

# HOWARD LAW JOURNAL

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## LETTER FROM THE EDITOR-IN-CHIEF

For the 62nd year of the *Howard Law Journal*, we have devoted Issue I to recognizing the fifty years of social justice work by the Washington Lawyers' Committee. In 1984, Volume 27 of the *Howard Law Journal* published the "Papers by the Washington Lawyers' Committee for Civil Right Under the Law" in celebration of the Committee's fifteen-year anniversary. Today, thirty-five years later, the *Howard Law Journal* once again has the pleasure of celebrating the Committee's work. The articles by members of the Washington Lawyers' Committee, together with two *Howard Law Journal* student notes make up this Issue which focuses on legal advocacy for marginalized communities.

This special Issue begins with David Cynamon and John Freedman's "Survey of the Lawyers' Committee Work on Private and Public Employment Discrimination Cases: 1984-Present," which discusses one of the Committee's very first projects, the 1971 Equal Employment Opportunity Project and the work of the Committee since. Beginning with this project, the Committee made extensive use of volunteer lawyers drawn from firms throughout Washington, D.C. to assist private and public sector workers. The efforts of the Committee in the Employment Discrimination arena resulted in the litigation of many cases which ultimately established legal precedent under the new federal civil rights laws.

Next, George Ruttinger, in his Article, "Washington Lawyers' Committee for Civil Rights and Urban Affairs: A Report on the Committee's Fair Housing Project, 1984-2017," chronicles the Committee's role in aiding in the creation of a new organization—the Fair Housing Council of Greater Washington (FHC). Ruttinger argues that fair housing is a pivotal civil right because where you live often determines your access to quality education, well-paying jobs, nourishing food, and other important social and economic relationships.

In their Article, "The Washington Lawyers' Committee's Fifty-Year Battle for Racial Equality in Places of Public Accommodation," Robert Duncan and Karl Lockhart place the work of the Committee in the context of the broader development of applicable public accommodations law and the evolution of American society. Their Article highlights the efforts of the Committee to integrate aspects of everyday life where frequent interaction between and among strangers is most common—the public places.

"Our Nation is moving toward two societies, one black, one white—separate and unequal." Philip Fornaci, Alan Pemberton, and Michael Beder open their Article, entitled, "Criminal Justice in the Courts of Law and Public Opinion," with this striking declaration. In their Article, the authors

detail the efforts of the Committee to reform the criminal justice system, and to combat the system's profoundly disparate impact on communities of color. Though the Committee does not provide criminal defense services, the Committee has tackled a series of civil rights issues emerging out of the discriminatory application of criminal laws, and the harsh and often unconstitutional carceral system.

In his second piece, "The Washington Lawyers' Committee's Pursuit of Quality Public Educational Opportunity for All of DC's Children," Robert Duncan discusses the motivation and strategy behind the ongoing 40-year struggle to improve public schooling in the District of Columbia. Particularly, the Committee has focused its work in school building disrepairs; shortages or misallocation of teachers, books, and supplies; and security and fund-raising problems which led to the formation of Parents United for Full Public School Funding.

Nancy Noonan and Sylvia Costelloe, in their Article, "The Washington Lawyers' Committee's Cases and Other Initiatives Involving Immigration and Refugee Law," highlight the Immigrant and Refugee Rights Project established in 1978. This project was not only the first such program in Washington, D.C., but has also become one of the strongest pro bono immigration legal referral programs in the area. Through this project, the Committee employed Spanish-speaking staff to respond to the legal needs of newcomers in the community.

We close the Washington Lawyers' Committee's work with Joseph D. Edmonson's Article, "Washington Lawyer's Committee 50th Anniversary: Disability Rights Project." In his Article, Edmonson discusses the Disability Rights Council of Greater Washington (DRC) and the Committee's commitment to improve access to public accommodations for people with disabilities. Edmonson closes this work with the critical victories of the Committee in their newest social justice initiative—Disability Rights.

In addition to the work by the Washington Lawyers' Committee, we are very proud to include the works authored by two members of Volume 62 of the *Howard Law Journal*. The first comment, authored by Candace Caruthers, "When the Cops Become the Robbers: The Impact of Asset Forfeiture on Blacks and How to Curtail Asset Forfeiture Abuses," argues that our nation's asset forfeiture system disproportionately impacts blacks who—as the lowest-income earning population—may easily spiral into poverty after the seizure of a home, car, or life-savings. To address this issue, Caruthers advocates for the improvement and utilization of the Excessive Fines clause as a tool to combat oppressive asset forfeiture and for forfeiture revenue to primarily be returned to victims and poured back into communities harmed by the war on drugs.

Lastly, we conclude Issue I with Barri Dean's note, "What are Those Ingredients You are Mixing Up Behind Your Veil?" As a result of major

pharmaceutical manufacturers forbidding the use of their products to carry out executions, prison officials have resorted to using compound pharmacies to mix up combinations of drugs to be used in executions. Dean explores these alternative lethal injections, prison protocols, and their constitutionality.

On behalf of the *Howard Law Journal*, I thank you for your support and readership. It is our hope that this Issue will be thought-provoking and that it will encourage you to join the fight towards social justice.

KARLA V. MARDUEÑO  
EDITOR-IN-CHIEF  
VOLUME 62



# Introduction to Washington Lawyers' Committee's 50th Anniversary Articles

RODERIC V.O. BOGGS\*

The set of articles that follow was prepared for the fiftieth anniversary of the Washington Lawyers' Committee for Civil Rights and Urban Affairs. A similar set of articles was prepared in 1983 for the Committee's fifteenth anniversary. These initial articles were also published in the *Howard Law Journal*.

The articles appearing in this issue of the *Howard Law Journal* focus primarily, but not exclusively, on the Committee's work over the past thirty-five years.<sup>1</sup> We are proud that Howard University School of Law is once again taking the lead in publishing these papers because of the school's historic role in advancing the cause of civil rights in our country. We are particularly proud of the Committee's long affiliation with the school, notably dating back to Law School Dean Wiley A. Branton's extraordinary service as one of the Committee's early Co-Chairs and a Board Member for many years.

The authors of the articles included in this publication and their respective law firms have all had extensive experience working with the Committee, in many cases dating back to the Committee's earliest efforts involving the topics about which they are writing.

To put the Committee's work in proper perspective, a bit of history should be mentioned. The Washington Lawyers' Committee was established in 1968 as a project of the National Lawyers' Committee, an organization founded in 1963 by leaders of the organized bar at the request of President John F. Kennedy, to respond to the growing crisis of civil rights in our country, most evident in the South.

In the wake of a widespread series of riots in major cities across the country in the mid-1960s and the publication of the Kerner Commission's

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\* Roderic V.O. Boggs served as the Executive Director of the Washington Lawyers' Committee from April of 1971 until June of 2016. At that time, he became a Senior Advisor to the Committee. Prior to becoming the Committee's Executive Director, beginning in November of 1969, Mr. Boggs served as a staff attorney at the National Lawyers Committee. In that capacity, he played a major role in supporting the Washington Committee's early work in the fields of fair employment litigation and criminal justice reform.

1. The articles written by members of the Washington Lawyers' Committee for Civil Rights and Urban Affairs incorporate the personal and professional recollections of some of the members and associates of the Committee whose work over the last thirty-five years has helped define the Committee's identity as an organizational leader in civil rights and urban affairs across the six subject matters included. Throughout the articles, the Washington Lawyers' Committee for Civil Rights and Urban Affairs is abbreviated to WASH. LAW. COMM. in citations.

comprehensive report on the causes of these traumatic events, the leaders of the National Lawyers' Committee for Civil Rights, led by Louis F. Oberdorfer, took responsibility for organizing a set of local Committees in major urban areas. Their purpose was to engage the private bar in addressing the root causes of the violence the Commission had identified. Primary among these were: discrimination in housing, employment and public accommodations, and a range of issues related to inequality in the criminal justice system and public education.

The impetus for this work took on an added sense of urgency following the assassination of Dr. Martin Luther King in April of 1968. This tragic event set off a new wave of riots in cities across the country, including several days of violent disturbances in Washington, D.C. As a first step in addressing the situation in the District of Columbia, Louis Oberdorfer enlisted John E. Nolan, a partner at the firm of Steptoe & Johnson, to take the lead in establishing the Washington Lawyers' Committee. With the help of a small group of leaders from prominent firms in the city, including John Douglas, Robert Wald, Edward Bennett Williams, and Herbert Miller, among others, the Committee began operations in 1969. John Nolan was selected as the Committee's first Chair and Stephen J. Pollak succeeded him in 1971.

The new organization's 1971 Annual Report set out four criteria to guide its selection of specific programs going forward:

- (1) They should address problems of poverty and discrimination;
- (2) They should require the services of numerous pro bono resources;
- (3) They should hold out the prospect of systemic law reform; and
- (4) They should serve as a significant means for educating the private bar about the dimensions of urban problems in the community.

In keeping with these priorities, the early work of the Committee was focused on employment discrimination in both the public and private sectors and criminal justice reform. It is notable that the Committee began its work just as major new national civil rights laws covering employment, public accommodations, and housing discrimination were taking effect. As Louis Oberdorfer remarked at the time, "[l]awyers would be essential to making these new laws effective."

One of the Committee's first projects, which engaged the pro bono services of more than 100 lawyers from more than a dozen firms, sought to establish a right to treatment for individuals addicted to heroin, who were being charged with drug possession for personal use. All of the volunteer attorneys who agreed to represent an individual defendant were asked to raise the defense addiction while also seeking diversion for their clients into a drug treatment program.

This innovative project—the Narcotic Addict Legal Services Project (NALSP)—provided the first trial experience for dozens of young lawyers,

many of whom went on to assume leadership roles in major law firms as well as positions as leaders on the bench and in the Bar. The two young lawyers who argued the major law reform cases developed by this project before the D.C. Court of Appeals and Court of Appeals for the D.C. Circuit respectively were John Ferren and Patricia Wald, both of whom went on to serve as Chief Judges of the courts before which they argued for the Committee in the early 1970s.

While regrettably, the law reform litigation the Committee pursued was ultimately unsuccessful, the model for deploying large numbers of pro bono attorneys to address significant civil rights issues became a central element in the Committee's work going forward. Because virtually all the individuals represented by Committee volunteers as part of the NALSP were able to enter and perform well in drug treatment programs, the Committee's project also demonstrated the great benefits of pre-trial diversion programs in dealing with drug addiction.

The next major Committee initiative to address systemic issues was its Employment Discrimination Project. This effort began in 1970, just as the city was beginning work on a major subway system and the local building trades were rife with historic practices of racial exclusion. At the same time, new federal legislation was being enacted to provide the first meaningful legal rights for federal, state, and local workers to challenge employment discrimination. Thus, in the early 1970s, the Committee made extensive use of panels of volunteer lawyers drawn from firms throughout the city to assist private and public sector workers.

The many cases brought during this period established legal precedents under the new federal civil rights laws, including dozens of successful class action lawsuits involving federal agencies and major private sector employers. Several cases were vital in supporting the adoption and implementation of affirmative action plans by the Department of Labor and the D.C. government involving the construction industry. The work undertaken by the Employment Project became the model for numerous projects that the Committee established over the following decades.

During the 1970s and early 1980s, the Committee began several programs responding to emerging community needs. These efforts included the creation of a panel of lawyers to represent Vietnam veterans seeking to challenge their less than honorable military discharges, the development of a special program to recruit area firms to support law reform work by the local Neighborhood Legal Services Program, and sponsorship of a program to provide legal services to migrant workers in Maryland, Virginia, and West Virginia. It also organized a special panel of lawyers to assist family day care providers to deal with difficult administrative constraints.

While none of these projects became permanent parts of the Committee's agenda, they did illustrate the organization's unique ability to harness

the resources of the private bar in collaboration with other legal services providers to meet emerging civil rights challenges.

The next major Committee program to become a long-term part of the organization's work was its Immigrant and Refugee Rights Project. This work began in 1978 when the Committee started to provide legal services to the rapidly growing number of newcomers in the region facing life-threatening human rights conditions and critical challenges in securing sanctuary in the United States. At the time this project began, it was, to our knowledge, the only legal services program in the D.C. area with a bi-lingual staff available to clients facing immigration issues. As in the case of its Employment Project, the Immigrant Rights Project quickly began to utilize the twin approaches of individual representation combined with law reform litigation and policy advocacy.

Also in 1978, the Committee began its now more than forty-year commitment to working with D.C. parents and community leaders to advocate on behalf of all children in the city for a quality public education. Since its first efforts in this field, no issue has been more fundamental to the Committee's work or engaged a larger quantity of law firm resources. Employing a broad spectrum of advocacy and general counsel services on behalf of parents and their children, as well as targeted litigation as appropriate, the Committee has played a vital role in keeping the issue of public education in the forefront of the civil rights agenda in our community. Recalling the meetings in 1978 and 1979 with Vincent Reed, then the D.C. Superintendent of Schools, that led to the Committee's decision to launch its Public-School Project, it would have been difficult to imagine the scope of the work that was about to begin or its continuing relevance as a local and national civil rights priority.

The next Committee project that began informally in the late 1970s was its Fair Housing Project. Since its creation, the Committee had worked on several fair housing cases in conjunction with local open housing organizations. This work took on a new sense of urgency and promise following the Supreme Court's 1982 decision upholding the standing of fair housing testing organizations and individual testers to pursue claims of discrimination under the 1968 Fair Housing Act. This decision and the Committee's subsequent role in aiding in the creation a new organization—the Fair Housing Council of Greater Washington (FHC)—ushered in a new era of proactive enforcement of fair housing laws that has now been a prominent part of the Committee's agenda for nearly forty years.

The combination of the Fair Housing Council's community outreach education and testing efforts and the Committee's provision of high-quality legal resources to aggrieved parties has proven to be a uniquely powerful resource for addressing a form of discrimination that has always been very difficult to identify and successfully challenge.

In 1990, the same combination of education, outreach, and paired testing was central to the creation of the Fair Employment Council of Greater Washington (FEC). Once again, the Committee provided legal support for establishing an independent organization that began to apply the concept of paired testing to issues of potential discrimination in employment hiring. In subsequent years, under the auspices of this group, several studies were conducted, and two major lawsuits established precedents upholding the use of employment testing as a civil rights enforcement tool.

Also in 1990, following the passage of the Americans with Disabilities Act, the Committee became more active in seeking to assist individuals now afforded new civil rights protection. To further this work, in 1992 the Committee supported the creation of a third new entity—the Disability Rights Council of Greater Washington (DRC). Like its predecessor organizations, the DRC immediately set to work identifying areas of discrimination affecting individuals with various disabilities and developing outreach programs to inform affected people of their legal rights. The DRC has played a significant role in building relationships with other local and national disability rights organizations and has served as an institutional plaintiff in dozens of ground-breaking civil rights cases.

The FHC and FEC came together in 1999 to form the Equal Rights Center (ERC) and in 2005, the DRC also became a formal part of this organization. The Washington Lawyers' Committee continues to serve as litigation counsel for all these organizations in their new structure.

Another important milestone in the Committee's history occurred in 2006 when the organization merged with the DC Prisoners' Legal Services Program. While the Committee had a long history of concern for issues of criminal justice reform and prisoners' rights dating back to its earliest days, it had not been active in these fields since the mid-1980s. In 1989, a new organization—the D.C. Prisoners' Project—was formed to assume the primary leadership role for providing pro bono legal services in this field.

Over the next decade it became clear that there was potential for achieving far greater effectiveness for both organizations through a merger. This became even clearer following the closing of Lorton Reformatory in 1999 and the dispersal of D.C. prisoners throughout the federal prison system. In 2006, the D.C. Prisoners' Project became a formal part of the Washington Lawyers' Committee. Over the past twelve-years, the promise of this programmatic merger has been realized in the greatly expanded litigation and policy advocacy work of the combined entities.

The articles that follow discuss the Committee's efforts in the primary program areas just noted, with the addition of a seventh article on the Committee's public accommodations work. While never formally constituted as a separate Committee project, public accommodations litigation has been

such an important part of the Committee's work over the years that we believe it deserves special recognition in this publication.

Due to limitations of time and space, the articles that follow do not discuss one other Committee initiative that does bear mention here—the Introduction to Legal Reasoning Program. This was a special Committee program, begun in 1981, to provide tutorial services to minority and disadvantaged students about to enter law school. It was based on a pilot effort developed in Chicago, that used law firm volunteers to teach classes for six-week sessions during the summer. During the more than thirty-years that the Washington Lawyers' Committee has operated this program, over 2,000 students have participated, and hundreds of area law firm attorneys have provided instruction. For many years, the administrative support for this successful work was provided by the firm of Hogan Lovells.

Throughout the Committee's fifty-year history, thousands of lawyers drawn from more than 150 firms have worked with the Committee on its various programs and projects. This work has encompassed large and small civil rights and poverty cases, as well as education, outreach and general counsel support for dozens of community groups. While a precise determination of the full amount of pro bono services provided is impossible to calculate, by any measure, many thousands of clients have benefitted from the Committee's efforts.

While the full impact of the Committee's efforts will best be measured over time, it is not too soon to note several of the factors that help account for the organization's longevity and success in providing an enormous volume of pro bono services.

The first of these is the vision of the Committee's founders who understood the magnitude of the challenges presented by the Nation's long history of racial discrimination and the untapped potential of the private bar in this city to respond to an urgent call to service. The initial response to this call issued by Louis Oberdorfer, John Nolan, and their colleagues fifty-years ago set the organization on a course from which it has never wavered. In making clear, as Judge Oberdorfer did throughout his career, that our civil rights law would have no meaning without lawyers to enforce them, the Committee found a message that resonated powerfully with the lawyers of our city.

A key element in the Committee's success over the years has been the willingness of its Board and Co-Chairs to embrace a mission that, while never failing to maintain a focus on issues of racial bias in our society, has at that same time consistently encouraged the development of new programs addressing the civil rights concerns of other groups in need of legal representation.

It was with that vision in mind that the Committee expanded the scope of its work to address the civil rights of women, immigrants, individuals

with disabilities, and members of the LGBTQ community. The Committee is proud of its foresight in responding to the legal needs of these groups. In doing so, it has consistently attempted to bring these different constituencies together.

Similarly, the Committee is proud of its record of being among the first pro bono organizations in the city to focus significant resources on the critical need to improve the quality of our city's public schools, especially in terms of resources targeted on minority and disadvantaged students.

Closely related to the visionary leadership of the Committee's founders are the efforts of three groups of individuals: (1) the dedicated lawyers from firms throughout the city who have answered the call to service as Board Members and volunteers on Committee cases and projects; (2) the exceptional men and women who have served as project directors and staff attorneys over the years; and (3) perhaps most importantly, the remarkable individuals and organizations who have been the Committee's clients.

It would be difficult to exaggerate the importance of the men and women who have served as Committee Co-Chairs, Board Members and Trustees throughout its history. Not only have they been instrumental in the development of the Committee's program and carrying the major responsibility for fundraising but also in many cases, they have served with distinction as co-counsel in prominent Committee cases. The record of their success as litigators is illustrated by the list of authors of articles in this volume of the *Howard Law Journal* and the earlier articles about the Committee dating back to 1984. Individuals like David Cynamon, Marc Fleischaker, George Ruttinger, Nancy Noonan, John Freedman, Joe Edmondson, Alan Pemberton and Robert Duncan, to name only a few, represent decades of deep commitment to the Committee's mission.

No discussion of contributors to the Committee's legacy would be complete without noting the extraordinary contributions of the many African-American lawyers, such as Frederick Abramson, George Jones, Charles Duncan, Tyrone Brown, Jeffrey Robinson, John Payton, Tom Williamson, Benjamin Wilson, Inez Smith-Reid, Melvin White, Denise Vanison and Ted Howard. Each of these individuals served as a Committee Co-Chair, several of them for more than a single term. All of them carried on the high standard of leadership established by Wiley Branton, the Committee's first African-American Co-Chair.

The Committee is also very proud of the dedicated women who have served with distinction as Co-Chairs of the organization. Marguerite Owen, Sara Ann-Determan, Denise Vanison, Stasia Kelly, Inez Smith-Reid, and Jennifer Levy have all made lasting contributions to the Committee's legacy.

Special recognition should be afforded to the several distinguished judges who earlier in their careers served as Committee Co-Chairs, Trustees

or co-counsel in major cases. These include the Honorable James Robertson, David Tatel, Patricia Wald, John Ferren, Inez Smith-Reid and Steven Wellner.

As much as anything the Committee's record is the product of the commitment, judgment, and skill of the principal staff lawyers who have helped to develop its innovative programs and guide its litigation and advocacy efforts with particular distinction. Going back to its earliest days, lawyers like Ann Macrory, who for over a decade served as the Committee's Associate Director and later as a staff attorney directing a number of Committee projects, will never be forgotten. Similarly, the incredible efforts of Project Directors, such as Avis Buchanan, Joe Sellers, Kerry Scanlon, John Relman, Elaine Gardner, Susan Huhta and Matt Handley, were essential to the Committee's success. The same may be said of the contributions of Mary Levy and Iris Toyer. Their leadership and commitment for nearly forty-years defined the Committee's dogged pursuit of securing a quality education for the neediest children in our city. The numerous dedicated lawyers who have directed the Committee's work on behalf of immigrants and refugees are equally deserving of commendation.

The final group to be acknowledged is perhaps the most appropriate to recognize: the individuals and organizational clients the Committee has been privileged to represent. Often at great personal risk, these men and women became true heroes by directly challenging injustice. I know every Committee staff member could name numerous clients whose personal stories will always be sources of inspiration. Space does not permit an extended discussion of many of these individuals. However, dating back to the Committee's earliest days, there are three people in particular who will always be foremost in my personal memory.

Perhaps no one personifies the courage and commitment of the Committee's clients more than Alfred McKenzie, who, beginning in the early 1970s, led the extended legal battle to address systemic racial discrimination in the Offset Press Section of the Government Printing Office (GPO). Following his service as a bomber pilot with the famed Tuskegee Airmen in World War II, Mr. McKenzie returned to his position in a low-level job at the GPO. For over twenty-years, he confronted a pervasive system of racial discrimination there that denied all African-Americans opportunities for advancement to supervisory positions.

In 1973, the Committee initiated a lawsuit on the behalf of Mr. McKenzie and his fellow workers that extended for over fifteen-years. Following Alfred McKenzie's retirement, the extraordinary victory achieved in this case could never have been won without his inspired leadership.

In speaking at the fairness hearing approving the ultimate settlement of the McKenzie case, Judge Barrington Parker, among the first African-

American Judges to serve on the US District Court for the District of Columbia, said:

We have something here which I consider a permanent and lasting victory as far as the black workers of the GPO are concerned. And I may say that it was really something which in my judgment and in the judgment of elder members of this court we felt should have been resolved a long time ago. These victories perhaps don't come about as frequently as we like, but they do come about, they do come about . . .

The McKenzie case settlement provided injunctive relief that fundamentally reformed the discriminatory employment practices of the Government Printing Office. In 1993, not too long after the conclusion of his case, Alfred McKenzie died and was buried with full military honors at Arlington Cemetery. Today his leadership in fighting for equal rights is prominently noted in the official history of the Government Printing Office.

During the same period the Committee began representing Mr. McKenzie, the Committee also agreed to assist a group of women led by Dorothy Thompson in the Bindery Division of the GPO. These women sought our help in challenging systemic sex discrimination and denials of equal pay. At that time, sex discrimination was pervasive within the federal government and especially blatant in the Bindery Division where women were limited to rates of pay well below that provided to male employees performing similar or lesser work.

Only after two trials and several appeals did the plaintiffs win a sweeping victory in this case. The relief eventually provided included, broad injunctive relief and back and front pay of over \$20 million for several hundred female employees. Dorothy Thompson, the fearless leader of the plaintiffs in this case for decades, never wavered in her commitment or backed down in the face of threats and harassment. Like Alfred McKenzie, she is today recognized by the GPO as a champion of equal rights.

It is noteworthy that in 2017, several of the principal lawyers who had represented Alfred McKenzie and Dorothy Thompson in their landmark cases were invited to the GPO to meet the new Public Printer, Davita Vance-Cooks, an African-American woman.

Sandy McCrary and her son, Michael, are the final clients to be noted. In the early 1970s, Sandy, a white woman married to an African-American man, sought to enroll her mixed-race son in a private nursery school in Fairfax County. When Michael presented himself at the school, accompanied by his father, he was turned away on the basis of his race. With the Committee's support, a lawsuit challenging this action was filed that ultimately reached the Supreme Court. In 1976, the Court struck down the school's policy under Section 1981 of the Civil Rights Act of 1866. Without Sandy's persistence this case could not have been prosecuted so successfully.

There are two notable postscripts to this story. First, in her capacity as a federal government EEO official in the years following her son's case, Sandy McCrary brought numerous other clients with meritorious claims to the Committee's attention. Second, her son, Michael, went on to have an All-Pro career as a defensive end for the Seattle Seahawks and Baltimore Colts in the NFL. As a star player, Michael was widely known as an indomitable force with an exceptional will to win. Shortly after his retirement, when asked about the source of his spirited play, he cited his mother's example as a fighter for civil rights as his inspiration.

The articles that follow set out an evolving history that I hope provides a fair representation of what the Committee has accomplished. It is essential when evaluating this record to remember that the challenges to civil rights we are confronting today are incredibly serious and the gains that at one time seemed secure cannot be taken for granted.

It is with this reality in mind that I hope these articles will serve as a call to action by all who share the Committee's commitment to equal opportunity and a just society. As we look ahead, it gives me great confidence to know that the Committee's leadership is in excellent hands and a new generation of supporters is fully prepared to address the critical challenges that lie ahead.

# A Survey of the Lawyers’ Committee Work on Private and Public Employment Discrimination Cases: 1984-Present

DAVID CYNAMON AND JOHN FREEDMAN\*

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## INTRODUCTION

Title VII of the Civil Rights Act of 1964<sup>1</sup> created a potentially powerful tool to dismantle entrenched employment discrimination by enabling private individuals to bring suit against their employers for violations of the law. But in order to make this tool effective, people needed lawyers. In 1968, in response to the Report of the National Advisory Commission on Civil Disorders (also known as the Kerner Commission)<sup>2</sup>, the Washington Lawyers’ Committee for Civil Rights and Urban Affairs (“Committee”)<sup>3</sup> was founded to make that potential a reality by providing pro bono legal counsel to plaintiffs in the Washington, D.C. metropolitan area.<sup>4</sup> In 1971, the Committee established its first project, the Equal Employment Opportunity Project, to

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1. 42 U.S.C. §§ 2000e–2000e-17 (2018).  
2. *History*, WASH. LAW. COMM., <https://www.washlaw.org/about-us/history>.  
3. The original name was the Washington Lawyers’ Committee for Civil Rights Under Law. The name was later changed to reflect the broadened scope of the Committee’s activities, including public education in Washington, D.C.  
4. WASH. LAW. COMM., *supra* note 2.

challenge discrimination by private employers.<sup>5</sup> When Title VII was expanded in 1972 to cover federal, state and local governments,<sup>6</sup> the Committee established the Federal Sector Employment Project to provide similar legal assistance for public sector employees. During the Committee's first fifteen years, these two projects constituted the bulk of the Committee's work and achieved a number of landmark rulings.<sup>7</sup>

While the Committee has greatly expanded its scope since those early years, private and public sector employment discrimination cases remain an integral part of the Committee's work. Since 1984, the Committee has paired with numerous volunteer law firms to pursue more than 100 private sector employment discrimination cases and at least 25 public sector lawsuits.<sup>8</sup> This paper surveys some of the more significant cases and results achieved, and discusses opportunities and challenges for the future.

## I. THE COMMITTEE'S EARLY YEARS: 1971-1983

Before reviewing the Committee's work in this area during the past 35 years, it is worth briefly summarizing the first fifteen years because some of those cases continued into the period covered by this survey. During the early years of its existence, the Committee faced a "target-rich environment," as racial discrimination in employment was common throughout the Washington D.C. region.<sup>9</sup> As a result, the Committee pursued multiple class actions against private employers, labor unions and federal agencies.<sup>10</sup> Because class action and anti-discrimination law had not been fleshed out, many of these cases took

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5. *Id.*

6. The Equal Employment Opportunity Act of 1972, § 706(f)(1); 42 U.S.C. § 2000e-15(f)(1) (1976).

7. See, e.g., Elliot M. Minberg, *Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: The Federal Sector Employment Project: Efforts by the Washington Lawyers' Committee to Combat Employment Discrimination in the Federal Government, 1972-1983*, 27 *How. L.J.* 1339 (1984).

8. See generally WASH. LAW. COMM., ANNUAL REPORTS, 1984-2001; WASH. LAW. COMM., UPDATES, Vols. 8 No. 2-22 No. 1, Fall 2002-Spring 2016.

9. See WASH. LAW. COMM., ANNUAL REPORT, 1974-1975, Appendix B.

10. See Minberg, *supra* note 7; John Payton, *Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: Redressing the Exclusion of and Discrimination Against Black Workers in the Skilled Construction Trades: The Approach of the Washington Lawyers' Committee for Civil Rights Under Law*, 27 *How. L.J.* 1397, 1398 (1984).

years to litigate due to hard fought discovery disputes, extensive motions practice and appeals.<sup>11</sup>

Among the Committee's first private employment discrimination class actions were cases brought against Bassett Furniture Industries and Allied Chemical Corporation.<sup>12</sup> In both companies, black employees were relegated to lower-level positions, were paid less than their white counterparts, and had no opportunity for advancement.<sup>13</sup> Both cases were vigorously defended, but after several years of hard-fought litigation, the Committee was able to achieve favorable settlements for the plaintiffs.<sup>14</sup>

A major focus of the Committee during this period was racial discrimination in the construction trade unions. Construction of the D.C. Metro system was about to begin, and in order to ensure that African American workers would have a fair opportunity to share in the work, a group of local civil rights and community organizations formed the Washington Area Construction Industry Task Force ("Task Force") to combat historical discrimination in the skilled construction trades.<sup>15</sup> Working with the Task Force, the Committee sued most of the area construction trade unions, including unions representing bricklayers, sheet metal workers, carpenters, electrical workers, and ironworkers. All of these cases, with the exception of the ironworkers, were ultimately resolved by settlement.<sup>16</sup> The litigation against the ironworkers union lasted into the period covered by this article, and is discussed in more detail below.<sup>17</sup>

In addition to suits directly against the construction trade unions, in 1977, the Committee, on behalf of the Task Force, pursued actions against the Department of Labor and the District of Columbia for their failure to enforce federal and local laws and administrative affirmative action plans to eliminate discrimination in the construction industry.<sup>18</sup> The action against the Department of Labor was resolved by entry of a consent decree in 1978, but it took four more years of

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11. See, e.g., *Berger v. Iron Workers Reinforced Rodmen*, Loc. 201, 170 F.3d 1111 (D.C. Cir. 1999); *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989).

12. *Belcher v. Bassett Furniture Indus.*, 588 F.2d 904, 594 (4th Cir. 1978). See, e.g., *Clanton v. Allied Chem. Corp.*, 409 F. Supp. 282 (E.D. Va. 1976).

13. *Belcher*, 588 F.2d at 594; *Clanton*, 409 F. Supp. at 282.

14. See generally *Belcher*, 588 F.2d 904. See *Clanton*, 409 F. Supp. at note 283.

15. Payton, *supra* note 10; see WASH. LAW. COMM., *supra* note 2.

16. This is a personal recollection of the author and/or the Committee.

17. A full description of the Committee's construction trade union litigation is contained in Payton, *supra* note 10.

18. Payton, *supra* note 10, at 1432-34.

litigation to obtain the Department's compliance with the decree. The parallel action against the District of Columbia was settled in 1983.<sup>19</sup>

The Committee's Federal Employment Project pursued multiple class actions against federal agencies, including the Government Printing Office, the Government Accounting Office, the General Services Administration, the Drug Enforcement Administration, and the Energy Research and Development Agency.<sup>20</sup> These and other cases not only resulted in millions of dollars in front and back pay awards, but established important precedents for the rights of federal workers in combatting discrimination in the Federal Government.<sup>21</sup>

## II. CASE SCREENING AND SELECTION

From the outset, the Committee's small but dedicated legal staff has co-counseled with volunteer law firms so that the Committee can leverage its resources to litigate many more, and much larger, cases than the Committee staff themselves would be able to handle on their own. Over the years, the Committee has co-counseled with more than 100 law firms; indeed, more than 60 firms, including most of the larger firms in Washington, D.C., are currently represented on the Committee's Board of Directors.<sup>22</sup>

In the early years, cases came to the Committee primarily on an ad hoc basis: individuals seeking representation in discrimination cases would contact the Committee directly. The staff would then interview the potential plaintiffs and, if the cases appeared to have merit, would attempt to recruit law firms to take the cases.<sup>23</sup> Some cases came as referrals from the Equal Employment Opportunity Commission (EEOC) which, in its early years, was limited in the types of cases it could directly handle. The class actions against Bassett Furniture Industries and Allied Chemical came to the Committee in this fashion, pursuant to an EEOC grant to the Committee.<sup>24</sup> The Committee worked with the Task Force to develop cases against the construction trade industry unions.<sup>25</sup> Similarly, the Committee's Federal Employment Project worked with local organizations like the Urban

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19. *Id.*

20. *Id.*

21. See Minberg, *supra* note 7, at 1364–68.

22. *Leadership*, WASH. LAW. COMM., <https://washlaw.org/about-us/leadership>.

23. Interview with Roderic V.O. Boggs, Committee Executive Director, 1971–2016 [hereinafter Boggs Interview].

24. WASH. LAW. COMM., ANNUAL REPORT, 1973–74 at 4–6.

25. Payton, *supra* note 10, at 7–13.

League to meet with minority employees at federal agencies to discuss problems of discrimination and identify potential cases.<sup>26</sup>

As the number of cases and referrals multiplied, they exceeded the capacity of the Committee's staff to screen and coordinate with law firms. Accordingly, in 1973, the Committee worked with the D.C. Bar to set up the Federal Employees Legal Advice and Referral Service, operated under the Bar's auspices.<sup>27</sup> That Service was the progenitor of the Bar's Lawyer Referral and Information Service which matches volunteer lawyers with individuals seeking representation in a wide variety of areas.<sup>28</sup>

The Committee's ad hoc referral system for private and public employment discrimination cases, however, became increasingly unwieldy. Often, individuals seeking legal assistance would contact multiple legal service organizations and private law firms, resulting in much duplication of effort in screening potential cases.<sup>29</sup> Accordingly, in the early 1980's, the Committee organized a network of attorneys in local law firms to review and screen cases; a law firm receiving a request for assistance could refer the case for screening by this network, which reduced duplication of effort and ensured that a more uniform standard of review was applied.<sup>30</sup>

As the Committee's caseload continued to grow, in the mid-1980's, the Committee assigned a legal assistant to screen potential cases.<sup>31</sup> Law firms were invited to refer cases to the Committee for screening; if a case was deemed meritorious and appropriate for the Committee's mission, the Committee would then seek a volunteer firm with which to co-counsel.<sup>32</sup> By 1990, the Committee was screening approximately 1000 requests for assistance per year in private and public employment discrimination cases.<sup>33</sup> Accordingly, the Committee hired its first full time case screener, Avis Sanders, who remained with the Committee until 2002.<sup>34</sup>

Under its current system, begun with Ms. Sanders, the Committee's staff screener is the first stop for all referrals and direct requests

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26. Mincberg, *supra* note 7, at 1408-20.

27. WASH. LAW. COMM., ANNUAL REPORT, 1974-75, at 6-7.

28. WASH. LAW. COMM., ANNUAL REPORT, 1979-1980, at 4.

29. Boggs Interview, *supra* note 23.

30. WASH. LAW. COMM., ANNUAL REPORT, 1984-85, at 5.

31. Boggs Interview, *supra* note 23.

32. Wash. Law. Comm., ANNUAL REPORT, 1985-86, at 5.

33. Wash. Law. Comm., ANNUAL REPORT, 1990-91, at 7.

34. *Id.*

for assistance.<sup>35</sup> If the matter does not involve discrimination or an issue falling within the scope of the Committee's other project areas, the individual may be referred to another legal aid organization. Otherwise, the screener will write up a summary of the case, which is then considered and discussed at a weekly meeting of the Committee's project directors, under the auspices of the Director of Litigation. If there is a consensus that the case has merit and is consistent with the Committee's mission, the Committee staff will circulate the case among the Committee's participating law firms for volunteers or, in some cases, the staff will handle the matter on its own.<sup>36</sup>

### III. PRIVATE SECTOR EMPLOYMENT CASES: 1984-PRESENT

Since 1984, the EEO Project has litigated more than twenty class-action lawsuits against private employers, three cases that were foundational to the development of "tester" standing in employment discrimination cases brought by individuals and employment organizations, and numerous cases that resulted in significant punitive damages and injunctive relief.<sup>37</sup> Together these cases have resulted in more than \$82 million in monetary awards, ranging in amounts from \$80,000 to \$38.4 million, as well as injunctive relief to remedy illegal workplace harassment and discrimination by private employers towards prospective, current, and former employees.<sup>38</sup> These cases were consistent with the Committee's goals of taking cases that have the potential to provide structural remedies to discrimination through class action relief, to establish precedent in undeveloped areas of the anti-discrimination laws, and to discourage discrimination by imposing heavy compensatory and punitive damages on malefactors.<sup>39</sup>

#### A. Tester Cases

In the absence of overt statements or conduct, discrimination in employment, housing and public accommodations can be difficult to discern, much less prove. An unsuccessful job applicant, or a person

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35. WASH. LAW. COMM., ANNUAL REPORT, 1996, at 4; WASH. LAW. COMM., ANNUAL REPORT, 2001, at 5.

36. This assertion is based on the Boggs Interview, *supra* note 23, as well as the Authors' personal knowledge.

37. WASH. LAW. COMM., ANNUAL REPORTS, 1984–2001; WASH. LAW. COMM., UPDATES, Vols. 8 No. 2–22, No. 1, Fall 2002–Spring 2016.

38. *Id.*

39. *Id.*

told that the apartment she was seeking has already been rented, cannot know from that information alone whether discrimination was a factor in the decision. Discovery might produce such information, but before any discovery can take place, a plaintiff must have a reasonable basis for filing a claim of discrimination.<sup>40</sup>

To address this problem, in the early 1980's the Committee began working with the Fair Housing Council of Greater Washington to use paired testers to investigate potential housing discrimination.<sup>41</sup> Ten years later, the Committee started working with the Fair Employment Council of Greater Washington ("FEC") to do testing in the employment context.<sup>42</sup> The FEC would have pairs of black and white testers with identical qualifications submit job applications in order to determine whether the prospective employer demonstrated a pattern of selecting white applicants over equally qualified black applicants.<sup>43</sup> In 1999, the two Councils merged to become the Equal Rights Center ("ERC"), with which the Committee has maintained a close and highly productive relationship.<sup>44</sup>

One of the obstacles to the tester approach, however, was the question of standing. As neither the testers nor the testing organization were actual applicants for employment, defendants argued that they had suffered no injury and therefore had no standing to pursue discrimination claims for damages or injunctive relief.<sup>45</sup> The Committee was involved in several groundbreaking cases to resolve this question.

In the first national case in which civil rights testers filed claims under the equal employment laws, two African American testers and the FEC sued a local employment agency and its national franchiser,

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40. See generally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

41. WASH. LAW. COMM., ANNUAL REPORT, 1983, at 13-14; WASH. LAW. COMM., ANNUAL REPORT, 1988, at 10.

42. The Fair Housing Council was established in 1983 by a group of interfaith clergy in response to the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which upheld the standing of testers to sue defendants for housing discrimination. The FEC was established in 1990 by a group of attorneys experienced in employment matters, to extend the tester model to employment discrimination.

43. WASH. LAW. COMM., ANNUAL REPORT, 1990-1991, at 8.

44. A third testing organization, the Disability Rights Council, was established in 1992 and merged into the ERC in 2002.

45. In order to establish standing to sue, a plaintiff must satisfy three requirements: (1) the plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent; (2) there must be a causal connection between the injury and the conduct brought before the court; and (3) it must be likely, rather than speculative, that a favorable decision by the court will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Snelling & Snelling, for discriminatorily denying referrals to the African American testers while offering them to their white counterparts.<sup>46</sup> The U.S. District Court denied a motion to dismiss, finding that both the African American testers and the FEC had standing to bring claims under Title VII and 42 U.S.C. 1981, which prohibits racial discrimination in the making and enforcement of contracts.<sup>47</sup> On interlocutory appeal, the D.C. Circuit agreed that the FEC had organizational standing under Title VII but that, because the testers lacked the ability at the time to obtain damages, they lacked standing under Title VII.<sup>48</sup> The Court also ruled that neither the testers nor the FEC had standing under Section 1981.<sup>49</sup> Although the denial of standing for the individual testers was a setback, upholding the FEC's standing was a major impetus to the ability of the Council and Committee to pursue testing investigations and lawsuits resulting from those investigations. In the case at hand, the plaintiffs settled their claims in return for a six-figure damage payment along with injunctive relief, including the employment agency's agreement to participate in the FEC's program, "Getting a Job is a Job," in which D.C. high school students are trained in job-seeking skills.<sup>50</sup>

Several years later, the FEC and the Committee brought a similar testing case under the District of Columbia Human Rights Act ("DCHRA"), the District's counterpart to Title VII.<sup>51</sup> The FEC and two female testers, along with a genuine job seeker, filed suit against a local employment agency for sex discrimination, based on allegations that the agency's owner linked referrals to demands for sexual favors.<sup>52</sup> In the first tester case in the country actually to proceed to trial, the plaintiffs were awarded significant compensatory and punitive damages.<sup>53</sup> The judgment was affirmed on appeal; the D.C. Court of Appeals held that both testers and fair employment organizations have individual and organizational standing under the DCHRA to

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46. Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp., 829 F. Supp. 402, 403 (D.D.C. June 18, 1993).

47. *Id.* at 403–407.

48. Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1281 (D.C. Cir. 1994).

49. *Id.*

50. WASH. LAW. COMM., 3 UPDATE 1 at 4 (Summer 1994).

51. See generally *Molovinsky v. Fair Emp't Council of Greater Wash., Inc.*, 683 A.2d 142 (D.C. 1996).

52. *Id.* at 144.

53. *Id.* at 145.

bring suit for discrimination.<sup>54</sup> Thus, testers have broader standing rights under local District of Columbia law than under federal law.

The Committee's representation of the ERC continues to the present, primarily in the areas of housing and public accommodations discrimination. This work is discussed in separate articles covering those areas.

#### B. Ironworkers' Union Litigation

As mentioned above in Part II, during the 1970's the Committee brought multiple cases to end historical race discrimination in the local construction trade unions. Although all of the cases were hard fought, all but one were ultimately settled. The settlements with the bricklayers', electrical workers' and sheet metal workers' unions provided class-wide relief through the entry of consent decrees, which typically included goals and timetables to increase black union membership and opportunities for higher skilled positions.<sup>55</sup> The case against the carpenters' union, in which the court denied class certification, was settled on an individual basis.<sup>56</sup>

The ironworkers' union, however, did not settle. The Committee filed a class action against the union in 1975, alleging violations of 42 U.S.C. § 1981 and Title VII.<sup>57</sup> The district court certified the class on July 26, 1976.<sup>58</sup> There ensued six years of discovery, motions practice, and pre-trial proceedings. In accordance with the procedure recognized by the Supreme Court in the *Teamsters* case,<sup>59</sup> the court bifurcated the issues of class-wide liability and individual damages for trial.<sup>60</sup> In the summer of 1981, the case went to trial on the issue of the union's liability for a pattern and practice of discrimination.<sup>61</sup> But it was not until 1985 – one decade after the complaint was filed – that the district court issued its decision in favor of the plaintiffs and imposing class-wide injunctive relief.<sup>62</sup>

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54. *Id.* at 146.

55. Payton, *supra* note 10.

56. *Id.*

57. *Berger v. Iron Workers Reinforced Rodmen*, Loc. 201, 843 F.2d 1395, 1406 (D.C. Cir. 1988) [hereinafter *Berger*].

58. *Id.*

59. *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 329, 360–61 (1977) [hereinafter *Teamsters*].

60. *Berger v. Iron Workers Reinforced Rodmen*, Loc. 201, 170 F.3d 1111, 1117 (D.C. Cir. 1999).

61. *Berger*, 843 F.2d at 1406–07.

62. *Id.* at 1407.

The union appealed, and in 1988, the D.C. Circuit affirmed in part, reversed in part, and remanded for further proceedings.<sup>63</sup> After imposing injunctive relief regarding class-wide liability on February 15, 1989, the district court referred the matter to a special master to conduct hearings to determine the amount of back pay and other damages to which individual class members would be entitled.<sup>64</sup> These hearings required a massive undertaking by the Committee, as 173 class members submitted claims.<sup>65</sup> The Committee and lead plaintiffs' law firms recruited and coordinated more than 100 volunteer attorneys to represent these class members.<sup>66</sup> The hearings were completed in 1991, but the special master did not issue his findings until 1994. After yet another appeal and remand,<sup>67</sup> final payments of more than \$1 million in back pay, damages, and interest were made to successful individual class members in 1999.<sup>68</sup>

*Berger* took 25 years – a quarter of a century – to litigate from start to finish. Inexcusable delays by the district court and special master played a role. But, it is not unusual for major civil rights actions to take years to litigate (as will be seen in the next discussion of the *Circuit City* litigation). Few individual private law firms have the resources or motivation to undertake such marathons. The Committee's ability to recruit and coordinate large numbers of volunteers from multiple private law firms makes it possible to pursue and succeed in cases challenging discrimination against the most intransigent and deep-pocketed opponents.

### C. Circuit City

One of the most significant private employment discrimination cases pursued by the Committee in the mid-1990's was a class action lawsuit against Circuit City Stores, Inc.<sup>69</sup> The case illustrates both the scope of the Committee's work and the challenges presented by a federal judiciary that had become increasingly conservative in the 1980's and 1990's, particularly the U.S. Court of Appeals for the Fourth Circuit.

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63. *Id.* at 1443–44.

64. *Berger*, 170 F.3d at 1117.

65. *Id.* at 1124.

66. WASH. LAW. COMM., Report of Activities 1989–90 at 6–7.

67. *Berger*, 170 F.3d at 1119, 1144.

68. *Berger v. Iron Workers Reinforced Rodmen*, Loc. 201, No. 75-1743 (J.G.P.), 1999 WL 34870222 (D.D.C. Dec. 8, 1999).

69. *See generally* Lowery v. Circuit City Stores, Inc., 158 F.3d 742 (4th Cir. 1998).

Circuit City was a nationwide retailer of consumer electronic products, with its headquarters in Richmond, Virginia.<sup>70</sup> The main office was a large operation with 3,500 employees, of whom about 800 were African American.<sup>71</sup> The company had no written objective requirements for promotion; promotions were based on subjective criteria, supposedly reflecting merit.<sup>72</sup> But, despite the fact that almost one-third of headquarters employees were black, Circuit City's upper-level management was entirely white, and only two black employees had ever been promoted to supervisor from the position of assistant supervisor.<sup>73</sup>

In October 1995, the Committee, in conjunction with one of its supporting law firms, filed a class action complaint against Circuit City on behalf of eleven individual African American headquarters employees.<sup>74</sup> The complaint alleged that Circuit City had engaged in a pattern or practice of racial discrimination that created a glass ceiling at company headquarters for black employees, including the eleven named plaintiffs.<sup>75</sup> Plaintiffs sought certification of the case as a class action, broad injunctive relief to remedy the alleged class-wide discriminatory promotion practices, injunctive, and monetary relief for the named plaintiffs.<sup>76</sup>

The case was hard fought from the outset. Circuit City successfully moved to transfer the case from the U.S. District Court for the District of Maryland to Circuit City's "home court," the Richmond Division of the U.S. District Court for the Eastern District of Virginia.<sup>77</sup> The company vigorously resisted plaintiffs' discovery requests, and the court ultimately sanctioned Circuit City for discovery abuses.<sup>78</sup> Along the way, the court dismissed the claims of two plaintiffs as time-barred and granted summary judgment in Circuit City's favor as to the claims of three other plaintiffs.<sup>79</sup>

In April 1996, the district court granted plaintiffs' motion to certify the case as a class action pursuant to Fed. R. Civ. P. 23(b)(2), and certified a mandatory non opt-out class for all African Americans em-

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70. *Id.* at 749.

71. *Id.*

72. *Id.* at 749-50.

73. *Id.*

74. *Id.* at 749, 753.

75. *Id.* at 749-50.

76. *Id.* at 753.

77. *Id.*

78. *Id.*

79. *Id.* at 753-55.

ployed at Circuit City headquarters within the statute of limitations period.<sup>80</sup> Plaintiffs then proposed a bifurcated *Teamsters* trial plan, in which a jury would first determine liability and punitive damages as to the class-wide pattern-or-practice claim as well as liability and damages for the named plaintiffs.<sup>81</sup> Then, in phase two, the jury would determine liability and damages for potentially 200 additional class members with claims. In response, however, the district court *sua sponte* decertified the class.<sup>82</sup> The court concluded that trying the case as a bifurcated class action would be inefficient and unfair to Circuit City.<sup>83</sup> Instead, the court ruled that the case would go to trial on the individual claims of the six remaining plaintiffs, during which those plaintiffs would be permitted to present their evidence of Circuit City's alleged pattern or practice of discrimination, and Circuit City could defend that claim.<sup>84</sup> If the jury found in favor of plaintiffs on that claim, the court ruled that appropriate injunctive relief could be entered, and Circuit City would be collaterally estopped from denying its pattern or practice in any subsequent claims filed by class members.<sup>85</sup> Because one effect of the decertification order would be to end the tolling of the statute of limitations for the claims of unnamed class members, the court agreed to stay the entry of the decertification order until the conclusion of the trial.<sup>86</sup>

The trial commenced on October 28, 1996, and lasted for a month.<sup>87</sup> In support of their pattern-or-practice claims, the plaintiffs presented a statistical expert who demonstrated that the differences in promotion rates between similarly situated black and white employees at Circuit City were statistically significant, i.e., that such differences could not be explained by non-discriminatory reasons, like differences in levels of experience, but rather that racial discrimination was the

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80. *Id.* at 753.

81. Plaintiff's Motion for Severance and to Adopt a Bifurcated Trial Plan, *McKnight v. Circuit City Stores, Inc.* (Lowery v. Circuit City Stores, Inc.), No. 3:95-CV-964, 1997 WL 33794407 (D. Md. 1997).

82. *Lowery*, 158 F. 3d at 754.

83. *Id.*

84. *Id.*

85. *Id.*

86. The filing of a Rule 23 class action complaint automatically tolls the running of any applicable statutes of limitations with respect to all members of the putative class, until certification of the class is denied or the class is decertified. At that point, unnamed members of the putative class have thirty days in which to file individual cases. *Id.*

87. *See id.* at 755.

likely differentiating factor.<sup>88</sup> Circuit City presented its own expert statistician to rebut the plaintiffs' witness. The plaintiffs, however, did not rely solely on statistical evidence. They also presented evidence of statements by Circuit City upper management personnel, including its head of human resources, that reflected disparaging attitudes toward African Americans.<sup>89</sup> Plaintiffs also introduced evidence that Circuit City had "buried" two internal reports that raised concerns about racial discrimination in promotions at company headquarters.<sup>90</sup>

At the conclusion of the trial, the jury unanimously found that Circuit City had in fact engaged in a pattern or practice of racial discrimination in promotions.<sup>91</sup> The jury also found in favor of two plaintiffs on their individual claims, for which the jury awarded both compensatory and punitive damages.<sup>92</sup> After denying Circuit City's post-trial motions, the district court entered an injunction aimed at eliminating the company's racially discriminatory promotion practices.<sup>93</sup> Among other things, the injunction required Circuit City to establish a Department of Diversity Management and to establish within ninety days, a new, non-discriminatory promotions program based on objective, transparent criteria.<sup>94</sup>

Circuit City appealed to the Fourth Circuit from all of the rulings adverse to it, while plaintiffs cross-appealed from the order decertifying the class as well as the rulings adverse to the nine individual plaintiffs whose claims had been dismissed at the trial court level. The Court of Appeals upheld the district court's decertification of the class, holding that such an order lay within the exercise of the trial court's discretion.<sup>95</sup> The Court then held, however, that having decertified the class, the district court should not have permitted the individual plaintiffs to pursue a pattern-or-practice claim, which according to the appellate panel is available only in class actions.<sup>96</sup> Accordingly, the Fourth Circuit overturned the pattern-or-practice verdict and va-

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88. *See id.* at 755; *see also Teamsters*, 431 U.S. at 340–43 (The U.S. Supreme Court held that such statistical evidence is admissible to establish the existence of a pattern or practice of discrimination, given that overt evidence of racial discrimination is often lacking. Thus, class action discrimination cases typically feature a "battle of experts" between statisticians retained by plaintiffs and defendants).

89. *Lowery*, 158 F.3d at 751.

90. *Id.*

91. *Id.*

92. *Id.* at 756.

93. *Id.*

94. *Id.*

95. *Id.* at 757–59.

96. *Id.* at 761.

cated the trial court's injunction designed to remedy the promotion practices that the jury had found to be discriminatory.<sup>97</sup> The Court of Appeals also vacated the punitive damages awarded to the individual plaintiffs, finding that there was not sufficient evidence to show that Circuit City's conduct was "so egregious that it was appropriate to submit the issue of punitive damages to the jury."<sup>98</sup>

The Fourth Circuit's rulings on the pattern-or-practice claim led to a result precisely contrary to that intended by the district court as well as contrary to the jury's verdict based on the evidence presented at trial. The district court had decertified the class, not because it found that plaintiffs had failed to satisfy any of the Rule 23 criteria, but because the court concluded that the pattern-or-practice claim could be tried more fairly and efficiently as part of the trial of plaintiffs' individual claims. The Court of Appeals agreed that it was within the district court's discretion to decertify the class, but then held that having done so the court had no discretion to try the pattern-or-practice claim.<sup>99</sup> Had the district court known that class decertification meant the death knell for such a claim, one wonders whether the court would have exercised its discretion in that manner. The Fourth Circuit, however, did not give the lower court the opportunity to consider class certification in light of the appellate court's ruling; rather than remand the case for further proceedings in accordance with its opinion, the Court of Appeals simply vacated the pattern-or-practice verdict and the corresponding injunctive relief as a matter of law.<sup>100</sup>

Plaintiffs sought Supreme Court review of the Fourth Circuit's decision. The Supreme Court granted the petition and remanded the case to the Court of Appeals to reconsider punitive damages in light of *Kolstad v. Am. Dental Ass'n*, which held that in discrimination cases, the plaintiff need not prove "egregious misconduct" in order to recover punitive damages.<sup>101</sup> On remand, the Fourth Circuit reinstated the punitive damages awarded by the jury, but did not reinstate the pattern-or-practice verdict and related injunction.<sup>102</sup>

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97. *Id.* at 766.

98. *See id.*

99. *Id.* at 768.

100. *Id.*

101. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 546 (1999).

102. *Id.*

The *Circuit City* case is illustrative of the Committee's work in several respects. First, it demonstrates how the Committee's practice of partnering with volunteer law firms enables the Committee to leverage its influence by pursuing large class action cases that would be beyond the Committee's own staff resources. *Circuit City* spanned several years and involved thousands of attorney and support staff hours. Yet, this was only one of multiple big cases that the Committee litigated, not just in the area of employment discrimination, but in public accommodations and housing as well.

Second, *Circuit City* reflects the Committee's willingness and ability to take on deep pocket defendants in pursuit of fair employment practices. This case was fought bitterly and tried on Circuit City's home turf. Yet, a jury of local citizens listened to the evidence and sent a powerful message that employment discrimination, covert as well as overt, is not acceptable. The Fourth Circuit's adverse rulings notwithstanding, the jury's verdict was widely reported in Richmond, and the ultimate assessment of punitive damages against the company was a clear statement of disapproval of its pattern and practice of racial discrimination.

Third, *Circuit City*, like the ironworkers' union litigation, demonstrates that enforcement of the civil rights laws is a tough, long-term battle. Victory, in any given case, is far from certain. Despite having proved a pattern or practice of discrimination in promotions at Circuit City headquarters, the plaintiffs were deprived of a legal remedy against that practice. Steps forward are inevitably accompanied by steps backward. Progress comes in hard-fought increments.

#### D. Railroads and Utilities

At the turn of the century, the Committee pursued a trio of class actions against Amtrak on behalf of African American employees and applicants for employment. The Committee achieved significant class-wide monetary and injunctive relief through two settlements. A third case, however, remained stalled for years at the class certification stage, and ultimately the district court denied class certification, reflecting the difficulties of pursuing nationwide employment class actions.

*Thornton, et al. v. Nat'l R.R. Passenger Corp.*, was filed on behalf of African Americans employed in positions covered either by a Collective Bargaining Agreement between Amtrak and the Brotherhood

of Maintenance of Way Employees (“BMWE”) for the Northeast Corridor or the Corporate Agreement between Amtrak and the BMWE, encompassing workers for the Metropolitan Boston Transit Authority (collectively, “BMWE positions”).<sup>103</sup> The lawsuit also included unsuccessful applicants for BMWE positions. After the district court certified the case as a class action, the parties reached a settlement that required changes to Amtrak’s employment policies to remedy the effects of past discrimination, plus \$16 million in damages.<sup>104</sup> The settlement of a companion case, *McLaurin, et al. v. Nat’l R.R. Passenger Corp.*, resulted in an \$8 million fund for class members as well as broad injunctive relief, including revisions to Amtrak’s hiring, promotion, training, right-of-way, and EEO practices and a compensation study to provide the basis for eliminating any race-based disparities that operated to the detriment of African American employees; the establishment of a Vice President for Business Diversity; and the monitoring of the effects of the changed practices.<sup>105</sup>

The third case, filed in late 1999, was brought on behalf of a nationwide class of black Amtrak railroad workers. *Campbell, et al. v. Nat’l R.R. Passenger Corp.*, et al.<sup>106</sup> The complaint alleged discrimination in hiring, pay, promotions, discipline, and other employment practices.<sup>107</sup> After it became clear that an early mediated settlement was not possible, the parties engaged in litigation reminiscent of the *Berger* case. There was extensive discovery and motions practice, and the complaint was amended five times to reflect information obtained during discovery. The motion for class certification was filed and fully briefed in 2012.<sup>108</sup> The district court requested several rounds of supplemental briefs and hearings before plaintiffs could submit the class certification issue for decision.<sup>109</sup> Finally, on April 26, 2018 – six years

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103. Compl., 16 F. Supp. 2d 5 (D.D.C. 1998) (No. Civ.A. 98-890(EGS)). The information in this paragraph was taken principally from WASH. LAW. COMM., 4 UPDATE 1–2 (1998) and WASH. LAW. COMM., ANNUAL REPORT 1999.

104. *Thornton v. Nat’l R.R. Passenger Corp.*, No. 1:98-cv-00890-EGS, 2000 WL 33727177 (D.C. Mar. 1, 2000); see also *Amtrak Settles Racial Suit, Vows Changes*, L.A. TIMES (Mar. 04, 2000), <http://articles.latimes.com/2000/mar/04/business/fi-5285>.

105. See generally Daniel Machalaba, *Amtrak to Pay \$8 Million and Change Practices to Settle Racial-Bias Lawsuit*, WALL ST. J. (July 2, 1999, 1:00 AM), <https://www.wsj.com/articles/SB93087610774777627>.

106. *Campbell v. Nat’l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 285–86 (D.D.C. 2018).

107. The complaint can be accessed through the Wiggins Child website. See *The Campbell, Et Al. V. Amtrak Class Action Litigation*, <https://www.wigginschilds.com/news/noteworthy-cases/campbellvamtrak/> (last visited Nov. 4, 2018).

108. *Campbell*, F. Supp. 3d at 289.

109. *Id.*

after the motion for class certification was filed – the district court issued an opinion denying the motion, although the long delay between the filing of the motion and the decision had effectively denied the motion already.<sup>110</sup> The Committee is now assessing how to proceed with the case on an individual basis. As in *Berger* and several large public accommodations cases, the Committee will probably recruit multiple law firms to represent the individual plaintiffs on a coordinated basis.

In *Martin v. Potomac Elec. Power Co.*, the Committee took on PEPSCO, the electric utility serving the Washington, D.C. metropolitan area.<sup>111</sup> The named plaintiffs represented a class of 20,000 African-American employees and applicants and a separate class of women employees, claiming that PEPSCO engaged in a pattern or practice of racial discrimination in promotions and assignments.<sup>112</sup> After the district court certified the class, the parties reached a historic settlement that provided for wide-ranging reforms to PEPSCO's personnel system and the largest amount of monetary relief in such a case in the Washington D.C. area up to that time, consisting of \$38.4 million in back pay, damages, and attorneys' fees.<sup>113</sup>

#### E. LGBTQ Discrimination

From the outset, the Committee has been involved in cutting edge employment discrimination lawsuits. Most recently, on July 14, 2015, the Committee, with co-counsel Gay & Lesbian Advocates & Defenders (GLAD), filed a class action lawsuit against Wal-Mart charging the retail giant with discriminating against employees who were married to same-sex spouses by denying their spouses health insurance benefits.<sup>114</sup> The lawsuit was the first class action filed on behalf of gay workers since the U.S. Supreme Court ruled in favor of marriage equality in *Obergefell v. Hodges*.<sup>115</sup> Class representative Jacqueline Cote works in Wal-Mart's Swansea, Massachusetts store and was denied spousal health insurance for her wife, Diana (Dee) Smith-

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110. *Id.* at 286.

111. *See generally* *Martin v. Potomac Elec. Power Co.*, Nos. 86–0603, 87–1177, 87–2094 and 88–0106, 1990 WL 158787 (D.D.C. May 25, 1990).

112. Michael York, *Pepco Bias Suit Heads for \$38 Million Settlement*, WASH. POST, (Feb. 21, 1993), [https://www.washingtonpost.com/archive/politics/1993/02/21/pepco-bias-suit-heads-for-38-million-settlement/271a7bfc-409c-478c-9940-600bc3283c09/?utm\\_term=.44a2c617dbcb](https://www.washingtonpost.com/archive/politics/1993/02/21/pepco-bias-suit-heads-for-38-million-settlement/271a7bfc-409c-478c-9940-600bc3283c09/?utm_term=.44a2c617dbcb).

113. *Id.*

114. Compl. at 1, *Cote v. Wal-Mart Stores Inc.*, No. 1:15-12945-WGY (D. Mass. July 14, 2015).

115. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607–08 (2015).

son, who has battled ovarian cancer since 2012.<sup>116</sup> The complaint alleged that, by denying spousal health benefits to Ms. Cote that were available to employees in opposite sex marriages, Wal-Mart discriminated against her based on her sex, in violation of Title VII.<sup>117</sup> As a result of the discrimination, Dee lacked health insurance to pay for her treatment and more than \$150,000 in uninsured medical expenses.<sup>118</sup>

After the district court denied Wal-Mart's motion to dismiss and certified the class, the parties entered into a historic settlement pursuant to which Wal-Mart agreed to an injunction requiring it to continue to treat same-sex and opposite-sex married couples equally in the provision of health insurance benefits, as well as to create a class-wide fund of \$7.5 million (including attorneys' fees), which will be used to make payments to 305 class members.<sup>119</sup> This settlement, and the procedural victories leading to it, represent an important precedent for providing the LGBTQ community protection under federal civil rights laws.

#### F. "Wage Theft" Cases

In addition to pure discrimination cases, the Committee has pursued litigation involving so-called "wage theft": employers who violate the Fair Labor Standards Act ("FLSA") and related federal and state laws regarding payment of minimum wages, overtime, and the like. Because many victims of wage theft are immigrants, these cases have been pursued by both the Committee's EEO Project and Immigrant & Refugee Rights Project. Three of the most significant cases are the following:

In *Cryer v. Intersolutions, Inc. et al*, the Committee sued InterSolutions, a temporary staffing agency, which routinely denied overtime pay to its temporary and in-house non-exempt employees and threatened to terminate employees who complained about these practices.<sup>120</sup> The District Court certified an FLSA class of more than 500 temporary employees, after which InterSolutions agreed to a settle-

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116. Compl., *supra* note 114, at 32–34.

117. Compl., *supra* note 114, at 1–3, 76.

118. Class Action Compl. at 9; *Cote v. Wal-Mart Stores Inc.*, No. 1:15-cv-12945-WGY (D. Mass. July 14, 2015).

119. Settlement Agreement, *Cote v. Wal-Mart Stores Inc.*, No. 1:15-cv-12945-WGY (D. Mass. Dec. 2, 2015).

120. *Cryer v. Intersolutions, Inc.*, No. 06-2032, 2007 U.S. Dist. LEXIS 29339, at \*2–3 (D.D.C. Apr. 7, 2007).

ment.<sup>121</sup> Plaintiffs received full compensation for three years of unpaid overtime, which is doubled in accordance to the FLSA, and attorneys' fees of nearly \$150,000.<sup>122</sup> The settlement also required InterSolutions to hire an external auditor to review the pay practices of the company and determine whether any other temporary employees were owed back pay.<sup>123</sup>

In 2009, the Committee filed a class action lawsuit, *Claros v. Nastos Construction, Inc., et al.*, alleging that Nastos violated the FLSA by failing to pay its employees overtime for work over 40 hours per week, and for withholding other required compensation.<sup>124</sup> The Defendant vigorously litigated the case, which involved extensive motions, multiple amendments to the complaint, and numerous discovery disputes.<sup>125</sup> Ultimately, however, in 2013 the Committee was able to achieve a class wide settlement with Nastos, pursuant to which the employee class received \$700,000 in unpaid wages and attorneys' fees.<sup>126</sup>

In *Ayala v. Tito Contractors, Inc., et al.*, a complaint was filed in October 2013 on behalf of employees of a construction contractor, in a case similar to *Nastos Construction*.<sup>127</sup> The complaint alleged that Tito had violated the FLSA, as well as related D.C. and Maryland wage laws, by insisting that its employees routinely work 60-80 hours per week but failing to pay overtime, pressuring employees to under-report, and failing to keep accurate time records.<sup>128</sup> Plaintiffs sought class certification under the FLSA's "collective action" provision, 29 U.S.C. § 216(b).<sup>129</sup> The district court duly certified the class in 2014,

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121. *Id.*

122. *Cryer v. Intersolutions, Inc.*, No. 06-2032, Consent Decree filed June 13, 2007 (Dkt. No. 54).

123. *Id.*

124. Collective Action, Class Actions, and Individual Compl. at 2-3, *Claros v. Nastos Constr., Inc.*, No. 1:09-cv-01888 (D.D.C. Oct. 2, 2009).

125. See docket for *Claros v. Nastos Constr., Inc.*, (Dkt. No. 1:09-CV-01888 ). The statement is confirmed by the docket entries in the case, which reflect numerous motions and discovery disputes.

126. See Settlement Agreement at 3, *Claros v. Nastos Constr., Inc.*, No. 1:09-cv-01888 (D.D.C. May 31, 2013) (stating that a settlement of \$550,000 was decided); see also Order and Final Judgment at 3, *Claros v. Nastos Constr., Inc.*, No. 1:09-cv-01888 (D.D.C. Jan 14, 2014) (stating that plaintiffs were awarded \$150,000).

127. *Ayala v. Tito Contrs., Inc.*, 82 F. Supp. 3d 279, 283 (D.D.C. Mar 4, 2015).

128. *Id.*

129. *Id.*

after which Tito submitted to a settlement in March 2015 that restored more than \$800,000 in unpaid wages to the plaintiff class.<sup>130</sup>

G. Individual Cases

Although class actions “make the headlines,” the Committee has represented hundreds of individual plaintiffs in discrimination actions covering a wide variety of issues. In many of these cases, the Committee achieved significant damage awards and/or injunctive relief, either through trial or settlement. Examples include the following:

1. *Garcia Hernandez v. Chipotle Mexican Grill, Inc.*

In May 2011, Doris Garcia Hernandez began working at Chipotle Mexican Grill on M Street in Washington, D.C.<sup>131</sup> Ms. Garcia received positive employment reviews for her work, until she informed her supervisor of her pregnancy in late November 2011.<sup>132</sup> She claimed that upon learning of her pregnancy, her supervisor changed his attitude towards her and instituted a new policy that made it more difficult for employees to use the bathroom and drink water.<sup>133</sup> She was then terminated after taking leave to attend a prenatal appointment.<sup>134</sup>

The Committee filed suit on Ms. Garcia Hernandez’s behalf, alleging pregnancy discrimination in violation of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and the District of Columbia Human Rights Act.<sup>135</sup> After trial, the jury returned a verdict of \$50,000 in compensatory damages and \$500,000 in punitive damages against Chipotle.<sup>136</sup> Moreover, the case inspired the District of Columbia Council to pass the Protecting Pregnant Workers Fairness Act to ensure that D.C. employees like Ms. Garcia Hernandez are guaranteed pregnancy accommodations at work.<sup>137</sup>

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130. Order Granting Plaintiff’s Motion for Conditional Class Certification, *Ayala v. Tito Contrs., Inc.*, 82 F. Supp. 3d 279 (D.D.C. Mar 4, 2015) (filed Feb. 26, 2014) (1:13CV01603). Details of the Settlement Agreement are personal recollections of the author.

131. Compl. at 9, *Hernandez v. Chipotle Mexican Grill, Inc.*, 257 F. Supp. 3d 100 (D.D.C. 2014) (No. 1:14-cv-00297-BAH).

132. *Id.* at 3.

133. *Id.* at 4.

134. *Id.* at 6.

135. *Id.* at 1.

136. Verdict Form at 1, *Hernandez v. Chipotle Mexican Grill, Inc.*, No. 14-297, 257 F. Supp. 3d 100 (D.D.C. 2016).

137. Abha Bhattarai, *Chipotle Ordered to Pay \$550,000 for Discriminating Against Pregnant Worker*, WASH. POST (Aug. 9, 2016), <https://www.washingtonpost.com/business/capitalbusiness/>

2. *Hardin v. Dadlani*

Ms. Hardin, who is African American, was hired to fill a bartender position at Redline, a D.C. bar, lounge and restaurant.<sup>138</sup> On Ms. Hardin's first day of work, the restaurant's owner appeared to be extremely disgusted after discovering that his staff had hired an African American bartender.<sup>139</sup> He proceeded to fire her on the spot.<sup>140</sup> Evidence gathered during the Committee's investigation showed that this blatant action was only part of an across-the-board scheme of discriminatory exclusion, including policies that excluded African Americans from working in visible positions and denied African American customers equal access to the establishment.<sup>141</sup> After a full trial, the jury awarded Ms. Hardin \$175,000 in compensatory damages and \$501,000 in punitive damages.<sup>142</sup>

3. *Prince of Peace Lutheran Church v. Linklater*<sup>143</sup>

Ms. Linklater, a music director at a local Lutheran church, was sexually harassed by the church's pastor.<sup>144</sup> She received outstanding performance evaluations until she complained about the harassment, after which she was subject to severe retaliation and a campaign to drive her out of the church.<sup>145</sup> Ms. Linklater was awarded damages totaling \$1,350,000 for intentional infliction of emotional distress, including \$1,000,000 in punitive damages against the pastor.<sup>146</sup> After a complex set of appeals and cross-appeals, the parties agreed to a settlement.<sup>147</sup>

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[chipotle-ordered-to-pay-550000-for-discriminating-against-pregnant-worker/2016/08/09/962ac72e-5e49-11e6-8e45-477372e89d78\\_story.html?utm\\_term=.0e2fda7a6477](http://www.chipotle-ordered-to-pay-550000-for-discriminating-against-pregnant-worker/2016/08/09/962ac72e-5e49-11e6-8e45-477372e89d78_story.html?utm_term=.0e2fda7a6477).

138. Compl. at 2, *Hardin v. Dadlani*, 221 F. Supp. 3d 87 (D.D.C. 2011) (No. 1:11-cv-02052).

139. *Id.*

140. *Id.*

141. *Hardin v. Dadlani*, 221 F. Supp. 3d 87, 99 (D.D.C. 2016).

142. Judgment in a Civil Action at 1, *Hardin v. Dadlani*, 221 F. Supp. 3d 87 (D.D.C. 2016) (No. 1:11-cv-02052-RBW).

143. Relman, Dane & Colfax PLLC, *Jury Awards \$687,000 in Race Discrimination Case*, <http://www.relmanlaw.com/civil-rights-litigation/cases/Redline-Hardin-v-Dadlani.php> (last visited Oct. 11, 2018).

144. *Prince of Peace Lutheran Church v. Linklater*, No. 237453-V, 2005 WL 6369945 (Md. Cir. Ct. Jan. 19, 2005), *aff'd*, 28 A.3d 1171 (Md. 2011).

145. *Id.*

146. *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171, 1179 (Md. 2011).

147. This was a private settlement, the details of which are the author's personal recollection.

4. *McCoy v. Peake Printers, Inc.*

The Committee, co-counseling with the law firm of Miller and Chevalier, obtained a jury award of \$2.4 million in compensatory and punitive damages for Mr. McCoy, an African-American press operator, on his claims of race discrimination, retaliation and a hostile work environment.<sup>148</sup> This outcome was one of the highest monetary awards for an individual discrimination case within the jurisdiction.<sup>149</sup> While Peake Printers' appeal was pending, the Committee successfully settled Mr. McCoy's claims for a payment of more than \$2 million, as well as attorneys' fees and various forms of injunctive relief.<sup>150</sup>

5. *Cooper v. Paychex, Inc.*

Mr. Cooper, an African American district sales manager, was terminated from his position from a national payroll servicing company, even though he was performing as well as or better than his white peers.<sup>151</sup> Discovery revealed that the company had a history of not hiring or promoting African American employees.<sup>152</sup> After a four-day trial, the district court concluded that the reason Paychex gave for terminating Mr. Cooper was merely pretext for racial discrimination and entered a judgment in his favor for \$200,000 in compensatory damages and \$100,000 punitive damages, plus more than \$300,000 in attorneys' fees.<sup>153</sup> The Fourth Circuit upheld the judgment on appeal.<sup>154</sup>

6. *Martin v. Holiday Universal*

Seven current and former employees brought an action against Holiday, a health club chain, alleging that they were denied promotions and transfers to Holiday's Washington, D.C. branches; the former employees alleged that they were discharged as a result of racial discrimination.<sup>155</sup> Holiday agreed to a settlement providing for nearly

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148. Ruben Castaneda, *Maryland Pressman Awarded \$2.4 Million in Bias Case*, WASH. POST (Apr. 28, 2001), [https://www.washingtonpost.com/archive/local/2001/04/28/md-pressman-award-ed-24-million-in-bias-case/8ffe136a-91ed-402f-8ba9-3ac1c9680913/?utm\\_term=.cb1b6fb759f0](https://www.washingtonpost.com/archive/local/2001/04/28/md-pressman-award-ed-24-million-in-bias-case/8ffe136a-91ed-402f-8ba9-3ac1c9680913/?utm_term=.cb1b6fb759f0).

149. *Id.*

150. *Id.*

151. *Cooper v. Paychex Inc.*, 163 F.3d 598 (4th Cir. 1998).

152. *Id.*

153. *Cooper v. Paychex Inc.*, 960 F. Supp. 966 (E.D. Va. 1997), *aff'd*, 163 F.3d 598 (4th Cir. 1998).

154. *Cooper*, 163 F.3d at 598.

155. *Martin v. Holiday Universal, Inc.*, No. JH-90-1188, 1990 U.S. Dist. LEXIS 18102, at \*1-5 (D. Md. Oct. 3, 1990).

\$1 million in compensatory damages and attorney's fees, as well as broad injunctive relief.<sup>156</sup>

7. *Plater v. W.A. Chester, LLC*

W.A. Chester LLC is a company that installs high-voltage electric transmission lines throughout the Washington, D.C. metropolitan area and nationally.<sup>157</sup> Plaintiff Leroy Plater and other African American employees were given the least desirable jobs at Chester, denied promotion to higher level positions, and generally experienced a racially hostile work environment.<sup>158</sup> Before trial, Chester agreed to a settlement that included broad injunctive relief requiring implementation of company-wide comprehensive structural and policy changes designed to make the company workplace more welcoming for minorities.<sup>159</sup> These changes included mandatory diversity training for all employees; new and expanded non-discrimination policies, including a zero tolerance policy for discrimination by supervisors; hiring an outside consultant to participate in investigations of discrimination complaints; and periodic reporting to plaintiff's counsel of compliance with these requirements.<sup>160</sup>

8. *Equal Employment v. National Hospitality*

Jesus Romero, who worked for 16 years as a dishwasher at Sheraton National Hotel in Arlington, Virginia, was fired after the hotel instituted an English-fluency requirement for all of its employees.<sup>161</sup> The Committee joined the EEOC in a lawsuit on Mr. Romero's be-

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156. WASH. LAW. COMM., ANNUAL REPORT, 1990–1991, at 8. The Committee also brought a related case against Holiday on behalf of African Americans whose applications for club memberships had been denied based on their race. This case is discussed in detail in Robert Duncan's article on Public Accommodations. Robert Duncan, *The Washington Lawyers' Committee's Fifty-Year Battle for Racial Equality in Places of Public Accommodation*, 62 *How. L.J.* [forthcoming Fall 2018].

157. Amended Compl. at 4, *Plater v. W.A. Chester, LLC*, No. 1:06-cv-01219 (D.D.C. Nov. 20, 2006). See generally WASH. LAW. COMM., *An Interview with Joseph G. Davis, Lead Counsel In Plater v. W.A. Chester, LLC*, 13 *UPDATE 2*, at 6 (Fall 2007) (discussing Davis and the Committee's work on this case).

158. Amended Compl. at 8, *Plater v. W.A. Chester, LLC*, No. 1:06-cv-01219 (D.D.C. Nov. 20, 2006).

159. Order granting parties' Joint Motion to Enter Settlement Order, *Plater v. W.A. Chester, LLC*, No. 1:06-cv-01219 (D.D.C. July 15, 2007).

160. *Id.*

161. See WASH. LAW. COMM., 11 *UPDATE 2* at 15 (Fall 2005). See also Amy Joyce, *Hotel Settles Language Suit with EEOC*, WASH. POST (Nov. 10, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/09/AR2005110902107.html>; Amy Joyce, *EEOC Sues Virginia Hotel Over English Fluency Policy*, WASH. POST (Oct. 6, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A9663-2004Oct5.html>.

half, alleging that Sheraton's blanket policy had a discriminatory impact on Spanish-speaking workers in positions for which English fluency was not a reasonable requirement.<sup>162</sup> Sheraton submitted to a settlement and consent decree that included payment of \$50,000 in damages and back pay to Mr. Romero, along with \$30,000 in attorneys' fees.<sup>163</sup> The consent decree required Sheraton to rescind its overbroad English-fluency requirement and to train its managers on Title VII's prohibition of discrimination on the basis of national origin, including the potentially discriminatory impact of an English fluency requirement.<sup>164</sup> Under the agreement, the defendant is also required to report back to the EEOC periodically on its compliance efforts.<sup>165</sup>

9. *Fenwick v. So. MD Electric*<sup>166</sup>

Paul Fenwick, an African American lineman at the defendant utility (SMECO), worked for years in a racially hostile atmosphere in which he and other black employees endured racial epithets and threatening conduct.<sup>167</sup> The company's management and human resources department ignored complaints, and he was eventually terminated after 22 years of service.<sup>168</sup> After Mr. Fenwick was ordered reinstatement through union arbitration, the company transferred him to a remote company location and denied him transfers into positions for which he had the greatest seniority.<sup>169</sup>

The Committee's lawsuit on Mr. Fenwick's behalf resulted in a consent decree, pursuant to which SMECO was required to institute mandatory diversity training for all employees, including not less than one full day of training for nonmanagement employees and two days for management employees.<sup>170</sup> In addition, the company was required to implement a streamlined program of investigating discrimination complaints by an outside Discrimination Compliance Officer, with all such investigation reports being personally reviewed by the

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162. Joyce, *EEOC Sues Virginia Hotel Over English Fluency Policy*, *supra* note 161.

163. Joyce, *Hotel Settles Language Suit with EEOC*, *supra* note 161.

164. *Id.*

165. *Id.*

166. Consent Decree with Exhibit A and Approval, *Fenwick v. So. MD Electric*, No. 8:03-cv-00383 (D. Md. Feb. 10, 2003) (filed Jan. 7, 2004).

167. See WASH. LAW. COMM., 10 UPDATE 3 (Spring 2004).

168. *Id.*

169. *Id.*

170. *Id.*

company president.<sup>171</sup> The injunctive relief also included measures aimed at increasing the numbers of African Americans in management positions by recruiting at predominantly African American colleges and advertising openings in *The Afro-American* newspaper of Baltimore.<sup>172</sup>

#### IV. PUBLIC SECTOR EMPLOYMENT CASES

Since 1984, the EEO Project has continued to litigate cases against public sector employers, including several class action lawsuits.<sup>173</sup> Three of the most significant cases are described below, as well as a recent individual action in which significant damages were awarded.

A. *Neal v. Department of Corrections, Brokenborough v. Department of Corrections, Merrion v. Corizon Health, Inc.*<sup>174</sup>

Filed twenty years apart, these cases — all Title VII lawsuits against the D.C. Department of Corrections based on a pervasive pattern of sexual harassment — are three of the most significant public sector employment discrimination lawsuits the Committee has brought in the last quarter century.<sup>175</sup> The differences between these cases highlight how the Committee has addressed an increasingly difficult legal environment to vindicate our clients' rights on a class wide basis.<sup>176</sup>

The *Neal* case was the largest public sector employment discrimination case pursued by the Committee in the mid-1990's; it challenged a pattern and practice of sexual harassment at the D.C. Department of Corrections against female employees and retaliation against employees who objected to harassment.<sup>177</sup> Working with co-counsel at three private firms, and assisted by volunteer counsel from many other firms

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171. *Id.*

172. *Id.*

173. See generally WASH. LAW. COMM., ANNUAL REPORTS AND UPDATES, 1984-Present.

174. See *Neal v. Dir., D.C. Dep't of Corr.*, No. 93-2420, 1995 WL 517249 (D.C. Cir. 1995); *Brokenborough v. D.C.*, 236 F. Supp. 3d 41 (D.C. Cir. Feb. 17, 2017); *Merrion v. Corizon Health, Inc.*, No 1:13-cv-1757, 2013 WL 6835531 (M.D. Pa. 2013).

175. See generally *id.*

176. See generally *id.*

177. 1995 WL 517249, at \*9.

who represented individual claimants, the Committee was able to achieve significant relief for the class.<sup>178</sup>

The Committee initially filed suit in November 1993 on behalf of a single plaintiff — Sharon Bonds — who worked as a correctional officer in the D.C. Jail, where she experienced harassment (unwanted touching, unwanted overtures, and unwelcomed sexual advances) by two supervisors and was threatened by her supervisor after she complained.<sup>179</sup> In January 1994, the Committee filed an amended complaint seeking class wide injunctive and monetary relief on behalf of eight employees, who alleged a pervasive pattern and practice of sexual harassment by supervisors, as well as a pattern of retaliation against individuals who complained.<sup>180</sup>

After the Defendants attempted to transfer the lead plaintiff, Bessye Neal, to a different position, the Committee sought and obtained injunctive relief in early 1994.<sup>181</sup> The Court subsequently entered a second injunction barring retaliation against another named plaintiff and the husband of a third named plaintiff, as well as the other named plaintiffs.<sup>182</sup> Later, the Court found that the Defendants had engaged in further acts of retaliation and held the Defendants in contempt, on two occasions actually imprisoning D.C. Jail managers for violating the injunction against retaliation.<sup>183</sup> The Court also appointed a special master to oversee personnel actions regarding the named plaintiffs.<sup>184</sup>

Throughout the class discovery phase, the Committee had to go to the Court repeatedly to ensure that Defendants complied with their discovery obligations, with the Court repeatedly holding Defendants in contempt of discovery orders.<sup>185</sup> After the Defendants, in responding to a discovery request to identify persons with knowledge of the matter, failed to identify a single person, the Court's sanctions

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178. *Id.* at 1. *The Neal* case was also the first major case developed by Warren Kaplan, a successful attorney in private practice who, after retiring from his law firm, joined the Committee as its first Senior Counsel, working in the EEO Project. Kaplan was instrumental in developing and litigating a number of major cases for the Committee, including the Circuit City case, described earlier. He also was the model for subsequent Senior Counsel who have provided invaluable assistance to the Committee. They bring years of experience and maturity to the staff, devoting the skills that they developed in private practice to public interest work.

179. *Id.* at 9.

180. Docket at 31–32, *Bonds v. Dir.*, D.C. Dep't of Corr., No. 93-2420 (D.C. Cir. 1993).

181. *Id.* at 32.

182. Consent Decree, *Neal v. Dir.*, D.C. Dep't of Corr., No. 93-2420 (RCL), at 9.

183. Docket, *supra* note 180, at 65.

184. Consent Decree, *supra* note 183, at 5–6.

185. These contempt orders are in the docket.

culminated in an order precluding the Defendants from introducing any fact witnesses at trial whom they could not have identified earlier.<sup>186</sup>

Ultimately, the Court certified a class on December 23, 1994.<sup>187</sup> In March 1995, the Committee commenced a trifurcated trial — with the first phase on class liability issues, the second phase on damages to the named plaintiffs, and the third phase on equitable remedies.<sup>188</sup> During the liability phase, after learning that a correctional officer who had testified against the Defendants was transferred following her testimony, the Court entered an order enjoining the Defendants from taking any retaliatory action or threatening retaliatory action against any witnesses in the case and holding two of the Defendants' employees in criminal contempt.<sup>189</sup> After twenty-two trial days, on April 4, 1995, the jury unanimously ruled for the Plaintiffs — finding that the Department of Corrections engaged in a pattern and practice of sexual harassment and retaliation by creating a sexually hostile working environment for female employees.<sup>190</sup> Following seven days of additional trial, the jury awarded damages to six of the individual plaintiffs, in amounts ranging from \$75,000 to \$500,000.<sup>191</sup>

At the conclusion of the jury trial, the Court held an additional two-day bench trial to consider injunctive relief.<sup>192</sup> In August 1995, finding that sexual harassment occurred at the Department of Corrections “openly and wantonly,” District Judge Lamberth entered sweeping injunctive relief, both enjoining the Defendants from engaging in sexual harassment and retaliation, mandating that the Department of Corrections establish a new Office of Special Inspector tasked with drafting a new policy on and investigating all complaints of sexual harassment and retaliation, and appointing a special master to protect the named plaintiffs from further retaliation.<sup>193</sup>

Judge Lamberth also ordered that the absent class members would be entitled to *Teamsters* hearings to allow individual class members to establish that they had been unfavorably affected by the De-

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186. Docket, *supra* note 180, at 48.

187. *Id.* at 43.

188. *Id.* at 47.

189. *Id.* at 48.

190. *Id.* at 49–50.

191. *Id.* at 50.

192. *Id.* at 56.

