. Further study and discussion can lead to more effective survey instruments and methods of analyzing qualitative data. That effort will, in turn, help the courts and the legal profession to become more responsive to the needs of all participants in the legal system.

D. RECOMMENDATIONS

1. The Chief Justice should:

a. charge the Oregon Judicial Department’s Access to Justice for All Committee with overseeing and coordinating implementation of the recommendations outlined in this report. Because that committee already is working to address issues of racial and ethnic fairness in the justice system, it is well positioned to ensure that individuals’ multiple perspectives, or intersectionalities, will be incorporated into the work of securing gender fairness;

b. Establish within the Oregon Judicial Department at least one permanent full-time staff position, plus appropriate support staff, to coordinate the work of the Access to Justice for All Committee; and

c. include in the Oregon Judicial Department’s 1999-2001 biennial budget a request for the funds and position authority necessary for such staff.

2. The Legislative Assembly and the Governor should:

- ensure that the Access to Justice for All Committee is adequately funded.

3. The Access to Justice for All Committee, the Oregon State Bar, the Oregon Judicial Department, law firms, and law schools should:

- include consideration of intersectionality issues in future studies and discussions of gender fairness. Likewise, all educational programs recommended in the chapters that follow should include intersectionality issues.

²⁵ Based on the 1996 estimates of the Center for Population Research and Census at Portland State University, the racial composition of Oregon residents is: 93.8% white, 1.7% African-American, 3.0% Asian-Pacific Islander, and 1.6% Native American/Eskimo. Among all those racial groups, 5.4% of the population is of Hispanic origin.