193. Neal, *supra* note 177, at \*2, 13.

partment's pattern and practice of harassment or retaliation.<sup>194</sup> Following this order, the Committee recruited counsel to represent more than 250 claimants.<sup>195</sup> Active litigation on these claims continued through 2005.<sup>196</sup>

Following trial, the Defendants appealed. In August 1996, the D.C. Circuit reversed, finding that the District Court had abused its discretion in precluding the Defendants from presenting any fact witness at trial without having considered whether lesser sanctions were appropriate.<sup>197</sup> Instead of retrying the case, the parties reached a settlement and agreed to a consent decree in August 1997 that included \$8.5 million in damages plus equitable relief for the class, including maintaining the Office of Special Investigator.<sup>198</sup> The consent decree expired in February 2004.<sup>199</sup>

Almost ten years later — in November 2013 — the Committee again sued the Department of Corrections based on a continuing pattern and practice of sexual harassment of female employees.<sup>200</sup> The suit was filed on behalf of six employees of the Department of Corrections alleging ongoing sexual harassment and retaliation, and noting that “the conduct that gives rise to the *Neal* class action continues at the DOC today.”<sup>201</sup> The lead plaintiff — Lisa Brokenborough — experienced repeated unwanted sexual overtures from her supervisor (including exposing himself) and was denied promotions and overtime hours for rebuffing his advances.<sup>202</sup>

In contrast to the *Neal* action, the *Brokenborough* action was filed only on behalf of the individual plaintiffs and not as a class action.<sup>203</sup> This change in tactics reflects the intervening 2011 Supreme Court case in *Wal-Mart Stores v. Dukes*, which reversed the certification of a class of women who alleged that they had been denied equal pay and promotions on the basis of their sex.<sup>204</sup>

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194. Procedure for Absent Class Members at 1, *Neal v. Dir.*, D.C. Dep't of Corr., No. 93-2420 (D.C. Cir., 1995).

195. WASH. LAW. COMM. 2 UPDATE 1 (Spring 1996); WASH. LAW. COMM. 3 UPDATE 2 (Fall 1997).

196. Docket, *supra* note 180.

197. Docket, *supra* note 180, at 94.

198. *Id.* at 100.

199. Compl. at 8, *Brokenborough v. D.C.*, 236 F. Supp. 3d 41 (D.C. Cir. Feb. 17, 2017).

200. *Id.* at 2.

201. *Id.* at 8.

202. *Id.* at 9–11, 13.

203. *Id.* at 5.

204. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

In spring 2015, five of the plaintiffs reached settlements with the Department of Corrections.<sup>205</sup> After the Defendants' motion for summary judgment, as to the last plaintiff, was denied in February 2017, the parties settled the case in May 2017.<sup>206</sup>

B. *Hopson v. Baltimore City Police Department*<sup>207</sup>

In 2004, the Committee filed a class action race discrimination lawsuit against the City of Baltimore Police Department alleging a pattern and practice of discrimination against African American police officers.<sup>208</sup> The initial suit was filed on behalf of twenty-one black officers, asserting that African American officers received disparate treatment in the Department's disciplinary system compared to Caucasian officers, were subject to a hostile work environment, and had experienced retaliation for opposing discriminatory practices.<sup>209</sup> For example, the lead plaintiff — Louis Hopson — was subjected daily to racially derogatory epithets and racially motivated threatening actions by his supervisors and co-workers, and suffered retaliation after complaining to the Internal Affairs Division by being transferred to the 4 a.m. shift.<sup>210</sup>

After several years of discovery and litigation on class certification issues, in June 2009, the Committee and the Defendants reached a settlement providing for significant monetary relief to the individual named plaintiffs, as well as broad equitable relief.<sup>211</sup> As part of the settlement, the City of Baltimore agreed to pay \$2.5 million to the plaintiffs and in attorneys' fees and costs, with the potential for additional compensation if certain aspects of the non-monetary relief were not implemented.<sup>212</sup>

With regard to non-monetary relief, the Police Department agreed to retain an outside consultant to advise and report on any racial disparities in the administration of the disciplinary system.<sup>213</sup> The Police Department also agreed to provide leadership training programs over a five year period to encourage minority and female candi-

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205. WASH. LAW. COMM., Spring 2015 UPDATE.

206. *Id.*

207. *Hopson v. Balt. City Police Dep't*, 232 F.R.D. 228 (D. Md. Nov. 22, 2005).

208. Docket at 20, *Hopson v. Balt. City Police Dep't*, 232 F.R.D. 228 (D. Md. Nov. 22, 2005).

209. *Id.*

210. Compl. at 11, *Hopson v. Balt. City Police Dep't*, 232 F.R.D. 228 (D. Md. Nov. 22, 2005).

211. Settlement Agreement at 1, *Hopson v. Balt. City Police Dep't*, 232 F.R.D. 228 (D. Md. Nov. 22, 2005).

212. *Id.* at 4.

213. *Id.* at 6.

dates for promotion.<sup>214</sup> And the Police Department agreed to enhance training in the Police Department's EEO and disciplinary functions.<sup>215</sup>

The settlement was approved by the Court and the case was dismissed in July 2009.<sup>216</sup>

C. *Little v. Washington Metropolitan Area Transit Authority* (“WMATA”)<sup>217</sup>

The *Little* case was one of the largest public sector employment discrimination cases pursued by the Committee in the mid-2010s, and was a class action lawsuit filed on behalf of applicants and employees of WMATA (the Metro) and its contractors who had been denied employment because of WMATA's use of a criminal background screening policy.<sup>218</sup> The Committee asserted that the use of this policy — which barred individuals with a broad range of criminal convictions from employment at WMATA — had a disparate impact against African American applicants and employees in violation of Title VII.<sup>219</sup> The Committee worked with private co-counsel and the NAACP Legal Defense Fund.<sup>220</sup>

The Committee initially filed suit against WMATA in July 2014 on behalf of nine plaintiffs, each of whom had a job offer revoked, been terminated or otherwise adversely impacted because of a prior criminal conviction.<sup>221</sup> For example, the lead plaintiff — Erick Little — had a job offer revoked to be a MetroBus driver based on a 27-year old conviction for drug possession; at the time his offer was revoked, Mr. Little worked as a bus driver for a regional bus service.<sup>222</sup> Several of the other plaintiffs were terminated from WMATA contractors after years of employment because of drug possession convictions that were similarly dated.<sup>223</sup>

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214. *Id.* at 8.

215. *Id.* at 6.

216. *See* Settlement Agreement, *Hopson v. Baltimore*, No. 1:04CV03842, 2009 WL 2416595 (D. Md. 2009).

217. *Little v. Wash. Metro. Area Transit Authority*, 100 F. Supp. 3d 1 (D.C. Cir. 2015).

218. Compl. at 3, *Little v. Wash. Metro. Area Transit Authority*, 100 F. Supp. 3d 1 (D.C. Cir. 2015).

219. *Id.* at 11–12.

220. *Id.* at 42.

221. Docket at 22, *Little v. Wash. Metro. Area Transit Authority*, 100 F. Supp. 3d 1 (D.C. Cir. 2015).

222. Compl. at 17, *Little v. Wash. Metro. Area Transit Authority*, 100 F. Supp. 3d 1 (D.C. Cir. 2015).

223. *Id.* at 18–19.

Notwithstanding the *Wal-Mart v. Dukes* decision, the Committee decided to pursue the *Little* case as a class action under Rule 23(b)(2), primarily seeking relief that is injunctive in nature.<sup>224</sup> One factor that facilitated this decision was that WMATA had implemented its criminal background check screening policy in late 2011 by adopting a single uniform policy (Policy 7.2.3) that was memorialized in a single written document.<sup>225</sup>

In April 2015, the Court granted WMATA's request to bifurcate proceedings to resolve class certification issues before merits discovery could proceed.<sup>226</sup> Throughout the remainder of 2015 and early 2016, the Parties engaged in fact and expert discovery on class certification issues, with the plaintiffs moving for class certification in May 2016.<sup>227</sup>

In March 2017, District Judge Collyer granted the class certification motion in part, certifying three subclasses that covered WMATA applicants and employees of WMATA's contractors.<sup>228</sup> The court subsequently ordered that merits discovery be completed expeditiously.<sup>229</sup>

Shortly after the class certification decision, WMATA announced that it was rescinding policy 7.2.3, and replacing it with a policy that emphasized individual determinations based on the facts and circumstances of the employee's background, rather than automatic disqualifications.<sup>230</sup>

After merits discovery was largely completed, in November 2017, the plaintiffs and WMATA reached a settlement providing for significant equitable and monetary relief.<sup>231</sup> With regard to equitable relief, WMATA agreed that it would not go back to Policy 7.2.3 and would maintain its revised policy in place for at least a year. With regard to monetary relief, WMATA agreed to pay \$6.5 million to the class and in attorneys' fees and costs.<sup>232</sup> On April 27, 2018, the district court granted final approval of the settlement, though an appeal challenging

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224. *Id.* at 13.

225. *Id.* at 403; *id.* at 417.

226. *See Little v. Wash. Metro. Area Transit Authority*, 100 F. Supp. 3d 1, 4–7 (D.D.C. 2015).

227. *Little v. Wash. Metro. Area Transit Authority*, 249 F. Supp. 3d 394, 416 (D.D.C. 2017).

228. *Id.* at 426.

229. *See Docket, Little v. Wash. Metro. Area Transit Authority* (Dkt. No. 1:14CV01289).

230. *See Little v. Wash. Metro. Area Transit Authority*, No. 14-1289, 2018 U.S. Dist. LEXIS 70849, at \*7 (D.D.C. 2018).

231. *See id.* at 6–7.

232. *Id.* at 7.

the settlement would have to be resolved before settlement funds are distributed.<sup>233</sup>

D. *Van Rossum v. Baltimore County, Maryland*<sup>234</sup>

Dianne Van Rossum worked as a health inspector for Baltimore County's Department of Environmental Protection and Resource Management.<sup>235</sup> Her office was located in the county courthouse. In May 2009, she began to experience a variety of symptoms, including reduced vision, pain and numbness, which she attributed to mold and fungus in the courthouse.<sup>236</sup> Shortly afterward, the Department relocated to a new building, but Van Rossum's symptoms worsened, due to poor ventilation and the fumes from new paint and construction materials.<sup>237</sup> She requested and was granted an accommodation, in which her office was moved to a lower floor, occupied by the Department of Recreation and Parks ("DPR"), and her symptoms eased.<sup>238</sup>

In January 2010, Van Rossum was informed that the DPR needed her office and that she would need to move back to her original office in the new building.<sup>239</sup> She submitted a medical leave request to cover expected absences, as a result of which she was demoted to the previous job that she had held when she joined the Department.<sup>240</sup> After being told that if she did not return to her original office, she would face disciplinary action, Van Rossum took early retirement in April 2010, as a result of which she lost some pension and related benefits.<sup>241</sup>

Van Rossum filed a claim with the EEOC, alleging discrimination under the Americans With Disabilities Act ("ADA").<sup>242</sup> In March 2013, the EEOC issued its decision, agreeing with Van Rossum that the County had violated the ADA by failing to adequately address her disability, denying her a reasonable accommodation, and demoting her and forcing her to retire prematurely.<sup>243</sup>

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233. *Id.* at 25.

234. *Van Rossum v. Balt. City.*, 178 F. Supp. 3d 292 (D. Md. 2016).

235. *Id.* at 293.

236. *Id.*

237. *Id.* at 293–94.

238. *Id.* at 294.

239. *Id.*

240. *See id.*

241. *Id.* at 295.

242. *Id.* at 293.

243. *Id.* at 295.

After the EEOC's efforts to conciliate the claim failed, the Committee filed an ADA discrimination suit on Van Rossum's behalf in Maryland Federal District Court in January 2014.<sup>244</sup> The County argued that because she had filed for social security disability benefits (which required proof that the claimant's disability prevented her from working), she could not also pursue an ADA claim.<sup>245</sup> The court, however, agreed with Van Rossum that because her disability did not prevent her from working with reasonable accommodations, the County's failure to make such accommodations entitled her to file a disability claim while continuing to pursue her discrimination claim.<sup>246</sup>

After a one-week trial in January 2017, the jury returned a verdict in Van Rossum's favor on all counts, and awarded her \$780,000 in damages.<sup>247</sup> The trial court denied the County's post-trial motions, and also awarded plaintiff \$500,000 in attorneys' fees and costs. The judgment and verdict were upheld on appeal.<sup>248</sup>

The jury's award is one of the largest ever granted in a failure-to-accommodate case under the ADA, and sends a powerful message to employers to take ADA issues and reasonable requests for accommodations seriously.<sup>249</sup> The case is also important as a precedent that the filing of a social security disability claim does not automatically preclude an employee from pursuing a disability discrimination claim against their employer.<sup>250</sup>

## V. MERGER WITH THE EMPLOYMENT JUSTICE CENTER

In April 2017, with the support of a grant from the D.C. Bar Foundation, the Committee merged with the Employment Justice

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244. *See id.* at 296.

245. *See id.* at 297.

246. *See id.* at 299.

247. *Jury Awards Baltimore County Former Employee with a Disability more than \$780,000 in Lawsuit Brought by Washington Lawyers' Committee for Civil Rights and Kirkland & Ellis*, WASH. LAW. COMM. (Feb. 2, 2017), <https://www.washlaw.org/news-a-media/548-jury-awards-baltimore-county-former-employee-with-a-disability-more-than-780-000-in-lawsuit-brought-by-washington-lawyers-committee-for-civil-rights-and-kirkland-ellis> [hereinafter *Jury Awards*].

248. *See Van Rossum v. Balt. City.*, No. GJH-14-0115, 2017 U.S. Dist. LEXIS 147893, at \*1 (D. Md. Sept. 11, 2017).

249. *See Jury Awards, supra* note 247.

250. Scott Johnson Jr., *Receipt of SSDI Benefits Does Not Provide a Basis for Dismissal of ADA Claim*, SOC'Y FOR HUMAN RES. MGMT., <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/ssdi-benefits-ada-claim.aspx> (last visited Sept. 8, 2018).

Center (the “EJC”).<sup>251</sup> The EJC was founded on Labor Day, 2000, to provide legal protection and assistance to low-wage workers in the District and surrounding suburbs.<sup>252</sup> The EJC provides advice to workers through free clinics, pursues impact litigation, and engages in advocacy for passage and enforcement of laws to protect workers’ rights.<sup>253</sup>

The centerpiece of the EJC’s mission is its Workers’ Rights Clinic, which is held seven times a month at locations in Shaw, Anacostia, and Northeast Washington.<sup>254</sup> At these free clinics, workers speak with an intake volunteer who assists the worker with legal advice or drafting pro se demand letters or administrative complaints.<sup>255</sup> The clinics are staffed by intake volunteers, including both lawyers and non-lawyers, along with a team of experienced volunteer attorney advisors.<sup>256</sup> The clinics not only provide advice and assistance for workers facing discrimination and wage theft, but also help with FMLA rights, unemployment compensation, and workers’ compensation, among other issues.<sup>257</sup> In appropriate cases, where the dispute cannot be resolved through advice or brief assistance, the clinic refers workers to volunteer counsel for pro bono representation.<sup>258</sup> Since its inception, the Workers’ Rights Clinic has served about 1300 workers per year and has recovered more than \$10 million in back wages and damages for its clients.<sup>259</sup>

In addition to the Clinic, the EJC advocates for the passage and enforcement of worker protection laws in the District. In 2008, for example, the EJC was instrumental in obtaining the D.C. Council’s adoption of the Accrued Sick and Safe Leave Act, which mandates paid sick leave as well as paid leave for workers who are victims of

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251. *DC Employment Justice Center’s Workers’ Rights Efforts Continue Under Washington Lawyers’ Committee for Civil Rights & Urban Affairs*, DC BAR FOUND. (May 24, 2017), <https://dcbfound.org/dc-employment-justice-centers-workers-rights-efforts-continue-under-washington-lawyers-committee-for-civil-rights-urban-affairs/> [hereinafter *DC Employment*].

252. *Merger of the Washington Lawyers’ Committee for Civil Rights & Urban Affairs and the D.C. Employment Justice Center*, WASH. LAW. COMM. (Apr. 19, 2017), <https://www.washlaw.org/news/581-merger-of-the-washington-lawyers-committee-for-civil-rights-urban-affairs-and-the-d-c-employment-justice-center>.

253. *See id.*

254. EMP’T JUSTICE CTR., 2010 ANNUAL IMPACT REPORT (2011).

255. *See Get Involved*, WASH. LAW. COMM., <https://www.washlaw.org/get-involved>.

256. *Id.*

257. *Workers’ Rights Clinic*, WASH. LAW. COMM., <https://www.washlaw.org/projects/workers-rights-clinic>.

258. *See id.*

259. EMP’T JUSTICE CTR., 2008 ANNUAL IMPACT REPORT (2009).

domestic violence and sexual assault.<sup>260</sup> In 2014, the EJC played a key role in the passage of the D.C. Wage Theft Prevention Act, which significantly increased the penalties for wage theft, broadened the remedies available to victims, and required that employers maintain accurate time records and pay their workers at least twice a month.<sup>261</sup> Other workers' protection laws in which the EJC has been involved are the Fair Criminal Records Screening Act of 2014, which prohibits public employers from considering an applicant's criminal history for certain jobs until after the initial application; the Minimum Wage Act of 2013; the Workplace Fraud Act of 2012, which prohibits misclassification of construction workers as independent contractors; and the Unemployment Insurance Reform Act of 2010, which expanded eligibility and benefits for the many workers suffering from the impact of the Great Recession.<sup>262</sup>

Finally, the EJC has developed programs to enable workers to better protect their own rights. In 2010, the EJC created Workers Advocating for Greater Equality (WAGE), which educates workers on their legal rights and trains them to educate and advocate on behalf of fellow workers.<sup>263</sup> A similar EJC organization called the Injured Workers Advocates (IWA) advocates on behalf of those who have suffered workplace injuries or disabilities.<sup>264</sup> And the EJC is a leader in the Just Pay Coalition, a coalition of labor, non-profit organizations, including the Committee, faith leaders and worker leaders to press for adoption of legal protections for workers and for enforcement of existing labor and workers' rights laws.<sup>265</sup>

The overlap between EJC's work and the Committee's Employment Project, which, as has been seen, includes wage theft and related cases, made the merger a natural fit.<sup>266</sup> The EJC's four staff members – two lawyers, the clinic coordinator, and community organizer –

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260. *10 Steps to Implement D.C.'s Accrued Sick and Safe Leave Act*, CLASP (Apr. 2012), <https://www.clasp.org/sites/default/files/public/resources-and-publications/files/Steps-to-implementation-DC-paid-sick-days-law-v5-on-CLASP-template-FINAL-2.pdf>.

261. *D.C. Wage Theft Prevention Amendment Act of 2014 Goes Into Effect*, D.C. BAR, <http://www.dcbar.org/pro-bono/newsletters/summer-2015/wage-theft-in-effect.cfm>.

262. EMP'T JUSTICE CTR., 2010 ANNUAL IMPACT REPORT (2011); EMP'T JUSTICE CTR., 2012 ANNUAL IMPACT REPORT (2013), EMP'T JUSTICE CTR., FINAL REP. 2014–15 (Aug. 6, 2015).

263. EMP'T JUSTICE CTR., 2012 ANNUAL IMPACT REPORT (2013).

264. *See id.*

265. *See Making Our Laws Real: Protecting Workers Through Strategic Enforcement of DC's Labor Laws*, DC JOBS WITH JUSTICE (Apr. 9, 2018), <http://www.dejwj.org/laws-real/>.

266. *See DC Employment*, *supra* note 251.

joined the Committee's project staff.<sup>267</sup> The EJC benefits from the Committee's greater resources and extensive relationships with law firms, while the EJC, through the Workers' Rights Clinic, gives the Committee a greater physical presence in communities of color and communities living in poverty.<sup>268</sup> The clinics also provide the Committee an opportunity to increase its reach into client communities, to collect data on the experience of clients, and to build its docket of high impact cases.<sup>269</sup> And workers benefit from a "one-stop shopping experience" for legal advice and assistance from a combined organization with greater resources and expertise than the individual components.<sup>270</sup>

## VI. CURRENT ISSUES AND CHALLENGES FACING THE COMMITTEE

Much has changed in the half century since the Committee was established to help make the promise of Title VII and other civil rights laws a reality. Blatant racial segregation of private and public workforces in the Washington, D.C. metropolitan area is largely a thing of the past, due in part to the Committee's efforts such as the Federal Employment Project and its work with the Washington Area Construction Industry Task Force.<sup>271</sup> Sexual harassment is recognized as a form of discrimination subject to Title VII, and more protection is available to gay and lesbian employees.<sup>272</sup> Federal and local agencies, and most large private employers in the region, have policies in place to prohibit discrimination based on race, gender and sexual orientation. A substantial body of case law has been built on which plaintiffs in discrimination actions can seek redress under federal, state and local anti-discrimination laws. When the Committee was created, few other civil rights organizations or private law firms were available to represent victims of employment discrimination.<sup>273</sup> Now, a number of law firms – some of which were founded or headed by alumni of the

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267. Proposal of the Washington Lawyers' Committee for Civil Rights and Urban Affairs Underserved Communities Rights of Low-Wage District of Columbia Workers.

268. *Id.*

269. *Id.*

270. *Id.*

271. Payton, *supra* note 10.

272. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment constitutes discrimination prohibited by Title VII); DC Human Rights Act of 1977, as amended, § 2-1401.11(a) (prohibiting discrimination based on, *inter alia*, sexual orientation).

273. Report of the National Advisory Commission on Civil Disorders (Kerner Commission), 1968.

Committee's staff attorneys – provide effective representation to plaintiffs in employment discrimination lawsuits.<sup>274</sup>

Yet, while great progress has been made, there also remains a great deal to be done, and the Committee's mission is as critical now as it was fifty years ago. While overt employment discrimination is less common – albeit by no means extinct – subtler but still pernicious discrimination remains. The WMATA case, discussed above, is a good example: the policy barring employment to those with criminal convictions appeared neutral on its face, but in fact had a significant disparate impact on African American employees and applicants. Legal protections for transgender employees are not yet as robust as they are for other protected classes. An increasingly conservative federal judiciary has made it more difficult for plaintiffs to pursue discrimination claims successfully, particularly class actions. And the U.S. Government itself can be an ally during some Administrations, but an adversary in others. For example, in the recent Supreme Court case concerning the availability of class actions in arbitration proceedings,<sup>275</sup> the Obama Administration submitted an *amicus* brief supporting the position that employees cannot be forced to waive their rights to pursue class actions in arbitration; the Trump Administration reversed course and advised the Court that the Government had changed its position.<sup>276</sup>

Clearly, the Committee's work is even more important during Administrations, like the present one, that are hostile to enforcement of the civil rights laws. But even with sympathetic Administrations in place, the Committee will have work to do. Neither Government agencies nor private law firms have the Committee's experience and capability to recruit and coordinate multiple volunteer law firms and lawyers. Additionally, the Committee can serve as a resource to private plaintiffs and law firms by sharing its accumulated expertise on how best to pursue and litigate discrimination claims.

Among the biggest challenges currently facing the Committee in employment discrimination cases are: (1) the availability of class

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274. *E.g.*, Cohen Milstein (Joseph M. Sellers, former Committee EEO Project Director), [www.cohenmilsteinc.com/professional/joseph-m-sellers](http://www.cohenmilsteinc.com/professional/joseph-m-sellers); Relman, Dane & Colfax PLLC (John P. Relman, former Committee Fair Housing Project Director), [www.relmanlaw.com/attorneys/jrelman.php](http://www.relmanlaw.com/attorneys/jrelman.php).

275. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

276. Lydia Wheeler, *Supreme Court Upholds Agreements that Prevent Employee Class-Action Suits*, THE HILL (May 21, 2018, 10:16 AM), <http://thehill.com/regulation/court-battles/388601-supreme-court-upholds-agreements-that-prevent-employee-class-action>.

actions to victims of discriminatory patterns or practices; (2) how to protect workers in the modern “gig” economy from employment discrimination; and (3) how to address so-called “cat’s paw” discrimination, in which an adverse employment action is the indirect result of discrimination by subordinate supervisors or co-workers. Each of these issues is addressed below.

A. Class Actions After Wal-Mart Stores and Epic Systems

As the summary of the Committee’s work in this article makes clear, class actions are a vital weapon against pattern-or-practice discrimination, which adversely affects large numbers of employees. Although, in theory, it should be possible for an individual plaintiff or plaintiffs to prove a pattern or practice of discrimination and obtain appropriate injunctive relief, the courts have not generally permitted such an approach.<sup>277</sup> Thus, class actions have been a key component of the Committee’s EEO Project.

Recent decisions of the Supreme Court, however, have severely limited, and potentially eliminated, the availability of class actions in most employment discrimination cases. In *Wal-Mart Stores, Inc. v. Dukes*, the Court reversed the certification pursuant to Rule 23(b)(2) of a nationwide class of 1.5 million women employees of Wal-Mart.<sup>278</sup> The plaintiffs alleged that the company violated Title VII by giving local managers unlimited discretion over pay and promotion decisions, and the managers’ subjective exercise of discretion had a disparate impact on women. The Court held that such a nationwide class, which essentially challenged millions of individual employment decisions, could not meet the “commonality” requirement of Rule 23(a)(2), and that the class wide back pay claims could not be certified under Rule 23(b)(2) because the requested monetary relief was not merely incidental to injunctive relief.<sup>279</sup>

In some respects, *Wal-Mart Stores* simply reflects the adage that hard cases make bad law. A 1.5 million member nationwide class challenging individual pay and promotion decisions, and seeking an enormous amount of back pay, was an ambitious enterprise in a federal judiciary already skeptical of broad class actions.<sup>280</sup> Indeed, the

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277. See *Lowery*, 158 F.3d at 759.

278. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

279. See *id.* at 359–60.

280. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U L. REV. 286, 319 n.123 (2013).

Court's ruling that the case could not satisfy Rule 23(b)(2) was unanimous; the ruling on the commonality issue, however, was 5-4.<sup>281</sup>

In any event, the Court's ruling has created obstacles to employment discrimination class actions in two respects. First, *Wal-Mart Stores* makes clear that challenges to employment discrimination resulting solely from subjective decision making by management or supervisory personnel cannot be sustained as class actions. Second, the Supreme Court's ruling that back pay claims cannot be pursued on a class basis under Rule 23(b)(2) eliminates the possibility of determining back pay based on application of class wide formulas and requires instead that all such claims must be determined in individual *Teamsters* hearings.<sup>282</sup>

But while *Wal-Mart Stores* made it more difficult for employees to take collective action against discriminatory policies and practices, it was not in itself a death knell. As subsequent appellate decisions have made clear, employment practices that have subjective features can still be challenged on a class wide basis, if those practices arise within the context of a uniform company policy.<sup>283</sup>

The true death knell may have come in the Court's very recent decision in *Epic Systems Corp. v. Lewis*.<sup>284</sup> In that case, the Court held in a 5-4 decision that class action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA) and do not violate the National Labor Relations Act (NLRA).<sup>285</sup> In previous decisions, the Court held that employers could require employees, as a condition of employment, to arbitrate employment disputes, including statutory discrimination claims.<sup>286</sup> But the Court left open the question whether employers could also require employees to give up their right to pursue collective actions in arbitration proceedings. *Epic Systems* answered that question in the employers' favor.<sup>287</sup> As the decision emphatically supports enforce-

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281. Lyle Denniston, *Opinion Analysis: Wal-Mart's Two Messages*, SCOTUS BLOG (June 20, 2011, 2:02 PM), <http://www.scotusblog.com/2011/06/opinion-analysis-wal-marts-two-messages/>.

282. See *Wal-Mart Stores*, 564 U.S. at 366.

283. See, e.g., *McReynolds v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 672 F.3d 482, 488 (7th Cir. 2012); see also Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After Wal-Mart v. Dukes*, 48 AKRON L. REV. 803, 823 (2015), for a useful discussion of the impact of the case.

284. See generally *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

285. *Id.*

286. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

287. *Epic Sys. Corp.*, 138 S. Ct. at 1632.

ment of waivers of class action claims in arbitration agreements, it is likely to accelerate the use of such agreements by employers, especially larger employers, and, in doing so, reduce even further the availability of class actions as a means of enforcement of the civil rights laws in the employment context.

This is not to say that all discrimination class actions are a thing of the past. There are still many employers, including government employers who, for a variety of reasons, are unlikely to impose arbitration requirements on their employees. In circumstances where large numbers of employees are adversely affected by such employers' uniform employment policies or practices, collective action may remain viable.

Nonetheless, in the wake of the Court's decisions in *Wal-Mart Stores* and *Epic Systems*, the recourse for workplace-related disputes will likely shift away from collective employment litigation to individual lawsuits or arbitration claims. As Justice Ginsberg's dissent in *Epic Systems* cautions, the economics of pursuing individualized claims through arbitration will deter employees from bringing claims altogether and lead to a "gap" in the enforcement of statutes designed to protect workers.<sup>288</sup> As a result, there will be an increase in resource-constrained workers bound by arbitration agreements, who may have previously turned to collective actions but who will now require legal aid to pursue costly arbitration proceedings. Developing support for suits on behalf of these individuals will be critical.

In these circumstances, the Committee may have an even more crucial role to play than it has in the past. The Ironworkers' Union case, discussed earlier, provides a useful template. There, after obtaining a class wide finding of liability, the Committee was able to recruit and coordinate numerous volunteer lawyers to represent more than 100 individual class members in their *Teamsters* hearings.<sup>289</sup> There are few other local organizations that can organize and supervise such an undertaking. That capability can be used to redress the imbalance between deep-pocketed employers and groups of workers who will need to challenge discriminatory policies or practices on an individual rather than collective basis.

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288. *Id.* at 1647 ("finding that an employee utilizing Ernst & Young's arbitration program would likely have to spend \$200,000 to recover only \$1,867.02 in overtime pay . . .") cited in *Sutherland v. Ernst & Young*, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011).

289. See *Berger*, 843 F.2d at 1438.

Similarly, the Committee can act as a clearinghouse and hub to facilitate the sharing and coordination of resources among private attorneys representing individuals with similar claims against similar employers. The Committee could establish a section on its website that would enable a private attorney to post information about a lawsuit or arbitration brought against a particular employer. Other attorneys who have clients with similar claims against the same employer could post as well, and a confidential extranet could then be established that would enable all counsel in such cases, with the assistance of Committee staff lawyers, to coordinate strategy, share information, and allocate costs and resources so as to make practical the arbitration of multiple individual claims against the same employer. Using this local network as a model, the Committee could encourage Lawyers' Committees or similar civil rights organizations around the country to adopt such networks, with the goal of creating a nationwide network to effectively challenge class wide employment discrimination in a post-class action legal environment.

B. Application of Federal Anti-Discrimination Statutes to Protect Workers in the "Gig" Economy

In recent years, as part of an effort to reduce costs while increasing productivity and employing new technologies, businesses have increasingly signaled a preference for hiring workers for individual and short-term projects, often in an effort to label workers as independent contractors rather than employees in what is commonly referred to as the "gig" or "sharing" economy. While the U.S. Department of Labor has struggled to quantify the number of gig workers, some estimates suggest that the "gig" economy currently comprises an estimated third of the American workforce.<sup>290</sup> As the number of workers classified by companies as independent contractors continues to grow, more and more workers will be left unprotected by federal anti-discrimination statutes.

There is consensus among federal circuit courts, including the D.C. Circuit and Fourth Circuit, that Title VII protections do not extend to independent contractors.<sup>291</sup> Independent contractors also remain unprotected by other federal anti-discrimination statutes

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290. Patrick Gillespie, *Intuit: Gig Economy is 34% of US Workforce*, CNN MONEY (May 24, 2017, 2:51 PM), <http://money.cnn.com/2017/05/24/news/economy/gig-economy-intuit/index.html>.

291. *See, e.g., Khaksari v. Chairman, Broadcasting Bd. of Governors*, 689 F. Supp. 2d 87, 92 (D.D.C. 2010) *aff'd*, 2011 WL 5514018 (D.C. Cir. 2011) (no triable issue of fact under Title VII

including the Americans with Disabilities Act (ADA)<sup>292</sup> and Age Discrimination in Employment Act (ADEA).<sup>293</sup> As a result, an increasing number of workers in the “gig” economy find themselves limited to state and local statutes when seeking remedies for discriminatory work practices.

While avenues for redress are narrow, several circuits recognize two federal anti-discrimination statutes as providing causes of action for independent contractors: Section 504 of the Rehabilitation Act and Section 1981 of the Civil Rights Act of 1866 42 U.S.C. § 1981.<sup>294</sup> The Fifth, Ninth, and Tenth Circuits have all found that Section 504 of the Rehabilitation Act, which prohibits discrimination against disabled persons in federally assisted programs or activities,<sup>295</sup> provides a private cause of action to independent contractors who would not have standing under the ADA.<sup>296</sup> Although the D.C. Circuit has never held that the Rehabilitation Act covers independent contractors, in *Redd v. Summers*, the court reversed the district court’s decision to grant summary judgment to the FBI in a Rehabilitation Act claim involving an independent contractor, noting “[t]he Bureau’s tour guide contract may constitute a federal program or activity, in which case [plaintiff] is entitled to show that she was unlawfully denied participation in the contract or retaliated against for protesting such denial” in violation of the Act.<sup>297</sup> The court’s language in *Redd*, along with the reasoning applied by the Fifth, Ninth, and Tenth Circuits, could be applied in future litigation in the D.C. Circuit to reach a holding that

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where worker is an independent contractor); *see also* *Farlow v. Wachovia Bank of N.C., N.A.*, 259 F.3d 309, 316 (4th Cir. 2001) (independent contractor cannot bring a Title VII claim).

292. *See, e.g.*, *Ratledge v. Science Applications Intern. Corp.*, No. 10 Civ. 239, 2011 WL 652274, at \*2 (E.D. Va. Feb. 10, 2011) (“The ADA does not protect independent contractors from discrimination based upon disability”); *Schalk v. Associated Anesthesiology Practice*, 316 F. Supp. 2d 244, 249 (D. Md. 2004) (“independent contractors are not ‘employees’ covered by the [ADA], nor are those seeking to become independent contractors ‘job applicants’ covered by the statute”).

293. *See, e.g.*, *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 980 (4th Cir. 1983) (affirming dismissal of ADEA claim where plaintiff was an independent contractor and not an employee); *Art & Drama Therapy Inst., Inc. v. District of Columbia*, 110 F. Supp. 3d 162, 173 (D.D.C. 2015) (ADEA applies to employees but not independent contractors).

294. *See* 29 U.S.C. § 794(a); *see also* 42 U.S.C. § 1981.

295. *See* 29 U.S.C. § 794(a).

296. *See* *Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422, 429 (5th Cir. 2016) (“[b]ecause the Rehabilitation Act does not incorporate Title I [of the ADA]’s standards for determining which entities may be held liable for employment discrimination, it does not incorporate Title I’s requirement that the defendant be the plaintiff’s employer”); *Fleming v. Yuma Reg’l Med. Ctr.*, 587 F.3d 938, 943 (9th Cir. 2009) (Congress does not intend for the Rehabilitation Act to restrict coverage to the employer-employee relationship); *Shrader v. Ray*, 296 F.3d 968, 969 (10th Cir. 2002) (Rehabilitation Act “does not incorporate the ADA definition of an employer”).

297. *Redd v. Summers*, 232 F.3d 933, 941 (D.C. Cir. 2000).

Section 504 of the Rehabilitation Act does cover independent contractors, providing further protection to disabled workers.

In addition to the Rehabilitation Act, Section 1981 may allow for independent contractors to sue for race discrimination. Section 1981 states, in relevant part, “[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for security of persons and property as is enjoyed by white citizens . . . .”<sup>298</sup> The First, Third, Eighth, and Eleventh Circuits have all held that independent contractors may bring a cause of action under Section 1981 for discrimination occurring within the scope of the independent contractor relationship.<sup>299</sup> While Section 1981 claims are preferable to Title VII claims in certain instances because they allow for a longer statute of limitations than the latter and do not have a cap on damages, such claims are limited exclusively to discrimination on the basis of race or ethnicity. Consequently, independent contractors remain without federal protections against discrimination on the basis of other traits including gender, religion, or sexual orientation.

In determining whether a party who brings a discrimination suit is an independent contractor or employee for purposes of Title VII and other federal discrimination statutes, the D.C. Circuit has set forth a twelve-factor test.<sup>300</sup> Among the factors for the court to consider are “the skill required in the particular occupation;” “the length of time during which the individual has worked;” the manner in which the work relationship is terminated;” and “whether the work is an integral part of the business of the employer.”<sup>301</sup> Among these, the court noted that the most important factor is “the extent of the employer’s right to control the means and manner of the worker’s performance” but “[c]onsideration of all of the circumstances surrounding the work relationship is essential.”<sup>302</sup> As a result, the court created a “relatively

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298. 42 U.S.C. § 1981(a).

299. See *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181 (3d Cir. 2009); *Wortham v. Am. Family Ins. Grp.*, 385 F.3d 1139 (8th Cir. 2004) (worker’s status as an independent contractor does not preclude her from pursuing a claim under Section 1981); *Webster v. Fulton Cty.*, 283 F.3d 1254, 1257 (11th Cir. 2002) (independent contractor can state a claim for violation of Section 1981); *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999) (Section 1981 “does not limit itself, or even refer, to employment contracts but embraces all contracts and therefore includes contracts by which a[n] . . . independent contractor” may bring a cause of action under section 1981 for discrimination occurring within the scope of the independent contractor relationship).

300. *Spirides v. Reinhardt*, 613 F.2d 826, 831–32 (D.C. Cir. 1979).

301. *Id.* at 832.

302. *Id.* at 831.

open-ended, fact-intensive inquiry”<sup>303</sup> that has left both employers and workers with a sense of uncertainty of what ultimately defines whether a worker is an employee or an independent contractor.

Most of these precedents arose in the context of an economy where the employer-employee relationship was the norm. Given the increase of short-term work contracts and independent-contractor agreements, the Committee could pursue litigation to challenge the *Spirides* test and urge the court to re-design the analysis in an effort to create a more simplified version that would give employers and workers a better understanding of the kind of work arrangement into which they are entering. For example, the court could embrace a test similar to the “ABC” test implemented this year by the California Supreme Court.<sup>304</sup> The “ABC” test presumptively considers all workers employees and permits workers to be classified as independent contractors, under California state wage law, *only* if the hiring business demonstrates three conditions:“(a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity’s business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”<sup>305</sup> In creating this new test, the court noted the disadvantages of complex multifactor tests including the difficulty of determining how a particular category of workers is classified from both the hiring business and worker perspective as a primary reasoning for creating a simpler, three-pronged analysis.<sup>306</sup>

In addition to the complex questions surrounding the classification of independent contractors, the gig economy presents difficulties in determining who a worker can name as a defendant in a discrimination suit as workers may have more than one putative employer. For example, if a tech assistant for a radiology practice that contracts with a hospital elects to sue for discrimination, is she limited to suing the radiology practice, the hospital, or can she sue both?

In *Redd v. Summers*, the D.C. Circuit observed that “[f]or a joint employment test, a fairly standard formulation is that of the Third

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303. *Konah v. D.C.*, 815 F. Supp. 2d 61, 70 (D.D.C. 2011).

304. *See Dynamex Operations West, Inc. v. Super. Ct.*, 416 P.3d 1, 34 (Cal. 2018).

305. *Id.* at 8.

306. *Id.* at 40–41.

Circuit [the *Browning-Ferris* test],” which considers “whether one employer[,] while contracting in good faith with an otherwise independent company, has retained for itself sufficient control over the terms and conditions of employment of the employees who are employed by the other employer.”<sup>307</sup> However, the court, in *Redd*, opted to apply the *Spirides* test based on the parties’ decision to rely on *Spirides* in their motions.<sup>308</sup> The court re-emphasized that determining the existence of an employer-employee relationship should focus on the extent to which the alleged employer has the “right to control the means and manner of the worker’s performance.”<sup>309</sup> Notably, in deciding to use the *Spirides* test, the D.C. Circuit doubted whether the test was suited for the case<sup>310</sup> and subsequently, the district court has concluded that the *Browning-Ferris* test is better suited to resolve claims of joint employment.<sup>311</sup>

Under the *Browning-Ferris* analysis, the court has held that where one contractor pays the salaries and benefits to a worker but the other retains sufficient control of the terms and conditions of employment, including scheduling and performance standards, both are joint employers.<sup>312</sup> While the *Spirides* focuses on the degree of control retained by the alleged employer, the *Spirides* test places an additional focus on “whether the relationship shares attributes commonly found in arrangements with independent contractors or with employees” including “duration of engagement, the method of payment, leave, retirement benefits, and taxes.”<sup>313</sup>

Thus, while district courts have reasoned that the two tests often lead to the same outcome,<sup>314</sup> an examination of the hypothetical offered at the beginning of this section demonstrates why the D.C. Circuit should embrace the use of the *Browning-Ferris* test in cases involving the issue of joint-employment in order to achieve uniform results that will provide better clarity to this issue. If a tech assistant

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307. *Redd*, 232 F.3d at 938 (alteration in original) (quoting *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982)).

308. *Id.*

309. *Id.*

310. *Id.* at 937.

311. *See, e.g.*, *Clayton v. D.C.*, 117 F. Supp. 3d 68, 83 (D.D.C. 2015); *Coles v. Harvey*, 471 F. Supp. 2d 46, 50 (D.D.C. 2007).

312. *Int’l Union v. Clark*, No. 02 Civ. 1484, 2016 WL 2598046, at \*7–8 (D.D.C. Sept. 11, 2006).

313. *Gray v. LaHood*, 917 F. Supp. 2d 120, 126 (D.D.C. 2013) (citing *Redd*, 232 F.3d at 940).

314. *See, e.g.*, *Dean v. Am. Fed’n of Gov’t Emps.*, 549 F. Supp. 2d 115, 122 (D.D.C. 2008) (reasoning that the *Browning-Ferris* test “is not terribly distinct from the primary consideration in the *Spirides* test”).

sued both the hospital and the radiology center alleging discrimination, under the *Browning-Ferris* test, even if the radiology center were the entity responsible for paying her salary and benefits, the hospital would still be liable if the tech assistant could show that the hospital retained sufficient control over the conditions of her employment including standards and the hours she worked. However, under the *Spirides* test, a court could arguably determine that this level of control would not be enough for joint-employer status if the tech assistant were unable to meet the additional requirements of *Spirides*.

With this in mind, the Committee might seek to pursue discrimination suits involving joint-employer claims and use the opportunity to advocate for a complete adoption of the *Browning-Ferris* test. As opposed to *Spirides*, the *Browning-Ferris* test provides a simplified understanding of what it means to be a joint-employer.

### C. Cat's Paw Theory of Liability

“Cat’s paw” discrimination occurs when a subordinate who is motivated by a discriminatory animus influences, but does not directly make the decision to take an adverse employment action.<sup>315</sup> A subordinate’s acts can nonetheless be attributed to an employer if the subordinate intended to cause an adverse employment action, and the acts are a proximate cause of the ultimate employment action.<sup>316</sup>

The Supreme Court first applied the cat’s paw theory in *Staub v. Proctor Hospital* to a claim of unlawful termination under the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>317</sup> In *Staub*, a United States Army reservist alleged that his two immediate supervisors were hostile to his service obligations and schemed to have him fired by fabricating a series of workplace infractions.<sup>318</sup> As a result of his immediate supervisors’ actions, another supervisor ultimately decided to terminate Staub.<sup>319</sup> In his complaint, Staub did not allege that the final decision maker was motivated by any unlawful anti-military animus.<sup>320</sup> Rather, Staub complained that the biased actions taken by his immediate supervisors

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315. *Staub v. Proctor Hosp.*, 562 U.S. 411, 419 (2011).

316. *See id.* at 422.

317. *Id.* at 419–22.

318. *Id.* at 414–15.

319. *Id.* at 415.

320. *Id.*

constituted a motivating factor in the ultimate decision to terminate him.<sup>321</sup>

In an opinion written by Justice Scalia, an eight member majority held in favor of Staub on the cognizability of the cat's paw theory of discrimination.<sup>322</sup> After noting that USERRA "is very similar to Title VII," the Court interpreted the relevant provisions according to "general principles of law, agency law, which form the background against which federal tort laws are enacted."<sup>323</sup> Informed by these principles, the Court held that an employer can be held liable for intentional acts taken by a biased subordinate supervisor even if the final decision is itself unbiased, so long as the earlier act is a motivating factor in the ultimate decision.<sup>324</sup> The biased earlier act and the unbiased later act are each a proximate cause of the plaintiff's injury.<sup>325</sup>

According to the Court, it is "axiomatic under tort law that the exercise of judgment by the decision maker does not prevent the earlier agent's actions (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm."<sup>326</sup> The final decision maker's neutrality is insufficiently "remote" or "purely contingent" to break the causal chain.<sup>327</sup> Furthermore, the later, unbiased decision is insufficiently independent from the earlier action to constitute a superseding cause, because it is not a "cause of independent origin that was not foreseeable."<sup>328</sup>

Thus, under cat's paw liability, if a plaintiff successfully demonstrates a predicate discriminatory act taken by a non-decision maker, the burden shifts to the employer to demonstrate that it would have made the same decision regardless of the non-decision maker's bias.<sup>329</sup> A decision "entirely justified" on other, nondiscriminatory grounds satisfies the defendant's burden.<sup>330</sup>

Although *Staub* generally endorsed the cat's paw theory, the Court expressly stated in a footnote that its opinion did not address whether an employer can be held liable for biased acts taken by non-

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321. *Id.*

322. *Id.* at 422. Justice Alito, joined by Justice Thomas, separately concurred to express disagreement with the Court's reasoning.

323. *Id.* at 417–18.

324. *Id.* at 419–21.

325. *Id.*

326. *Id.* at 419.

327. *Id.*

328. *Id.* at 420.

329. *See id.* at 421.

330. *Id.*

supervisory co-workers.<sup>331</sup> There is currently a circuit court split on the issue of whether the cat's paw theory extends to acts taken by co-workers, with some circuits extending the theory to co-workers and adopting a negligence-based approach to employer liability, while other circuits decline to extend the theory to co-workers. For example, because the *Staub* opinion refers only to supervisors and expressly declines to address the issue of co-workers, the Fourth Circuit has declined to extend the cat's paw theory to such cases.<sup>332</sup> Similarly, a Sixth Circuit opinion declined to answer the question, noting that *Staub* "did not resolve whether cat's paw liability can be predicated on actions taken by co-workers, rather than supervisors."<sup>333</sup> On the other hand, the Second Circuit has held that an employer can be liable if the employer acts negligently with regard to a co-worker's acts, the co-worker acted with an unlawful motive, and the acts cause an adverse employment action.<sup>334</sup>

The Supreme Court's decision in *Vance v. Ball State University* possibly further complicates the cat's paw theory.<sup>335</sup> In *Vance*, the Court held that for the purposes of Title VII harassment claims, supervisors are employees "empowered by the employer to take tangible employment actions against the victim."<sup>336</sup> Tangible employment actions include hiring, firing, failing to promote, disciplining, and other decisions that cause a "significant change in employment status."<sup>337</sup> As a district court observed after *Vance*, the *Vance* decision appears to create "tension" with *Staub* because, "if the discriminating employee has the power to fire a Title VII plaintiff, he is a supervisor under *Vance*. However, there would be no need for the employee to convince someone else to fire the plaintiff."<sup>338</sup> Whether *Vance* did in fact displace any of the holding in *Staub* is not clearly resolved.

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331. *Id.* at 422 n.4 ("We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision.")

332. *Smyth-Riding v. Scis. & Eng'g Servs., LLC*, 699 F. App'x 146, 155–56 (4th Cir. 2017).

333. *Seoane-Vazquez v. Ohio State Univ.*, 577 F. App'x 418, 428 n.4 (6th Cir. 2014).

334. *Vasquez v. Express Ambulance Serv.*, 835 F.3d 267, 276 (2d Cir. 2016).

335. *See Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

336. *Id.*

337. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998).

338. *Burlington v. News Corp.*, 55 F. Supp. 3d 723, 734 (E.D. Pa. 2014). "Indeed, the entire *raison d'être* of cat's paw liability is that the biased subordinate lacks the power to fire another employee unilaterally and must therefore convince a superior to do so. A rule that only permits cat's paw liability to attach if the biased employee has the authority to fire others would in most cases defeat the purpose of cat's paw liability." *Id.* at 738.

Given these unresolved questions, cases involving discriminatory acts taken by co-workers offer an opportunity to address whether co-worker claims are clearly cognizable and if so, whether the negligence-based approach is the correct one. Additionally, cases that involve employees whose responsibilities do not clearly make them either a co-worker or a supervisor offer an opportunity to reconcile any tension between *Staub* and *Vance*. If co-worker claims do not fit within the scope of the cat's paw theory, then a case in which a co-worker is delegated significant power to influence decisions, such that they are in effect exercising supervisory authority, would also present an opportunity to address these issues.

#### CONCLUSION

For 50 years, the Washington Lawyers' Committee for Civil Rights and Urban Affairs has been at the forefront of the fight against employment discrimination by private and government employers in the Washington, D.C. region. Although there have been great changes and great improvements in this area, the battle is far from over. As the Committee begins its second half century, its small but highly effective legal staff, supported by its large network of volunteer law firms and attorneys, are ready to meet whatever challenges may arise.

# Washington Lawyers’ Committee for Civil Rights and Urban Affairs: A Report on the Committee’s Fair Housing Project, 1984–2017

GEORGE D. RUTTINGER\*

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## INTRODUCTION

In 2018, the Washington Lawyers’ Committee for Civil Rights and Urban Affairs (formerly known as the Washington Lawyers’ Committee for Civil Rights Under Law) will celebrate its 50th Anniversary. During the past forty-nine years, the Committee has been a national leader in enforcement of civil rights laws. Its leadership ex-

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tends to enforcement of the Fair Housing Act of 1968 (“FHA”) and corresponding local fair housing laws. Fair housing is widely regarded as a pivotal civil right because where you live often determines your access to quality education, well-paying jobs, nourishing food, and other important social and economic relationships. The impact of residential segregation on children in particular is well summarized by Richard Rothstein in *Color of Law: The Forgotten History of How Our Government Segregated America*:

The consequences of being exposed to neighborhood poverty are greater than the consequences of poverty itself. Children who grow up in poor neighborhoods have few adult role models who have been educationally and occupationally successful. Their ability to do well in school is compromised from stress that can result from exposure to violence. They have few, if any, summer job opportunities. Libraries and bookstores are less accessible. There are fewer primary care physicians. Fresh food is harder to get. Airborne pollutants are more present, leading to greater school absence from respiratory illness. The concentration of many disadvantaged children in the same classroom deprives each child of the special attention needed to be successful.<sup>1</sup>

The Committee’s role in promoting fair housing in the D.C. metropolitan area and nationally has been significant, in part because the Department of Housing and Urban Development (“HUD”) and the Department of Justice often lack the resources, and at times the political will, to rigorously enforce the FHA.

Although this report summarizes the Committee’s Fair Housing project over the past thirty-three years, it is in effect an update of a report published in 1984 that discussed the first eight years of the project.<sup>2</sup> As Mr. Scanlon’s and this report document show, the fair housing efforts of the Committee have evolved over time to address the most cutting edge and critical civil rights issues as they arise. Housing discrimination against protected categories of citizens, such as discrimination based on race, national origin, disability and gender, has been a constant. Over the years, more subtle but nonetheless deleterious forms of discrimination have emerged, and the Committee has been quick to identify and combat them. Thus, cases challenging familial

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1. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: THE FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 187 (2017).

2. See generally Kerry Alan Scanlon, *Civil Rights Papers: Washington Lawyers’ Committee for Civil Rights Under Law; A Report on the Committee’s Fair Housing Project 1975–1983*, 27 *How. L.J.* 1457 (1984).

status discrimination were followed by challenges to lending discrimination (including predatory lending), insurance redlining, gender and racial harassment, source of income discrimination, violation of the design and construction standards of the FHA protecting disabled home-seekers, the adverse impact of gentrification of affordable housing, and the collateral consequences of criminal convictions on access to housing. Many of these more cutting edge enforcement actions were predicated on showing that facially neutral policies had a disparate impact on protected home-seekers. New trends in fair housing enforcement are discussed at the end of this report.

One of the innovations in fair housing enforcement pioneered by the Committee was the founding of a sister organization devoted to testing, enforcement, education and outreach in furtherance of equal housing opportunity. Thus, in 1983, the Committee was instrumental in creation of the Fair Housing Council of Greater Washington (“FHCGW”), which became the Equal Rights Center (“ERC”) after its 1999 merger with the Fair Employment Council. The ERC has worked with the Committee in testing properties for compliance with the fair housing laws and investigating complaints of housing discrimination. Individual victims of discrimination sometimes had difficulty meeting their burden of proof because the trial devolved into a “he said-she said” scenario in which the outcome turned on the jury’s evaluation of the credibility of the plaintiff’s story versus that of the property manager’s employees. As demonstrated by some of the case histories discussed below, testing by the ERC often provided crucial evidence of discriminatory practices that corroborated the plaintiff’s story.

The Committee filed an amicus brief in the landmark case of *Havens Realty Corp. v. Coleman*, which established the standing of testers and testing organizations to bring actions against firms accused of violating the FHA.<sup>3</sup> This brief was one of a series of amicus briefs filed by the Committee that helped shape the development of fair housing law. Other examples are discussed after the section on case histories.

## I. CASE HISTORY

The number of fair housing cases brought by the Committee over the past thirty-three years is too voluminous to discuss within the con-

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3. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

finances of this report. Thus, this report summarizes some selected key cases prosecuted by the Committee and cooperating counsel in the various categories of housing discrimination.

A. Discriminatory Advertising

The Scanlon article documented the Committee's efforts to promote equal housing opportunity by challenging use of all white models in advertising for housing. The Committee continued to devote resources to advertising cases in the 1980s and beyond. For example, in *Saunders v. Gen. Servs. Corp.*, the Committee and cooperating counsel took Richmond, Virginia's largest apartment management company to trial for fair housing violations, resulting in a 45-page opinion ruling for the plaintiffs.<sup>4</sup> The court's decision found that the defendant had violated the FHA by using predominantly white human models in its advertising. The court also ruled that the defendant had committed civil fraud by failing to include a fair housing logo in its advertisements, in violation of an earlier settlement agreement with the Committee.

The Committee and cooperating counsel achieved another significant victory in *Spann v. Colonial Vill., Inc.*, involving another challenge to the use of all white models in advertising for housing.<sup>5</sup> In a ground-breaking decision, the D.C. Circuit applied *Havens* to uphold the standing of the FHCGW to challenge discriminatory advertising practices.<sup>6</sup> In so ruling, the court cited the FHCGW's allegations that:

[D]efendants' preferential advertising tended to steer Black home buyers and renters away from the advertised complexes and thus impelled the organizations to divert resources to checking or neutralizing the ads' adverse impact. The organizations also claimed that the advertisements required them to devote more time, effort, and money to endeavors designed to educate not only Black home buyers and renters, but the D.C. area real estate industry and the public that racial preference in housing is indeed illegal.<sup>7</sup>

This decision solidified the standing of the FHCGW to bring fair housing actions in its own name and became an important precedent for establishing the standing of fair housing organizations in subsequent cases.

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4. *See generally* *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042 (E.D. Va. 1987).

5. *See generally* *Spann v. Colonial Vill., Inc.*, 899 F.2d 24 (D.C. Cir. 1990).

6. *Id.* at 27.

7. *Id.*

B. Race and National Origin Discrimination

As noted above, combatting discrimination on the basis of race and national origin has been a constant in the program of the Committee. The most blatant form of discrimination occurs when a management company tells a Black or Latino tester that no apartments are available in a complex while it shows a white testers available units in the same complex. Steering Black home-seekers to predominantly African American or Latino neighborhoods or apartment complexes is another more blatant scenario. Beyond these scenarios, testing investigations have revealed more subtle forms of discrimination, such as showing apartments to both Black and white testers but offering rent abatements or other favorable terms only to the white testers. In addition, as discussed below, the Committee has been called upon to combat insidious forms of racial harassment in housing complexes.

In an example of blatant discrimination and steering, the Committee and cooperating counsel represented Pamela Hendrickson, an African American employed by the U.S. Navy who was re-assigned to Washington.<sup>8</sup> When she searched for apartments on Capitol Hill, Yarmouth Management told her that none of the listed apartments in which she was interested were available and steered her to apartments in predominantly Black neighborhoods that were in poor condition.<sup>9</sup> Ms. Hendrickson contacted the FHCGW, whose testing demonstrated that some of the apartments listed by Yarmouth were in fact available.<sup>10</sup> Ms. Hendrickson brought suit in the U.S. District Court for the District of Columbia.<sup>11</sup> Ultimately, the case was settled for a payment of \$150,000 and five-year consent decree that obligated Yarmouth to train its employees in fair housing, establish a complaint procedure for clients, and affirmatively market its properties to African Americans.<sup>12</sup>

In *Tscherny v. Horning Bros.*, the Committee and cooperating counsel represented a bona fide claimant and the FHCGW in litigation arising out of discriminatory refusal to rent to a Latino tester.<sup>13</sup> The case was settled in 1990 for one of the largest payments in a na-

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8. WASH. LAW. COMM., ANNUAL REPORT, 1996, at 19 (1996).

9. *Id.*

10. *Id.*

11. *Hendrickson v. Yarmouth Mgmt.*, No. 1:95-cv-01528, (D.D.C. Aug. 11, 1995).

12. WASH. LAW. COMM., *supra* note 8.

13. *Tscherny v. Horning Bros.*, No. 1:88-CV-03426 (D.D.C. Nov. 29, 1998).

tional origin discrimination case.<sup>14</sup> In addition, the parties entered into a Consent Order that contained innovative provisions requiring the defendant to affirmatively market apartments in the Hispanic community and provide brochures and applications in both Spanish and English.<sup>15</sup>

The Committee and cooperating counsel also established an important principle in *Pinchback v. Armistead Homes Corp.*<sup>16</sup> The board of Armistead had the power to veto the sale of any home in the Armistead Gardens community.<sup>17</sup> In thirty years, the community had never had a Black member.<sup>18</sup> The evidence at trial established that it was board policy to reject the offers of any Blacks who wanted to buy a home in Armistead Gardens.<sup>19</sup> Ms. Pinchback saw an ad for a home and contacted a real estate agent, who told her that Armistead Gardens would not allow Blacks in the community.<sup>20</sup> Pinchback therefore did not make an offer on the home, but she reported the incident to HUD and brought suit in the U.S. District Court under Title VIII and the Maryland Fair Housing Act.<sup>21</sup> Pinchback prevailed at trial and was awarded damages and injunctive relief.<sup>22</sup> On appeal, Armistead argued that Pinchback was not entitled to relief because she had never submitted an offer on the home, and the “futile gesture” doctrine established under employment law did not apply in the context of fair housing.<sup>23</sup> The Fourth Circuit affirmed the district court decision, holding that where it is clear that the defendant adheres to a policy of racial discrimination, the plaintiff need not engage in the “futile gesture” of making an offer for housing that she knows will be refused, and potentially suffer the humiliation of that refusal.<sup>24</sup> *Pinchback* was significant because the futile gesture doctrine had previously been applied only in the context of actions under Title VII, so it was the first case applying this important doctrine to fair housing claims under Title VIII.

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14. WASH. LAW. COMM., ANNUAL REPORT, 1990–91, at 26 (1991).

15. *Id.*

16. *See generally* *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990).

17. *Id.* at 1449.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1450–51.

24. *Id.* at 1452–53.

## C. Harassment

### 1. Racial

The Committee broke ground in several cases involving disturbing racial harassment of African American tenants and home owners. In *Bradley v. Carydale Enters*, the Committee and cooperating counsel won a verdict after trial in a racial harassment and retaliation case.<sup>25</sup> The court ruled that Ms. Bradley had been harassed by a racist tenant and that the landlord had unlawfully retaliated against her.<sup>26</sup> The case was ultimately settled for a payment of \$120,000 and adoption of a company-wide affirmative action plan.<sup>27</sup> At the time, this was the largest settlement ever in a Virginia housing discrimination case.<sup>28</sup> This was the first case holding a landlord liable under 42 U.S.C. § 1981 for racial harassment of one tenant by another tenant.

The Committee extended the law on racial harassment of tenants to condominium associations in *Reeves v. Carrollsburg Condo. Unit Owners Ass'n*.<sup>29</sup> In that case, the Carrollsburg Association rules allowed eviction of a condominium owner if he was denying quiet enjoyment of the property to another owner.<sup>30</sup> A white Carrollsburg owner harassed Ms. Reeves, an African American fellow owner, with racial epithets and threats of lynching, but the Association took no action against him.<sup>31</sup> In its decision, the district court established the important principle that a condominium association can be held liable under the FHA for failing to take action to stop racial harassment of one condominium owner by another.<sup>32</sup>

### 2. Gender

In *Williams v. Poretsky Management*, Ms. Williams was sexually harassed by a maintenance worker at the apartment complex where she resided.<sup>33</sup> She complained to the resident manager, who refused to take action and in fact assigned the harasser to perform repairs on

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25. *Bradley v. Carydale Enters.*, 730 F. Supp. 709, 711 (E.D. Va. 1989).

26. *Id.*

27. *Va. Woman Gets \$120,000 In Civil Rights Lawsuit*, JET, Nov. 13, 1989, at 9.

28. *Id.*

29. *Reeves v. Carrollsburg Condo. Unit Owners Ass'n*, No. CIV. A. 96-2495RMU, 1997 WL 1877201, at \*7-8 (D.D.C. Dec. 18, 1997).

30. *Id.* at \*8.

31. *Id.* at \*1.

32. *Id.* at \*4-5, \*8.

33. *Williams v. Poretsky Mgmt.*, 955 F. Supp. 490, 491 (D. Md. 1996).

Ms. Williams's apartment.<sup>34</sup> The landlord also refused to release her from her lease. The Committee and cooperating counsel brought suit against the landlord for violating the FHA by failing to take action to protect Ms. Williams.<sup>35</sup> The landlord moved for summary judgment on the basis that Ms. Williams was never deprived of her right to rent her apartment.<sup>36</sup> The court denied the defendant's motions, upholding the right of the plaintiffs to bring suit against landlords under the FHA where sexual (or racial) harassment on the premises has become severe enough to create a "hostile housing environment."<sup>37</sup> This decision represented an extension of the hostile working environment doctrine established in employment discrimination cases involving sexual harassment. The court thus followed the precedent established in *Pinchback* regarding application of Title VII jurisprudence to Title VIII cases. As the court explained:

The Fourth Circuit has recognized that sexual harassment is actionable under Title VII. . . . It also has recognized the shared purpose of Title VII and Title VIII to end discrimination. . . . Moreover, in recognition of these similar aims, it has been willing to import doctrines or interpretations of language accepted under Title VII to Title VIII claims.<sup>38</sup>

As a result of these decisions, favorable developments in fair employment law can be utilized in developing the law on fair housing.

#### D. Familial Status Discrimination

The Committee and cooperating counsel have handled a series of groundbreaking cases challenging housing discrimination based on familial status. The 1988 amendments to the FHA added familial status as a protected category.<sup>39</sup> Even before that, however, courts recognized that discrimination against families with children often has a disparate impact on racial and ethnic minorities. For example, in *Betsey v. Turtle Creek Associates*, Turtle Creek management issued eviction notices to families in Building 3 of an apartment complex so that it could convert the building to an all-adult facility.<sup>40</sup> The district court found that the plaintiff had failed to make out a *prima facie* showing

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34. *Id.*

35. *Id.*

36. *Id.* at 491–92.

37. *Id.* at 494–495, 498.

38. *Id.* at 495.

39. Fair Housing Amendments Act, 42 U.S.C. § 3604 (1988).

40. *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 985 (4th Cir. 1984).

of intentional discrimination because, although the families evicted from Building 3 were predominantly African American, there was no showing that Blacks in the Turtle Creek complex as a whole or in the surrounding community were adversely impacted by the evictions.<sup>41</sup> The Fourth Circuit reversed, holding that the plaintiff had shown that the all-adult conversion policy had a disparate impact on African Americans who resided at Building 3, and that evidence of a broader impact was unnecessary to show discriminatory intent.<sup>42</sup> The *Betsey* decision was cited in support of the Fair Housing Amendments Act of 1988 (“FHAA”), which added “familial status” as a protected category under the FHA.<sup>43</sup>

The Committee and cooperating counsel won a significant victory at trial in *Timus v. William J. Davis, Inc.*<sup>44</sup> Plaintiff Carrie Timus was selecting an apartment in a complex managed by Davis pursuant to a settlement agreement resolving an earlier complaint of familial status discrimination.<sup>45</sup> An agent of the Davis told Ms. Timus that the apartment complex did not rent to families with children.<sup>46</sup> Subsequent testing by the FHCGW confirmed the discriminatory policy.<sup>47</sup> After a jury trial in July 1992, the jury found for Ms. Timus and awarded damages of \$2,415,000.<sup>48</sup> Because the defendant lacked the resources to pay a judgment of this magnitude, the case was later settled for a payment of \$765,000 and comprehensive injunctive relief.<sup>49</sup> The *Timus* verdict was the first and largest familial status damages award and sent shock waves through the housing industry.<sup>50</sup> It established familial status discrimination, which often adversely affects minority fami-

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41. *Id.*

42. *Id.* at 987–99.

43. Legislative History of the Fair Housing Amendments Act of 1988, P.L. 100-430I (1988), Fair Housing Amendments Act of 1987, Hearing before the Subcommittee on the Constitution of the Senate Judiciary Committee on S. 558, 100th Congress, March 31, April 2, 7, June 9, and July 1, 1987 at p. 196.

44. *Timus v. William J. Davis, Inc.*, No. 1:91-CV-00882 (D.D.C. Apr. 22, 1991).

45. WASH. LAW. COMM., *supra* note 14, at 25; WASH. LAW. COMM., MAKING A DIFFERENCE: REFLECTIONS ON EQUAL JUSTICE at 13-16 (1998). See Robert Pear, *Accusation of Bias Against Children Leads to Big Award in Housing Suit*, N.Y. TIMES (July 16, 1992), <https://www.nytimes.com/1992/07/16/us/accusation-of-bias-against-children-leads-to-big-award-in-housing-suit.html>; Christine Spolar, *\$2.4 Million Awarded in Housing Bias Suit*, WASH. POST (July 15, 1992), [https://www.washingtonpost.com/archive/local/1992/07/15/24-million-awarded-in-housing-bias-suit/6b1eaadd-02dd-4302-9fa9-9846e15778ac/?utm\\_term=.3022371163c9](https://www.washingtonpost.com/archive/local/1992/07/15/24-million-awarded-in-housing-bias-suit/6b1eaadd-02dd-4302-9fa9-9846e15778ac/?utm_term=.3022371163c9).

46. See Pear, *supra* note 45; Spolar, *supra* note 45.

47. See Pear, *supra* note 45.

48. See *id.*; Spolar, *supra* note 45.

49. WASH. LAW. COMM., ANNUAL REPORT, 1994, at 33 (1994).

50. *Id.*

lies, as equally egregious as racial dissemination. The magnitude of the award facilitated settlement of subsequent FHAA cases.

#### E. Lending Discrimination

The Committee pioneered litigation challenging denial by financial institutions of credit sought by African Americans to buy or improve their homes. In *Boyer v. First Virginia Bank*, the plaintiff was a law professor at Howard University who owned a beautiful home in Silver Spring, Maryland, had a net worth over \$1 million, and had the highest possible credit rating.<sup>51</sup> He applied for a \$50,000 home equity loan by appearing in person at a branch of First Virginia Bank.<sup>52</sup> To his amazement, the bank denied this modest loan despite his spotless credit history.<sup>53</sup> Sensing discrimination, Professor Boyer then applied to several other banks by mail and was approved by all of them, including a sister bank of First Virginia Bank.<sup>54</sup> After defeating a motion for summary judgment, Professor Boyer settled the litigation for \$210,000, which at that time was the largest settlement ever achieved in a lending discrimination case.<sup>55</sup> The settlement also provided for comprehensive injunctive relief that included training of bank employees, solicitation of minority homeowners to apply for home equity loans, and retention of loan records to permit monitoring of loan practices.<sup>56</sup>

In *Lathern v. NationsBanc* and *Stackhaus v. NationsBanc*, the Committee and cooperating counsel brought one of the largest pattern and practice cases against a major lending institution.<sup>57</sup> The suits alleged that a class of African Americans and twenty-four individuals in the Washington, D.C. area were denied loans or otherwise treated unfairly in underwriting decisions by NationsBanc dating back to 1990.<sup>58</sup> The suit was based in part on statistical evidence compiled in a path-breaking report issued by the Committee in 1994 documenting

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51. *Boyer v. First Virginia Bank of Maryland*, No. 92-3632 (D. Md. filed Dec. 23, 1992).

52. Complaint for Declaratory Judgment, Permanent Injunctive Relief and Damages ¶¶ 22-3, *Boyer v. First Virginia Bank of Maryland*, No. 92-3632 (D. Md. 1992).

53. *Id.* ¶ 27.

54. *Id.* ¶ 28.

55. WASH. LAW. COMM., ANNUAL REPORT, 1995 at 24 (1995); WASH. LAW. COMM., FALL 1996 UPDATE 2 (2010) at 8.

56. WASH. LAW. COMM., ANNUAL REPORT, 1995, *supra* note 55.

57. See *Lathern v. NationsBanc Corp.*, No. 95-01805 (D.D.C. filed Sept. 21, 1995); *Stackhaus v. NationsBanc Corp.*, No. 96-1077 (D.D.C. filed May 10, 1996).

58. WASH. LAW. COMM., ANNUAL REPORT 1995, *supra* note 55, at 25; WASH. LAW. COMM., ANNUAL REPORT 1996, at 20-21 (1996).

discriminatory lending practices in the Washington area.<sup>59</sup> Settlement of the suits provided monetary relief to the individual plaintiffs and putative class members who filed claims with a mediator.<sup>60</sup>

Both of these Committee cases were groundbreaking because as of the early 1990's, the Department of Justice was just starting to implement a program for challenging lending discrimination in the housing market.<sup>61</sup> In particular, there was no precedent for the decision in *Boyer* recognizing that disparate treatment could be established by evidence that a financial institution did not fairly apply its underwriting standards.

#### F. Redlining

Another insidious form of housing discrimination occurs when property management firms, lenders, or insurance companies adopt policies that deny housing opportunities to persons who live in certain communities, usually predominantly African American areas. This practice is referred to as “redlining,” which the Committee has vigorously challenged in a number of actions over the decades.<sup>62</sup> *Wilson v. NV Homes* is an example of an unusual redlining practice.<sup>63</sup> The Wilsons owned a house in the Shaw neighborhood in D.C., which at the time was a predominantly African American area.<sup>64</sup> They wished to buy a home in suburban Maryland, and were attracted to houses built by NV Homes.<sup>65</sup> They were also attracted by the company’s “Guaranteed Buy” program, which promised that if the prospective new home buyers were unable to sell their existing house within a certain period after making an offer on an NV home, the company would purchase the existing house for a significant percentage of its appraised value, thus allowing the sellers to purchase a new NV home.<sup>66</sup> However, when NV Homes’ appraiser visited the Wilsons’ home in

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59. WASH. LAW. COMM., ANNUAL REPORT 1996, *supra* note 58; WASH. LAW. COMM., ANNUAL REPORT, 1997, at 24 (1997); WASH. LAW. COMM., 30th ANNIVERSARY REPORT 1968–1998 at 27.

60. WASH. LAW. COMM., ANNUAL REPORT, 1999, at 24 (1999).

61. *Fair Lending Enforcement*, U.S. DEP’T OF JUSTICE (Jan. 2001), <https://www.justice.gov/crt/fair-lending-enforcement-program>.

62. *Lawyers’ Committee and Washington Lawyers’ Committee Applaud Supreme Court’s Decision Upholding the Fair Housing Act’s Disparate Impact Standard*, WASH. LAW. COMM., (June 25, 2015), <https://washlaw.org/news-a-media/430-upholding-fair-housing-act>.

63. *See generally* *Wilson v. NV Homes*, No. 90-1128 (D.D.C. 1990).

64. Complaint for Declaratory Judgment, Permanent Injunctive Relief and Damages ¶ 16, *Wilson v. NV Homes*, No. 90-1128 (D.D.C. 1990).

65. *Id.* ¶¶ 17, 19

66. WASH. LAW. COMM., 25th ANNIVERSARY REPORT 1968-1993, at 35 (1993).

the Shaw neighborhood, she left the engine in the car running and completed her “inspection” within a few minutes of arriving.<sup>67</sup> NV Homes subsequently denied the Wilsons’ application to participate in the Guaranteed Buy program, undercutting their ability to move into a new home.<sup>68</sup> The Committee and cooperating counsel brought suit alleging that NV Homes’ denial of participation in the Guaranteed Buy program constituted unlawful redlining.<sup>69</sup> The parties settled the case for the largest cash payment ever received in a case involving denial of financial assistance by a home builder, as well as injunctive relief ensuring that if the defendant continued its Guaranteed Buy program, it would administer the program in a non-discriminatory manner.<sup>70</sup>

The Committee took on a more expansive and higher impact case in *National Fair Housing Alliance, Inc. v. Travelers Property Casualty Corp.*<sup>71</sup> The National Fair Housing Alliance, the ERC, four other fair housing organizations, and an African American resident of D.C. alleged that Travelers and two other companies engaged in pervasive discriminatory practices and policies that restricted or denied access to homeowners insurance in predominantly African American neighborhoods throughout the United States.<sup>72</sup> Evidence from testing and other investigations conducted by the fair housing organizations had confirmed that Travelers implemented and maintained discriminatory guidelines and practices.<sup>73</sup> In 2001, the plaintiffs and Travelers entered into a settlement involving a substantial cash payment and injunctive relief.<sup>74</sup>

The Committee has also taken a leading role in the jurisprudence on reverse redlining, also referred to as predatory lending. The most notable example is *Hargraves v. Capital City Mortg. Corp.*<sup>75</sup> This suit alleged that Capital City engaged in fraudulent, usurious, and preda-

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67. *Id.*

68. WASH. LAW. COMM., 25TH ANNIVERSARY REPORT 1968-1993, at 35 (1993); Compl. for Declaratory Judgment, Permanent Injunctive Relief and Damages ¶ 27, *Wilson v. NV Homes*, No. 90-1128 (D.D.C. 1990).

69. *See generally* Complaint for Declaratory Judgment, Permanent Injunctive Relief and Damages, *Wilson v. NV Homes*, No. 90-1128 (D.D.C. 1990).

70. WASH. LAW. COMM., 25TH ANNIVERSARY REPORT 1968-1993 at 35.

71. *See generally* Nat’l Fair Hous. All., Inc. v. Travelers Prop. Cas. Corp., No. 00-1506 (D.D.C. filed June 26, 2000).

72. *See generally* Compl., Nat’l Fair Hous. All., Inc. v. Travelers Prop. Cas. Corp., No. 00-1506 (D.D.C. 2000).

73. *Id.*

74. *Id.*

75. *See generally* *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000).

tory lending practices in African American census tracts in D.C. The company marketed loans to African Americans with poor credit but equity-rich properties, including a Baptist church.<sup>76</sup> The interest rates for these loans were as high as 30%.<sup>77</sup> The suit alleged that once borrowers fell behind, Capital City relied on hidden accelerator clauses to add penalties and attorneys' fees that forced the borrowers into default, allowing Capital City to foreclose on the properties.<sup>78</sup> The suit alleged that Capital City targeted African American neighborhoods for its predatory lending practices in violation of the FHA.<sup>79</sup>

In 2000, the district court denied the defendants' motion for summary judgment regarding their fair housing claims.<sup>80</sup> The court focused on the plaintiffs' allegations of reverse redlining, which the court defined as follows: "Redlining is 'the practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents . . . . Reverse redlining is the practice of extending credit on unfair terms to those same communities.'"<sup>81</sup> In other words, reverse redlining is the practice of offering bad loans in predominantly minority areas with the intent of forcing default and foreclosure, allowing the lender to, in effect, rob the borrower of his or her property. The court ruled that the plaintiffs had made a *prima facie* showing that: (1) Capital City had engaged in several predatory lending practices that could "make housing unavailable by putting borrowers at risk of losing the property which secures their loans,"<sup>82</sup> and (2) its lending practices had a disparate impact on African Americans, based on statistical evidence that Capital City made a greater percentage of its loans in majority Black census tracts than other sub-prime lenders.<sup>83</sup> The Federal Trade Commission (FTC) filed a companion case that was settled for a substantial monetary payment into a victims' fund and comprehensive injunctive relief.<sup>84</sup> *Hargraves* was the

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76. *Id.* at 15.

77. Amended Compl. at ¶24, *Hargraves v. Capital City Mortg. Corp.*, 1998 WL 35288126 (D.D.C. Oct. 14, 1998) (No. 98-1021 (JHG/AK)).

78. *Hargraves*, 140 F. Supp. 2d at 18.

79. *Id.* at 14.

80. *Id.*

81. *Id.* at 20.

82. *Id.*

83. *Id.* at 21. The Federal Trade Commission ("FTC") filed a companion case that was settled for a substantial monetary payment into a victims' fund and comprehensive injunctive relief. *See generally* *FTC v. Capital City Mortg. Corp.*, No. CIV. A. 98-237 (JHG), 1998 WL 1469619 (D.D.C. July 13, 1998).

84. *See generally* *FTC v. Capital City Mortg. Corp.*, No. CIV. A. 98-237 (JHG), 1998 WL 1469619 (D.D.C. July 13, 1998).

first and seminal decision in the country to hold that targeting minority areas for bad loans in order to steal homes was a denial of housing in violation of § 3604(a) of the FHA.

#### G. Disability Discrimination

The Committee has been in the forefront of advocating for fair housing opportunity for persons with disabilities. In a series of recent cases, the Committee and cooperating counsel have challenged large real estate firms that have failed to provide sufficient accessibility to the disabled in the design and construction of multi-unit housing complexes. These suits are brought under the FHA and Americans with Disabilities Act (“ADA”) and are typically based on testing the complexes conducted by the ERC. Settlement of these cases has resulted in making tens of thousands of additional apartments accessible nationwide.<sup>85</sup> For example, in *Equal Rights Ctr. v. AvalonBay Communities, Inc.*, the ERC alleged that 100 complexes owned and operated by AvalonBay failed to comply with the FHA and ADA in that many units were inaccessible.<sup>86</sup> AvalonBay filed a motion to dismiss, which the court denied in 2009.<sup>87</sup> The parties thereafter entered into a settlement agreement under which AvalonBay agreed to survey and remediate up to 8,250 units across the United States, along with public and common use areas associated with those units.<sup>88</sup> AvalonBay also made a commitment of \$50,000 per year for ten years to the ERC’s Multifamily Housing Resource Program.<sup>89</sup> Finally, the settlement included payment of damages, attorneys’ fees, and costs.<sup>90</sup> Similar results were reached as a result of suits against large nationwide real estate firms such as Bozzuto, Archstone, Trammell Crow, Camden Properties and Equity Residential.<sup>91</sup>

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85. See EQUAL RIGHTS CENTER, Press Releases 2018-2014, <https://equalrightscenter.org/press-releases/>.

86. *Equal Rights Ctr. v. AvalonBay Cmty., Inc.*, No. CIV.A.AW-0502626, 2009 WL 1153397, at \*9 (D. Md. Mar. 23, 2009).

87. *Id.* at \*10.

88. 16 WASH. LAW. COMM., SPRING 2010 UPDATE 3 (2010).

89. *Id.*

90. *Id.*

91. See e.g., WASH. LAW. COMM., *Equal Rights Center and Equity Residential Settle Litigation and Agree to Expand Accessible Housing* (Jan. 4, 2017), <https://www.washlaw.org/news/541-equal-rights-center-and-equity-residential-settle-litigation-and-agree-to-expand-accessible-housing>; Ashley White, *Equal Rights Center and AvalonBay Settle Litigation and Agree to Expand Accessible Housing*, EQUAL RIGHTS CENTER (Nov. 2, 2009), [https://equalrightscenter.org/pr-archives/2009/06-10.08.09\\_AvalonBay\\_Press\\_Release.pdf](https://equalrightscenter.org/pr-archives/2009/06-10.08.09_AvalonBay_Press_Release.pdf).

The Committee has also advocated for disabled individuals who were denied equal housing opportunities. The Committee and cooperating counsel established an important precedent on reasonable accommodations for the disabled in *United States v. California Mobile Home Park Mgmt.*<sup>92</sup> Ms. Cohen-Strong leased a mobile home from the defendant, which customarily charged a daily fee for the presence of long-term guests and a monthly parking fee for such guests.<sup>93</sup> Ms. Cohen-Strong's infant daughter had a respiratory condition that required care from a home health care aid.<sup>94</sup> She requested that the defendant waive the customary guest and parking fees for her daughter's aid.<sup>95</sup> The defendant refused.<sup>96</sup> The district court granted the defendant's motion to dismiss on the ground that a landlord cannot violate the FHA by refusing to waive generally applicable fees on behalf of a handicapped person.<sup>97</sup> The Ninth Circuit reversed, stating: "As the language of § 3604(f)(3)(B) makes clear, the FHAA imposes an affirmative duty upon landlords reasonably to accommodate the needs of handicapped persons."<sup>98</sup> The court rejected the notion that because the requested waivers applied only to financial costs, as opposed to other forms of accommodation to the tenant, they could not be considered a "reasonable accommodation" under the Act: "[T]he history of the FHAA clearly establishes that Congress anticipated that landlords would have to shoulder certain costs involved, so long as they are not unduly burdensome."<sup>99</sup>

*Wright v. Rocks*, was a unique case in which the Committee and cooperating counsel obtained an unusually powerful result.<sup>100</sup> Mr. Wright, who was hearing and visually impaired, applied for an apartment in Prince George's County, Maryland, and was told that his income was insufficient to rent the apartment.<sup>101</sup> He offered to pay one year's rent in advance, but was still rejected.<sup>102</sup> A disability counselor subsequently spoke with a rental agent at the complex, who made dis-

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92. See generally *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413 (9th Cir. 1994).

93. *Id.* at 1415.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Cal. Mobile Home Park Mgmt.*, 29 F.3d at 1381-82.

99. *Id.*

100. *Wright v. Rocks*, No. 8:94-cv-03506 (D. Md. Dec. 19, 1994).

101. WASH. LAW. COMM., ANNUAL REPORT, 1996, at 25 (1996); WASH. LAW. COMM., MAKING A DIFFERENCE: REFLECTIONS ON EQUAL JUSTICE at 10-13 (1998).

102. *Id.*

criminy remarks about Mr. Wright and offered to steer him to another complex.<sup>103</sup> The counselor recorded the conversation, which led to a settlement between the parties.<sup>104</sup> The settlement entailed a payment of \$160,000 in damages and a five-year consent decree that obligated the defendant to affirmatively market apartments to persons with disabilities and establish a procedure for offering them reasonable accommodations.<sup>105</sup> Most noteworthy was that Mr. Wright was provided with an apartment, rent-free, for the rest of his life.<sup>106</sup>

Another disability discrimination case helped shape the law on insurance redlining.<sup>107</sup> The plaintiffs were homeowners who rented their house out to groups of disabled persons.<sup>108</sup> When they sought to convert their homeowners' insurance policies to landlord policies, the insurance companies refused to do so and cancelled the existing policies.<sup>109</sup> The Committee and cooperating counsel brought suit on behalf of the landlords and the FHCGW alleging violations of the FHA and the Americans with Disabilities Act.<sup>110</sup> The district court denied defendants' motion to dismiss the FHA claim arguing that denial of insurance does not make housing unavailable.<sup>111</sup> The court reasoned:

If, in order to rent to disabled persons, a landlord must risk losing her home through loss of mortgage financing, loss of catastrophic insurance, and loss of liability insurance, she will be disinclined to rent to disabled persons. Such powerful disincentives to rent to disabled persons, make housing unavailable to them.<sup>112</sup>

The court also held that denial of insurance violated the provision of the FHA prohibiting discrimination in the "provision of services or facilities" in connection with a dwelling.<sup>113</sup>

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1 (D.D.C. 1999).

108. *Id.* at 2.

109. *Id.* at 3.

110. *Id.* at 1.

111. *Id.* at 6, 8.

112. *Id.* at 6.

113. *Wai*, 75 F. Supp. 2d at 7; see Section II below discussing the amicus brief filed by the Committee and cooperating counsel in *Nat'l Ass'n for Advancement of Colored People v. Am. Family Mut. Insur.*, 978 F.2d 287 (7th Cir. 1992), which resulted in a similar holding on application of the FHA to insurance redlining.

## H. Source of Income Discrimination

Many jurisdictions, including D.C. and suburban Maryland, have enacted ordinances that prohibit discrimination based on source of income.<sup>114</sup> This means that a property owner cannot lawfully refuse to rent to persons who hold Housing Choice Vouchers, formerly known as Section 8(a) vouchers.<sup>115</sup> These vouchers are issued under a federal program and administered by local public housing agencies (“PHAs”), which receive funds from HUD to administer the vouchers.<sup>116</sup> The vouchers are designed to assist low income, elderly and disabled persons and families to obtain safe, decent and sanitary housing in the private market.<sup>117</sup> The PHA pays a subsidy to the property owner on behalf of the voucher holder covering a substantial portion of the rent, with the voucher holder paying the balance.<sup>118</sup> Because of the nature of voucher holders, discrimination against them has a disparate impact on minorities and disabled persons. Thus, the Committee has been active in challenging source of income discrimination, with the assistance of testing by the ERC. For example, in *Equal Rights Center v. E & G Prop. Servs., Inc.*, the ERC brought suit challenging E&G’s admitted refusal to accept vouchers under the D.C. Human Rights Act (“DCHRA”).<sup>119</sup> The court rejected E&G’s legal challenges to application of the DCHRA’s prohibition of source of income discrimination to its refusal to accept vouchers, and granted the ERC’s partial motion for summary judgment on liability.<sup>120</sup> The case settled on the eve of trial, ensuring that nearly 1,500 apartment units in D.C. will be made available to Housing Choice Voucher holders.<sup>121</sup>

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114. See POVERTY & RACE RESEARCH ACTION COUNCIL (PRRAC), Keeping the Promise: Preserving and Enhancing Housing Mobility in the Section 8 Housing Choice Voucher Program, Appendix B: State, Local, and Federal Laws Barring Source-of-Income Discrimination, 1 [*hereinafter PRRAC Report*], <https://prrac.org/pdf/AppendixB.pdf>; U.S. DEP’T OF HOUSING AND URBAN DEV. AND U.S. DEP’T OF JUSTICE, JOINT STATEMENT, *Reasonable Accommodations Under the Fair Housing Act*, <https://www.justice.gov/crt/us-department-housing-and-urban-development>.

115. See *PRAAC Report*, at 1.

116. U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, Housing Choice Vouchers Fact Sheet, [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/hcv/about/fact\\_sheet](https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet) (last visited Oct. 10, 2018).

117. *Id.*

118. *Id.*

119. Order Denying Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction and Denying Plaintiff’s Motion for Leave to Supplement the Complaint, *Center v. E & G Property Servs.*, No. 05–2761, 2006 WL 6365413, at \*1 (D.C. Sup. Ct. Nov. 1, 2006).

120. *Id.* at \*5.

121. 13 WASH. LAW. COMM, FALL 2007 UPDATE 7 (2007).

## II. AMICUS BRIEFS

Apart from direct litigation of precedent-setting fair housing cases, the Committee and cooperating counsel have historically contributed to the development of fair housing law by authoring a series of amicus briefs in important housing cases.<sup>122</sup> The Introduction refers to the Committee's brief in *Havens Realty Corp. v. Coleman*, which established the standing of testers and testing organizations to bring actions against firms accused of violating the FHA.<sup>123</sup> There are many other examples, but two cases bear mention.

In *Nat'l Ass'n for Advancement of Colored People v. Am. Family Mut. Ins. Co.*, the Committee and cooperating counsel filed an amicus brief on behalf of the National Fair Housing Alliance in an important case establishing insurance redlining as a violation of the FHA.<sup>124</sup> The NAACP brought suit alleging that insurance redlining—"charging higher rates or declining to write insurance for people who live in particular areas"—violated the FHA.<sup>125</sup> The district court dismissed the claims under the FHA, and the Seventh Circuit reversed.<sup>126</sup> The court held that insurance redlining violates the prohibitions in both § 3604(a) against refusing to sell or rent to protected classes or acting to "otherwise make [housing] unavailable" and in § 3604(b) against discriminating "in the provision of services" relating to the sale or rental of a dwelling.<sup>127</sup> In a memorable formulation of the impact of insurance redlining, the court stated: "No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable."<sup>128</sup>

In *City of Edmonds v. Oxford House, Inc.*, the Committee and cooperating counsel filed a brief in support of a group home for the disabled that was accused by the City of violating zoning ordinances by leasing a home in an area zoned for single family housing.<sup>129</sup> Oxford House complained that the City of Edmonds had violated the FHA by refusing to make a reasonable accommodation allowing Ox-

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122. See e.g., Brief for the Lawyers' Committee for Civil Rights Under Law, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 367 (1982). See generally Brief of Amici Curiae Washington Lawyers' Committee for Civil Rights & Urban Affairs, *Montgomery Cnty. v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr.*

123. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 367 (1982).

124. *Nat'l Ass'n for Advancement of Colored People v. Am. Family Mut. Insur. Co.*, 978 F.2d 287, 290 (7th Cir. 1992).

125. *Id.*

126. *Id.* at 302.

127. *Id.* at 297.

128. *Id.*

129. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 730 (1995).

ford House to lease a single-family home for care of 10–12 substance abusers.<sup>130</sup> The district court dismissed the complaint on the basis that the City ordinance’s definition of “family,” which included “a group of five or fewer persons who are not related,” fell within the FHA exemption for “any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”<sup>131</sup> The Ninth Circuit reversed and remanded for further consideration of the claims asserted by Oxford House and, in a consolidated case, the United States.<sup>132</sup> In affirming the Ninth Circuit’s decision, the Supreme Court held that the City’s definition of “family” did not fall within the maximum occupancy exemption of the FHA, reasoning as follows:

The defining provision at issue describes who may compose a family unit; it does not prescribe “the maximum number of occupants” a dwelling unit may house. We hold that § 3607(b)(1) does not exempt prescriptions of the family-defining kind, *i.e.*, provisions designed to foster the family character of a neighborhood. Instead, § 3607(b)(1)’s absolute exemption removes from the FHA’s scope only total occupancy limits, *i.e.*, numerical ceilings that serve to prevent overcrowding in living quarters.<sup>133</sup>

*City of Edmonds* thus established an important precedent regarding the application of residential zoning ordinances to group homes for the disabled.

### III. EMERGING ISSUES

#### A. Collateral Consequences of Criminal Convictions

The Committee has recently begun focusing on ways to address the collateral consequences of incarceration on access to employment and housing. Nationwide, the prison population consists predominantly of African American males, who upon release encounter many forms of discrimination that deter their re-integration into society.<sup>134</sup> This problem is particularly acute in the D.C. area and has a disparate impact on African Americans who are disproportionately represented

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130. *Id.* at 729.

131. *Id.* at 730 (citing 42 U.S.C. § 3607(b)(1) (1995)).

132. *Id.*

133. *Id.* at 728 (emphasis in original).

134. Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, AMERICAN PROGRESS (Mar. 13, 2012), <https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>.

in the prison population.<sup>135</sup> Ninety-one percent of the District's prison population is African American, despite the fact that the City is almost half white.<sup>136</sup> The highest rates of incarceration are from wards 7 and 8.<sup>137</sup> The impact on families is significant and is a driving factor not only in income and wealth inequality but also in limiting social mobility.

The Committee and cooperating counsel are pursuing a series of investigations and legal actions challenging policies discriminating against persons with criminal records in the provision of housing. In *Alexander v. Edgewood Mgmt.*, the Committee brought an action alleging that the defendant's denial of Mr. Alexander's application for an apartment at three complexes under its management was discriminatory.<sup>138</sup> The complaint alleged that Edgewood's denial of housing violated its own Tenant Selection Plan ("TSP") since the complexes acted on the basis of an overturned conviction from the 1990s and a 2007 misdemeanor conviction, both of which were outside the timeframe for consideration under the TSP.<sup>139</sup> More importantly, application of the TSP would have a disparate impact on African Americans given their disproportionate representation in the prison community. In July 2016, the court denied the defendants' motion to dismiss.<sup>140</sup> The court ruled that Mr. Alexander had appropriately cited prison population statistics from D.C. in support of his disparate impact claim: "Given the demographics in the area and historical conviction rates, African Americans are statistically more likely to fall into that category and thus be excluded by defendants' unpublished policy."<sup>141</sup> The court further ruled that the defendants' broad policy of excluding persons with non-violent, non-drug-related convictions, such as Mr. Alexander's 2007 misdemeanor conviction, "may explicitly run afoul of the law as articulated in recent HUD guidance."<sup>142</sup> The *Alexander* ruling will be applicable to similar cases challenging

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135. *A Capitol Concern: The Disproportionate Impact of the Justice System on Low-income Communities in DC*, JUST. POL'Y INST., 5 (2010), [http://www.justicepolicy.org/uploads/justice-policy/documents/10-07\\_exs\\_capitolconcern\\_ac-ps-rd-dc.pdf](http://www.justicepolicy.org/uploads/justice-policy/documents/10-07_exs_capitolconcern_ac-ps-rd-dc.pdf).

136. *Id.*

137. *Id.* at 1; see also DC DEP'T OF CORRECTIONS FACTS AND FIGURES 11 (2013), <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DC%20Department%20of%20Corrections%20Facts%20n%20Figures%20June%202013.pdf>.

138. *Alexander v. Edgewood Mgmt.*, No. 15-01140 (RCL), 2016 WL 5957673, at \*1 (D.D.C. July 25, 2016).

139. *Id.*

140. *Id.* at \*4.

141. *Id.*

142. *Id.* at \*4.

denial of housing opportunities based on prior convictions, some of which are being evaluated by the Committee as of this writing.

B. Affordable Housing and Gentrification

Apart from discrimination against individuals and families, the availability of affordable housing has diminished as a result of gentrification, particularly in some formerly low-income areas of D.C. like the Shaw-U Street neighborhoods.<sup>143</sup> The Committee and cooperating counsel have challenged attempts to eliminate affordable housing for low income families in cases such as *One DC v. Mid-City Financial Corporation*.<sup>144</sup> As described in the 2017 Wiley A. Branton Awards program honoring One DC with the Alfred McKenzie Award:

In August of 2016, ONE DC, along with a group of families, filed a class action lawsuit challenging the discriminatory redevelopment of Brookland Manor, an affordable housing complex located in Northeast DC. More than 150 of the units house large families that have made their home on the property for generations. Brookland Manor is one of the few remaining DC communities with the four- and five-bedroom apartments necessary to provide safe, adequate housing for these families. Appallingly, the developer “justified” this discrimination claiming that large families are “not consistent with the creation of a vibrant new community.”<sup>145</sup>

Litigation of this case is ongoing.<sup>146</sup>

Whether discrimination in the provision of housing or housing services is exposed by complaints from individuals who are injured by the discrimination or tests conducted by such organizations as the ERC, the Committee will continue to use its own resources, as well as leveraging the resources of cooperating law firms that provide pro bono services, to combat housing discrimination in all of its forms.

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143. Sam Gringlas, *Old Confronts New in A Gentrifying D.C. Neighborhood*, NAT'L PUB. RADIO, (Jan. 16, 2017), <https://www.npr.org/2017/01/16/505606317/d-c-s-gentrifying-neighborhoods-a-careful-mix-of-newcomers-and-old-timers>.

144. *Borum v. Brentwood Village*, 218 F. Supp. 3d 1, 6 (D.D.C. 2016).

145. CIVIL RIGHTS, ANTI-POVERTY, AND EQUAL JUST. ADVOC., 5 (2017), [http://www.washlaw.org/pdf/wlc\\_annual\\_luncheon\\_program\\_2017.pdf](http://www.washlaw.org/pdf/wlc_annual_luncheon_program_2017.pdf).

146. *Id.*



# The Washington Lawyers' Committee's Fifty-Year Battle for Racial Equality in Places of Public Accommodation

ROBERT B. DUNCAN\* AND KARL M.F. LOCKHART†

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## INTRODUCTION

The Washington Lawyers’ Committee for Civil Rights and Urban Affairs was established in 1968, just four years after the enactment of the landmark Civil Rights Act of 1964. A small group of concerned Washington, D.C. lawyers founded the Committee in response to a 1968 National Advisory Commission on Civil Disorders report identifying racial segregation and poverty as root causes of the city riots that erupted during the late 1960s.<sup>1</sup> The report’s recommendations fo-

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1. *History*, WASH. LAW. COMM., <http://www.washlaw.org/about-us/history> (last visited Sept. 15, 2018).

### *Racial Equality in Places of Public Accommodation*

cused on eliminating discrimination in education, housing and employment opportunity; and on dedicating the public resources necessary to ensure all Americans have “a minimum standard of decent living.”<sup>2</sup> Since its inception, the Lawyers’ Committee has accepted the Commission’s clarion call, as other articles in this volume demonstrate, working tirelessly to fight the effects of poverty and to ensure equal access to schools, housing and jobs.

However, the Commission emphasized that the national action necessary to achieve the Report’s “major goal[,] the creation of a true union—a single society and a single American identity”—would require more than simply eliminating “barriers to . . . choice of jobs, education, and housing” and helping “[the poor] to deal with the problems that affect their own lives.”<sup>3</sup> What was also critically needed was “increase[d] communication across racial lines to destroy stereotypes, halt polarization, end distrust and hostility, and create common ground for efforts toward public order and social justice.”<sup>4</sup> In support of this then-transformational objective, the Washington Lawyers’ Committee also took on the challenge of integrating those aspects of everyday life where frequent interaction between and among strangers is most common—the public places where consumers make purchases, find entertainment, and utilize services. As this article will describe, some of the Committee’s most impactful and important work has come in this “public accommodations” arena over the years.

Title II of the 1964 Act was intended, as President Kennedy proclaimed in 1963, to ensure it would be “possible for American consumers of any color to receive equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores, without being forced to resort to demonstrations in the street.”<sup>5</sup> In service of this integrative goal, the Lawyers’ Committee enlisted and worked with private firms to investigate and litigate public accommodation cases in the Washington area from the time of the Committee’s creation and the early days of the post-Civil Rights Act

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2. *Id.*; *Report of The National Advisory Commission on Civil Disorders*, NAT’L ADVISORY COMM’N ON CIV. DISORDERS, 12 (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf> [hereinafter NAT’L ADVISORY COMM’N ON CIV. DISORDERS].

3. *Report of The National Advisory Commission on Civil Disorders*, NAT’L ADVISORY COMM’N ON CIV. DISORDERS, 11 (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf>.

4. *Id.*

5. John F. Kennedy, U.S. President, Civil Rights Address (July 11, 1963), <http://www.americanrhetoric.com/speeches/jfkcivilrights.htm>.

desegregation movement.<sup>6</sup> Then, starting in 1988, the Committee played a leading role in a series of significant, high-profile national civil rights cases against major hotels and restaurant chains.<sup>7</sup> The Committee has since steadfastly pursued the elimination of race discrimination uncovered by diverse consumers, in the D.C. area and beyond, seeking to utilize the services of hotels, restaurants, rental car agencies, retail stores, health clubs, taxicabs and even nightclubs.<sup>8</sup> The Committee's pioneering fight against consumer racism—on-going even now more than forty years after the legendary sit-ins at segregated lunch counters—has resulted in important victories for victims of discrimination and changed the way companies do business.

This Article is written as part of a series of articles to commemorate the Washington Lawyers' Committee's fiftieth anniversary. For the first time, it seeks to chronicle the Committee's role in combatting discrimination in the provision of public accommodations over its fifty years, and to place this work in the context of the broader development of applicable law and the evolution of American society. While cases that have set beneficial precedent or generated landmark settlements deserve the attention they receive, what has been truly remarkable about the Lawyers' Committees' achievements in this area are the innovative and inclusive strategies the Committee has employed to pursue its work. The Committee has successfully marshaled the efforts of prominent members of the private bar and partnered with leading civil society and civil rights organizations. From its effective coordination with the Department of Justice to developing and pioneering the use of illuminating empirical studies, the Washington Lawyers' Committee's groundbreaking methods have strengthened the effectiveness of the use of civil rights litigation to challenge and modify the behavior of discriminating businesses that provide public accommodations.<sup>9</sup> These innovations should continue to serve the interests of promoting "a single society and a single American identity" in the face of today's changing political and societal divides, and the evolution of disruptive new technologies that are shifting the ways public accommodations are delivered.<sup>10</sup>

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6. WASH. LAW. COMM., *supra* note 1.

7. *Id.*

8. *Id.*

9. *See generally id.*

10. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *supra* note 2, at 11.

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Parts II and III of this Article will review the history of public accommodations law in the United States and discuss the most important work of the Washington Lawyers' Committee over the years in the public accommodations space. We recount the evolution of public civil rights law and practice in Part II; from the end of the Civil War Reconstruction era and Jim Crow, through the Supreme Court's decisions in *Plessy v. Ferguson* and the *Civil Rights Cases*, to the Civil Rights Movement and Title II of the Civil Rights Act of 1964. We also describe how Section 1981 of the Reconstruction-era Civil Rights Act of 1866 has been used since the 1960's to broaden and strengthen enforcement of civil rights in the public accommodations arena. In Part III, we then review how the Washington Lawyers' Committee put Title II and Section 1981 into practice as it first responded to "lunch-counter" like refusal to serve discrimination in the 1970's and early 80's, and then handled less obvious refusal to serve and nationwide differential treatment cases in the 80's and 90's. We also review how the Lawyers' Committee later focused on the effects of resistant residual racial bias that still triggered "situational" differential treatment problems in the late 90's, and well into the first decade of the early twenty-first century.

Part IV of this Article will look at where the promise of equal treatment in public accommodations stands today; identifying outstanding relevant legal questions and issues, highlighting new age/sharing economic industries likely to present future public accommodations discrimination issues, and hypothesizing on the potential impacts of the Trump phenomenon and presidency in this area. We will conclude, in Part V, by recognizing the impact public accommodations civil rights efforts have had to date, and close with thoughts on the need for public interest organizations such as the Lawyers' Committee and the private bar to continue to be vigilant in championing consumer integration going forward.

### I. PUBLIC ACCOMMODATIONS CIVIL RIGHTS LAW AND PRACTICE FROM THE CIVIL WAR TO THE 1964 CIVIL RIGHTS ACT AND THE BIRTH OF THE WASHINGTON LAWYERS' COMMITTEE

The story of public accommodations civil rights law in the United States begins at the close of the Civil War. In 1865, Congress promptly ratified the Thirteenth Amendment to the U.S. Constitution, banishing slavery when the Confederate states surrendered to

end the Civil War.<sup>11</sup> During the post-war Reconstruction era, federal troops occupying Southern states protected the newly installed Republican governments looking to grant full citizenship to freed slaves and to offer them the opportunity to participate in the broader society.<sup>12</sup> The Fourteenth and Fifteenth Amendments, ratified in 1868 and 1870, respectively, guaranteed former slaves equal protection of the laws and the right to vote.<sup>13</sup> Southern Blacks became increasingly politically and socially active, and equal interaction between the races gradually became more common.<sup>14</sup>

But federal troops were withdrawn from the South as part of the 1877 Compromise of the disputed presidential election between Democrats, who controlled the House of Representatives and wanted the troops out, and Republicans, whose candidate was permitted to assume the presidency in exchange for their agreement to the removal of the troops.<sup>15</sup> The departure of the soldiers brought the period of Reconstruction to an end, and enabled the implementation by new “redeemer governments” of Jim Crow laws enforcing segregation and restricting Black participation in virtually all aspects of public society, from access to bathrooms and water fountains to service in restaurants and the use of sidewalks.<sup>16</sup> Institutional and societal racism quickly returned to the American South with full force.

In 1883, the U.S. Supreme Court overturned the Civil Rights Act of 1875.<sup>17</sup> The Act had been put in place to ensure freedom of access to hotels, inns, and other places of public accommodation, deriving its authority from the Fourteenth and Fifteenth Amendments.<sup>18</sup> But the Court rejected this legislative justification in the *Civil Rights Cases*,<sup>19</sup> a group of cases involving African-Americans suing private providers of a public accommodation that excluded Blacks from state law sanctioned “whites only” rooms, sections, or services.<sup>20</sup> The Supreme

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11. *From Emancipation to the Present*, ENCYCLOPEDIA OF AFRICAN-AMERICAN CIVIL RIGHTS 520–22 (Charles D. Lowery & John F. Marszalek eds., 1992).

12. PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 79–80 (1999).

13. *From Emancipation to the Present*, *supra* note 12, at 186–87.

14. MICHAEL L. LEVINE, *AFRICAN AMERICANS AND CIVIL RIGHTS: FROM 1619 TO THE PRESENT* 98–103 (1996).

15. *Id.* at 105–06.

16. *Id.* at 114–17; KLINKNER, *supra* note 13, at 90–92.

17. *Id.* at 90; *see* Civil Rights Act of 1875, ch. 114, 43 Stat. 335–37 (1875).

18. Michael Bitzer, 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 300 (Paul Finkelman eds., 2013).

19. *Civil Rights Cases*, 109 U.S. 3, 14 (1883).

20. *Id.* at 4–9.

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Court ruled that this part of the Act was unconstitutional because it did not follow from the Fourteenth Amendment<sup>21</sup> and it impinged on individual private property owners rights to control their businesses as they saw fit.<sup>22</sup> A Louisiana law mandating segregated train cars was then upheld in the now notorious 1896 Supreme Court decision in *Plessy v. Ferguson*, which enunciated the infamous “separate but equal” doctrine for public facilities.<sup>23</sup> This inauspicious state of affairs was to continue for the next half-century.

Democratic President Harry S. Truman’s comments on the importance of ending discrimination, and his decision to desegregate the military in 1948,<sup>24</sup> were early signs of a shift in the many decades long tide of institutionalized racism and public segregation that Democratic national political dominance and the Supreme Court’s *Civil Rights Cases* and *Plessy v. Ferguson* decisions had nurtured in the South. The Civil Rights Movement began to slowly dismantle Jim Crow restrictions on African-Americans in the 1950’s, and the Supreme Court disavowed the “separate but equal” concept in *Brown v. Board of Educ.* in 1954.<sup>25</sup> While the Southern states’ “massive resistance” to the integration of public schools, and to desegregation in general, continued largely unabated,<sup>26</sup> civil rights advocates turned increasingly from courts to direct actions targeting restaurants and other places of business that discriminated based on race.<sup>27</sup> In the year following the famous 1960 sit-in at the Woolworth’s lunch counter in Greensboro, North Carolina, for example, an estimated 70,000 people participated in sit-ins at “restaurants, lunch counters, and libraries; ‘stood in’ at movie theaters; ‘kneeled in’ at churches; and ‘waded in’ at beaches.”<sup>28</sup>

These protests and perhaps even more importantly, the media coverage of violent responses to them by racist officials and white supremacists proved to be an extremely effective way of bringing attention to the discrimination that was taking place in these sorts of locations.<sup>29</sup> Democratic President Lyndon Johnson signed the John F.

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21. *Id.* at 18.

22. *Id.* at 14.

23. *See generally* *Plessy v. Ferguson*, 163 U.S. 537 (1896).

24. LEVINE, *supra* note 14, at 174–76.

25. *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

26. *See generally* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 80 (Clive Webb, ed., 2005).

27. LEVINE, *supra* note 14, at 179–86.

28. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY, Oxford Univ. Press, 373 (2004).

29. *Id.* at 435–36, and ch. 7.

Kennedy-authored Civil Rights Act of 1964<sup>30</sup> into law ten years after the Supreme Court decided *Brown v. Board of Education*. While the legislation sought to end discrimination in several contexts, Title II of the Act made it illegal to “withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive any person of”<sup>31</sup> the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation”<sup>32</sup> because of “race, color, religion, or national origin.”<sup>33</sup> The 1964 Act relied on Congress’s power to regulate activities impacting interstate commerce in an effort to insulate the Act from the challenge that doomed the earlier Civil Rights Act of 1875.<sup>34</sup>

This time, the Supreme Court, concluding that Congress had a rational basis for finding that segregation in restaurants had a “direct and highly restrictive effect upon interstate travel by Negroes,”<sup>35</sup> upheld the civil rights legislation as a constitutional regulation of commerce in two landmark decisions. In *Katzenbach v. McClung*, the Court held that a barbeque restaurant just off a major interstate highway in Birmingham, Alabama, could no longer refuse to serve Black guests.<sup>36</sup> The Court reached a similar result in connection with a whites-only hotel in *Heart of Atlanta Motel, Inc. v. U.S.*<sup>37</sup> Within six months of its enactment, Title II thus became a battle-tested implement for combatting discrimination in public accommodations.

While the changing legal landscape resulted in some resistance—and resulting violence in some locations—,<sup>38</sup> it has been said that many, perhaps most, hotels, restaurants and other places of public accommodation altered their formal segregationist policies and behavior to comply with the equal treatment mandate of Title II fairly promptly

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30. 42 U.S.C. § 1981 (1991).

31. *Id.* § 2000a-2(a).

32. *Id.* § 2000a(a).

33. *Id.*

34. *Id.* § 2000a(b). The section defining “public accommodation” specifically includes references to interstate commerce. *Id.*

35. *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964).

36. *Id.* at 304.

37. *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 241 (1964).

38. Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?*, 36 *HAMLIN J. PUB. L. & POL’Y* 1, 13–15 (2015) (citing *U.S. v. Clark*, 249 F. Supp. 720 (S.D. Ala. 1965)) (responses of Sherriff Clark of Selma Alabama to efforts of African Americans to eat at the Thirsty Boy Drive-In and see a show from the formerly white section of the Wilby Theatre); *U.S. v. Warren Co.*, 10 *Race Relations Law Reporter* (RRLR) 1293 (S.D. Ala. 1965) (other Selma restaurants); *Williams v. Connell and Bolden v. Allen*, 9 *RRLR* 1427, and *Plummer v. Brock*, 9 *RRLR* 1399 (M.D. Fla. 1964) (St. Augustine, Florida restaurants).

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after its enactment and the early failed challenges.<sup>39</sup> In fact, once businesses serving a particular market were required to integrate, they tended to increase their customer base, and thereby profit by doing so (or lose out on the expanded customer base if they refused).<sup>40</sup> Some southern business communities actually welcomed Title II for its ability to provide cover for expanding markets and eliminating a barrier to investment from outside the South.<sup>41</sup> In his 1965 and 1966 annual reports, the U.S. Attorney General reported “gratifying” levels of “voluntary[y] desegregate[ion]” in places of public accommodation in southern cities known to have had serious racial issues, and “a high incidence of voluntary compliance . . . in cities and urban areas,” while acknowledging “significant patterns of non-compliance . . . in rural areas in several Southern states.”<sup>42</sup>

Because Title II was by political and practical necessity aimed at reducing the dramatic disruption occurring due to high-profile sit-ins and lunch counter protests, however, certain features of Title II curtailed its effectiveness from early on as a tool for realizing the goal of equal public integration when individualized resistance did occur. First, it was limited to places of public accommodation that could be said to fall within the remit of Congress’s power to regulate under the Commerce Clause. Since Title II emerged against the backdrop of the long and winding history of the civil rights movement, state Jim Crow laws, and prior Supreme Court rulings described above, its drafters had specific places of discrimination in mind.<sup>43</sup>

In fact, the statute enumerates fairly clear-cut categories of enterprises that count as “public accommodations.”<sup>44</sup> Though many cases

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39. See Landsberg, *supra* note 38, at 13 (citing Taylor Branch, *Pillar of Fire: America in the King Years, 1963–65* at 388 (1989)); see also REBECCA E. ZEITLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 122 (2006).

40. Landsberg, *supra* note 38, at 23–24.

41. *Id.* at 19 (citing CLAY RISEN, *THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT* 247 (2014)).

42. *Id.* at 16 (citing ATTY. GEN., *ANNUAL REPORT* 182 (1965); ATTY. GEN. *ANNUAL REPORT* 207 (1966)).

43. Telephone Interview with John Relman, Founder/Director, Relman, Dane & Colfax (July 17, 2017) [hereinafter J. Relman 7/17/17]; see also *U.S. v. DeRosier*, 332 F. Supp. 316, 319 (S.D. Fla. 1971), *rev’d on other grounds*, 473 F.2d 749 (stating that from the very language of the statute, it seems clear that Congress did not intend to include every public place).

44. See 42 U.S.C. § 2000a(b) (“Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally en-

involving restaurants, hotels, or places of entertainment were relatively straightforward, the applicability of the statute to other businesses could be less clear.<sup>45</sup> While broad, the specificity of the definition of “public accommodation” in the statute presented opportunities for challenges to enforcement lawsuits in less clear-cut contexts, and in some cases relieved discriminating businesses from responsibility under it.<sup>46</sup> In other instances, courts read the statute broadly to prohibit discriminating businesses from evading its reach by attempting to re-characterize themselves as establishments that would not meet the statutory definitions.<sup>47</sup>

Second, Title II was designed primarily as a tool to enable the government to take action to enforce the federal civil rights provisions. As a result, remedies under the Act were limited to injunctive relief, and while private litigants could bring claims under Title II, they could not obtain damages.<sup>48</sup> The incentives for private assistance in enforcement were thus extremely limited given the unavailability of monetary relief.<sup>49</sup> Early litigation—most of which was initiated by the

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gaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.”).

45. See, e.g., *Bartley v. Virgin Grand Villas*, 197 F. Supp. 2d 291, 296 (D. V.I. 2002) (finding that timeshare at a resort hotel is not a place of public accommodation under Title II); *Dean v. Ashling*, 409 F.2d 754, 755–56 (5th Cir. 1969) (finding that a trailer park is a place of public accommodation); *U.S. v. DeRosier*, 332 F. Supp. 316, 317 (S.D. Fla. 1971), *rev'd on other grounds*, 473 F.2d 749 (finding that a bar with jukebox and pool table is a “place of entertainment” and thus covered by Title II); *Fazzio Real Estate Co. v. Adams*, 396 F.2d 146, 148 (5th Cir. 1968) (finding that a bowling alley with a snack bar inside was covered by Title II).

46. See, e.g., *Welsh v. Boy Scouts of Am.*, 787 F. Supp. 1511, 1541 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir. 1993) (finding that the Boy Scouts is not a public accommodation); *Halton v. Great Clips, Inc.*, 94 F. Supp. 2d 856, 862 (N.D. Ohio 2000) (finding that hair salons are not a public accommodation).

47. See, e.g., *U.S. v. La. Rest. Club*, 256 F. Supp. 151, 154 (W.D. La. 1966) (enjoining association of restaurants from evading the statute by claiming they were private clubs); *Presley v. City of Monticello*, 395 F.2d 675, 676 (5th Cir. 1968) (finding that gas stations are public accommodations); *U.S. v. Beach Assoc., Inc.*, 286 F. Supp. 801, 807 (D. Md. 1968) (finding that privately-owned beaches charging admission are public accommodations); *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474, 477 (E.D. Va. 1966) (finding that golf courses are public accommodations); *Rousseve v. Shape Spa for Health & Beauty, Inc.*, 516 F.2d 64, 67 (5th Cir. 1975), *reh'g denied* 520 F.2d 943 (finding that health clubs and spas are public accommodations); *Evans v. Seaman*, 452 F.2d 749, 751 (5th Cir. 1971), *cert. denied* 92 S.Ct. 2493, 408 U.S. 924, 33 L.Ed.2d 335 (finding that roller skating rinks are public accommodations).

48. J. Relman 7/17/17, *supra* note 43; see also Drew S. Days III, “Feedback Loop”: *The Civil Rights Act of 1964 and Its Progeny*, 49 ST. LOUIS U. L.J. 981, 985 (2005).

49. J. Relman 7/17/17, *supra* note 43; Amanda G. Main, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 BRANDEIS L.J. 289, 314–15 (2000).

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Justice Department—reflected this government action dependency.<sup>50</sup> Moreover, the lack of financial risk also constituted a figurative racist thumb on the non-compliance risk/benefit scale for businesses that were inclined not to embrace integration, or even to affirmatively reject it absent actual government intervention.<sup>51</sup>

In response to these constraints, private civil rights litigators dusted off the largely dormant Section 1981 of the Civil Rights Act of 1866,<sup>52</sup> which had been drafted and passed in the Reconstruction era for the purpose of confirming and reinstating the rights of newly-freed slaves.<sup>53</sup> Although brief, the statute is powerful. It simply states that African-Americans have the same rights as anyone else in the country to make or enforce a contract.<sup>54</sup> This gave activists broad power to challenge discriminatory practices of a wide variety of businesses—even those that were not designated as public accommodations under Title II.<sup>55</sup> Refusal to conduct commerce equally with people of different races could now support a claim by a victimized private party for damages, even if the business involved did not meet the technical definition of a public accommodation under Title II. Moreover, compensatory damages were obtainable, creating incentives, and recompense, for private enforcement activity.<sup>56</sup>

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50. J. Relman 7/17/17, *supra* note 43; *see, e.g.*, *U.S. v. DeRosier*, 473 F.2d 749, 750 (5th Cir. 1973) (Justice Department suit to integrate bars using Title II); *Katzenbach v. Gulf-State Theaters, Inc.*, 256 F. Supp. 549, 551 (N.D. Miss. 1966) (action to integrate movie theaters) (Katzenbach was the Attorney General); *see generally* *Katzenbach v. McClung*, 379 U.S. 294 (1964) (case brought by government to integrate restaurants); *Heart of Atlanta Motel Inc. v. U.S.*, 379 U.S. 241 (1964) (case brought by government to integrate hotels).

51. J. Relman 7/17/17, *supra* note 43; John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 *HASTINGS L.J.* 1135, 1135–39 (1990).

52. To note, the Civil Rights Act of 1866 is a different act from the Civil Rights Act of 1875, which, as mentioned previously, was largely struck down by the *Civil Rights Cases*.

53. J. Relman 7/17/17, *supra* note 43.

54. 42 U.S.C § 1981(a)–(b) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”).

55. In fact, the Lawyers’ Committee represented one of the plaintiffs in *Gonzales v. Fairfax-Brewster Sch.*, 363 F. Supp. 1200, 1200 (E.D. Va. 1973), which the Supreme Court upheld when consolidated into *Runyon v. McCrary*, 427 U.S. 160 (1976). In *Runyon*, the Supreme Court held that Section 1981 was applicable to “purely private acts of racial discrimination,” such as the denial of entry to a private school in that case, contrary to the earlier ruling in the *Civil Rights Cases*. *Id.* at 170, 192 (White, J., dissenting).

56. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 421 (1968) (discussing case under §1981 regarding housing discrimination). Though alleged violations of Title II were withdrawn prior to

II. THE WASHINGTON LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS AND URBAN AFFAIRS PUBLIC  
ACCOMMODATIONS CIVIL RIGHTS  
WORK AND DEVELOPMENTS  
FROM 1968 TO 2017

It was into this milieu that the Washington Lawyers' Committee entered upon its formation in 1968 as an affiliate of the National Lawyers' Committee, which was founded in 1963 at the request of President Kennedy to enlist the leaders of the private bar in the effort to secure racial justice in the South.<sup>57</sup> The Washington Committee's arrival on the scene of the drive for racial equality in the D.C. area at this moment in time was both appropriate and needed. After all, the region was still recuperating from embarrassing and dangerous racial incidents that played a role in prompting the enactment of the Civil Rights Act of 1964 just a few years earlier. The city was just beginning to recover from the destructive rioting that broke out in Washington, D.C., after the assassination of Martin Luther King, Jr., in 1963,<sup>58</sup> for instance. Virginia's key role in the massive public school integration resistance movement following the *Brown* decision had only ended, reluctantly, in 1959.<sup>59</sup> Large areas of Maryland near D.C. did not even begin to desegregate public schools until the early 1960's.<sup>60</sup> Additionally, a significant portion of the state's many restaurants along its principal north-south thruway remained segregated as of the early 1960's in spite of well documented "Freedom Rider" styled sit-ins. These demonstrations were spurred by President Kennedy's pleas that restaurant owners stop refusing service to representatives of the newly decolonized African nations - that Kennedy was trying to woo away from the communists - as they traveled to D.C. from the United Nations in New York.<sup>61</sup> The D.C. metropolitan area may not have been

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trial, the court in *Gonzales* stated that Title II was not a limitation on Section 1981, thus opening the gates for plaintiffs to claim both Title II and Section 1981 violations in the same suits. *Gonzales*, 363 F. Supp. at 1205.

57. CARL M. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION 275 (1977); see generally ANN GARITY CONNELL, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW: THE MAKING OF A PUBLIC INTEREST LAW GROUP (2003).

58. Neely Tucker, *The Wreckage of a Dream*, WASH. POST (Aug. 24, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A27044-2004Aug23.html>; Denise Kersten Wills, "People Were Out of Control": Remembering the 1968 Riots, WASHINGTONIAN (Apr. 1, 2008), <https://www.washingtonian.com/2008/04/01/people-were-out-of-control-remembering-the-1968-riots/>.

59. KLARMAN, *supra* note 28, at 349, 398-99, 410, 417-18.

60. See *id.* at 347.

61. NICK BRYANT, THE BYSTANDER: JOHN F. KENNEDY AND THE STRUGGLE FOR BLACK EQUALITY 219-22 (2006).

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the “deep South,” but much of it remained segregated, had been part of the Confederacy, and was still “southern” in many ways, including with respect to race relations.

#### A. Correcting Resistant Blatant Refusals to Provide Equal Accommodations in the 70’s

Upon its formation, the Lawyers’ Committee immediately became very busy monitoring and facilitating equality of access to education, housing, employment and consumer credit, as other Articles in this 50th Anniversary collection reflect. The D.C. area experience with respect to access to public accommodations, however, seemed generally to duplicate the kind of quiet compliance that was evident elsewhere in the years after the enactment of the ’64 Act. But the Committee did begin to act on indications that some places of public accommodation were still refusing to serve African-American consumers. In the first few years of its existence, the D.C. law firm of Hogan & Hartson was enlisted to research legal remedies that might be available to take action against businesses in the city that purported to serve all citizens, but in fact did not serve inhabitants of predominantly Black residential areas.<sup>62</sup> And in 1972, the D.C. law firms of Arnold & Porter and Steptoe & Johnson joined with the Committee to challenge racial restrictions in the use of a hall for a wedding reception and to open private athletic facilities in the Washington area to African-Americans, respectively.<sup>63</sup>

In the mid-70’s, the Committee and the firm Mullin, Connor & Rhyne sued Beltway Movers, Inc. in federal court in D.C., under 42 U.S.C § 1981, challenging its refusal to carry out its contractual obligation to provide moving services, and obtaining a monetary settlement for the aggrieved integrated couple plaintiffs.<sup>64</sup> The Sachs, Greenebaum & Taylor and Johnson & Smith law firms worked with the Committee to challenge the dismissal of a Black youngster from an Annapolis Maryland Elks Lodge team participating in Anne Arundel County Youth Football League in federal court in Maryland.<sup>65</sup> The case, which rested on both Title II and § 1981, was settled favorably -

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62. WASH. LAW. COMM., ANNUAL REPORT, 1971, at 4 (1971).

63. WASH. LAW. COMM., ANNUAL REPORT, 1972, at 9 (1972).

64. WASH. LAW. COMM., ANNUAL REPORT, 1975–76, app. B at vii (1976); WASH. LAW. COMM., ANNUAL REPORT, 1976–77, at 14 (1977).

65. *Bryant v. Elks Lodge*, 622 (D. Md. # H-75-1864, H-76-801) D. MD 1976; ANNUAL REPORT, 1976–77, *supra* note 65, at 15 (1977); WASH. LAW. COMM., ANNUAL REPORT, 1977–78, app. B at vii (1978). Over twenty depositions were taken by Wash. Law. Comm. Attorney, Rod

after two years of active litigation and the denial of the Elks Lodge motion to dismiss - for monetary damages, attorneys' fees and costs, and a commitment to non-discrimination in Elk's youth programs going forward.<sup>66</sup>

Through the latter half of its first full decade, the Committee continued to challenge, often with the assistance of volunteer lawyers from law firms, one-off instances of "lunch counter"-like "refusals to serve" African-Americans. The Law Offices of Gary Howard Simpson and the Levitan, Ezrin, Cramer, West and Weinstein firm worked with the Committee to bring successful claims before the Maryland Human Rights Commission and in federal court in Maryland on behalf of a Black customer who was refused service by Rita's Beauty Parlor, for example.<sup>67</sup> Rita's agreed to injunctive relief to resolve the agency action, and to damages in settlement of the § 1981 claim.<sup>68</sup> The Committee also settled a "shopping while Black" lawsuit filed by Arnold & Porter in Maryland federal court in 1979 on behalf of an African-American mother and son who were detained and harassed by security personnel at a Korvettes department store.<sup>69</sup> The two, who had been escorted to a private room and interrogated about a claim that the boy had stolen two needles to inflate basketballs, settled the case in 1981 for \$55,000.<sup>70</sup>

As the 70's came to a close, the Committee also pursued claims to contest the denial of check cashing privileges to Blacks,<sup>71</sup> raced-based exclusion from a motel swimming pool,<sup>72</sup> and substandard service and racial insults directed at a small group of African-Americans dining at a Crystal City restaurant.<sup>73</sup> As was the case across the country, some white-owned American businesses found it difficult to put aside long-held prejudices and fears that impacted the way they operated. The

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Boggs, and an attorney from the Department of Justice also assisted with this case. Conversation with Rod Boggs. Interview with Rodd Boggs, Attorney, U.S. Department of Justice.

66. WASH. LAW. COMM., ANNUAL REPORT, 1978-79, at 16 (1979).

67. *Weaver v. Riva's Beauty Parlor*; *Weaver v. Shifflet* (D. Md. #A-79-363); WASH. LAW. COMM., *supra* note 66, at app. B at x.

68. WASH. LAW. COMM., ANNUAL REPORT, 1979-80 at 24 (1980).

69. *Alston v. Korvettes*; WASH. LAW. COMM., *supra* note 68, at 24-25, app. B at viii.

70. WASH. LAW. COMM., ANNUAL REPORT, 1981-82, at 21 (1982).

71. WASH. LAW. COMM., ANNUAL REPORT, 1980-81, at 18 (1981). Administrative charges were pursued by Allen M. Lencheck, P.C.

72. WASH. LAW. COMM., *supra* note 71. *Jackson* was handled by the law firm of Cohen & Ann and the Wash. Law. Comm.).

73. WASH. LAW. COMM., ANNUAL REPORT, 1983-84, at 12, 19 (1984). The firm of Stewart & Garland ultimately obtained a damages verdict from a jury in favor of the patrons of the restaurant in this case, *Vaughn v. Albert Lee Co.* See *id.*

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Committee marshaled the assistance of the local bar to push them along.

B. Establishing the Right to Full Fee Recovery for Refusal to Serve Legal Work in the '80's

With the dawn of the 1980's, the Committee's public accommodations efforts began to turn toward new, more complex, second-generation issues. Committee staff assisted a civil rights lawyer in Alexandria, Virginia, whose attorney's fees submission was cut in half despite his successful prosecution of a suit brought by three Black women who were denied entry to a restaurant.<sup>74</sup> The restaurant responded to the fee petition by accusing the lawyer of unlawful solicitation and champerty because he had informed the women of the restaurant's policy and urged them to conduct the "test" that precipitated the lawsuit.<sup>75</sup> Judge Merhige then awarded the lawyer only half of the fees listed in the petition, holding that the testers, having failed to recover compensatory damages, had necessarily achieved only a minimal level of success.<sup>76</sup> In *Jackson v. McCoy* (4th Cir. No. 85-2141), the Fourth Circuit reversed and remanded in favor of the lawyer, holding in a case of first impression that success in a civil rights case must be judged according to the goals of the litigation.<sup>77</sup> The Committee's work thus helped establish the important proposition that in cases involving civil rights testers, whose goal in participating is not individual "compensation," a limited damages award does not necessarily signal limited success.<sup>78</sup>

The Committee remained vigilant for refusal to serve incidents during this time period, as well, pursuing such cases even as the discriminatory activities became more subtle and veiled. The best example was a Prince Georges County, Maryland, Best Western motel's policy denying admission to those living within 60 miles of the location, most of whom "just happened" to be Black.<sup>79</sup> After the plaintiffs survived a motion for summary judgment,<sup>80</sup> the jury found for the

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74. WASH. LAW. COMM., ANNUAL REPORT, 1984-85, at 1920 (1985).

75. *Id.*

76. WASH. LAW. COMM., ANNUAL REPORT, 1985-86, at 1419 (1986); WASH. LAW. COMM., ANNUAL REPORT, 1987, at 18 (1987).

77. *Jackson v. McCoy*, 809 F.2d 785, 785 (4th Cir. 1987).

78. WASH. LAW. COMM., *supra* note 76.

79. WASH. LAW. COMM., ANNUAL REPORT, 1989-90, at 28 (1990); *Clark v. Maryland Hosp., Inc.*, 972 F.2d 338 (4th Cir. 1992).

80. *Clark v. Sims*, No. CIV. A. HAR-89-1577, 1990 WL 27867, at \*2 (D. Md. Feb. 15, 1990).

Committee's African-American clients, and awarded nominal damages.<sup>81</sup> The federal judge then awarded plaintiffs prevailing party attorney's fees, but only up to the point when plaintiffs had rejected a settlement offer.<sup>82</sup> The Fourth Circuit reversed and remanded the case, finding that rejection of a settlement offer alone is an improper basis upon which to deny a fee award.<sup>83</sup> These early successful restaurant and motel cases turned out to be precursors to cases in which the Committee would employ increasingly sophisticated testing and other investigative techniques to root out and combat the less "blatant" and trickier-to-prove "refusal to serve" approaches and excuses employed by businesses still discriminating on the basis of race in the late 1980's and 90's.

C. Confronting the Long-Standing Problem of Taxi Discrimination in D.C. in the late 80's

The Committee teamed with the firm of Schiff, Hardin & Waite to support three Black women alleging discrimination by cab drivers in the late 70's,<sup>84</sup> and had heard widespread complaints about inequitable taxi services for many years. Inspired to action by a Black Washington Post editorial staff member who wrote in 1989 about being passed up by taxi-cabs in favor of whites,<sup>85</sup> the Committee worked with Hogan & Hartson to assist a coalition of concerned community organizations seeking to analyze and document the extent of discriminatory practices in the Washington, D.C. taxi industry.<sup>86</sup> Buoyed in part by the Fourth Circuit's appreciation of the value of testing results in the civil rights context, the Committee then set out to attack the unequal treatment the research revealed using testing techniques it had pioneered in the fair housing context.<sup>87</sup> In a series of 300 tests conducted under the direction of a team of social scientists at Howard University, Black testers proved to be seven times less likely to be picked up than similarly dressed white testers standing nearby.<sup>88</sup>

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81. WASH. LAW. COMM., ANNUAL REPORT, 1994, at 41 (1994).

82. *Id.*

83. *Clark v. Sims*, 28 F.3d 420, 422 (4th Cir. 1994).

84. WASH. LAW. COMM., *supra* note 68, at 23.

85. Ronald D. White, *Left at the Curb*, WASH. POST (July 15, 1989).

86. WASH. LAW. COMM., ANNUAL REPORT, 1988 at 28 (1988).

87. WASH. LAW. COMM., *supra* note 79, at 12.

88. STANLEY E. RIDLEY, JAMES A. BAYTON, & JANICE HAMILTON OUTTZ, WASH. LAW. COMM. FOR CIVIL RIGHTS UNDER THE LAW, TAXI SERVICE IN THE DISTRICT OF COLUMBIA: IS IT INFLUENCED BY THE PATRONS' RACE AND DESTINATION? 17 (1989). This report of Howard University social scientists is described in the Equal Rights Center's report. EQUAL RIGHTS

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Teaming with Hogan & Hartson, the Committee then sued eight drivers and the three taxi-cab companies most frequently involved in rejecting Black customers in the first action of its kind nationally.<sup>89</sup> In a landmark ruling that provided a model for similar challenges in other cities, civil rights claims brought by tester-plaintiffs against the companies survived a motion for summary judgment in *Floyd-Mayer v. Am. Cab Co.*, meaning that the companies could be held liable for the discriminatory conduct of their “independent contractor” drivers.<sup>90</sup> Faced with the extraordinary pass-by statistics and the testers’ finding that service to predominantly Black neighborhoods was more than twice as difficult to procure as was a ride to equally distant white neighborhoods, the companies settled for \$50,000 and injunctive relief requiring greater discipline over drivers and affirmative measures to facilitate complaints and curb discriminatory conduct.<sup>91</sup> A similar § 1981 case brought with Hogan & Hartson in 1990 against another cab company on behalf of two Black patrons who were denied service after white friends hailed a cab for them was also successful, resulting in a \$35,000 damages award, attorney’s fees and similar injunctive relief.<sup>92</sup> As a result of the Committee’s work, taxi companies in D.C. were put on notice that they could be held responsible for discriminatory conduct by drivers if they did not find ways to stop it.

#### D. Combatting Clandestine Discrimination in Health Spa Membership in the early ‘90’s

While the taxi cases were underway, the Committee recruited a phalanx of other firms to step in to work on a highly publicized §1981 class action lawsuit brought in 1990 against Holiday Spas on behalf of Blacks who had been discouraged from joining fitness centers in the Washington area.<sup>93</sup> The suit, which had quickly expanded to include clubs in Atlanta, Boston, Philadelphia and Baltimore and become one of the largest public accommodations cases in history to that point, alleged that implementation of the policy included costlier member-

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CENTER, SERVICE DENIED: RESPONDING TO TAXI CAB DISCRIMINATION IN THE DISTRICT OF COLUMBIA 2 (Oct. 2003).

89. WASH. LAW. COMM., ANNUAL REPORT, 1990, at 11 (1991).

90. *Floyd-Mayers v. Am. Cab Co.*, 732 F. Supp. 243, 248 (D.D.C. 1990).

91. WASH. LAW. COMM., *supra* note 89.

92. WASH. LAW. COMM., *supra* note 89, at 26; *Cooper v. Conn. Cab Assoc.*, (D.D.C. No. 90-1758).

93. *Kernan v. Holiday Universal, Inc.*, No. JH90-971, 1990 WL 289505, at \*1 (D. Md. Aug. 14, 1990) (granting motion for class certification).

ship fees for African-Americans, less favorable payment terms, long delays and rude treatment.<sup>94</sup> The Committee coordinated a legal team comprised of dozens of attorneys in the five key metropolitan areas from Wilmer, Cutler & Pickering, Onek Klein & Farr, Piper & Marbury, Southerland Asbell & Brennan, Pepper Hamilton & Scheetz, and Sullivan & Worchester to prosecute the massive lawsuit, captioned *Kernan v. Holiday Universal*.<sup>95</sup>

They faced off against a concerted and far-reaching policy of racially discriminatory membership practices at over fifty Holiday Spas locations.<sup>96</sup> Over 400 depositions were taken and more than 65 former Holiday employees were persuaded to testify about discriminatory practices.<sup>97</sup> Investigations uncovered the existence and meaning of coded notations regarding African-Americans on applicant lists (“DNWAM,” meaning do not want as member) and on applications themselves (circling the “B” in the word “BASIC” to indicate a Black prospect, the “A” for Asian, or the “C” to identify Caucasians).<sup>98</sup> After nearly two and a half years of vigorous litigation, a landmark settlement was reached in March 1992, on the eve of trial.<sup>99</sup> Holiday consented to entry of judgment against it, agreed to pay \$9.5 million in damages and attorney’s fees over four years, offered free one-year memberships to each of the 5,000 members of the plaintiff class, and accepted injunctive relief that resulted in a sweeping overhaul of marketing procedures at the defendant Holiday locations and several hundred other clubs owned by Holiday’s new parent, Bally Manufacturing Corp.<sup>100</sup>

The Holiday Spas case resulted in one of the largest monetary settlements and some of the most wide-ranging injunctive relief ever achieved in a racial discrimination suit under Section 1981 and Title II of the 1964 Civil Rights Act to that time.<sup>101</sup> It was also undoubtedly the Committee’s most ambitious undertaking in its first twenty years of existence, exemplifying the unique and key role the Committee has played in battling unlawful discrimination in its modern forms by mar-

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94. WASH. LAW. COMM., *supra* note 89, at 12.

95. *Id.*

96. *Id.* at 10.

97. *Id.*

98. WASH. LAW. COMM., 1968–1993 MAKING A DIFFERENCE: REFLECTIONS ON SIX CASES 1517 (1993).

99. WASH. LAW. COMM., *supra* note 89, at 27.

100. *Id.*; WASH. LAW. COMM., *supra* note 98.

101. WASH. LAW. COMM., *supra* note 89, at 27.

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shaling substantial premiere legal teams, covering broad geographic areas, coordinating class members, and achieving substantial monetary and injunctive outcomes. In addition, the case highlights the role that the Department of Justice has played in public accommodations discrimination suits, as the Civil Rights Division initially filed a complaint against Holiday Spas and obtained a consent decree before the class action was filed.<sup>102</sup> The discovery—and successful public defeat—of such widespread institutionalized racism in the health club industry also led the Committee to look carefully into efficacy of the membership policies and practices of other health clubs.

In *Manuel v. World Gym of Wheaton*, seven Black patrons challenged membership practices that offered them only the highest-priced memberships and denied them financing options offered to white patrons.<sup>103</sup> Assisted by Hogan & Hartson, the Committee's clients obtained a Maryland federal court jury verdict of nearly \$100,000 in compensatory and punitive damages in 1991, and the judge ordered the club to pay plaintiff's lodestar attorney's fees.<sup>104</sup> The Department of Justice, which had entered the case as a plaintiff, helped obtain important broad injunctive relief as well.<sup>105</sup> The Committee also represented prospective Black gym patrons challenging the equality of membership practices under Title II and § 1981 in *Mosley v. Defensive Arts Inc.*<sup>106</sup> Confronted with evidence that the Norfolk, Virginia club was destroying racially coded records former employees said were similar to those uncovered in the Holiday Spas case, the Committee and Crowell & Moring initiated the litigation with an *ex parte* temporary restraining order and a search warrant that was enforced by gun-carrying U.S. Marshalls.<sup>107</sup> Reams of incriminating records, some carrying codes indicating the race of applicants, were seized.<sup>108</sup> Although class certification was denied, the club agreed to settle the case in 1991 for \$50,000 and injunctive relief to avoid continued litigation.<sup>109</sup> The Committee had helped make sure that the health club industry re-

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102. Tracy Thompson, *Suit Against Holiday Spa Expands*, WASH. POST (Nov. 14, 1989), [https://www.washingtonpost.com/archive/local/1989/11/14/suit-against-holiday-spa-expands/9709a387-a9b4-4dfb-9096-d9c204c7e26f/?utm\\_term=.15da6866a90f](https://www.washingtonpost.com/archive/local/1989/11/14/suit-against-holiday-spa-expands/9709a387-a9b4-4dfb-9096-d9c204c7e26f/?utm_term=.15da6866a90f).

103. WASH. LAW. COMM., *supra* note 89, at 10.

104. *Id.* at 27.

105. *Id.*

106. *Id.* at 11, 27.

107. *Id.*

108. *Id.*

109. WASH. LAW. COMM., ANNUAL REPORT, 1968-1993, at 21 (1993).

ceived the message that segregated facilities were no longer acceptable, or good business.

E. Ensuring that Denny's Restaurants Treat all Customers Equally Nationwide

It was not long before the Committee was presented with its next daunting opportunity to serve the goal of ensuring equal access to public accommodations. Like the taxi and health club cases, it presented new challenges, required responses to new demands, achieved a successful conclusion, and had a tremendous long-term impact. In 1992, based on evidence indicating that Denny's restaurants in California were requiring African-American customers to pre-pay, subjecting Blacks to inferior and substandard service, and ejecting Black customers, the U.S. Department of Justice put the Denny's company on notice that a government investigation had shown it to be discriminating.<sup>110</sup> Settlement discussions resulted in the entry of a consent decree in a Title II case between Denny's and the Justice Department, but did not resolve claims asserted on behalf of African-American customers of Denny's restaurants in California by the law firm of Saperstein, Mayeda, Larkin & Gouldstein.<sup>111</sup>

On April 1, 1993, the effective date of the DOJ's consent decree, six Black Secret Service officers assigned to protect President Bill Clinton on a visit to the Naval Academy were denied service at a Denny's restaurant in Annapolis, Maryland.<sup>112</sup> All of the white officers who were part of the same uniformed detail sitting in the same area of the restaurant were served promptly, while the Black officers were ignored.<sup>113</sup> Within weeks of filing a complaint in federal court in Baltimore on behalf of the six agents alleging violations of Title II and Section 1981, the extensive media coverage of the "lunch-counter"-sit-in invoking circumstances brought scores of complaints of discrimination against Denny's to the Committee from African-Americans nationwide.<sup>114</sup> On the Committee's motion, supported by fifty declarations alleging discrimination at thirty-three Denny's restaurants around the country, the court granted leave to amend the complaint in *Dyson v. Denny's Inc. & Flagstar Corp.*, to include class

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110. WASH. LAW. COMM., UPDATE, Fall 1993, at 4.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

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action claims challenging Denny's Restaurant's discriminatory policies nation-wide.<sup>115</sup>

The legal team undertook a massive year-long nationwide investigation, interviewing hundreds of Denny's' customers and former employees who detailed dozens and dozens of haunting tales of discrimination in Denny's restaurants coast-to-coast, while other members of the team handled numerous discovery and other motions.<sup>116</sup> As the accumulated evidence mounted, and its damning nature became increasingly clear, the company and the Committee, co-counsel Hogan & Hartson, the Department of Justice, and the Saperstein firm engaged in settlement discussions that resulted in a record-setting combined \$45.7 million settlement of the nationwide and California class actions against Denny's.<sup>117</sup> The settlement also placed Denny's under an extensive five to seven-year court order to provide non-discrimination training to all of its employees, to fund civil rights testers to check for discrimination, to increase the representation of minorities in its advertisements, and to appoint a Civil Rights Monitor to police compliance.<sup>118</sup>

The settlement was the largest ever in a public accommodations case<sup>119</sup> and elicited 170,000 settlement claims from mistreated African-American Denny's customers, which were then processed by the Committee.<sup>120</sup> The Assistant Attorney General for Civil Rights, Deval Patrick, said at the time: "The settlement demonstrates the great good that can come from cooperation between federal authorities, private civil rights attorneys, and an American corporation, that in this case was willing . . . to do the right thing . . ."<sup>121</sup> Under the settlement, the company's pledge to do so was posted in all Denny's restaurants along with a 1-800 discrimination complaint number.<sup>122</sup> This vast corporation, with 1,700 restaurants, became the face of committed and purposeful public accommodations desegregation.

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115. *Id.*

116. WASH. LAW. COMM., MAKING A DIFFERENCE: REFLECTIONS ON EQUAL JUSTICE 17-19 (1998).

117. WASH. LAW. COMM., UPDATE, Summer 1994, at 1, 3.

118. *Id.*

119. Stephen Labaton, *Denny's Restaurants to Pay \$54 Million in Race Bias Suits*, N.Y. TIMES (May 25, 1994), <https://www.nytimes.com/1994/05/25/us/denny-s-restaurants-to-pay-54-million-in-race-bias-suits.html>.

120. See WASH. LAW. COMM., *supra* note 117 (reporting that payouts were made on 130,000 meritorious claims.); see also WASH. LAW. COMM., UPDATE, Spring 1996, at 11.

121. See WASH. LAW. COMM., *supra* note 117.

122. WASH. LAW. COMM., ANNUAL REPORT, 1997, at 10 (1997).

F. Rooting out Blatant Discrimination in Consumer Retail Transactions through the 90's

Recalcitrant businesses did not put refusal to serve policies on hold while the Committee and legal community devoted their energies to these high-profile mega-civil rights efforts in the taxicab, health club, and restaurant industries. So the Committee managed to continue to find strong private law firms willing to help wage the fight against "resistant" blatant discriminatory business strategies through the 1990's and into the 2000's. Several of the Committee's cases in this time period involved unequal treatment of consumer transactions in retail stores. In *Byrd v. Sharper Image*, for example, a white customer was readily permitted to exchange a pair of sunglasses without a receipt immediately after an identical request by her African-American friend was declined by the same store manager.<sup>123</sup> The lawsuit brought against Sharper Image by the Committee and the firm of Shaw, Pittman, Potts & Trowbridge in federal court in Washington, D.C., resulted in a 1995 settlement for \$150,000 and an agreement to put in place anti-discrimination policies and employee training.<sup>124</sup>

The Committee and Shaw Pittman prevailed as well in a Maryland federal court case against Footlocker for a store clerk's refusal to let two African-Americans pay by check while allowing a white customer to make the identical purchase with a check; Footlocker settled the matter in 1993 for \$100,000 and an agreement to train its employees.<sup>125</sup> The Committee also pursued an ultimately unsuccessful suit against KB Toys in 1999 for its refusal to accept checks at only store locations in primarily African-American neighborhoods in the Washington-Baltimore metropolitan area.<sup>126</sup> The Equal Rights Center confirmed that KB Toys refused to accept checks at stores with primarily African-American clientele, but accepted checks at stores where customers were primarily white.<sup>127</sup> Years later, in 2003, the Committee took on the representation of an African-American man whose out-of-state check was refused at a Staples store in Winchester, Virginia.<sup>128</sup> When he later learned that white colleagues had made

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123. WASH. LAW. COMM., UPDATE, Spring 1996, at 11.

124. *Id.*

125. *Jackson v. Kinney Shoe Corporation*; WASH. LAW. COMM., ANNUAL REPORT, 1994, at 42 (1994).

126. *Buchanan v. Consol. Stores Corp.*, 125 F. Supp. 2d 730, 730 (D. Md. 2001).

127. *Id.* at 733.

128. *Williams v. Staples, Inc.*, No. CIV.A.502CV00054, 2003 WL 1873937, at \*1 (W.D. Va. Apr. 8, 2003).

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purchases there using out-of-state checks, the Equal Rights Center sent testers to the store and confirmed that it accepted out-of-state checks only from the white testers, and the Committee sued on his behalf.<sup>129</sup> In a published unanimous opinion, the Fourth Circuit overturned a district court grant of summary judgment in favor of Staples,<sup>130</sup> and the case was settled shortly thereafter.<sup>131</sup>

But the Committee also found that there were still blatant “throw-back” refusal to serve situations demanding a response even as late as the mid-1990’s, unfortunately. The Committee successfully pursued a claim on behalf of Shirley Roman, a Navy Lieutenant-Commander, who was refused service at a Host-Marriott concession stand at Dulles Airport in 1995, for example.<sup>132</sup> She received \$15,000 plus damages and fees in a settlement that also called for anti-discrimination training for the Host-Marriot’s employees.<sup>133</sup>

Additionally, in May of 1995, an Avis Rent-A-Car franchisee in Wilmington, North Carolina, New Hanover Rent-A-Car, refused to rent to an African-American from southern Virginia the three minivans she had reserved in advance for use on a family trip to Disney World.<sup>134</sup> When she called an Avis 1-800 number to complain because she suspected the action had been taken due to her race, she learned that Avis had received a number of complaints of racial discrimination about New Hanover.<sup>135</sup> The Committee, Crowell & Moring and the North Carolina firm of Parker, Poe, Adams and Bernstein took on the case, filing a complaint against Avis in the U.S. District Court for the Eastern District of North Carolina in May 1996.<sup>136</sup> As additional evidence of discrimination was gathered in discovery from former New Hanover employees, and an Avis customer representative told of Avis’ failure to act despite knowing of the franchisee’s policies, the named plaintiffs sought certification of a class of similarly mistreated patrons and prospective patrons.<sup>137</sup> The case, captioned *Pugh v. Avis Rent-A-Car Systems, Inc.* (E.D.N.C. 96-CV-9-F [2]), was settled in 1998 for \$5.4 million, to be distributed to African-Americans who had

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129. *Id.* at \*2.

130. *Williams v. Staples, Inc.*, 372 F.3d 662, 665 (4th Cir. 2004).

131. E-mail from Reed Colfax, Partner, Relman, Dane & Colfax, to Robert B. Duncan, Partner, Hogan Lovell (Oct. 26, 2017) (on file with author).

132. WASH. LAW. COMM., ANNUAL REPORT, 1996, at 33 (1996).

133. *Id.*

134. WASH. LAW. COMM., UPDATE, Fall 1997, at 9–10.

135. WASH. LAW. COMM., UPDATE, Spring 1998, at 1, 8.

136. *Id.*

137. WASH. LAW. COMM., *supra* note 134.

tried to rent from New Hanover.<sup>138</sup> Avis paid \$3.8 million, and the franchisee paid \$2.1 million and agreed to a consent injunction requiring five years of monitoring and training at its five locations in North and South Carolina.<sup>139</sup> This highly visible case helped persuade the New York legislature to consider legislation to prevent discrimination in car rental operations.<sup>140</sup>

G. Policing Persistent Unequal Treatment of Consumers as the 21st Century Dawned

On December 5, 2000, the Committee and two other firms negotiated the resolution of what might have been the first case of consumer racism involving the Internet.<sup>141</sup> Kozmo.com, an early “dot com” company which billed itself as the “Internet 7-11,” promised to deliver video rentals, CDs, books, and snack food to customers’ homes within an hour.<sup>142</sup> When two African-American residents of Southeast and Southwest Washington telephoned Kozmo to arrange deliveries, they were told that the company did not serve their zip codes; or in fact any others in which the population happened to be predominantly African-American.<sup>143</sup> With Cohen, Milstein, Hausfeld & Toll and Crowell & Moring, the Committee filed a class action lawsuit on behalf of the disappointed Northeast and Southeast D.C. “on-line” consumers, charging the internet retailer with racially redlining the African-American neighborhoods it did not serve, some of which were much closer to Kozmo’s warehouse than the predominantly white neighborhoods it did serve.<sup>144</sup> The suit alleged violations of the Civil Rights Acts of 1866 and 1964, and the District of Columbia’s Human Rights Act.<sup>145</sup> Pursuant to the settlement agreement, Kozmo expanded its service areas in several cities, including into predominantly Black areas of Washington, D.C.<sup>146</sup> Perhaps more interestingly, and more significantly given the subsequent demise of the company, the Committee also obtained \$125,000 from Kozmo to help

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138. WASH. LAW. COMM., *supra* note 135.

139. *Id.*

140. WASH. LAW. COMM., UPDATE, Fall 1998, at 3.

141. *Id.*

142. WASH. LAW. COMM., ANNUAL REPORT, 2000, at 9 (2000).

143. *Id.*

144. *Id.*

145. Kate Marquess, *Redline May Be Going Online: Dot-com Delivery Service Faces Same Complaints as Brick-and-Mortar Peers*, ABA J., Aug. 2000, at 80.

146. WASH. LAW. COMM., *supra* note 142.

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the Equal Rights Center and others bridge the digital divide in and around the nation's capital.<sup>147</sup>

In mid-2005, the Committee and the law firm of Relman, Dane & Colfax filed a lawsuit against a Washington, D.C. area automotive giant, Jim Koons Automotive Companies, on behalf of an African-American army veteran who purchased a car from the company.<sup>148</sup> The case, *Lloyd v. Jim Koons Automotive Companies*, alleged that Koons secretly and exorbitantly marked up loan rates available through the manufacturer's financing arm to Black customers when it did not do so for whites, and that the dealership engaged in deceptive and unfair trade practices, in violation of federal and Maryland state civil rights and consumer protection laws.<sup>149</sup> While lawsuits accusing major auto manufacturers' financing arms of discrimination against African-American borrowers for allowing dealers to add points subjectively to interest rates had been pursued, this apparently was the first case seeking to hold a dealer responsible for such behavior.<sup>150</sup>

#### H. Renewing the Battle in the Ongoing War against Discrimination in the Taxi-Cab Industry

Even as the civil rights law prohibiting discrimination in public accommodations marked its 35th year, and the Committee's first cases challenging taxi-cab discrimination came up on their 10-year anniversaries, the Committee found itself fighting once again for equal treatment in the cab industry in D.C. Ready to head home from work at a Georgetown restaurant, and after watching several cabs pass by his Black housemate and fellow bartender, a white bartender flagged down a Presidential Cab on Wisconsin Avenue.<sup>151</sup> He waved his Black friend over to join him as he started to get into the car.<sup>152</sup> Upon seeing the African-American rider approaching, the cab driver pulled away so suddenly that the white rider's foot was still outside the car.<sup>153</sup> The driver then stopped and declared that he would take the white

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147. J. Sellers 7/19/17; Keith Regan, *Kozmo.com Cuts Staff, Exits Market*, E-COM. TIMES (Jan. 9, 2001), <https://www.ecommercetimes.com/story/6568.html>.

148. WASH. LAW. COMM., UPDATE, Fall 2005, at 5, 19.

149. *Id.*

150. *Id.*; see *Lloyd v. Jim Koons Auto. Cos.*, No. 8:05-cv-02403-AW (D. Md. Apr. 21, 2006) (ruling that the plaintiff must take his claims to arbitration due to language in the signed financing contract).

151. WASH. LAW. COMM., *supra* note 142.

152. *Id.*

153. *Id.*

customer but not his Black housemate.<sup>154</sup> The Committee and Crowell & Moring brought suit in federal district court alleging violations of both federal and D.C. antidiscrimination laws by the “independent contractor” driver and the cab company in *Bolden v. J&R Inc. Taxicab Co.* (Presidential Cab Co.) (D.D.C. No. 1:99cv01255).<sup>155</sup> A jury found against both defendants, and awarded the housemates \$120,000, including over \$100,000 in punitive damages.<sup>156</sup> The verdict was upheld by the D.C. Circuit in 2002.<sup>157</sup>

A telephone tester-based study conducted by the Equal Rights Center found that residents of northwest Washington were 14 times more likely to receive taxi service than callers for cab service from locations in Southeast, a predominantly African-American neighborhood across the Anacostia River.<sup>158</sup> The disparities between Diamond Cab’s responses to calls from the two areas were so great that the Committee and Crowell & Moring filed suit on behalf of two residents of Southeast against the company in 2000.<sup>159</sup> The case, *Mitchell v. DCX, Inc.* (Diamond Cab), alleging both race and place of residence discrimination under the D.C. Human Rights Act and section 1981 based on the civil rights tester evidence of redlining, survived summary judgment in 2003.<sup>160</sup> Judge Roberts of the district court for D.C. held that plaintiffs had proved – and defendants could not materially dispute – that the cab company’s actions had a disparate impact on Black residents of Southeast D.C.<sup>161</sup> The case was settled before trial in 2004, with the cab company agreeing to require its officers, employees and agents to abide by all applicable federal and District of Columbia laws prohibiting discrimination in taxicab service; to require its operators, dispatchers and drivers to provide taxicab service to all on an equal basis within the taxicab service areas

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154. *Id.*

155. *Bolden v. J & R Inc.*, No. CIV.A. 99-1255, 2001 WL 1910561, at \*1 (D.D.C. Mar. 1, 2001).

156. *Id.*

157. *Id.*

158. REVEREND JAMES G. MACDONELL & VERALEE LIBAN, EQUAL RIGHTS CENTER, SERVICE DENIED: RESPONDING TO TAXI CAB DISCRIMINATION IN THE DISTRICT OF COLUMBIA, 23 (2003). The Equal Right Center’s “core strategy for identifying unlawful and unfair discrimination is civil rights testing. When the ERC identifies discrimination, it seeks to eliminate it through the use of testing data to educate the public and business community, support policy advocacy, conduct compliance testing and training, and, if necessary, take enforcement action.” *About Us, Strategic Priorities*, EQUAL RIGHTS CENTER, <https://equalrightscenter.org/about-us/> (last visited Sept. 14, 2018).

159. WASH. LAW. COMM., *supra* note 142.

160. *Mitchell v. DCX, Inc.*, 274 F. Supp. 2d 33, 37 (D.D.C. 2003).

161. *Id.* at 47.

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regulated by the DC Taxicab Commission; to provide training sessions for its officers and employees; to post complaint procedures and sanctions for violating pertinent laws and procedures; to keep written records concerning complaints of discrimination; and to set up a progressive disciplinary program for drivers, dispatchers or operators found to have discriminated within the service area.<sup>162</sup>

The Committee also filed several cases in federal court in D.C. in 2001 on behalf of African-Americans who were either passed over by cab drivers or were asked to leave cabs upon stating their destination in a predominantly African-American neighborhood.<sup>163</sup> In one case, the law firm of Bach, Robinson & Lewis joined with the Committee to sue District Cab Company on behalf of a Black woman heading home from a late night shift at Georgetown University Hospital.<sup>164</sup> After asking where she was heading and allowing her to enter the cab, the driver spotted five white people waiting for a taxi nearby.<sup>165</sup> After telling his Black rider to “get out,” the driver pulled up and picked up the white passengers, leaving his ejected rider to take a bus home.<sup>166</sup> Captioned *Snead v. District Cab Co.* (D.D.C. No. 01CV00632), the case was settled on favorable terms in December of 2001.<sup>167</sup>

In another 2001 case, the Committee and Hogan & Hartson represented a Black official in the Fair Housing Section of the Department of Housing and Urban Development, who – with the assistance of a doorman at the Loews L’Enfant Plaza Hotel - attempted to enter a Your Way cab that had just discharged a white passenger at the hotel.<sup>168</sup> When the driver saw his prospective Black passenger, he pulled away leaving the doorman and the would-be rider standing agape.<sup>169</sup> The case, *Greene v. Amritsar* (Your Way Taxicab), alleging violations of 42 U.S. §1981, the D.C. Human Rights Act and various common laws, was filed in 2001.<sup>170</sup> The company settled in 2003, agreeing to pay an undisclosed sum in damages and to broad injunctive remedies,

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162. WASH. LAW. COMM., UPDATE, Fall 2004, at 5, 17.

163. Martin Di Caro, *Discrimination Complaints Trickle In About D.C. Cabs*, WAMU (Sept. 11, 2014), [https://wamu.org/story/14/09/11/discrimination\\_complaints\\_about\\_dc\\_cabs\\_trickle\\_in/](https://wamu.org/story/14/09/11/discrimination_complaints_about_dc_cabs_trickle_in/).

164. WASH. LAW. COMM., ANNUAL REPORT, 2001, at 8, 28 (2001).

165. *Id.*

166. *Id.*

167. REVEREND JAMES G. MACDONELL & VERALEE LIBAN, EQUAL RIGHTS CENTER, SERVICE DENIED: RESPONDING TO TAXI CAB DISCRIMINATION IN THE DISTRICT OF COLUMBIA, 2 n.9 (2003).

168. WASH. LAW. COMM., *supra* note 164.

169. *Id.*

170. *Greene v. Amritsar Auto Servs. Co.*, 206 F. Supp. 2d 4, 5 (D.D.C. 2002).

including the Denny's-like posting of notices in each company cab alerting customers of its commitment to antidiscrimination laws and providing information on how to file complaints of driver discrimination.<sup>171</sup>

In a third case, the Committee and Clifford, Chance, Rogers & Wells represented an African-American woman who, upon entering a Standard Cab, asked to be taken to her home at 17th Street and Benning Road in Northeast D.C.<sup>172</sup> After driving a short distance, the driver pulled over, told her he would not take her to that address, and demanded \$5 for the trip up to that point.<sup>173</sup> As the Committee's client got into a second cab, she observed the Standard Cab pick up a white woman who had hailed it just a few yards from where she had been told to get out of the car.<sup>174</sup> A suit, captioned *Jones v. Standard Taxicab Company* (D.D.C. No. 01CV2568), that was filed in D.C. federal court in 2001, settled for damages and injunctive relief that included complaint procedure and training.<sup>175</sup>

Driving a taxicab is not an easy way to earn a living, and it is one which, for the most part, involves the provision of a public accommodation in a fairly unique "private" transaction between two or more persons. Because it is such a "one-to-one" type of interaction, it is ripe to be impacted by personal biases and fears. While there are many well-meaning taxi drivers in D.C., the issue of discriminatory incidents in the business has been long-standing and significant.<sup>176</sup> Though the problem clearly has not been completely resolved, the Committee's persistent efforts – involving the careful researching and testing of the issue, the mobilization of significant resources, the involvement of multiple plaintiffs, the insistence on improving avenues for complaints, and the willingness to keep returning as the problem reappeared – have made a difference over the years for Black cab riders in the District.

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171. EQUAL RIGHTS CENTER, *supra* note 167, at 67.

172. WASH. LAW. COMM. *supra* note 164, at 9, 27.

173. *Id.*

174. *Id.*

175. EQUAL RIGHTS CENTER, *supra* note 167, at 5–6.

176. *See generally id.*

## *Racial Equality in Places of Public Accommodation*

### I. Compelling Other National Chains to Take Responsibility for Ensuring Equal Inclusion

Five young African-American men, former undergraduate classmates at Georgetown University, gathered at the Cincinnati-Northern Kentucky International Airport before the wedding of one of the men in June of 1998.<sup>177</sup> Before leaving the airport, they decided to have lunch together at the Cheers Restaurant operated by Marriott.<sup>178</sup> The groom and his friends, the only African-Americans in the restaurant, sat down and ordered lunch.<sup>179</sup> As they waited, meals were brought and served to other customers.<sup>180</sup> Although other customers were not required to pay before receiving their food, the waitress insisted that the group of African-American men pay before she would deliver their orders.<sup>181</sup> Recognizing the Denny's-like appearance of discrimination, the Committee filed a lawsuit, captioned *Claremont v. Host Marriot Services Corporation* (D. Md. No. MJG-99-CV-1665), in June 1999.<sup>182</sup> The case, which was filed in federal court in Maryland where Host Marriot's corporate offices were located, quickly came to the attention of the company's general counsel.<sup>183</sup> The general counsel expressed dismay at the humiliating treatment the men had received, and quickly settled the case, agreeing to a period of ongoing civil rights monitoring.<sup>184</sup>

When several minority guests, including two undercover African-American police officers, were subjected to discriminatory room rental, assignment, maintenance and pricing practices at a Florida Motel 6, the Committee joined with Hogan & Hartson and several Florida firms to pursue their claims in *Jackson, et al. v. Motel 6, Inc.*<sup>185</sup> Based on the experiences of the plaintiffs, the court authorized the Committee to publish notice of the lawsuit nationwide and to establish a 1-800 discrimination complaint line.<sup>186</sup> When the Middle District of Florida's initial certification of a class<sup>187</sup> on the basis of the

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177. WASH. LAW. COMM., ANNUAL REPORT, 1999, at 10 (1999).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. WASH. LAW. COMM., ANNUAL REPORT, 2000, at 28 (2000).

183. *Id.*

184. *Id.*; J. Relman 7/17/17, *supra* note 43.

185. WASH. LAW. COMM., ANNUAL REPORT, 1997, at 10, 27 (1997); *see also* *Jackson v. Motel 6 Multipurposes, Inc.*, 172 F.R.D. 462 (M.D. Fla. 1997).

186. *Jackson*, 172 F.R.D. at 464.

187. *Jackson v. Motel 6 Multipurposes, Inc.*, 175 F.R.D. 337, 339 (M.D. Fla. 1997).

numerous additional complaints received through this process was overturned by the 11th Circuit,<sup>188</sup> the case was settled on confidential terms.<sup>189</sup> In January 2003, the Committee and Holland & Knight filed a complaint against Red Roof Inn in Tallahassee, Florida alleging racial discrimination in violation of the Civil Rights Act of 1866.<sup>190</sup> A prospective patron of the hotel was refused a room, initially under the guise that the Inn would not accept a check – even though the hotel had a policy of accepting checks from company-approved patrons such as she was and later when they rejected her offer to pay in cash.<sup>191</sup> She agreed to a settlement with the company later in the fall of 2003.<sup>192</sup>

In 2001, the Committee joined with the Ferguson Stein Law Offices of Charlotte, North Carolina and the Law Office of Ted J. Williams in D.C., to sue Waffle House, Inc., a local Charlotte Waffle House franchisee, and a security guard company in the Western District of North Carolina on behalf of five African-American residents of the D.C. area.<sup>193</sup> The men had traveled to North Carolina as part of a gospel singing group tour.<sup>194</sup> When they tried to sit and order a meal at the Waffle House in Charlotte, the restaurant security guard evicted them so that white customers who had arrived later could be seated.<sup>195</sup> As a result of publicity generated by the filing of this action and two others that followed shortly thereafter, many African-Americans contacted the Committee to allege similar discriminatory treatment in Waffle House restaurants around the country.<sup>196</sup> The initial cases<sup>197</sup> were settled confidentially following mediation in 2002,<sup>198</sup> but thirteen additional complaints were filed on behalf of individual plaintiffs against the company and franchises in the fall of 2003.<sup>199</sup>

In 2004 and 2005, after media coverage of those filings prompted still more complaints, the Committee and co-counsel expanded this

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188. *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1008 (11th Cir. 1997).

189. WASH. LAW. COMM., ANNIVERSARY REPORT 1968–1998, at 30 (1998).

190. WASH. LAW. COMM., UPDATE, Spring 2003, at 6.

191. WASH. LAW. COMM., UPDATE, Fall 2003, at 6.

192. *Id.*

193. WASH. LAW. COMM., ANNUAL REPORT, 2001, at 9, 28 (2001).

194. *Id.*

195. *Id.*

196. *Id.*

197. Complaint at 1, *Gordon v. Hillcrest Foods, Inc.*, No. 3:01cv281-mo (W.D.N.C. May 22, 2001).

198. WASH. LAW. COMM., *supra* note 191, at 5.

199. WASH. LAW. COMM., UPDATE, Fall 2004, at 5, 18.

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national civil rights initiative against Waffle House, Inc.<sup>200</sup> This was done through the filing of additional complaints in the Southeast, where Waffle House restaurants dot the landscape, as well as through the filing of complaints in the South and Southwest, where it appeared the pattern and practice of discrimination was being repeated.<sup>201</sup> The firms working on these cases included Drinker Biddle & Reath, Ferguson Stein Chambers Adkins Gresham & Sumter, Terris Pravlick & Millian, Foley & Lardner, Vinson & Elkins, Covington & Burling, Alderman & Devorsetz and Wiley Rein & Fielding. Aspects of all four initial cases filed in Georgia, North Carolina, and South Carolina survived summary judgment.<sup>202</sup> The decision in *Eddy v. Waffle House* was particularly emphatic, finding that utterance of the epithet “nigger” alone provided direct evidence of a denial of service in the public accommodations context.<sup>203</sup>

In August of 2005, four cases, which had been brought against the largest Waffle House franchise in the country, Northlake Foods, Inc., by the Committee and the firms of Ross, Dixon & Bell, Kirkland & Ellis, Reed Smith and Pillsbury Winthrop Shaw Pittman, were settled.<sup>204</sup> The lawsuits, filed in the Eastern District of Virginia, had alleged that nine African-Americans, one Hispanic and two Asian Americans were denied service or subjected to discriminatory treatment at Northlake’s Waffle House restaurants in Hopewell, Fredericksburg and Chesapeake, Virginia.<sup>205</sup> Northlake agreed to corporate-wide systemic change across its 149 restaurants in Florida, Georgia and Virginia.<sup>206</sup> The company was required to clarify its nondiscrimination policy, hire a training consultant to design training for its management and hourly workforce on customer discrimination issues, appoint a compliance officer to develop an improved policy to investigate and respond to future customer complaints, and report periodically to the Committee on its maintenance of state-of-the-art policies and procedures on customer treatment.<sup>207</sup>

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200. *Id.* at 5.

201. *Id.* at 5.

202. *Eddy v. Waffle House, Inc.*, 335 F. Supp. 2d 693, 701 (D.S.C. 2004); *Solomon v. Waffle House, Inc.*, 365 F. Supp. 2d 1312, 1329 (N.D. Ga. 2004); *Lloyd v. Waffle House, Inc.*, 347 F. Supp. 2d 249, 256 (W.D.N.C. 2004); *Slocumb v. Waffle House, Inc.*, 365 F. Supp. 2d 1332, 1341 (N.D. Ga. 2005).

203. *Eddy*, 335 F. Supp. 2d at 700.

204. WASH. LAW. COMM., UPDATE, Fall 2005, at 5, 19.

205. *Id.* at 5.

206. *Id.*

207. *Id.*

Meanwhile, the Committee joined with lawyers from Covington & Burling and a coalition of more than ten other firms around the country to bring cases in four states on behalf of the NAACP and 100 African-Americans alleging discrimination when they attempted to patronize various Cracker Barrel restaurants nationwide.<sup>208</sup> The suits alleged a pattern and practice of preferential treatment for whites by Cracker Barrel that included providing white customers preferential seating, segregating Blacks in the smoking section, forcing Blacks to endure unreasonably long waits for seating and service, and otherwise providing noticeably substandard service to African-American customers.<sup>209</sup>

The Committee and the coalition firms also played an important role in assisting the Department of Justice in investigating Cracker Barrel and convincing the Justice Department to file suit; which it did in 2004 in federal court in Georgia simultaneously with the entry of a consent decree against the company.<sup>210</sup> The government's complaint alleged that Cracker Barrel engaged in a pattern and practice of discrimination against African-Americans in violation of Title II in at least 30% of its restaurants in seven specific states, as well as elsewhere.<sup>211</sup> Additionally, the complaint alleged Cracker Barrel managers directed, participated or acquiesced in the discrimination.<sup>212</sup> The consent decree required that Cracker Barrel hire an outside auditor to oversee the implementation of effective nondiscrimination policies and procedures, the development of new training programs to assure compliance with the policies and procedures, and the creation of an enhanced system to investigate and resolve customer complaints of discrimination, including severe disciplinary actions against employees as necessary.<sup>213</sup> The private-party cases were settled on favorable terms shortly thereafter.<sup>214</sup>

In this set of cases, the Committee built on and demonstrated its proven ability to parlay numerous individual incidents of racial humiliation into momentous and focused corporate-wide attention on civil rights and a realignment of racially-sensitive policies and practices at some of the largest providers of public accommodations in the nation.

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208. WASH. LAW. COMM., UPDATE, Spring 2004, at 1, 11.

209. *Id.*; WASH. LAW. COMM., *supra* note 191.

210. WASH. LAW. COMM., *supra* note 191.

211. *Id.*

212. *Id.*

213. *Id.*

214. WASH. LAW. COMM., UPDATE, *supra* note 199, at 1, 16.

### *Racial Equality in Places of Public Accommodation*

Utilizing the resources of the most prestigious law firms in the country; teaming with the DOJ and civil rights organizations; identifying great numbers of similarly treated “victims;” coordinating numerous plaintiffs, cases and proceedings; grabbing the attention of the most senior company officials; obtaining damage awards sufficient to discourage future discriminatory behavior; and demanding injunctive relief designed to both encourage company-wide attitudinal change and maintain corporate focus for an extended period, the Committee’s work helped change corporate culture at these companies, and the awareness of their employees.<sup>215</sup>

#### J. Calling Out Discriminatory Corporate Responses to Large African-American Gatherings

African-American college students and alumni attending the 1999 Black College Reunion gathering in Daytona Beach, Florida were shocked by the unwelcoming service they received at the purportedly luxury Adams Mark Hotel.<sup>216</sup> Hotel guests were forced to wear orange identification wrist bands to use hotel facilities, were required to prepay hotel bills, were subjected to hostile security measures, and received drastically reduced levels of hotel service.<sup>217</sup> Upon establishing that Daytona Beach visitors visiting the Adams Mark Hotel during the predominantly white Spring Break Weekend shortly before had faced no such indignities,<sup>218</sup> the Committee filed a class action lawsuit in the Middle District of Florida asserting Title II and section 1981 claims on behalf of these hotel “guests” and visitors who had experienced discrimination at the Adams Mark Hotel.<sup>219</sup> The state of Florida later joined the case, captioned *Gilliam v. HBE Corp.* (M.D. Fla. No. 99-596-CIV-ORL-22C), to assert unfair and deceptive business practices claims for damages, and the U.S. Department of Justice filed a companion suit alleging a nationwide pattern of race discrimination by the hotel chain.<sup>220</sup>

Aided by the pressure on the company imposed by the three-pronged, private, state and federal attack, the Justice Department and the parties settled the matter in late 2001.<sup>221</sup> Negotiations were extensive,

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215. *Id.*

216. WASH. LAW. COMM., ANNUAL REPORT, 1999, at 10 (1999).

217. WASH. LAW. COMM., ANNUAL REPORT, 2000, at 2829 (2000).

218. J. Relman 7/17/17, *supra* note 43.

219. *Gilliam v. HBE Corp.*, 204 F.R.D. 493, 494 (M.D. Fla. 2000).

220. WASH. LAW. COMM., *supra* note 217.

221. WASH. LAW. COMM., ANNUAL REPORT, 2001, at 8, 27 (2001).

and the judge pressured the parties to settle on terms he would feel comfortable approving.<sup>222</sup> Ultimately, the hotel agreed to pay \$1.1 million in damages.<sup>223</sup> Some of that amount was distributed as compensation among the plaintiffs and others impacted by the hotel's discriminatory conduct.<sup>224</sup> A portion, however, was distributed to four historically Black colleges in Florida.<sup>225</sup> Having worked successfully to alter corporate-wide discriminatory attitudes in cases such as Cracker Barrel, Waffle House and Host Marriot, the Adam Mark case marked the Committee's first foray into countering stereotyping and discrimination prompted by feelings of intimidation in the presence of large groups of African-Americans.<sup>226</sup> Similar discriminatory reactions have been observed at events such as the Essence Festival in New Orleans, Louisiana, the Orange Festival in Savannah, Georgia, and during Black Bike Week in Myrtle Beach, South Carolina.<sup>227</sup>

#### K. Reminding South Carolina's Myrtle Beach to Respect Black Bike Week Attendees

In 2003 and 2004, the Committee and six law firms filed complaints alleging widespread race discrimination by restaurants, a hotel, and the police department<sup>228</sup> during the annual Black Bike Week in Myrtle Beach, South Carolina, which is attended primarily by African-Americans.<sup>229</sup> Black Bike Week is one of two large motorcycle rallies

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222. WASH. LAW. COMM., *supra* note 217.

223. WASH. LAW. COMM., *supra* note 221.

224. *Id.*

225. *Id.*

226. *Id.*

227. Telephone Interview with Richard J. Ritter, Senior Counsel, Washington Lawyers' Committee (June 11, 2017) [hereinafter R. Ritter 7/11/17]; Telephone Interview with Anson Asaka, Assistant General Counsel, NAACP (June 17, 2017) [hereinafter A. Asaka 7/17/17].

228. WLC UPDATE, (Wash. Law. Comm., Wash., D.C.), Spring 2003, at 1. Although not a public accommodation issue per se, Steptoe & Johnson, the South Carolina law firm of Derfner, Altman & Wilborn, and the Committee also brought a case against the Myrtle Beach Police in May of 2003 alleging that restrictive traffic patterns adopted during Black Bike Week, and not Harley Week, violated the Black bikers' rights under the Equal Protection Clause of the U.S. Constitution. *Id.* at 11. The U.S. District Court for the District of South Carolina granted a preliminary injunction against the city in May 2005, ruling that the one-way, limited access traffic plan that was imposed by the police for just this time period was designed to discourage Black bikers from attending the event. WASH. LAW. COMM., UPDATE, Spring 2006, at 4, 5; Nat'l Ass'n for Advancement of Colored People v. City of Myrtle Beach, No. 4:03-1732-25TLW, 2006 WL 2038257 (D.S.C. July 20, 2006). In early 2006, the court approved a settlement of the case that required the city to use the same traffic plan during the peak hours of both special event weeks, and to provide training to all law enforcement personnel deployed during Black Bike Week on both uniform standards for policing crowds and cultural sensitivity. *Id.*

229. WASH. LAW. COMM., UPDATE, Spring 2003, at 1,6, 11.

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held in the Myrtle Beach area each year in May.<sup>230</sup> Hundreds of thousands of predominantly white riders come to the area for the “Harley Davison Spring Bike Rally” in mid-May.<sup>231</sup> The Yachtsman Hotel, one of the largest hotels in the city, required Black Bike Week guests to agree in writing to follow a unique set of rules that were not in place for the Harley event the week before or at any other time of the year.<sup>232</sup> Patton Boggs and the Committee brought class action claims in federal court in South Carolina challenging the Yachtsman Hotel’s uniquely restrictive approach to its guests during Black Bike Week.<sup>233</sup> In addition to charging its highest rental rates during the week, the hotel required Black bikers to sign a contract with 34 special rules and to pay for their entire stay at least 30 days prior to their arrival.<sup>234</sup> The hotel required no such contract, imposed no extensive set of rules, and did not demand prepayment at any other time of the year.<sup>235</sup> The hotel settled in 2004, paying \$1.2 million to be distributed to guests who stayed there during Black Bike Week in 2000, 2001, and 2002.<sup>236</sup> The Yachtsman also consented to broad injunctive relief to insure there would be no recurrence of the challenged practices.<sup>237</sup>

In April 2005, the Committee and Hogan & Hartson obtained a consent order against J. Edward Fleming, the owner of several large restaurants in Myrtle Beach, which since at least 1999 he had closed to avoid serving patrons attending Black Bike Week.<sup>238</sup> The order required that the restaurants stay open during normal business hours during Black Bike Weeks and called for monetary compensation to eight African-American plaintiffs, who would have eaten at a Fleming’s restaurant had they been open during the previous event week, and to the Conway Branch of the NAACP, which was also a plaintiff in the case.<sup>239</sup>

After the Committee, Hogan & Hartson and the South Carolina firm of Derfner, Alman & Wilborn sued Greg Norman’s Australian Grille on behalf of the NAACP, alleging that its closure during Black Bike Week in 2003 was racially motivated, the restaurant remained

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230. *Id.*

231. *Id.*

232. WASH. LAW. COMM., *supra* note 191, at 1, 6.

233. *Id.* at 11.

234. *Id.*

235. *Id.*; A. Asaka 7/17/17, *supra* note 227.

236. WASH. LAW. COMM., UPDATE, Spring 2005, at 11.

237. *Id.*

238. *Id.*

239. *Id.*

open for Black Bike Week in 2004, and stayed open for Black Bike Weeks in subsequent years.<sup>240</sup> In early 2006, with this positive change in behavior established, the plaintiffs accepted Greg Norman's Offer of Judgment in the amount of \$100,000, plus costs and attorney's fees, to resolve the matter.<sup>241</sup>

The Committee, Hogan & Hartson and Derfner, Alman & Wilborn also resolved a lawsuit against the national restaurant chain Damon's Grill for its discriminatory closing of its two Myrtle Beach outlets during Black Bike Week but not Harley week.<sup>242</sup> Both restaurants were open for Black Bike Week in 2005, after the suit was filed, and remained open for subsequent Black Bike Weeks.<sup>243</sup> Under the consent decree entered in 2006, Damon's committed to serving all customers without regard to race at all times of the year, including Black Bike Week, and to training all managerial staff and employees on the requirements and methods of complying with federal and South Carolina state laws prohibiting race discrimination in places of public accommodation.<sup>244</sup> Damon's also paid \$125,000 in damages, plus costs and attorney's fees.<sup>245</sup>

The NAACP has sent teams to investigate and monitor both rally weeks in Myrtle Beach since first learning about the widespread problem as a result of complaints to the organization. Working with local branches of the NAACP, volunteer attorneys from the private sector, local college students recruited through state NAACP conferences, the NAACP Field Department and others, on-site civil rights monitoring has continued for years.<sup>246</sup> Press conferences are held prior to Black Bike Week each year to make clear that monitoring is ongoing, to advertise a hotline number for complaints, and to emphasize that complaints of civil rights violations will be pursued through legal action as appropriate.<sup>247</sup> Eleven lawsuits have been filed since 2003.<sup>248</sup>

Thirty additional complaints have been made to the South Carolina Human Affairs Commission.<sup>249</sup> The Committee filed complaints

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240. WASH. LAW. COMM., UPDATE, Spring 2006, at 4-5.

241. *Id.* at 5.

242. WASH. LAW. COMM., UPDATE, Fall 2006, at 5.

243. *Id.*

244. *Id.*

245. *Id.*

246. A. Asaka 7/17/17, *supra* note 227. Telephonic testing was less successful because white business owners would not be forthcoming over the phone. R. Ritter 7/12/17.

247. A. Asaka 7/17/17, *supra* note 227.

248. R. Ritter 7/12/17, *supra* note 227.

249. R. Ritter 7/12/17, *supra* note 227.

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with the South Carolina Human Affairs Commission against restaurants in Myrtle Beach based on their practices during Black Bike Week in 2006.<sup>250</sup> In 2008, The Pantry, Inc., which owns and operates a chain of gas stations and convenience stores under the name Kangaroo Express in the Myrtle Beach area, settled a Human Affairs Commission complaint filed by the Committee and Relman, Dane & Colfax alleging that its facilities provided different terms and conditions of service during Black Bike Week in 2007 than it had for Harley week or at any other time of the year.<sup>251</sup> The settlement provided that the Pantry locations would ensure equal treatment of future Black Bike Week visitors, provide antidiscrimination training to its employees and independent contractors and establish procedures for receiving and investigation complaints, and that the company would pay monetary compensation to the plaintiffs.<sup>252</sup>

The Ocean Boulevard Friendly's restaurant in Myrtle Beach closed down during Black Bike Weeks from 2000 to 2006, offering barbeque in the parking lot instead of the full usual menu for the only time all year.<sup>253</sup> The Committee and Relman, Dane & Colfax instigated a putative class action lawsuit in 2007 to challenge the inequitable conduct on behalf of the NAACP, an individual biker and a class of African-Americans.<sup>254</sup> In November of 2008, the Committee, Covington & Burling, Patton Boggs, Crowell & Moring, Relman, Dane & Colfax and the South Carolina firm Derfner, Altman & Wilborn filed three more discrimination claims with the South Carolina Human Affairs Commission on behalf of the NAACP and individual Black Bike Week attendees.<sup>255</sup> The charges alleged that the Sea Horn Motel and Hamburger Joe's restaurant both closed during Black Bike Week 2008, and that the Landmark Hotel raised its rates, closed several of its facilities and imposed other discriminatory terms on its guests.<sup>256</sup> All three claims were resolved by settlement in 2010 and 2011.<sup>257</sup>

The Molly Darcy restaurant in Myrtle Beach closed for the duration of Black Bike Week in 2010, as it had for several prior years, and the Myrtle Beach Pan American Pancake and Omelet House refused

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250. WASH. LAW. COMM., UPDATE, Spring 2008, at 5.

251. *Id.* at 5, 11.

252. *Id.* at 11.

253. *Id.*

254. *Id.*

255. WASH. LAW. COMM., UPDATE, Spring 2009, at 7.

256. *Id.*

257. WASH. LAW. COMM., UPDATE, Fall 2012, at 11.

to serve African-American customers during the 2010 rally.<sup>258</sup> The law firms of Covington & Burling and Derfner, Altman & Wilborn again assisted the Committee in filing lawsuits against these two popular restaurants on behalf of the NAACP and individual plaintiffs in May 2011.<sup>259</sup> Pan American settled the claims in 2012.<sup>260</sup> The suit against Molly Darcy survived a motion to dismiss in 2012,<sup>261</sup> and settled shortly thereafter.<sup>262</sup>

The coordinated and continuing monitoring and enforcement activities of the NAACP, the Committee, and cooperating law firms has made a difference for Black Bike Week patrons. Hotline call activity, which is monitored carefully, shows a noticeable positive change in the experience for visitors during the rally over time, and the “overwhelming majority of businesses have been open during Black Bike Weeks.”<sup>263</sup> “Welcome Biker” signs are now up during both event weeks each year.<sup>264</sup>

L. Insisting that Popular D.C. Nightclubs Welcome Patrons of any Race or National Origin

In January 2006, the Committee and the law firm of Katten Muchin Rosenman filed a national origin discrimination complaint in the U.S. District Court for the District of Columbia on behalf of a recent immigrant of Arab descent who was forcibly ejected from the FUR Nightclub in Washington, D.C.<sup>265</sup> The nightclub, the D.C. Police Department and Government, and certain known and unknown police officers were all named as defendants in the lawsuit, *Mazloum v. D.C. Police Department*,<sup>266</sup> which alleged that the plaintiff had been accosted and punched in the nose by a bouncer, and then arrested, ejected, beaten and subjected to race-based taunts by off-duty plain clothes police who were patrons of the nightclub, all without cause and based on his national origin.<sup>267</sup> The plaintiff obtained a jury verdict against the bouncer and the nightclub for battery, and against one

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258. WASH. LAW. COMM., UPDATE, Spring 2012, at 9.

259. *Id.*

260. *See id.*

261. Nat'l Ass'n for the Advancement of Colored People, Inc. v. Molly Darcy, Inc., No. 4:11-CV-01293, 2012 WL 4473138, at \*1 (D.S.C. Sept. 26, 2012).

262. *Id.*; Order Approving Consent Decree, (Nov. 2, 2012).

263. A. Asaka 7/17/17, *supra* note 227.

264. *Id.*

265. WASH. LAW. COMM., UPDATE, Spring 2006, at 5.

266. *Mazloum v. D.C. Metro. Police Dep't*, 576 F. Supp. 2d 25, 29 (D.D.C. 2008).

267. WASH. LAW. COMM., UPDATE, Spring 2008, at 5, 11.

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of the officers under section 1983; damages of \$35,000 were awarded; and plaintiff's attorneys obtained an award of \$334,000 in 2009.<sup>268</sup> The matter was finally resolved in a settlement under which the District of Columbia paid \$340,000.<sup>269</sup>

In early 2008, the Committee and Kirkland & Ellis settled race and ethnic discrimination claims brought on behalf of a social networking group of Persian/Iranian-American professionals who were told by the popular Blue Gin nightclub in the Georgetown section of D.C. that they should stop using the club for social events because the owners were looking for a "whiter crowd."<sup>270</sup> Discussions with the club owner about federal and local civil rights laws led to an agreement that included a public apology, an enhanced diversity training program that included independent event planners, and monetary compensation to the group.<sup>271</sup> Hopefully, D.C. nightclubs have gotten the message that efforts to manage the racial or ethnic make-up of their customer-base will not be tolerated by the Committee.

### III. PRACTICAL, LEGAL AND SOCIETAL FACTORS LIKELY TO PRESENT CHALLENGES TO CIVIL RIGHTS IN PLACES OF PUBLIC ACCOMMODATION AS THE 21ST CENTURY UNFOLDS

While substantial progress has obviously been made since the 1960's, it cannot be said that civil rights in the area of public accommodations is a done deal. First, the disturbing resilience of stereotyping and bias in nightclub "image" creation, in large social event settings, in tradition-laden corporate policies, and in passenger selection by cab drivers despite many years of legal and societal disapproval demonstrates the importance of vigilance, particularly as forms of, and means of access to, places of public accommodation are transformed in the innovative 21st century economy. Second, the effectiveness of laws put in place fifty years ago in addressing the civil rights questions of today and tomorrow is unclear, particularly as new developments pose challenges to adequate enforcement, standards of proof, scope of coverage, and applicability to gender and sexual orientation discrimination. Finally, the 2016 presidential election campaign and the resulting presidency, and societal phenomenon, of Donald

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268. WASH. LAW. COMM., UPDATE, Fall 2009, at 12.

269. WASH. LAW. COMM., UPDATE, Fall 2010, at 11.

270. WASH. LAW. COMM., *supra* note 267, at 5, 10.

271. *Id.* at 11.

Trump raises anew concerns long thought by many to have been resolved regarding how we treat one another in this country and how we respect, and protect, those who are different.

A. Safeguarding Civil Rights in 21st Century Classes of Public Accommodation

The dawn of the 21st century has already transformed many aspects of our culture. Ready availability of computers, ease of mobility, and now 24-hour access to smartphones, has brought with it new ways of marketing, finding, arranging for, and accessing public accommodations. While the above cases demonstrating the persistence of racism affecting the traditional provision of public accommodations and services into the late 1990's and 2000's serve as a warning that stereotyping and bias remain even now, rapidly evolving technology and the speed of change in our society will surely offer new and different ways for biases, bigotry and stereotyping to manifest themselves.

Big data may make monitoring and policing violations of civil rights laws in the public accommodations industries easier in some ways, but privacy expectations and on-line anonymity will likely make them simpler to execute, and to hide, as well. The extraordinary pace of change we are likely to see over the next several decades will almost certainly bring types of public accommodations and issues relating to access to them that are unimaginable today. Concerns regarding equality of access to a few new “breeds” of public accommodation offerings have already received some media attention, however.<sup>272</sup>

Perhaps the most obvious example of the new genre of companies navigating this rapidly-evolving and complex terrain is the now not-so-new Airbnb, Inc., a privately held online marketplace for hospitality services.<sup>273</sup> Airbnb acts as a broker connecting owners of rental properties and rooms, hostel beds and hotel rooms with prospective short-term “guest” renters.<sup>274</sup> The company makes money from commissions paid in conjunction with bookings.<sup>275</sup> The Airbnb operation obviously bears some features common to hotels (and hotel

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272. *Id.*

273. See Jonathon Shieber, *How Airbnb Went from Renting Air Beds for \$10 to a \$30 Billion Hospitality Behemoth* (Aug. 12, 2018), <https://techcrunch.com/2018/08/12/how-airbnb-went-from-renting-air-beds-for-10-to-a-30-billion-hospitality-behemoth/>.

274. *About Us*, AIRBNB, <https://press.airbnb.com/about-us/> (last visited Sept. 9, 2018).

275. *What Are AirBnB Service Fees*, AIRBNB, <https://www.airbnb.com/help/article/1857/what-are-airbnb-service-fees?topic=250> (last visited Sept. 9, 2018).

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websites) in that it offers its users access to a place to stay. It also resembles taxicabs in that the actual transaction is largely an (albeit virtual) one-on-one arrangement made between private individuals. Airbnb’s “user profiles,” to which both hosts and guests are privy in order to ease safety/trust concerns, provide photographs and other identifying information on users that could be misused.<sup>276</sup>

Like other on-line “sharing culture” enterprises, Airbnb has taken the position that because it is a provider of an exchange platform, and not a provider of a public accommodation – a room, which is provided by the private “host” – their operations are not subject to Title II scrutiny.<sup>277</sup> But it is not hard to imagine that the same prejudices and stereotypes still seen in more traditional contexts clearly could manifest themselves in Airbnb transactions as well. In fact, a 2015 study by Harvard Business School found widespread discrimination by Airbnb hosts against guests whose names suggested that they were Black.<sup>278</sup> Arbitration clauses have inhibited litigation,<sup>279</sup> but company officials have recently referred to user discrimination as “the greatest challenge” the company faces.<sup>280</sup>

In 2016, the company initiated an internal bias and discrimination review of its entire platform, led by the former head of the American Civil Liberties Union’s legislative office.<sup>281</sup> In June of that year, Airbnb removed a host from the platform after he sent racial epithets to a Nigerian woman who was trying to reserve lodging.<sup>282</sup> And in July, in response to the rising tide of concern and still more complaints of racism, the company engaged former Attorney General Eric Holder to work alongside former Committee lawyer, John Relman -

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276. See Seth Porges, *Dear Would-Be Airbnb Guests: Here’s Why Hosts Keep Turning You Down* (Jan. 18, 2016, 9:00 AM), <https://www.forbes.com/sites/sethporges/2016/01/18/dear-would-be-airbnb-guests-heres-why-hosts-keep-turning-you-down/#6149e6481e59>.

277. See Aaron Belzer & Nancy Leong, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1299–1300 (2017).

278. See Benjamin Edelman, Michael Luca, & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1, 1 (2017), <http://www.benedelman.org/publications/airbnb-guest-discrimination-2016-09-16.pdf>.

279. *Selden v. Airbnb, Inc.*, No. 16-CV-00933, 2016 WL 6476934, at \*1 (D.D.C. Nov. 1, 2016), *appeal denied*, No. 16-CV-933, 2016 WL 7373776 (D.D.C. Dec. 19, 2016), *appeal dismissed*, 681 F. App. 1 (D.C. Cir. 2017), *cert. denied*, No. 17-79, 2017 WL 3036756 (U.S. Oct. 2, 2017).

280. *Diversity*, AIRBNB, <https://www.airbnb.com/diversity> (Last visited on Sept. 15, 2018).

281. Emily Badger, *Airbnb Says It Plans to Take Action to Crack Down on Racial Discrimination on Its Site*, WASH. POST (June 2, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/06/02/airbnb-says-it-wants-to-take-action-to-crack-down-on-racial-discrimination-on-its-site/?utm\\_term=.6eee84bb0838](https://www.washingtonpost.com/news/wonk/wp/2016/06/02/airbnb-says-it-wants-to-take-action-to-crack-down-on-racial-discrimination-on-its-site/?utm_term=.6eee84bb0838).

282. *Id.*

who helped lead the case against Denny's described above and now leads a private law firm focused on discrimination matters - to develop an anti-discrimination policy for Airbnb.<sup>283</sup>

To resolve a complaint filed against it by the California Department of Fair Employment and Housing (DFEH), Airbnb agreed in April 2017 to permit the state to conduct testing of certain multi-listing hosts who have been the subject of discrimination complaints in the past.<sup>284</sup> DFEH's complaint alleged that the company had failed to prevent discrimination and should be held liable.<sup>285</sup> Like the testing the Committee and the Equal Rights Center used in the fair housing context and to develop several of the public accommodations cases described above, Black and white applicants with otherwise identical backgrounds would attempt to book lodgings.<sup>286</sup> Then, in August of 2017, upon concluding that the company's services were being used by white nationalists looking to arrange lodging for a visit to attend a high-profile and now infamous racist rally scheduled for Charlottesville Virginia, Airbnb deactivated accounts it suspected were being used by prospective attendees.<sup>287</sup>

In addition to responding to discrimination complaints and legal action, boycotts and lawsuits against the company have now been threatened by those forced off the service.<sup>288</sup> And the prevailing view among legal scholars is that antidiscrimination laws likely do not reach many of the smaller landlords using Airbnb.<sup>289</sup> Airbnb is clearly operating in a legal and culturally fraught grey area. The societal, business

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283. See Abha Bhattarai, *Airbnb Hires Eric Holder To Help Company Fight Discrimination*, WASH. POST (July 22, 2016), [https://www.washingtonpost.com/news/business/wp/2016/07/20/eric-holder-joins-airbnb-to-help-company-fight-discrimination/?utm\\_term=.3f5f9d621229](https://www.washingtonpost.com/news/business/wp/2016/07/20/eric-holder-joins-airbnb-to-help-company-fight-discrimination/?utm_term=.3f5f9d621229).

284. See Sam Levin, *Airbnb Gives in to Regulator's Demand To Test For Racial Discrimination By Hosts*, THE GUARDIAN (Apr. 27, 2017), <https://www.theguardian.com/technology/2017/apr/27/airbnb-government-housing-test-black-discrimination>.

285. *Id.*

286. *Id.*

287. Kyle Swenson, *Airbnb Boots White Nationalists Headed To 'Unite the Right' Rally in Charlottesville*, WASH. POST, (Aug. 8, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/08/08/airbnb-boots-white-nationalists-headed-to-unite-the-right-rally-in-charlottesville/?utm\\_term=.8670001e6c97](https://www.washingtonpost.com/news/morning-mix/wp/2017/08/08/airbnb-boots-white-nationalists-headed-to-unite-the-right-rally-in-charlottesville/?utm_term=.8670001e6c97).

288. See Jonah Engel Bromwich, *Airbnb Cancels Accounts Linked to White Nationalist Rally in Charlottesville*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/2017/08/09/us/airbnb-white-nationalists-supremacists.html> (stating that white supremacist leader Jason Kessler was "considering ways to strike back at Airbnb after the event, including by starting a boycott or a class-action lawsuit").

289. Aaron Belzer & Nancy Leong, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1318 (2017); Michael Todisco, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. 121, 122 (Mar. 2015).

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and legal pressures on the company are great, and questions relating to the practicalities and law concerning its responsibility for, and success in controlling, discriminatory conduct by its hosts will be the subject of ongoing monitoring and potentially legal action.

Ride-sharing companies such as Uber and Lyft face similarly unresolved uncertainties and risks of legal responsibility for discriminatory actions taken by drivers engaged through their online platforms. A tester-based study of drivers in Seattle and Boston, for example, found that prospective riders with African-American sounding names had to wait significantly longer for rides, and were much more likely to have their rides cancelled, compared to similarly situated white testers.<sup>290</sup> Can it be that Uber and Lyft drivers will be allowed to discriminate while their competition - taxicab companies and drivers - are held to a higher standard of equal service? Can there be any doubt that Airbnb, Uber and Lyft are not the last of the new sharing economy and other “breeds” of public accommodations providers (or platforms) we will see develop going forward? The evidence suggests that their appearance and progression will bring new, unique and untested challenges to the policing of discrimination and racism.<sup>291</sup>

#### B. Guaranteeing the Adequacy of Today’s Public Accommodations Civil Rights Law

The cases of Airbnb, Uber and Lyft also highlight unresolved questions regarding the adequacy of current public accommodations civil rights laws to address unequal treatment going forward. For example, does Title II require that a defendant have a physical “place” at which it mistreats consumers? In *Welsh v. Boy Scouts of America*,<sup>292</sup> the Northern District of Illinois found the Boy Scouts “. . .not to be a place of public accommodation within the scope of Title II because it did not ‘operate from or avail [its] members of access to a particular facility or location.’”<sup>293</sup> Is there a logical basis for excluding from the reach of Title II organizations which do not operate a unitary, definite “place” of business, but which of necessity par-

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290. Mark Scott, *Study Finds Some Uber and Lyft Drivers Racially Discriminate*, N.Y. TIMES (Oct. 31, 2016), <https://www.nytimes.com/2016/11/01/technology/uber-lyft-racial-discrimination.html>.

291. Yanbo Ge, et al., *Racial and Gender Discrimination in Transportation Network Companies*, 20 (Nat’l Bureau of Econ. Research, Working paper No. 22776, 2016), <http://www.nber.org/papers/w22776.pdf>.

292. See generally *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413 (N.D. Ill. 1990).

293. *Welsh v. Boy Scouts of Am.*, 787 F. Supp. 1511, 1541 (N.D. Ill. 1992).

ticipate in the making of public accommodations (albeit at multiple and shifting locations) available to the public? Similarly, should Airbnb “hosts” be relieved of nondiscrimination obligations – in spite of their use of the service – merely because, as the *Welsh* court noted, “Congress has expressly declared that a private residence in which the homeowner dwells does not become a public accommodation simply because the owner opens it to the public.”<sup>294</sup>

As was discussed briefly above, Title II also provides only for injunctive relief.<sup>295</sup> The focus on simply stopping discriminatory conduct may have made sense in the context of the statute’s enactment, where the goal was to empower the federal government to forcibly desegregate openly resistant merchants.<sup>296</sup> But as segregation has become increasingly sophisticated, disguised and/or hidden, the cost of rooting out and forcing change has become enormous. At best, the costs will drastically limit the DOJ’s ability to take on more than the most egregious of cases. Additionally, the Department’s inability to recover any of its investigative and prosecutorial costs given the lack of a damages provision in Title II will render even that level of governmental action prohibitively expensive from cost/benefit and prioritization perspectives.<sup>297</sup> The lack of a damages provision for civil litigants virtually assures they will take up little of the slack. Perhaps, even more importantly, it impacts the violator’s analysis of the cost of resisting claims and refusing to settle.<sup>298</sup> In contrast, the Fair Housing Act provides for damages,<sup>299</sup> making it a much more attractive mechanism from the perspective of aggrieved house-hunter and their representatives, and a much more effective tool for encouraging discriminating property owners to back down. Is this a limitation that can and should be fixed?

Title II also does not by its language prohibit gender or sexual orientation discrimination in the provision of public accommodations. Discrimination in places of public accommodation is prohibited only on the basis of race, religion or national origin.<sup>300</sup> The statute also excludes private clubs from the reach of its antidiscrimination man-

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294. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1274 (7th Cir. 1993).

295. J. Relman 7/17/17, *supra* note 43.

296. *Id.*

297. *Id.*

298. Personal Conversation with Paul Hancock, (July 11, 2017).

299. 42 U.S.C. §§ 3601-3619, 3631 (1996).

300. 42 U.S.C. § 2000a(a) (1964).

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date.<sup>301</sup> Unequal treatment based on gender and by private clubs was purposely excluded at the time of enactment out of political necessity: While Congress was prepared in 1964 to outlaw racism, sexism was still largely ignored and even accepted as the natural order of things (particularly by men), and race and gender limited private clubs were seen as off-limits to government intervention.<sup>302</sup> Consensus could not be reached on eliminating these, then-accepted, aspects of our culture.<sup>303</sup> Whether amendments in these areas would be possible today is not clear, and in any event might well cause unexpected repercussions, such as ending “ladies nights” at bars and women-only health clubs.<sup>304</sup>

Although the Civil Rights Act of 1964 does not prohibit public accommodations discrimination based on gender, Title VI of the same act prohibits employment discrimination based on “race, color, religion, sex, or national origin.”<sup>305</sup> The addition of sex as a protected class has allowed women to more fully participate in the workplace over the past decades.<sup>306</sup> Furthermore, in recent years, “sex” has been read to include gender identity and sexual orientation, providing protection for LGBT employees who have faced discrimination.<sup>307</sup> A strong majority (76 percent) of the public supports these sorts of safeguards in the employment space—as well as in the field of housing, with 74 percent of Americans supporting anti-discrimination laws that would pro-

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301. *Id.* § 2000a(e).

302. See Note, *Public Accommodations Laws and the Private Club*, 54 GEO. L.J. 915, 918 (1966). In addition, the right to freedom of association under the First Amendment could be implicated, or at least according to some views. See *id.*; see also Margaret E. Koppen, *The Private Club Exemption from Civil Rights Legislation—Sanctioned Discrimination or Justified Protection of Right to Associate*, 20 PEPP. L. REV. 643, 652 (1993).

303. To prove this point, Title II gave rise to the longest filibuster in Senate history at the time. See Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?*, 36 HAMLINE J. PUB. L. & POL’Y 1, 1 (2015).

304. See Jessica E. Rank, *Is Ladies’ Night Really Sex Discrimination: Public Accommodation Laws, De Minimis Exceptions, and Stigmatic Injury*, 36 SETON HALL L. REV. 223, 247 (2005); see also Joyce L. McClements & Cheryl J. Thomas, *Public Accommodations Statutes: Is Ladies’ Night Out?*, 37 MERCER L. REV. 1605, 1623 (1986); Michael R. Evans, Comment, *The Case for All-Female Health Clubs: Creating a Compensatory Purpose Exception to State Public Accommodation Laws*, 11 YALE J.L. & FEMINISM 307, 308 (1999).

305. 42 U.S.C. § 2000e-2 (1964).

306. The percentage of women in the U.S. labor force increased by nearly 15% since Title VII was passed. See *Women in the Labor Force*, UNITED STATES DEPARTMENT OF LABOR, [https://www.dol.gov/wb/stats/NEWSTATS/facts/women\\_lf.htm#one](https://www.dol.gov/wb/stats/NEWSTATS/facts/women_lf.htm#one) (last visited Sept. 9, 2018).

307. See *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (holding that intentional discrimination against a transgender individual is discrimination based on sex and therefore violates Title VII); see also *Baldwin v. Dep’t of Transportation*, EEOC DOC 0120133080 (July 15, 2015) (holding that discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII).

tect LGBT individuals.<sup>308</sup> Despite this broad public support, the current political climate would seem to indicate that any amendment of Title II to include sex, sexual orientation, or gender identity as protected classes is far off.<sup>309</sup>

Another unresolved question regarding Title II relates to the standard of proof required of a plaintiff suing under the statute. In *Hardie v. NCAA*, for example, the NCAA was sued over the disparate impact of its refusal to allow convicted felons to coach in an NCAA sponsored high school basketball tournament.<sup>310</sup> The complaint, which was brought under Title II because the coaches were looking to participate in a public tournament, asserted that the disparate impact of the rule on African-Americans could have been avoided by a more individualized analysis focusing on the non-discriminatory “safety” objectives it was claimed to serve.<sup>311</sup> The NCAA argued that the case should be dismissed because the rule – which it acknowledged might well impact African-Americans disproportionately – was not intended for the purpose of discrimination.<sup>312</sup> The district court granted summary judgment for the NCAA, stating that disparate impact claims are not cognizable under Title II, and on appeal, the Ninth Circuit affirmed the lower court’s ruling but explicitly refused to rule on whether or not Title II encompassed disparate-impact claims.<sup>313</sup> Instead, the panel held that even if disparate impact claims were recognizable under Title II, the plaintiff had failed to meet one of the elements.<sup>314</sup>

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308. HENRY J. KAISER FAMILY FOUND., *INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC’S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION* 8 (2001), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/new-surveys-on-experiences-of-lesbians-gays-and-bisexuals-and-the-public-views-related-to-sexual-orientation-chart-pack.pdf>; see also Betsy Cooper, et al., *Beyond Same-sex Marriage: Attitudes on LGBT Nondiscrimination Laws and Religious Exemptions from the 2015 American Values Atlas*, PUBLIC RELIGION RESEARCH INSTITUTE (Feb. 18, 2016), <https://www.prrri.org/research/poll-same-sex-gay-marriage-lgbt-nondiscrimination-religious-liberty/> (indicating that 71% of Americans support laws that would protect LGBT persons from employment discrimination).

309. See, e.g., Daniel Wiessner, *U.S. Justice Department Says Anti-bias Law Does Not Protect Gay Workers*, REUTERS (Jul. 27, 2017, 10:53 AM), <https://www.reuters.com/article/us-usa-court-lgbt-idUSKBN1AC2DZ> (discussing the Trump Administration’s DOJ reversal of the Obama Administration’s position on Title VII and sexual orientation); see also *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017) (ruling that “sex” in Title VII does not encompass discrimination based on sexual orientation).

310. *Hardie v. NCAA*, 97 F. Supp. 3d 1163, 1164 (S.D. Cal. 2015).

311. *Id.* at 1166.

312. *Id.* at 1165.

313. *Id.* at 1169; *Hardie v. NCAA*, 861 F.3d 875, 887 (9th Cir. 2017).

314. *Hardie v. NCAA*, 861 F.3d 875, 886 (9th Cir. 2017).

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As the *Hardie* case illustrates, case law remains undecided on whether Title II plaintiffs can use a disparate impact theory to prove discrimination, or whether they must prove that intentional discrimination took place. The former approach would be similar to the standard that is applied in employment discrimination cases brought under Title VII of the 1964 Civil Rights Act.<sup>315</sup> Title II claims alleging disparate impact have been recognized in some jurisdictions.<sup>316</sup> Other courts, however, have insisted that litigants demonstrate that the defendant purposefully treated individuals dissimilarly because of their race, religion, or national origin.<sup>317</sup> How this question is resolved will determine whether Title II will remain a valuable tool to combat activities that have discriminatory effect, or whether such discriminatory effect, and the damaging societal consequences, will be permitted to continue as long as there is no proof of discriminatory intent.

Similarly, while it has been established that proof of intentional discrimination is a required element of a § 1981 claim, there is conflict in the case law regarding what discriminatory treatment is actionable. In 2000, in *Callwood v. Dave & Buster's*, the Sixth Circuit established what has come to be known as the “markedly hostile” test for actionability.<sup>318</sup> The court held that discriminatory treatment in the delivery of services constituted a violation of Section 1981, even if the service was grudgingly provided.<sup>319</sup> In these cases, plaintiffs may not have been prevented from “mak[ing] or enforce[ing] a contract” in the language of the statute, but the “terms and conditions” of the contract—the provision of services—were different.<sup>320</sup> In other words, the mistreatment alone, even without an outright refusal to contract, could serve as a basis for a Section 1981 claim.<sup>321</sup>

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315. See generally *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

316. See generally *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Robinson v. Power Pizza, Inc.*, 993 F. Supp. 1462 (M.D. Fla. 1998); *O'Neill v. Gourmet Sys. of Minn., Inc.*, 219 F.R.D. 445 (W.D. Wis. 2002); *Coward v. Town & Vill. of Harrison*, 665 F. Supp. 2d 281 (S.D.N.Y. 2009) (allowing the possibility of disparate impact claims).

317. *Akiyama v. United States Judo Inc.*, 181 F. Supp. 2d 1179, 1187 (W.D. Wash. 2002); *LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1370 (S.D. Fla. 1999) (requiring intentional discrimination).

318. *Callwood v. Dave & Buster's, Inc.*, 98 F. Supp. 2d 694, 707 (D. Md. 2000).

319. *Id.* at 710.

320. J. Relman 7/17/17, *supra* note 43.

321. J. Relman 7/17/17, *supra* note 43.

While a number of courts have adopted this test since *Callwood*,<sup>322</sup> others have not. In these cases, courts have held that a “complete denial” of services must take place in order for a section 1981 violation to occur.<sup>323</sup> As we have seen from the discussion above, the enactment and enforcement of civil rights laws since 1964 has gradually eliminated most blatant refusal of serve incidents or has made discriminators more devious in the implementation of exclusionary efforts. If a showing of “complete denial” is the threshold, the very belittling impact President Kennedy sought to halt will be allowed to continue, through slow service, additional security scrutiny, varied payment policies, etc. This too is a civil rights battle that remains to be won.<sup>324</sup>

C. Countering the “Trump Effect” on Attitudes toward Equality in Public Accommodations

Finally, it is not possible at this moment in our nation’s history to fail to note that the election and early stages of the presidency of Donald Trump raises, at the very least, additional and new-found concerns regarding the direction of civil rights over the next several years. From his own insensitive (if not outright racist) comments and attitudes toward people of different races, sexes, nationalities and even disabilities during his campaign and as President, to his policy announcements and administrative actions, Trump appears to have sanctioned racism, misogyny, nationalism, name-calling, homophobia, and even insulting the disabled. He has lent legitimacy to blatant extremists and haters, and failed to stand up for those subjected to their vitriol and violence or to laud the progress this country has made on civil rights over many years.<sup>325</sup>

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322. *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 871 (6th Cir. 2001); *Brooks v. Collis Foods, Inc.*, 365 F. Supp. 2d 1342, 1356 (N.D. Ga. 2005); *Dobson v. Central Carolina Bank & Trust Co.*, 240 F. Supp. 2d 516, 520 (M.D.N.C. 2003).

323. *See, e.g., Lizardo v. Denny’s, Inc.*, 270 F.3d 94, 102 (2d Cir. 2001); *Williams v. Staples, Inc.*, 372 F.3d 662, 667 (4th Cir. 2004). *See generally* Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. §1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1, 56 (2003).

324. Although the “complete denial” is hard to prove, plaintiffs may have other avenues of redress. *See, e.g., David Stout, 3 Blacks Win \$1 Million in Bauer Store Incident*, N.Y. TIMES, (Oct. 10, 1997), <https://www.nytimes.com/1997/10/10/us/3-blacks-win-1-million-in-bauer-store-incident.html> (discussing that Eddie Bauer is liable for negligent supervision of employees and defamation of character, but not for civil rights claims).

325. Jake Johnson, *Endorsing ‘Violence and Extremism Among His Base,’ Trump Pardons Oregon Ranchers Who Inspired Right-Wing Militia’s Armed Takeover of Public Lands, Common Dreams* (July 10, 2018), <https://www.commondreams.org/news/2018/07/10/endorsing-violence-and-extremism-among-his-base-trump-pardons-oregon-ranchers-who>.

### *Racial Equality in Places of Public Accommodation*

Whether President Trump's personal failures of moral leadership embolden his fanatical supporters or offer other-wise responsible people permission to act on sublimated fears and prejudices in the public accommodations arena, there is already plenty of evidence that he has incited racial, ethnic, sex and disability-based distrust, conflict and harassment. Given predictable human nature, it seems implausible that the effects of this less demanding environment will not manifest themselves in increased bias and discrimination in places of public accommodations.<sup>326</sup> Moreover, it is increasingly evident that the Department of Justice under Trump and Attorney General Sessions is likely to do little to enforce civil rights laws. In fact, it appears this Administration will actively roll-back long-established civil rights protections.

#### IV. THE WASHINGTON LAWYERS COMMITTEE AND OTHER PRIVATE COUNSEL WILL REMAIN KEY TO PROTECTING CIVIL RIGHTS IN PLACES OF PUBLIC ACCOMMODATION

Augmented by section 1981, and with the support of the Department of Justice and organizations like the Lawyers' Committee, the impact of the Civil Rights Act of 1964 on American society, since its enactment, has been nothing short of transformational.<sup>327</sup> Instances of refusals to serve customers equally in restaurants, stores and other places of public accommodation are now rare. Many national companies offering public accommodations have established extensive training and compliance procedures to prevent discrimination, most businesses have recognized the marketing benefits of equal treatment, and examples of markedly hostile mistreatment have been declining.<sup>328</sup> The Civil Rights Division pursued only six cases of public accommodations discrimination in the decade running from 2005-2015, compared to fifteen cases between 1995 and 2005, and roughly twice that many between 1964 and 1975.<sup>329</sup> Since the last of the Myrtle

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326. Related or not, an uptick in public accommodations discrimination at Black Bike week in South Carolina has seemingly been detected. R Ritter 7/11/17, *supra* note 43.

327. *Id.*

328. Discriminatory conduct reminiscent of the Jim Crow era still rears its ugly head occasionally, however. See, e.g., Sue Anne Pressley, *Jim Crow Lives On in Florida's Bar's Back Room*, WASH. POST (Apr. 1, 2001), <http://articles.latimes.com/2001/apr/01/news/mn-45213> (discussing that Black patrons were served only in the back of a package store in Perry, Florida).

329. See *Housing and Civil Enforcement Section Cases, Public Accommodations Cases*, U.S. DEP'T OF JUST. <https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#pa> (last visited Sept. 10, 2018).

Beach Black Bike week cases, the Committee's limited public accommodations docket too reflects this progress.

But the antics and ineptitudes of the Trump administration, and the recent resurgence of racist and nationalist organizations invigorated by it, serve as stark reminders that this progress is neither complete nor uninterrupted. Widespread equality in access to public accommodations has not eliminated bigotry and prejudice from our American culture. Nor does it provide any assurance of permanence, or that new 21st century breeds of public accommodations providers will necessarily follow this path, or that civil rights laws will not be weakened and narrowed when they need to be strengthened and broadened to deal with the issues of today and tomorrow. Indeed, the Committee's work continues to provide an important reminder of the need to keep up the fight. In 2016, through the efforts of the Committee and Relman, Dane & Colfax, a jury held a D.C. sports bar accountable for race discrimination after hearing testimony that the bar brazenly used a "fake guest list" to exclude African-Americans and the bar's owner unabashedly told management that he only wanted to hire blondes.<sup>330</sup> Public interest advocacy organizations and the private bars must continue to be vigilant and creative in championing integration in places of public accommodations going forward.

The Committee is well-positioned to play a leading role in this effort. It has proven over the years its ability to employ innovative strategies, like testing in the taxi cases, and monitoring in Myrtle Beach,<sup>331</sup> to root out discrimination in places of public accommodation. In cases like those against Denny's restaurants and Holiday Spas, it has demonstrated its ability to coordinate with the Department of Justice to better pursue and remedy violations of civil rights laws. The Committee has handled single plaintiff and small defendant matters against retail stores and others, such as the Blue Gin Nightclub, as well as large nationwide matters with thousands of victims against major national corporations like Cracker Barrel. It has convinced companies from D.C. taxicab owners, the New Hanover Rent-

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330. Courtland Milloy, *Black Bartenders Firing Serves as a Reminder That Blatant Discrimination Still Happens*, WASH. POST (Feb. 2, 2016), [https://www.washingtonpost.com/local/black-bartenders-firing-serves-as-a-reminder-that-blatant-discrimination-still-happens/2016/02/02/2cf696f0-c9bd-11e5-a7b2-5a2f824b02c9\\_story.html?utm\\_term=.be55c18e2f85](https://www.washingtonpost.com/local/black-bartenders-firing-serves-as-a-reminder-that-blatant-discrimination-still-happens/2016/02/02/2cf696f0-c9bd-11e5-a7b2-5a2f824b02c9_story.html?utm_term=.be55c18e2f85); Benjamin Freed, *Redline Sports Bar Discriminated Against Former Bartender, Jury Says*, WASHINGTONIAN (Jan. 26, 2016), <https://www.washingtonian.com/2016/01/26/redline-sports-bar-discriminated-against-former-bartender-jury-says/>.

331. A. Asaka 7/17/17, *supra* note 227.

### *Racial Equality in Places of Public Accommodation*

A-Car franchisee and the Northlake Foods Waffle House franchise, to the national Denny's restaurant and Host Marriott chains, to establish state-of-the-art antidiscrimination training programs, highlight complaint procedures, and accept ongoing monitoring. Kozmo Inc. agreed to help bring internet to disadvantaged neighborhoods. Adams Mark made contributions to historically Black colleges, and Bally initiated affirmative advertising to attract diverse health club members.

The Committee's high profile and sterling reputation has established the Committee as a trusted conduit for complaints about discrimination experienced by consumers of public accommodations facilities and services. It has worked closely and effectively with public interest and watchdog organizations such as the NAACP, in Myrtle Beach and against Cracker Barrel restaurants, and the Equal Rights Center in taxi cases and others, to strengthen their well-established civil rights initiatives. Finally, but perhaps most importantly of all, the Committee has successfully marshaled and coordinated the massive resources of too many prestigious well-resourced private law firms in Washington, D.C. and beyond to count, in order to construct effective and powerful teams to fight discrimination in places of public accommodation.

### CONCLUSION

The 50th Anniversary of the Washington Lawyers' Committee for Civil Rights and Urban Affairs offers an opportunity to consider the significant progress that has been made—and the critical role the Committee has played in creating the “single society and . . . single American identity” that President Kennedy envisioned would make it “possible for American consumers of any color to receive equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores.”<sup>332</sup> It is also a fitting moment to recognize the integral role the Committee has played in achieving all that has been accomplished, and to acknowledge how critical the Committee's extraordinary work, creativity, persistence and involvement has been in moving us closer to Kennedy's goal of racial equality. But this is also an appropriate occasion to reflect on the work that remains to be done to achieve Kennedy's stated aim: “to increase communication across racial lines to destroy stereotypes, to halt polarization, end distrust and hostility, and create common ground for efforts toward pub-

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332. Civil Rights Address, *supra* note 5.

lic order and social justice.”<sup>333</sup> As we move into the 21st century economy, and struggle under the yoke of the current administration’s regressive policies and attitudes, the Committee is well-placed to help spearhead the work that will be required to resist backsliding and to continue to advance the objective of assuring equal access to public accommodations for the next generation.

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333. WASH. LAW. COMM., *supra* note 1.

# Criminal Justice in the Courts of Law and Public Opinion

PHILIP FORNACI,\* ALAN PEMBERTON,† AND MICHAEL BEDER‡§

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## INTRODUCTION

“Our Nation is moving toward two societies, one black, one white—separate and unequal.”<sup>1</sup> So concluded the Report of the National Advisory Commission on Civil Disorders, released in February 1968 and commonly known as the Kerner Commission Report, which identified racial discrimination and poverty as root causes behind the escalating series of riots in American cities.<sup>2</sup> Later that year, in response to the report, a group of leading Washington, D.C. lawyers founded the Washington Lawyers’ Committee for Civil Rights Under Law (now the Washington Lawyers’ Committee for Civil Rights and Urban Affairs) (“Committee”).<sup>3</sup> Over the past half-century, the Committee’s efforts have spanned the gamut of employment, housing, and education issues identified in the Kerner Commission Report as contributing to the deep racial disparities in American life, and the Committee has expanded its work to include advancing the rights of immigrants and persons with disabilities.<sup>4</sup>

In addition, from the Committee’s early days, one of the mainstays of the Committee’s work has been efforts to reform the criminal justice system, and particularly to combat the system’s profoundly disparate impact on communities of color, in particular the African American community. The Committee does not provide criminal defense services. Instead, the Committee has focused on a series of civil rights issues emerging out of the discriminatory application of the criminal laws, and the harsh and often unconstitutional carceral system. The Committee’s litigation and advocacy has addressed what

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1. NAT’L ADVISORY COMM. ON CIV. DISORDERS, REP. OF THE NAT’L ADVISORY COMM’N ON CIV. DISORDERS 1 (1968) [hereinafter KERNER COMMISSION REPORT].

2. *Id.* at 9.

3. *History*, WASH. LAW. COMM., <https://www.washlaw.org/about-us/history> (last visited Oct. 30, 2018).

4. *Id.*; KERNER COMMISSION REPORT, *supra* note 1, at 7.

conduct should be criminalized and how it should be policed, the conditions in which those accused or convicted of crimes are confined in jails and prisons, and the lasting collateral effects of arrests and convictions on returning citizens that persist long after completion of any formal sentence.<sup>5</sup>

This article offers an overview of some of the Committee's key efforts over the past half-century to address the inequities produced by the District's criminal laws and the deficiencies in the District's treatment of individuals convicted and/or incarcerated under those laws. Through both litigation and public policy advocacy, the Committee has made significant impacts in these areas, including through public reports that helped build support for reforming the District's marijuana laws and through litigation victories that forced changes in the District's jails and federal prisons.<sup>6</sup> The Committee's experience suggests that, going forward, advocates must continue to be prepared pursue both litigation and public advocacy efforts if they wish to achieve broad-based criminal justice reforms.

## I. CRIMINALIZATION AND ARREST

Michelle Alexander's book, *The New Jim Crow*, set forth and popularized a wide-ranging critique of what she termed "mass incarceration," which she identified as a racialized system of social control that "refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison."<sup>7</sup> The selection of what conduct to criminalize—and whom to label a criminal—is not a neutral process, Alexander argued, particularly when it comes to America's war on drugs.<sup>8</sup> To the contrary, although formally race-

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5. See *Committee Fellows Tackle Intersection of Criminal System and Poverty*, WASH. LAW. COMM. (Nov. 21, 2017), <https://www.washlaw.org/news/657-committee-fellows-tackle-intersections-of-criminal-system-and-poverty>; see generally WASH. LAW. COMM., D.C. PRISONERS: CONDITIONS OF CONFINEMENT IN THE DISTRICT OF COLUMBIA 2–3 (2015), [http://www.washlaw.org/pdf/conditions\\_of\\_confinement\\_report.pdf](http://www.washlaw.org/pdf/conditions_of_confinement_report.pdf) (examining the serious and recurring confinement issues within the D.C. Jail and Correctional Treatment Facility).

6. See WASH. LAW. COMM., RACIAL DISPARITIES IN ARRESTS IN THE DISTRICT OF COLUMBIA, 2009–2011: IMPLICATIONS FOR CIVIL RIGHTS AND CRIMINAL JUSTICE IN THE NATION'S CAPITAL 31–32 (2013), [https://www.washlaw.org/pdf/wlc\\_report\\_racial\\_disparities.pdf](https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf) [hereinafter WLC ARRESTS REPORT]; see generally WASH. LAW. COMM., D.C. PRISONERS: CONDITIONS OF CONFINEMENT IN THE DISTRICT OF COLUMBIA 2–3 (2015), [http://www.washlaw.org/pdf/conditions\\_of\\_confinement\\_report.pdf](http://www.washlaw.org/pdf/conditions_of_confinement_report.pdf) (examining the serious and recurring confinement issues within the D.C. Jail and Correctional Treatment Facility).

7. MICHELLE ALEXANDER, *THE NEW JIM CROW* 12–13 (rev. ed. 2012).

8. *Id.* at 5–8.

neutral, the criminal justice system “manage[s] to round up, arrest, and imprison an extraordinary number of black and brown men, when people of color are actually no more likely to be guilty of drug crimes and many other offenses than whites.”<sup>9</sup> As a result, “[l]ike Jim Crow, mass incarceration marginalizes large segments of the African American community, segregates them physically (in prisons, jails, and ghettos), and then authorizes discrimination against them in voting, employment, housing, education, public benefits, and jury service.”<sup>10</sup>

Early in its history, the Committee—recognizing the potential discriminatory effects and other societal consequences of over criminalization—pushed, through litigation and other public advocacy, to hold police accountable for misconduct and to narrow the state’s ability to criminalize low-level, victimless conduct, in particular gambling, prostitution, and drug possession.<sup>11</sup> The Committee’s litigation efforts on police accountability have met with significant success, but litigation to force broader changes in the District’s criminal laws proved unsuccessful.<sup>12</sup> The Committee’s public advocacy for action to address systematic disparities in the structure and enforcement of criminal laws in the greater Washington area continued, nonetheless. Most recently, the Committee’s analysis of racial disparities in District arrests provided key support for successful efforts to decriminalize, and later legalize, low-level marijuana possession in the District—an offense for which African American residents were disproportionately arrested.<sup>13</sup>

#### A. Police Accountability

Beginning at least as early as the 1980s and through the present, the Committee has brought police-misconduct cases targeting individual instances of police brutality, racially motivated arrests and other civil rights violations, including:

*Habib v. Prince Georges County*,<sup>14</sup> in which two brothers were savagely beaten by Prince Georges County police during their arrest,

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9. *Id.* at 17.

10. *Id.*

11. *See infra* notes 14–42.

12. *See infra* notes 43–46.

13. *See* WLC ARRESTS REPORT, *supra* note 6, at 13.

14. *See* Norris P. West, *Man beaten by PG police gets \$1.9 million award Jury says officers used excessive force*, BALT. SUN, (Mar. 18, 1993), [http://articles.baltimoresun.com/1993-03-18/news/1993077201\\_1\\_habib-george-county-prince-george](http://articles.baltimoresun.com/1993-03-18/news/1993077201_1_habib-george-county-prince-george) (“A federal jury awarded \$1.9 million yesterday to a black Rockville man and the estate of his brother after finding that four white Prince George’s County police officers used excessive force against them in 1989.”).

killing one brother and badly injuring the other. The case settled after a jury verdict for plaintiffs, for \$1.9 million. *Habib* helped shine a light on the Prince Georges department, which has a history of excessive police violence.<sup>15</sup>

*Gooden v. Howard County*,<sup>16</sup> a case challenging the racially-motivated arrest and handcuffing of an African American woman by Howard County police on baseless charges of noise in her apartment. Although ultimately decided in favor of defendants on qualified-immunity grounds, the case helped establish the rights of arrestees in the Fourth Circuit for future cases.

*Richards v. Gelsomino*,<sup>17</sup> a case alleging a racially motivated arrest by a D.C. Metropolitan Police Department officer, which settled on favorable terms after the federal judge denied the police officer's motion to dismiss a civil rights claim.

*J.A. v. Miranda*,<sup>18</sup> a case in federal court in Maryland that settled after the court granted in part and rejected in part the police officer and Montgomery County defendants' motions to dismiss, in a case where officers had beaten and improperly arrested a bystander who was attempting to videotape the arrest of his brother by the same officers.

*Robinson v. Farley*,<sup>19</sup> in which the plaintiff, a 28-year-old man with physical and intellectual disabilities, left a bus stop after a Prince Georges County, Maryland police officer began watching him, and was followed to his grandmother's house, whereupon the officer called in reinforcements and beat the plaintiff needlessly, inflicting severe injuries. Plaintiff was never charged with a crime. The case settled favorably after a federal judge in the District of Columbia denied the defendants' motions to dismiss.

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15. See TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 76–78 (2015) (detailing the death of Prince Jones, Jr. at hands of Prince Georges policeman); Jason Cherkis & Kevin Diaz, *Black Victim, Black Cop, Black County*, WASH. CITY PAPER (Sept. 22, 2000), <https://www.washingtoncitypaper.com/news/article/13020801/black-victim-black-cop-black-county>.

16. See generally *Gooden v. Howard Cty.*, 954 F.2d 960 (4th Cir. 1992) (discussing qualified immunity defense).

17. *Richards v. Gelsomino*, 240 F. Supp. 3d 173, 181 (D.D.C. 2017) (denying motion to dismiss).

18. *J.A. v. Miranda*, No. PX 16-3953, 2017 U.S. Dist. LEXIS 141643 (D. Md. Sept. 1, 2017).

19. *Robinson v. Farley*, 264 F. Supp. 3d 154, 156–58, 163 (D.D.C. Sept. 1, 2017) (denying defendants' motion to dismiss).

*Avila v. Dailey*,<sup>20</sup> in which the plaintiff, a construction contractor, gave a friend a ride home after the friend was involved in a fight at a restaurant. D.C. Metropolitan police seized plaintiff's van and held it for over a year, falsely stating it was needed as evidence, and apparently seeking to coerce plaintiff into identifying his friend. The court refused to grant defendants' motion to dismiss on qualified-immunity grounds, granted plaintiff partial summary judgment on Fourth Amendment grounds, and allowed the case to proceed on a Fifth Amendment claim.

Most recently, the Committee was able to secure a \$125,000 offer of judgment<sup>21</sup> for a client who was detained in a baseless and racially based traffic stop by a police officer for Laurel, Maryland, and then strip searched (forced to pull down his pants so that his genitals and buttocks could supposedly be inspected) in full view of the public in a commercial parking lot.<sup>22</sup> The client was never arrested or charged with a crime.<sup>23</sup> Although the Laurel police department officially disclaimed knowledge of the officer's actions, they in fact had information about the strip search, and presented the officer with a meritorious service award the week after the incident.<sup>24</sup> The illegal search occurred in 2014, the Committee and co-counsel filed suit in federal court in Maryland in 2015, and following extensive discovery and briefing, the court issued its opinion confirming the acceptance of the judgment and award of attorneys' fees in 2018.<sup>25</sup> The Committee's co-counsel was the Partnership for Civil Justice Fund.

The Committee's efforts to address police misconduct extended beyond litigation, as well. For instance, in 1984 the Committee launched an effort, in partnership with the Montgomery County, Md., branch of the NAACP and several major law firms, to study Mont-

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20. *Avila v. Dailey*, 246 F. Supp. 3d 347, 350–51, 360–61, 64, 67 (D.D.C. 2017) (granting partial reconsideration and directing that trial proceed).

21. Andrews Michaels, *Laurel Police Officer to Pay \$125,000 in Civil Rights Lawsuit*, WASH. POST (Mar. 24, 2017, 12:50 PM), <https://www.baltimoresun.com/news/maryland/howard/laurel-ph-ll-police-civil-lawsuit-0330-20170324-story.html>.

22. *Sergeant v. Acol*, No. PWG-15-2233, slip op. at 1 (D. Md. Jan. 3, 2018).

23. *Victory: \$125,000 Judgment Entered Against Laurel Police Officer in Public Strip Search Case*, WASH. LAW. COMM. (Mar. 21, 2017), <https://www.washlaw.org/news/569-victory-125-000-judgment-entered-against-laurel-police-officer-in-public-strip-search-case>.

24. *Id.*

25. *Sergeant*, slip op. at 10.

gomery County Police Department procedures and allegations of the mistreatment of people of color by county police.<sup>26</sup>

#### B. Gambling and Prostitution

In the 1970s the Committee, “[m]otivated by concern for the apparent discrimination on the basis of race, sex, and economic class in the enforcement of gambling and prostitution laws . . . conducted a study of laws and enforcement practices concerning victimless crimes with the assistance of grants from the United States Catholic Conference and the United Church of Christ.”<sup>27</sup> One result of the study was a 1973 report on gambling enforcement in the District that recommended legalizing “numbers” games “as an alternative to police corruption, unequal enforcement and diminishing community respect for authority.”<sup>28</sup> Reporting on the Committee’s findings, *Jet* magazine noted that legalization of numbers games would “halt the trend where a Black person who wagers a nickel on a three-digit number is more likely to be arrested than a white who gambles hundreds of dollars in Las Vegas, thousands on the stock market or five in a bingo game.”<sup>29</sup> The magazine highlighted the Committee’s findings that in the District, “Blacks make up 92 percent of all gambling arrests and 72 percent of the population,” and that an even greater disparity existed at the national level, where “70 percent of all persons arrested for gambling in the U.S. are Black, although the nation is 12 percent Black.”<sup>30</sup> In 1977, a citizens commission established by the D.C. Council did recommend legalizing certain forms of gambling, including by establishing an official lottery.<sup>31</sup> A voter initiative approving a lottery ultimately passed in November 1980, with the law taking effect in March 1981 after passing the Congressional review period.<sup>32</sup> However, supporters of the initiative appeared to focus on the additional revenue a lottery could raise for the cash-strapped District (which was instead

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26. See Sonia Boin, *D.C. Law Firm Joins Study of Police Treatment of Blacks*, *THE NEWS*, Nov. 29, 1984, at A-9; R.H. Melton, *Panel Set to Study Police Brutality Claims*, *WASH. POST.*, June 26, 1984, at B4.

27. Gwen T. Johnson, *Civil Rights Papers: Washington Lawyers’ Committee for Civil Rights Under Law: A Survey of the Lawyers’ Committee Work for Criminal Justice*, 27 *HOW. L.J.* 1253, 1259 (1984).

28. *Id.* (citing *WASH. LAW. COMM., LEGALIZED NUMBERS IN WASHINGTON* (1973)).

29. *Lawyers Seek To Legalize Numbers Betting In D.C.*, *JET*, Oct. 18, 1973, at 36.

30. *Id.*

31. Jack Eisen, *Legal Gambling of Several Types Proposed for City*, *WASH. POST.*, May 2, 1978, at A1, A14.

32. D.C. Law 3–172 (corresponds to D.C. Code §§3–1301 *et seq.* (2016)); D.C. Code § 22-1716 *et seq.* (1987).

being captured by Maryland's lottery) rather than on the racial disparities identified in the Committee's report seven years earlier.<sup>33</sup>

Another effort stemming from the Committee's concerns about the enforcement of vice crimes was the Committee's representation of two of six women charged with violating the District's statute prohibiting soliciting for prostitution.<sup>34</sup> The women argued—and the trial court agreed—that the law was discriminatorily enforced against them on the basis of sex.<sup>35</sup> The trial court further found that the statute unconstitutionally infringed on the defendants' free-speech and privacy rights.<sup>36</sup> The D.C. Court of Appeals, however, was unconvinced. In an eight-page opinion, the court rejected the privacy and free-speech arguments and held that “the trial court's finding of discriminatory enforcement is unsupported by the record.”<sup>37</sup> The court noted that the statute was gender-neutral on its face and had been enforced against “a male who seeks to sell himself to another male for purposes of sodomy.”<sup>38</sup> Drawing an analogy to drug enforcement efforts, the court also opined that although “the major law enforcement efforts in enforcing the statute are directed against the sellers [rather than purchasers] of sex . . . unquestionably there may be wholly valid reasons for such a circumstance,” just “as is true in the enforcement of the narcotics laws, where sellers are the principal police targets.”<sup>39</sup>

### C. Drug Offenses

The Committee attempted, unsuccessfully, to establish through litigation the principle that individuals addicted to narcotics should not be held criminally responsible for drug possession, but that instead “various forms of rehabilitative treatment [should be] substituted for criminal incarceration of heroin addicts and other individuals convicted of drug abuse.”<sup>40</sup> The Committee hoped, in a series of trials, to build on decisions in the U.S. Court of Appeals for the D.C. Circuit

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33. Eugene Robinson & Keith B. Richburg, *Area Voters Follow Their Traditions*, WASH. POST, Nov. 5, 1980; Keith B. Richburg & Ron Shaffer, *Progambling Ads May Turn Tide On Vote in D.C.*, WASH. POST, Oct. 30, 1980; Eisen, *supra* note 31, at A1.

34. *United States v. Moses*, 339 A.2d 46, 48 (D.C. 1975).

35. *Id.*

36. *Id.* at 50–51.

37. *Id.* at 55.

38. *Id.*

39. *Id.*

40. Peter Barton Hutt, *Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: The Role of the Washington Lawyers' Committee for Civil Rights Under Law in the Handling of Drug Abuse*, 27 How. L.J. 1243, 1243 (1984).

and the Fourth Circuit that struck down public-intoxication convictions of alcoholics.<sup>41</sup> The Committee argued that narcotic addiction was a recognized medical condition, and that for individuals who, as a result of that condition, had “lost control over the use of narcotics, possession is not a voluntary act, involves no criminal intent, and thus is not properly punished under common law principles of criminal responsibility,” nor could the Eighth Amendment countenance “punish[ing] a sick person for the symptoms of his disease.”<sup>42</sup>

The Committee’s litigation efforts on this issue culminated—and foundered—in two appellate decisions, one issued by the U.S. Court of Appeals for the D.C. Circuit and one by the D.C. Court of Appeals. The D.C. Circuit issued a fractured set of opinions in *U.S. v. Moore*, the upshot of which was the conclusion—by five of the nine judges across two main opinions—that neither the common law nor the Eighth Amendment prohibits holding a person who is addicted to narcotics criminally responsible for possessing narcotics, which the judges viewed as a voluntary act (distinct from the defendant’s merely experiencing a craving for narcotics).<sup>43</sup> The D.C. Court of Appeals followed suit, holding that the “defense sought to be asserted”—that a person charged with heroin possession “may raise an affirmative defense of lack of common law criminal responsibility due to heroin addiction”—had been “explored inch by inch and rejected in” *Moore*, and that the D.C. Court of Appeals agreed with that rejection.<sup>44</sup>

Both the D.C. Circuit and the D.C. Court of Appeals also based their conclusions, in part, on their assessments that federal and local drug laws provided sufficient flexibility and treatment options to avoid injustice to those convicted of mere possession.<sup>45</sup> History shows oth-

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41. *Id.* at 1245–46.

42. *Id.* at 1246.

43. *United States v. Moore*, 486 F.2d 1139, 1147–48, 1153–54 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 980 (1973) (*per curiam*) (opinion of Wilkey, J.); *id.* at 1198–1200 (opinion of Leventhal, J.).

44. *Gorham v. United States*, 339 A.2d 401, 403 (D.C. 1975).

45. *Moore*, 486 F.2d at 1202–03 (“As to possession of narcotics by addicts for personal use, we take note of the limited impact projected by Congress for the present law – with Congressional contemplation that the Government would withhold criminal prosecution of mere addicts, and that they would be subject to pretrial diversion and the court’s broad probation authority.”); *Gorham*, 339 A.2d at 413 (“Diversion, probation and incarceration are the methods that the community has now chosen in reaction to the crime of heroin possession. At a minimum, criminalization forces the nontrafficking addict who will not seek out treatment into the treatment facilities made available through the criminal justice system. This is to the good of all concerned. The addict who is able to refrain from heroin usage after he has been processed through this system has benefitted personally as has the community which will no longer have to support his self-destructive habit which carries with it a harmful effect on society.”).

erwise. Rather, “[i]n less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million, with drug convictions accounting for the majority of the increase.”<sup>46</sup>

The Committee later found much greater success in advocating for drug-law reforms outside the litigation context. Forty years after *Moore*, in July 2013, the Committee released the first of four reports, with the support of an advisory committee of five retired and senior federal and District judges,<sup>47</sup> examining aspects of the criminal justice system in and around the District.<sup>48</sup> This first report analyzed comprehensive datasets provided by the District’s Metropolitan Police Department (“MPD”) and D.C. Superior Court showing the racial and geographical distribution of arrests for various types of offenses in the District from 2009 through 2011.<sup>49</sup> The report found that African Americans were significantly over-represented in arrests for a broad range of offenses. Among the report’s key findings:

Although African-Americans comprised roughly half of the District’s adult population, eight out of ten arrests made between 2009-2011 were of African-Americans.<sup>50</sup>

Wards with more African-American residents witnessed a higher number of arrests. Nine out of ten of the District’s African-American residents resided in five of its eight wards, and seven out of ten arrests made in the city occurred in these five wards.<sup>51</sup>

Six out of ten drug arrests involved simple possession, for which African-American arrestees accounted for close to nine out of ten arrests during the three-year time-span.<sup>52</sup> Wards that had a high percentage of African-American residents had a higher percentage of all drug arrests, while wards that had a higher percentage of white residents had a lower percentage of drug arrests, although African-American arrestees still accounted for most arrests in these wards.<sup>53</sup> Despite the disparities in drug arrests between the two

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46. ALEXANDER, *supra* note 7, at 6 (citing Marc Mauer, *Race to Incarcerate* 33 (rev. ed. 2006)).

47. Among the judges on the advisory committee were Patricia M. Wald, retired Chief Judge of U.S. Court of Appeals for the D.C. Circuit—who was the court-appointed appellate counsel to the defendant in *United States v. Moore*—and John M. Ferren, a senior judge of the District of Columbia Court of Appeals, who represented Ms. Gorham in *Gorham v. United States*.

48. WLC ARRESTS REPORT, *supra* note 6, at 1.

49. *Id.* at 1.

50. *Id.* at 7.

51. *Id.* at 8.

52. *Id.* at 14.

53. *Id.* at 15.

groups, data from the National Survey on Drug Use and Health showed that rates of illegal drug use among whites and African-Americans were roughly equal.<sup>54</sup>

The report's overall conclusion was stark: "arrests over the three-year period exhibited serious and pervasive racial disparities," requiring an "in-depth investigation into the factors generating this disparate racial impact."<sup>55</sup> The report also recommended that "in light of the overwhelming racial disparities identified in arrests related to misdemeanor drug offenses, and marijuana arrests in particular," it should be "[a]n immediate priority" to place a "renewed focus . . . on treating drug abuse as a public health concern rather than a primary focus of the criminal justice system . . . determin[ing] the extent to which the use of certain currently illegal drugs should be decriminalized or legalized."<sup>56</sup>

The Committee's report drew significant press coverage.<sup>57</sup> Moreover, it was widely credited—along with a similar report on marijuana arrests by the ACLU of the National Capital Area released earlier in 2013—as a driving force behind ultimately successful efforts to first decriminalize, and then legalize through a public referendum, simple possession of small amounts of marijuana.<sup>58</sup> The Washington Post reported that the Committee and ACLU findings had "shaped the debate" on decriminalizing marijuana possession under District law<sup>59</sup> and had contributed to an "overall change in opinion" on marijuana

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54. *Id.* at 16.

55. *Id.* at 31.

56. *Id.* at 32.

57. See, e.g., Peter Hermann, *Study Cites Racial Disparities in D.C. Arrests*, WASH. POST (July 12, 2013), [https://www.washingtonpost.com/local/study-cites-racial-disparities-in-dc-arrests/2013/07/11/02a46260-ea18-11e2-8f22-de4bd2a2bd39\\_story.html?utm\\_term=.fbb4ee5e8029](https://www.washingtonpost.com/local/study-cites-racial-disparities-in-dc-arrests/2013/07/11/02a46260-ea18-11e2-8f22-de4bd2a2bd39_story.html?utm_term=.fbb4ee5e8029); Martin Austerhuhle, *Report: Arrests in D.C. Disproportionately Affect African-Americans*, WAMU (July 12, 2013), [https://wamu.org/story/13/07/12/report\\_arrests\\_in\\_dc\\_disproportionately\\_affect\\_african\\_americans/](https://wamu.org/story/13/07/12/report_arrests_in_dc_disproportionately_affect_african_americans/); *Report Finds Racial Disparity Among D.C. Arrest Rates*, WTOP (July 12, 2013, 6:12 PM), <https://wtop.com/news/2013/07/report-finds-racial-disparity-among-dc-arrest-rates/>.

58. See, e.g., Matt Ferner, *Washington, D.C. Votes to Legalize Recreational Marijuana*, HUFF. POST (Nov. 4, 2014), [https://www.huffingtonpost.com/2014/11/04/washington-dc-legal-marijuana\\_n\\_5947520.html](https://www.huffingtonpost.com/2014/11/04/washington-dc-legal-marijuana_n_5947520.html); Dan Merica, *D.C. Council Votes to Ease Marijuana Laws*, CNN (Mar. 4, 2014), <http://politicalticker.blogs.cnn.com/2014/03/04/d-c-council-votes-to-ease-marijuana-laws/>; Matt Cohen, *Will the Marijuana Decriminalization Bill Solve D.C.'s Race and Gender Disparity Problem?*, DCIST (Nov. 15, 2013, 12:18 PM), [http://dcist.com/2013/11/will\\_the\\_marijuana\\_decriminalization.php](http://dcist.com/2013/11/will_the_marijuana_decriminalization.php).

59. Aaron C. Davis, *D.C. Poised for Giant Leap Toward Legalizing Marijuana*, WASH. POST (Oct. 24, 2013), [https://www.washingtonpost.com/local/dc-politics/dc-poised-for-giant-leap-toward-legalizing-marijuana/2013/10/24/db183fb0-3cbe-11e3-b6a9-da62c264f40e\\_story.html?utm\\_term=.8d93aa9b1ed1](https://www.washingtonpost.com/local/dc-politics/dc-poised-for-giant-leap-toward-legalizing-marijuana/2013/10/24/db183fb0-3cbe-11e3-b6a9-da62c264f40e_story.html?utm_term=.8d93aa9b1ed1).

legalization in the District.<sup>60</sup> Activists also cited the report's findings in hearings before the D.C. Council's Committee on the Judiciary and Public Safety regarding the Metropolitan Police Department's stop-and-frisk policies.<sup>61</sup>

## II. CONDITIONS OF CONFINEMENT

The bulk of the Committee's criminal justice litigation efforts have heavily focused on vindicating prisoners' rights to constitutionally adequate conditions of confinement.<sup>62</sup> Although significant deficiencies remain, these efforts have produced meaningful advances for prisoners.

### A. Early Efforts of the Washington Lawyers' Committee to Address Over-Criminalization of Communities of Color

The Committee made an early and long-lasting advance for prisoners' rights in the District of Columbia with three cases that established improved due process in the District's prison disciplinary systems. The first cases, *Pollard v. Washington*<sup>63</sup> and *Woodward v. Washington*,<sup>64</sup> initiated in 1971, were class actions litigated by the Committee and lawyers from Covington & Burling. These cases challenged disciplinary proceedings in which prisoners were punished and transferred into maximum security confinement for alleged disciplinary infractions "without notice, hearing, counsel or any of the other rudiments of a fair trial[.]"<sup>65</sup> The Committee also joined in a related case in the Eastern District of Virginia, *Wright v. Jackson*.<sup>66</sup> The end result was a detailed code of prison disciplinary procedures, largely drafted by the plaintiffs' lawyers, that was finally enacted into law by the D.C. Council over a decade later as the Lorton Regulations Ap-

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60. Aaron C. Davis & Peyton M. Craighill, *In major shift, D.C. residents strongly support legalizing marijuana*, WASH. POST (Jan. 15, 2014), [https://www.washingtonpost.com/local/dc-politics/in-major-shift-dc-voters-strongly-support-legalizing-marijuana/2014/01/15/9fcc6d04-7d6a-11e3-93c1-0e888170b723\\_story.html?utm\\_term=.53d4a390eb79](https://www.washingtonpost.com/local/dc-politics/in-major-shift-dc-voters-strongly-support-legalizing-marijuana/2014/01/15/9fcc6d04-7d6a-11e3-93c1-0e888170b723_story.html?utm_term=.53d4a390eb79).

61. See Marielle A. Moore, *The Next Stage of Police Accountability*, 14 SEATTLE J. SOC. JUST. 145, 161 (2015).

62. See *DC Prisoners' Project*, WASH. LAW. COMM., <https://www.washlaw.org/projects/dc-prisoners-rights> (last visited Nov. 1, 2018).

63. See William H. Allen, *Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: The Lawyers' Committee and the Lorton Disciplinary Code*, 27 HOW. L.J. 1231 *passim* (1984) (discussing *Pollard v. Washington*, No. 2055-71 (D.D.C. 1971)).

64. *Id.* at 1233 (discussing *Woodward v. Washington*, No. 71-1659 (D.D.C. 1971)).

65. *Id.* at 1232.

66. See generally *Wright v. Jackson*, 505 F.2d 1229 (4th Cir. 1974) (examining inmates' claims of due process violations).

proval Act of 1982.<sup>67</sup> This law remained in effect until the closure of the Lorton facilities and the 2001 transfer of the District's sentenced felons into the Federal Bureau of Prisons pursuant to the D.C. Revitalization Act,<sup>68</sup> a law that serves as the "enlightened legislative product of an enlightened city government, with no suggestion on the face of it that this was substantially a code written by representatives of the affected inmates themselves, who seized opportunities to have enacted, in the name of the Constitution, policies that appeared to go beyond constitutional requirements."<sup>69</sup>

#### B. The Founding of the D.C. Prisoners' Legal Services Project

In the early 1980s, the District of Columbia entered the war on drugs and passed a series of draconian drug laws and mandatory minimum sentences that caused a dramatic increase in the District prison population.<sup>70</sup> At its peak, the eight prisons at the Lorton, Virginia Correctional complex housed more than 9,000 prisoners, almost 1,700 prisoners were housed at the DC Jail, and 1,000 prisoners were housed in a series of halfway houses.<sup>71</sup> In addition, approximately 5,000 prisoners convicted of D.C. Code offenses were housed in the federal prison system.<sup>72</sup> The prison complex was established in 1910 with the construction of the Workhouse at Occoquan, followed by the construction of the Central Facility in 1914, and the Maximum Security Facility in 1920.<sup>73</sup> Buildings that incarcerated Alice Paul and the Suffragettes when they were arrested for seeking the franchise for women remained in use as prison dormitories until the complex closed in

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67. *Moore v. Gaither*, 767 A.2d 278, 280–81 (D.C. 2001) (explaining how the Lorton Regulations Approval Act of 1982 came about).

68. Spencer S. Hsu & Cheryl W. Thompson, *VA. Prisons may Take 1800 Lorton Inmates*, WASH. POST (Jan. 31, 1998), [https://www.washingtonpost.com/archive/local/1998/01/31/va-prisons-may-take-1800-lorton-inmates/7285d640-1dc5-43a6-80de-14bc16c54a4a/?utm\\_term=.905f69deae4b](https://www.washingtonpost.com/archive/local/1998/01/31/va-prisons-may-take-1800-lorton-inmates/7285d640-1dc5-43a6-80de-14bc16c54a4a/?utm_term=.905f69deae4b).

69. Allen, *supra* note 63, at 1238.

70. See Jennifer Senior, 'Locking Up Our Own,' *What Led to Mass Incarceration of Black Men*, N.Y. TIMES (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/books/review-locking-up-our-own-james-forman-jr.html> (tracing increasingly harsh penalties for drug use in the District of Columbia and their effect on over-incarceration and attendant social ills, and an inability or unwillingness on the District government's part to comply with prison conditions orders issued by the courts).

71. *Closing of Lorton Correctional Complex: Hearings on H.R. 461 Before the Subcomm. on the Dist. of Columbia of the Comm. on Gov't Reform and Oversight*, 104th Cong. 32–33, 46 (1995).

72. *Id.* at 33.

73. *Id.* at 73.

2001.<sup>74</sup> These prisons were old, in disrepair, violent, and lacked adequate medical and mental health services, educational opportunity, or programs designed to rehabilitate prisoners.<sup>75</sup> Staff corruption was rampant.<sup>76</sup>

In the 1970s and early 1980s, there was a series of conditions of confinement cases brought by the firms of Covington & Burling and Shaw, Pittman, Potts & Trowbridge, the National Prison Project of the American Civil Liberties Union, and the Public Defender in response to increased crowding and deteriorating conditions. Initially, three of the Lorton prisons – Occoquan, Central and Maximum – and the DC Jail were found to have conditions that fell below the constitutional minimum and enjoined to make improvements.<sup>77</sup> Many more cases and injunctions followed.

The conditions litigation cast a bright light on the crisis in the District's prisons and Jail. A group of advocates came together to create a sustainable institutional response. Covington & Burling gifted an attorneys' fee earned in the litigation regarding the Lorton Modular facility. The Agnes and Eugene Meyer Foundation and the Morris and Gwendolyn Cafritz Foundation and the Public Welfare Foundation offered early support and the D.C. Prisoners' Legal Services Project was formed.<sup>78</sup> The Project opened its doors in early 1989 with an executive director, staff attorney, and secretary.<sup>79</sup>

In 2006, the D.C. Prisoners' Legal Services Project merged with the Washington Lawyers' Committee.<sup>80</sup> As part of the Committee,

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74. See Wilson Korges, *The Lasting Legacy of Suffragists at the Lorton Women's Workhouse*, FOLKLIFE (Mar. 21, 2018), <https://folklife.si.edu/magazine/lasting-legacy-of-suffragists-at-lorton-occoquan-womens-workhouse>; Serge F. Kovalski, *Lorton's Final Lockdown*, WASH. POST (Nov. 20, 2001), [https://www.washingtonpost.com/archive/local/2001/11/20/lortons-final-lockdown/dddc4cf1-42f2-4fdb-ac07-2524a452ac16/?noredirect=on&utm\\_term=.c03b4a04b95e](https://www.washingtonpost.com/archive/local/2001/11/20/lortons-final-lockdown/dddc4cf1-42f2-4fdb-ac07-2524a452ac16/?noredirect=on&utm_term=.c03b4a04b95e).

75. Louise Bernikow, *Night of Terror Leads to Women's Vote in 1917*, WOMEN'S ENEWS (Oct. 30, 2004), <https://womensenews.org/2004/10/night-terror-leads-womens-vote-1917/#.Us2mpUko6M8>.

76. See Lafayette Bailey, *Segregated, Silenced and Far From Home*, WASH. POST (Oct. 3, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A1765-2004Oct1.html>; see also Seth Feranti, *The Lorton Experience*, GORILLA CONVICT (Oct. 21, 2011), <https://www.gorillaconvict.com/2011/10/the-lorton-experience-2/>.

77. See *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 865, 869 (D.D.C. 1989); *Twelve John Does v. D.C.*, 855 F.2d 874, 874–75, 879 n.1 (D.C. Cir. 1988) (summarizing Lorton and D.C. Jail cases); *Campbell v. McGruder*, 580 F.2d 521, 551 (D.C. Cir. 1978); *Inmates, D.C. Jail v. Jackson*, 416 F. Supp. 119, 122–23 (D.D.C. 1976).

78. Personal recollection of Alan A. Pemberton. Mr. Pemberton was counsel in the Modular Facility litigation.

79. Interview with Grace M. Lopes, Project's initial Executive Director.

80. Memorandum from Executive Director Rod Boggs *et al* to Director Gustavo Velasquez and General Counsel Alexis Taylor (Aug. 11, 2008) (on file with WASH. LAW. COMM.).

attorneys and advocates continued to provide self-help materials, engage in individual administrative representation, pursue systemic litigation and seek reform through policy advocacy.<sup>81</sup>

C. Persistent response to persistent problems

The District's and the Nation's failed project of incarceration as a method of social control necessarily and irrevocably leads to the deprivation of the humanity of prisoners, guards and the community. While the work of the Project and the Committee to address and mitigate the harm of unconstitutional prison conditions has evolved to meet current challenges, persistent themes in the work have remained steady since the Project was founded.

These themes include:

1. Access to Medical and Mental Health Services

The Project was founded when HIV/AIDS was moving quickly into the injection drug user community. For the first decade, HIV dominated the Project's work. The prison health system was grossly deficient for the level of chronic and acute illness found in the pre-AIDS prison population.<sup>82</sup> That system broke entirely under the demands to treat prisoners with AIDS and AIDS related illnesses, with tuberculosis as an especially acute concern.<sup>83</sup> The Project addressed these issues through litigation, including lawsuits challenging the unconstitutionality of conditions at the D.C. Jail, especially with respect to HIV and tuberculosis care during the Project's service as counsel in the case,<sup>84</sup> and seeking to remedy unconstitutionally deficient health services at the Lorton Minimum and Medium Security Facilities and at Lorton's Youth Center.<sup>85</sup> In addition, the Project undertook policy initiatives with the District government. Staff members of the Project fought for increased funding for medical and mental health care during the budget cycle<sup>86</sup> and urged policies that addressed harm reduc-

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81. *DC Prisoners' Project*, *supra* note 62.

82. *The Financial Condition of the District of Columbia and the Federal Payment Reauthorization: Hearing on H.R. 2902 Before the Comm. on the D.C. H.R.*, 103d Cong. 208–10 (1994) (testimony of Jonathan M. Smith Exec. Dir. of the DC Prisoners' Legal Serv. Project) [hereinafter *Hearings*].

83. *Id.*

84. *Id.*; *Jackson*, 416 F. Supp. at 120.

85. *Hearings*, *supra* note 82, at 199–202 (testimony of Jonathan M. Smith, Exec. Dir. of the DC Prisoners' Legal Serv. Project).

86. Personal recollection of Jonathan M. Smith. Mr. Smith was the Executive Director of the DC Prisoners' Legal Services Project.

tion including condoms in prison, voluntary testing, increased use of anti-viral medication and prisoner education.<sup>87</sup>

Similarly, prisoners experience mental illness at rates much higher than the general population.<sup>88</sup> Leaving aside whether prison is an appropriate setting for persons with mental illness in any case, the failure to provide mental health treatment is persistent and widespread. It was a significant feature in the Lorton and D.C. Jail litigation and dominates the prisoners' rights docket today.<sup>89</sup> The Committee's groundbreaking litigation to address the abusive use of solitary confinement in the federal Bureau of Prisons, described below,<sup>90</sup> is a direct continuation of this work. District prisoners who have mental illness far too often find their way into the cruelest corners of the federal system where they are treated with the harshest forms of isolation. The Committee has taken on the most extreme conditions at the BOP's most secure facility—the Administrative Facility at the Maximum Security Prison in Florence Colorado—and one of the oldest prisons in the federal system—Lewisburg Penitentiary.<sup>91</sup>

Prisoners with disabilities are routinely abused and neglected. Today, the Committee represents deaf prisoners across the country to ensure reasonable accommodations and the ability to communicate with staff and the outside world.<sup>92</sup>

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87. See generally Nathan McCall, *AIDS Toll Rising in DC Jails; Better Care Sought for Afflicted Inmates*, WASH. POST, Feb. 4, 1991, at D1; Keith A. Harriston, *Protest Asks Condoms for D.C. Inmates; High Incidence of HIV is Cited*, WASH. POST, April 9, 1993, at B5; *DC Prisoners' Project*, supra note 62; Toni Locy, *Judge Orders Health Plan Implemented at D.C. Jail*, WASH. POST, Nov. 2, 1994, at A8; Serge F. Kovalski, *Jail Medical Services are Returned to D.C. Control: Judge Cites Progress and Ends Receivership*, WASH. POST, Sept. 19, 2000, at B01 (addressing health problems and medical services in D.C. jails).

88. Jim Oliphant, *Death Behind Bars: Suicides in Jails and Prisons Could Be Prevented, Experts Say. But It Would Take a Public Commitment*, NAT'L L.J. ONLINE, (Dec. 2, 2002 12:00 AM), at 2.

89. Personal knowledge of Phil Fornaci. Mr. Fornaci is Senior Counsel, Washington Lawyers' Committee for Civil Rights and Urban Affairs and Project Director of the DC Prisoners' Project.

90. See *infra* notes 177–209 and accompanying text.

91. *Id.*

92. See *Minnis v. Johnson*, No. 1:10-cv-00096-TSE -TRJ (E.D. Va. Nov. 16, 2010); *Jarboe v. Md. Dep't of Pub. Safety and Corr. Serv.*, No. 1:12-cv-00572-ELH (D. Md. Feb. 20, 2015); *Adams & Knights v. Ky.*, No. 3:14-cv-00001-GFVT (E.D. Ky. June 25, 2015); *Bryant v. Fed. Bureau of Prisons*, No. 2:11-cv-00254-CAS (C.D. Cal. June 2, 2014). Ongoing cases involving deaf and hard of hearing prisoners include: *Heyer v. Fed. Bureau of Prisons*, 849 F.3d 202 (2017); *Briggs v. Mass. Dep't of Corr.*, No. 15-40162-GAO (D. Mass. June 26, 2016); *McBride v. Mich. Dep't of Corr.*, 294 F. Supp. 3d 695, 721 (E.D. Mich. 2018); *Levy et al. v. La. Dep't of Pub. Safety and Corr.*, No. 3:16-cv-00542-JWD-EWD (M.D. La. Aug. 16, 2016).

## 2. Harsh and Abusive Physical Condition

The Project and later the Committee have worked to mitigate the harshest of the physical conditions in the District's prisons, DC Jail and the federal BOP. As counsel for DC Jail prisoners in *Inmates of DC Jail v. Jackson*, Project staff and attorneys from Shaw Pittman, successfully maintained a population cap and achieved other reforms.<sup>93</sup> Later, in *Inmates of Modular Facility v. Barry*, the Project and Covington & Burling secured a wide-ranging consent decree imposing measures to reduce violence and protect prisoners from harm.<sup>94</sup> Significantly, the decree imposed a cap on the number of prisoners who could be housed in the prison.<sup>95</sup>

After the dismissal of the *Campbell v. McGruder* litigation in 2004, and the worsening of conditions at the D.C. Jail, the Project engaged in significant litigation and policy advocacy to address continued overcrowding and escalating violence at the D.C. Jail. With the transfer of D.C. prisoners to the federal system, the Project focused on litigation and advocacy against the federal BOP.<sup>96</sup>

## 3. Sentencing and Parole

Litigation and advocacy regarding the operation of the prison system is essential. More than 30 years of successful court cases demonstrate that the best reform is to reduce the number of people who are incarcerated. Since the Project's beginning, Project and Committee staff have fought to reduce excessively harsh sentences, over-detention and the failures of the parole system. In the 1980s and 1990s, the Project was a frequent witness before the District of Columbia Council on sentencing law legislation.<sup>97</sup> A significant legislative success for the Project was to lead the coalition that secured passage of a compassionate release law that allowed prisoners determined by a doctor to be within six months of death due to a terminal illness to be released on parole.<sup>98</sup> This law provided relief and comfort to dozens of prisoners and their families in the final stages of AIDS.

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93. *Jackson*, 416 F. Supp. at 124–25.

94. *Inmates of Modular Facility v. D.C.*, No. 96-7094, 1996 WL 734195, at \*1 (D.C. Cir. Nov. 25, 1996).

95. *Id.*

96. See discussion *infra* Section IV.

97. See *Hearings*, *supra* note 82, at 208–10 (testimony of Jonathon M. Smith, Exec. Dir. of the D.C. Prisoners' Legal Serv. Project).

98. See 18 U.S.C. § 3582(c)(1)(A) (2002); 28 CFR 572.40 (1994) ("18 U.S.C. 4205(g) was repealed effective November 1, 1987, but remains the controlling law for inmates whose offenses

Dysfunction in the parole system has also been a constant theme over the last 30 years. In 1991 the Project sued the District for Due Process violations in *Ellis v. D.C.*<sup>99</sup> As Twain is said to have remarked, history may not repeat itself, but it “rhymes.”<sup>100</sup> Beginning in 2010, the Committee entered into litigation with the Parole Commission regarding Due Process that remains ongoing.<sup>101</sup>

#### 4. Private Prisons

The District of Columbia was an early customer of the private prison industry. Due to the demands of an overcrowded system, economic woes and political pressure from Congress, the District began shipping prisoners to out-of-state prisons and private facilities in 1997.<sup>102</sup>

These prisons, understaffed and poorly managed, became the next target for litigation: *Green v. D.C.* (challenge to unconstitutional conditions in non-District, non-federal institutions housing District prisoners under contract)<sup>103</sup>; *Inmates of Sussex II v. Angelone* (challenge to Virginia contract facility’s punitive and degrading use of four-point restraints—strapping prisoners to steel bunks for up to 48 hours—resulting in the cessation of restraint practices and the subse-

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occurred prior to that date. For inmates whose offenses occurred on or after November 1, 1987, the applicable statute is 18 U.S.C. 3582(c)(1)(A).”); John A. Beck, *Compassionate Release from New York State Prisons*, 27 J.L. MED. & ETHICS 216 (Fall 1999); Brie Williams, et al, *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 155 ANNALS OF INTERNAL MED. 122, 122–23 (2011); Marty Roney, *36 states release ill or dying inmates*, USA TODAY (Aug. 14, 2008, 12:29 PM), [https://usatoday30.usatoday.com/news/nation/2008-08-13-furloughs\\_N.htm](https://usatoday30.usatoday.com/news/nation/2008-08-13-furloughs_N.htm).

99. See *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C. Cir. 1996) (holding that the district should not be enjoined to comply with the board’s procedural regulations).

100. *Talk:History*, WIKIQUOTE (last updated Apr. 11, 2017), <https://en.wikiquote.org/wiki/Talk:History>. There has been debate on whether the quote is from Twain or if he was misquoted. See *Historic recurrence* (last updated Jan. 15, 2018), [https://en.wikiquote.org/wiki/Historic\\_recurrence](https://en.wikiquote.org/wiki/Historic_recurrence).

101. *Daniel v. Fulwood*, 823 F. Supp. 2d 13 (D.D.C. 2011), *rev’d* 766 F.3d 57, 60 (D.C. Cir. 2014). After the case was remanded, the U.S. Parole Commission promulgated a new regulation that applied factors set out in the D.C. Board’s 1972 guidelines. *Daniel v. Smoot*, 287 F. Supp. 3d 74, 77–78 (D.D.C.) (2018), adhered to in part on reconsideration, 316 F. Supp. 3d 79 (D.D.C. 2018).

102. See Jonathan Smith, *The District of Columbia Revitalization Act and Criminal Justice: The Federal Government’s Assault on Local Authority*, 4 U. D.C. L. REV. 77, 90 (1997) (noting that the District of Columbia’s experience with private prisons prior to the Revitalization Act had been “very poor,” and advocating against the mandatory use of private prisons for D.C. felons). Mr. Smith was at the time the Executive Director of the Project. He is currently the Executive Director of the Committee.

103. See *Green v. District of Columbia*, No. 90-793, 1991 U.S. Dist. LEXIS 1977, at \*2 (D.D.C. Feb. 13, 1991).

quent termination of the District's contract with the facility)<sup>104</sup>; *In re Northeast Ohio Correctional Center* (challenge to operations at contractor-operated private facility in Youngstown, Ohio, housing some 1400 District prisoners, challenging barbaric health care, unrestrained violence and other abuses; resulted in substantial damages to class members and injunctive relief)<sup>105</sup>; *Wright v. Corrections Corp. of America* (long-running suit challenging cost and other terms of for-profit telephone service at contractor-operated facilities housing District inmates out-of-state).<sup>106</sup>

##### 5. The Diaspora of the D.C. Revitalization Act

The District faced a financial collapse in 1995 with an operating deficit of more than \$722 million.<sup>107</sup> The District's bonds were at junk status and the City ran out of money to pay its bills.<sup>108</sup> A Control Board was imposed by Congress and in 1997, the National Capital Revitalization and Self-Government Improvement Act of 1997 (known as the Revitalization Act) was passed into law.<sup>109</sup> The Revitalization Act had widespread impact on the District's finances and was an assault on home rule, but it kept the City afloat. Part of the Faustian bargain struck by the District was that it lost control of large portions of its criminal justice system. The Superior Court and the Court of Appeals, as well as the Public Defender Services, were federalized; Lorton was closed and convicted D.C. Code offenders were transferred to the federal Bureau of Prisons; the D.C. Parole Board was abolished and the parole function assigned to the United States Parole Commission; and the District was forced to rewrite its criminal sentencing laws to eliminate indeterminate sentences (parole eligible sentences) and impose on newly convicted prisoners sentences with a determinate length.<sup>110</sup>

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104. See ANNUAL REPORT OF THE DISTRICT OF COLUMBIA PRISONERS LEGAL SERVICES PROJECT (2001) (on file with WASH. LAW. COMM.).

105. *Busey v. Corr. Corp. of Am. (In re Northeast Ohio Corr. Ctr.)*, No. 99-3733, 2000 U.S. App. LEXIS 8780, at \*2 (6th Cir. Apr. 28, 2000).

106. *Wright v. Corr. Corp. of Am.*, No. 1:00-CV-00293(GK), 2016 U.S. Dist. LEXIS 6855 at \*2-3 (D.D.C. Jan. 21, 2016).

107. JON BOUKER, THE D.C. REVITALIZATION ACT: HISTORY, PROVISIONS AND PROMISES 81 (2008), <https://www.brookings.edu/wp-content/uploads/2016/07/appendix-1.pdf>.

108. *Id.*

109. *Id.*

110. See Balanced Budget of 1997, Pub. L. No. 105-33, § 11231, 111 Stat. 251, 745 (1997); see also D.C. CODE § 24-131 (2001); Smith, *supra* note 102 (discussing the potential ramifications of the Act); D.C. Sent'g Comm., Revitalization Act, DC.GOV, <https://sdc.dc.gov/page/revitalization-act> (last visited Nov. 2, 2018).

The federalization of the criminal justice system sent District prisoners from the frying pan into the fire. They were removed from a decrepit and poorly run prison system under local control and close to home, to a harsh and unabiding federal system far from home and out of reach from political pressure. The initial years following the Act were chaotic and dangerous. D.C. prisoners were first often sent to private facilities or rural local jails.<sup>111</sup> Violence often ensued.<sup>112</sup> Once arriving in federal custody, the panoply of issues addressed through litigation and policy by the Committee in the ensuing twenty years took hold.

### III. SOME OF THE MOST SIGNIFICANT CASES AND PROJECTS REGARDING PRISON CONDITIONS

#### A. D.C. Jail Cases

The Project took on some of its most significant, and sustained, efforts on behalf of District prisoners when it became lead counsel in the long-running D.C. Jail litigation, which focused on the issues of severe overcrowding and grossly inadequate health care. The litigation originated in the 1970s with two class action lawsuits—*Campbell v. McGruder* and *Inmates of DC Jail v. Jackson*—seeking redress for unconstitutional conditions at the D.C. Jail. *Campbell* was filed on behalf of pretrial detainees confined to the Jail.<sup>113</sup> *Inmates of D.C. Jail* was filed on behalf of sentenced prisoners housed at the Jail.<sup>114</sup> For many years thereafter, the District consistently violated the District Court’s orders in both cases and failed to bring the Jail up to minimum constitutional standards.<sup>115</sup>

#### 1. Inadequate Health Care

The provision of medical services at the D.C. Jail and the Correctional Treatment Facility (“CTF”) has had a troubled history. The D.C. Department of Corrections (“DOC”), which had also managed medical care at the Lorton prison complex before its closure in 1998, had faced multiple lawsuits over the DOC’s deliberate indifference to

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111. See generally *supra* notes 102–106 and accompanying text.

112. *Id.*

113. *Campbell v. McGruder*, 416 F. Supp. 111, 112 (D.D.C. 1976).

114. *Jackson*, 416 F. Supp. at 120.

115. *Hearings*, *supra* note 82 (testimony of Jonathan M. Smith, Exec. Dir. of the DC Prisoners’ Legal Serv. Project).

prisoners' medical and mental health needs.<sup>116</sup> There were similar problems at the D.C. Jail, which continued after the closing of Lorton.<sup>117</sup>

In 1995, the U.S. District Court for the District of Columbia removed medical services at the Jail from the DOC's control, placing these services under the temporary supervision of a court-appointed Receiver.<sup>118</sup> This decision came after the District's failure to address problems with medical care raised in two lawsuits brought against the Jail in 1971 and 1975.<sup>119</sup> Among other issues, these cases alleged that DOC was failing to provide minimally adequate medical care for inmates at the D.C. Jail.<sup>120</sup>

The Receiver determined that medical care should be provided by an outside entity, and awarded a contract in March 2000 to the Center for Correctional Health and Policy Studies (CCHPS).<sup>121</sup> CCHPS was a nonprofit organization formed by medical staff who had provided services at the Jail under the Receivership.<sup>122</sup> CCHPS was awarded a contract to provide services at both the Jail and the CTF.<sup>123</sup>

Unfortunately, CCHPS's performance as medical provider was poor, and broadly impacted by the overcrowded conditions at the Jail during the period 2000–2005. In 2003, with the dismissal of the *Campbell v. McGruder* class action, the role of the court-appointed monitor also ended, leaving no on-site monitoring of compliance with court orders and the end of the population cap at the Jail.<sup>124</sup> A 2004 report on medical services at the Jail performed by the U.S. General Accounting Office confirmed that the DOC had failed to provide sufficient oversight of medical services, while limiting access to the facility

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116. *Id.*

117. D.C. Dep't of Corr., *Dep't of Corrections Closes Final Prison and Accomplishes Major Milestone*, DC.GOV (Nov. 19, 2001), <https://doc.dc.gov/release/department-corrections-closes-final-prison-and-accomplishes-major-milestone>.

118. *Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357, 1359. (D.C. Cir. 1998).

119. *See Jackson*, 416 F. Supp. at 119; *Campbell*, 416 F. Supp. at 111.

120. *See Campbell*, 416 F. Supp. at 111.; *Jackson*, 416 F. Supp. at 119. The CTF was not part of these lawsuits.

121. U.S. GENERAL ACCOUNTING OFFICE, *MEDICAL SERVICES GENERALLY MET REQUIREMENTS AND COSTS DECREASED, BUT OVERSIGHT IS INCOMPLETE 1* (2004), <https://www.gao.gov/assets/250/243270.pdf>.

122. *Id.*

123. *Id.*

124. D.C. PRISONERS' LEGAL SERVICES PROJECT & JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH, *FROM THE INSIDE OUT: TALKING TO INCARCERATED WOMEN ABOUT HEALTH CARE 1* (2005), [http://www.washlaw.org/pdf/WomensHealth\\_Hopkins.pdf](http://www.washlaw.org/pdf/WomensHealth_Hopkins.pdf).

by advocates.<sup>125</sup> During the period 2003-2004 in particular, the Project received constant complaints from prisoners at the Jail and the CTF, in particular from women prisoners.<sup>126</sup>

In 2004, the Project initiated a study in collaboration with the Johns Hopkins Bloomberg School of Public Health, focusing on women in the Jail and CTF.<sup>127</sup> In November 2005, the Project produced a public report, in collaboration with Johns Hopkins, *From the Inside Out: Talking to Incarcerated Women About Healthcare*.<sup>128</sup>

In October 2006, the D.C. Council organized a joint hearing of the Committee on the Judiciary and the Committee on Health, in response to the Project's advocacy efforts.<sup>129</sup> That month, the District awarded a three-year contract to Unity Healthcare, a community-based medical and mental health service provider.<sup>130</sup> Unity utilized a public health model of health care delivery, with its medical providers working both in the Jail/CTF and in the community, providing continuity of care for people released to the community.<sup>131</sup>

## 2. Overcrowding

The Jail's long-running inability to provide adequate health care was due in large part to perpetual overcrowding. In 1985, Judge William Bryant found that the conditions at the Jail continued to violate prisoners' constitutional rights:

Time and time again, defendants [the District has] requested the court to defer to their accumulated wisdom, to stay its hand, to give them more time. Time and again, these requests have been honored in the hope and expectation that defendants would solve these problems expeditiously and effectively. However, instead of matters improving[,] they have deteriorated.<sup>132</sup>

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. D.C. Dept. of Corr., *Department of Corrections Institutes Community-Oriented Healthcare for Inmates*, DC.GOV (Oct. 2, 2006), <https://doc.dc.gov/release/department-corrections-institutes-community-oriented-healthcare-inmates>.

130. *Id.*

131. *Id.*

132. U.S. v. District of Columbia, 703 F. Supp. 982, 985 (D.D.C. 1988) (emphasis omitted) (quoting *Campbell v. McGruder*, No. 71-1462, Mem. & Order at 50 (D.D.C. July 15, 1985)).

The Court's findings were based on many factors, including evidence that assaults and stabbings were regular occurrences.<sup>133</sup> To help remedy these unconstitutional conditions, Judge Bryant imposed a population cap of 1,694 at the Jail.<sup>134</sup> This population cap was routinely exceeded, at times by several hundred prisoners.<sup>135</sup>

After the passage of the D.C. Revitalization Act in 1997, and the transfer of sentenced D.C. prisoners to the federal Bureau of Prisons (BOP), the D.C. Department of Corrections retained control over the D.C. Jail, yet conditions did not improve.<sup>136</sup>

In the early 2000s, overcrowding at the Jail was at its peak. Predictably, the extremely dangerous and unconstitutional conditions at the Jail exploded into bloodshed over four days in December 2002.<sup>137</sup> Givon Pendleton and Mikal Gaither, two pretrial detainees held at the Jail, were brutally murdered.<sup>138</sup> A third detainee, Bradley Autman, was near-fatally stabbed.<sup>139</sup> In less than two years leading up to the December 2002 murders, District officials had increased the number of inmates housed at the Jail by more than 40%.<sup>140</sup> At the same time, the Project and other advocates had issued repeated and urgent warnings to the DOC about life-threatening conditions as the Jail became more frequent and ominous.<sup>141</sup> The District ignored them.<sup>142</sup>

In 2004, the Project, joined by plaintiffs' attorney Douglas Sparks and the law firm of Covington & Burling, filed a wrongful death action on behalf of Pearl Beale, the mother of Mr. Pendleton.<sup>143</sup> Mr. Pendleton was a pretrial detainee murdered by a man awaiting trial (and later convicted) on two murder charges.<sup>144</sup> No corrections of-

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133. KATHY PATTERSON & COUNCIL OF D.C., BILL 15-31, "DISTRICT OF COLUMBIA JAIL IMPROVEMENT ACT OF 2003" 14 (2003), <http://lims.dccouncil.gov/562/B15-0031-COMMITTEEREPORT.pdf>.

134. *United States v. District of Columbia*, 703 F. Supp. at 986.

135. *Id.*

136. *See* PATTERSON, *supra* note 133, at 10–11.

137. *Id.* at 3.

138. *Id.*

139. Complaint at 9, *Beale v. D.C.*, No. 1:04-CV-0959 (D.D.C. June 10, 2004); *see also* Serge F. Kovalski, *Inmate Dies, Another Hurt In D.C. Jail Stabbings*, WASH. POST (Dec. 17, 2002), [https://www.washingtonpost.com/archive/local/2002/12/17/inmate-dies-another-hurt-in-dc-jail-stabbings/08612add-803a-4527-8fd7-d073380ab25e/?utm\\_term=.00a165a342c8](https://www.washingtonpost.com/archive/local/2002/12/17/inmate-dies-another-hurt-in-dc-jail-stabbings/08612add-803a-4527-8fd7-d073380ab25e/?utm_term=.00a165a342c8).

140. Complaint, *supra* note 139, at 4.

141. *Id.* at 4–6.

142. *See id.* at 10.

143. WASH. LAW. COMM., SPECIAL 40TH ANNIVERSARY ISSUE: DISTRICT OF COLUMBIA SETTLES CASE INVOLVING WRONGFUL DEATH OF PRISONER 15 (2008), <https://www.washlaw.org/pdf/UPDATE-Fa08-FINAL.pdf>.

144. Jason Cherkis, *Pearl Beale Gets Justice: City Gives Biggest Payout in Wrongful Death Of Inmate*, WASH. CITY PAPER (Dec. 2, 2008), <https://www.washingtoncitypaper.com/news/city->

ficer witnessed the murder.<sup>145</sup> After four years of extremely contentious litigation, the District settled the case in what is believed to be the largest individual damages settlement in the history of litigation against the D.C. Department of Corrections.<sup>146</sup>

Yet despite securing damages for two victims of overcrowding at the Jail, the dangerous conditions persisted. In 2004, *Campbell v. McGruder* was quietly dismissed after a successful motion by the District that the continuing consent decree violated the terms of the Prison Litigation Reform Act.<sup>147</sup>

## B. Federal Prisoners

The Project's merger with the Committee in 2006 enabled the Project to take on litigation involving the federal Bureau of Prisons (BOP), where D.C. felons had been held since 1998. By 2006, approximately 7,000 D.C. prisoners were in the BOP.<sup>148</sup>

Because D.C. prisoners are commonly convicted of more typical "state offenses" (e.g. robbery, low-level drug distribution, assault, arson, homicide), rather than more typical "federal offenses" (high level drug conspiracies, financial crimes, interstate offenses), D.C. prisoners tend to be held in the highest security BOP facilities.<sup>149</sup> Under the calculus of the BOP, "street crimes" like those for which D.C. prisoners tended to be convicted, merited a higher security classification.<sup>150</sup>

With the movement of D.C. prisoners into the BOP, litigation challenging conditions of confinement became more complex than when challenging conditions at Lorton. The BOP is a much larger system, with more than 210,000 prisoners, with D.C. prisoners representing a small fraction of the total population.<sup>151</sup> Additionally, be-

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desk/blog/13056826/pearl-beale-gets-justice-city-gives-biggest-payout-in-wrongful-death-of-inmate.

145. *Id.*

146. WASH. LAW. COMM., *supra* note 143, at 15.

147. *Campbell v. McGruder*, No. 03-7045, 2004 U.S. App. LEXIS 1069, at \*1-2 (D.C. Cir. Jan. 23, 2004).

148. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2006 2 (2007), <https://www.bjs.gov/content/pub/pdf/p06.pdf>.

149. *Housing of DC Felons Far Away from Home: Effects on Crime, Recidivism and Reentry, Hearing Before the Subcomm. on Fed. Workplace, Postal Serv., and the Dist. of Columbia of the H. Comm. on Oversight and Gov. Reform*, 111th Cong., 49, 82 (2010) (testimony of Philip Fornaci).

150. Martin Austerhuhle, *D.C. Inmates Serve Time Hundreds of Miles from Home. Is It Time to Bring Them Back?*, WAMU, (Aug. 10, 2017), <https://wamu.org/story/17/08/10/d-c-in-mates-serving-time-means-hundreds-miles-home-time-bring-back/>.

151. SABOL ET AL., *supra* note 148, at 2, 4, 21.

cause there is no single constituency for federal prisoners, Eighth Amendment litigation involving the BOP had been relatively rare, as compared with litigation involving state prison systems.<sup>152</sup> With the move of D.C. prisoners to the BOP, however, a new constituency for reform in the BOP was created, and the BOP was opened up litigation by attorneys for D.C. prisoners, most significantly by the D.C. Prisoners' Project, now a part of the Committee.

In 2007, the Committee initiated its first case involving the BOP, specifically the federal prison in Lewisburg, Pennsylvania, a facility with a long reputation for brutal conditions. The case, *Womack v. Lappin*, involved a D.C. prisoner, David Womack, who had been held in a solitary confinement cell for 26 days in full body restraints. This was a test of federal officials' claims of qualified immunity in such circumstances, and the Project won an important decision denying those immunity claims.<sup>153</sup>

The BOP proved to be a recalcitrant defendant, and the case was litigated through trial in 2012.<sup>154</sup> Although ultimately an all-white Harrisburg, Pennsylvania jury refused to award damages after a week-long trial in 2012, *Womack* established that BOP officials could be held accountable for Eighth Amendment violations over claims of sovereign and qualified immunity defenses.<sup>155</sup>

In another matter, the Committee challenged the BOP's failure to protect a D.C. prisoner against assault after exposing him falsely as a "snitch." In *Doe v. Wooten*,<sup>156</sup> the Committee and Covington & Burling LLP established the BOP's responsibility to take reasonable steps to insure a prisoner's safety in the face of actual and potential threats.<sup>157</sup> Doe survived two trips to the Eleventh Circuit Court of Appeals, again overcoming qualified immunity and jurisdictional defenses.<sup>158</sup> Ultimately, the BOP was forced to move the plaintiff to a non-BOP facility, where he safely served out his sentence.<sup>159</sup>

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152. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 974–75, 978 (2009).

153. *Womack v. Smith*, No. 08-2229, 2009 U.S. App. LEXIS 2840, at \*1–8 (3d Cir. Feb. 12, 2009).

154. See *Womack v. Smith*, No. 1:06–CV–2348, 2012 WL 1245752 (M.D. Pa. Apr. 13, 2012).

155. This is a personal recollection of Phil Fornaci. See generally Judgment at 1, *Womack v. Smith*, No. 1:06–CV–2348, Doc. 237 (M.D. Pa. 2012); see also *Womack*, *supra* note 153, at \*2–8.

156. *Doe v. Wooten*, No. 1:07–CV–2764–RWS, 2010 WL 2821795 (N.D. Ga. July 16, 2010).

157. *Id.* at \*4–5.

158. See *Doe v. Wooten*, No. 09–13707, 2010 WL 1645136, at \*2 (11th Cir. Apr. 26, 2010); *Doe v. Wooten*, 747 F.3d 1317, 1326 (11th Cir. 2014).

159. Personal recollection of Phil Fornaci.

1. Private Prisons

In 2007, the Committee took on the issue of private prisons, which had begun to contract with the BOP. At the time of Lorton's closing, a new private facility, Rivers Correctional Institution (RCI), was opened, with the goal of housing D.C. prisoners through a contract with the BOP.<sup>160</sup> This facility holding about 1,300 prisoners had only one doctor on staff, who worked less than full time at the facility.<sup>161</sup> Complaints about medical care at RCI flowed from D.C. prisoners since its opening.<sup>162</sup>

In 2007, the Committee, again with Covington & Burling, filed a class action lawsuit challenging the failure to provide adequate medical care.<sup>163</sup> Filed initially in D.C. District Court, the case was quickly transferred to the Eastern District of North Carolina.<sup>164</sup> This move was ultimately fatal to the case.

*Mathis* alleged a wide range of deliberate indifference to prisoners' medical needs against the BOP and the private contractor (the GEO Group), citing Eighth Amendment, the Rehabilitation Act and third-party beneficiary contract liability theories.<sup>165</sup> In a 2009 decision, the District Court dismissed all claims.<sup>166</sup> Most importantly, the Court ruled against finding liability against GEO Group, based primarily on an earlier Fourth Circuit decision, *Holly v. Scott*.<sup>167</sup> In that somewhat odd decision, the Fourth Circuit concluded that GEO's ownership and operation of Rivers did not convert GEO into a gov-

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160. The D.C. Revitalization Act included language that one half of all D.C. prisoners were to be held in private contract facilities in the BOP. Although this goal was never possible, on average nearly 500 D.C. prisoners are held at RCI since 2000 at any given time. See *Doing Time: Are DC Prisoners Being Adequately Prepared for Reentry with Equal Access to BOP Services?, Hearing Before the Subcomm. on Fed. Workplace Postal Serv., and the Dist. of Columbia of the H. Comm. On Oversight and Gov. Reform*, 110th Cong., 6, 25 (2007) (statements of Rep. Eleanor Holmes Norton and Harley G. Lappin).

161. Complaint at 28–29, *Mathis et al. v. GEO Grp., Inc.*, No. 1:07CV1155 (D.D.C. June 28, 2007).

162. See Robert Piere, *N.C. Prison Doesn't Serve D.C. Inmates Well, Critics Say*, WASH. POST (Oct. 15, 2007), [http://www.washingtonpost.com/wp-dyn/content/article/2007/10/14/AR2007101401420\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/10/14/AR2007101401420_pf.html).

163. Complaint, *supra* note 161, at 34–37.

164. Transfer Order at 1, *Mathis et al. v. GEO Grp., Inc.*, No. 1:07-cv-01155-RMU (D.D.C. Feb. 28, 2008).

165. Complaint *supra* note 161, at 27, 40–43, 46.

166. *Mathis et al. v. GEO Grp., Inc.*, No. 2:08-CT-21-D, 2009 BL 380966 at \*23 (E.D.N.C. Nov. 9, 2009).

167. *Id.* at \*6 (citing *Holly v. Scott*, 434 F.3d 287, 293–94 (4th Cir. 2006)).

ernment actor and did not permit the private acts of GEO to be imputed to the BOP as government action.<sup>168</sup>

Under the *Holly* precedent, even plaintiffs seeking injunctive relief rather than damages under a *Bivens* action, could not find relief against either the GEO Group or RCI.<sup>169</sup> Similar reasoning was applied in a subsequent suit filed by the Committee in 2010, *Somie v. GEO Group, Inc.*,<sup>170</sup> again seeking injunctive relief on behalf of prisoners at RCI, this time over denial of religious rights.<sup>171</sup> The District Court again rejected these claims, citing *Holly* to support the proposition that GEO Group is not a government actor, and extinguishing even claims for injunctive relief in non-*Bivens* actions.<sup>172</sup>

## 2. Mental Health and Solitary Confinement

In 2012, the Committee filed a class action on behalf of all prisoners with mental illness held in the BOP's "supermax" ("ADX") facility in Florence, Colorado.<sup>173</sup> The case was developed after two years of investigation and analysis, in response to a plea from a friend of a Mr. Bacote, a man with both intellectual and psychiatric disabilities.<sup>174</sup> Co-counsel were attorneys from Arnold & Porter LLP.<sup>175</sup>

The ADX facility is the BOP's most secure prison, nicknamed by staff the "Alcatraz of the Rockies."<sup>176</sup> Depending on which unit they are in, prisoners spend at least 20, and as much as 24, hours per day locked alone in their cells.<sup>177</sup> The cells measure approximately 12 feet by 7 feet, and have solid walls that prevent prisoners from viewing the interiors of other cells or having direct interactions with other prisoners.<sup>178</sup>

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168. *Holly*, 434 F.3d at 292–94.

169. *See id.*

170. *Somie v. GEO Group, Inc.*, No. 5:09–CT–3142–FL, 2011 WL 4899692 (E.D.N.C. Oct. 13, 2011).

171. *Id.* at \*1.

172. *Id.* at \*3–5.

173. Initially filed as *Bacote v. Fed. Bureau of Prisons*, on behalf of five individual prisoners. It was later amended as *Cunningham v. Fed. Bureau of Prisons* in a class action complaint, which also included The Center for Legal Advocacy d/b/a Disability Law Colorado as a plaintiff. *Cunningham v. Fed. Bureau of Prisons*, No. 12–cv–01570–RPM–MEH, 2016 WL 8786871 (D. Colo. Dec. 29, 2016).

174. Based on the personal recollection of Phil Fornaci.

175. *Cunningham*, 2016 WL 8786871.

176. Complaint at 2, *Bacote v. Fed. Bureau of Prisons*, No. 1:12CV01570, 2012 WL 4891269 (D. Colo. July 18, 2012).

177. *Id.* at ¶ 22.

178. *Id.*

Despite the well-documented dangers of placing prisoners with mental illness in this kind of isolation, the BOP routinely placed such men at the ADX.<sup>179</sup> In some units, psychotropic medication is not allowed, regardless of the prisoner's diagnosis.<sup>180</sup> Individual, private counseling was not provided to any prisoners, nor were mental health evaluations done of new arrivals to the ADX, as required by BOP policy.<sup>181</sup>

By 2014, the BOP engaged in settlement negotiations, which continued for two years.<sup>182</sup> During this period, the BOP revised its policies around mental illness and other relevant rules, clearly in response to this case.<sup>183</sup> The BOP also created small facilities at three different BOP facilities to house prisoners with mental illness who could not be subjected to solitary confinement.<sup>184</sup> Many of the original plaintiffs, all of whom suffer from serious mental illnesses, were removed from the ADX during the early years of the litigation.<sup>185</sup>

In 2016, the parties entered into a comprehensive settlement agreement that expanded mental health services, out-of-cell time and programming for residents with mental illness, along with a commitment to expanded evaluation protocols to exclude most, but not all, prisoners with serious mental illness from the ADX.<sup>186</sup> It also provided for monitoring by outside experts to ensure compliance.<sup>187</sup>

### 3. USP Lewisburg

In 2017, less than one year after settlement of the ADX case, the Committee filed a similar complaint against the BOP, this time focused on the BOP maximum security prison in Lewisburg, Pennsylvania (where David Womack's case had arisen).<sup>188</sup> Co-counsel in

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179. *Id.* at ¶ 43.

180. *Id.* at ¶ 23.

181. *Id.* at ¶ 47.

182. Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Terms and Proposed Notice to the Class, at 3, *Cunningham v. Fed. Bureau of Prisons*, No. 12-cv-01570-RPM, 2016 WL 8786871 (D. Colo. Dec. 29, 2016).

183. See *U.S. Bureau of Prisons Policy Statement 5310.16*, "Treatment and Care of Inmates With Mental Illness," FED. BUREAU OF PRISONS (May 1, 2014). [https://www.bop.gov/policy/progstat/5310\\_16.pdf](https://www.bop.gov/policy/progstat/5310_16.pdf)

184. *Cunningham*, 2016 WL 8786871, at \*2.

185. *Id.*

186. Addendum to Joint Motion to Approve Settlement, at 3–4, *Cunningham v. Fed. Bureau of Prisons*, No. 12-cv-01570-RPM, 2016 WL 8786871 (D. Colo. Dec. 29, 2016).

187. Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Terms and Proposed Notice to the Class, *supra* note 182, at 14.

188. *McCreary v. Fed. Bureau of Prisons*, No. 1:17-CV-01011, 2018 BL 221117 (M.D. Pa. June 20, 2018).

this matter is Latham & Watkins LLP.<sup>189</sup> Lewisburg was designated a “special management unit” in 2009, creating another BOP long-term solitary confinement facility.<sup>190</sup> Numerous D.C. prisoners are housed there.<sup>191</sup>

Despite the commitments of the BOP in the course of the ADX litigation and settlement, conditions at Lewisburg for prisoners with mental illness are even worse than at the ADX. At this facility, prisoners are locked in their cells for at least twenty-three hours per day (usually more), either alone or with another prisoner.<sup>192</sup> At USP Lewisburg, where there are no psychiatrists on staff or available by phone, prisoners with pre-existing mental illness diagnoses routinely have their psychiatric medications discontinued.<sup>193</sup> No one-on-one counseling is provided, even for prisoners who have attempted suicide.<sup>194</sup> Use of “four-point restraints,” that is, attaching prisoners to a table by their four limbs for days and weeks at a time, is common.<sup>195</sup> The only mental health “treatment” provided is a “therapeutic package” consisting of crossword, word search, and Sudoku puzzles, coloring books, and written instructions on meditation.<sup>196</sup>

The *McCreary v. Federal Bureau of Prisons* class action lawsuit was filed in June 2017.<sup>197</sup> More than one year later, defendants’ motion to dismiss was denied but no class has yet been certified.<sup>198</sup>

This experience of extended litigation is particularly common with regard to USP Lewisburg, where the *Womack* case took more than seven years for trial. In 2011, the Committee initiated another case, with co-counsel at the Pennsylvania Institutional Law Committee and the law firm of Dechert LLP, on behalf of prisoners at Lewisburg.<sup>199</sup> This case, *Richardson v. Kane*, sought to address the rampant violence at the facility, which had resulted in at least two deaths of prisoners during the previous three years.<sup>200</sup>

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189. *Id.*

190. *Id.* at 1, 5.

191. D.C. CORR. INFO. COUNCIL, INSPECTION REP.: USP LEWISBURG 1 (2015).

192. *McCreary*, 2018 BL 221117 at \*5.

193. *Id.* at \*6–7.

194. Complaint at 26–28, *McCreary*, 2018 BL 221117.

195. *Id.* at 28; *McCreary*, 2018 BL 221117, at \*7 (M.D. Pa. Jun. 20, 2018).

196. Ex. A, *McCreary*, 2018 BL 221117.

197. *McCreary*, No. 1:17-cv-01011-YK-SES (M.D. Pa. Jun. 20, 2018).

198. *McCreary*, No. 1:17-CV-01011-YK-SAS (M.D. Pa. Jun. 20, 2018).

199. *Richardson v. Kane*, No. 3: CV–11–2266, 2013 WL 1452962, at \*1 (M.D. Pa. Apr. 9, 2013).

200. *Id.* at \*2; Complaint at 2, *Richardson*, 2013 WL 1452962.

*Richardson* challenged the practice of placing hostile inmates together in cells and/or recreation cages despite the serious risk that the hostile inmates will cause substantial material harm to each other.<sup>201</sup> As part of this placement, BOP employees punish inmates who refuse dangerous placements by putting them in restraints for hours at a time, sometimes as long as twenty-four hours or more.<sup>202</sup>

Most claims in the *Richardson* case were dismissed on a motion to dismiss 2013.<sup>203</sup> In 2015, the Third Circuit Court of Appeals vacated and remanded the case.<sup>204</sup> As of 2018, class certification has not been decided, but discovery is ongoing.<sup>205</sup>

### C. Public Advocacy

The D.C. Prisoners' Project ("Project")—before and after its merger with the Committee—not only has fiercely litigated on behalf of prisoners, but also has been able to use public advocacy to achieve further gains, which include creating additional avenues to litigate the District's obligations to those in its custody. These efforts have been most effective with respect to the Jail and CTF, where local District officials retain control. With the end of the *Campbell* litigation, the Project focused on legislative and other public advocacy efforts to bring about changes in management at the Jail, in particular with regard to the soaring population at the Jail.<sup>206</sup>

On May 23, 2003, the Council's Committee on the Judiciary issued its report on Bill 15-31, now renamed "The District of Columbia Jail Improvement Act of 2003."<sup>207</sup> The goal of the Bill was explicit:

The purpose of Bill 15-31 is to improve what are currently unsafe, unhealthy, overcrowded, and inhumane conditions at the District of Columbia Central Detention Facility ("Jail"). . . including a classification system and housing plan; institute a population ceiling at the Jail; and the requirement that the facility obtain accreditation by a national professional correctional organization. These specific improvements are designed to result in a safer institution. To fail to pass legislation in this arena would constitute a failure to recognize

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201. *Richardson*, 2013 WL 1452962, at \*1.

202. *Id.* See also *McCreary*, 2018 BL 221117, at \*8.

203. *Richardson*, 2013 WL 1452962, at \*1.

204. *Richardson v. Bledsoe*, 829 F.3d 273, 291 (3d Cir. 2016).

205. *Richardson*, No. 3: CV-11-2266, 2013 WL 1452962 (M.D. Pa. 2013).

206. See generally *DC Prisoners: Issues for the Obama Administration*, WASH. LAW. COMM. (2009), <https://www.washlaw.org/images/docs/Reports%20-%20Issues%20for%20the%20Obama%20Administration.pdf> (addressing D.C. prisoner issues for the Obama administration).

207. KATHY PATTERSON & COUNCIL OF D.C., *supra* note 133.

and act on what is potentially a dangerous situation for inmates, staff and residents of the District of Columbia.

The D.C. Jail Improvement Act finally was enacted in January 2004, but the requirements of the Act were resisted by the D.C. government.<sup>208</sup> Among other features, the Act required that the Mayor hire a private consultant to determine the maximum number of people who could be held at the Jail at any one time.<sup>209</sup> Despite the findings of the private consultant report, which proposed a population cap, the District refused to issue the cap.<sup>210</sup> For the next year, the Project engaged in sustained advocacy with the D.C. Council, the Office of the Mayor, and the media, to highlight the District's failure to comply with the Act and set a population cap.<sup>211</sup> Spurred on by the Project's advocacy, a *Washington Post* editorial on April 26, 2005, "The City as Lawbreaker," noted regarding the District's refusal to comply with the Act, "Whether the [Mayor Anthony] Williams administration is enamored of the law or hates it is secondary to the requirement to obey. The executive is not a law unto itself."<sup>212</sup>

In June 2005, the Project, in collaboration with the law firm of Wiley Rein LLP, filed *Anderson v. Williams* in D.C. Superior Court on behalf of prisoners at the DC jail seeking compliance with the DC Jail Improvement Act.<sup>213</sup> For more than two years, the Project pressed for the implementation of a population cap at the Jail through mediation and finally through summary judgment briefing.<sup>214</sup> In August 2007, Judge Melvin Wright ruled in favor of plaintiffs and granted the relief sought: imposition of a population cap at the D.C. Jail. that the Mayor's duty to establish a cap was a "non-delegable duty."<sup>215</sup>

In October 2007, at a hearing that included members of the media in attendance, the District agreed to set a population cap, but at 3,198 prisoners, nearly double the population under the *Campbell v. McGruder* consent decree, and more than 1,000 prisoners over the tar-

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208. *Id.* at 2; District of Columbia Jail Improvement Amendment Act of 2003, D.C. Law 15-62, D.C. Stat. §24-201.71 (2003).

209. KATHY PATTERSON & COUNCIL OF D.C., *supra* note 133, at 2.

210. *Id.* at 2; Press Release, D.C. Prisoners' Legal Services Project, D.C. Inmates File Lawsuit Over Mayor's Refusal to Obey the Law (June 29, 2005).

211. Press Release, D.C. Prisoners' Legal Services Project, *supra* note 210.

212. *The City as Lawbreaker*, WASH. POST (Apr. 26, 2005), 2005 WLNR 28689758.

213. Complaint for Declaratory & Injunctive Relief, *Anderson v. Williams*, 2005 CA 005030 B (D.C. Super. Ct. 2005).

214. *Anderson v. Williams*, 2005 CA 005030 B (D.C. Super. Ct. 2005).

215. Order for Summary Judgment, *Anderson v. Williams*, 2005 CA 005030 B (D.C. Super. Ct. Aug. 24, 2007); Complaint for Declaratory & Injunctive Relief, at 3, 9-10, *Anderson v. Williams*, 2005 CA 005030 B (D.C. Super. Ct. 2005).

get level established by the District's consultants<sup>216</sup> Judge Wright threatened to hold the Mayor in contempt of court for his refusal to set a limit consistent with the requirements of the law, and gave him one week to either agree to a cap within the consultants' recommended range or to take an appeal.<sup>217</sup> Despite initial public statements indicating an intent to appeal, the District subsequently changed course and agreed to establish a cap on the Jail's population of 2,164, as reported in the *Washington Post* on October 11, 2007.<sup>218</sup>

Much more recently, long after the termination of most Jail litigation, the Committee, working with a panel of distinguished former judges, and lawyers at Covington & Burling LLP, issued extensive investigative reports on various aspects of the criminal justice system in the D.C. region.<sup>219</sup> The third such report to appear drew attention to continuing areas of concern about conditions of confinement for some 1200 prisoners at the D.C. Jail and 800 prisoners at the Jail's neighboring facility, the contractor-operated Correctional Treatment Facility.<sup>220</sup> The WLC Conditions of Confinement Report discussed several recurring issues that it identified as requiring the prompt attention of the D.C. Department of Corrections and policymakers in the District.

The Committee's report drew significant attention from the media, public, and policymakers.<sup>221</sup> The District ultimately did not re-

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216. *Campbell v. McGruder*, No. 1:71-cv-1462, (D.D.C. 1971); Robert E. Pierre, *D.C. Judge Pressures City on Jail Population*, WASH. POST (Oct. 6, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/05/AR2007100502268.html>.

217. Pierre, *supra* note 216.

218. David Nakamura, *D.C. Agrees to Abide by 2004 Limit On Inmates*, WASH. POST (Oct. 11, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/10/AR2007101001743.html>.

219. WASH. LAW. COMM., D.C. PRISONERS: CONDITIONS OF CONFINEMENT IN D.C. 1 (2015), [http://www.washlaw.org/pdf/conditions\\_of\\_confinement\\_report.pdf](http://www.washlaw.org/pdf/conditions_of_confinement_report.pdf).

220. *Id.* at 2.

221. See Courtney Belme & James Ridgeway, *Report Blasts Conditions at District of Columbia Jail*, SOLITARY WATCH (Aug. 26, 2015), <http://solitarywatch.com/2015/08/26/report-blasts-conditions-at-district-of-columbia-jail/>; Alex Zielinski, *Correction Required: The D.C. Jail is Falling Apart. What Should Replace It?*, WASH. CITY PAPER (July 2, 2015, 11:00 AM), <http://www.washingtoncitypaper.com/news/city-desk/blog/13069734/correction-required-the-d-c-jail-is-falling-apart-what-should-replace-it/>; Martin Austerhuhle, *Report: Condition of D.C. Jail 'Alarming,' Improvements Needed for Inmates*, WAMU 88.5 (June. 11, 2015), [http://wamu.org/story/15/06/11/report\\_condition\\_of\\_dc\\_jail\\_alarming\\_improvements\\_needed\\_for\\_inmates/](http://wamu.org/story/15/06/11/report_condition_of_dc_jail_alarming_improvements_needed_for_inmates/); Aaron C. Davis, *D.C. mayor's budget plan keeps tax cuts intact, alters school improvement funding*, WASH. POST (Mar. 24, 2016), [https://www.washingtonpost.com/local/dc-politics/dc-mayors-budget-plan-keeps-tax-cuts-intact-changes-school-improvement-funding/2016/03/24/2e55c5c4-f132-11e5-89c3-a647fccc95e0\\_story.html?utm\\_term=.80cf48d6e5ec](https://www.washingtonpost.com/local/dc-politics/dc-mayors-budget-plan-keeps-tax-cuts-intact-changes-school-improvement-funding/2016/03/24/2e55c5c4-f132-11e5-89c3-a647fccc95e0_story.html?utm_term=.80cf48d6e5ec).

new its contract with CCA, which expired in 2017.<sup>222</sup> Furthermore, the District is moving forward with plans to build a new jail to replace the D.C. Jail and CTF.<sup>223</sup> These plans have sparked controversies about the conditions of confinement of youth charged as felons, as well as concerns about the funding and transparency of the project, which are separate issues of their own.<sup>224</sup>

In the fourth of its criminal justice reports, the Committee analyzed prison conditions for women in the District.<sup>225</sup> Women's prison conditions tend to receive even less public attention than those of men. Although the population of women in prison is significantly smaller than that of their male counterparts, the challenges they face and the social repercussions of their treatment in prison are arguably greater. Significant litigation challenged the conditions for women in D.C. prisons in the 1990s on an equal protection theory, but the D.C. Circuit ruled en banc that women could not claim an equal protection violation because they were not "similarly situated" vis a vis male prisoners.<sup>226</sup> Prison conditions for women remain poor.<sup>227</sup> Moreover, the report came to the conclusion that the vicious cycle of poverty, criminal activity, incarceration, recidivism, and breakdown of families and communities seemed to have an even more adverse impact on women of color than their male counterparts.<sup>228</sup> Recent years have seen a disturbing growth in the incarceration of women. In fact, the years 1980-1998 saw an increase of more than 500 percent in incarcerated women nationwide.<sup>229</sup> In the District, this increase was even more exaggerated, as the same time period saw an 800 percent increase in

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222. See *District to Assume Operation of the Correctional Treatment Facility in February of 2017*, D.C. DEP'T OF CORR. (Mar. 25, 2016), <https://doc.dc.gov/release/district-assume-operation-correctional-treatment-facility-february-2017>.

223. Elizabeth O'Gorek, *What's Going on With Plans for New DC Jail? ANC 6B New Hill East Task Force holds meeting amid rumors*, HILL RAG (Oct 3, 2017), <http://hillrag.com/2017/10/03/whats-going-plans-new-dc-jail/>.

224. Martin Austermuhle, *Report: Condition of D.C. Jail 'Alarming,' Improvements Needed for Inmates*, WAMU 88.5 (June 11, 2015), [http://wamu.org/story/15/06/11/report\\_condition\\_of\\_dc\\_jail\\_alarming\\_improvements\\_needed\\_for\\_inmates](http://wamu.org/story/15/06/11/report_condition_of_dc_jail_alarming_improvements_needed_for_inmates).

225. WASH. LAW. COMM., D.C. WOMEN IN PRISON: CONTINUING PROBLEMS AND RECOMMENDATIONS FOR CHANGE (2016), available at [http://www.washlaw.org/pdf/dc\\_women\\_in\\_prison\\_report.pdf](http://www.washlaw.org/pdf/dc_women_in_prison_report.pdf).

226. *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 913 (D.C. Cir. 1996).

227. WASH. LAW. COMM., *supra* note 225, at 3.

228. *Id.* at 7.

229. See *id.* at 17 (citing U.S. GEN. ACCT. OFF., *Women in Prison: Issues and Challenges Confronting U.S. Correctional Systems* (B-280204) (Dec. 1999) ["1999 GAO Report"], at 2.).

the number of women prisoners.<sup>230</sup> This increase in incarceration resulted in more mothers being taken away from their children and contributed to the breakdown of families and other community institutions.<sup>231</sup> These breakdowns inevitably fortified the cycle of poverty, incarceration and recidivism.

While addressing these broader systemic issues, the report focused on the hurdles that women face as part of the criminal justice system. It concentrated on the CCA's operations at CTF, where D.C. women are jailed, and at Hazelton Secure Female Facility ("SFF"), a federal prison in West Virginia where the largest number of D.C. women convicted of felonies are housed.<sup>232</sup> The report concluded by providing eleven recommendations to address the issues identified in its findings, focusing on a lack of trauma care, family support, training and education, and proper medical care.<sup>233</sup> The Women in Prison report garnered some media attention,<sup>234</sup> but its impact on law and policy so far has been limited, in part because many of the recommended remedies would be dependent on amendments to federal legislation.

#### IV. PAROLE AND POST-INCARCERATION

The Committee's efforts to protect the rights of incarcerated individuals are not limited to the conditions of the incarceration itself. The Committee also has sought to enforce D.C. prisoners' rights to seek and obtain parole, as well as to counteract the numerous barriers faced by returning citizens and individuals with criminal convictions who were never incarcerated at all.<sup>235</sup>

One of the less visible changes brought by the D.C. Revitalization Act, in addition to making D.C. prisoners into federal prisoners, was the federalization of D.C. parole. Under the D.C. Revitalization Act,

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230. See *id.* (citing Bureau of Justice Statistics, *Sentenced Female Prisoners Under the Jurisdiction of State or Federal Correctional Authorities, December 31, 1978-2014* (July 29, 2015) (showing an increase from 45 female prisoners in 1980 to 359 female prisoners in 1998 for the District of Columbia)).

231. See *id.* at 7 (explaining that the cycle of removing mothers from their homes breaks down the family and continues the cycle for future generations).

232. See *id.* at 6.

233. WASH. LAW. COMM., *supra* note 225, at 87-94.

234. See Rachel Kurzius, *Report: Some D.C. Women Imprisoned More Than 1000 Miles From Their Families*, DCIST (Mar. 25, 2016, 12:25 PM), [http://dcist.com/2016/03/report\\_dc\\_women\\_in\\_prison.php](http://dcist.com/2016/03/report_dc_women_in_prison.php).

235. See *DC Prisoners' Project*, *supra* note 62; see also "Returning Citizens Opportunity to Succeed Amendment Act of 2017," *Statement Before the Comm. on the Judiciary of Council of the District of Columbia* (Dec. 7, 2017) (Testimony of Philip Fornaci, at 1, 3, 4, 7).

the D.C. Board of Parole was disbanded.<sup>236</sup> Decisions regarding parole grants for people with so-called “indeterminate sentences,” that is, sentences that include parole eligibility after serving a minimum prison term, were moved under the jurisdiction United States Parole Commission (USPC).<sup>237</sup>

Additionally, the USPC was given control over revocations of parole and supervised release.<sup>238</sup> Under the sentencing scheme adopted after enactment of the D.C. Revitalization Act, the USPC was given jurisdiction over the activities of formerly incarcerated people, with the power to re-incarcerate parolees or people on supervised release for failure to comply with USPC release rules.<sup>239</sup> Day-to-day supervision is provided by the federal Court Services and Offender Supervision Agency (CSOSA), a federal agency which derives its legal authority from the USPC.<sup>240</sup>

The Committee has led efforts to protect the rights of D.C. prisoners and those released from BOP custody against the unregulated actions of the USPC. In *Sellmon v Reilly*,<sup>241</sup> a 2008 case litigated by non-WLC attorneys,<sup>242</sup> District Court Judge Ellen Huevelle ruled that the USPC had violated the *ex post facto* clause of the U.S. Constitution in applying its own rules in making parole grant decisions.<sup>243</sup> By substituting its own parole guidelines and practices in place of the rules formerly used by the D.C. Board of Parole, the Court found that

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236. See Balanced Budget of 1997, Pub. L. No. 105-33, § 11231, 111 Stat. 251, 745 (1997); see also D.C. CODE § 24-131 (2001).

237. See *id.* at § 11212(a); see also Philip Fornaci, *Restoring Control of Parole to D.C.: A Presentation to the D.C. Council*, (Mar. 16, 2018) at 5.

238. See Balanced Budget of 1997, *supra* note 236; see also Philip Fornaci, *supra* note 237, at 3–5 (Parole was abolished for federal offenders in 1984, under the Sentencing Reform Act, which created the practice of “supervised release.” As an alternative to parole and probation for people convicted of federal felonies, a supervised release period starts after a person is released from prison. He or she is put under direct supervision and monitoring by a federal agency of their compliance with release rules, with the possibility of re-incarceration or other sanctions for violation of those rules. Supervised release does not replace a portion of the sentence of imprisonment, like parole does, but rather is imposed in addition to the time spent in prison. Under the D.C. Revitalization Act, all D.C. sentences for felony offenses committed after August 4, 2000 no longer included parole eligibility, but instead included a period of supervised release following incarceration.).

239. See *id.*; see also Fornaci, *supra* note 237, at 6 (citing D.C. CODE § 24-131).

240. See *id.* at § 11233(a)-(d); see also Philip Fornaci, *supra* note 237, at 5, 18, 19.

241. See *Sellmon v. Reilly*, 561 F. Supp. 2d 46 (D.D.C. 2008).

242. See *id.* at 48 (*Sellmon* was filed by Jason Wallach, formerly of the law firm of Dickstein Shapiro).

243. *Id.* at 49.

the USPC had significantly increased the risk that D.C. prisoners would serve longer terms of incarceration.<sup>244</sup>

In the wake of the *Sellmon* decision, the Committee initiated a massive effort to secure rehearings for hundreds of D.C. prisoners denied parole prior to *Sellmon*, mobilizing the private bar to provide representation to D.C. prisoners at the far-flung facilities where they were being held.<sup>245</sup> Several hundred D.C. prisoners were subsequently released on parole after *Sellmon*, and the Committee has continued its efforts to provide legal representation to D.C. prisoners at parole hearings.<sup>246</sup>

In 2010, the Committee filed another case challenging the USPC's handling of parole grant hearings, this time for D.C. prisoners convicted of offenses that occurred prior to 1985. The *Sellmon* decision required the USPC to apply the D.C. Board of Parole's rules in place beginning in 1985, but did not consider the guidelines in place for prisoners whose offenses occurred prior to 1985.<sup>247</sup> Those parole decisions should have been adjudicated under rules issued by the D.C. Board of Parole in 1972. The *Daniel v. Fulwood* complaint was dismissed on a motion to dismiss in 2011, but that decision was reversed in 2014 by the Court of Appeals.<sup>248</sup> In 2015, the Committee and the USPC reached a settlement agreement, with the USPC issuing new regulations to formalize parole criteria for prisoners whose offenses occurred from 1972 to 1985, utilizing the former D.C. Board of Parole 1972 Guidelines.<sup>249</sup>

In 2017, the Committee returned to court to seek enforcement of the settlement agreement in *Daniel*, arguing that the USPC had failed to apply the 1972 Guidelines in good faith.<sup>250</sup> While the Court allowed the USPC broad discretion in decision-making in these cases, the Court found that the USPC had violated the agreement with regard to the frequency of re-hearings.<sup>251</sup>

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244. *Id.*

245. See "Housing of DC Felons Far Away from Home: Effects on Crime, Recidivism and Reentry," *Statement Before the Subcomm. on Fed. Workforce, Postal Serv. And the District of Columbia of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (May 5, 2010) (testimony of Philip Fornaci, at 1–2).

246. *Id.*

247. See *Sellmon*, 561 F. Supp. 2d at 49.

248. See *Daniel v. Fulwood*, 766 F.3d 57, 58 (D.C. Cir. 2014).

249. See Fornaci, *supra* note 237, at 10 (citing *Daniel v. Fulwood*, 766 F.3d 57, 58 (D.C. Cir. Sept. 12, 2014)).

250. Motion to Enforce Settlement Agreement, *Daniel v Fulwood*, No. 1:10-cv-00862 (D.C. 2017).

251. Memorandum Opinion, *Daniel v. Smoot*, No. 1:10-cv-00862 (D.D.C. 2018).

The Committee has also challenged certain parole and supervised revocation practices of the USPC. In *Chandler v. U.S. Parole Commission*, the Committee successfully challenged the labeling of a prisoner as a sex offender by the USPC despite the lack of any conviction for a sex offense.<sup>252</sup> In *Ford v. Caulfield*, the Committee secured a judgment that a formerly incarcerated D.C. resident who had repeatedly had his parole “revoked” when he was in fact no longer on parole.<sup>253</sup> Mr. Ford had been repeatedly arrested and imprisoned for violations of parole even after his parole term had ended.<sup>254</sup> The Project subsequently secured significant monetary damages on his behalf.<sup>255</sup>

Concerns regarding the USPC’s handling of both parole granting decisions and its parole and supervised release revocation practices have compelled the Committee and other D.C. organizations to seek the restoration of local control of parole from the USPC. Currently, almost 80 percent of the USPC’s caseload is D.C. prisoners and supervisees, a federal agency acting in the role of local paroling agency.<sup>256</sup> The USPC acts without authority from, and not in collaboration with, any D.C. government agency.

By 2018, approximately 1,700 of 4,600 D.C. prisoners held in BOP facilities were incarcerated through USPC revocations of parole and supervised release, not for committing new offenses. More than 1,000 D.C. prisoners languish in the BOP despite eligibility for parole.<sup>257</sup> One-third of the D.C. Jail population is made up people accused of parole, supervised release and probation violations.<sup>258</sup> Successful efforts to localize parole, and to reform parole and supervision practices in D.C., could result in the lowest level of mass incarceration in the District in more than 40 years.

The Committee also has sought to highlight the numerous employment, housing and other barriers—beyond incarceration, fines, or other aspects of any formal sentence—faced by individuals who have been arrested or convicted. These barriers, commonly referred to as “collateral consequences,” were the subject of the second of the Com-

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252. *See Chandler v. U.S. Parole Comm’n*, 60 F. Supp. 3d 205, 224–25 (D.D.C. 2014).

253. *See Ford v. Caulfield*, 652 F. Supp. 2d 14, 19, 22 (D.D.C. 2009).

254. *Id.* at 14–15.

255. Stipulation of Settlement and Dismissal, *Ford v Mitchell*, C.A. 10-1517 (D.C.D.C. 2014).

256. *See Fornaci, supra* note 237, at 7.

257. *Id.* at 8.

258. *Id.* at 3.

mittee's series of four criminal justice reports.<sup>259</sup> The Collateral Consequences Report examined the various penalties imposed by ancillary rules, statutes and broader systemic practices that make it difficult for those with conviction records to get jobs, housing, or public assistance, or to participate in civil life, under the laws of the District, Maryland, and Virginia.<sup>260</sup>

The impact of these collateral consequences on the broader community is substantial, given the large number of people with criminal records and the racially disparate impact of the criminal justice system. For instance, the Collateral Consequences Report noted that, at the time, about 10 percent of the District's population—some 60,000 people—had been convicted of an offense.<sup>261</sup> As the Committee previously reported, African Americans make up a disproportionate share of those arrested in the District,<sup>262</sup> and such disparities “appeared to persist through the court process, with about 87 percent of D.C. Superior Court cases that could be matched to an arrest [in the period studied by the WLC Arrest Report] involving African American defendants.”<sup>263</sup> The D.C. Sentencing Commission similarly found that of the 2,154 felony offenders sentenced by the D.C. Superior Court in 2012, almost 93 percent were African-American,<sup>264</sup> and the Collateral Consequences Report noted that “[o]verall, the rate of incarceration of African Americans in D.C. has been estimated to be some 19 times the rate of whites.”<sup>265</sup> The report also noted the disproportionately high share of African Americans in the Maryland and Virginia prison populations.<sup>266</sup>

The report's findings regarding some of the most significant collateral consequences include:

Employment: Inquiries into criminal history can present a significant hurdle for individuals looking for jobs, especially in the wide vari-

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259. WASH. LAW. COMM., *THE COLLATERAL CONSEQUENCES OF ARRESTS AND CONVICTIONS UNDER D.C., MARYLAND, AND VIRGINIA LAW* (Oct. 22, 2014) [hereinafter *COLLATERAL CONSEQUENCES REPORT*] [http://www.washlaw.org/pdf/wlc\\_collateral\\_consequences\\_report.pdf](http://www.washlaw.org/pdf/wlc_collateral_consequences_report.pdf).

260. *Id.* at Exec. Summary.

261. *See id.* at 1.

262. *See supra* notes 27–39, and accompanying text.

263. *See COLLATERAL CONSEQUENCES REPORT*, *supra* note 259, at 3 (citing WLC Arrest Report at 27).

264. *Id.* at 3–4 (citing DISTRICT OF COLUMBIA SENTENCING AND CRIMINAL CODE REVISION COMMISSION, 2012 ANNUAL REPORT, at 52, (April 26, 2013), [http://sdc.dc.gov/sites/default/files/dc/sites/sdc/publication/attachments/annual\\_report\\_2012.pdf](http://sdc.dc.gov/sites/default/files/dc/sites/sdc/publication/attachments/annual_report_2012.pdf)).

265. *Id.* at 4 (citing M. Mauer & R. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, at 11 (Sentencing Project, July 2007)).

266. *See id.*

ety of field—such as commercial drivers, elevator mechanics, and property managers in the District—that require occupational licenses.<sup>267</sup> Although laws in the District, Maryland, and Virginia each provide certain protections intended to prevent an individual’s conviction from serving as a *de facto* bar to employment—including “ban-the-box” provisions in the District and Maryland limiting employers’ ability to inquire about an applicant’s criminal history—licensing boards and employers retain broad discretion to consider the applicant’s criminal history, and limits on the use of criminal history to deny a license or job generally are not subject to effective judicial enforcement.<sup>268</sup>

**Housing:** Each of the three jurisdictions allows private agents or landlords to freely inquire into, and reject, applicants based on criminal history.<sup>269</sup> With respect to public housing (including rent assistance), federal regulations require that public housing authorities and other owners of assisted housing be permitted to take criminal history into account to some degree but leave local authorities and owners “significant discretion with respect to how an individual’s criminal history should affect his or her eligibility for benefits.”<sup>270</sup> Of the three jurisdictions studied, only the District had enacted regulations intended to limit the exercise of that discretion.<sup>271</sup>

**Civic Participation:** All three jurisdictions prohibit individuals convicted of a felony from voting or serving on a jury, among other rights, for at least some period of time. Virginia’s constitution provides for the permanent disqualification of individuals with felony convictions unless their rights are individually restored by the Governor.<sup>272</sup> Although Virginia’s current policies attempt to streamline the rights-restoration process—including by proactively identifying individuals who may qualify to have their rights restored after they are no longer incarcerated or under active supervision—the continuation of those policies is subject to the discretion of the then-sitting Governor. The District and Maryland, in contrast, have provided for the automatic restoration of voting and other rights to qualified individuals.<sup>273</sup>

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267. *See id.* at 6.

268. *Id.* at Exec. Summary, 7.

269. *See* COLLATERAL CONSEQUENCES REPORT, *supra* note 259, at 16–17.

270. *Id.* at 14.

271. *See id.* at Exec. Summary.

272. *See id.* at 19; *Howell v. McAuliffe*, 292 Va. 320, 349 (2016) (holding that the Governor may not restore rights to individuals with felony convictions on a blanket basis).

273. COLLATERAL CONSEQUENCES REPORT, *supra* note 259, at 20.

Some of the Collateral Consequences Report's recommendations included (1) strengthening and expanding "ban-the-box" and similar provisions, including by providing for judicial enforcement of such provisions, (2) limiting the discretion of licensing boards, employers and landlords in considering an applicant's criminal history, particularly with respect to years-old convictions or convictions for minor offenses, and (3) providing for the automatic restoration of voting rights upon an individual's release from incarceration (as is the case in the District), rather than requiring the individual to wait until all aspects of a sentence have been completed (as in Maryland) or until the Governor affirmatively restores the individual's rights (as in Virginia).<sup>274</sup>

The Collateral Consequences Report has served as a resource for advocates and others in analyzing the impact of collateral consequences,<sup>275</sup> as well as for the Committee's own continued advocacy on these issues.<sup>276</sup>

## V. FUTURE DIRECTIONS

The most prominent problems affecting prisoners nationally include the continuing use of solitary confinement, the mistreatment of prisoners with disabilities (most prominently people with mental illness) and of course the sheer number of people incarcerated. These same issues are central to our advocacy on behalf of D.C. prisoners as well, and will likely remain the areas of focus for the Committee in the years ahead in both litigation and public policy advocacy.

D.C. prisoners are disproportionately held in high security settings in the BOP, and their conditions of confinement in these facilities will continue to dominate the Committee's work. The Committee's litigation with federal prisoners with psychiatric disabilities held in the BOP's highest security prisons—the ADX and USP

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274. See *id.* at Exec. Summary, 23, 25.

275. See Jason Juffras et al., *The Impact of "Ban the Box" in the District of Columbia*, DC AUDITOR, at 4 (June 10, 2016) <http://www.dcauditor.org/sites/default/files/FCRSA%20%20Ban%20the%20Box%20Report0.pdf> (analyzing the District's Fair Criminal Record Screening Amendment Act of 2014 for the Office of the District of Columbia Auditor); see also EQUAL RIGHTS CENTER, UNLOCKING DISCRIMINATION: A DC AREA TESTING INVESTIGATION ABOUT RACIAL DISCRIMINATION AND CRIMINAL RECORDS SCREENING POLICIES IN HOUSING 11 (Oct. 2016), <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf>.

276. *Bill 21-0706 Fair Criminal Record Screening for Housing Act of 2016, Comm. on the Judiciary of the Council of the District of Columbia, Written Testimony of Owen Doherty*, at 1–2 (July 11, 2016), <https://lawyerscommittee.org/wp-content/uploads/2016/07/Washington-Lawyers-Committee-Written-Testimony-Bill-21-0706.pdf> (testifying in support of the Fair Criminal Record Screening for Housing Act of 2016, later enacted as D.C. Law 21-0259).

Lewisburg—has revealed shocking violations of basic human rights, including torture, and deliberate indifference to prisoners’ mental health needs. While our litigation on these issues will seek to address the needs of D.C. prisoners in particular, the Committee will address these issues in broad-based legal actions so as to address inhumane conditions for all BOP prisoners.

Widespread use of solitary confinement exacerbates mental health symptoms, with several federal courts finding that placement of people with serious mental illness into solitary confinement settings is a violation of the Eighth Amendment.<sup>277</sup> Nonetheless, many of the Committee’s clients moved out of the ADX or USP Lewisburg in the course of litigation, due to their mental health diagnoses, have been placed in solitary confinement in other high security prisons.<sup>278</sup> Further, in late 2019, the BOP is expected to open a new “supermax” prison in Thomson, Illinois and another new high security prison in Eastern Kentucky a few years later.<sup>279</sup> Given the BOP’s track record in mistreating prisoners with psychiatric disabilities, and the BOP’s continuing budget shortfalls despite this expansion, we can anticipate that these prisoners will suffer most severely in the new facilities.

The Committee has also turned its attention to the unconstitutional conditions in immigration detention facilities. For example, in *Doe v. Shenandoah Valley Juvenile Center Commission*,<sup>280</sup> the Committee sued the owner and operator of an immigration detention facility on behalf a 17-year-old unaccompanied Mexican minor who had been detained at the Shenandoah Valley facility simply because he had entered the United States without authorization after suffering domestic abuse and other violence in Mexico. The case alleges conditions at the Shenandoah facility that “shock the conscience, including violence by staff, abusive and excessive use of seclusion and restraints, and the denial of necessary mental health care.”<sup>281</sup> The complaint

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277. See e.g., Ind. Prot. And Advocacy Serv. Comm. v. Comm’n, No. 1:08-cv-01317, 2012 WL 6738517 (S.D. Ind. Dec. 21, 2012).

278. Personal recollection of Phil Fornaci based on contact with former ADX prisoners.

279. *Officials: Illinois Prison to Open Next Year*, U.S. NEWS (June 10, 2018, 12:28 PM) <https://www.usnews.com/news/best-states/illinois/articles/2018-06-10/officials-illinois-prison-to-open-next-year>; see also Eli Hager, *Hal Rogers wants a prison in Letcher County. The Trump administration has doubts*, LEXINGTON HERALD-LEADER (Nov.8, 2017), <https://www.kentucky.com/news/state/article183540796.html#storylink=cpyhttps://www.kentucky.com/news/state/article183540796.html>.

280. Class Action Complaint at 1, *Doe v. Shenandoah Valley Juvenile Ctr. Comm’n*, No. 5:17-cv-00097 (W.D. Va. Oct. 4, 2017).

281. *Id.* at 1.

also complained of discriminatory harsh treatment of Latino immigrants vis-à-vis white non-immigrant prisoners.<sup>282</sup>

Conditions in D.C. jail facilities continue to deteriorate, with the crumbling infrastructure at D.C. Central Detention Facility worsening those conditions.<sup>283</sup> The Committee remains the primary watchdog for conditions in local jail facilities, and will continue this role moving forward.

But the most significant opportunities for addressing the needs of D.C. prisoners may come as the result of non-litigation advocacy, in particular efforts to restore local control of parole to the D.C. government. With parole and supervised release revocations resulting in more than one-third of all D.C. incarcerations,<sup>284</sup> reform of parole and supervised release supervision practices could have a dramatic impact on reducing the total number of D.C. prisoners.

Yet even if the Committee is successful in reducing the D.C. prisoner population, as well as in other areas of criminal justice reform, the inherent problems of reintegration into society after a period of incarceration or a criminal conviction will remain. The Committee's work will therefore also continue to include strategies for addressing the impact of criminal records on access to housing, employment and public accommodations. These impacts are most acutely felt by the District's African-American and immigrant communities, whose representation in the criminal system is hugely disproportionate to their numbers in the D.C. population.<sup>285</sup> The struggle for criminal justice reform thus remains a vital part of the larger civil rights struggles in which the Committee has been engaged since its founding.

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282. *Id.* at 9.

283. See WASH. LAW. COMM., *supra* note 219, at 12.

284. See Fornaci, *supra* note 237, at 3.

285. See COLLATERAL CONSEQUENCES REPORT, *supra* note 259, at 3.

# The Washington Lawyers’ Committee’s Pursuit of Quality Public Educational Opportunity for All of DC’s Children

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### BACKGROUND

In *Bolling v. Sharpe*,<sup>1</sup> one of the five 1954 *Brown v. Board of Education*<sup>2</sup> companion cases, the U.S. Supreme Court held that Washington, D.C.'s racially segregated public school system violated the due process clause of the Fifth Amendment.<sup>3</sup> In the decade that followed abolition of the District's dual school system, white enrollment in its public schools dropped from 50 percent to less than 10 percent.<sup>4</sup>

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1. *Bolling v. Sharpe*, 347 U.S. 497 (1954).  
2. *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954).  
3. *Bolling*, 347 U.S. at 498-99.  
4. STEVEN J. DINER, *CRISIS OF CONFIDENCE: THE REPUTATION OF WASHINGTON'S PUBLIC SCHOOLS IN THE TWENTIETH CENTURY*, 53 (1982).

In 1967, in *Hobson v. Hansen (Hobson I)*,<sup>5</sup> the U.S. District Court for the District of Columbia ordered that students in overcrowded schools in the city (which were located overwhelmingly in African-American wards) be given the option to attend the then under-populated schools in the more affluent (and predominantly white) areas west of Rock Creek Park in order to counter the ongoing discriminatory effects of the city's entrenched racial and economic segregation.<sup>6</sup> The Court also mandated the development and implementation of public school and teacher assignment plans focused on achieving integration.<sup>7</sup> In 1971, in *Hobson v. Hanson (Hobson II)*, the frustrated District Court ordered the D.C. school district to equalize per pupil expenditures for teacher compensation across the system in order to provide economically disadvantaged children—the overwhelming majority of whom were African-American—with the equal educational opportunity to which they were constitutionally entitled.<sup>8</sup>

As part of a larger study of the implementation of the *Hobson II* equalization order, the National Lawyers' Committee for Civil Rights Under Law produced a 1977 report concluding that decision-making with respect to District public school budgets, curriculum and personnel was unduly centralized.<sup>9</sup> The report went on to discuss how decentralization could encourage local parent groups and principals to collaborate on the best use and allocation of resources in their particular circumstances.<sup>10</sup> Inspired by the analysis, representatives of three D.C. community school boards then approached the National Lawyers' Committee for legal assistance in renegotiating agreements with the D.C. Board of Education to increase their involvement in decision-making regarding local schools.<sup>11</sup>

The Washington Lawyers' Committee for Civil Rights (hereinafter the "Washington Lawyers' Committee" or the "Committee"),<sup>12</sup> which had consulted with the National Lawyers' Committee regarding

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5. *Hobson v. Hansen*, 269 F. Supp. 401, 495, 510, 517 (D.C. 1967); *aff'd en banc sub. nom. Smuck v. Hobson*, 408 F.2d 175, 190 (D.C. Cir. 1969).

6. *Hobson*, 269 F. Supp. at 517.

7. *Id.* at 517–18.

8. *Hobson v. Hansen*, 327 F. Supp. 844, 863–64 (D.C. 1971).

9. D. LONG, M. GAFFNEY & L. BODI, *LEGAL CONSTRAINTS ON DECENTRALIZED DECISION-MAKING IN THE PUBLIC SCHOOL SYSTEM OF THE DISTRICT OF COLUMBIA 2* (1977).

10. *Id.* at 5.

11. Joseph M. Sellers, *Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: Public Education Legal Services Project: A Private Sector Initiative in the Area of Public Education*, 27 *How. L.J.* 1471, 1477 (1984).

12. The organization later added "and Urban Affairs" to its name to better reflect the scope of its efforts in areas such as D.C. public education.

the possibility of engaging pro bono resources of cooperating law firms to respond to the civil rights and poverty issues inhibiting the provision of quality public education in the District of Columbia, arranged for the firms of Covington & Burling and Debevoise & Lieberman to represent the local school boards in the negotiations.<sup>13</sup> The Washington Lawyers' Committee also saw opportunity in the District of Columbia Board of Education's 1978 enactment of rules establishing Neighborhood School Councils (NSCs) of local school parents, teachers, students and non-parent communities to advise principals on school decisions regarding resource allocation, curriculum, building and ground maintenance, budget and staffing priorities.<sup>14</sup> Committee staff members explored ways in which the resources of the private D.C. bar and business community might be used to enhance parental involvement in the schools, whether in conjunction with NSCs or other parental advisory groups such as Elected School Advisory Councils (SACs)<sup>15</sup> and local chapters of the Parent-Teacher and Home and School associations. With the encouragement of school officials and organizations supporting public education, the Committee's Public Education Legal Services Project (hereinafter the "PELSP" or the "Education Project") was conceived as a means to implement this strategy.

Thus began the Committee's challenging and ongoing 40-year struggle to improve public schooling in the District of Columbia. As chronicled more fully in *Civil Rights Papers: Washington Lawyers' Committee for Civil Rights Under Law: Public Education Legal Project: A Private Sector Initiative in the Area of Public Education*, which was published in a 1984 edition of the Howard Law Journal in celebration of the Committee's first fifteen years,<sup>16</sup> the next five years were active ones for the Committee's new Education Project. Early on, Committee staff and lawyers from the firms of Nussbaum & Owen and Rogers & Wells produced a "lengthy manual explaining the legal framework in which the school system operated and identifying those

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13. Sellers, *supra* note 11, at 1477.

14. *Id.* at 1477-78; see also DON DAVIS, PATRICIA BURH & VIVIAN JOHNSON, A PORTRAIT OF SCHOOLS REACHING OUT: REPORT OF A SURVEY OF PRACTICES AND POLICIES OF FAMILY-SCHOOL-COMMUNITY COLLABORATION, 92 (1992) (discussing the necessity of effective formal mandate that requires neighborhood school councils).

15. Sellers, *supra* note 11, at 1477-78; See also The Elementary and Secondary Education Act of 1965, 20 U.S.C. § 301 (1965), amended by 20 U.S.C. 6301 (2015) (authorizing the formation of a program to assist in vitally needed educational services).

16. Roderic V.O. Boggs, *Introduction*, 27 How. L.J. 1223-24 (1984).

areas . . . where parents and their legal representatives could have impact.”<sup>17</sup>

Simultaneously, with the support of District school leaders and the local community school board, the Committee focused its parental engagement efforts initially on Anacostia, an overwhelmingly African American section of the city that had among the highest levels of unemployment, public assistance, public housing and crime and, not surprisingly, the lowest student test scores in the District.<sup>18</sup> After interviewing school principals and parents, fourteen Anacostia schools were selected, attorneys from the private bar were recruited, and “matched” private attorneys began working with parent organizations for each school by early 1980.<sup>19</sup> Volunteer lawyers began helping local communities resolve straightforward local concerns such as school building disrepair, shortages or misallocation of teachers, books and supplies, and security and fund-raising problems, often liaising with District governmental agencies and school administrators and officials on behalf of schools, parents and students.<sup>20</sup>

When an unusually drastic system-wide budget cut led to massive teacher layoffs and the elimination of many classroom programs that dwarfed the problems of individual schools in 1980, Education Project attorneys joined with active parents from Anacostia and wealthier wards to try to minimize the toxic impacts of the cuts and prevent such crises in the future.<sup>21</sup> The Committee sponsored the formation of Parents United for Full Public School Funding (“Parents United”)<sup>22</sup> to monitor and address public school budgeting issues on an ongoing basis.<sup>23</sup> Marshaling extensive educational and budgetary expertise, Parents United produced reports comparing DC’s per pupil school expenditures in fiscal years 1981 and 1982 unfavorably to those in adjacent Montgomery County, Maryland, and organized more than 1,000 parents of District school children around the city to advocate for resolution of the system’s fiscal problems and against major cuts to the school board’s proposed budgets by the Mayor and City Council.<sup>24</sup>

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17. Sellers, *supra* note 11, at 1480.

18. *Id.* at 1480–81.

19. *Id.* at 1482.

20. *Id.* at 1483–85.

21. *Id.* at 1486–87.

22. *Id.* at n. 37 (stating that the organization changed its name to Parents United for the District of Columbia Public Schools in 1985 to better reflect the breadth of its activities).

23. Sellers, *supra* note 11, at 1487.

24. See generally WASH. LAW. COMM., ANNUAL REPORT, 1982–83 (1983). PARENTS UNITED FOR FULL PUBLIC SCHOOL FUNDING, COMPARATIVE ANALYSIS OF THE PUBLIC SCHOOL BUDG-

In the face of Parent United's analyses, reporting, advocacy and mobilization of expertise and demonstrative voters over the next several years, the Mayor and Council restored millions of dollars to the final 1982, 1983 and 1984 school budgets ultimately approved by Congress, resulting in reinstatement of programs that had been reduced or eliminated by the 1980 budget cuts.<sup>25</sup>

Parents United also assumed a more active front-line role on other issues of critical importance to the wellbeing of the DC public schools in the early 1980s. Parents United was a key participant in a broad coalition of civic and community groups that successfully opposed a DCPS-funded tuition tax credit initiative that had been placed on the 1981 ballot by the National Taxpayer's Union, for example.<sup>26</sup> With the firms of Beveridge & Diamond and Wald, Harkrader & Ross, Parents United issued a 1982 "Educational Impact Assessment" endorsing longer school days and an extended school year,<sup>27</sup> which the Washington Teachers' Union and the Board of Education then incorporated into a new contract. Later that year, Parents United made recommendations to an ad hoc committee formed pursuant to the new collective bargaining agreement to study the teacher assessment system. And in 1983, Parents United intervened in a successful lawsuit filed by the DC Board of Education to stop then-Mayor Marion Barry from unilaterally imposing part of the District's budget deficit on the school system.<sup>28</sup> Represented by Arent, Fox, Kintner, Plotkin & Kahn and Committee staff, Parents United was found to have standing to argue that the Mayor's action denied the public the opportunity to comment on the proposed budget in violation of the DC Home

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ETS-FISCAL 1981 FOR THE DISTRICT OF COLUMBIA AND MONTGOMERY COUNTY, at 3 (1981). A report with similar findings, conducted in 1982, also included such details as the fact that D.C. spent half as much on its school libraries as Montgomery County. PARENTS UNITED FOR FULL PUBLIC SCHOOL FUNDING, COMPARATIVE ANALYSIS OF THE PUBLIC SCHOOL BUDGETS-FISCAL 1982 FOR THE DISTRICT OF COLUMBIA AND MONTGOMERY COUNTY, at 4 (1982). The analyses were prepared by Mary Levy and others at the law firm of Rauh, Silard & Lichtman, and Foley, Lardner, Hollenbough & Jakobs. Having served as a key volunteer researcher for the Committee since 1980, Mary Levy would later join the Committee to head the Public Education Reform Project from 1990 to 2009, would produce numerous reports on the school district and its finances, and would become perhaps the leading source for school budget and other data on D.C.P.S.

25. Sellers, *supra* note 11, at 1488.

26. *Id.* at 1488-89.

27. PARENTS UNITED, AN EDUCATIONAL IMPACT ASSESSMENT OF CONTRACT TERMS IN DISPUTE BETWEEN THE D.C. BOARD OF EDUCATION AND THE WASHINGTON TEACHERS' UNION, I (1982).

28. Sellers, *supra* note 11, at n. 40.

Rule Charter.<sup>29</sup> After a temporary restraining order was issued, a settlement was reached instituting several new programs, including pre-K, and mandating that all future education budgeting would take place through standard budgeting procedures rather than mere executive fiat.<sup>30</sup>

The Committee also formed the Washington Parent Group Fund (“Parent Group Fund”) in 1981 to help public school parents in the low-income Anacostia Education Project schools support educational enrichment programs not available as part of the regular school curriculum.<sup>31</sup> A separate, tax-exempt entity, the Fund was “designed to encourage fund-raising at Project schools by matching funds raised from the private sector with money raised by the parents.”<sup>32</sup> The law firms of Wald, Harkrader & Ross and Arent, Fox, Kintner, Plotkin & Kahn, along with Price Waterhouse, formulated the Fund guidelines and procedures, and the Fund was governed by a board consisting of parents and representatives of the business community and the Committee.<sup>33</sup> The Fund facilitated investments of nearly \$50,000 in a range of programs in its first two years, and brought concerned D.C. public school parents together for discussions focused on educational issues at regular Fund meetings.<sup>34</sup> Business community financial support grew rapidly, Barbara Bush actively encouraged corporate and parental involvement in the Fund, and the initiative was recognized nationally by the Ford Foundation as a model of corporate support for public education.<sup>35</sup>

## INTRODUCTION

This Article—written as part of a series of pieces to commemorate the Committee’s fiftieth anniversary—now seeks to chronicle the Committee’s work empowering parents of color and of limited income in support of public educational equity, reform and student enrichment in the District from the early 1980’s to the present day. Building on the early efforts of the Committee’s Education Project attorneys, Parents United and the Parent Group Fund, the Committee has continued in the years since to play an important role—alongside empow-

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29. *Id.*

30. WASH. LAW. COMM., ANNUAL REPORT, 1983-84, at 18 (1984).

31. Sellers, *supra* note 11, at 1486.

32. *Id.* at 1490.

33. *Id.*

34. *Id.* at 1491.

35. *Id.* at 1492.

ered parents, private attorneys and the business community—in seeking to ensure that the needs of DC’s school children are not short-changed amid the wide-ranging ravages of long-running urban poverty and segregation. In doing so, the Committee has strived to position itself as a partner—rather than an adversary—working *with* public school leaders, staff and communities toward this end, and challenging and drawing attention to impediments placed in the way of achieving this goal in deference to less noble or worthy competing interests.

Combining active hands-on support and guidance for local children, parent organizations and schools with city-wide policy research and activism and strategic public interest litigation, the Committee has spearheaded a unique approach over the last 35 years.<sup>36</sup> In pursuit of adequately resourced high-quality public education for low-income children in the District, the Committee and related entities have marshaled a range of seemingly disconnected change agents and pursued divergent but reinforcing tracks toward improvement of the D.C. Public School system (hereinafter “DCPS”). Fulfilling the Constitutional guarantee of equal and adequate public education for the District’s economically disadvantaged and non-white students has proven a confoundingly elusive goal, however.<sup>37</sup> As Parents United documented in a comprehensive report published fifty years after *Brown* and *Bolling*,<sup>38</sup> frustratingly enduring challenges remain. This Article seeks, therefore, both to identify and describe the distinctive value the Washington Lawyers’ Committee for Civil Rights and Urban Affairs has been able to bring to the struggle for quality and equality in DC public school education over the years, and to anticipate areas of ongoing and arising concern in which Committee vigilance and leadership can have an important impact into the future.

Part II of this Article will document the Committee’s unwavering focus, as general counsel of Parents United and in its own right, on empowering parents of D.C.’s public school children in pursuit of adequate government funding for DCPS and to advocate for educational change, reform and improvement within the school system since the early days of the Education Project and the budget battles that birthed Parents United in the early 1980s. We will review the continuing financial woes of the District and its public schools through the 1980s,

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36. Sellers, *supra* note 11, at 1476–78.

37. *Brown*, 347 U.S. at 495; *Bolling*, 347 U.S. at 498.

38. WASH. LAW. COMM., SEPARATE AND UNEQUAL: THE STATE OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS FIFTY YEARS AFTER BROWN AND BOLLING (2005).

and the Committee's involvement in challenging leadership choices that failed to prioritize the public school children of the Nation's Capital. We will chronicle Committee and Parents United recommendations and activities regarding teacher recruitment, retention and evaluation, the condition of the schools themselves, and the health and safety of students attending them. We will look at the impact of the Federal takeover of District governance in the mid-90s, and Committee involvement with and critique of the work of the Control Board and appointed school leadership in that time frame. Then we will move forward to look at the state of DCPS in the first decade and a half of the new century, including Committee-led efforts in the early 2000's to bring school grounds and athletic facilities up to acceptable standards, Committee and Parents United condemnation of the continuing failures of the system, and their contributions to the transition of control of the schools to the District's Mayor in 2006.

In Part III, we will take a look at the expansion and evolution over time of the private/public school partnership program that began with the Committee's recognition that bringing the resources of private firm lawyers and businesses to bear on public schools in the city through "matching" efforts could broaden and deepen academic opportunities while further empowering local parents. First embodied in the Anacostia parent/lawyer partnerships and the Parent Group Fund of the early 1980s, which the Committee formed and for which it served as general counsel, the private/public partnership concept has expanded exponentially to provide an ever-widening array of enrichment opportunities for ever-growing numbers of D.C. school students. Public school students across the District now regularly receive individualized hands-on guidance and access to otherwise inaccessible enrichment opportunities with the help of law firm volunteers; public school communities benefit from the support and involvement of law firm lawyers and employees in school activities and events; families of public school children are encouraged and supported through law firm participation in parent organizations; city-wide challenge programs sponsored by firms bring out the best in the District's students; and the emerging Committee-sponsored Parent Empowerment Program offers matching funds for local parent-teacher inspired programs.

Unfortunately, even as we enter the sixth decade of both the Committee's existence and the District's purportedly integrated public school system, the District still struggles to provide a quality public education for all of the District's children, regardless of race or socio-

economic status. So, as we will discuss in Part V, the Committee continues to focus on the empowerment of parents and on building a city-wide network of advocacy and support; expanding on its historic themes of partnerships, analysis, advocacy and empowerment as the best ways to support and improve educational opportunity for school children in the District. In addition to linking DCPS parents across racial and socio-economic lines and promoting and coordinating partnerships among school and law/business communities, the Committee continues to work to expand the partnership program and to reinforce important connections among participating and prospective schools and firms and businesses and community partners, and to offer funding partnership opportunities to support academic enrichment programs at schools.

We will look at how the Committee's expanding connections among parent teacher groups has enabled the Committee to introduce more parent and teacher leaders to the District-wide Coalition for DC Public Schools and Communities ("C4DC"). The Committee's Public Education Project has also hosted forums to raise awareness and stimulate discussion on issues and concerns facing the broader DCPS community. And the Committee's efforts to understand, explain and respond to the challenges that the uncoordinated decade-long expansion in D.C. of the new "dual"—traditional and charter—school system has presented to the goal of quality educational opportunity for all students—and particularly for students of color residing in predominantly low-income neighborhoods—will be considered. This is just one example of how the Education Project has been returning to litigation and policy analysis and advocacy in D.C. over the past few years as a vehicle for improving racial equity and eliminating the harmful effects of discrimination and poverty.

We will conclude with a summary of the hurdles the school district is likely to be facing in the coming years, and a blueprint for Committee involvement that may be effective, if adequately resourced, in responding to the evolving challenges based on the organization's historically-tested, and proven, broad-based strategy for achieving change.

I. THE COMMITTEE'S EARLY LEADERSHIP IN PUSHING FOR "FULL" DCPS FUNDING LED TO EXPANDED ROLES AND INFLUENCE FOR THE COMMITTEE, PARENTS UNITED AND ITS SCHOOL PARENT MEMBERS ON SYSTEM-WIDE FINANCIAL AND OPERATIONAL ISSUES

The Washington Lawyers' Committee has spearheaded extensive efforts to promote adequate school funding and quality student-focused school operations since its first foray into school finances through and in support of Parents United at the time of the school budget battles of the early and mid-1980s.<sup>39</sup> In the years that followed, Parents United developed into a flagship organization for securing resources for schools in the District: Its overall role growing to include marshalling data and evaluating school system operations, empowering school parents and administrators with factual information and documentation, and demanding and monitoring the system's response to identified needs.<sup>40</sup> Over the years, Parents United, and the Committee's Mary Levy, became the District's most authoritative source of information, analysis, and advocacy regarding school system-wide matters.<sup>41</sup> In addition to working to secure adequate system-wide annual budget funding, Parents United, the Committee and the public school parents they helped "arm" and empower took it upon themselves to address issues of teacher quality and compensation, building and facilities conditions, and staffing adequacy; all concerns that were highlighted during those early '80s budget crises that spawned Parents United in the first place.

A. Illuminating Comparative Underfunding and Reporting Failing Grades

Parents United's comparisons of DCPS versus Montgomery County school district spending for the 1981-1982 fiscal year identified a significant variation between the two similarly-sized systems in budgeting for and hiring of teachers. DCPS employed 350 to 450 fewer teachers than Montgomery County.<sup>42</sup> In 1982, the system had one seventh the number of classroom aides (86 in DCPS versus 601 in

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39. Sellers, *supra* note 11, at 1488-89.

40. *Id.* at 1490-91.

41. WASH. LAW. COMM., ANNUAL REPORT, 1993, at 12 (1994).

42. PARENTS UNITED, COMPARATIVE ANALYSIS OF THE PUBLIC SCHOOL BUDGETS - FISCAL 1982 FOR THE DISTRICT OF COLUMBIA AND MONTGOMERY COUNTY 3 (1981).

Montgomery County).<sup>43</sup> Spending for instructional support staff services such as attendance officers, social workers, psychologists, curriculum development, and special education testing, constituted about five percent of the District's budget, while consuming nine percent of that of Montgomery County.<sup>44</sup> Administrative and central office support also received about 25% less funding in the District system, and DCPS employed significantly fewer staffers.<sup>45</sup> DCPS spent half as much on libraries as Montgomery County, and \$9 million more on custodial expenses, utilities, maintenance, and repairs, likely due to older school buildings and vandalism.<sup>46</sup>

Parents United's focus on teacher quality began with recommendations made in connection with the 1982 renegotiation of the teachers' union collective bargaining agreement and the ad hoc committee formed pursuant to the renegotiated contract to propose an updated teacher evaluation system.<sup>47</sup> Parents United recommended an increase in teacher pay overall, creation of a system to advance pay scales for high quality teaching, development of a reward system for teachers who minimized sick leave, an extension of the school day, smaller class sizes, and teacher relief from non-teaching duties.<sup>48</sup> Recognizing that "[q]uality schooling relied on quality teaching," the report to the ad hoc committee also set forth its recommendations for the establishment of "an objective, reliable and valid teacher evaluation system."<sup>49</sup>

Keeping the focus on improving schools, two Parents United representatives served on a DCPS Superintendent's Task Force on Teacher Initiatives that released a report in 1984 making seventeen recommendations for ways DCPS could achieve educational excellence based on national studies and research.<sup>50</sup> Many of the recommendations highlighted DCPS's financial issues, including the need

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43. *Id.* at 4.

44. *Id.*

45. *Id.*

46. *Id.*

47. PARENTS UNITED, AN EDUCATIONAL IMPACT ASSESSMENT OF CONTRACT TERMS IN DISPUTE BETWEEN THE D.C. BOARD OF EDUCATION AND THE WASHINGTON TEACHERS' UNION, at Summary (1982).

48. *Id.*

49. PARENTS UNITED, PARENTS UNITED RECOMMENDATIONS FOR THE TEACHER EVALUATION SYSTEM 1 (1982).

50. PARENTS UNITED, PARENTS UNITED'S RECOMMENDATIONS FOR EDUCATIONAL EXCELLENCE IN THE D.C. PUBLIC SCHOOLS: THE IMPLICATIONS OF NATIONAL STUDIES FOR THE FY 1985 D.C. PUBLIC SCHOOL BUDGET, at Introduction (1984).

for higher teacher salaries<sup>51</sup> and funding for critical school building maintenance and improvements.<sup>52</sup> This analysis was followed by a Parents United-instigated and authored 1985 report titled “*Business and Civic Leaders Study of the Fiscal Needs of the District of Columbia Public Schools.*”<sup>53</sup> Mary Levy, then of the law firm of Ruah, Lichtman, Levy & Turner, was the principal drafter of the report, which compared resources available to typical elementary and secondary schools in DC to those in Fairfax and Montgomery Counties.<sup>54</sup>

The results of the comparisons were stark: DC lagged in nearly every measure, generally due to underfunding.<sup>55</sup> For example, DCPS spent nearly half as much per pupil as did Montgomery County schools on textbooks, supplies, and materials.<sup>56</sup> The condition of DC public school buildings “demoralized teachers and students; they are dim, drab, uncomfortable, and occasionally dangerous,”<sup>57</sup> and would “require an extra-ordinary one time investment of capital funds” to bring them to an acceptable standard.<sup>58</sup> The report also recognized the dire need for support staff in DCPS schools, calling for “substantially greater paraprofessional and secretarial support” so principals could manage the significant demands of running high-needs schools instead of acting as receptionists and processing paperwork,<sup>59</sup> and specialty staff, such as librarians and counselors, could be relieved from inappropriate administrative or manual workloads.<sup>60</sup> As a result of this report and advocacy efforts by Squire, Sanders & Dempsey; Pierson, Ball & Dowd; Ruah, Lichtman, Levy & Turner; and Covington & Burling, funding increases for textbooks and supplies, the expansion of Pre-K, and major improvements to buildings and grounds were included in DCPS’s 1986 fiscal year budget.<sup>61</sup>

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51. *Id.* at 7. This call for increased salaries was repeated in a later report, which showed that salaries were chronically under market compared to neighboring areas—sometimes by more than 20%. See WASH. LAW. COMM., THE RECRUITMENT AND RETENTION OF EXCELLENT TEACHERS FOR THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS 15 (1987).

52. PARENTS UNITED, *supra* note 50, at 14–15.

53. PARENTS UNITED, BUSINESS AND CIVIC LEADERS STUDY OF THE FISCAL NEEDS OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS 1 (1985).

54. WASH. LAW. COMM., ANNUAL REPORT, 1985-86, at 16 (1986).

55. PARENTS UNITED, *supra* note 53, at 5.

56. *Id.* at 39.

57. *Id.* at 4.

58. *Id.*

59. *Id.* at 5.

60. *Id.*

61. WASH. LAW. COMM., ANNUAL REPORT, 1984-85, at 16 (1985).

In 1986, Parents United issued a report based on responses from 110 DCPS schools to a questionnaire regarding building conditions and classroom resources.<sup>62</sup> The survey confirmed that classes skewed large; offices were understaffed; libraries had small collections and many lacked full-time librarians; art and music instruction was limited or non-existent at some schools; many schools lacked nurses; and counselors had extremely high student-to counselor ratios.<sup>63</sup> Following a 3,000 participant Parents United “balloon launch” for full public school funding at the District Building and the testimony of more than 50 Parents United-coordinated witnesses in a 10-hour City Council meeting, a substantially full budget, including \$8 million for building repairs, was adopted for the 1987 fiscal year.<sup>64</sup>

Efforts by the Committee and Parents United to improve the quality of the public education experience in the District continued in the late 80s and early 90s.<sup>65</sup> In early 1987, the law firm of Lichtman, Trister & Turner helped Parents United prepare its first public “*Report Card for the Mayor*,” which emphasized the inadequacy of resources available to schools in DC through multiple failing grades.<sup>66</sup> Publicity generated by the report card, along with advocacy by Parents United, spurred budgetary adjustments, including provisions for reductions in class sizes in the lower elementary grades and secondary level English and Math classes,<sup>67</sup> and the Mayor’s agreement to fund teacher pay increases as they were negotiated.<sup>68</sup> Meanwhile, a Parents United follow-up survey of school building conditions released in June 1987 revealed that little progress had been made on urgent, major repairs.<sup>69</sup>

In September 1987, the Committee published a report outlining recommendations for attracting and retaining high quality teachers to the District.<sup>70</sup> The Committee identified four major areas for improvement: (1) more competitive teacher salaries, (2) facilities im-

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62. Report on file with author.

63. Report on file with author.

64. PARENTS UNITED, 10TH ANNIVERSARY GALA COMMEMORATIVE PROGRAM 11 (1990).

65. *See id.* at 12–14. Delabian Rice-Thurston served as Executive Director of Parents United from 1984-2000. She came to Parents United after working as city planner for D.C. Rice-Thurston’s husband was a DCPS teacher and they had two young children who attended DCPS schools.

66. *Id.* at 12.

67. WASH. LAW. COMM., ANNUAL REPORT, 1987, at 14 (1987).

68. PARENTS UNITED, *supra* note 64, at 12.

69. *Id.*

70. WASH. LAW. COMM., THE RECRUITMENT AND RETENTION OF EXCELLENT TEACHERS FOR THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS, at Summary (1987).

provement or compensation for poor working conditions, (3) waiver of the requirement that teachers live in the District, and (4) reestablishment of teacher testing as part of the hiring process.<sup>71</sup> The fact that DCPS salaries were low compared to “virtually all the surrounding suburban jurisdictions,” presented a “major obstacle to retaining new teachers.”<sup>72</sup> Referencing findings from Parents United’s 1986 report on facilities, the Committee cited the difficulty recruiting teachers given the dilapidated school buildings, old or broken equipment and lab facilities, outdated or missing text books, low-achieving pupils, and the location of schools in high-crime areas.<sup>73</sup> The residency requirement created additional hiring problems because the District had a small supply of housing that was both of decent quality and affordable for teachers’ salaries. And the lack of English or subject-matter proficiency requirements or good cause rejection were identified as major shortcomings in the teacher hiring process.<sup>74</sup>

B. Offering Promise and Reform but Expressing Alarm(s)

In an effort to bring some certainty to the ambiguities and vagaries of the annual multi-stepped (from School Board to Mayor to Council to Congress) budget approval process, the law firm of Hogan & Hartson had begun working with the Committee in the mid-80s on a citizen initiative to place funding for public education in DC as “of the highest priority,” and ensure that the Board of Education, the Mayor, and the DC Council would hold annual public hearings regarding the needs and priorities of local schools.<sup>75</sup> Through the leadership of the Committee, over 20,000 sponsoring signatures were collected,<sup>76</sup> key civil rights organizations (such as the Urban League) and community leaders voiced their public support, and private lawyers took to the streets to encourage voting.<sup>77</sup> The DC Public School

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. WASH. LAW. COMM., *supra* note 54, at 15.

76. *Id.* Iris Toyer, who later served as Director of the Committee’s Public School Legal Services Project from 1994-2009, was a sponsor of the Initiative. Iris began her involvement with Committee in 1980 as PTA president at Stanton Elementary School, one of the original schools in the PELSP. She went on to become a Co-Chair of Parents United, and was elected to the D.C. Board of Education in 1990 and served in that role until 1992. While serving in these positions she secured a BA degree from University of the District of Columbia in 1983 and a law degree from Georgetown Law School in 1987.

77. *Id.*

Support Initiative, also known as Initiative 25,<sup>78</sup> which also required that specific criteria (such as teacher salaries and building conditions) be considered in funding decisions, ultimately became law with the approval of 77% of DC voters on November 3, 1987.<sup>79</sup> The following month, Parents United issued a second “Educational Impact Assessment” of the contract terms at issue in negotiations between the Board of Education and the Washington Teachers Union, urging an increase of teacher salaries and work day to suburban district levels.<sup>80</sup>

Led by Parents United, crowds of parents and other activists packed the FY 1989 school budget hearings held by the Mayor and the City Council pursuant to Initiative 25 in December 1987 and March 1988.<sup>81</sup> A “Citizens Committee on the 1988 and 1989 Budgets” convened in May of 1988 by Parents United, and assisted by attorneys from Arent, Fox, Kintner, Plotkin & Kahn and Laxalt, Washington, Perito & Debuc,<sup>82</sup> concluded that the school system faced a deficit due to inadequate funding of pay increases.<sup>83</sup> In late 1988, Parents United members, represented by Morrison & Foerster, intervened in the Board of Education’s suit against the Mayor to compel him to authorize supplemental funding in order to honor his written promises to fund DC teacher pay increases.<sup>84</sup>

Keeping the pressure on, Parents United’s “Witness for D.C. Public School Funding” initiative brought parents and others from several public schools to the District Building every weekday for six weeks in early 1989 to support full funding of the Board of Education’s requested FY 1990 budget.<sup>85</sup> Meanwhile, a “Second Report of the Citizens Committee on the 1988 and 1989 Budgets,” issued by Parents United in January 1989, again with the help of the Arent Fox and Laxalt Washington firms, reaffirmed that additional funding was needed to avert furloughs of school system employees.<sup>86</sup> In March, the Mayor settled the supplemental funding lawsuit with the Board, agreeing to absorb the funding deficit, add funds to the FY 1989 budget, and support the school system in seeking \$20 million addi-

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78. WASH. LAW. COMM., ANNUAL REPORT, 1988 (20TH ANNIVERSARY EDITION), at 12 (1988).

79. WASH. LAW. COMM., *supra* note 67, at 14.

80. PARENTS UNITED, *supra* note 64, at 12.

81. WASH. LAW. COMM., *supra* note 78, at 12.

82. *Id.*; WASH. LAW. COMM., ANNUAL REPORT, 1989, at 27 (1989).

83. WASH. LAW. COMM., *supra* note 78, at 12.

84. *Id.*

85. PARENTS UNITED, *supra* note 64, at 13.

86. *Id.*

tional funding from Congress for FY 1990.<sup>87</sup> Parents United responded by initiating its “Ounce of Prevention” campaign for \$20 million in Congressional funding, taking Congressional staff members to tour the dismal athletic fields at McKinley High School.<sup>88</sup>

With several Parents United members, the D.C. Committee on Public Education (COPE), a task force made up of business and civic leaders, issued its report in June of 1989.<sup>89</sup> *Our Children, Our Future* proposed an array of solutions to the deficiencies of public schooling in the District that were consistent with both earlier Parents United pleas and then-current educational philosophies, and were purportedly possible to implement within the city’s limited financial means.<sup>90</sup> In December of that year, the school board, with the support of COPE and Parents United, submitted a budget request for FY 1991 of \$600 million, with 95% of the requested increase representing costs of implementation of the COPE recommendations.<sup>91</sup> Following another edition of Parents United’s “Citizen Witness for DC Public School Funding” event in early 1990, the Mayor recommended full funding, and the Council adopted a budget of \$526 million, plus \$20 million for building repairs and \$36 million promised for teacher pay increases.<sup>92</sup> The budget included funding to continue smaller class sizes, additional classroom aides, school supplies and equipment, athletic trainers and other curriculum and program improvements.<sup>93</sup>

Battles over school funding continued into the early 90s, however, with Arent, Fox, Kintner, Plotkin & Kahn representing Parents United, as the school system sued when Mayor Barry again tried to reclaim millions of dollars of school funding.<sup>94</sup> As he had years earlier, the mayor tried to accomplish this by implementing an executive order to manage a city budget shortfall.<sup>95</sup> In September of 1990, the appellate court ruled in favor of the school system and Parents

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87. *Id.*

88. *Id.*

89. WASH. LAW. COMM., ANNUAL REPORT, 1990–91, at 13 (1991). A variety of Congressional advocacy efforts led by Akin, Gump, Strauss, Hauer & Feld with the assistance of Parents United resulted in extra funding for after-school enrichment programs for fiscal year 1990. WASH. LAW. COMM., ANNUAL REPORT, 1989, at 26 (1989).

90. *Id.*

91. PARENTS UNITED, *supra* note 64, at 13.

92. *Id.* at 14.

93. *Id.*

94. WASH. LAW. COMM., ANNUAL REPORT, 1990–91, *supra* note 89, at 13.

95. *Id.*

United, which intervened at the appellate level, preserving funding for school supplies, textbooks, and other basic educational necessities.<sup>96</sup>

Parents United also spearheaded a major effort in the late 80s and early 90s to assure that schools were safe for DCPS students.<sup>97</sup> With the Lawyers Committee as counsel, Parents United sued the District in 1989 for enforcement of the District of Columbia Public School Nurse Assignment Act,<sup>98</sup> which required the assignment of a registered nurse to each elementary and secondary school for a minimum amount of time each week.<sup>99</sup> In settlement, the District also agreed to provide a nurse or certified athletic trainer at specified DCPS athletic events. While the District allotted funds for the hiring of fourteen athletic trainers, it could not cover every athletic event and hired only half of the number of nurses it would need to comply with the Act.<sup>100</sup> The court granted a preliminary injunction in October of 1989 for the enforcement of the medical supervision of athletic events, stating that having unsupervised events “unequivocally” risked irreparable harm or injury to student-athletes.<sup>101</sup> Summary judgment was granted in favor of Parents United on August 3, 1990 for enforcement of both provisions, resulting in a permanent injunction for the provision of nurses and athletic trainers.<sup>102</sup> The District was held in contempt twice before fully complying in March of 1992.<sup>103</sup>

In a massive December 1989 “Special Report on DC Public School Buildings and Grounds,” Parents United and Steptoe & Johnson documented intolerable and unsafe conditions at DCPS schools.<sup>104</sup> A report on fire and building code violations in school buildings was released by Parents United in April of 1990.<sup>105</sup> Because maintenance of school buildings and school grounds had been an easy

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96. *Id.*; *Barry v. Bush*, 581 A.2d 308–09 (D.C. 1990). Parents United was able to win this suit because of work done earlier in *Evans v. Washington*, 459 F. Supp. 483 (D.D.C. 1978), which as part of the settlement stipulated that the mayor could not unilaterally defund schools. The mayor violated the settlement order by his action and thus was enjoined by the court. *Id.* at 310–11.

97. WASH. LAW. COMM., ANNUAL REPORT, 1989-90. *Parents United v. Dist. of Columbia*, No. 89-8377 (D.C. Super. Ct. 1989).

98. *Kelly v. Parents United for the Dist. Of Columbia Pub. Sch.*, 641 A.2d 159, 160 (D.C. 1994).

99. *Id.* at 160–61.

100. *Id.*

101. *Id.* at 162.

102. *Id.*

103. *Id.* at 163.

104. WASH. LAW. COMM., MAKING A DIFFERENCE: REFLECTION ON SIX CASES 22 (1993).

105. PARENTS UNITED, *supra* note 64, at 14.

target for budget cutting,<sup>106</sup> DCPS facilities suffered from years of neglect: 75% of schools in the District had roofs that leaked, and there were thousands of fire code violations across all schools, many of which were life-threatening.<sup>107</sup> These facts were publicized through Parents United's organized "Witness for DC Public School Funding" school visits, press conferences, articles in the Washington Post, and television and radio spots.<sup>108</sup> Ultimately, this activism led to major increases in capital funding, including \$10 million dollars in a special capital appropriation from the District of Columbia, and \$12 million from Congress.<sup>109</sup>

In 1993, Parents United worked with Hogan & Hartson and Debevoise & Plimpton in renewed advocacy efforts to raise salaries for the woefully underpaid teachers in DCPS.<sup>110</sup> Parents United documented teachers' low morale and the fact that good teachers had left to work at higher paid schools in the suburbs.<sup>111</sup> As a result of Parents United's campaign, DCPS Superintendent Franklin Smith granted the first teacher salary increase in three years.<sup>112</sup>

Step toe & Johnson brought a lawsuit on behalf of Parents United to force DCPS to conduct more fire inspections of schools and fix the ongoing fire code hazards.<sup>113</sup> District Judge Kaye Christian issued an injunction in 1994 ordering the District to repair the extant violations, 1,807 of which were life-threatening,<sup>114</sup> and warned DCPS that she would not allow affected schools to open at the start of the next school year if the repairs were not made over the summer.<sup>115</sup> In the face of slow progress, the opening of DCPS schools was ultimately delayed for three days in 1994.<sup>116</sup> While the delay was short-lived, it was a

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106. WASH. LAW. COMM., *supra* note 104, at 23.

107. *Id.*

108. *Id.*

109. *Id.* Total repair needs had been estimated at \$500 million. WASH. LAW. COMM., 1 UPDATE 7 (1993).

110. *Id.*

111. *Id.*

112. WASH. LAW. COMM., *supra* note 104, at 23.

113. Parents United v. Dist. of Columbia, No. 92-03478 (D.C. Super. Ct. 1994); *see also* 2 WASH. LAW. COMM. UPDATE 1, 5 (1994); WASH. LAW. COMM., ANNUAL REPORT, 1994, at 40 (1994).

114. *See* Parents United, No. 92-03478, at 261; *Fire Code Violations May Delay Opening of Washington Schools*, N.Y. TIMES (Sept. 4, 1994), <https://www.nytimes.com/1994/09/04/us/fire-code-violations-may-delay-opening-of-washington-schools.html>.

115. Sari Horwitz, *Judge Takes D.C. to School*, WASH. POST (Sept. 2, 1994), [https://www.washingtonpost.com/archive/local/1994/09/02/judge-takes-dc-to-school/6a52e88b-4490-42d8-a895-d669a5a8dd50/?utm\\_term=.bbf997552cfc](https://www.washingtonpost.com/archive/local/1994/09/02/judge-takes-dc-to-school/6a52e88b-4490-42d8-a895-d669a5a8dd50/?utm_term=.bbf997552cfc).

116. *Id.*

highly publicized failure of the system that offered newly re-elected Mayor Barry an opportunity to wrest control of the operations of DCPS from the school board, which was the first elected representative body D.C. residents had ever known. At the same time, Parents United lamented the perpetually poor achievement levels of DCPS schools.

### C. Ceding to Federal Control While Spotlighting Unlevel Fields

Emboldened by Republican mid-term election wins in late 1994, and given ready justifications such as a city-wide financial crisis and indications of mismanagement like delayed school openings, Congress assumed significant control of District governance in 1995. A five-member control board was appointed by the President to assume fiscal oversight of the District.<sup>117</sup> Although a dire and controversial step, federal involvement did spur coordination between city government and Congress to create a “comprehensive bold plan for radical reform,” in the words of two Representatives.<sup>118</sup> Part of this plan was to improve management and budgeting practices, and introduce formula-based funding.<sup>119</sup> Mary Levy, the Director of the Committee’s Education Project and widely regarded as the most knowledgeable analyst of school finance in the District, was heavily involved in this process.<sup>120</sup> Her expertise was critical to working out the new plan.<sup>121</sup> Hogan & Hartson also partnered with Parents United to analyze school budgets and spending, and to advise schools on not only preventing disruptions caused by the financial crisis, but also cuts to the budget over which Congress had assumed control.<sup>122</sup>

On April 27, 1996, President Clinton signed the D.C. Appropriations Act, which contained many elements of the reform plan.<sup>123</sup> Among these were budgetary and management improvements, including monthly and annual budget and finance reporting, revision and publication of detailed budget plans to match the money the city actu-

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117. WASH. LAW. COMM., 1 UPDATE 3–4 (1995). A major change would come to the structure of governance for D.C. Public Schools again in 2007, when legislation passed through Congress and approved by President Bush amended the D.C. Home Rule Charter to make D.C. Public Schools governed by the Mayor and D.C. Council rather than the Board of Education. WASH. LAW. COMM. 13 UPDATE 6 (2007).

118. WASH. LAW. COMM., 1 UPDATE 3–4 (1995).

119. *Id.*

120. *Id.*

121. *Id.*

122. WASH. LAW. COMM., ANNUAL REPORT, 1995, at 36 (1995).

123. District of Columbia Appropriations Act, Pub. L. No. 04-194, 110 Stat. 2356 (1997).

ally had (as opposed to what it asked for), a zero-based budget, and published budgets for each school.<sup>124</sup> These transparency measures were paired with a formula for D.C. government funding of schools on a per-student basis.<sup>125</sup> Hogan & Hartson helped draft some provisions of the legislation.<sup>126</sup> Unfortunately, the bill did not arrive in time to prevent a \$54 million cut to education funding for fiscal year 1996-97, which led to continued textbook and supply shortages and large class sizes, many of which exceeded thirty students per classroom.<sup>127</sup>

The fire code litigation continued for eight years, and at times it led to the closure of multiple schools for failure to comply.<sup>128</sup> When schools closed, Parents United pushed for an infusion of capital funding and the creation of an independent facilities authority to raise funding and handle capital improvement issues.<sup>129</sup> These efforts, combined with the lawsuit, led to twice as much construction funding being allocated to the schools in 1997 than in prior years, but neither the D.C. City Council, Control Board, nor Congress were willing to make a firm commitment for capital improvements to fully repair schools to a level comparable with other districts.<sup>130</sup> A settlement reached in November of 1997 committed the District to funding a renovation and repair plan, holding yearly inspections, and appointing an independent advisor to monitor compliance.<sup>131</sup> The work of Parents United and the Committee, in part through the litigation efforts over school fire code violations, resulted in an FY 1999 budget that included funding for modernizing or replacing buildings for the first time ever. While insufficient to accomplish the scale of rebuilding needed, 100 million dollars were allocated for capital improvements to schools, a major increase from the twenty million dollars per year that had been allocated to this area before the lawsuit.<sup>132</sup>

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124. *Id.* at 2370–71.

125. PARENTS UNITED, D.C. PUBLIC SCHOOL FUNDING: MYTH & REALITY 11 (2003).

126. WASH. LAW. COMM., 2 UPDATE 8 (1996).

127. *Id.* at 9.

128. WASH. LAWYERS' COMM., ANNUAL REPORT, 1996, at 30 (1996). For example, approximately 78,000 students were forced to start school three weeks late in the 1997–98 school year because the roof installation plans did not meet safety requirements. 3 WASH. LAW. COMM. UPDATE 3 (1997); Parents United v. Dist. of Columbia, 699 A.2d 1121, 1123 (D.C. 1997).

129. WASH. LAW. COMM., ANNUAL REPORT, 1996, *supra* note 128, at 30.

130. WASH. LAW. COMM., 3 UPDATE 10–11 (1997).

131. WASH. LAW. COMM., ANNUAL REPORT, 1997, at 29 (1997).

132. WASH. LAW. COMM., ANNUAL REPORT, 1998, at 15, 32 (1998).

As part of the November 1997 capital improvements settlement, 27.5% of proceeds from each D.C. general obligation bond issue were to go to public schools for major repair and renovation projects.<sup>133</sup> When a 1999 bond issue shorted schools by close to \$11 million, Steptoe & Johnson stepped in to address the issue on behalf of the Committee by threatening legal action.<sup>134</sup> In response, the District adjusted its fiscal year 2000 and 2001 capital budgets such that schools would receive 30% of all bond funding in 2000 and 2001.<sup>135</sup> Steptoe also took steps to ensure transparency with respect to funding and other data.<sup>136</sup> In early 2001, the Board of Education approved the Facility Master Plan, which would modernize or replace DCPS schools in batches of ten over the following ten to fifteen years.<sup>137</sup> Implementation of the Master Plan would require \$2 billion, a stark contrast to the annual average of \$18 million spent on facilities between 1990 and 1996.<sup>138</sup>

Under the Control Board reform plan, the District was required to allocate school funds pursuant to a uniform per-pupil calculation, with limited variations for certain grade levels, disabled students, and students below minimum literacy levels.<sup>139</sup> Mary Levy and Committee staff with extensive experience in school finance provided technical assistance in writing the formula,<sup>140</sup> including drafting the legislation that would eventually become the Uniform Per Student Funding Formula enacted by the D.C. Council.<sup>141</sup> Sidley & Austin and the Committee monitored compliance with the formula and other budget appropriations.<sup>142</sup> In later years, when tweaks to the formula became necessary to provide adequate general and special education for all students, the Committee worked with the D.C. State Education Office to make recommendations to the Mayor and the D.C. Council.<sup>143</sup>

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133. WASH. LAW. COMM., ANNUAL REPORT, 1999, at 27 (1999).

134. *Id.*

135. WASH. LAW. COMM., ANNUAL REPORT, 2000, at 36 (2000).

136. *Id.*

137. PARENTS UNITED, LEAVING CHILDREN BEHIND: THE UNDERFUNDING OF D.C. PUBLIC SCHOOLS BUILDING REPAIR AND CAPITAL BUDGET NEEDS 4-5 (2003).

138. *Id.* at 3.

139. See WASH. LAW. COMM., *supra* note 130, at 30.

140. *Id.*

141. WASH. LAW. COMM., ANNUAL REPORT, 1998, at 15 (1998).

142. WASH. LAW. COMM., ANNUAL REPORT, 1999, at 27 (1999).

143. WASH. LAW. COMM., ANNUAL REPORT, 2001, at 13 (2001).

In 2001, a report entitled “Unlevel Playing Fields” highlighting the disparities in funding for athletic programs between the District and suburban public schools in Montgomery and Fairfax Counties was released by the Committee, Parents United and Kirkland & Ellis.<sup>144</sup> Noting that DCPS athletics looked to be in good condition at the time of the 1989 court victory in which DCPS was ordered to hire medical staff for athletic competitions, the report explained how drastically that changed during the 1990s. The report demonstrated that student athletes and physical education programs in D.C. were, by the start of the next decade, once again severely underfunded.<sup>145</sup>

Funding for the DCPS athletics department had been cut by one third since 1992,<sup>146</sup> and DCPS students spent nearly one-half as much as Fairfax and Montgomery counties on all extracurricular activities on a per-student basis.<sup>147</sup> The improvements that had been made to facilities (such as gyms, locker rooms, fields, and weight rooms) in the early 1990s largely deteriorated, and some were still “dilapidated and dangerous.”<sup>148</sup> Coaches were receiving stipends as little as half of what peers in similar urban districts received.<sup>149</sup> The most striking feature of the 2001 report, however, was the “Visual Comparison” section. DCPS high school facilities were directly compared to neighboring district schools’ through photographs, and the differences were stark. The authors called for an additional \$1 million in funding for athletics on an annual basis,<sup>150</sup> and the severity of the comparison stirred regional interest and led to a foundation being set up to support DCPS athletics—the Level Playing Fields Foundation—for which Akin, Gump, Strauss, Hauer & Feld provided legal support.<sup>151</sup>

#### D. Highlighting Long-Festering Problems Sent Back to the Drawing Board

When Congress returned control of D.C.’s schools to the District Board of Education in 2001, Parents United, the Committee, and Sidley Austin analyzed the DCPS budget and expenditure reports to

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144. *Id.* at 13, 37.

145. *Id.*

146. PARENTS UNITED, *Unlevel Playing Fields: A Comparative Study of Athletic Programs, Facilities and Funding in the District of Columbia and Suburban Public School Districts*, DC WATCH (June 2001), <http://www.dwatch.com/parents/pu0106.htm>.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. WASH. LAW. COMM., *supra* note 143, at 37.

ascertain why an \$80 million deficit was projected for 2002.<sup>152</sup> The report that was produced, “*The Blame Game: Searching for Financially Accountable Schools in the District of Columbia*,” explained how the 1996 Appropriations Act (which made the chief financial officers of every executive agency of the District, including the Board of Education, directly responsible only to the District’s Chief Financial Officer) had wreaked havoc on financial reporting in the District.<sup>153</sup> It extended the kind of finger-pointing that had long been evident in the District among the Mayor, the Council and the Board of Education when it came to public education to yet another oversight official, reinforcing the already “fractured and irrational separation of powers that de-links the substantive policymaking authority and operations from the budgetary decision-making authority governing DCPS” and “continues to fail its students.”<sup>154</sup> The 2001 report recommended periodic public review sessions and the onboarding of an external auditor to ensure accountability.<sup>155</sup>

Meanwhile, the initial *Unlevel Playing Fields* report was followed up by three more, all of which continued to detail the abysmal and deteriorating state of funding for athletics and athletic facilities in the District.<sup>156</sup> The DCPS athletics budget was just 60% of what it had been 10 years earlier by the 2002 update report.<sup>157</sup> But there was some positive movement: coaching stipends had been increased by 10% since an analysis the prior year, though they remained lower than in neighboring districts.<sup>158</sup> A capital project—the construction of a stadium by Anacostia High School—had been announced, and student participation remained steady.<sup>159</sup> Private sector donations provided some repairs and facilities improvements, and Parents United and the Committee created the Level Playing Fields Foundation for

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152. *Id.*

153. PARENTS UNITED, *THE BLAME GAME: SEARCHING FOR FINANCIALLY ACCOUNTABLE SCHOOLS IN THE DISTRICT OF COLUMBIA* 3–4 (2001).

154. PARENTS UNITED, *SEPARATE AND UNEQUAL: THE STATE OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS FIFTY YEARS AFTER BROWN AND BOLLING* 36 (2005).

155. *Id.*

156. PARENTS UNITED, *UNLEVEL PLAYING FIELDS II: AN UPDATE ON DISTRICT OF COLUMBIA HIGH SCHOOL ATHLETIC PROGRAMS, FACILITIES, AND FUNDING* (2002); PARENTS UNITED, *UNLEVEL PLAYING FIELDS SIX MONTH UPDATE* (2003); PARENTS UNITED, *UNLEVEL PLAYING FIELDS IV: A STUDY OF ATHLETIC PROGRAMS, FACILITIES, AND FUNDING IN THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS* (2008).

157. PARENTS UNITED, *UNLEVEL PLAYING FIELDS II*, *supra* note 156, at 4.

158. *Id.* at 6.

159. PARENTS UNITED, *UNLEVEL PLAYING FIELDS SIX MONTH UPDATE*, *supra* note 156.

outside support. The subsequent 2003 update described a proposed budget increase of over \$1 million.<sup>160</sup>

Two years into the Master Plan, however, threatened budget cuts prompted Parents United to publish *Leaving Children Behind: The Underfunding of D.C. Public Schools Building Repair and Capital Budget Needs* in July 2003. The report outlined how the proposed budget fell short for FY 2004 through FY 2009. To emphasize the vital importance of the repair work called for in the Master Plan, Parents United included photographs of some of the “less dire” schools that were not even slated for work in the first three rounds of construction.<sup>161</sup> The photos showed large holes in ceilings, walls, and floors throughout even these lower priority school buildings.<sup>162</sup> Plumbing was exposed, bathroom stalls did not close, and sinks and toilets were inoperable. Walls were unpainted and windows broken. Staircases were missing tile, leaving just wooden subfloor, and playgrounds were bare.<sup>163</sup> This report was promoted through a press conference and a tour of schools for Congressional staff.<sup>164</sup> Patton Boggs led efforts to combat budget cuts to the athletic trainer program and also covered school budget developments on Capitol Hill.<sup>165</sup>

The Committee and its partners Sidley Austin and Trainum, Snowdon & Deane also released another report in 2003, entitled “D.C. Public School Funding—Myth and Reality.”<sup>166</sup> The report’s four main findings highlighted some of the key issues then facing public schools in the District. First, an increasing and overwhelming majority of DCPS students needed more support than the average pupil, given their limited English proficiency, special education needs and economic disadvantages.<sup>167</sup> Second, state and local funding for DCPS was lower than all but one of the surrounding suburban districts.<sup>168</sup>

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160. *Id.*

161. WASH. LAW. COMM., 9 UPDATE 15 (2003).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. WASH. LAW. COMM., 9 UPDATE 8 (2003).

167. *Id.*

168. *Id.* This finding was re-confirmed in a later WLC report prepared by Sidley Austin, along with Akin Gump, Foley & Lardner, Fulbright & Jaworski, Steptoe & Johnson, and Covington & Burling, “Separate and Unequal, the State of D.C. Public Schools Fifty Years after *Brown* and *Bolling*,” which also showed that DCPS principals and teachers were among the most poorly paid in the region; WASH. LAW. COMM., 11 UPDATE 1 (2005). Unfortunately, these disparities were nothing new. See Joseph M. Sellers, *Public Education Legal Services Project: A Private Sector Initiative in the Area of Public Education*, 27 HOWARD L.J. 1471, 1475, 1488 (1984)

Third, contrary to popular perception, DCPS spent no more than many school districts on administrative functions.<sup>169</sup> And finally, 80% of funding increases that had been sought for FY 2004 were allocated to pay increases, emergency building programs, and other operationally non-discretionary system maintenance expenses, rather than to system educational quality improvement.<sup>170</sup>

Parents United issued a seminal report, *Separate and Unequal: The State of the District of Columbia's Public Schools Fifty Years After Brown and Bolling*, in 2005. Prepared by the Committee, the law firms of Sidley Austin, Akin Gump, Foley & Lardner, Fulbright & Jaworski, Steptoe & Johnson, and others, *Separate and Unequal's* intensively researched analysis documented the dire failings still disabling the DC public school system. The report chronicled woefully insufficient funding, programming and course offerings that had deteriorated since the days of those Supreme Court rulings, salaries that hampered recruitment and retention of the most experienced teachers and principals, crumbling and unsafe school buildings, outdated and inadequate special education programming, deficient and treacherous athletics and extra-curricular opportunities, and deficient student health services.<sup>171</sup> At the time of the report, funding for the Facilities Master Plan approved by Congress was so inadequate that the Superintendent was considering scrapping the plan altogether to focus only on repairing broken items such as HVAC systems and roofs, rather than on modernization of the system's vast array of outmoded and decaying schools.<sup>172</sup> Recalling its "blame game" analysis from the 2001 report of that name, Parents United lamented that if the fragmentation of authority among the District's CFO, the Board of Education, the Mayor and Council is "[l]eft unchanged, this flawed system will continue to undermine both the fiscal soundness and educational quality of what is an already struggling public school system."<sup>173</sup>

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(describing the gaps in funding between D.C. and other neighboring schools as of the early 1980s).

169. WASH. LAW. COMM., *supra* note 166.

170. *Id.*

171. PARENTS UNITED, *supra* note 153, at 2–5.

172. *Id.* at 20–28.

173. *Id.* at 36.

E. Money, Mayor and Modernization Makes for Measured Movement

While the Committee and Sidley also worked together toward the passage of the D.C. School Modernization Financing Act of 2006, which guaranteed sorely needed bond funding of \$100 million and other revenues of \$100 million annually for building construction and renovation,<sup>174</sup> some estimates placed capital requirements alone for DCPS over the following 15 years at \$2.2 billion.<sup>175</sup> Despite years of committed and vigorous leadership and advocacy, and numerous incremental and sometimes “system-saving” victories, it had become increasingly evident to Committee leadership that the monumental change needed to transform DCPS into a quality educational experience across racial and economic lines would require an influx of funding that the School Board simply did not have the clout to deliver. As Parents United observed in the 2005 *Separate and Unequal* paper, “as long as this disjointed system of educational governance is in place, the promise of educational opportunity embodied in *Brown and Bolling* will remain out of reach in the District of Columbia.”<sup>176</sup>

With the support of many Committee and educational community leaders, the District of Columbia Public Education Reform Amendment Act was enacted in 2007 under the leadership—and consistent with the campaign platform—of newly elected Mayor Adrian Fenty.<sup>177</sup> The Act substantially restructured DCPS and fundamentally changed how District schools were to be funded and financed.<sup>178</sup> Controversial because the Reform Act placed DCPS under the Mayor and removed power from the historically significant school board, the entity with operational responsibility for the schools would now no longer need to seek approval from others in order to fund operational needs or implement new initiatives. The Act also created the Office of Public Education Facilities Modernization (“OPEFM”), which sprang into action with a “Heating and Boiler Blitz” in 2007.<sup>179</sup> The

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174. WASH. LAW. COMM., 12 UPDATE 11 (2006).

175. *Id.*

176. PARENTS UNITED, *supra* note 154, at 38.

177. Sara Mead, *The Capital of Education Reform*, U.S. NEWS (Apr. 20 2017), <https://www.usnews.com/opinion/knowledge-bank/articles/2017-04-20/michelle-rhee-set-national-example-of-education-reform-in-washington-dc>.

178. District of Columbia Public Education Reform Amendment Act of 2007 § 104, 38 D.C. Code 173 (2018).

179. WASH. LAW. COMM., THE STATE OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS 2010: A FIVE YEAR UPDATE 1, 30 (2010).

“Air Conditioning Blitz” followed in 2008. By 2010, a new Master Plan for rejuvenation of existing school buildings was in place.<sup>180</sup>

Even as these potentially game-changing developments evolved, however, Parents United issued a 2008 update on the state of the DCPS athletic program.<sup>181</sup> It reported that the athletic budget had been cut in half between 1993 and 2008, with the funding cuts impacting every facet of athletics: facilities could not be repaired or updated, coaches could not be paid, and some sports could no longer be offered.<sup>182</sup> Even some of the athletic trainers hired pursuant to court order had been laid off, reviving safety concerns about competitions unsupervised by medical personnel. The report also included a case study focusing on Cardozo High School’s still “decaying athletic facilities.”<sup>183</sup> Most or all of the facilities issues mentioned in the 2001 report persisted and worsened, and new issues had arisen.

Unfortunately, Parents United had gradually discontinued operations as a city-wide education and advocacy organization over the two years leading up to the publication of this last update report.<sup>184</sup> Numerous factors played into this major change in the city’s educational landscape. Prominent among them were the retirement in 2000 of Parents United’s longtime and highly respected Executive Director, Delabian Rice-Thurston, and increasing challenges in securing adequate foundation support to fund a core staff.<sup>185</sup> The departure of many parents who opted to send their children to charter schools in the early 2000’s also reduced Parents United’s base of support in certain sections of the city.<sup>186</sup> In addition, with the changes in school governance leading to mayoral control of the schools in 2007, significant increases in funding for DCPS removed one of the most pressing issues that had been at the center of Parents United’s agenda throughout its history.

In 2010, the Committee released an updated report on the state of DCPS entitled, *The State of the District of Columbia Public Schools 2010: A Five Year Update*, prepared by Sidley Austin, Ballard Spahr,

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180. *Id.*

181. See generally PARENTS UNITED, UNLEVEL PLAYING FIELDS IV: A STUDY OF ATHLETIC PROGRAMS, FACILITIES, AND FUNDING IN THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS (2008).

182. *Id.* at 5–6.

183. *Id.* at 14.

184. Personal knowledge of author.

185. Personal knowledge of author.

186. The Urban Inst., *Washington, DC: Our Changing City Chapter 2: Schools*, URBAN.ORG, <http://apps.urban.org/features/OurChangingCity/schools/#enrollment> (last visited Sept. 9, 2018).

Beveridge & Diamond, Covington & Burling, Dickstein & Shapiro, Reed Smith, Steptoe & Johnson, and Sullivan & Cromwell.<sup>187</sup> This report praised the reorganized system's significant improvement in many areas, including funding and special education.<sup>188</sup> But it also emphasized that the gains were fragile—and dependent to a significant degree on the continued financial well-being of the District going forward—and that DCPS still lagged surrounding districts in many metrics.<sup>189</sup>

II. THE COMMITTEE'S EARLY FOCUS ON THE  
ACADEMIC ENRICHMENT POTENTIAL OF CONNECTING  
VOLUNTEER LAWYERS WITH DCPS SCHOOLS AND  
PARENTS BROADENED, EXPANDED AND EVOLVED AS  
NEEDS CHANGED AND CREATIVITY  
SPARKED INNOVATION

As the Committee and Parents United continued the pursuit of adequate DCPS funding, the Education Project expanded its early initiative to “match” volunteer lawyers with parents of students attending needy schools in Anacostia by launching the School Partnership Program in the late 1980s.<sup>190</sup> The Committee recruited additional law firms to partner with DCPS elementary, middle, and high schools throughout the city to explore programs that would directly benefit school communities. The Committee has continued to support the Partnership Program by recruiting firms and schools annually, hosting quarterly luncheons for partners to report their activities, coordinating various city-wide initiatives, and publishing a newsletter twice a year. The Partnership Program has grown to be a model for public-private sector collaboration and empowerment in Washington, D.C. Recently, DCPS adopted this model, and is coordinating its efforts with WLC to recruit more businesses.

In the spring of 2011, while lauding the Program in a speech at the Committee's School Partnership recruiting luncheon, then DCPS Chancellor Kaya Henderson lamented that less than a quarter of the DCPS Title I schools were benefiting from partnerships, and chal-

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187. WASH. LAW. COMM., *supra* note 179, at 64. As he had for the prior “Blame Game” and “Separate and Unequal” reports, Ron Flagg of Sidley served as the primary drafter of the Update. *Id.* at 1.

188. *Id.* at 3.

189. *Id.* at 4.

190. See generally WASH. LAW. COMM., *Public Education Project*, <https://www.washlaw.org/projects/public-education> (last visited Nov. 6, 2018).

lenged the Committee to double that number. In response, Committee staff initiated an effort to start six to seven new partnerships annually. By mid-2017, law firms, businesses, and other organizations were partnering with more than fifty schools.<sup>191</sup> From its early efforts to broaden the connection between DCPS and the legal community, the Partnership Program has evolved to bring academic enrichment to students; encourage parental and broader community involvement in school programs; and foster indelible connections among DCPS students, the local legal and business sectors, and social organizations seeking to elevate children in underserved communities.

The Committee initiated the Parent Group Fund with just \$7,600. Before it lost momentum in the 1990s, the Parent Group Fund had funded over 600 enrichment projects, valuing over \$1 million, at 60 DC public schools.<sup>192</sup> Drawing upon the successful financial empowerment experience of the 1980s and its ongoing support of parent/school fundraising efforts, the Committee's Public Education Project added the Parent Empowerment Program to its Education Project portfolio of initiatives in 2016.<sup>193</sup> The Parent Empowerment Program incentivizes parents to raise money to support enrichment programs at their children's schools by matching their donations.<sup>194</sup> In barely a year of operation, more than ten DCPS parent groups, in collaboration with principals and teachers, have received funding for academic enrichment projects designed to increase parent participation and student enthusiasm in learning based on needs they perceive within the schools.<sup>195</sup> Participating law and accounting firms support the Parent Empowerment Program by applying for Committee matching funds, and assisting schools in making sound, equitable and informed decisions when choosing enrichment projects.

#### A. Lawyer Volunteerism and the Partnership Program

The Partnership Program currently marshals the energy and creativity of an active network of stakeholders. Students, teachers, administrators, parents, public service organizations, and law and business

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191. *Id.* (follow "Partnerships" tab for listing of school partnerships).

192. This is according to internal records of the Committee.

193. *See* WASH. LAW. COMM., *supra* note 190.

194. At the launch of the PEP program, Rick Rome, Vice Chairman of the Washington, D.C. office of the Savills Studley commercial real estate services firm and a long-time school partnership leader, provided the initial matching funds for the program, and BDO Consulting provided accounting advice and services to the parent-teacher organizations and the Committee.

195. WASH. LAW. COMM., EDUCATION JUSTICE PARENT EMPOWERMENT PROGRAM 2 (2018).

leaders share best practices for improving the experience and future prospects for DCPS students. The activities of each school partnership are unique and reflect the age and grade level of the students, the priorities of the school's principal and teachers, and the interests and background of the law firm or business participants. The Partnership Program also encourages citywide networking among sponsoring firms and businesses to share best practices, launch program-wide initiatives, develop relationships with other public school-supporting community organizations, and recruit new school, law firm and business participants into the program. Now, the Partnership Program fosters community, family and law and business sector involvement in the DC public schools.

#### 1. Supporting and Enhancing Student Enrichment Initiatives

Since its earliest days, the key focus of the Partnership Program has been on student enrichment. Participating schools and external partners have furthered this goal through tutoring, mentoring and other traditional academic support. They have expanded their support as the Partnership Program has evolved. School partners have sponsored field trips, internships, arts programs, higher education counseling and scholarships and other experiential learning opportunities. Today, thousands of DCPS students and alumni have benefitted from enrichment programs created through the Committee's partnership initiative.

More than two dozen school partnership firms participate in tutoring, reading and literacy programs with DCPS students.<sup>196</sup> Some programs have been tailored to help students prepare for and improve on standardized testing.<sup>197</sup> Others have emphasized reading and liter-

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196. Among the school partner pairings with long-running tutoring programs have been Tyler Elementary School and Akin Gump Strauss Hauer & Feld LLP; Amidon Bowen Elementary School and McDermott Will & Emery; and J.O. Wilson Elementary School and the U.S. Courts. Traditionally, tutoring involved law firm attorney and staff volunteers traveling to meet students on campus on a weekly or monthly basis to tutor students in reading and math. As technology has advanced, tutoring also now occurs on-line via real-time interactive platforms. See generally JOHN TYLER ELEMENTARY, *Community Partners*, [www.tylerelementary.net/school/community-partners/](http://www.tylerelementary.net/school/community-partners/). Volunteers from several law firms have utilized the software and curriculum materials that Chicago-based Innovations in Learning has developed to tutor students from their offices, including: Steptoe & Johnson with Thomas Elementary School; Paul Hastings with Garfield Elementary School; Crowell & Moring with Davis Elementary School; and DLA Piper with Thomas Elementary School.

197. In 2013, then Tyler Elementary School Principal, Jennifer Frentress, reported improvements on the D.C. Comprehensive Assessment System ("D.C. CAS") standardized tests that she attributed, in part, to Akin Gump volunteers who had tutored Tyler students in reading and math. There were dramatic reductions in the numbers of students in the below basic category

acy.<sup>198</sup> School partner firms have funded curriculum support materials to assist students needing additional help in targeted academic subjects.<sup>199</sup>

The Partnership Program also features activities designed to match students with private-sector professionals who provide mentorship in a variety of areas. One firm launched a mentorship program during the 2006-2007 school year to mentor high school seniors as they consider and prepare for college.<sup>200</sup> Other mentoring programs have promoted financial literacy.<sup>201</sup> Several school partners participate in the Girls on the Run mentoring program that blends leadership training and self-worth programming with running, for girls in grades three through eight.<sup>202</sup> Squire Patton Boggs launched a girl's empowerment mentoring program designed to challenge girls in their partner school to think critically about their personal and academic success.<sup>203</sup> Firms

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(from 27% of students reading below basic last year to 12% this year; and from 38% of student performing below basic in math to 28% below basic in math). The principal noted continued steady gains in literacy and math with 46% of students meeting standards in reading up from 37% a year ago, a 9% improvement in composition, 9% improvement in meeting math standards. [This data is from files or communications of the author.]

198. Goodwin Procter installed a "GoodRead" reading and literacy program at West Education Campus. When DLA Piper volunteers worked with third-graders at Thomas Elementary, participants earned improved scores in reading. Federal Highway Administration volunteers read with third-grade students for several years at Payne Elementary School, which likewise reported improved reading skills among its participating students. As part of its partnership with School Without Walls, Fried Frank has rewarded students for reading 25 or more books with book store gift cards and the top prize of a tablet computer for the student reading the most books. See generally Cammy Contizano, *Our School Partnership*, WASH. LAW. COMM., (Oct. 3, 2014), <https://www.washlaw.org/news/381-our-school-partnership>; FRIED FRANK, *Community Service*, <http://friedfrank.com/index.cfm?pageID=62>.

199. During 2016-2017, Akin Gump provided funding for on-line academic intervention materials for Tyler Elementary, which Principal Mitch Brunson attributes to improving English language and arts (ELA) scores (by 2%) and math scores (by 6%) and to reducing the number of students performing below basic standards (by 5% in ELA and 4% in math). [This data is from files or communications of the author.]

200. During 2006-2007, then Sutherland, Asbill & Brennan (now Eversheds Sutherland) launched Sutherland Junior College for students from Bell Multicultural High School to learn about, prepare for, apply to, get accepted by and attend four-year colleges.

201. Akin Gump summer associates in 2009 taught Tyler Elementary students a day-long financial literacy program sponsored by Junior Achievement.

202. Participating in Girls on the Run programming for third-fifth grade students are Goodwin Procter West Education Campus; Kirkland & Ellis with Marie Reed Elementary, Savills-Studley with Hendley Elementary, and Zuckerman Spaeder and BDO with Orr (renamed Boone) Elementary.

203. In 2010, then Patton Boggs (now Squire Patton Boggs) launched Girls Empowered as a pilot mentoring program for seventh- and eighth-grade girls at Francis Stevens Education Center.

have also sponsored issue forums<sup>204</sup> and roundtable discussions on critical social issues for students at their partner schools.<sup>205</sup>

Summer internships have enabled students to spend summers with partner organizations learning about aspects of the professional work environment. An internship program run by Eversheds Southerland helped enhance computer, research and presentation skills, and introduced students to careers in human resources, technology and catering.<sup>206</sup> Another law firm hires students to work in discovery and litigation technology as well as human resources. In some cases, high school graduates of internship programs have returned to the firm during college summers to resume their work.<sup>207</sup> Among the more innovative programs is a Saturday Academy that Covington & Burling hosts during the school year to provide enrichment activities and prepare students for the working world.<sup>208</sup>

Many law school partner firms coach students preparing for moot court competitions sponsored by DC-based law schools. Georgetown Law Center's Street Law Clinic and the American University's Marshall-Brennan Constitutional Literacy Project feature students from DCPS high schools arguing mock-trial cases before actual judges. In both of these programs, the Education Justice Project coordinates all of the mentor attorneys and staff at area partner law firms who work with students, law school student teachers and school teachers

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204. Epstein, Becker & Green launched a six-week "Legend Program" created by the National Street Law organization to provide law-related education for students featuring "legal legends" in the D.C. community at Langley Elementary that included HUD Administrative Law Judge and two Epstein partners. Epstein also brought in Mary Beth Tinker to talk about her First Amendment case in which the Supreme Court where the Court ruled that "students do not shed their constitutional rights at the schoolhouse door." See *Tinker v. Des Moines Board of Education*, 393 U.S. 503, 506 (1969).

205. Dickstein Shapiro held roundtable discussions with the Duke Ellington School for the Arts regarding violence in the media, citizen action against violence and government safety regulations versus personal freedom.

206. Sutherland hosted four seniors from Columbia Heights Education Campus during the 2015 summer as part of its Junior College internship program.

207. Cleary, Gottlieb, Steen & Hamilton hired two seniors from McKinley Technology High School to work at its Discovery & Litigation Technology Department and its Human Resources Department, one of whom returned to work at Cleary while attending George Washington University. One Ellington School of the Arts summer internship program participant deferred college for a year to continue working in Dickstein Shapiro's Information Technology Department.

208. During these Saturday sessions, students learn interview skills and how to create resumes and complete job applications. Covington also hires summer interns from the academy and currently has several permanent employees who are Saturday Academy alumni. Cardozo High School students have participated for many years in Covington & Burling's Saturday Academy.

throughout the year.<sup>209</sup> Arent Fox hosts debates for high school students in a format resembling appellate advocacy.<sup>210</sup> Law firm partners also support the DCPS Inspiring Youth Program, where incarcerated male students between the ages of 15 and 18 participate in the Street Law mock trial program.<sup>211</sup> Zuckerman Spaeder volunteers help prepare third-graders for an annual Frederick Douglass Oratorical Contest.<sup>212</sup>

School partner firms have often helped bridge the financial gap for public school children in the District by sponsoring trips—invaluable but expensive aspects of the traditional school experience—to locations that students may not otherwise have a chance to see or explore. Beveridge & Diamond sponsored a student boat trip along the Potomac and Anacostia Rivers to study ecology and hands-on environmental learning.<sup>213</sup> Other firms have sponsored school trips to nearby ski resorts and theme parks,<sup>214</sup> as well as to the U.S. Supreme Court and the Library of Congress.<sup>215</sup> Building on the arts curriculum that it has supported at its partner school, one firm transported the school's drama club to a Broadway show in New York City—the same show the club would be performing later that year.<sup>216</sup> Another partner

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209. In 2018, Williams & Connolly attorneys mentored the winning D.C. Street Law Mock Trial team from Dunbar High School, and Fried Frank coached the second place team from School Without Walls. In 2015, Paul Weiss attorneys mentored the winning Mock Trial team from Anacostia High School in defeating Banneker Academic High School. Since 2012 lawyers from Coburn & Greenbaum, Eaton Law and the Committee have helped to teach the year-long Street Law course and coached Mock Trial teams in the Incarcerated Youth Program. Law firm partners also host high school competitors as they prepare their cases and legal arguments. In preparation for Street Law competitions, Fried Frank and Paul Weiss host students in pre-mock trial courtroom sessions.

210. In 2015, Arent Fox hosted students from Eastern and McKinley Technology High Schools to debate subjects including whether college athletes should be paid and what library services are most beneficial to the public. Attorneys from the firm and the American Library Association served as debate judges.

211. See WASH. LAW. COMM., *supra* note 190.

212. For many years, Zuckerman Spaeder volunteers with backgrounds in drama and recitation coached Orr (renamed Boone) Elementary students for the Frederick Douglass Oratorical Competition that the National Park Service hosts at the Frederick Douglass National Historic Site in Anacostia.

213. Beveridge & Diamond volunteers teach a seven-week environmental course at Savoy Elementary School, culminating in boat trips sponsored by the Chesapeake Bay Foundation to evaluate water samples along the Potomac and Anacostia Rivers.

214. Akin Gump and Perkins Coie are among the firms that have sponsored ski and theme park trips for their school partners, Tyler Elementary and Powell Elementary.

215. During the 2007-2008 school year, volunteers from the former Howrey & Simon firm hosted fifth-grade students from Bancroft Elementary School on a morning visit to the Supreme Court, a picnic on the grounds of the Library of Congress, and an afternoon tour of the Library.

216. Akin Gump provided bus transportation for the Tyler Elementary School Thespians to attend *Willy Wonka* on Broadway.

firm funded the tuition for students to attend summer camp for a month in New York's Adirondack Mountains.<sup>217</sup> Dickstein Shapiro has sent students over the summer to a local school arts center for two weeks of specialty arts training.<sup>218</sup>

## 2. Reinforcing and Strengthening School Communities

From early efforts to support parents looking to improve their children's overall academic experience, the Partnership Program has expanded over the decades to include programs benefitting entire school communities. School partners have invested in school refurbishment and beautification; hosted fairs, field days, and festivals; donated school supplies and technology; and supported the arts; in order to enhance the surroundings and collective experience of each school community.<sup>219</sup>

Many law firm and business school partners participate in the DCPS's School Beautification Day, which is held each August prior to the first day of school.<sup>220</sup> One law firm established a not-for-profit to raise and manage funds for construction and maintenance of a new outdoor classroom at its partner school, raised thousands of dollars to help refurbish the school's library as part of the Capitol Hill Community Foundation's School Libraries Project,<sup>221</sup> and currently funds posters and other signage to emphasize the school's annual school-wide mission statement.<sup>222</sup> Law firms and businesses also support a wide

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217. For several summers, Akin Gump provided scholarships for Tyler Elementary School students to attend Camp Dudley on Lake Champlain in New York State. The law firm and school principal collaborated to identify potential candidates for the scholarship, focusing on children who were kind and natural leaders among their peers, yet who had never traveled beyond the boundaries of their local neighborhoods. To be in the mountains, swim in lakes and reside in a community of children from 35 states and 15 foreign countries that is committed to developing leaders and caring for others was transformative for these students, and for those in the camp community who got to know them.

218. *Firms Get Creative with Fundraising and Other Resources*, PARTNERS UNLIMITED BULL. BOARD 5 (FALL 2008); DICKSTEIN SHAPIRO LLP, VAULT GUIDE TO LAW FIRM PRO BONO PROGRAMS 186 (2012), <http://www.vault.com/media/3874589/6457.pdf>. Dickstein Shapiro sent Elington School of the Arts students each summer to the Anderson Arts Center in Colorado for more than a decade.

219. See WASH. LAW. COMM., *Public Education Project*, *supra* note 190.

220. Teams of professionals help their partner schools by organizing classrooms, supplies and books, cleaning lockers and windows, setting up bulletin boards and hallway displays, planting and weeding garden beds, and painting and decorating doors and walls. See generally *Mayer Brown Participates in District of Columbia School Beautification Day*, MAYER BROWN, (Sept. 11, 2007), <https://www.mayerbrown.com/publications/mayer-brown-participates-in-district-of-columbia-school-beautification-day-09-11-2007/>.

221. Personal recollection of author.

222. Akin Gump originally established a 501(c)(3)—the Akin Gump School Partnership Project, Inc.—to raise and expend funds in support of its partnership with Tyler Elementary

array of annual festivals at their partner schools, including seasonal celebrations, school registration carnivals, and family fun and field days.<sup>223</sup> One firm donates the food, beverages and amusements for its school partner's annual field and fun day.<sup>224</sup> Summer associates and other volunteers work alongside U.S. Marine volunteers from a nearby barrack.<sup>225</sup> Another firm hosted a health fair, science fair and a career fair with its partner school.<sup>226</sup>

Over the years, school partners have invested heavily in school supplies and technology that school budgets may not cover. Several firms hold annual school supply drives to provide students with backpacks, book bags, notepads, writing instruments, art supplies, adhesive bandages, and re-closable storage bags.<sup>227</sup> Another law firm, through its environmental practice group, converted recycled papers into brightly-colored notepads that it donated to its partner school.<sup>228</sup> The Legal Department at Fannie Mae sponsored a series of book drives for its partner school to fill classroom libraries for teachers and to supply children with summer assignment and personal reading.<sup>229</sup> One law firm deployed its information technology personnel to

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School, subsequently forming a separate non-profit to raise and manage funds specifically for the outdoor classroom project at Tyler.

223. Paul Hastings volunteers have participated at Garfield Elementary School's Registration Carnival by staffing carnival amusements and giving away Giant gift cards at the registration tent as an extra incentive for parents to register their children early for the coming school year. Early registration can make a difference in the financial resources available to a school since enrollment is a major factor in determining budgets for individual schools.

224. For nearly two decades, Akin Gump has participated each June in the Fun Fair at Tyler Elementary School, often staffing with summer associates the amusements and food stations the firm donates to the event.

225. Personal knowledge of author.

226. In 2011, in addition to catering dinner for students and parents at Science Night at Garfield Elementary School, Paul Hastings brought a team of 20 professionals – including partners, associates, legal assistants, a billing supervisor and librarian – to Garfield's Career Education Week to discuss their careers. From among clients and friends, the firm also invited an art dealer, personal trainer, radio DJ, secret service agent and NIH medical researcher to present at the event. *See generally* Elinor Hart, *Program Perspective*, PARTNERS UNLIMITED BULL. BOARD, FALL 2011, at 2.

227. In 2015, 200 volunteers from Hogan Lovells raised funds to purchase backpacks and fill them with supplies, ultimately donating a total of 500 well-stocked backpacks to its school partner, Kimball Elementary School, and to nine other Washington, D.C. public schools, donating a total of more than 9,000 backpacks full of supplies. *See generally* *Backpacks Provided Hogan Lovells for Kimball and Other Schools*, PARTNERS UNLIMITED BULL. BOARD, Fall 2015, at 7.

228. Teachers at Savoy Elementary School used these colorful notepads that partner firm Beveridge & Diamond donated as incentives and rewards for students. *See generally* *Firms Provide School Supplies*, PARTNERS UNLIMITED BULL. BOARD, Fall 2009, at 6.

229. The Legal Department at Fannie Mae sponsored book drives for its school partner, Marie Reed Learning Center, both to increase book supplies for the school's main library and in-classroom libraries.

purchase and install wireless access points, network cards, and computers, and connect the school to the internet.<sup>230</sup>

Support for the arts has been a consistent element of the Partnership Program. A common collaboration among school partners involves annual holiday card contests. Art students create and submit designs. Then, partner firms select the annual holiday cards that are sent to clients and friends.<sup>231</sup> As part of its Landmark Arts Project, attorneys and staff at another partner firm taught lessons to students about historical Washington, D.C. landmarks. Afterwards, students created art work depicting the landmarks and the firm displayed the art in one of its conference rooms.<sup>232</sup> For the last several years, one law firm has donated the sound equipment—including wireless microphones—for the annual spring musicals at its partner school.<sup>233</sup> Other firms provide meals at back-to-school nights,<sup>234</sup> and participate in school community nights. Paul Hastings has introduced math games and science activities to family nights at its partner school, as firm vol-

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230. This was the result of a three-year collaboration between Akin Gump, Tyler Elementary and technology professionals at DCPS to address technology concerns at the school.

231. Dickstein Shapiro featured an Ellington School student-designed holiday card for nearly two decades, awarding prizes to the winners at a reception each December and making a donation each year to Ellington's Visual Art Department. See *Community Impact: Finalist*, DICKSTEIN SHAPIRO LLP (May 18, 2009, 1:55 PM), <https://www.bizjournals.com/washington/stories/2009/05/18/tidbits8.html>. The winning design appeared on over 20,000 holiday cards members of the firm sent out during the holidays. Blank Rome has now taken over that partnership, including the holiday card program. Pepper Hamilton, which sponsors a similar holiday card contest, selects both a winning design and 12 “runners up” to appear in a calendar that is later sold to raise money for the school. Pepper Hamilton conceived of the calendar recognizing how many outstanding drawings Stanton Elementary students submitted each year during the firm's annual holiday card contest. Among the longest running collaborations in the WLC Partnership Program, Pepper Hamilton has partnered with Stanton for nearly 30 years.

232. Arent Fox has sponsored the Landmark Arts Project at Randle Highlands Elementary School, which has assigned each grade a D.C. landmark – e.g., the White House, Washington Monument, Frederick Douglass' home, Mary McLeod Bethune's home and Council House, Union Station, the U.S. Capitol and Supreme Court. Arent Fox attorneys and staff then visited each classroom to teach a lesson on the landmark assigned to the class, after which students create art work depicting the landmarks to be displayed at the law firm.

233. Akin Gump has donated wireless microphones and other sound equipment for spring musical performances at Tyler Elementary School, including *The Lion King*, *Aladdin* and *Willy Wonka*.

234. Covington & Burling and Akin Gump regularly provide refreshments for back-to-school nights at Cardozo High School and Tyler Elementary School, respectively. Steven Pearlstein, *Charities That Defies Economics*, WASH. POST, (Dec. 24, 2014), <http://www.washingtonpost.com/wp-dyn/articles/A23722-2004Dec23.html>; JOHN TYLER ELEMENTARY COMMUNITY PARTNERS, <http://www.tylerelementary.net/school/community-partners/> (last visited Sept. 7, 2018). Tyler Elementary School hosts several community nights during the school year, at which students, families, faculty and school staff gather in community over a meal donated by law firm partner Akin Gump.

unteers collaborate with an educational non-profit that provides activities for the event.<sup>235</sup>

### 3. Developing and Providing Academic Challenge for Students

While the Committee launched the Partnership Program primarily to connect DC public schools and professional-sector partners in pursuit of enrichment activities specific to those pairings, the Committee has also sponsored and encouraged a broader range of activities available to all participants in the school partnerships. In some cases, these city-wide programs evolved from the school partnership pairings themselves. In others, an array of non-profits has leveraged a growing relationship with the Committee's Partnership Program, participating law firms and businesses to introduce city-wide special programming for DCPS students.

In 2004, Arent Fox held a small American-states based geography tournament at Randle Highlands Elementary featuring a game—GeoPlunge—that firm partner Alan Fishel had invented as a way for kids to have fun learning about geography.<sup>236</sup> Two years later, Fishel recruited the Committee to coordinate the first annual GeoPlunge Geography Tournament featuring 4th-6th grade students from Randle and seven other DCPS elementary schools.<sup>237</sup> Today, two LearningPlunge tournaments are held each year at the Smithsonian Institution's National Portrait Gallery, with 350–400 students competing and far more involved in GeoPlunge clubs at their local public schools. Volunteers from area law firms and businesses coordinate and underwrite the cost of the tournaments and help teachers and resource specialists coordinate clubs and prepare students to compete.

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235. Attorneys and staff from Paul Hastings have participated in Math and Science Night at Garfield Elementary School, collaborating with Turning the Page, which engages parents and other family members to improve their children's educational experiences and school communities. See Bulletin Report, WASH. LAW. COMM., *Paul Hastings Brings Math Games to Garfield Family Night*, (Spring 2016), [http://www.washlaw.org/pdf/pubbb\\_spring\\_2016.pdf](http://www.washlaw.org/pdf/pubbb_spring_2016.pdf).

236. Bulletin Report, WASH. LAW. COMM., *New Geography Game a Big Hit With Learners of All Ages*, (Fall 2005), [https://www.washlaw.org/pdf/PUBB\\_Fall\\_2005.pdf](https://www.washlaw.org/pdf/PUBB_Fall_2005.pdf).

237. Bulletin Report, WASH. LAW. COMM., *Partner Schools Score GeoPlunge Wins*, (Spring 2007), <https://www.washlaw.org/pdf/PUBBNewsletter-Spring2007FINAL.pdf>. Alan and Arent Fox later formed LearningPlunge, a 501(c)(3), with GeoPlunge as its flagship initiative, to develop educational games for igniting children's passion for learning through thinking, knowledge, teamwork, sportsmanship and fun. See generally LEARNINGPLUNGE, <http://www.learningplunge.org/>. (last visited Sept. 08, 2018). In 2016, LearningPlunge teamed up with the American Geographical Society to take GeoPlunge to cities throughout the United States, and successful GeoPlunge events have since been initiated several other cities. In November 2017, The National Geospatial Intelligence Agency used GeoPlunge to launch its Partners in Education program at the elementary school level.

In addition to LearningPlunge and Girls on the Run DC<sup>238</sup> related programs, and the Georgetown Law Center Street Law Clinic<sup>239</sup> and American University's Marshall-Brennan Constitutional Literacy Project<sup>240</sup> moot courts, for which the Committee's staff coordinates attorney mentors, other non-profits also collaborate with the Committee's Partnership Program, DCPS and participating law firms and business to bring additional city-wide literacy, mentoring and social/emotional learning programs to DC elementary schools. Law firms have sponsored the DC Scores organization at their partner schools, for example, introducing organized soccer, a poetry curriculum and community service opportunities in underprivileged neighborhoods.<sup>241</sup> Partnership Program law firm volunteers also work with Everybody Wins! DC, a non-profit devoted to promoting children's literacy and a love of learning through shared reading experiences.<sup>242</sup> Through Committee coordination efforts, programs such as Reading Partners, Literacy Lab, and Innovation for Learning's Tutormate have also been made available to students through the Program and its volunteers.

#### B. Fundraising and the Parent Empowerment Program

Building on the success of the Parent Group Fund in the early 1980s, the Committee recently launched the Parent Empowerment Program (PEP), which is designed to match funds raised by parent groups for programs and activities that principals, teachers and parents select, and in which school partners participate, with the goal of germinating lasting change within the schools.<sup>243</sup> Committee and Education Program staff developed a pilot "matching" program in 2016 as a means to empower parents with children in DCPS schools to improve their children's educational opportunities and have a greater

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238. See generally *GIRLS ON THE RUN* WASH. D.C., <https://www.gotrdc.org/our-organization>. In 2014, Goodwin Proctor, which worked with a team of 15 third- through fifth-grade girls at West Education Campus, ultimately entered 10 attorneys into the final Girls on the Run 5K race in Anacostia Park. Cammy Continzano, *Our School Partnership*, WASH. LAW. COMM., (Oct. 3, 2014), <https://www.washlaw.org/news/381-our-school-partnership>.

239. See *Georgetown Street Law Program*, GEORGETOWN LAW, <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/street-law-program/>. (last visited Sept. 8, 2018).

240. See *Marshall-Brennan Constitutional Literacy Project*, AM. U. WASH. C. OF L., <https://www.wcl.american.edu/impact/initiatives-programs/marshallbrennan/>. (last visited Sept. 8, 2018).

241. See *D.C. SCORES*, <https://www.D.C.scores.org/>. (last visited Sept. 8, 2018).

242. See *EVERYBODY WINS* D.C., <http://www.everybodywinsDC.org/>. (last visited Sept. 8, 2018).

243. See *Parent Empowerment Program*, WASH. LAW. COMM., <http://www.washlaw.org/projects/public-education>. (last visited Sept. 8, 2018).

voice in their public school communities and in public school education issues in the District. In the spring of 2016, with seed funding from law firm and corporate real estate brokerage and consulting firm Savills-Studley, the Committee provided grants to parent-teacher groups at four DCPS schools. The groups held fundraisers to support matching grants of \$1000 each, and the combined funds were used by each group to pay for an academic enrichment program that would also be supported by parent volunteers.<sup>244</sup> The unmistakable return on investment prompted The Morrison & Foerster Foundation to provide funding to enable the Committee to hire a Coordinator of the Parent Empowerment Program and the Parent Empowerment Program (PEP) Fund.

Even before the establishment of the PEP, the Committee had long crusaded for tangible private contributions to parent organizations and the school partnerships—leadership and encouragement that has taken many forms. A few of the school partnerships had worked with their schools' parent-teacher organizations, initially providing food, advice and sometimes programming for meetings. In addition to hosting annual celebrations and fundraising activities, the Committee has also suggested that participating law firms and businesses hold auctions and raffles to benefit school partnerships. And various Partner law firms have advised parent-teacher associations and organizations as they seek to establish and operate their own

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244. By the end of 2017, the PEP Fund had distributed more than \$12,000 to parent-teacher groups, and looked to distribute at least \$10,000 more in 2018 and to increase the total amount of grants available in subsequent years. The value of the activities funded in PEP's brief period of existence speaks to the significance of the developing "matching" program. A parent-teacher organization at one school used PEP funds to produce a Family Fun Night featuring crafts and games for families, an event that nearly doubled the number of parents who signed up to volunteer for school activities, including a PEP-sponsored literacy program that would involve students and parents. Zuckerman Spaeder supported the Orr Elementary School PTO's successful Family Fun Night fundraising efforts. Another law firm helped its school partner organize a PTO fundraising and recruiting carnival to raise funds—and obtain matching funds—for a summer family reading program. Hogan Lovells helped Kimball Elementary School organize its PTO recruiting carnival. Another firm helped the PTA at its partner school plan an enrollment carnival to sign up PTA members and volunteers, a mindfulness program introducing families to the benefits of yoga and meditation, and a Career Day Bazaar involving parents and students in activities illustrating parents' careers and professional experiences. Akin Gump collaborated with the Tyler Elementary School PTA to identify and support fundraising for these PEP-inspired programs. One elementary school, with the assistance of Buckley Sandler, organized a Coding Club Program where parents and students participated in a Code with Your Kids event in which student experts introduced their parents and classmates to computer coding. Buckley Sandler assisted Cleveland Elementary School with organizing a successful Code with Your Kids fundraising event.

501(c)(3) charities to conduct fundraising on behalf of schools.<sup>245</sup> Among the most notable Committee-inspired fundraisers are the Celebration of Song, featuring student choirs from partner schools singing alongside celebrity voices about civil rights and other meaningful themes,<sup>246</sup> and an annual city-wide Cooking for Kids Bake Sale and Taste-Off competition, in which partnership firms hold bake sales and tasting competitions to raise funds for their school partners.<sup>247</sup>

At the suggestion of Beveridge & Diamond, the Committee formed a School Nonprofit Working Group in late 2014 to develop a resource for parent teacher organizations based on the growing expertise of those firms, as well as that of attorneys from Squire Patton Boggs, Hogan Lovells, and Dentons.<sup>248</sup> The *Guide to Nonprofit Vehicles for Fundraising to Assist District of Columbia Public Schools*<sup>249</sup> is a toolkit intended to make it easier for firms to support parent groups as they organize, fundraise and establish new enrichment activities at the schools.<sup>250</sup> Since the Committee's Guide was published in January 2016, more than 200 copies have been distributed to parent teacher organization members, and hundreds have accessed the electronic version of the Guide available on the Committee's website.

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245. *Guide to Nonprofit Vehicles to Assist District of Columbia Schools*, WASH. LAW. COMM., (Jan. 2016), [http://www.washlaw.org/pdf/wlc\\_school\\_nonprofit\\_toolkit\\_and\\_appendix.pdf](http://www.washlaw.org/pdf/wlc_school_nonprofit_toolkit_and_appendix.pdf). Among the D.C.P.S. schools where PTAs/PTOs have established 501(c)(3) are: School-Within-School at Goding (Elementary), Brent Elementary, Capitol Hill Cluster School (PK3-8th grade – 3 campuses), Janney Elementary, Lafayette Elementary, Maury Elementary, Tyler Elementary, Eaton Elementary, School Without Walls and Orr (renamed Boone) Elementary. Akin Gump, Fried Frank, Zuckerman Spaeder and Perkins Coie had gone further by helping to draft bylaws or forming 501(c)(3) nonprofit organizations to assist in fundraising to benefit their schools.

246. *See 5th Annual Celebration of Song Benefit Raises \$80,000 for Washington Lawyers' Committee Programs*, WASH. LAW. COMM., (Dec. 12, 2013), <https://www.washlaw.org/news/457-5th-annual-celebration-of-song-recap-and-photos>. In advance of each Celebration event, the Committee and participating firms have sold raffle tickets and donated lavish prizes to raise funds for the Partnership Program.

247. *See 2018 Cooking for Kids Bake-Sale and Taste-Off Benefits DC Public Schools*, WASH. LAW. COMM., (Mar. 13, 2018), <https://www.washlaw.org/news/704-2018-cooking-for-kids>. The winning entries are sent to the Committee's offices for a city-wide taste-off featuring celebrity chefs as judges. The Annual Bake Sale and Taste-Offs raise \$8,000-10,000 each year for the D.C.P.S. schools whose partners participate.

248. *See* WASH. LAW. COMM., *supra* note 245. The participating law firms included Beveridge & Diamond, which chaired the effort, as well as Akin Gump Strauss Hauer & Feld; Dentons; Fried, Frank, Harris, Shriver & Jacobson; and Squire Patton Boggs.

249. *See generally id.*

250. *Id.* The Committee in 2016 published a *Guide to Nonprofit Vehicles for Fundraising to Assist District of Columbia Public Schools* that analyzes and compares different tax-exempt organization options for D.C.P.S. schools and their parent organizations. It provides practical advice on establishing and maintaining fundraising mechanisms for schools and/or their parent organizations, and includes specific resources, forms and contacts for getting started.

III. THE COMMITTEE CONTINUES TO WORK TO  
SUPPORT AND IMPROVE EDUCATIONAL OPPORTUNITY  
FOR PUBLIC SCHOOL STUDENTS IN THE DISTRICT  
THROUGH THE ENCOURAGEMENT OF MORE  
PARTNERSHIPS, MORE PARENT EMPOWERMENT, AND  
MORE ANALYSIS, ADVOCACY AND LITIGATION

The Committee's support for greater educational opportunity for public school students in the District of Columbia—while varying over time in reaction to evolving political and practical realities—has continued to be in recent years as diverse and unwavering as it has been since the civil rights organization initially ventured into the new space to fill what it saw as a glaring void. What Committee staff observed forty years ago was a starkly segregated school system that was short on funds, subject to disabling political infighting, treating local schools unequally, failing to focus on adequately serving its students, distancing itself from the surrounding business community, and not being held accountable by parents. In response, the Committee sought to develop strong supportive partnerships between law firms and businesses and parents, students and schools; to accumulate and evaluate data in order to understand the system's operational difficulties and performance flaws; to press government and school leaders for adequate funding and change to force the system to better serve its various constituencies; and to teach, train and empower parents of children in the system's schools so they could exercise their influence as parents and citizens of the District to demand better education for their children. Committee activities continue to serve these foundational objectives.

In addition to spearheading, organizing, supporting, encouraging and coordinating participation in the Partnership Program, the Committee holds regular networking and recruiting events intended to expand the Program and to reinforce important connections among participating and prospective school, firm and business and community partners. Three times a year, networking luncheons hosted by area law firms feature updates from DCPS Community Partnership leaders from the Office of Family and Public Engagement, programming developments from Lawyers' Committee staff, updates from academic programming and community partners, and the renowned "lightning round," in which attendees share developments about school partnership activities and encourage prospective school, law

firm and business attendees to explore new partnerships. The sessions serve as a laboratory for partnership participants to share best practices, consider new activities and encourage participation in the city-wide and community partner activities. The Committee's Spring Luncheon also involves a recruitment effort specifically directed toward schools and professional sector prospects considering whether and how to launch new partnerships.

The Education Justice Project has similarly expanded the work of the Parent Empowerment Program to go beyond the financial support of academic enrichment programs at schools. It is now also supporting Know Your Rights clinics on housing and employment issues. Moreover, spurred by recent publicity regarding the vast difference between what affluent public school parent teacher organizations raise each year for their schools and what is available for most DCPS schools, several affluent parent teacher groups in DC have begun donating regularly to the PEP Fund, and parents are beginning to network more among each other to share knowledge and resources regarding fundraising techniques, event planning and academic enrichment programs.<sup>251</sup>

The Committee's expanding connections among parent teacher groups have also enabled it to introduce additional parent and teacher leaders to a District-wide public education advocacy group called the Coalition for DC Public Schools and Communities ("C4DC"). Formed in 2014, the C4DC includes parents and members of Ward Education Councils in every part of the city, as well as policy and advocacy organizations including the Committee, the 21st Century Schools Fund, the DC Fiscal Policy Institute, the Senior High Alliance of Parents, Principals and Educators, Teaching for Change and We ACT Radio. The over-arching goal of the C4DC is to have a network of excellent neighborhood DCPS schools in every Ward, complemented by a reasonable number of strong charter school options.<sup>252</sup>

The Committee's Public Education Project has also hosted forums to raise awareness and stimulate discussion on issues and concerns facing the broader DC public school community. In 2017, for instance, the WLC co-hosted with the Coalition for DC Public Schools

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251. *Pushing Back Against the Racial Wealth Gap and Inequity in Schools*, WASH. LAW. COMM., (Apr. 3, 2018), <http://www.washlaw.org/news/713-pushing-back-against-the-racial-wealth-gap-and-inequity-in-schools>.

252. See, Home Page, COAL. FOR D.C. PUB. SCH. AND COMMUNITIES, <http://www.c4dcpublicschools.org>. (last visited Sept. 8, 2018).

and Communities and Teaching for Change a free screening of the documentary *Backpack Full of Cash*.<sup>253</sup> The feature-length film, narrated by Actor Matt Damon, explores the growing privatization of public schools and the resulting impact on America's most vulnerable children. Filmed in Philadelphia, New Orleans, Nashville and Union City (NJ), *Backpack* addresses the realities and impacts of education reform policies such as vouchers and charter schools on traditional public school systems.<sup>254</sup>

Certainly, some charter schools in DC and elsewhere provide certain students with good educational foundations and opportunities. However, nationwide studies comparing traditional schools to charter schools have found that "students perform similarly across the two settings in most locations."<sup>255</sup> Further, on average, charter schools are even more racially and economically segregated than traditional public schools, according to several studies, including one by the Civil Rights Project at U.C.L.A.<sup>256</sup> The findings of these studies raise important questions about the role of charter schools in an equitable public education system.

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253. See *id.*; BACKPACK FULL OF CASH, <http://www.backpackfullofcash.com/> (last visited Nov. 06, 2018).

254. Following the film screening, WLC Executive Director Jonathan Smith moderated a discussion among Leslie Fenwick, Dean Emeritus and Professor at Howard University School of Education; Joshua Starr, CEO of Phi Delta Kappa International, and former Superintendent of Montgomery County Public Schools; and Stanley Sanger, former Superintendent of Union City Schools, NJ. The panel also responded to questions from the audience. DC Councilmember David Grosso, Chairman of the Education Committee, attended, as well as members of the DC State Board of Education, representatives of the DC Ward Education Councils, other DC education advocates, parents, DCPS administrators and teachers, and business leaders. Employees of the Public Charter School Board and Friends of Choice in Urban Schools, a charter advocacy organization, also attended.

255. See, e.g., Ron Zimmer, Brian Gill, Kevin Booker, Stephane Lavertu, & John Witte, *Examining Charter Student Achievement Effects Across Seven States*, 31 ECON. OF ED. REV. 213, 222 (Issue No. 2, 2012); see also Stéphanie Lavertue & John Witte, *The Impact of Milwaukee Charter Schools on Student Achievement*, BROOKINGS, (Mar. 25, 2009), <https://www.brookings.edu/research/the-impact-of-milwaukee-charter-schools-on-student-achievement/>. In particular, charter schools emphasizing online instruction or blended learning do considerably worse than traditional public schools. *Online Charter School Study*, at 23, CENTER FOR RESEARCH ON ED. OUTCOMES, (2015), <https://credo.stanford.edu/pdfs/Online%20Charter%20Study%20Final.pdf>.

256. See, e.g., *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, UCLA CIV. RTS. PROJECT, (2009), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report>; Emmanuel Felton, *Nearly 750 Charter Schools are Whiter than the Nearby District Schools*, HECHINGER REP., <http://hechingerreport.org/nearly-750-charter-schools-are-whiter-than-the-nearby-district-schools/>, (June 17, 2018).; Gordon Laffer, *Do Poor Kids Deserve Lower-Quality Education than Rich Kids? Evaluating School Privatization Proposals in Milwaukee, Wisconsin*, ECON. POL'Y INST., (Apr. 24, 2014), <https://www.epi.org/publication/school-privatization-milwaukee/>.

Charter initiatives were conceived by union teachers and were initially lauded by advocates on both the left and the right as a means for experienced teachers and administrators to find alternative approaches to teaching and learning in small, “lab school” settings that could be shared with entire school districts.<sup>257</sup> The better charter schools can live up to this promise, and can have a role in a comprehensive public education system. But not all charter schools have honored their commitments to the public; the District has suffered from a few charter school financial scandals that enriched individuals running the schools while students, teachers and their communities suffered the consequences.<sup>258</sup>

The large charter school sector in the District, which operates without any significant coordination with DCPS, presents new challenges for educational equity, which the Committee has worked to address. For example, starting in 2014 the Committee worked with the law firms of Lewis Baach, Dickstein Shapiro and Gilbert to represent members of the C4DC as amicus to oppose a charter school lawsuit<sup>259</sup>

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257. Richard D. Kahlenberg & Halley Potter, *The Original Charter School Visionary*, N.Y. TIMES, (Aug. 30, 2014), <https://www.nytimes.com/2014/08/31/opinion/sunday/albert-shanker-the-original-charter-school-visionary.html>.

258. For example, Options Public Charter School received more than \$41,000 per student, but it paid its administrators exorbitant salaries and its management companies exorbitant fees. Investigators discovered that administrators were using school funds to buy million dollar properties in Virginia and Florida. The CFO of the Public Charter School Board approved the grossly inflated management and transportation contracts for Options, then quit the PCSB and became the CFO for Options’ management company. See Emma Brown, *New Claims Surface in Options Charter School Case*, WASH. POST, (Jan. 3, 2014), [https://www.washingtonpost.com/local/education/new-claims-surface-in-options-charter-school-case/2014/01/03/c02d1f5e-74a4-11e3-8b3f-b1666705ca3b\\_story.html?utm\\_term=.f8b0ae5498a1](https://www.washingtonpost.com/local/education/new-claims-surface-in-options-charter-school-case/2014/01/03/c02d1f5e-74a4-11e3-8b3f-b1666705ca3b_story.html?utm_term=.f8b0ae5498a1).

Dorothy Height Community Academy Public Charter Schools distributed \$13 million (\$2 million a year) to a for-profit management company owned by the founder Kent Amos, yet little of it benefited the school. Moriah Costa, *Charter School Founder Pays \$3 Million in Settlement*, WATCHDOG, (May 12, 2015), [https://www.watchdog.org/issues/education/charter-school-founder-pays-million-in-settlement/article\\_50003fde-b42d-5257-9c3e-895ced485318.html](https://www.watchdog.org/issues/education/charter-school-founder-pays-million-in-settlement/article_50003fde-b42d-5257-9c3e-895ced485318.html).

Lawrence Riccio, CEO of School for the Arts in Learning, regularly used school funds to pay for apartments and his lavish traveling lifestyle in Scotland and France. See Jeffrey Anderson, *Charter School Pioneer Gets FBI Scrutiny*, WASH. TIMES, (May 5, 2010), <https://www.washingtontimes.com/news/2010/may/05/charter-school-pioneer-gets-fbi-scrutiny/>.

For more on nationwide charter school financial scandals, waste and fraud, see generally *Charter School Vulnerabilities to Waste Fraud and Abuse*, CTR. FOR POPULAR DEMOCRACY, (May 2017), [http://educationvotes.nea.org/wp-content/uploads/2017/05/Charter-School-Fraud\\_Report\\_2017\\_rev1a.pdf](http://educationvotes.nea.org/wp-content/uploads/2017/05/Charter-School-Fraud_Report_2017_rev1a.pdf).

259. See Emma Brown, *D.C. Charter Schools Sue City, Alleging Unequal Funding*, WASH. POST, (July 30, 2014), [https://www.washingtonpost.com/local/education/dc-charter-schools-sue-city-alleging-unequal-funding/2014/07/30/b19f88ca-1759-11e4-9e3b-7f2f110c6265\\_story.html?utm\\_term=.baccf26bed67](https://www.washingtonpost.com/local/education/dc-charter-schools-sue-city-alleging-unequal-funding/2014/07/30/b19f88ca-1759-11e4-9e3b-7f2f110c6265_story.html?utm_term=.baccf26bed67). Washington Latin and Eagle Academy. Each charter school organization, whether it operates one school or many in D.C., is considered a separate Local Education Agency or LEA; D.C.P.S is also considered one LEA, so there are a total of 67 LEAs in D.C.

against the District that claimed that charter schools were underfunded.<sup>260</sup> Had the charter plaintiffs prevailed, nearly \$100 million could have been taken from DCPS schools and reallocated to charter schools each year.

The case involved interpretation of the DC School Reform Act of 1995 (the “SRA”), which authorized the opening of charter schools in DC and the development of the funding formula, which was then devised by local experts, including representatives of Parents United.<sup>261</sup> The court ultimately ruled against the charter plaintiffs, holding that the Council did not violate the SRA with its decisions concerning supplemental and emergency appropriations to DCPS to cover budget shortfalls, contributions to the Teacher’s Retirement Fund, and appropriations to the Department of General Services—categories that were not included as part of the Per Student Funding Formula in the first place.<sup>262</sup>

The Committee, as amicus, noted that when the SRA had passed, both the DC Council, which drafted most of the initial legislation, and Congress, which slightly altered it before it passed, expressed concern that the process might create a two-tiered and unfair system where more active parents and generally less challenging students would migrate to charter schools, leaving to DCPS neighborhood schools the task of educating students needing greater educational and social-emotional supports. Yet the Committee contended that statistics show that is exactly what has happened. Charter schools in the District teach nearly 46% of the 90,000 public school students in DC as of the 2016-2017 school year,<sup>263</sup> but DCPS has by far the larger number of

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260. *D.C. Ass’n of Chartered Pub. Schs. v. District of Columbia*, 277 F. Supp. 3d 67, 73 (D.D.C. 2017).

261. DC School Reform Act of 1995, D.C. CODE ch. 18 § 38. See *D.C. Ass’n of Chartered Pub. Schs.*, 277 F. Supp. 3d at 74.

262. *D.C. Ass’n of Chartered Pub. Schs.*, 277 F. Supp. 3d at 78. The Committee, along with Steptoe & Johnson and Lewis Baach Kaufmann Middlemiss, represented the C4DC amicus group in briefing the appeal during the Summer of 2018.

263. Rebecca David, Kevin Helsa, & Susan Aud Pendegrass, *A Growing Movement: America’s Largest Public School Communities*, NAT. ALL. FOR PUB. CHARTERED SCHS., (Oct. 2017), <https://www.publiccharters.org/publications/growing-movement-americas-largest-charter-public-school-communities> (last visited Sept. 10, 2018). As of SY 2017-2018, there are 120 charter school campuses in D.C. See 2018 Annual Report, D.C. PUB. CHARTER SCH. BD., <https://www.dcpsb.org/report/pscb-annual-reports> (last visited Sept. 10, 2018). As of the same school year, there are 115 D.C.PS school campuses. See Enrollment, D.C. PUB. SCHS., <https://D.C.ps.D.C.gov/page/D.C.ps-glance-enrollment> (last visited Sept. 10, 2018). The total of 235 school campuses in D.C. is more than what Fairfax County has, and it is one of the largest school districts in the country, with more than twice as many students as D.C. FAIRFAX COUNTY PUB. SCHS., <https://www.fcps.edu/about-fcps> (last visited Sept. 10, 2018).

schools that educate school populations that have large concentrations—70% or more—of the lowest-income students who are below grade level or who need significant special education, English language, or social/emotional guidance.<sup>264</sup> All of the DCPS schools serving this category of students who deserve more supports have populations that are more than 93% students of color.<sup>265</sup>

The Committee’s involvement in the Charter School Funding lawsuit is just one example of the Education Justice Project’s work in policy analysis and advocacy, and even litigation when necessary, over the past few years, with a focus on improving racial equity and eliminating the harmful effects of discrimination and poverty. The Education Project also provided testimony in support of legislation that the DC Council recently passed severely restricting the use of out-of-school suspensions in both DCPS and DC charter schools. This limitation should significantly reduce the school-to-prison pipeline in DC, particularly for students of color who were disproportionately affected by suspensions.<sup>266</sup> The Project also provided research for a DC study by Mary Levy and a UCLA Civil Rights Project symposium demonstrating that the DC federal voucher system does not improve educational outcomes for low-income students of color.<sup>267</sup> Further, it worked with C4DC members to challenge the Public Charter School Board’s reversal of a decision, without prior notice to the public, which originally denied expansion to certain charter schools that a re-

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264. See Enrollment Audit, D.C. OFFICE OF THE STATE SUPERINTENDENT OF ED., *Audit and Verification of Student Enrollment for the 2016-2017 School Year*, at 1–3 (Feb. 13, 2017), [https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/2016-17%20School%20Year%20Enrollment%20Audit%20Report\\_0.pdf](https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/2016-17%20School%20Year%20Enrollment%20Audit%20Report_0.pdf). See also AT-RISK FUNDS, <http://atriskfunds.ourDCschools.org/> (last visited Nov. 06, 2018).

265. Enrollment Audit, D.C. OFFICE OF THE STATE SUPERINTENDENT OF ED., *Audit and Verification of Student Enrollment for the 2017-2018 School Year*, at 101 (Feb. 15, 2018), [https://osse.dc.gov/sites/default/files/dc/sites/osse/page\\_content/attachments/2017-18%20School%20Year%20Audit%20and%20Verification%20of%20Student%20Enrollment%20Report%20-%20Feb%202018.pdf](https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/2017-18%20School%20Year%20Audit%20and%20Verification%20of%20Student%20Enrollment%20Report%20-%20Feb%202018.pdf); See generally AT-RISK FUNDS, <http://atriskfunds.ourDCschools.org/> (last visited Nov. 06, 2018). “At Risk” is defined in legislation by the D.C. Council to include students who are homeless, in the foster care system, on TANF or SNAP, or more than a year older than their classmates. D.C. CODE § 38-2901.

266. Steptoe & Johnson researched and helped prepare the testimony.

267. Mary Levy, *Washington, D.C. Voucher Program: Civil Rights Implications*, <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/washington-d.c.s-voucher-program-civil-rights-implications/Levy-D.C.-VOUCHER-PAPER-FINAL-TO-POST-030218C.pdf> (2018). The Committee staff and Hogan Lovells provided the research and drafting.

cent GAO Report found were suspending 20% to 30% of their students of color each year.<sup>268</sup>

The Project worked with the DC Office of the Attorney General to provide guidance to all DC public school personnel regarding the rights of immigrant students and parents with respect to changing federal immigration policy.<sup>269</sup> On the heels of a series of scandals that culminated in the resignation of DCPS Chancellor Wilson and Deputy Mayor for Education Niles in February 2018, Project Director Kent Withycombe and eight other individual members of the C4DC met with Council members and their key staff members on several occasions to advocate for more equity in DC public schools, greater coordination between the public school sectors, and greater transparency in the school systems.<sup>270</sup> Finally, to increase the reliability of the data and the transparency of the public school systems in DC, the Committee most recently joined with C4DC in supporting DC Council proposed legislation promoting a University of Chicago-style consortium of DC-area independent academic institutions to evaluate the progress of the DC public schools every year.

## CONCLUSION

The Lawyers' Committee has served a unique role in supporting quality equal public education in the District since it helped enlist volunteer lawyers to represent local school boards looking to obtain more autonomy in operating their schools in the late 1970s. The Education Project drew on the private litigation approach that the Committee and its law firm lawyer recruits had been employing successfully to enforce civil rights in employment, housing and public accommodations to devise a program of direct immediate support for parents in their local schools combined with longer term policy analysis, advocacy and litigation. The Committee enlisted and fostered

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268. *The Committee's Public Education Project, Coalition for DC Public Schools & Communities: June 19 Reversal Approving DC Prep Enrollment Petition Violated the Law*, WASH. LAW. COMM., (Sept. 01, 2017), <https://www.washlaw.org/news/632-coalition-for-dc-public-schools-communities-june-19-reversal-approving-dc-prep-enrollment-petition-violated-the-law>. The DC Office of Open Government found that the PCSB violated the DC Open Meetings Act. While it required further training for PCSB office personnel, it did not require PCSB to reverse its decision.

269. Mayer Brown provided the research and drafting. *Id.*

270. *The Committee and the C4DC Advocate with D.C. Councilmembers for More Equity in D.C. Public Schools*, WASH. LAW. COMM., (Mar. 12, 2018), <http://www.washlaw.org/news/703-the-committee-and-the-c4D.C.-advocate-with-D.C.-councilmembers-for-more-equity-in-D.C.-public-schools>.

relationships with a diverse array of individually-interested constituencies, educated and informed them concerning the broader concerns and issues impacting DC public education, empowered and encouraged each of them to apply their highest and best effort(s) toward commonly developed goals, planned and coordinated their activities to achieve optimal overall impact, and sought to keep their focus on the best approaches to fixing problems going forward rather than wasting energy re-arguing about mistakes of the past. Over the past forty years, the Committee has evolved a vibrant and effective model for public interest organizations intent on seeing reform in public educational systems in the future.

But the Committee's own work is cut out for it as it continues to pursue its mission of improving DC's public education system in the years to come. While the DC Public School Partnership Program has demonstrated its ability to work with and empower parents and schools to enrich the academic lives of students, the program currently reaches only about two thirds of the 85 DCPS schools. Committee staff is committed to increasing the numbers of schools, parent groups and students able to receive the broad array of proven benefits such partnerships can provide in the years to come. This massive recruitment and coordination effort will demand ongoing investment of the limited resources available to the Committee itself, as well as continued and expanded legal and business community resources and support and the sustained interest and desire of school communities and families.

The Parent Empowerment Program and PEP Fund has garnered significant recent publicity, and appears poised as well to strengthen and expand significantly in the coming years as annual donations to the Fund have begun to increase. Further, as the parent teacher groups grow and School Partnerships become more involved in supporting them, the Education Project will look for opportunities to expand the scope of Program activities to serve the interests of the parent groups and their school communities. Among the broadened initiatives currently contemplated are a variety of "know your rights" educational clinics and legal matter intake and referral services. Again, fulfillment of these ambitions to both grow funding and expand opportunities will depend on both school community and family demand and committed and generous legal and business support.

Finally, the recently renamed Education Justice Project is looking to broaden its mission to achieve racial justice in education and elimi-

nate the harmful effects of discrimination and poverty by expanding its critical litigation and policy advocacy work in the District, and elsewhere as there is need. Seeing the C4DC as a potentially powerful and diverse force of educational equity leadership in the District in the years to come, the Project expects to continue to play a key role through its participation in and support and promotion of the District-wide public education advocacy organization.

One area that will demand the attention of the Committee and other experts and leaders going forward will be the better coordination of the public/charter school systems in the District to ensure better outcomes for all students, regardless of whether they attend charters or DCPS schools. For example, as of School Year 2016-2017, there were more than 21,000 empty public school seats, with DCPS and the charter sector roughly splitting that total.<sup>271</sup> Funding is another concern. District taxpayers provide 83% of the total funding for charter schools each year; federal taxpayers provide another 9-10% of that total.<sup>272</sup> The District also needs to hold charter schools accountable for performance. To what extent is the shifting of funds from DCPS schools to charter schools justifiable based on outcomes? And how should limited public education funds be managed to best serve the goal of quality education for all students in the District? These are all questions that need critical, informed and fair analysis leading to honest answers, and action.

As has been demonstrated repeatedly since it ventured into the public education space forty years ago, the Committee's objective in analyzing and advocating on this and other issues of critical educational importance—as in its support of the school partnership, parent empowerment and education justice programs—will be to ensure that each child in the District receives equal access to quality public schooling regardless of their level of need or the race, neighborhood or income level of their family. Unfortunately, while progress has been made, much more work remains to be done to achieve this goal.

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271. *Public Education Supply and Demand for the District of Columbia CityWide Fact Sheet, SY2016-17*, at 9, OFF. OF DEP. MAYOR OF ED., [https://dme.dc.gov/sites/default/files/dc/sites/dme/publication/attachments/SY16-17\\_Citywide%20School%20Fact%20%20Sheet\\_10.06.17.pdf](https://dme.dc.gov/sites/default/files/dc/sites/dme/publication/attachments/SY16-17_Citywide%20School%20Fact%20%20Sheet_10.06.17.pdf).

272. See 2016 Financial Audit Review Report, Sources of Revenue Report, D.C. PUB. CHARTER SCH. BD., (July 13, 2017). <https://www.dcpsb.org/2016-financial-audit-review>.

# The Washington Lawyers' Committee's Cases and Other Initiatives Involving Immigration and Refugee Law

NANCY NOONAN\* AND SYLVIA COSTELLOE\*\*

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## INTRODUCTION

The Washington Lawyers' Committee for Civil Rights & Urban Affairs ("Lawyers' Committee" or "Committee") established its program now named the Immigrant and Refugee Rights Project in 1978 ("Project").<sup>1</sup> It was the first such program in the Washington D.C. area that employed Spanish-speaking staff to respond to the legal needs of newcomers in the community.<sup>2</sup> The Project sought to mobilize the resources of the private bar to provide critical legal representation and advocacy on issues facing immigrants. The Project has devoted significant resources in assisting immigrants to obtain their civil rights or challenge denials of basic civil rights due to their national origin or citizenship status. The Project has filed a number of cases challenging discriminatory employment and housing practices, denouncing law enforcement misconduct against immigrants, and assisting groups and individuals targeted for abuse following the September 11, 2001, terrorist attacks. It has also researched and reported on civil rights issues and proposed policy changes to the government to improve respect for the civil rights of immigrants.

The Project's involvement in immigration and refugee issues is wide-ranging: it serves as an intermediary between federal and state government agencies and immigrant communities, it has created one of the strongest pro bono immigration legal referral programs in the area, it coordinates local and national policy advocacy initiatives, it provides training to lawyers who seek to represent immigrants and asylees, and it responds to traditional civil rights concerns in areas such as fair housing and equal employment. This article summarizes a number of the Project's noteworthy endeavors relating to immigration

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1. Deborah M. Levy, *Washington Lawyers' Committee for Civil Rights under Law: The Alien Rights Law Project*, 27 *How. L.J.* 1265 (1984). The project was initially known as the Alien Rights Law Project and renamed in 1990 as the Asylum and Refuge Rights Project. Its current name was adopted in 1999 in order to reflect changes in the issues addressed and the client population the Committee sought to serve.

2. Since 2012, the project has focused increasingly on civil rights denials affecting newcomers in the areas of employment, housing, and criminal justice reform. As a result, responsibility for the day-to-day operation of the project has been assigned to Committee staff members with specific expertise in these fields. During the period 1978-2012, the following individuals served as Project Directors:

1978-1981 Dale F. Swartz  
1981-1982 Juan Mendez  
1982-1990 Carolyn Waller  
1991-1997 Deborah Sanders  
1998-2004 Denise Gilman  
2006-2012 Laura Varela

and refugee issues that have occurred since the article *Washington Lawyers' Committee for Civil Rights Under Law: The Alien Rights Law Project* was published in 1984,<sup>3</sup> which summarized the Committee's work on the Alien Rights Law Project since 1978.<sup>4</sup>

## I. THE CURRENT STATUS OF IMMIGRATION IN THE UNITED STATES

Immigration has become a particularly contentious issue in recent years. Bills have been introduced to significantly reduce the levels of legal immigration to the United States<sup>5</sup> and the current President, Donald Trump, has publicly announced his support of such reductions.<sup>6</sup> The Administration has also announced restrictive new procedures affecting asylum seekers and has begun to expand the already massive immigration detention system. Serious concerns have been raised as to whether the Administration's actions to remove undocumented immigrants from the United States are violating due process because of the lack of access to legal representation by these immigrants as well as clogged immigration courts.<sup>7</sup> There were an estimated eleven million undocumented immigrants in the United States as of 2015.<sup>8</sup> Large numbers of documented and undocumented persons living and working in the United States are being affected by the changes in immigration policy.<sup>9</sup> Other initiatives include the creation of a denaturalization task force to investigate whether certain naturalized U.S. citizens committed fraud in the naturalization process, with

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3. Levy, *supra* note 1, at 1265.

4. *Id.* at 1267.

5. See generally RAISE Act, S. 1720, 115th Cong. (2017) (amending the Immigration and Naturalization Act to establish a point system for immigration).

6. See *President Donald J. Trump Backs RAISE Act*, WHITEHOUSE.GOV, (Aug. 2, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/>.

7. Katie Benner & Charlie Savage, *Due Process for Undocumented Immigrants, Explained*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/politics/due-process-undocumented-immigrants.html>; *The Deported: Immigrants Uprooted from the Country They Call Home*, HUMAN RIGHTS WATCH (Dec. 5, 2017), <https://www.hrw.org/report/2017/12/05/deported/immigrants-uprooted-country-they-call-home>.

8. Jeffrey S. Passel & D'Vera Cohn, *As Mexican Share Declined, U.S. Unauthorized Immigrant Population Fell in 2015 Below Recession Level*, PEW RES. CTR. (Apr. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/04/25/as-mexican-share-declined-u-s-unauthorized-immigrant-population-fell-in-2015-below-recession-level/>.

9. CAP Immigration Team & Michael D. Nicholson, *The Facts on Immigration Today: 2017 Edition*, CTR. FOR AM. PROGRESS (Apr. 20, 2017, 9:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2017/04/20/430736/facts-immigration-today-2017-edition/>.

the goal of revoking their naturalization and removing those individuals from the United States.<sup>10</sup>

Comprehensive immigration reform is desperately needed but has little chance of passing due to the inability of the parties in Congress and the President to agree on those issues. In the meantime, the Trump Administration has repealed the Deferred Action for Childhood Arrivals (“DACA”) program,<sup>11</sup> and since September 2017, has ended the Temporary Protected Status (“TPS”) designation for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan,<sup>12</sup> and more countries may have TPS terminated in the future. The termination of TPS for these nationalities will result in hundreds of thousands of foreign nationals who have lived and worked lawfully in the United States for decades losing work authorization and facing deportation to unsafe conditions in their home countries.<sup>13</sup>

## II. THE PROJECT HAS BEEN INVOLVED IN A WIDE RANGE OF CASES AND INITIATIVES ON BEHALF OF IMMIGRANTS AND REFUGEES

### A. Recent Cases

In May 2017, citizens or lawful permanent residents who had at least one family member seeking entry to United States, and three organizations serving or representing Muslim clients or members, brought an action for declaratory and injunctive relief against the President, the Department of Homeland Security (“DHS”) and its Secretary, the Department of State and its Secretary, and the Office of the Director of National Intelligence and its Director, regarding the

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10. See *Denaturalization, Explained: How Trump Can Strip Immigrants of their Citizenship*, Vox (July 18, 2018, 11:20 AM), <https://www.vox.com/2018/7/18/17561538/denaturalization-citizenship-task-force-janus>.

11. This termination is currently being litigated. See *Casa De Maryland v. U.S. Dep’t of Homeland Sec.*, 284 F. Supp. 3d 758 (D. Md. 2018), *appeal filed* *Casa de Maryland v. DHS*, Nos. 18-1521, 18-1522 (4th Cir. Sept. 1, 2018).

12. Royce Murray, *TPS Is Extended for Somalia, Leaving Only 4 of 10 Designations Intact*, AM. IMMIGR. COUNCIL: IMMIGR. IMPACT (July 20, 2018), <http://immigrationimpact.com/2018/07/20/tps-extended-somalia-designations/> (“Although the effective dates of those terminations were delayed by 12 or 18 months, more than 310,000 TPS holders are now on a path to losing their status altogether and will be at risk of deportation. That leaves only Somalia, South Sudan, Syria, and Yemen with TPS, which includes approximately 8,800 beneficiaries.”).

13. See Tanya Arditi, *RELEASE: U.S. Would Lose \$164B in GDP Over 10 Years If TPS Holders from El Salvador, Honduras, and Haiti Were Removed from Labor Force, Finds New CAP Analysis*, CTR. FOR AM. PROGRESS (Oct. 20, 2017), <https://www.americanprogress.org/press/release/2017/10/20/441213/release-u-s-would-lose-164b-in-gdp-over-10-years-if-tps-holders-from-el-salvador-honduras-and-haiti-were-removed-from-labor-force-finds-new-cap-analysis/>.

President's second Executive Order temporarily suspending entry of nationals from six predominantly Muslim countries, suspending for 120 days the United States Refugee Admissions Program ("US-RAP"), and decreasing refugee admissions for 2017 by more than half.<sup>14</sup> The Committee filed an *amicus curiae* brief along with several other *amici*. The Fourth Circuit held that a nationwide preliminary injunction was warranted, but the order was later vacated following the Executive Order's expiration "by its own terms" on September 24, 2017.<sup>15</sup>

On October 5, 2017, following the Trump Administration's decision to roll back DACA, the Lawyers' Committee, together with CASA de Maryland and a coalition of other immigrant rights organizations and individual recipients and applicants of the DACA program, sued the federal government for unjustly and illegally ending the program. The lawsuit argues that the government did not follow proper procedures in ending the program and was instead motivated by an unconstitutional racial animus against Mexican and Central American DACA beneficiaries. It seeks to reinstate DACA and protect the privacy of individuals who were induced to submit sensitive personal information to immigration officials when they applied.<sup>16</sup>

In addition, on October 4, 2017, the Lawyers' Committee and Wiley Rein LLP filed a Fifth Amendment complaint in the U.S. District Court for the Western District of Virginia on behalf of immigrants detained in the Shenandoah Valley Juvenile Center.<sup>17</sup> The complaint seeks to remedy a range of violations of the U.S. Constitution, including the systemic and routine denial of necessary mental health care, discrimination based on race and national origin by staff, excessive force, and the extreme and inappropriate use of restraints and seclusion in the Center.<sup>18</sup> The complaint seeks an injunction from the court to reform the practices at the Center.<sup>19</sup> The Center houses approximately 30 immigrant children, and is one of only two secure detention facilities for immigrant children in the country.<sup>20</sup> Each of the

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14. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 574 (4th Cir. 2017), *vacated*, 138 S. Ct. 353 (2017).

15. *Int'l Refugee Assistance Project v. Trump*, 876 F.3d 116, 119 (4th Cir. 2017) (citing Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017)).

16. *See Casa De Maryland*, 284 F. Supp. 3d at 762–63, 778–79.

17. *See John Doe, et al. v. Shenandoah Valley Juvenile Ctr. Comm'n*, No. 5:17-cv-00097, ECF No. 1 (W.D. Va., Oct. 4, 2017).

18. *Id.* at 1.

19. *Id.* at 24.

20. *Id.* at 6, 16.

young people in the facility entered the United States escaping violence in their home countries, predominantly in Mexico and Central America.<sup>21</sup>

#### B. Local Advocacy

In 2004, the Lawyers' Committee helped pass the D.C. Language Access Act of 2004, which was one of the first in the country. They spearheaded a coalition of grassroots and legal organizations from the community to draft and promote the legislation through campaigns, testimony before the D.C. council, and by working with D.C. council members. The law includes strong provisions requiring local government to service immigrants in the languages that they speak. The Act "obligates the DC government to provide equal access and participation in public services, programs, and activities for residents of the District of Columbia who cannot (or have limited capacity to) speak, read, or write English."<sup>22</sup>

The Lawyers' Committee has also been active in local policy issues. For example, on December 6, 2016, the Lawyers' Committee submitted testimony in support of the D.C. Council's Resolution Regarding Federal Immigration Raids (2016 PR21-0617), which was introduced in response to the escalating fear felt by the D.C. immigrant community regarding the pervasive anti-immigrant rhetoric that has characterized politics in recent times.<sup>23</sup> The Lawyers' Committee's testimony urged the D.C. Council to pass key legislation that would provide stronger protection to immigrant residents.

#### C. Lawyer Training

In 1978, the Project began training lawyers to provide pro bono representation to individuals in deportation proceedings or facing civil rights violations related to their national origin or non-citizen status. The training was initially provided to several hundred lawyers. Today, the Lawyers' Committee's achievements are largely due to the collaboration between Committee staff and the thousands of lawyers from

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21. *Id.* at 1.

22. See OFFICE OF HUMAN RIGHTS, D.C., *Know Your Rights: Language Access*, <https://ohr.dc.gov/service/know-your-rights-language-access> (last visited Oct. 7, 2018) (summarizing the purpose of D.C. Code Mun. Regs. tit. 4 § 1201 (LexisNexis 2018)).

23. See Matthew K. Handley et al., *The Committee Submits Written Testimony in Support of Sense of the Council Regarding Federal Immigration Raids Resolution of 2016 PR21-0617*, WASH. LAW. COMM. (Dec. 6, 2016), <http://www.washlaw.org/news-a-media/537-testimony-pr21-0617>.

over 100 law firms in the D.C. area who have given generously of their pro bono time.

#### D. Employment Discrimination

The Lawyers' Committee has been involved in a number of employment discrimination cases involving immigrant workers. In *Montoya v. S.C.C.P. Painting Contractors*,<sup>24</sup> the Lawyers' Committee and co-counsel Pillsbury Winthrop Shaw Pittman LLP obtained a consent decree, approved by the Maryland District Court, against S.C.C.P. Painting Contractors, which agreed to pay \$200,000 in unpaid wages, damages, and attorneys' fees to immigrant workers who had claimed wage payment abuse by the company.<sup>25</sup> The Lawyers' Committee and co-counsel had filed a collective and class action against the area painting company on February 21, 2007, in Maryland District Court for engaging in a uniform and systematic scheme of wage payment abuse against their immigrant employees for work performed throughout Washington, D.C., and Maryland.<sup>26</sup> The case established important precedent in the Fourth Circuit on January 14, 2008 when the District Court of Maryland ruled, in a published decision, that an individual's immigration status is irrelevant in a Fair Labor Standards ("FLSA") action.<sup>27</sup> The court held that the protections provided by the FLSA are available to citizens and undocumented immigrants, regardless of immigration status. This result will help protect thousands of exploited immigrant workers in the future.

In *Lopez v. NTI*,<sup>28</sup> the Committee co-counseled with Brown Goldstein Levy LLP and CASA of Maryland, and successfully represented Plaintiffs with limited proficiency in English who had claims for unpaid minimum, overtime, and promised wages after digging trenches and installing fiber-optic cable for the benefit of Verizon. To date, the litigation has resulted in a partial settlement of \$105,000.<sup>29</sup> This amount covers a portion of the workers' unpaid promised wages as well as attorneys' fees and costs.<sup>30</sup>

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24. *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569 (D. Md. 2008).

25. *Id.* at 582.

26. Complaint at 2, *Montoya v. S.C.C.P. Painting Contractors, Inc.* 530 F. Supp. 2d at 746, 749 (D. Md. 2008).

27. *Montoya*, 530 F. Supp. 2d at 749.

28. *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471 (D. Md. 2010).

29. *Id.* at 474.

30. *Id.*

E. Housing Discrimination

The Lawyers' Committee has had particular success in its work challenging housing discrimination against immigrants. In *Torres v. District of Columbia*,<sup>31</sup> the Lawyers' Committee filed a class action lawsuit against the D.C. Department of Human Services alleging violations of language access requirements.<sup>32</sup> The suit resulted in a landmark settlement against the D.C. Department of Human Services.<sup>33</sup>

In *2922 Sherman Avenue Tenants Ass'n v. District of Columbia*,<sup>34</sup> the Lawyers' Committee, together with Relman & Dane PLLC, Jenner & Block LLP, and Tycko & Zavareei LLP, obtained a settlement worth \$700,000 on behalf of twenty-four tenants of the Columbia Heights/Mt. Pleasant Neighborhood alleging discrimination on the basis of national origin.<sup>35</sup> The settlement resolved the tenants' claims that District officials had selectively enforced housing codes when they condemned large apartment buildings in predominantly Hispanic neighborhoods and forced tenants to move, under the guise of "code enforcement," with little or no notice to the tenants, and no relocation assistance.<sup>36</sup>

In *Equal Rights Center v. City of Manassas*,<sup>37</sup> the Lawyers' Committee and co-counsel, Beveridge & Diamond PC, filed a lawsuit in the U.S. District Court for the Eastern District of Virginia claiming that the City had violated the U.S. Constitution, the Federal Fair Housing Act, and federal and state civil rights laws to target Hispanic residents and by engaging in illegal harassment, intimidation, and coercion based on national origin and familial status.<sup>38</sup> The complaint further alleged that Manassas City Public Schools violated the U.S. Constitution, the Federal Fair Housing Act, and federal and state civil rights laws by secretly disclosing confidential student records to the

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31. *Torres v. District of Columbia*, No. 1:15-cv-01766 (D.D.C. Oct. 21, 2015).

32. Def. Notice of Removal at 2, *Torres*, No. 1:15-cv-01766.

33. Settlement Agreement, WASH. LAW. COMM., [http://www.washlaw.org/pdf/dhslan\\_settlement\\_11.29.16.pdf](http://www.washlaw.org/pdf/dhslan_settlement_11.29.16.pdf) (last visited Oct. 7, 2018).

34. *2922 Sherman Ave. Tenants' Ass'n v. D.C.*, 444 F.3d 673 (D.C. Cir. 2006).

35. Sue Anne Pressley Montes, *City to Pay \$700,000 in Settlement with Hispanic Tenants*, WASH. POST (Dec. 14, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/13/AR2006121302518.html>.

36. *Id.*

37. *Equal Rights Ctr. v. City of Manassas*, No. 1:07-cv-01037 (E.D. Va. Oct. 16, 2007).

38. Complaint at 2, 15, *Equal Rights Ctr. v. City of Manassas*, No. 1:07-cv-01037 (E.D. Va. Oct. 16, 2007).

City to target Hispanic families for discriminatory zoning actions.<sup>39</sup> In September 2008, the parties reached a settlement agreement which included expansive new protections for residents related to the City's residential inspections.<sup>40</sup> As part of the settlement, the City and the School Board agreed to pay \$775,000 to resolve all the plaintiffs' claims of damages, attorneys' fees, and administrative costs relating to the lawsuit.<sup>41</sup>

#### F. Education

The Lawyers' Committee has also been actively involved in cases involving discrimination of immigrants in education. In *Horne v. Flores*,<sup>42</sup> the Lawyers' Committee filed an *amicus curiae* brief in a case alleging that the State of Arizona was violating Equal Educational Opportunities Act ("EEOA") by failing to take appropriate action to overcome language barriers.<sup>43</sup> The Supreme Court ultimately held that a statewide injunction was not warranted, and that the district court must consider factual and legal challenges that may warrant relief on remand.<sup>44</sup>

In a seminal case, *Plyler v. Doe*,<sup>45</sup> the Supreme Court affirmed a Fifth Circuit Court of Appeals decision that held unconstitutional a Texas statute denying the children of undocumented immigrants access to free public education.<sup>46</sup> The Project participated in the Supreme Court as well as in the Court of Appeals. In the Fifth Circuit, the Project joined with the Bishop of the Episcopal Diocese of Dallas to file a brief as *amici curiae*.<sup>47</sup> The Project and the Diocese argued that the state's denial of basic education to undocumented immigrant children violated both the Due Process and Equal Protection Clause

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39. *Id.* at 16.

40. *Manassas City Council Approves Settlement of Civil Rights Lawsuit*, EQUAL RIGHTS CTR., (Sept. 23, 2008), [https://equalrightscenter.org/pr-archives/2008/07-09.23.08\\_Manassas\\_City\\_Council\\_Approves\\_Settlement\\_of\\_Ci.pdf](https://equalrightscenter.org/pr-archives/2008/07-09.23.08_Manassas_City_Council_Approves_Settlement_of_Ci.pdf).

41. *Id.*

42. *Horne v. Flores*, 557 U.S. 433 (2009).

43. Brief of Amici Curiae Washington Lawyers' Committee for Civil Rights and Urban Affairs Immigrant and Refugee Rights Project, DC Language Access Coalition, and Latin American Youth Center, in Support of Respondents Miriam Flores and Rosa Rzeslawski, at 4–6, Thomas C. Horne, Superintendent, Arizona Public Instruction v. Miriam Flores, et al., 2009 WL 815217.

44. *Horne*, 557 U.S. at 470–72.

45. *Plyler v. Doe*, 457 U.S. 202 (1982).

46. *Id.* at 230.

47. Brief for the Washington Lawyers' Committee for Civil Rights Under Law and the Bishop of the Episcopal Diocese of Dallas, Texas, as Amici Curiae in Support of Appellees, *Plyler v. Doe*, 1981 WL 389999 (5th Cir. 1981).

of the Fourteenth Amendment.<sup>48</sup> In the Supreme Court, the Project filed an *amicus* brief together with the Bishop of the Episcopal Diocese of Dallas. The brief focused primarily on the argument that the statute was unconstitutional under any standard of review because it was not rationally related to any legitimate State purpose.<sup>49</sup> The Project argued that Texas could not justify the statute merely by adopting a federal purpose.<sup>50</sup> In a 5–4 decision, the Supreme Court affirmed the decision of the Fifth Circuit.<sup>51</sup> Justice Brennan’s opinion for the Court began by recognizing that undocumented immigrants may claim the benefit of the Fourteenth Amendment’s guarantee of equal protection, and holding that the Texas statute did not pass the rational basis test.<sup>52</sup>

On the local level, the Lawyers’ Committee testified before the D.C. Council in July 2015 regarding the “Language Access for Education Amendment Act of 2015,” which seeks to increase language access in public schools and would better serve the immigration population of students across the District of Columbia.<sup>53</sup>

#### G. Refugees and Political Asylum

Upon the Project’s establishment in 1978, it became involved in the administrative proceedings that led to the promulgation of new regulations governing the procedures to be used by the then Immigration and Naturalization Service (“INS”) in determining political asylum claims asserted by immigrants at ports of entry or in the United States. For most of 1979 through March 1980, the Project was involved in a coalition effort to enact the Refugee Act of 1980 and to include within the Act provisions that, in substance, would make it consistent with the U.N. Convention and Protocol Relating to the Status of Refugees. The Project has also been involved in efforts to secure extended voluntary departure on behalf of certain groups.

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48. *Id.* at 5–7.

49. Brief for the Washington Lawyers’ Comm. for Civil Rights Under Law & the Bishop of the Episcopal Diocese of Dallas, Texas, as Amici Curiae in Support of Appellees, at 11, *Plyler v. Doe*, 457 U.S. 202 (1982).

50. *Id.* at 13.

51. *Plyler*, 457 U.S. at 230.

52. *Id.* at 210–11.

53. COMM. ON EDUC., COUNCIL OF THE DISTRICT OF COLUMBIA, REPORT ON BILL 21-0066, THE “LANGUAGE ACCESS FOR EDUCATION AMENDMENT ACT OF 2015”, B. 21-0066, 21st Sess., at 1, 18 (2015).

In addition to political asylum representation, the Project provided assistance to approximately 350 cases<sup>54</sup> involving post-asylum issues and also responded to approximately 800 telephone calls per month.<sup>55</sup> The Project helped its successful asylees bring their families to the United States. The Project also helped individuals and families apply for legal permanent residency (green cards), obtain required travel documents, apply for citizenship, and obtain fee waivers when eligible. As a result of the hands-on experience gained during this five-year initiative, the Project provided quarterly legal updates and individual assistance to its cadre of volunteer lawyers.

One of its success stories was the reunification of an Ethiopian family. The principal asylee was able to bring their daughter to the United States after a lengthy process, but in the meantime, the daughter gave birth. The quirk in the law was that the asylee's child was eligible to enter the U.S. as asylees, but not the grandchild.<sup>56</sup> The Project succeeded in reunifying the grandchild with his family and avoided a lengthy wait under the family visa process.

The Project responded to approximately eighty telephone calls a month in Spanish, French and other languages through a language line funded by the D.C. Bar. The Project referred callers to other immigration providers including members of the CAIR coalition, government agencies, and private low-cost attorneys. In addition, the Project provided immigration forms, and helped individuals obtain case processing times and court dates.

In *Haitian Refugee Center v. Smith*,<sup>57</sup> a 16-count complaint seeking preliminary and permanent injunctive relief was filed against INS District Office No. 6, alleging that the Government's program regarding Haitian asylum-seekers was designed to achieve mass deportation of Haitians in violation of their rights under the Refugee Protocol, the Constitution, the Immigration and Nationality Act and INS regulations.<sup>58</sup> The Project had an active role in this case. The District Court enjoined the Government from expelling or deporting any members of the class and from further processing of asylum request until the Government submitted, and the court approved, a plan for reproces-

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54. The number of post-asylum cases was provided to the author and based on the recollection of the members and/or associates of the Washington Lawyers' Committee.

55. The number of telephone calls is an estimate of a ten-year period, 1995 to 2005, during which the Project was very active in this aspect of work.

56. This information was provided to the author by the Washington Lawyers' Committee.

57. *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982).

58. *Id.* at 1026–28.

sing the plaintiffs' applications.<sup>59</sup> The Court of Appeals affirmed the aspects of the lower court's decision that found substantial due process violations in the administrative procedures employed by the INS in processing the Haitians' asylum applications.<sup>60</sup> In addition, the Project provided assistance to hundreds of Haitian asylum applicants in proceedings before the Board of Immigration Appeals. Project volunteers worked directly with immigration rights organizations and individual immigration attorneys throughout the country on this matter.

#### H. The *Ayuda* Case

In 1988, Arent Fox LLP was approached by the Committee for help in representing four immigrant rights organizations—Ayuda, Inc.; the Latin American Youth Center; the Ethiopian Community Center, Inc.; and the Mexican American Legal Defense and Educational Fund—in a challenge to the implementation of the Immigration Reform and Control Act of 1986 (“IRCA”).<sup>61</sup> Under that statute, an amnesty program was opened briefly for “undocumented aliens”—defined as immigrants who had entered the country legally as non-immigrants, but whose status subsequently became unlawful through the passage of time or some violation such as unauthorized employment—to come forward to seek legalization.<sup>62</sup> The statute set out the requirements for amnesty, one of which was that “the alien’s unlawful status was known to the Government as of [January 1, 1982].”<sup>63</sup> The INS promulgated regulations which defined “known to the government” as “known to the INS.”<sup>64</sup> The immigrant rights organizations contended that this interpretation was too narrow and that “known to the government” should mean known to any agency of the government.<sup>65</sup>

In consultation with the Arent Fox attorneys involved, the Lawyers' Committee was involved in a significant effort geared towards proposing inventive methods of defining how an applicant could prove he or she was “known to the government.” By advocating for a broad

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59. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 532–33 (S.D. Fla. 1980).

60. *Smith*, 676 F.2d at 1041.

61. Immigration Reform and Control Act of 1986, Pub.L. 99–603, 100 Stat. 3359 (1986).

62. *Ayuda, Inc. v. Meese*, 687 F. Supp. 650, 652 (D.D.C. 1988).

63. *Id.* at 652–53.

64. *Id.* at 651.

65. *Id.* The reason for the requirement was to show that the immigrant had in fact been in the United States as of January 1, 1982 and that his or her status had become unlawful as of that date.

definition of the concept, the Lawyers' Committee was able to substantially increase the number of successful applications that likely would have been denied otherwise.

A team of Arent Fox attorneys, working with attorneys from the Lawyers' Committee, filed a lawsuit—on behalf of the four immigrant rights organizations and five “Doe” plaintiffs—in the United States District Court for the District of Columbia requesting a declaratory judgment and injunctive relief. The case was assigned to Judge Stanley Sporkin of that Court, who held daily hearings on the matter and, in March 1988, issued a preliminary injunction preventing the INS from enforcing the regulation which limited the number of otherwise eligible immigrants who could seek legalized residence status.<sup>66</sup> Subsequently, the Judge issued approximately thirty Supplemental Orders, some of which established a procedure whereby the undocumented aliens could file an application with Arent Fox<sup>67</sup> to be able to present their cases before a Special Master appointed by Judge Sporkin.<sup>68</sup> The Spanish-language television and radio stations announced this in their news broadcasts, and the next day the Arent Fox switchboard was flooded with calls from Spanish-speaking individuals seeking information and application forms. After the Arent Fox telephone system proved inadequate to the task, questions were referred to the various agencies that then stepped in and provided the personal assistance requested, and a process was established by immigrant organizations to assist foreign nationals in obtaining the benefit. The Lawyers' Committee subsequently assembled a coalition of immigrants' rights groups to help with amnesty applications.

Judge Sporkin's original orders were not appealed by the Government (indeed the Government acquiesced in the rulings). The Judge and the Special Master held daily hearings to refine the process. Because of those hearings, the Arent Fox and Lawyers Committee lawyers were instrumental in expanding the coverage of the initial ruling to other undocumented immigrants.

Later, eleven new organizations filed a motion to intervene in the case and raised issues that had not previously been considered, namely a requirement of the former Immigration and Nationality Act, 8 U.S.C. § 1305 (1976), *amended by* 8 U.S.C. § 1305 (1982), that immigrants who remained in the United States for more than 30 days file

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66. *Id.* at 666.

67. *Id.* at 673.

68. *Ayuda, Inc. v. Meese*, 700 F. Supp. 49, 51 (D.D.C. 1988).

address change reports to the Attorney General on a quarterly basis. Judge Sporkin again ruled for the plaintiffs but this aspect of the case was appealed to the United States Court of Appeals for the D.C. Circuit.<sup>69</sup> The Circuit, in a split decision, concluded on this other aspect that the District Court lacked jurisdiction.<sup>70</sup> The case was remanded to Judge Sporkin who attempted to interpret what the Circuit had said,<sup>71</sup> but the remand was appealed to the Circuit Court and the Circuit Court again reversed the District Court.<sup>72</sup> Arent Fox and the Lawyers' Committee filed at least two *certiorari* petitions with the United States Supreme Court involving this other aspect of the case. A similar case was before the Supreme Court at the same time and the Court ultimately found that the District Courts lacked jurisdiction.<sup>73</sup> The Supreme Court remanded *Ayuda* for further consideration in light of its ruling in *McNary*.<sup>74</sup> The Circuit Court on remand ruled in favor of the Government, though again by a split decision.<sup>75</sup>

As a result of the *Ayuda* litigation, an estimated 50,000 foreign nationals were allowed to legalize their resident status and stay in the country.<sup>76</sup> On his retirement from the bench in 2000, Judge Sporkin called the *Ayuda* case one of his most memorable cases while serving on the bench.<sup>77</sup> He was proud to have been able to mete out justice to these immigrants.

## I. Other Immigration Litigation and Advocacy Initiatives

In 1979, the Project addressed the failure of the INS to issue work authorizations in a timely manner to immigrants lawfully permitted to work. As a result of the Project's meetings with the Department of Justice ("DOJ"), DOJ issued new guidelines requiring timely issuance of work authorizations to applicants for adjustment of status and

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69. *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1329 (D.C. Cir. 1989), *vacated*, 498 U.S. 1117 (1991).

70. *Id.* at 1346.

71. *Ayuda, Inc. v. Thornburgh*, 744 F. Supp. 21, 22 (D.D.C. 1990).

72. *Ayuda, Inc. v. Thornburgh*, 919 F.2d 153 (D.C. Cir. 1990).

73. *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 497-99 (1991).

74. *Ayuda, Inc. v. Thornburgh*, 498 U.S. 1117 (1991).

75. *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C. Cir. 1991).

76. This information was provided to the author and is based on the personal recollections of those that worked on the case. See generally SUSANNE JONAS & NESTOR RODRÍGUEZ, *GUATEMALA-U.S. MIGRATION: TRANSFORMING REGIONS* (2014) (discussing migrant rights advocacy in the United States and the various victories affecting Guatemalan and Salvadoran asylum seekers).

77. This information was provided to the author and is based on the personal recollections of those that worked on the case.

waivers of excludability, and initiated rulemaking to regulate the procedures and standards for the issuance of work authorizations to immigrants.

In the early 1990s, the Lawyers' Committee advocated heavily in favor of granting Temporary Protected Status ("TPS") to Guatemalan refugees due to the human rights conditions in Guatemala. In 1993, the Lawyers' Committee submitted an extensive report to the U.S. Attorney General describing the legal and factual basis for granting TPS to Guatemalan refugees in the United States.<sup>78</sup> The effort was ultimately unsuccessful, however the U.S. Attorney General at the time, Janet Reno, vowed that the Department of Justice would monitor the situation in Guatemala and would reassess its determination regarding TPS at regular intervals.<sup>79</sup> The Lawyers' Committee's work laid the basis for fairer treatment of Guatemalans in asylum and removal proceedings, along with other Central Americans who received TPS.

In 2015, the Project spearheaded an initiative to assist Nepali nationals seeking TPS. On April 25, 2015, a massive earthquake hit Nepal, causing the deaths of more than 10,000 people, and leaving the country in a state of disaster.<sup>80</sup> The Department of Homeland Security designated Nepal for TPS, allowing eligible Nepalis to stay in the United States, legally work and attend school until they could safely return home. In response to that designation, the Lawyers' Committee, together with other community organizations, launched an initiative to assist with filing for TPS and pairing qualified applicants with pro bono representation.

#### J. CAIR Coalition

A further outgrowth of the Lawyers' Committee immigration law work is the Capital Area Immigrants' Rights ("CAIR") Coalition. CAIR Coalition was originally started as a project of the Lawyers' Committee, but became an independent non-profit organization on January 1, 2000. In the last decade, CAIR Coalition has more than doubled in size and has added two new programs to complement our original work serving detained adult immigrants. These programs in-

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78. Report on file with Wash. Law. Comm.

79. Letter on file with Wash. Law. Comm.

80. Kathryn Reid, *2015 Nepal earthquake: Facts, FAQs, and how to help*, WORLD VISION (Apr. 3, 2018), <https://www.worldvision.org/disaster-relief-news-stories/2015-nepal-earthquake-facts>.

clude the Detained Children's Program, which assists unaccompanied immigrant children in the custody of the Office of Refugee Resettlement in juvenile facilities in Maryland and Virginia, as well as the Virginia Justice Program, which educates public defenders on the immigration consequences of crimes with the goal of lessening the disparate impact of criminal proceedings on non-U.S. citizens.

Additionally, CAIR Coalition operates a Detailed Adult Program, which helps detained immigrants learn to understand the Immigration Court and deportation process so they can make better-informed decisions about their cases. CAIR Coalition also runs an Immigration Impact Lab, which aims to respond proactively to the injustices that the detained immigrant men, women, and children increasingly face in the American immigration detention and deportation system through appellate impact litigation. Finally, CAIR Coalition runs the *Comunidades Unidas* or Community Conversations Project, which is designed to provide holistic and culturally competent workshops on immigrants' rights, defenses against deportation, as well as rights against gender and domestic violence.

### III. REPORTS ISSUED BY THE LAWYERS' COMMITTEE ON ISSUES AFFECTING THE IMMIGRANT COMMUNITY IN WASHINGTON, D.C.

Over the past two decades, the Lawyers' Committee, together with several law firms, has issued numerous reports on issues affecting the Latino community in Washington, D.C., including educational opportunities, employment discrimination, access to health care, trends affecting Latinos and immigrants in rental housing in the District of Columbia, and civil rights. Notably, the Committee prepared a report after the 1991 Mount Pleasant Riots, when rioting had broken out in the Mount Pleasant neighborhood of Washington, D.C. in response to a police officer having shot a Salvadoran man in the chest following a Cinco de Mayo celebration.<sup>81</sup> The U.S. Commission on Civil Rights relied upon these reports heavily in a report on the state of Latinos in Washington, D.C.

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81. Emily Friedman, *Mount Pleasant Riots: May 5 Woven into Neighborhood's History*, WAMU 88.5 (May 5, 2011), [https://wamu.org/story/11/05/05/mount\\_pleasant\\_riots\\_may\\_5\\_woven\\_into\\_neighborhoods\\_history/](https://wamu.org/story/11/05/05/mount_pleasant_riots_may_5_woven_into_neighborhoods_history/).

The Committee then prepared and released a new series of reports ten years later in 2001–2002.<sup>82</sup> The Civil Rights Review Panel issued its report, “*A Place At The Table: Latino Civil Rights Ten Years After The Mount Pleasant Disturbances*,”<sup>83</sup> and provided the Conclusions and Recommendations based on the reports. The issues covered included the following: police abuses and interaction with the community, barriers to homeownership, rental housing barriers, employment discrimination, access to health services, immigration, education, and access to justice. The Review Panel stated that to move a Latino civil rights agenda forward, sustained advocacy was needed, as well as political will in governmental policymakers to make the changes needed to correct civil rights abuses and improve respect for the civil rights of Latinos.<sup>84</sup>

In recent years, special attention has been devoted to the concerns of day laborers in Washington, D.C. and surrounding jurisdictions. On October 29, 2008, the Lawyers’ Committee issued a report, *Wages Denied: Day Laborers in the District of Columbia*, in conjunction with Arent Fox, which documented the abuse and exploitation of D.C.’s day laborers, and recommended creating an indoor workers’ center where day laborers could connect with prospective employers.<sup>85</sup> The Committee also recommended that the D.C. Office of Wage-Hour Compliance modify its policies and practices to better address the circumstances under which vulnerable day laborers are cheated out of minimum and overtime wages.

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82. These reports were provided to the author by the Washington Lawyers’ Committee and include “‘A Piece of America’ Opportunities for Homeownership for Latinos and Latino Immigrants in the Washington, D.C. Metropolitan Area,” “Educational Opportunities for Latinos in the District of Columbia: 1992–2002,” “Employment Discrimination Against Latinos in the Washington, D.C. Area,” “Latino Access to Health Care in Washington, D.C.,” “The Police and the Latino Community: Bridging the Discrimination Gap,” “Access to Justice Report,” “The District of Columbia’s Latino Population and Immigration Law: Unresolved Problems, 1992–2002,” and “Rental Housing: Trends Affecting Latinos and Immigrants in the District of Columbia Metropolitan Area.” The following law firms collaborated on these reports: Arnold & Porter; Clifford Chance Rogers & Wells; Gibson, Dunn & Crutcher; Hogan & Hartson; Holland & Knight; Howrey Simon Arnold & White; Willkie, Farr and Gallagher; Vinson & Elkins; and Weil Gotshal & Manges.

83. SAUL SOLORZANO & YVONEE VEGA MARTINEZ, *A PLACE AT THE TABLE: LATINO CIVIL RIGHTS TEN YEARS AFTER THE MOUNT PLEASANT DISTURBANCES: CONCLUSIONS AND RECOMMENDATIONS OF THE CIVIL RIGHTS REVIEW PANEL (2002)* (on file with WASH. LAW. COMM.).

84. *Id.* at 37.

85. *An Interview with Lisa A. Estrada, Lead Author of Wages Denied: Day Laborers in the District of Columbia*, UPDATE, Spring 2009, at 7.

#### IV. THE PATH FORWARD—PRESSING ISSUES

Many pressing issues face immigrants today. Notably, for those who have lived and worked in the United States lawfully under the provisions of TPS or DACA, their ability to remain in the United States is uncertain. Congressional action is likely needed to provide these individuals with continued status in the United States. In addition, the Trump Administration has stepped up enforcement actions, including employment worksite raids, notices of inspection, and harsh detention and removal policies. These actions have created an environment that is more hostile to immigrants than we have seen in recent years. Other pressing issues include DHS's willingness to separate families, the Trump Administration's plans to build a border wall, and efforts to curtail family immigration.

The work of the Project remains more important than ever in these difficult times for our neighbors who are immigrants.

# Washington Lawyer's Committee 50th Anniversary: Disability Rights Project

JOSEPH D. EDMONDSON, JR.\*

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## INTRODUCTION

### I. BACKGROUND OF THE COMMITTEE'S DISABILITY RIGHTS PROJECT

The Washington Lawyers' Committee has established itself as a major advocate for the rights of people with disabilities. With its Disability Rights Project, the Committee has been able to work with this community to establish important landmarks and critical victories by improving access to public accommodations and state and local government services for people with disabilities. This area of civil rights advocacy and litigation, although more recent, has achieved remarkable successes<sup>1</sup> in the recent history of the Committee.

In 1990, Congress passed the landmark Americans with Disabilities Act ("ADA").<sup>2</sup> By securing for people with disabilities the same access to public accommodations and services that others take for granted, the ADA ensured that people with disabilities would no longer be denied their rights to choose where to shop, eat, and be entertained, among other critical facilities of daily living.<sup>3</sup> In the fall of 1992, after finding that the ADA aligned with its principles of fighting for disenfranchised persons, the Committee assisted in forming a new client organization, the Disability Rights Council of Greater Washington. The mission of the Disability Rights Council ("DRC") was to focus on a range of educational and advocacy programs covered by the ADA, as well as other statutory protections affecting people with disabilities. The Committee began its work with the DRC by providing it with general counsel and pro bono litigation support to advance the rights of people with disabilities. The early cases discussed below were instrumental in helping the DRC and the Committee formulate litigation strategies and set precedent for greater disability rights achievements in future matters. These strategies and precedent in turn improved access to government services, medical providers, and prisons, as well as important public accommodations such as stores, restaurants, hotels, and entertainment venues.

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1. The Committee has litigated many other extraordinarily important cases to remedy housing or employment discrimination against persons with disabilities. These are outlined in the articles discussing the Committee's Fair Housing and Employment projects.

2. Americans with Disabilities Act, Pub. L. No., 101-336, 104 Stat. 327, (1990) (codified as amended at 42 U.S.C. § 12101).

3. See 42 U.S.C. § 12101(a)(3) (finding that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.").

## *Disability Rights Project*

Several years later, in response to its growing disability rights caseload, the Committee established a dedicated Disability Rights Project to litigate the DRC and other disability rights cases. The 1996 formation of the Committee's Disability Rights Project marked the beginning of the Committee's growing emphasis on enforcing new rights established by the ADA. In 2005, the DRC merged with the Equal Rights Center ("ERC"), forming what many regarded as the premier civil rights investigative agency in the Washington, D.C. area.<sup>4</sup> The ERC's core mission was—and to this day remains—to identify unlawful and unfair discrimination through civil rights testing.<sup>5</sup> The ERC used focused investigations and testers to identify systemic denials of disability rights.<sup>6</sup> Together, the Committee's Disability Rights Project and its client the DRC (later the ERC) have been able to substantially change the lives of people with disabilities in the D.C. metropolitan area and throughout the country.

The Committee credits much of its success over the years to its committed staff and volunteer attorneys known as cooperating counsel. Beyond simply dedicating their time, energy, and resources, these attorneys had the drive, willingness, and passion to challenge the status quo and materialize the ADA's promises for a multitude of people. The litigation model used by the Committee since early in its history proved especially useful in the relatively new and untested area of disability rights. The Committee staff working with the Project, along with their close colleagues at the DRC and ERC concentrated a great deal of issue expertise. The partnership between cooperating counsel and expert Committee staff permitted a high degree of leverage, spreading the Committee's limited staff resources across a wide array of actively investigated and/or litigated matters.

Elaine Gardner served as director of the Disability Rights Project from 1996 to 2013. In her role, Elaine brought both a broad background in disability rights laws and a warm relationship with the deaf community to the Committee. From 2014 to August 2018, Deepa Goraya, Associate Counsel at the Committee, continued this work, along with many Committee staff members and cooperating counsel, to enforce the rights of people with disabilities, focusing in particular on improving the accessibility of websites, mobile applications, touch

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4. EQUAL RIGHTS CENTER, ABOUT US, <https://equalrightscenter.org/about-us/> (last visited Oct. 30, 2018).

5. *Id.*

6. *Id.*

screen kiosks, and other digital technology for individuals who, like her, are blind. The Committee's energetic and committed clients have also substantially enhanced the Project's ability to achieve its successes. Marc Fiedler, a prominent District of Columbia trial attorney who uses a wheelchair, has played a crucial leadership role as the Chairman of the Disability Rights Council of the ERC, and served as named plaintiff in many of the Committee's cases. The ERC innovated research and investigation techniques, which formed the basis for many of the Committee's fair housing and disability rights cases. The Committee's disability rights successes could not have been achieved without the contributions and commitment of these, and many other, individuals.

## II. LEGAL LANDSCAPE: THE AMERICANS WITH DISABILITIES ACT

The ADA was “the nation’s first comprehensive civil rights law addressing the needs of people with disabilities [by] prohibiting discrimination in employment, public services, public accommodations, and telecommunications.”<sup>7</sup> Prior to the ADA, there was widespread and systemic discrimination against people with disabilities. As Robert L. Burgdorf, Jr., regarded by the U.S. Supreme Court as the original drafter of the ADA,<sup>8</sup> wrote:

[C]hildren with disabilities were systematically excluded from American public schools . . . .

State residential treatment institutions for people with disabilities were generally abysmal. Large state facilities, typically located in rural areas with high walls and locked wards that isolated the residents from the rest of society, were primitive and often unsanitary, dangerous, overcrowded and inhumane . . . .

Most public transportation systems made few, if any, accommodations for persons with disabilities, resulting in a transportation infrastructure that was almost totally unusable by people with mobility or visual impairments—a situation that was mirrored in inaccessible private transportation services including taxis, ferries and private buses. Government buildings, public monuments and parks had generally been designed and built without taking into account the

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7. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *The American with Disabilities Act of 1990*, THE 1990s: NEW LAWS, NEW STRATEGIES, <https://www.eeoc.gov/eeoc/history/35th/1990s/ada.html> (last visited Oct. 30, 2018).

8. *Sutton v. United Airlines*, 527 U.S. 471, 484–85 (1999).

possibility that people with disabilities might want or need to use them. Flat or ramped entrances into stores and businesses were the exception rather than the rule. Curb cuts or ramps on sidewalks were extremely rare, often forcing people who used wheelchairs to make their way on streets, where they faced the peril of being hit by motor vehicles.<sup>9</sup>

Nor were there many legal remedies for people who faced discrimination as a result of their disability before the passage of the ADA. The Rehabilitation Act of 1973<sup>10</sup> provided some remedies, but only against entities that receive federal financial support. Similarly, the Fair Housing Act<sup>11</sup> provided some relief, but only for certain cases of housing discrimination, i.e., the failure to provide a “reasonable accommodation” based on a renter’s disability. The framers of the ADA recognized a need for comprehensive legislation to directly address the inequalities faced by people with disabilities, and to extend the protections provided by earlier laws. They therefore leveraged the most advantageous pieces of the existing civil rights statutes to provide broader protection for people with disabilities, resulting in the major provisions of the ADA as it exists today: Title I, which prohibits employment discrimination<sup>12</sup>; Title II, which covers the activities and services of state and local governments<sup>13</sup>; and Title III, which addresses the accessibility of places of public accommodation.<sup>14</sup> The cases discussed in this article were brought by the Committee and primarily litigated under these provisions of the ADA and its implementing regulations, as well as the Rehabilitation Act and the D.C. Human Rights Act.<sup>15</sup>

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9. Robert L. Burgdorf, Jr., *Why I Wrote the Americans with Disabilities Act*, WASH. POST: POSTEVERYTHING (July 24, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?noredirect=on&utm\\_term=.7af6665be8f9](https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?noredirect=on&utm_term=.7af6665be8f9).

10. 29 U.S.C. § 794.

11. 42 U.S.C. §§ 3601–3619.

12. 42 U.S.C. §§ 12111–12117. Title I prohibits discrimination against “a qualified individual with a disability” in application procedures, hiring, advancement and discharge, training, and in other terms and conditions of employment. 42 U.S.C. § 12112(a).

13. 42 U.S.C. §§ 12131–12165. Title II prohibits discrimination against a qualified individual with a disability in services, programs, or activities of a state or local government, or in the departments, agencies, or instrumentalities of a state or local government. 42 U.S.C. § 12132(a).

14. 42 U.S.C. §§ 12181–12189. Title III prohibits discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation. 42 U.S.C. § 12182(a).

15. D.C. Code § 2-1401 (prohibiting various acts of discrimination against people with disabilities).

CASE DISCUSSIONS

I. PUBLIC ENTITIES: PRISONS & PUBLIC SERVICES

A. Prisons

The Committee has secured a number of legal victories that have significantly improved prison conditions for people with disabilities. With both a Disability Rights and a Prisoners' Rights Project, the Committee had broad expertise in both the disability and prisoner rights fields, and was uniquely situated to bring early litigation addressing these important issues. The Committee fought to obtain settlements requiring that a number of prisons install assistive technologies, such as videophones, for deaf and hard-of-hearing inmates. The Committee has also helped to ensure that more sign language interpreters are available in prisons, and that visual notifications and other auxiliary aids are available and used more frequently to improve communication among inmates and correctional officers. The following cases illustrate the important work of the Committee and cooperating counsel on behalf of prisoners with disabilities.

*Minnis v. Virginia Department of Corrections*,<sup>16</sup> was a landmark case filed by the Committee and cooperating counsel as a putative class action on behalf of deaf inmates at the Powhatan Correctional Center in State Farm, Virginia ("Powhatan"). As a result of this settlement, Virginia's was the first major prison system in the United States to install videophones, along with providing other forms of substantial relief. This action continues to serve as a model for correctional facilities throughout the country.

The litigation arose out of the Virginia Department of Correction's ("VDOC") failure to provide inmates who were deaf or hard-of-hearing with adequate means to communicate with individuals outside of the prison. The VDOC provided only outdated text telephone devices, known as teletypewriters or "TTY" machines, which were no longer in use by the general deaf community, and which could not provide the deaf inmates with meaningful access to telephone services. The VDOC also failed to provide adequate access to qualified American Sign Language ("ASL") interpreters at Powhatan for medical appointments, educational and mental health programs, and relig-

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16. *Minnis v. Johnson*, No. 1:10-CV-00096 (E.D.Va. filed Jan 29, 2010). This case is commonly referred to as *Minnis v. Virginia Department of Corrections*.

ious programs in violation of the ADA. The VDOC's policy was to provide one sign language interpreter at Powhatan on only one day a week for six hours, despite having 15–20 deaf individuals in VDOC custody at any given time. Therefore, each of the deaf individuals on average, had only 25 minutes per week during which they could clearly communicate with and understand Powhatan staff, counselors, and medical personnel. The VDOC also refused to provide deaf individuals in its custody with adequate visual notification of daily events and safety announcements. The VDOC compounded these discriminatory practices by concentrating the deaf men in its custody at the medium-security Powhatan facility—even though, in accordance with VDOC guidelines, similarly situated hearing individuals were assigned to lower security facilities, where they were able to enjoy greater freedom.

The settlement, which was finalized in 2010, was a landmark victory that significantly improved the conditions of deaf inmates at Powhatan.<sup>17</sup> As a result of the settlement, the prison became the first major correctional facility in the United States to have a videophone so that deaf inmates could communicate with family and others outside the prison using ASL, which for many deaf people can be their only language. The settlement provided damages to all of the deaf inmates as well as attorney's fees. The settlement also provided the inmates with ASL interpreters two full days a week, sign-language interpretation of rules, disciplinary and release proceedings, medical appointments, and educational and vocational instruction. The settlement also made Video Remote Interpreting ("VRI") services available 24 hours a day for emergency communications, and provided for visual notifications for meals and events.

In *Jarboe v. Maryland Department of Public Safety & Correctional Services*,<sup>18</sup> the Committee, working closely with the National Association of the Deaf, similarly expanded access to services for deaf and hard-of-hearing inmates in Maryland. In 2012, after nearly ten years of complaints to Maryland Department of Public Safety & Correctional Services ("DPSCS") officials and to the U.S. Department of Justice ("DOJ") without success, a group of current and former deaf and hard-of-hearing inmates at DPSCS facilities filed a putative class action lawsuit in federal court in Baltimore, alleging violations of the

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17. WASH. LAW. COMM., 4th Quarter 2010 Q. REP. at 15.

18. *Jarboe v. Maryland Dep't of Pub. Safety & Corr. Servs.*, No. 1:12-cv-00572 (D. Md. filed Feb. 23, 2012).

ADA as well as other federal and constitutional claims. DPSCS facilities had provided inadequate services to the deaf and hard-of-hearing for years, making it impossible for the prisoners to fully participate in the prison system. DPSCS was not providing videophones or updated communication technology to allow deaf and hard-of-hearing inmates to communicate with their loved ones. Deaf and hard-of-hearing inmates were also not provided with appropriate auxiliary services or aids to hear announcements or other alarms, such as meal time alerts, alarms or notifications of other prison activities. Additionally, deaf and hard-of-hearing inmates were unable to participate in prison programs and/or educational courses that could potentially assist in parole hearings, and provide them with job skills that could be transferable to employment outside of prison. This lack of services also impacted the inmates' ability to advocate for themselves in disciplinary proceedings and in the administration of healthcare. For instance, the failure to provide auxiliary aids or ASL interpreters meant that deaf and hard-of-hearing inmates could not understand charges against them in disciplinary proceedings or effectively communicate with healthcare professionals.

Procedurally, this case is noteworthy for the precedent it set regarding the doctrine of vicarious exhaustion. DPSCS and its co-defendants filed motions to dismiss that were denied on March 13, 2013. The decision was a significant one because it was the first in the 4th Circuit and among only a few cases nationwide to apply the doctrine of vicarious exhaustion in the context of prisoner litigation. The court ruled that not every named plaintiff needed to exhaust their claims administratively for every alleged grievance as long as some plaintiffs met the exhaustion requirement under the applicable statute—in this case, the Prison Litigation Reform Act of 1996. Following the decision on the motions to dismiss and some limited discovery, the parties engaged in court-ordered mediation. In 2015, the Committee, cooperating counsel and the National Association of the Deaf, successfully mediated the issues, resulting in a monetary settlement of \$142,500.00 to cover attorney's fees, costs, and damages stipends to the named plaintiffs.<sup>19</sup> A detailed settlement agreement provided for: the installment of videophones and in-cell visual displays for announcements and other alerts; full utilization of pagers and close captioned devices; the provision of ASL interpreters and other auxiliary aids and ser-

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19. WASH. LAW. COMM., 3rd Quarter 2015 Q. REP. at 21.

vices, prompt repair of hearing aids; quarterly meetings with deaf and hard-of-hearing inmates; and appropriate training for staff and prison guards. *Jarboe* was a painstakingly-fought case and one whose outcome was able to benefit not only deaf and hard-of-hearing inmates within the Maryland DPSPS system, but also all incarcerated plaintiffs in the Fourth Circuit.

The Project achieved another significant victory for deaf and hard-of-hearing inmates in *Berke v. Federal Bureau of Prisons*.<sup>20</sup> The Committee and cooperating counsel brought an action against the Federal Bureau of Prisons (“BOP”) on behalf of Larry Berke, a deaf individual who was scheduled to serve time at a federal prison that lacked accommodations for deaf inmates. Mr. Berke asserted that the BOP discriminated against him by depriving him of qualified ASL interpreters and other aids, such as videophone technology, that were necessary for him to communicate upon his future placement into the BOP’s custody. Mr. Berke alleged that the BOP violated the Rehabilitation Act and his rights to due process, free speech, and freedom from cruel and unusual punishment. Mr. Berke argued that he would be unable to communicate with medical staff, healthcare providers, educational instructors, correctional officers, and other members of the institution’s staff because the prison did not have adequate auxiliary aids to allow for effective communication of deaf inmates. He would also be unable to communicate with his deaf family members without the videophone technology. The BOP agreed to transfer Mr. Berke to a different prison within the system and provide a number of accommodations he requested, such as visual alarms, closed-caption televisions, and other accommodations. The court ordered that Mr. Berke be provided access to sign language interpreter services during orientation, medical, disciplinary, and educational activities. Importantly, the court also ordered the BOP to perform a formal analysis to determine whether videophones could reasonably be installed for Mr. Berke’s use without raising security issues. Finally, the court awarded Mr. Berke’s attorney’s fees and costs.<sup>21</sup>

## B. Government Services and Programs

The Committee played an important role in securing increased access to public information and public programs for District of Co-

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20. *Berke v. Fed. Bureau of Prisons*, No 1:12-cv-01347-ESH (D.D.C. filed Aug. 14, 2012).

21. WASH. LAW. COMM., 3rd Quarter 2013 Q. REP. at 19–20.

lumbia residents with disabilities. The Committee has fought to make public activities such as voting, receiving information from online sources, accessing D.C. buildings and services, and even participating in the D.C. Lottery, more accessible to people with disabilities.

In one of the first cases in the nation concerning accessible voting machines and polling places, the Committee and cooperating counsel obtained a settlement of alleged ADA violations in *American Ass'n of People with Disabilities v. District of Columbia Board of Elections and Ethics*.<sup>22</sup> The suit sought to require that D.C. offer accessible voting machines so that voters with visual and manual impairments<sup>23</sup> could vote independently. The suit also sought to guarantee that all polling places in D.C. were accessible to voters with mobility impairments. For example, for many years, D.C. did not make its polling places accessible to people who could not access stairs. The settlement required that D.C. provide voting machines that were accessible to voters who are blind or have manual disabilities at every polling place. It also ensured greater access to D.C.'s polling places for people with mobility impairments. The case marked one of the first victories for voters with disabilities, who until this time had often had to rely upon the indignities and inequities of assistance inside the voting booth, or absentee or curbside balloting, in order to cast their votes. It also demonstrated the effectiveness of close collaboration between the Committee and advocacy groups; in this case, the American Association of People with Disabilities ("AAPD").

The Committee also took up the cause of voting accessibility in a case against the State of Florida. In *American Ass'n of People With Disabilities v. Harris*,<sup>24</sup> the Committee and cooperating counsel filed a similar action, again on behalf of the AAPD and a putative class of voters with manual and visual impairments in Duval County, Florida, alleging that the County's installation of optical scanner voting machines violated the ADA, as well as the Rehabilitation Act and the Florida Constitution. These individuals with disabilities required assistance in casting their votes, which required them to disclose their votes to third parties upon whom they had to rely to mark their votes

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22. *American Ass'n of People with Disabilities v. District of Columbia Bd. of Elections and Ethics*, No. 1:01-cv-01884 (D.D.C. filed Sept. 5, 2001).

23. Manual impairments are limitations on hand function due to conditions such as paralysis, amputation, arthritis, broken bones, carpal tunnel, repetitive stress injury, or other serious injury.

24. *Complaint, American Ass'n of People with Disabilities v. Harris*, No. 01-01275-CV-J-25-HTS (M.D. Fla. filed Nov. 8, 2001).

accurately. This process rendered their votes neither “secret” nor “direct” as required by the Florida Constitution. Following a bench trial, Plaintiffs won a declaratory judgment, including injunctive relief requiring the installation of compliant voting equipment. Unfortunately, however, the Committee’s victory was overturned by the Eleventh Circuit, which ultimately held that under the ADA’s implementing regulations voting machines were not “facilities.”<sup>25</sup>

*Miller v. District of Columbia*,<sup>26</sup> was another early and formative Committee case brought to make the District ensure accessibility to essential government services, in this case, accessibility by callers who are deaf to the city’s 911 system. This case was successfully resolved through a 1997 consent order. The order not only assured that D.C. residents who are deaf would have access to critical 911 services, but also served to introduce the Committee’s advocacy to D.C.’s deaf community, leading to further expansions of this community’s access to D.C. programs and services.

For decades, D.C.’s Metropolitan Police Department (“MPD”) failed to provide effective means of communication to deaf people living in D.C. while interacting with police officers. Fortunately, another early Committee case, *Shorter v. District of Columbia Metropolitan Police Department*,<sup>27</sup> successfully modified MPD policies. Plaintiff Vernon Shorter, who is deaf, was arrested and detained for over three days with no sign language interpreter services. Although Mr. Shorter suffered from a broken ankle during the arrest, he was unable to communicate his health needs to MPD, and he received no treatment while incarcerated. He was also unable to contact friends or family, as there were no accessible telephone services provided. The Committee and cooperating counsel achieved a settlement on behalf of Mr. Shorter requiring MPD to adopt policies and procedures to ensure that sign language interpreters were provided to individuals who are deaf. The settlement also resulted in the institution of a “Deaf and Hard of Hearing Unit” at MPD, as well as providing for the availability of TTY machines at MPD facilities to ensure that deaf individuals could communicate by telephone. The settlement trans-

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25. *American Ass’n of People With Disabilities v. Harris*, 647 F.3d 1093, 1108 (11th Cir. 2011).

26. Compl., *Miller v. District of Columbia*, No. 1:96-cv-02833 (D.D.C. filed Dec. 23, 1996).

27. Compl., *Shorter v. District of Columbia Metro. Police Dep’t*, No. 98-cv-2423 (D.D.C. filed June 24, 1998).

formed communications between the police and individuals who are deaf and compelled to interact with the police in D.C.<sup>28</sup>

In 2007, building on the Shorter settlement, the Committee and cooperating counsel filed another case against the District government to provide deaf individuals with equal opportunities to access a wide variety of D.C.'s services and programs. In *Equal Rights Center v. District of Columbia*,<sup>29</sup> Plaintiffs' reached a settlement with D.C., groundbreaking by scope and breadth, ensuring that sign language interpreters and auxiliary services would be available for deaf and hard-of-hearing D.C. residents at all times throughout D.C. agencies. The settlement required that the District maintain an interpreter contract that provided for qualified sign language interpreters upon request for communications with all D.C. agencies. In no small part to enforce and expand the result achieved in *Shorter*, the settlement also required that the MPD ensure that qualified interpreters are available on a 24/7 basis; maintain its Deaf and Hard of Hearing Liaison Unit; maintain at least one videophone in each station and substation; and maintain a novel pilot program providing at least two mobile Video Remote Interpreting ("VRI") devices to allow for "in the field" interpreting services. Additionally, the agreement required that D.C. Public Schools obtain seven VRI devices to ensure that parents who are deaf can communicate effectively with schools in emergencies. It also required that the D.C. Department of Mental Health secure VRI for its emergency services and maintain a videophone at St. Elizabeth's hospital for patients and staff with hearing impairments. Furthermore, all D.C. agency personnel were required to undergo communication training, and D.C. was required to develop a public education program to educate residents of D.C. on the availability of the services. The District also compensated the Committee and two plaintiffs with payment monetary compensation for damages and attorney's fees.

The Committee continued to show that the law of disability discrimination must keep pace with current technological advances when it filed yet another case against the District of Columbia, this time to ensure that individuals with hearing loss would have access to information contained in public service videos posted online. In *Mitchiner*

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28. WASH. LAW. COMM., ANNUAL REPORT, 2000, at 10–11.

29. Complaint, *Equal Rights Ctr. v. District of Columbia*, No. 1:07-cv-01838 (D.D.C. filed Oct. 11, 2007).

*v. District of Columbia*,<sup>30</sup> the Committee and cooperating counsel filed an action on behalf of plaintiff Jon Mitchiner for injunctive relief and damages under the ADA, the Rehabilitation Act, and the District of Columbia Human Rights Act. D.C. posts videos on its websites, as well as other websites like YouTube, that provide residents with information about D.C. The videos intend to communicate an array of information to D.C. residents, and have included information from the Department of Employment Services, the Department of Real Estate Services, and D.C. Public Schools. Because these videos were not captioned, Mr. Mitchiner and other deaf residents of D.C. did not have access to the information in the videos. To resolve the litigation, D.C. issued a Mayoral Order requiring that D.C. agencies properly caption all new videos. It also required that certain videos published online prior to the Mayoral Order be retroactively captioned, or in some cases transcribed. This case was among the first of its kind, and its resolution serves as a model for other state and local governments.<sup>31</sup>

In 2014, the Committee brought a similar case against the federal government in *American Council of the Blind v. Tangherlini*.<sup>32</sup> Representing the American Council of the Blind and a class of individual blind government contractors, the Committee and cooperating counsel filed a complaint against the General Services Administration (GSA) for failing to make its website, SAM.gov, accessible to users who are blind. This inaccessibility prevented federal contractors with visual impairments from registering or renewing their registration independently on the website. The parties reached a settlement that required GSA to make significant changes to SAM.gov, after which the website would undergo review by another independent accessibility expert.<sup>33</sup>

The Committee was able to use the D.C. Government's authority over its D.C. Lottery agents to improve accessibility for people with mobility-related disabilities, not simply for the purchase of lottery tickets at neighborhood convenience stores, but more importantly for the groceries and other necessities sold at those locations. For years, D.C. residents with mobility-related disabilities complained that they

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30. Compl., *Mitchiner v. District of Columbia*, No. 1:12-cv-00646 (D.D.C. filed Apr. 24, 2012).

31. WASH. LAW. COMM., FALL 2012 UPDATE 6.

32. *Am. Council of the Blind v. Tangherlini*, No. 1:14-cv-00671 (D.D.C. filed Apr. 22, 2014).

33. WASH. LAW. COMM., FALL 2015 UPDATE 6.

were unable to access neighborhood convenience stores and other retailers that sell D.C. Lottery tickets. Rather than bringing suit against each of the inaccessible small retailers individually, the Committee and cooperating counsel filed an action against the District of Columbia Lottery Board for injunctive relief and damages under the ADA, the Rehabilitation Act, and the District of Columbia Human Rights Act.<sup>34</sup> On the face of the complaint, Plaintiffs challenged the Lottery Board's policy of licensing agents to sell D.C. Lottery tickets in stores that were not accessible to people with mobility impairments, and alleged that D.C. and the Lottery Board discriminated against them by denying them an equal opportunity to participate in the D.C. Lottery.

D.C. regulations required the Lottery Board to assess the accessibility of an applicant's place of business before granting a lottery license to that applicant. The Lottery Board, however, licensed and continued to license new sales agents located in places of business that were not accessible to persons with mobility-related disabilities. Plaintiffs alleged that they were unable to purchase lottery tickets at locations near their homes; indeed, one plaintiff was unable to purchase D.C. Lottery tickets at all because not one of the twenty D.C. Lottery sites closest to her home was accessible. Plaintiffs reached a settlement with the Lottery Board that ensured that the D.C. Lottery would be accessible to individuals with disabilities.<sup>35</sup> The settlement required that D.C. Lottery agents remove barriers to accessibility within eighteen months, participate in trainings on accessibility and disability rights, and advertise fully accessible D.C. Lottery locations on its website. In sum, the settlement ensured the accessibility of over 450 D.C. Lottery locations in D.C. to people with disabilities. This case is an example of the Committee's creativity: although it can be classified as a case of ensuring access to government services, i.e., lottery tickets, by compelling the Lottery Board to take action, spurring compliance by store owners who would necessarily comply rather than lose the significant revenue derived from selling D.C. Lottery tickets, the Committee was able to render these locations accessible for all purposes.

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34. Compl., Equal Rights Ctr. v. District of Columbia Lottery Bd., No. 1:06-cv-01942 (D.D.C. filed Nov. 14, 2006).

35. WASH. LAW COMM., 4th Quarter 2015 Q. Rep. at 15.

C. Public Accommodation

1. Retail Stores

One of the largest and most impactful ways that the Committee has worked toward increased accessibility is by obtaining settlements that require stores and shopping centers to abide by ADA requirements to provide accessibility to people with mobility impairments. From neighborhood stores to national chains, the Committee has continued to advocate for shoppers with disabilities.

In 1993, shortly after the ADA was passed, the Committee, DRC, and co-plaintiff Marc Fiedler sued the Wiz music stores, alleging architectural barriers in two stores in D.C., one store in Maryland, and one store in Virginia.<sup>36</sup> Mr. Fiedler, who uses a wheelchair, spearheaded the filing of the suit after first attempting to persuade the Wiz ownership to modify their Cleveland Park, D.C. store. In his complaint, Plaintiffs alleged that the Wiz was in violation of Title III of the ADA because its stores were inaccessible to persons with mobility impairments. The resulting settlement required that the Wiz undertake renovations to provide accessibility to people in wheelchairs. The Wiz, however, failed to comply with the settlement. With the help of cooperating counsel, the Committee moved to enforce settlement. In 1995, the Committee was able to reach a second and final settlement requiring that the Wiz remedy the remaining violations in nearly all of its D.C. stores and pay \$80,000 in attorney's fees and damages.<sup>37</sup> The Wiz also agreed to donate part of its income from compact disc and audiocassette sales to the DRC.

Another early case, which opposed the systemic use of physical barriers known as "bollards" serving as shopping cart carrels at ten Safeway grocery stores in D.C., is an example of local litigation that had a profound national implication. In *Fox v. Safeway*,<sup>38</sup> two individual plaintiffs and the DRC alleged that Safeway denied equally convenient access to persons with mobility impairments by having security bollards with "flag" gates that prevented persons who use wheelchairs from entering or exiting the stores, and by failing to provide adequate, designated accessible parking. The complaint further alleged that these deficiencies constituted unlawful discrimination against persons

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36. See Compl., *Feidler v. Wiz Distrib.*, No. 1:93-cv-1514 (D.D.C. filed July 23, 1993).

37. WASH. LAW. COMM., WINTER 1995 UPDATE 4.

38. Compl., *Fox v. Safeway*, No. 94-0878 (D.D.C. filed Apr. 19, 1994).

with disabilities under Title III of the ADA and District of Columbia Human Rights Act.

Although it was not a party to the suit, the DOJ conducted an investigation based on a complaint at one of the stores, and concluded that Safeway violated the ADA, because wheelchairs could not fit through the flag gate and customers in wheelchairs were required to wait for a Safeway employee to unlock the only accessible entrance. The ability of the Committee, to secure the involvement of the DOJ in its disability rights cases, often by facilitating a formal complaint by an aggrieved party as was the case in *Fox*, has contributed to successful outcomes.

The case was resolved with an agreement requiring that Safeway survey over 800 stores nationwide and bring them into compliance with the ADA within a five-year period.<sup>39</sup> Safeway's settlement provided for payment of \$95,000—at the time the largest ADA settlement on record—as compensation for damages and attorney's fees, and included a nationwide compliance program monitored by the DOJ. The Disability Rights Education and Defense Fund, a California-based disability rights group, was instrumental in the settlement negotiations.

Access to grocery stores continued to be a focus of the Committee and its Disability Rights Project, given the difficulties that shoppers with disabilities had at these stores during the early years of the ADA. Success in the Safeway case led to additional settlements and agreements with grocery chains. The Committee and cooperating counsel obtained a settlement mandating that Shoppers Food Warehouse remove barriers to entry at all of its stores nationwide.<sup>40</sup> This case helped end the practice of installing shopping cart gate corrals, which served not only to keep grocery carts from leaving the store, but also kept customers in wheelchairs from entering the stores. In addition, after the DRC reported accessibility issues at 163 Giant Food Stores (“Giant”) supermarkets in the Washington market area, the Committee's Disability Rights Project made this large chain of supermarkets more accessible to individuals in wheelchairs through a 1999 agreement with Giant, achieved without resort to litigation.

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39. WASH. LAW. COMM., ANNUAL REPORT, 1995, at 11 (1995).

40. Compl., Disability Rights Council of Greater Washington v. Shoppers Food Warehouse Corp., No. 8:00-cv-2190 (D. Md. filed July 18, 2000).

The Committee and cooperating counsel effectuated another groundbreaking settlement against May Department Stores, a corporation which included the Lord & Taylor and the Hecht Department store chains.<sup>41</sup> The settlement addressed inaccessible display racks, paths of travel and other features in fifteen local stores, requiring that barriers to accessibility be removed. It also provided for extensive monitoring because, depending on the location of clothing racks and other features, most barriers to paths of travel were mutable, and could change from week to week. Assessing the accessibility of department stores and similar venues remains a complicated issue, and this settlement was particularly important because it helped to establish means of measuring accessibility in department stores. These measures continue to be used to this day.

Another important settlement was achieved in the Committee's litigation against a major discount chain in 2003. The Committee and cooperating counsel successfully negotiated a settlement agreement with Family Dollar Stores ("Family Dollar").<sup>42</sup> This particular case was settled following a demand letter and settlement negotiations—thus, litigation was never formally filed. The settlement required that Family Dollar modify over 4,000 of its stores nationwide so that shoppers who are blind or use wheelchairs could access them. Additionally, Family Dollar was required to conduct an accessibility survey and remove exterior and structural barriers. The settlement required that Family Dollar implement changes in its site development procedures. It also required that the chain clear store aisles of clutter, hire an ADA administrator, train employees, regularly monitor aisles for accessibility issues, and establish a procedure to report complaints to the DRC. The settlement included the payment of damages and attorney's fees.

In *Disability Rights Council of Greater Washington v. National Wholesale Liquidators*,<sup>43</sup> the Committee and cooperating counsel brought a similar action against National Wholesale Liquidators of West Hempstead, Inc. under the ADA and the District of Columbia Human Rights Act. National Wholesale Liquidators, a retailer specializing in the sale of close-out merchandise, operated forty-five

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41. Compl., Equal Rights Ctr. v. May Dep't Stores Co., No. 1:01-cv-1076 (D.D.C. filed May 16, 2001).

42. WASH. LAW. COMM., SPRING 2003 UPDATE 5.

43. Compl., Disability Rights Council of Greater Washington v. Nat'l Wholesale Liquidators, No. 1:04-cv-00999 (D.D.C. filed June 18, 2004).

stores in six states and D.C. Individual plaintiffs who used wheelchairs encountered structural barriers that prevented them from accessing the store to make retail purchases. The structural barriers included shopping cart corrals with locked swing gates that blocked people in wheelchairs from accessing the store; merchandise aisles that were not wide enough to be ADA compliant or otherwise blocked by obstructions; and wheelchair inaccessible restrooms. The DRC documented that the problems were widespread. When the DRC surveyed thirty-two National Wholesale Liquidators stores in seven states, it found that over seventy percent of the stores had shopping cart corrals rendering entrances inaccessible to people in wheelchairs; over eighty percent of the stores had barriers in the merchandise aisles that blocked persons in wheelchairs from accessing the aisles; and sixty-nine percent of the stores had restrooms that were inaccessible to people in wheelchairs.

The settlement required that the stores modify existing access barriers, remove cart corrals at store entrances, and implement policies regarding accommodations for customers with disabilities.<sup>44</sup> The relief also mandated thirty-six inch pathways to restrooms, elevators, dressing rooms, checkout counters, exits, and aisles. National Wholesale Liquidators was further required to have at least one thirty-two-inch pathway to at least fifty percent of the merchandise on every fixture. The settlement also required the company to provide training on their employee's obligations to customers with disabilities and to appoint an ADA coordinator. Additionally, all new National Whole Liquidator stores were required to be fully ADA compliant, and were required to keep compliance reports that included all complaints about access.

In *Disability Rights Council of Greater Washington v. Radio Shack*,<sup>45</sup> the Committee and cooperating counsel filed an action against RadioShack on behalf of a putative class of individuals with disabilities who reported discriminatory policies and barriers at the forty-nine RadioShack locations in the Washington Metropolitan area. The discriminatory barriers included entrances blocked by steps, which barred individuals in wheelchairs from accessing stores; narrow aisles obstructed by displays and merchandise, which blocked people in wheelchairs or scooters from accessing merchandise, and

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44. WASH. LAW. COMM., SPRING 2005 UPDATE 3, 11.

45. Compl. at 1, *Rosen v. Radio Shack Co.*, No. 1:03-cv-2596 (D.D.C. filed Dec. 22, 2003).

sales counters and interactive displays for electronic products that were inaccessible to people in wheelchairs or scooters.

This case was the first of its kind to address access to interactive electronic displays of products such as camcorders, wireless phones, and laptop computers. The case ultimately resulted in a settlement that applied to over five thousand RadioShack stores. The settlement ensured that individuals with disabilities were able to access the stores, and use RadioShack's displays and services on a nation-wide scale. RadioShack agreed to make substantial changes to its stores and procedures,<sup>46</sup> including: making in-store interactive displays accessible; requiring thirty-six inch wide aisles and keeping aisles clear of merchandise; surveying all forty-nine D.C. stores to ensure ADA compliance; having at least one accessible credit/debit card reader in each store; adopting a training program for managers and employees on how to assist customers with disabilities; having manager performance assessments involve whether ADA aisle-width requirements are followed; establishing a nationwide customer accessibility complaint system; reviewing plans for future stores and store renovations; retaining an ADA consultant; and providing the Committee with semi-annual reports on the progress of the modifications, copies of complaints, and the right to inspect stores regarding these modifications.

In one of the largest ADA settlements on record, the Committee and cooperating counsel filed and settled a putative class action against CVS Caremark Corporation ("CVS"), alleging that the drug-store chain's policies and practices resulted in stores that were inaccessible to individuals with disabilities.<sup>47</sup> Notably, the Committee had filed, litigated and settled a similar case against CVS Corporation in 2002 in U.S. District Court for the District of Columbia on behalf of the DRC. That earlier settlement required CVS Corporation to take steps to remedy the same accessibility issues (aisles would be unobstructed, counters would be accessible, and that parking was accessible) at stores in Maryland, the District of Columbia, and Virginia. When, the settlement term ended, however, the ERC began receiving complaints from people with disabilities who continued to experience

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46. WASH. LAW. COMM., ANNUAL REPORT, 2005, at 6 (2005).

47. See Compl., Equal Rights Ctr. v. CVS Caremark Corp., No. 8:09-cv-03275 (D. Md. filed Dec. 9, 2009); Stipulation of Dismissal, Equal Rights Ctr. v. CVS Caremark Corp., No. 8:09-cv-03275 (D. Md. filed Jan. 3, 2011).

difficulties when shopping at CVS stores throughout the United States.

As a result, the ERC undertook an investigation of fifty CVS stores in the Washington Metropolitan area, as well as stores in Connecticut, Indiana, Louisiana, Massachusetts, Ohio, Pennsylvania, Texas, and West Virginia. The investigation revealed barriers to accessibility at every store the ERC investigated, including: merchandise aisles that were inaccessible due to barriers such as un-shelved merchandise, seasonal displays, and boxes that narrowed the aisles so that someone in a wheelchair could not pass; pharmacy counters that were too high for customers who use wheelchairs to reach or use; inadequate parking for persons with disabilities; inaccessible check-out counters; inaccessible employment application devices; and blood pressure monitoring stations that do not permit usage by individuals who use wheelchairs. These findings were incorporated into ERC's complaint.

The resulting settlement was a major victory for the ERC, impacting 7,100 CVS stores across the United States.<sup>48</sup> The settlement required that CVS survey and remove accessibility barriers at all remodeled or altered stores and remove barriers at MinuteClinic retail health clinics within eighteen months. CVS also agreed to adopt new and revised training procedures that would ensure that store aisles are kept clear and accessible, and that an independent third-party survey company would be solicited to monitor the accessibility of the aisles. The agreement also provided that within one year of the agreement, every CVS would have at least one wheelchair accessible checkout counter. CVS also agreed to hire an independent consultant to review and monitor its policies and procedures for design and remodeling to ensure that stores remain compliant with the ADA. Additionally, CVS was required to provide reports to the ERC on its progress and to consider the ERC's input on policies and training. The settlement also provided monetary damages and attorney's fees to the plaintiffs.

In November 2009, the Committee filed two public accommodation cases concurrently against prominent national retail clothing companies. The first case was filed against Abercrombie and Fitch Co. ("Abercrombie").<sup>49</sup> Plaintiffs alleged that two of Abercrombie's retail chains, Abercrombie and Hollister, failed to provide people with

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48. WASH. LAW. COMM., SPRING 2011 UPDATE 17, 4.

49. Equal Rights Ctr. v. Abercrombie & Fitch Co., 767 F. Supp. 2d 510 (D. Md. 2010).

disabilities equal access to its goods and services, thus violating ADA Title III. Hollister stores were particularly inaccessible, as in lieu of a sign with the store name at their entries they instead generally relied on a signature inaccessible entrance porch featuring several steps up to the porch and down into the store. At the time that this suit was filed, the entrance to Hollister was typically accompanied by a side entrance for people with disabilities; however, few persons with disabilities used this entrance because accessibility signage for this door was often hidden or did not exist. When organizations of people with disabilities approached Abercrombie and asked them to remove the steps, the company refused. The lawsuit also alleged that the interiors of both the Abercrombie and Hollister stores were largely inaccessible. After similar litigation was filed in other states, Abercrombie settled in late 2015, agreeing to remove inaccessible entrances at nearly 100 of its Hollister stores.

The second case was filed on behalf of the ERC and two individuals, who both use wheelchairs, against retailer Filene's Basement, alleging that the retailer discriminated against people with mobility-related disabilities by failing to provide equal access to its stores in violation of both the ADA and the D.C. Human Rights Act.<sup>50</sup> After receiving complaints that three of Filene's Basement stores in D.C. failed to meet the accessibility requirements of the ADA and D.C. Human Rights Act, the ERC performed accessibility surveys at Filene's Basement stores in D.C. and five states. The surveys found numerous violations of the ADA, both in terms of architectural barriers and in terms of policy and practices. These architectural and structural barriers varied from store to store, but included an array of wheelchair-inaccessible merchandise departments, display counters, fitting rooms, restroom facilities, and elevators.

The barriers to accessibility also included operating policies, practices, and procedures in the stores which precluded people with disabilities from experiencing full and equal enjoyment of the goods and services. These policy violations included the pervasive failure to maintain accessible paths of travel, and the failure to maintain adequate aisle width between merchandise displays. Although the company filed for bankruptcy and subsequently sold or closed all of its

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50. Compl., Equal Rights Ctr. v. Filene's Basement, Inc., No. 1:08-cv-2007 (D.D.C. filed Nov. 21, 2008); *see also* WASH. LAW. COMM., SPRING 2009 UPDATE 15, 4.

retail stores, a settlement was successfully reached against the bankruptcy estate in 2011.

## 2. ATM Machines

Another important issue in the early days of the ADA was the inaccessibility of ATM machines. In 2000, the Committee brought a lawsuit against Chevy Chase Bank, alleging that blind customers could not access the bank's ATMs.<sup>51</sup> This case was notable in that, prior to the settlement, no banks in D.C. offered ATMs that were accessible to blind people. On behalf of the National Federation of the Blind and several blind plaintiffs, the Committee and cooperating counsel alleged that Chevy Chase Bank violated the ADA because it did not have ATMs that were ADA compliant. The settlement set forth a schedule to upgrade ATMs with voice-guided technology. More than five hundred Chevy Chase Bank ATMs located throughout D.C., Virginia, and Maryland were modified as a result of this settlement.

The same year, the Committee and cooperating counsel worked with the National Federation of the Blind ("NFB") to achieve an important settlement with a major ATM manufacturer in the case of *NFB, Inc. v. Diebold, Inc.*<sup>52</sup> Because it only addresses places of public accommodation, Title III of the ADA does not provide a cause of action against product manufacturers. Diebold, Inc. ("Diebold") is one of the major ATM manufacturers in the nation. Yet, when Diebold began to directly install and operate its own ATMs in Rite Aid drug stores nationwide, the Committee argued that Diebold's machines were places of public accommodation operated by Diebold, bringing the manufacturer into the purview of Title III of the ADA. The lawsuit alleged that the ATMs violated the ADA because they used screen text prompts that were not accessible to blind individuals, and sought that Diebold install voice guidance technology in their ATMs. The Diebold settlement resulted in over one million dollars in awards and fees.<sup>53</sup> The settlement required that Diebold partner with the NFB in developing new accessible ATMs. Diebold also committed to contributing one million dollars to construct NFB's National

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51. Disability Rights Council of Greater Washington v. Chevy Chase Bank, No. 1:00-cv-1167 (D.D.C. filed May 24, 2000); see also WASH. LAW. COMM., ANNUAL REPORT, 2001, at 10 (2001).

52. NFB, Inc. v. Diebold, Inc., No. 1:00-cv-01168 (D.D.C. filed May 24, 2000); see also WASH. LAW. COMM., ANNUAL REPORT, 2000, at 11 (2000).

53. WASH. LAW. COMM., ANNUAL REPORT, 2000 *supra* note 52.

Research & Training Institute for the Blind, and to advertising the locations of ATMs with voice guidance technology on its website.

Notably, this result, which made accessible ATMs more available to banks nationwide, could not have been achieved through litigation. Because of this settlement, Diebold went on to develop and distribute many of the earliest accessible ATMs.

### 3. Emergency Evacuation

Although the ADA clearly ensured that people with disabilities should be able to enter a place of public accommodation, it was initially less certain whether the ADA successfully protected the right of a person with a disability to exit or evacuate a place of public accommodation in an emergency. In *Savage v. Marshalls, Inc.*,<sup>54</sup> the Committee and cooperating counsel brought the first case in the nation affirming that the ADA covers accessible emergency evacuations. The case was brought on behalf of plaintiff Katie Savage, who used a wheelchair. Ms. Savage had been stranded in a Marshalls store during a 2002 emergency evacuation, almost a year to the day after the traumatic events of September 11th, 2001. Ms. Savage was effectively imprisoned in the store during the evacuation because Marshalls had no provision for the safe evacuation of people with disabilities. No one from Marshalls or the mall in which it was housed offered to assist in evacuating customers with disabilities from the multi-story mall. Ms. Savage was stranded for nearly an hour until the mall re-opened, fearing for her life after hearing that the fire alarm was pulled because of rumors of a bomb.

The settlement in Ms. Savage's case resulted in major changes to Marshalls' evacuation policies.<sup>55</sup> The settlement required accessible emergency exits or areas of rescue assistance at Marshalls stores in all U.S. states and Puerto Rico. Furthermore, the settlement required national policies for evacuating people with disabilities and training staff and employees. It also required that Marshalls designate an ADA consultant to oversee the modifications through compliance reports. This settlement became the first in the nation to set forth emergency evacuation requirements under the ADA.

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54. See generally *Savage v. Marshalls, Inc.*, 2004 WL 3045404 (Md. Cir. Ct. filed Feb. 26, 2003); see also WASH. LAW. COMM., SPRING 2005 UPDATE 11, 3.

55. WASH. LAW. COMM., SPRING 2005 UPDATE 11, 3.

#### 4. Restaurants

The Committee also obtained a number of legal victories for people with disabilities when it advocated for their right to access popular restaurants. By advocating for the removal of physical barriers, such as lowering counters and removing stairs, the Committee was able to give wheelchair users equal access to food options. With the support of cooperating counsel, the Committee has handled a series of high-impact cases addressing accommodations and accessibility throughout nationwide restaurant chains. The settlements stemming from these cases ensured that thousands of people with disabilities are able to access and enjoy a meal from a popular eatery with the same ease as their friends and family.

The first significant case regarding access to restaurants was filed in 1995, after Patricia Day's wheelchair got caught in the metal barrier used to form the queue line at a Burger King restaurant. The Committee and cooperating counsel sued the Burger King restaurant chain and alleged that the narrow metal queuing barriers posed a serious danger and barrier to persons in wheelchairs.<sup>56</sup> Burger King quickly became more accessible after settling in 1997, agreeing that future restaurants would provide full access for people with disabilities.<sup>57</sup> The corporation also agreed to survey all company-owned restaurants and resolve any access problems identified in the survey.

In 2007, the Committee and cooperating counsel brought an action against Potbelly Sandwich Works LLC ("Potbelly") under the ADA and the District of Columbia Human Rights Act in *Equal Rights Center v. Potbelly's Sandwich Works LLC*.<sup>58</sup> Potbelly's, a chain restaurant that operates in over 170 locations in eleven states, maintained significant barriers to wheelchair users and other people with mobility impairments. The plaintiff in this case alleged that she was unable to access Potbelly's goods and services due to architectural barriers, including impermissibly high service counters, self-service items placed out of reach of someone in a wheelchair, low tables and narrow seating areas, and narrow paths of travel that obstructed access to service counters.

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56. WASH. LAW. COMM., ANNUAL REPORT, 1997, at 11 (1997).

57. *Id.*

58. Compl. at 1, *Equal Rights Ctr. v. Potbelly's Sandwich Works LLC*, No. 1:07-cv-283 (D.D.C. Feb. 7, 2007).

The ERC surveyed Potbelly restaurants throughout D.C. to determine their accessibility. The ERC found that all of the restaurants surveyed had service counter heights that exceeded the maximum allowance under the ADA. The survey also revealed that all of the restaurants had seating area features that were impermissible under the ADA. The Committee and cooperating counsel filed a complaint in the U.S. District Court for the District of Columbia and ultimately negotiated a settlement. As a result of the settlement, Potbelly's committed to building ADA compliant ordering counters in all of their new restaurants nationwide.<sup>59</sup> Potbelly's also agreed to retrofit ordering stations in almost all existing restaurants to allow wheelchair users to access the counter; to ensure that at least five percent of seating in the restaurant would comply with the ADA; and to remove all barriers found by the ERC in its Washington, D.C. locations.

In *Equal Rights Center v. Subway Restaurants*,<sup>60</sup> the Committee and cooperating counsel brought an accessibility case against Subway Restaurants, one of the largest fast-food chains in the United States. The action arose from Subway's failure to make their restaurants accessible to people with physical disabilities. Subway Restaurants had significant barriers to people in wheelchairs, such as steps blocking access to restaurants, narrow doors, inaccessible bathrooms, and obstacles preventing wheelchair users from ordering or dining.

In the resulting settlement, Subway agreed to make some significant changes to eliminate barriers to wheelchair users at more than fifty restaurants in the D.C. area.<sup>61</sup> Subway agreed to make modifications to comply with ADA requirements, including installing entrance ramps, making entrances wide enough for wheelchairs, and making doors easy for people with disabilities to open. Subway also agreed to revise its policies and procedures to ensure that the process by which future restaurant sites are chosen is in compliance with ADA requirements.

A similar settlement was reached by the Committee and cooperating counsel in 2001 with Popeyes Restaurants ("Popeyes"), resulting from a demand letter without the need to file suit. Popeyes agreed to remove physical barriers to mobility-impaired individuals at all company-owned restaurants, and to adopt policies encouraging franchis-

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59. WASH. LAW. COMM., FALL 2008 UPDATE 14, 10-11.

60. *Equal Rights Ctr. v. Subway Rests.*, No. 1:06-cv-00725 (D.D.C. filed Apr. 21, 2006); see also WASH. LAW. COMM., SPRING 2006 UPDATE 12, 3.

61. WASH. LAW. COMM., *supra* note 60, at 11.

ees to remove such barriers. The settlement also awarded substantial damages to individual complainants.<sup>62</sup>

In 2009, the Committee and cooperating counsel sued the national restaurant chain Cosi, Inc. (“Cosi”) after an ERC member in a wheelchair was unable to enter a Cosi restaurant located in D.C.<sup>63</sup> An ERC survey of other Cosi restaurants identified significant accessibility issues throughout the chain. A year after the suit was filed, Cosi settled and agreed to survey its restaurants across the country.<sup>64</sup> By identifying accessibility issues and making necessary modifications to the restaurants, the survey was designed to ensure that Cosi restaurants complied with the ADA and state or local laws protecting the rights of people with disabilities. Cosi also implemented policies to improve accessibility, provided ADA training to staff, and made a monetary payment toward damages and attorney’s fees.

During the same summer as the Cosi litigation, the Committee worked with cooperating counsel to sue the Johnny Rockets restaurant chain.<sup>65</sup> The design of Johnny Rockets restaurants rendered many of the sites inaccessible to those in wheelchairs, violating the ADA and the D.C. Human Rights Act. For example, when Johnny Rockets remodeled a location near Dupont Circle, it failed to replace a ramp that had previously made the location accessible to people who use wheelchairs. The restaurant responded to complaints by asserting that wheelchair users could be carried over the steps—a solution that many people who use wheelchairs find degrading and dangerous. A survey by the ERC and complaints from other regions confirmed that Johnny Rockets restaurants routinely presented access barriers.

A few months after the suit was filed, a settlement was announced. Under the agreement, Johnny Rockets made all necessary modifications to their policies, practices, and procedures to ensure that their restaurants across the nation comply with both the ADA and any state or local laws addressing the rights of people with disabilities.<sup>66</sup> Johnny Rockets also agreed to actively work with its franchises to ensure that all locations were in compliance with the law and honor

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62. WASH. LAW COMM., ANNUAL REPORT, 2001, at 31 (2001).

63. *See* Compl., Equal Rights Ctr. v. Cosi, Inc., No. 1:09-cv-01122 (D.D.C. June 18, 2009); *see also* WASH. LAW COMM., SPRING 2010 UPDATE 16, 4.

64. WASH. LAW COMM., SPRING 2010 UPDATE 4.

65. *See* Compl., Herman v. Johnny Rockets Group, Inc., No. 1:09-cv-01120 (D.D.C. filed June 18, 2009); *see also* WASH. LAW COMM., FALL 2009 UPDATE 15, 7.

66. WASH. LAW COMM., FALL 2009 UPDATE 7.

the rights of people with disabilities when accessing its restaurants. The Dupont Circle location added a route into its restaurant that complies with the ADA.

Although the ERC's victories against national restaurant chains remedied discrimination against thousands of Americans, the Committee always believed that widespread discrimination begins when small scale discrimination is accepted. This belief prompted the Committee to file suits against local restaurants in the District of Columbia for continuous discrimination against people with disabilities. In 2008, the Committee filed suit against a restaurant in Dupont Circle ("Circa") for failing to provide people with disabilities equal access to its services, thus violating both the ADA and the D.C. Human Rights Act.<sup>67</sup> Despite the individual plaintiff's repeated attempts, the restaurant failed to remove barriers and refused for over six months to reopen an at-level entrance, maintaining only an entrance with a step. The restaurant's tables, service and ordering counter, and outdoor eating area were also inaccessible to people in wheelchairs. Within a few months, Circa committed to fixing all of the ADA violations alleged in the complaint, permitted inspections of the restaurant, and proffered \$40,000 in fees and damages.<sup>68</sup> The offer of judgment was accepted, and the restaurant now has an accessible entrance, tables, counter, and outdoor eating area.

The Committee later filed a discrimination suit against Mr. Smith's, a restaurant and piano bar located in Georgetown.<sup>69</sup> One of the managers of the piano bar had ordered wheelchair user and Georgetown University student Taylor Price to leave the bar because his wheelchair was creating a "fire hazard." The suit alleged that Mr. Smith's violated the ADA and the D.C. Human Rights Act. According to former Committee staff familiar with the matter, a confidential settlement was negotiated to resolve the litigation, which included measures to ensure that such incidents would not reoccur.

In August 2009, the Committee and cooperating counsel filed suit against the local restaurant Hank's Oyster Bar ("Hank's").<sup>70</sup> Although the landlord and Hank's had renovated the space extensively, the restaurant remained inaccessible to persons with wheelchairs be-

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67. See Complaint for Injunctive Relief and for Compensatory and Punitive Damages at 1, *Fiedler v. MHG Café Dupont, LLC*, No. 1:08-cv-225 (D.D.C. filed Feb. 11, 2008).

68. WASH. LAW. COMM., FALL 2009 UPDATE 14, 13.

69. Compl. at 1-3, *Price v. Kimberly, Inc.*, No. 1:09-cv-01709 (D.D.C. filed Sept. 9, 2009).

70. WASH. LAW COMM., FALL 2009 UPDATE 7.

cause of a step at the only entrance. Additionally, access to the restrooms was at times impeded and inaccessible to wheelchair users. The clear space of the restroom was used as storage, and the hallway to the restroom was lined with a silverware table, blocking wheelchair access. The tables at the restaurant were also inaccessible to wheelchair users. The ERC reached a settlement with Hank's providing for the removal of architectural barriers and modification of the restaurant's practices, policies, and procedures to comply with the ADA and the D.C. Human Rights Act.

## 5. Movie Theaters

Movie theaters and other entertainment venues pose special challenges for the deaf and hard-of-hearing community, in addition to the architectural barriers faced by people with mobility-related disabilities. Thus, the Committee has fought to require movie theaters to not only remove such architectural barriers, but to install technology such as assistive listening systems to ensure that people with these respective disabilities can equally enjoy the use of movie theaters.

In 1994, the Committee and cooperating counsel brought an important case against Cineplex Odeon Corporation, one of the largest movie theater chains dominating the D.C. area. In *Isbell v. Cineplex Odeon Corp.*, putative class plaintiffs alleged that Cineplex Odeon was in violation of the ADA for its failure to install assistive listening systems in their theaters.<sup>71</sup> The litigation resulted in a settlement whereby Cineplex Odeon theaters was required to provide assistive listening systems for hard-of-hearing patrons at all of its locations in the D.C. Metropolitan area.<sup>72</sup> The DOJ later expanded the consent order in *Isbell* to cover the entire United States. The consent order also required Cineplex Odeon to pay \$60,000 in attorney's fees and required the appointment of a special master to oversee compliance for a three-year period. The consent order was the first to require a special master under the ADA.

In 1997, the Committee brought another suit against Cineplex Odeon and Plitt Theaters, Inc. after finding that significant architectural and structural barriers existed in the theaters.<sup>73</sup> The suit alleged that individuals with wheelchairs were unable to access Odeon thea-

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71. WASH. LAW. COMM., FALL 1994 UPDATE 7.

72. WASH. LAW. COMM., ANNUAL REPORT, 1994, at 43 (1994).

73. See Compl., Disability Rights Council v. Cineplex Odeon Corp., No. 1:97-cv-03023 (D.D.C. filed Oct. 12, 1999).

ters in the D.C. area because the theaters failed to provide accessible restrooms, an adequate amount of wheelchair seating, and removable armrests on movie theater seats. As a result of the litigation, Cineplex Odeon agreed to provide the correct number of wheelchair accessible spaces and seats at all auditoriums and make restrooms accessible to movie-goers using wheelchairs.<sup>74</sup>

## 6. Hotels

The Committee also understood the importance of hotel accessibility, especially in D.C.—a city that welcomes millions of tourists annually. Hotel litigation under the ADA has posed particular issues, in that individuals from out of town with accessibility concerns often cannot prove that they will re-visit the site, and therefore may face challenges to their standing to bring suit. In 2010, the Committee and cooperating counsel overcame these challenges and achieved a settlement ensuring that three Hilton hotels in the District would take major steps to remediate accessibility barriers throughout the hotels, as well as advertise the accessibility of their businesses and retain policies to ensure that the hotels maintained accessibility.<sup>75</sup> The Committee also achieved settlements with other District hotels to remediate accessibility barriers at those hotels, thereby broadening the hospitality choices for tourists and business travelers with disabilities.<sup>76</sup>

## 7. Healthcare

Health care providers have a significant history of discriminating against people with disabilities. In fact, discrimination by the health care industry extends beyond the insult to the dignity of the plaintiff. This potentially endangers the health and well-being of the plaintiff or their loved ones.

A prevalent form of discrimination in health care settings occurs when a patient's disability impedes communication with their health practitioners, and the practitioners do not adequately provide auxiliary aids to enable effective communication. As a result, information provided by the plaintiff, as well as the consent granted by patients with disabilities when undergoing procedures, can be misunderstood.

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74. WASH. LAW. COMM., ANNUAL REPORT, 1999, at 11 (1999).

75. WASH. LAW. COMM., FALL 2010 UPDATE 6.

76. See Order Dismissing Case, Equal Rights Ctr. v. Trentuno Ltd. P'ship, No. 1:05-cv-02227 (D.D.C. Sept. 11, 2006); see also Compl., Disability Rights Council of Greater Wash. v. Capital Hotels, No. 1:03-cv-01876 (D.D.C. filed Sept. 8, 2003).

The Committee began its work on this issue early. In *Alexander v. Howard University Hospital*,<sup>77</sup> the Committee and cooperating counsel represented a deaf individual who had twice been a patient at Howard University Hospital. The patient received no sign language interpreter services during critical procedures and treatment. Similar complaints had been lodged against this hospital by other deaf patients in the past. The complaint sought relief under the ADA and the D.C. Human Rights Act. The settlement in this case ensured that the hospital would adopt policies and procedures to provide sign language interpreters for deaf patients and other deaf individuals.

The Committee and cooperating counsel filed a similar action to ensure that health care centers that rely on Video Remote Interpreting (“VRI”) services for deaf patients were required to provide effective communication, including adequate VRI services and in-person interpreting services when needed. In *Gillespie v. Dimensions Health Corp.*,<sup>78</sup> seven deaf individuals, who sought treatment at Laurel Hospital, alleged that Laurel Hospital relied on a slow and blurry VRI. When the VRI was unavailable—either because it was difficult to view, insufficiently mobile, or for any other number of reasons—hospital staff resorted to exchanging cryptic notes or simply failed to communicate at all with patients regarding their care. Despite specific and repeated requests, Plaintiffs were denied in-person sign language interpreter services. Due to the groundbreaking nature of the VRI issues in this case, the DOJ intervened.

The consent decree negotiated in this case provided comprehensive injunctive relief for hearing-impaired patients or companions of patients.<sup>79</sup> It established minimum quality standards for VRI equipment used in the future and required that Laurel Hospital both acquire more VRI equipment and store the equipment in easily accessible places. Laurel Hospital was also responsible for ensuring that personnel were all trained to use the auxiliary equipment.

Importantly, through this consent decree, the hospital agreed that VRI would not always provide effective communication and set standards for the provision of in-person interpreter services. These standards have served as a model in many subsequent cases and as a guideline for the DOJ. Additionally, Laurel Hospital agreed to ac-

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77. Compl., *Alexander v. Howard Univ. Hosp.*, No. 1:01-cv-01167 (D.D.C. filed May 29, 2001).

78. See generally *Gillespie v. Dimensions Health Corp.*, 369 F. Supp. 2d 636 (D. Md. 2005).

79. WASH. LAW. COMM., FALL 2006 UPDATE 19.

quire one text telephone per every four available public telephones. Due to the groundbreaking nature of the VRI issues in this case, the DOJ agreed to monitor the hospital's compliance with the terms of the Decree.

In the case of medical emergencies, a lapse in communication is often emotionally traumatic to the deaf family members of a patient. This was the case for Maribel and Stephen Heisley when their son was born with serious heart defects requiring emergency neonatal open-heart surgery. Throughout the emergency, these deaf parents were not provided with sign language interpreter services at critical points in their baby's treatment, including the explanation of his condition, the pre-surgical meeting with the doctors, the communication of medical risks when consenting to surgery, and importation communications during the baby's extensive post-surgical recovery. Rather, the parents were left almost completely in the dark to agonize over the survival and well-being of their child.

Thus, the Committee, cooperating counsel, attorneys from the National Association of the Deaf, and the DOJ sued the hospital for violation of Title III of the ADA and Section 504 of the Rehabilitation Act.<sup>80</sup> The hospital eventually settled. Under the settlement, Inova Health System agreed to provide qualified sign language interpreters, VRI; an agreed-upon schedule of appropriate auxiliary aids; and services to patients and their companions who are deaf or hearing-impaired. The hospital also agreed to pay a monetary sum for damages and attorney's fees.

The Committee has not limited its work in healthcare to ensuring effective communication. As in most public areas, many health care centers are not physically accessible to those with mobility impairments. A significant settlement with the Washington Hospital Center, the largest private hospital in D.C., greatly improved access to facilities and medical equipment for patients with mobility impairments, thereby significantly enhancing the health care these patient populations received.<sup>81</sup> The Committee and cooperating counsel filed the action on behalf of the DRC and four former hospital patients, and was one of the first in the country to address access to hospital facilities and medical equipment. The complaint alleged that patients with disabilities were unable to obtain standard medical treatment due to

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80. Order, *Heisley v. Inova Health Sys.* No. 1:10-cv-714 (E.D. Va. Aug. 26, 2010).

81. Settlement Agreement, *Disability Rights Council v. Wash. Hosp. Ctr.*, No. 1:03-cv-2434 (D.D.C. 2005).

the hospital's inaccessible patient rooms, bathrooms, and exam tables. Inaccessible exam tables and other medical equipment made it difficult for the plaintiffs to receive appropriate treatment. Inadequacies in policies and procedures did not ensure that patients with spinal cord injuries received the assistance they needed to eat, drink, and care for themselves. Under the terms of the settlement, the Washington Hospital Center agreed to implement substantial changes in facilities, equipment, policies, and procedures to ensure improved accessibility for inpatients and outpatients with disabilities. Changes included major architectural enhancements, resulting in many more accessible rooms; removal of barriers throughout the hospital; and procuring of accessible exam tables, chairs, and equipment for every department. Due to the significance of the issues and the comprehensive nature of the settlement, the DOJ again intervened to monitor compliance with the settlement terms.

With assistance from the DOJ, the hospital also reviewed and revised its policies to ensure equal access and benefits for patients with disabilities. To ensure that all persons with disabilities were appropriately accommodated in the future, the Hospital appointed an ADA officer, initiated a patient complaint process, and retained an ADA consultant, equipment expert, and architectural expert. The hospital also posted the rights of patients with disabilities and its complaint procedures, and provided disability training to hospital staff.

The Committee and cooperating counsel obtained an outstanding settlement against the Howard University Hospital Family Health Center ("Center") after several complaints regarding access issues in the Center.<sup>82</sup> The ERC alleged various access violations, including barriers at the Center's entrance, lack of accessible medical equipment, and other architectural barriers throughout the Center. The suit was swiftly settled in six months, ensuring access to health care services by people with mobility-related disabilities at this clinic.<sup>83</sup>

In *Equal Rights Center v. Hour Eyes*, the Committee and cooperating counsel obtained a national consent decree with Eye Care Centers of America, Inc. ("ECC"), one of the largest optometric retailers in the nation.<sup>84</sup> After receiving complaints that individuals were refused service at an optometry retailer because their wheelchair pre-

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82. See *Equal Rights Ctr. v. Howard Univ.*, No. 1:09-cv-01833 (D.D.C. dismissed Mar. 16, 2010).

83. WASH. LAW. COMM., SPRING 2010 UPDATE 4.

84. WASH. LAW. COMM., *supra* note 49 at 1.

vented them from sitting in the optometric examination chair, the ERC discovered that the facilities had no examination rooms that allowed a patron to remain seated in a wheelchair during an eye examination. Ultimately, the parties settled under the terms of a consent decree to ensure access for patients with mobility impairments.<sup>85</sup>

At the time, there were few if any consent decrees or settlements involving the accessibility of optometric retailers, so this decree has provided substantial guidance to this day. Notably, the *Hour Eyes* consent decree covered over five hundred ECC stores and required that all stores would be accessible to people with disabilities. The consent decree also mandated accessible eye examination equipment, testing rooms, and store service areas. The decree also ensured that physical barriers to stores would be removed, and required training for ECC staff to properly interact with customers with disabilities. More than twenty eye care centers in the Washington Metropolitan area alone were covered by the consent decree. Additionally, the Committee and cooperating counsel reached an agreement with ECC to compensate the plaintiffs with damages and attorney's fees.

#### D. Employment

When most people think of employment discrimination, they consider the blatant scenario in which an employer refuses to hire a prospective employee because of their disability.<sup>86</sup> Equally insidious, however, is the discrimination that occurs against an employee who has already been hired. A resonant example is that of *Hubbard v. United States Postal Service*,<sup>87</sup> in which the Committee received a serious complaint from deaf postal workers at the main U.S. Postal Service ("USPS") facility in the District of Columbia, which in 2003 experienced a catastrophic anthrax contamination, leading to the deaths of two postal workers and a long-term closure of the facility. The USPS hires many individuals who are deaf, and the facility impacted had a large number of such employees. Nonetheless, deaf USPS employees, some of whom were working in close proximity to postal workers who had died of anthrax, were profoundly frustrated in

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85. *Id.*

86. See the article on the Committee's Employment Project for a discussion of cases involving employment discrimination against employees with disabilities. David Cynamon and John Freedman, *A Survey of the Lawyers' Committee Work on Private and Public Employment Discrimination Cases: 1984–Present*, 62 *How. L.J.* (forthcoming Fall 2018).

87. *WASH. LAW. COMM., FALL 2013 UPDATE 5.*

their attempt to communicate with postal management and medical professionals. Because adequate sign language interpreter services were not provided at critical meetings, investigations, and medical consultations during and immediately following this event, the deaf workers were kept virtually in the dark about the effect of the anthrax crisis on their health and their jobs. Postal workers who were deaf also felt compelled to sign statements that they could not read nor understand. Furthermore, these workers were unsure why they were given medications, including Cipro, to take prophylactically to ensure they would not develop anthrax; as a result, some did not take the medication. In addition, the employees who were deaf did not understand the details of the facility closure and where they would be re-assigned. In this case, sign language interpreters were the only way to ensure effective communication with the employees who were deaf.

Upon receiving the complaints and in conjunction with filing litigation, the Committee wrote an urgent demand to the U.S. Postal Service for an immediate informational meeting in order to explain both the medical and operational implications of the emergency to the deaf postal workers. Ultimately, a three-hour meeting was held for almost forty postal workers in the D.C. region who were deaf. In addition to two certified interpreters, the meeting was also attended by two physicians from the Centers for Disease Control, a postal physician, two postal safety officers, postal management, and attorneys to answer the employees' many medical and job-related questions.

The class action suit brought pursuant to this incident sought a permanent improvement in communications with deaf postal employees nationwide. In 2013, the Committee reached a precedent-setting settlement with the U.S. Postal Service, establishing state-of-the-art reforms in the procedures and technology delivering interpreter services to a nationwide class of 6,000 current and former USPS employees who were deaf or hard-of-hearing.<sup>88</sup> The reforms implemented by the U.S. Postal Service greatly expanded the deployment and timely availability of qualified ASL interpreters to communicate safety and workplace information to deaf Postal Service employees throughout the country. In addition, the settlement provided for approximately \$3 million in compensatory damages, to be divided among the class of deaf and hearing-impaired employees, and \$1.5 million in attorney's

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88. *Id.*

fees.<sup>89</sup> Over the ten-year span of the litigation, Covington’s lead co-counsel, Tom Williamson, vigorously litigated this class action, and then engaged in intensive mediation efforts with the U.S. Postal Service, resulting in this comprehensive and innovative settlement.<sup>90</sup> The resolution was also facilitated by the creative and skillful efforts of Kenneth Feinberg, who served as mediator at the request of the parties.<sup>91</sup>

#### E. Transportation

Persons whose disability limits their mobility have their daily activities severely impaired when public or private transportation services discriminate against them. The Committee has always recognized this challenge and brought major litigation to ensure access to transportation services.

The Committee and cooperating counsel secured a significant victory in its class action against MetroAccess, the curb-to-curb paratransit service provided by Washington Metropolitan Area Transit Authority (“WMATA”) to people whose disabilities preclude them from using regular Metrorail and Metrobus service. Plaintiffs charged that MetroAccess’s paratransit service was so substandard that it illegally discriminated against people with disabilities and violated the ADA’s mandate that WMATA provide comparable transportation to people whose disabilities preclude them from using the regular fixed route system. Plaintiffs complained that MetroAccess buses often arrived extremely late or not at all, forcing riders with disabilities to miss appointments, jeopardize their employment, and wait outdoors in inclement weather. They also alleged excessively long trips, poor customer service, malfunctioning equipment, and reservation system inadequacies.<sup>92</sup>

In compliance with the terms of the \$14 million settlement agreement, WMATA hired expert consultants to assist in its ongoing oversight of MetroAccess performance. WMATA further implemented contract changes to enhance service by increasing the paratransit budget by \$4 million a year over a three-year period. In addition, every registered MetroAccess patron received 10 free rides; each of the 14 customers named in the class action suit received \$5,000;

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Equal Rights Ctr. v. Wash. Metro. Area Transit Auth.*, 573 F. Supp. 2d 205, 208 (2008).

WMATA riders, who provided sworn testimony, received \$1,000; the ERC received \$65,000; and the Committee and cooperating counsel received their fees. The Equal Rights Center also received over \$300,000 to monitor WMATA's compliance with the agreement.

Even discrimination regarding transportation-related services may undercut the mobility of a person with disabilities. For example, in *Equal Rights Center v. District of Columbia*,<sup>93</sup> the Committee and cooperating counsel alleged on behalf of the plaintiffs that the D.C. parking program discriminated against people with disabilities. The complaint cited inaccessible parking meters, illegally intrusive disability placard application forms, failure to recognize disability placards from other states, and unreasonably burdensome placard application process as violations of federal and district law. Most immediately, the lawsuit sought to replace D.C.'s discriminatory parking policies prior to the anticipated arrival of thousands of veterans and others with disabilities for the May 2004 opening ceremonies for the World War II Memorial at the Washington Mall.<sup>94</sup>

After the suit was filed, the D.C. Council passed emergency legislation to allow drivers with disabilities with a valid permit, license plate, or placard from other jurisdictions to park in time-limited spaces for free and for double the allotted time during the extended Memorial Day weekend.<sup>95</sup> Although the special rules addressed the short-term need, the lawsuit continued in order to achieve a permanent solution to inaccessible parking in D.C. In the summer of 2006, the parties reached a major settlement, which ensured that D.C. would provide designated meters of an accessible height on every block and paths of travel on each block with meters.<sup>96</sup> It also provided for curb cuts to the sidewalks on those blocks, reciprocity to other states' parking placards, and changes to placard application form. This important result in the first case of its kind has had a lasting impact throughout the country.

A novel lawsuit brought by the Committee and cooperating counsel against Zipcar<sup>97</sup> alleged that Zipcar violated both the ADA and D.C. Human Rights Act by failing to provide the full and equal enjoy-

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93. *Equal Rights Ctr. v. D.C.*, No. 1:04-cv-00529 (D.D.C. dismissed Feb. 21, 2007).

94. WASH. LAW. COMM., SPRING 2004 UPDATE 4.

95. *Id.*

96. WASH. LAW COMM., FALL 2006 UPDATE 6, 13.

97. The suit originally named Flexcar, another car-sharing company, as a co-defendant. Flexcar, however, was acquired by Zipcar in the course of this litigation.

ment of their car-sharing services to people with disabilities.<sup>98</sup> Specifically, the company did not provide vehicles equipped with hand controls. Hand controls are relatively inexpensive and easily installed devices that enable people with disabilities to drive vehicles without preventing other drivers from using the gas and brake pedals to operate the vehicle. Moreover, company policies restricted the transportation of assistance animals in their vehicles, and restricted people with disabilities from using aides to drive their vehicles.

Zipcar settled in September 2008, bringing the car-sharing industry into line with what has been required of car rental companies for years.<sup>99</sup> The settlement required that Zipcar provide hand control vehicles in the D.C. area as a pilot program and ensured that hand control vehicles would be available nationwide upon request. The settlement also allowed for assistance animals to travel in vehicles uncaged, and for D.C. members with disabilities to include up to two additional drivers for no additional fees. The defendant paid fees, damages, and monitoring costs to plaintiffs, and provided the individual plaintiff with a free membership and a credit for 3,000 miles annually for five years.

## II. EMERGING ISSUES

As described above, the Committee has strived to ensure that the principles of equal access provided for under the ADA and other laws are applied to current situations. As the way all people live and work has changed over time, so to have the challenges facing people with disabilities evolved. Thus, over the last few years, the Committee has continued to fight discrimination in a number of unique areas.

In the public accommodations area, the Committee has vigilantly embraced cases in order to fulfill the ADA's promise of equal convenience and enjoyment for people with disabilities. In *Ciotti v. New York City Department of Parks & Recreation*,<sup>100</sup> the Committee and cooperating counsel sued the City of New York and Central Park Boathouse, LLC alleging violations of Title II and Title III of the ADA, as well as the New York State Human Rights Law and the New York City Human Rights Law, by virtue of architectural barriers

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98. Compl. at 1, *Equal Rights Ctr. v. Zipcar, Inc.*, No. 07-cv-01823 (D.D.C. filed Oct. 10, 2007).

99. WASH. LAW COMM., FALL 2008 UPDATE 13.

100. Compl. at 1, *Ciotti v. New York City Dep't of Parks & Recreation*, No. 1:16-cv-00853 (S.D.N.Y. filed Feb. 3, 2016).

preventing access by wheelchair users such as Ms. Ciotti. Wheelchair users were only able to access the dining room through use of a steep movable metal ramp placed there by staff upon request.<sup>101</sup> Similarly, access to the patio could only be gained by removal of obstacles. The case was promptly settled soon after it was filed.

The Committee and cooperating counsel sued four cab companies—Yellow Cab Company of DC, Inc., Grand Cab Company, Elite Cab Association, and Pleasant Taxi Club, LLC—alleging that they had all engaged in discriminatory practices when their drivers repeatedly failed to pick up Eric Bridges, the Director of External Relations and Policy at the American Council of the Blind (“ACB”) and an ACB member, who was hailing a cab with his service dog, General.<sup>102</sup> These incidents were all caught on video by local television station WUSA9, which was filming a documentary on this issue.<sup>103</sup> A settlement was reached in *Bridges* whereby the four taxi companies agreed to an accessibility initiative to ensure that blind individuals accompanied by service animals have full and equal access to taxi services.<sup>104</sup>

Yet, the Committee’s work over the last several years has expanded beyond the past scope of public accommodation. The advent of the digital age has brought new forms of discrimination and ableism with it, particularly in the context of digital platforms. The most egregious offenses arise when websites, applications, or software are not made fully accessible for those who are visually impaired. The pervasiveness of inaccessible digital tools has pushed the Committee to expand the scope of its efforts in defending the interests of people with disabilities.

Most cases of this kind turn on the accessibility of phone applications, software, and electronic kiosks. In 2016, the Committee filed cases against both Sweetgreen restaurants and the BarBri bar examination preparation company, alleging that these companies failed to

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101. See *The Committee Settles Lawsuit against Historic New York Restaurant and Boat-house*, WASH. LAW. COMM. (Dec. 13, 2016), <https://washlaw.org/news/540-settlement-loeb-boathouse>.

102. Compl., *Bridges v. Grand Cab Company*, No. 2015 CA 001680 B (D.C. Super. Ct. filed Mar. 16, 2015).

103. *Several DC taxi companies agree to new guidelines*, WUSA9.COM (June 21, 2016), <https://www.wusa9.com/article/news/local/several-dc-taxi-companies-agree-to-new-guidelines/251581178>.

104. *Id.*; see also *American Council of the Blind Reaches Agreement with DC Taxi Companies to Enhance Accessibility of Street-Hail Service for Blind Individuals with Service Dogs*, WASH. LAW. COMM. (June 23, 2016), <https://washlaw.org/news/486-american-council-of-the-blind-reaches-agreement-with-dc-taxi-companies-to-enhance-accessibility-of-street-hail-service-for-blind-individuals-with-service-dogs>.

ensure that their digital platforms—both their applications and websites—were accessible to people with visual impairments.<sup>105</sup> A settlement was reached with Sweetgreen and the company agreed to make its online ordering portal and its mobile application accessible, as well as paying settlement payments to the plaintiffs.<sup>106</sup> *BarBri*, which was filed on behalf of three blind law students, also settled, agreeing to an extensive consent decree including requirements that it modify its web content, mobile applications, and study tools using industry-recognized standards, add resources to help it comply with such standards, and respond more quickly to requests for accommodations from its customers, and undergo an accessibility audit after improvements were made, among other things.<sup>107</sup>

In August 2017, the Committee and cooperating counsel filed an action against the Social Security Administration, stemming from the failure of information and check-in kiosks to accommodate people with visual impairments. In *Nat'l Fed'n of the Blind v. Berryhill*, Acting Comm'r of the SSA,<sup>108</sup> the NFB, and two blind individuals who receive Social Security benefits alleged that the SSA failed to make its Visitor Intake Processing touchscreen kiosks accessible to its blind visitors. Blind patrons were unable to check in independently at their local SSA field offices, instead being forced to rely on sighted third-parties or SSA staff—to whom they had to divulge private information, such as their social security numbers—to assist them in entering information into the kiosks. Moreover, because the patrons were unable to read the printed ticket generated by the kiosks, including their check-in number, they needed to rely on someone else to read the number or risk losing their appointment. According to the case docket, the parties have made repeated attempts at reaching a settlement, and the case has been referred for neutral case evaluation.<sup>109</sup>

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105. Compl. at 2, *Farmer v. Sweetgreen, Inc.*, No. 1:16-cv-02103 (S.D.N.Y. filed Mar. 22, 2016); Compl. at 1, *Stanley v. BarBri, Inc.*, No. 3:16-cv-01113-O (N.D. Tex. filed Apr. 25, 2016).

106. Stipulation and Order of Voluntary Dismissal, *Farmer v. Sweetgreen, Inc.*, No. 1:16-cv-02103 (S.D.N.Y. filed Feb. 01, 2017).

107. Consent Decree at 6–11, *Stanley v. BarBri, Inc.*, No. 3:16-cv-01113-BK (N.D. Tex. filed Jan 22, 2018).

108. Compl., *Nat'l Fed'n of the Blind v. Soc. Sec. Admin.*, No. 3:17-cv-1730-BAS-KSC (S.D. Cal. filed Aug. 28, 2017).

109. Order Granting Joint Motion to Stay Proceedings at 1, *Nat'l Fed'n of the Blind v. Soc. Sec. Admin.*, No. 3:17-cv-1730-BAS-KSC (S.D. Cal. filed Dec. 6, 2017); Notice and Order Setting Early Neutral Evaluation Conference at 1–2, *Nat'l Fed'n of the Blind v. Soc. Sec. Admin.*, No. 3:17-cv-1730-BAS-KSC (S.D. Cal. filed Oct. 9, 2018).

Also in 2017, the Committee and the ERC sued Uber for not requiring or facilitating the use of wheelchair accessible vehicles by its drivers, instead requiring that customers with disabilities use a slower and more expensive option within the application to hail a non-Uber taxicab.<sup>110</sup> The Complaint alleged that the ERC investigation demonstrated that Uber’s policy “relegates wheelchair users to a demonstrably inferior substitute for standard Uber service. Wheelchair users predictably must wait far longer for service through [the taxicab option] than others do for vehicles in Uber’s own fleet . . . .”<sup>111</sup> The Uber case continues to be litigated as this article goes to press.

The Committee’s cases against the General Services Administration are demonstrative of how technology designed to improve workflow and productivity for sighted users can leave people with visual disabilities behind. The Committee’s settlement in *American Council of the Blind v. Tangherlini*,<sup>112</sup> discussed *supra*, required the GSA to make its website accessible to contractors with visual disabilities. Similarly, in *Ashley v. Murphy*,<sup>113</sup> the Committee and cooperating counsel filed an action on behalf of Mr. Ashley, an 18-year employee with visual impairments who relied on a talking screen reader as part of accommodations for his disability. Mr. Ashley alleged that the GSA’s failure to provide comparable access to information technology across a wide array of software applications, as well as reasonable accommodations, violates the Rehabilitation Act. Among other things, the Administration’s software had mouse-overs and text boxes that were not “viewable” by the talking screen reader. As a result, visually impaired employees at the Administration, including Mr. Ashley, were not adequately armed to meet their employer’s expectations, and did not receive promotions for as long as thirteen years. The case is ongoing as this article goes to press.

The effect of the Committee’s efforts in the digital realm are twofold. The first effect follows the path laid by all of the Committee’s prior disability rights litigation: preserving the statutorily enshrined rights of those with disabilities. But accessible applications, websites, and software have the potential to revolutionize how people with disa-

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110. Compl. at 1, 12, Equal Rights Ctr. v. Uber Techs., Inc., No. 1:17-cv-01272 (D.D.C. filed June 28, 2017).

111. *Id.* at 3.

112. Compl., Am. Council of the Blind v. Tangherlini, No. 1:14-cv-00671 (D.D.C. filed Apr. 22, 2014).

113. Compl. and Jury Demand at 1, 13, Ashley v. Murphy, No. 1:18-cv-00574 (D.D.C. filed Mar. 14, 2018).

bilities interact with the world. By enforcing disability rights in the digital sphere, the Committee plays a second pivotal role in reducing the disparities between how able-bodied people and those with disabilities are able to access the world around them. The Committee is optimistic that, by redirecting efforts into the digital sphere over time, disability rights may become effectively evolve from a relatively reactive field to a more proactive one.

There is a theory in disabilities work which argues that no one is truly disabled. Rather, it argues that society chooses to “disable” those who are not able-bodied by continuously erecting obstacles for them to navigate. With the arrival of the digital age, the Committee is hopeful that the pervasive impact of technology paired with increasingly proactive disability rights litigation will limit how society disables others and highlight how each of us can play a role in creating a more inclusive world.

## CONCLUSION

Among the many threads that are woven into this rich tapestry of progressive accomplishments in the field of disability rights, particularly from the standpoint of the Committee’s advocacy, the role of technology in improving the daily lives of people with disabilities cannot be overstated. In thinking about how to fashion remedies to ensure a level playing field, keeping abreast of technological advances has been and continues to be critically important. And technology is not only advancing, but advancing at an ever-increasing rate. Thus, many solutions that were state-of-the art just a few short years ago, will likely be obsolete a few short years from now.

Conversely, as non-disabled workers, prisoners, and the public at large benefit from new technological advances, the challenge for employers and institutions will be how to ensure equal access to the same or equivalent technological amenities, as required by the ADA and other laws. Interestingly, non-profits and for-profit vendors alike may see opportunities for innovation in order to address such discrepancies.

The challenge for civil rights advocates practicing in the area of disability rights will be to closely monitor changing technology and continually assess whether persons with disabilities are being left behind, and whether the solutions—so often hard-fought—that we have erected in the past continue to be meaningful and effective in the present and for the future.

From the perspective of the Committee, the last quarter century has shown the value of partnerships in advancing the agenda of reform and full implementation of federally and locally guaranteed rights for persons with disabilities. The co-counsel relationships between the Committee and some of the most talented private practice lawyers and prominent law firms in the country have consistently yielded notable and often groundbreaking results. In many cases, skilled litigators with little or no background in disability rights, have leveraged the issue expertise on board in Committee project directors and staff attorneys, achieving far more than either partner could have done on its own. Similarly, the relationships between the Committee and other interest groups in the disability rights space have broadened the reach of the Committee, helping to identify problems in need of attention from a legal standpoint. They are on the front line of the struggle, and see potential cases in need of legal advocacy as they first arise.

These groups, such as the Disability Rights Council (now the Equal Rights Center), the National Association of the Deaf, the American Council for the Blind, and many others, have forged deeply-connected working relationships with the Committee. Investigators, attorneys and staff of these organizations have been the Committee's clients (serving as institutional plaintiffs, including claims for diversion of resources and frustration of mission damages) and collaborators. Those with in-house legal staff have served as co-counsel before local and federal courts, while investigators and staff have served as witnesses and consulting experts. The DRC (now ERC) has played a special role in pioneering and perfecting the use of evidence developed through testing of disability rights violations as a stand-alone basis for proving discrimination. Collaboration with the U.S. Department of Justice in appropriate cases has also furthered the Committee's litigation and advocacy goals, and should be pursued regardless of the political appointees who happen to be in charge during any particular executive term.

As the Committee embarks on its next half-century of work, the relationships it enjoys with the private bar and disability rights organizations should be deepened and enriched. Doing so will ensure that the Committee continues to enjoy unparalleled victories in the field, but continue to develop future waves of engaged and passionate counsel to carry on this vitally important work.

## NOTE

# When the Cops Become the Robbers: The Impact of Asset Forfeiture on Blacks and How to Curtail Asset Forfeiture Abuses

CANDACE CARUTHERS\*

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“[A]sset forfeiture takes a substantial toll on lower-income and racial minority individuals, [and] a strong excessive fines test is essential to protecting the property of those who can least afford to lose it.”<sup>1</sup>

INTRODUCTION

After the stock market crashed in 2008, Lisa Leonard, an IRS agent, hoping to protect her wealth, placed her career earnings and family inheritance—approximately \$250,000—inside a safe.<sup>2</sup> Lisa used some of this money to purchase a home in Texas for herself and later transported the safe to Pennsylvania to purchase another home.<sup>3</sup> After purchasing her Pennsylvania home, Lisa placed its bill of sale inside her safe, along with her remaining \$201,000.<sup>4</sup> Lisa then enlisted

1. Brent Skorup, Comment, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON U. CIV. RTS. L.J. 427, 431 (2012).

2. \$201,100.00 U.S. Currency v. State, No. 09-14-00478-CV, 2015 WL 4312536, at \*1 (Tex. App. July 16, 2015) [hereinafter *Currency*]. Lisa Leonard appealed the adverse decision in *Currency* to the Supreme Court and was denied certiorari, permitting the loss of Lisa’s life savings to stand. *Leonard v. Texas*, 137 S. Ct. 847, 847 (2017).

3. Prosecution argued at trial that Lisa presented conflicting stories about how the money arrived in Pennsylvania. See *Currency*, 2015 WL 4312536, at \*4. However, in *Leonard*, Justice Thomas did not address the prosecution’s arguments about how the safe arrived in Pennsylvania. See generally *Leonard*, 137 S. Ct. at 847.

4. See generally *Leonard*, 137 S. Ct. at 847.

her son, James Leonard, to transport the safe back to Texas on her behalf, where Lisa hoped to later use her savings to purchase a home for her son.<sup>5</sup> Unfortunately, Lisa was never able to buy this home. Instead, as James was driving, he was pulled over by police for a traffic infraction in an area known to police as a drug corridor.<sup>6</sup> During the stop, James consented to a search of his vehicle. Although neither James nor his girlfriend, who accompanied him on the trip, were charged of any crime, the police seized Lisa's safe, claiming that her life savings was substantially related to criminal activity.<sup>7</sup>

The Government took Lisa's cash and bill of sale through a process called Asset Forfeiture.<sup>8</sup> Lisa challenged the seizure of her property in *Leonard v. Texas*, but her case was denied certiorari by the Supreme Court due to a procedural error.<sup>9</sup> Under current law, it is up to the victims of civil asset forfeiture to prove their innocence (contrary to the traditional idea that you are innocent until proven guilty).<sup>10</sup> Lisa failed to do so at the trial level, so she was ultimately left with "little recourse" for her devastating financial loss.<sup>11</sup> Essentially, Lisa was robbed by the police, and although the outcome of

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Leonard*, 137 S. Ct. at 847 (explaining that Lisa did not raise her Due Process argument until she was before the Supreme Court).

10. Ewan Watt & Jordan Richardson, *Justice Thomas Defends Victims of 'Policing for Profit'*, NAT'L REV. (Mar. 10, 2017, 9:00 AM), <http://www.nationalreview.com/article/445644/civil-asset-forfeiture-clarence-thomas-asks-if-its-constitutional>. Currently, Texas's civil asset forfeiture laws permit the seizure of assets perceived to be involved in criminal activity without a conviction. *See id.* Thus, in *Currency*, the Court held that the contents of the safe could not be returned to Lisa because she did not prove her innocence, stating that she provided conflicting stories in her deposition and at trial about the contents of the safe. *Currency*, 2015 WL 4312536, \*4. Further, the court rejected Lisa's son's argument that the State did not provide adequate proof that the money was contraband. *See id.* at \*3. The court explained that the State presented sufficient circumstantial evidence due to the time of the stop, the location of the stop, i.e. it was a "main thoroughfare for transport" of money and drugs, and the fact that James and his passenger girlfriend provided conflicting stories about the contents of the safe. *Id.*

11. Watt & Richardson, *supra* note 10. Lisa was a victim of civil asset forfeiture since neither she nor her son were ever charged for a criminal offense. This comment will discuss the adverse impacts of both civil and criminal asset forfeiture. An improved excessive fines test is especially appealing because it would be applicable to civil and criminal asset forfeiture. *See Austin v. United States*, 509 U.S. 602, 608 (1993) ("The text of the Eighth Amendment includes no . . . limitation" to criminal cases). For criminal asset forfeiture, a defendant may challenge the government's proposed seizure during trial proceedings. *What We Investigate*, FBI, <https://www.fbi.gov/investigate/white-collar-crime/asset-forfeiture>, (last visited Mar. 24, 2018).

Lisa's unlucky situation seems absurd, under current U.S. asset forfeiture law, it was completely legal.<sup>12</sup>

Criminal and civil asset forfeiture are powerful and often abused tools available to law enforcement. In denying certiorari in *Leonard*, Justice Thomas addressed the failings of the current U.S. asset forfeiture system and expressed skepticism toward its constitutionality.<sup>13</sup> There are also extensive and well-chronicled examples of asset forfeiture abuses that are also a cause for concern, beyond the system's constitutionality.<sup>14</sup> These concerns range from millions of dollars in asset forfeiture revenue being used to give district attorneys salary bonuses,<sup>15</sup> to thousands of dollars being used to cover prosecutorial food-related expenses.<sup>16</sup>

In *Leonard*, Justice Thomas explained how asset forfeiture often disproportionately impacts the "poor and other groups least able to defend their interests in forfeiture proceedings."<sup>17</sup> Justice Thomas also provided examples of how police departments can abuse forfeiture against low-income and minority individuals.<sup>18</sup> For instance, Justice Thomas described how in Tehana, Texas, local officials forced a Latino man and his girlfriend to sign a waiver of their property rights by threatening the pair with "unsubstantiated felony charges" and placing their children in foster care.<sup>19</sup> Moreover, since in some com-

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12. See generally *Currency*, 2015 WL 4312536. According to Black's Law Dictionary, robbery is defined as "the illegal taking of property from the person of another, or in the person's presence, by violence or intimidation . . ." Robbery, BLACK'S LAW DICTIONARY (10th ed. 2014). As discussed throughout this article, modern asset forfeiture violates the historical purposes of asset forfeiture. See *infra* note 20 and accompanying text. Thus, the seizure of Lisa's assets was "unlawful" because seizure of her life savings is a seizure that could "impoverish the wrong doer." See *Colgan infra* note 35 and accompanying text.

13. *Leonard*, 137 S. Ct. at 849 ("I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice . . ."); see also Watt & Richardson, *supra* note 10 (explaining that the "whole procedure seemed wrong to Thomas" and that civil asset forfeiture harms public trust).

14. See *supra* note 8 for Justice Thomas's quote about the constitutionality of asset forfeiture.

15. See David M. Schwartz, *Lawsuit Seeks Return of \$3.25 million in Suffolk DA Bonuses*, NEWSDAY (Dec. 9, 2017, 8:12 PM), <https://www.newsday.com/long-island/politics/suffolk-district-attorney-bonus-lawsuit-1.15352863>; see also Gary Andersen & Lee Smith, *Civil Asset Forfeitures Are Not American Way*, FAIRMONT SENTINEL (Jan. 17, 2018), <http://www.fairmontsentinel.com/opinion/local-editorials/2018/01/17/civil-asset-forfeitures-are-not-american-way/> (explaining that seized property is often used to pay for law enforcement equipment).

16. Kody Leibowitz, *Cambria County DA Office Spent Thousands in Forfeiture Funds on Food, Attorney*, WJAC (Dec. 4, 2017), <http://wjactv.com/news/local/cambria-co-da-office-spent-thousands-in-forfeiture-funds-on-food-attorney>.

17. *Leonard*, 137 S. Ct. at 848.

18. *Id.*

19. *Id.*

munities the majority of blacks and other minority groups live beneath the poverty line, seizures of homes, cash, and automobiles can have a significant impact on a family's quality of life, including the possibility of the family becoming homeless.<sup>20</sup>

Although the Court unanimously opposes oppressive asset forfeiture,<sup>21</sup> the Department of Justice (“DOJ”), under the direction of former Attorney General Jeff Sessions, has announced that it will continue to maximize its use of civil and criminal asset forfeiture.<sup>22</sup> The DOJ's current position thus heightens the already existing need for the Court to take concrete action to limit asset forfeiture abuses. As the public becomes increasingly aware of the injustices surrounding asset forfeiture proceedings, state and federal lawmakers—both democratic and republican—have proposed legislation to change the current U.S. asset forfeiture system. For instance, a Georgia lawmaker proposed a bill that requires a conviction before any assets may be forfeited.<sup>23</sup>

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20. Nicholas Schieber, *The Civil Asset Forfeiture Program: An Analysis of the Actual Use, Racial Subjectivity, and Unfairness to Lower Earning Individuals*, 22 *ECON. CRIME FORENSICS CAPSTONES* 1, 21 (2017).

21. *Leonard*, 137 S. Ct. at 850; see also Jessica S. Mussallem et. al., *Keeping Current: Supreme Court Curbs SEC's Disgorgement Power: Holds That the SEC Can't Escape the SOL*, *BUS. L. TODAY*, July 2017, at 1 (“[T]he Court has shown a skepticism for such powerful—and often less regulated—government penalties”).

22. See Matt Ford, *The Bipartisan Opposition to Sessions' New Civil-Forfeiture Rules*, *THE ATLANTIC* (July 19, 2017, 4:25 PM), <https://www.theatlantic.com/politics/archive/2017/07/sessions-forfeiture-justice-department-civil/534168/> (stating that the DOJ “will continue to encourage civil-asset forfeiture whenever appropriate in order to hit organized crime in the wallet”). The Trump-Sessions DOJ has overwhelmingly expressed disdain for drug offenders, evidenced by a complete disregard for the traditional criminal law principle that the punishment should be rationally related to the crime. Trump has gone so far as to call for the death penalty for drug dealers. Darlene Superville, *Trump's Opioid Plan Calls for Death Penalty for Drug Traffickers*, *CHI. TRIB.* (Mar. 19, 2018, 11:00 a.m.), <http://www.chicagotribune.com/news/nation/world/politics/ct-trump-opioid-plan-death-penalty-20180318-story.html>; see also Damir Mujeniznovic, *The Tragedy and Uselessness of Torture*, *INQUISITOR* (Mar. 15, 2018), <https://www.inquisitr.com/opinion/4827970/the-tragedy-and-uselessness-of-torture/> (describing President Trump as “anti-Constitution” due to his consistent support of torture). However, as it was expected, White House spokespersons quickly scaled back Trump's initial declarations, stating that new policies will “seek the death penalty against drug traffickers when appropriate under current law.” Dan Diamond, *White House Tweaks Plan to Seek Death Penalty as Part of Opioid Response*, *POLITICO* (Mar. 18, 2018, 6:41 PM), <https://www.politico.com/story/2018/03/18/opioid-death-penalty-heroin-trump-423902> (emphasis added).

23. C.J. Ciramiella, *Georgia Lawmaker Introduces Bill to Require Conviction for Asset Forfeiture*, *REASON BLOG* (Dec. 12, 2017, 8:00 AM), <http://reason.com/blog/2017/12/12/georgia-lawmaker-introduces-bill-to-requ>. Republican Congressman Sensenbrenner of Wisconsin has also introduced the Due Process Act of 2017. See Due Process Act of 2017, H.R.1795 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/house-bill/1795?q=%7B%22search%22%3A%5B%22assetforfeiture%22%5D%7D&r=3> (last visited Mar. 31, 2018).

It is necessary for the Court to provide constitutional protections for minorities and other vulnerable populations against asset forfeiture. This comment will argue that the current asset forfeiture system fosters rampant violations of the historic meaning and purpose of the Excessive Fines Clause of the Eighth Amendment; that it disproportionately impacts the most vulnerable in society—primarily black individuals—and the Court should utilize an improved excessive fines test as a tool against oppressive forfeitures. Part One of this comment will discuss the historical development of asset forfeiture and the Excessive Fines jurisprudence. Part Two will discuss how asset forfeiture impacts blacks and how alternative approaches adopted by the Court, like the *Honeycutt*'s decision, will ultimately be unable to provide adequate protection from oppressive asset forfeiture. Due to the Court's inability to deliver substantive change, Part Three of this comment advocates for a more protective and well-defined excessive fines test that amends the concept of proportionality under the prevailing *United States v. Bajakajian*<sup>24</sup> test, to a factor-based standard that analyzes an individual's particular social and economic circumstances to measure whether a proposed forfeiture is excessive.

## I. BACKGROUND ON ASSET FORFEITURE AND THE EXCESSIVE FINES CLAUSE

### A. The Historical Background of Civil and Criminal Asset Forfeiture

Modern day asset forfeiture laws aim to take down large criminal enterprises by “[hitting] them where [it] hurt[s].”<sup>25</sup> In 1970, fear and hysteria about the crack cocaine epidemic resulted in former President Reagan's declaration of the “War on Drugs” and Congress's implementation of harsher sentencing laws.<sup>26</sup> As a consequence of this shift in federal policy and nationwide sentiment, asset forfeiture laws were given greater depth and force, beginning with the Racketeer In-

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24. See generally *United States v. Bajakajian*, 524 U.S. 321 (1998).

25. Karla R. Spaulding, “Hit Them Where It Hurts:” *Rico Criminal Forfeitures and White Collar Crime*, 80 J. CRIM. L. & CRIMINOLOGY 197, 198 (1989). For information about the historical roots of forfeiture law, see Melissa A. Rolland, *Forfeiture Law, the Eight Amendment's Excessive Fines Clause and United States v. Bajakajian* 74 NOTRE DAME L.R. 10, 1372 (1999). In the article, Rolland explains that forfeiture practices can be found in the bible and early English law. *Id.*

26. See Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 246–47 (2015) (“By 1971, 37.9 percent of the population viewed crime as the most important problem facing the nation. The media similarly connected drugs and violence by claiming that marijuana and ‘knives, chains, and handguns’ were commonplace in American schools.”).

fluence and Corrupt Organizations Act (“RICO”).<sup>27</sup> RICO made the proceeds of illegal activity subject to forfeiture.<sup>28</sup> Lawmakers claimed stronger asset forfeiture systems were necessary in order to give prosecutors powerful new tools against drug-related offenses.<sup>29</sup> Thus, the Drug Abuse Prevention and Control Act of 1970 (“Drug Abuse Prevention Act”) was designed primarily to “provide prosecutors with a new tool for obtaining lengthy sentences for those who *lead* drug organizations,” and was the most putative drug enforcement law up to that date.<sup>30</sup> Thus, the Drug Abuse Prevention Act and other legislative initiatives authorized both civil and criminal asset forfeiture.<sup>31</sup>

By the 1980s, the expansive asset forfeiture system devolved into a financial incentive for law enforcement to forfeit property. In 1984, Congress gave the Attorney General the ability to distribute federal seized property to state and local law enforcement.<sup>32</sup> Today, the DOJ continues to endorse the mantra that asset forfeiture is used to combat crime. The DOJ’s website claims that the goal of its asset forfeiture program is to “employ asset forfeiture powers in a manner that enhances public safety and security.”<sup>33</sup> Toward these alleged aims, in 2014, law enforcement took more personal and real property from people than burglars did.<sup>34</sup>

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27. David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL. R. 541, 546 (2017).

28. *Id.*

29. *History of Criminal Forfeiture*, 3 CRIM. PRAC. MANUAL § 106:2 (last updated Sept. 2018); see also Richard Weber, *Introduction*, in 55 ASSET FORFEITURE, U.S. ATT’Y BULL. 1 (Jim Donovan ed., 2007), available at <https://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf> (encouraging prosecutors to pursue civil and criminal asset forfeiture) [hereinafter *DOJ Attorney Guidance*].

30. Sharon C. Lynch, *Drug Kingpins and Their Helpers: Accomplice Liability Under 21 USC Sec 848*, 58 U. CHI. L. REV. 391, 393 (1991) (emphasis added).

31. See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 100, Stat. 3207 (1986); Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. §§981, 982 (authorizing civil and criminal forfeiture).

32. OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., REVIEW OF THE DEPARTMENT’S OVERSIGHT OF CASH SEIZURE AND FORFEITURE ACTIVITIES 7 (2017), <https://oig.justice.gov/reports/2017/e1702.pdf> [hereinafter *OIG Report*].

33. *Asset Forfeiture Program*, U.S. DEP’T OF JUST., <https://www.justice.gov/afp> (last visited Mar. 13, 2018).

34. Christopher Ingraham, *Law Enforcement Took More Stuff From People Than Burglars Did Last Year*, WASH. POST (Nov. 23, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/?utm\\_term=.6f50bc8b99c0](https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/?utm_term=.6f50bc8b99c0) (explaining that federal law enforcement deposited over \$5 billion into their asset forfeiture funds while burglars only stole \$3.5 billion); Chris Roberts, *Seizing People’s Stuff is Trump’s Favorite Tool in the War on Drugs*, OBSERVER (Apr. 20, 2018, 6:15 AM), [http://observer.com/2018/04/albuquerque-stops-asset-forfeiture-trumps-favorite-war-on-drugs-tool/?utm\\_campaign=social-low&utm\\_source=facebook&utm\\_medium=social](http://observer.com/2018/04/albuquerque-stops-asset-forfeiture-trumps-favorite-war-on-drugs-tool/?utm_campaign=social-low&utm_source=facebook&utm_medium=social) (“Asset forfeiture is

B. Origins of the Eighth Amendment Excessive Fines Clause and *Bajakajian*'s Proportionality Approach

For much of the Court's jurisprudence, the Eighth Amendment's Excessive Fines Clause has taken a backseat to the Cruel and Unusual Punishment Clause.<sup>35</sup> Yet, over the past two decades, the Excessive Fines Clause has come back into the spotlight, beginning with *United States v. Bajakajian* where the Court first held that asset forfeiture could be subject to the Excessive Fines Clause.<sup>36</sup>

The language of the Eighth Amendment to the U.S. Constitution,<sup>37</sup> which includes the Cruel and Unusual Punishment and Excessive Fines Clauses, can also be found in the English Bill of Rights.<sup>38</sup> In England, the Excessive Fines Clause was applicable to both civil and criminal fines.<sup>39</sup> Criminal penalties, called fines, were payments that were required in order to be released from prison and civil penalties were called amercements.<sup>40</sup> The Magna Carta prohibited amercements that "were disproportionate to the charged offense or that would serve to impoverish the wrongdoer."<sup>41</sup> The Magna Carta also adhered to a firm principle—termed "salvo contentamento suo (translated as 'saving his contentment,' or livelihood),"—which essentially means that individuals should not be responsible for an amount he or she would be unable to pay.<sup>42</sup>

There is evidence to support that the Framers adopted the English perspective on the Excessive Fines. When the Eighth Amendment was introduced in the First Congress, there was limited debate about the clause, demonstrating that the Framers were not critical of

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an enormous business . . . In almost every case, *the proceeds go straight into police budgets.*" (emphasis added).

35. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L. Q. 833, 833 (2013); see also Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. R. 277, 296 (2014) (explaining that the Court practically gave up interpreting the Excessive Fines Clause and merged the Cruel and Unusual standard into the Excessive Fines disproportionality standard).

36. McLean, *supra* note 35, at 833–34.

37. Many provisions of the U.S. Bill of Rights, that oversee the criminal justice process, were designed to protect the accused from the power of the state due to the harsh punishment and lack of protection provided to colonists during British rule. Linda R. Monk, *Crime & Punishment*, PBS, <http://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/crime-and-punishment/> (last updated Mar. 25, 2013).

38. Colgan, *supra* note 35, at 296.

39. *Id.* at 297.

40. *Id.*

41. *Id.*

42. McLean, *supra* note 35, at 835.

the amendment's long-standing principles.<sup>43</sup> When the Framers were adopting the Eighth Amendment, one speaker stated that “[if] a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it.”<sup>44</sup> This quote signals that not only would it be up to the courts to interpret the clauses, but the courts should be mindful of more lenient alternatives. Evidence of strong adherence to this principle can be found in seventeenth- and eighteenth-century common law.<sup>45</sup>

Yet, unlike the Court's typical approach, interpreting vague constitutional language written by the Framers,<sup>46</sup> the Court rejected the academic interpretation of how the English viewed the Excessive Fines Clause.<sup>47</sup> Instead, the Court adopted its own historical interpretation and limited the Excessive Fines Clause's applicability to “payment to a sovereign as punishment for some Offense.”<sup>48</sup>

Existing excessive fines jurisprudence has been unable to protect minorities from asset forfeiture abuses. This failure has occurred partly because the Supreme Court has been generally unwilling to hear cases that invoke the Excessive Fines Clause.<sup>49</sup> The prevailing

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43. Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages Some Lessons from History*, 40 VANDERBILT L. REV. 1233, 1241 (1987).

44. Colgan, *supra* note 35, at 296.

45. McLean, *supra* note 35, at 835.

46. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 622 (1992) (“The Framers adopted the Religion Clauses in response to a long tradition of coercive state support for religion, particularly in the form of tax assessments, but their special antipathy to religious coercion did not exhaust their hostility to the features and incidents of establishment.”); *Miranda v. Arizona*, 384 U.S. 436, 458 (1966) (“It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.”); *Counselman v. Hitchcock*, 142 U.S. 547, 576 (1892) (interpreting the Fifth Amendment, “it was the purpose of its framers ‘to declare, as part of the organic law, that no man should anywhere, before any tribunal, in any proceeding, be compelled to give evidence tending to criminate himself[.]’”).

47. This note was substantially completed prior to the Court's decision in *Timbs v. Indiana*, No. 17-1091, 2019 WL 691578, at \*3 (Feb. 20, 2019) (the Court came into agreement with the academic interpretation of the Excessive Fines Clause).

48. Colgan, *supra* note 35, at 298.

49. McLean, *supra* note 35, at 834 (explaining that the Court has refused to provide further guidance to lower courts who cite the *Bajakajian* test). It is also theorized that the Court has relied on the Equal Protection Clause instead of the Excessive Fines Clause to protect indigent individuals. *Excessive Fines*, JUSTIA, <https://law.justia.com/constitution/us/amendment-08/02-excessive-fines.html>, (last visited Oct. 20, 2018) (“The Court has elected to deal with the issue of fines levied upon indigents, resulting in imprisonment upon inability to pay, in terms of the Equal Protection Clause, thus obviating any necessity to develop the meaning of ‘excessive fines’ in relation to ability to pay.”). For example, pursuant to the “fundamental fairness” requirements of the Fourteenth Amendment, indigent defendants who cannot pay fines or restitution must receive an “Ability to Pay” hearing, which considers whether the defendant “willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay.” *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983). If the defendant “could not pay despite

standard for an Eighth Amendment Excessive Fines violation was set forth by the Court in *Bajakajian*.<sup>50</sup> In fact, *Bajakajian* was the first case where the Court attempted to interpret the meaning of “excessive.”<sup>51</sup> In *Bajakajian*, the Court shifted its narrow historical interpretation of “payment to the sovereign,”<sup>52</sup> and held that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense that it is designed to punish.”<sup>53</sup> However, the *Bajakajian* test has not been consistently applied by lower courts<sup>54</sup> due to a lack of further instruction from the Court. In fact, when applied by lower courts, the test is applied with “doctrinal uncertainty,”<sup>55</sup> creating a “little-known but important circuit split” as to how to define excessiveness under *Bajakajian*.<sup>56</sup>

Generally, courts do not regard a defendant’s ability to pay as a relevant concern under the Excessive Fines Clause.<sup>57</sup> These courts, have interpreted *Bajakajian* strictly and upheld forfeitures which are proportionate in relation to the nature of the offense.<sup>58</sup> In contrast, the First Circuit has held that a defendant “may raise whether the forfeiture order is so excessive under the Eighth Amendment that it would, in extreme cases effectively deprive the defendant of his or her future livelihood.”<sup>59</sup> The First Circuit’s implementation of this additional factor is a good example of the varying Excessive Fines applications amongst the circuits. Scholars take the position that the First Circuit’s approach, by considering the impact a forfeiture has on a defendant, “is significantly more faithful to the history and purpose of the Excessive Fines Clause.”<sup>60</sup>

Another approach, as articulated by a California federal district court in *United States v. Zumirez*,<sup>61</sup> asserts that to evaluate civil asset forfeitures “three factors should be weighed, with no one factor being

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sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment.” *Id.* at 672.

50. *Bajakajian*, 524 U.S. at 322. For information about the Court’s jurisprudence leading up to the *Bajakajian* test, see McLean, *supra* note 35, at 834.

51. Colgan, *supra* note 35, at 298.

52. *Id.* at 298–99.

53. *Bajakajian*, 524 U.S. at 322.

54. Skorup, *supra* note 1, at 431.

55. McLean, *supra* note 35, at 843.

56. *Id.* at 834.

57. *Id.* 834–35.

58. *Id.* at 834.

59. *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 16 (1st Cir. 2012).

60. McLean, *supra* note 35, at 835.

61. See generally *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994) [hereinafter *Zumirez*].

dispositive: (i) the inherent gravity of the offense compared with the harshness of the penalty; (ii) whether the property was an integral part of the commission of the crime; and (iii) whether the criminal activity involving the defendant's property was extensive in terms of time and/or spatial use."<sup>62</sup> Some scholars advocate for this test because it places a heavy burden on the government.<sup>63</sup>

Notably, *Zumirez* also suggests that in evaluating the harshness of the penalty, a court should consider the fact that "society and the courts place a higher value on real property, in particular the home, than on personal property."<sup>64</sup> Courts also sometimes look to the Sentencing Guidelines or statutory penalties to determine disproportionality.<sup>65</sup> There are divided schools of thought about whether this helps or hurts vulnerable individuals. One scholar suggests that courts "can determine the seriousness of the offense, and then do a mathematical calculation to generate a ratio by which the excessiveness of a fine can be objectively assessed."<sup>66</sup>

### C. Benefits of an Improved Excessive Fines Test

With a proper test to restrain zealous prosecutors, asset forfeiture can be used as a way to solve problems in the criminal justice system. According to *Bajakajian* and *Austin v. United States*, both civil and criminal asset forfeiture are subject to the Excessive Fines Clause because both serve "to punish the property owner for an offense that has been committed."<sup>67</sup> Thus, the benefits of an improved excessive fines test would not only serve to aid blacks who are disproportionately subject to drug arrests and charges, but could also help individuals like Lisa Leonard, who have their assets seized, but have committed no crime.<sup>68</sup> An improved excessive fines test could also ensure that an individual's punishment is fitting to the crime, by not making them

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62. *Zumirez*, 845 F. Supp. at 732.

63. Skorup, *supra* note 1, at 431.

64. *Zumirez*, 845 F. Supp. at 734.

65. Skorup, *supra* note 1, at 449.

66. Pimentel, *supra* note 22, at 545. As far as civil asset forfeiture is concerned, scholar Brent Skorup strongly disagrees with this proposition and has described using the Sentencing Guidelines as inappropriate because (1) they are intended solely for criminal offenses, (2) the gravity of offenses are less in civil forfeiture cases, (3) the burden of proof required is less than criminal cases, and (4) he fears that defendants will be subject to the Sentencing Guidelines in both civil and criminal litigation. Skorup, *supra* note 1, at 449–51.

67. Pimentel, *supra* note 22, at 555–56.

68. See discussion *infra* Part II.

responsible for more than they are culpable and alleviating some of the burden on individuals once released from prison.

Seized assets—the profits of which should be made available to law enforcement in lesser amounts<sup>69</sup>—can also be used to support new technologies to improve law enforcement. Although, as discussed in the Introduction, there are several law enforcement agencies that abuse forfeiture revenue, there are also examples of how such funds have been used to improve policing. For example, in Asheboro, North Carolina, three county agencies used around \$125,000 in drug forfeiture seizure revenue to purchase thermal imaging cameras called Forward Looking Infrared Radiometers.<sup>70</sup> The new cameras can take clear pictures from 3,000 feet above ground and can be used to take pictures of crime scenes, locate and photograph marijuana farms from far in the air, and help locate individuals, even at night.<sup>71</sup> Thus, such technology serves the public by protecting at-risk individuals, like the elderly and law enforcement, who can use this technology to collect data without risking physical harm.<sup>72</sup>

Moreover, asset forfeiture, when used properly, “has the power to disrupt or dismantle criminal organizations that would continue to function if only specific individuals are convicted and incarcerated.”<sup>73</sup> Many do not believe that prosecutors should be completely stripped of the ability to seize assets used or earned through crime.<sup>74</sup> If asset forfeiture was used as originally intended, and took down King Pins with fat pockets (i.e., the leaders of drug organizations), instead of the low-level, poor drug dealers, law enforcement would be much more effective in addressing drug abuse and drug related crime. Another great use of funds acquired through forfeiture, could be to pour money from seized assets back into communities. Creating afterschool or life-skills training programs, would likely go further in reducing

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69. See discussion *infra* Part III.

70. Judi Brinegar, *Future Eye in the Sky Aids Sheriff's Office*, THE COURIER TRIB., (Jan. 6, 2018) <http://www.courier-tribune.com/news/20180106/future-eye-in-sky-aids-sheriffs-office>.

71. *Id.*

72. See generally *id.* Such technology—if used properly—could be a method to address police violence by reducing the need for police and civilian encounters, to investigate unlawful activity.

73. *Asset Forfeiture Program*, UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/afp> (last accessed on Nov. 2, 2018).

74. Gary Andersen & Lee Smith, *supra* note 15. This comment does not advocate for abolishing the asset forfeiture system, but instead the implementation of constitutional barriers to protect the vulnerable in society through the Excessive Fines Clause of the Eighth Amendment.

crime, than increased policing<sup>75</sup> or stricter application of asset forfeiture as Attorney General Jeff Sessions proposes.<sup>76</sup>

Additionally, in some instances, criminal asset forfeiture would be preferable to prison sentences, which are disruptive for families and costly to the government.<sup>77</sup> In reality, lengthy prison sentences actually promote criminal activity, as they are “schools of crime” that produce recidivism through the barren and inhuman culture within prisons.<sup>78</sup> Further, research has revealed that lengthy prison sentences create disproportionate stress, mental health issues, and higher rates of infectious diseases for the communities impacted.<sup>79</sup> Thus, a strong excessive fines test could lead to the implementation of an asset forfeiture system that alleviates the collateral consequences that impact communities and individuals who are disproportionately prosecuted and imprisoned.

## II. ANALYSIS: *HONEYCUTT* FAILS TO CURTAIL ASSET FORFEITURE ABUSES

As mentioned in the Introduction, the Court has attempted, but ultimately been unable, to reign in asset forfeiture abuses. The Court has also noted the impact asset forfeiture has on disenfranchised groups. Part A of this section will evaluate available data about asset forfeiture and arrests, to determine the impact asset forfeiture has on blacks and other minorities. Part B of this section analyzes the approach the Court adopted in *Honeycutt* to address asset forfeiture. Ultimately, as discussed in Part C of this section, the *Honeycutt* decision has had limited success, and thus, the best way to address the failings of the current asset forfeiture system is to redefine the proportionality standard of *Bajakajian*. This would allow blacks, as the low-

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75. The Justice Department’s 2018 budget calls for increased border policing to fight the opioid crisis to keep “the American people safe from drugs, gangs and terrorists.” Sari Horwitz, *Justice Department’s \$28 Billion Budget Reflects Sessions’ Priorities*, WASH. POST. (Feb. 12, 2018), <https://www.lmtonline.com/news/article/Justice-Department-s-28-billion-budget-reflects-12608499.php>.

76. *See supra* note 17 and accompanying text.

77. Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture Into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 183–84 (2011).

78. PAUL GENDREAU, ET AL., DEP’T OF THE SOLIC. GEN. CAN., *THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM* 1, 3–4, 6 (1999), available at <https://www.prisonpolicy.org/scans/e199912.htm>.

79. Emily Von Hoffman, *How Incarceration Infects A Community*, THE ATLANTIC (Mar. 6, 2015), <https://www.theatlantic.com/health/archive/2015/03/how-incarceration-infects-a-community/385967/>.

est income earning population, to benefit from a test that contemplates their individual socio-economic background.

A. Impact of Asset Forfeiture on Blacks

The DOJ does not provide any data validating its assertion that asset forfeiture enhances public safety. Instead, the DOJ's Office of Inspector General published a report explaining that the DOJ "does not fully collect and analyze data on seizure and forfeiture activities sufficient to enable it to determine: (1) whether seizures benefit law enforcement efforts; or (2) the extent to which seizures present potential risks to civil liberties."<sup>80</sup> Such information is clearly vital for understanding the impact asset forfeiture has on minorities.

Moreover, evidence actually suggests that asset forfeiture is ineffective. For instance, despite the increased use of asset forfeiture over the years, drug sales remain the same and drug use has increased.<sup>81</sup> Despite having a lack of knowledge about asset forfeiture's costs and benefits, prosecutors are urged by their peers and supervisors to pursue asset forfeiture in all criminal drug cases whenever possible,<sup>82</sup> regardless of the defendant's culpability, financial circumstance, or the status of their dependents. In addition, police departments are not required to document the race of the individuals from whom they seize property.<sup>83</sup>

Thus, to determine the impact asset forfeiture has on blacks, it is necessary to analyze the manner by which law enforcement targets the poor and individuals suspected of drug crimes. Instead of going after the King Pins—who often possess large sums of money and their incarceration would most effectively subvert a major criminal enterprise—the DOJ has consistently targeted petty dealers, who are often

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80. *OIG Report*, *supra* note 32, at 17.

81. Skorup, *supra* note 1, at 428.

82. Craig Gaumer, *Criminal Forfeiture* 6, in 55 ASSET FORFEITURE, U.S. ATT'Y BULL. 29 (Jim Donovan ed., 2007), available at <https://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf> ("Prosecutors and investigators should consider forfeiture a part of every criminal case for which criminal forfeiture is authorized, in order to strip the defendants of the profits and tools of their crimes and deter others from engaging in such criminal activity.") (emphasis added).

83. Police departments are only statutorily required to report the total amount seized. Schieber, *supra* note 20, at 3. Beyond an improved excessive fines test, a non-judicial method to combat oppressive asset forfeiture would be implementing federal legislation requiring more data tracking and accountability.

black, poor,<sup>84</sup> and easily replaced by the King Pin who remains at large.<sup>85</sup> Blacks are most vulnerable to asset forfeiture abuse in the current system because “many forfeiture claims involve property owners involved in traffic stops, *Terry* stops, and low-level crimes.”<sup>86</sup> For example, a survey conducted of asset forfeiture in Philadelphia revealed that the police most often seized small amounts of cash, averaging around \$192.<sup>87</sup> Evidence that the DOJ will continue to go after low-level drug dealers is shown in Sessions’s determination to investigate and prosecute marijuana possession, even in states and territories where marijuana possession is legal.<sup>88</sup>

Asset forfeiture often targets low-income individuals. For instance, one scholar looked to data from Virginia and Texas about their seizure of vehicles.<sup>89</sup> Between the two states, over a six year period, more than 17,000 cars were seized—approximately eight cars a day.<sup>90</sup> Of those vehicles, the average car was worth \$6,000, the low cost of these vehicles makes it clear that seizure of cars in those states targets low-income individuals.<sup>91</sup>

Because asset forfeiture clearly impacts low-income communities the most, it also disproportionately impacts blacks. In 2014, blacks earned the least average income of any race, and although the poverty rate in America dropped between 2015 and 2016, blacks continue to have the highest rate of poverty of any race—at 22 percent—as compared to Hispanics at 19.4 percent and Asians at 10.1 percent.<sup>92</sup> Thus,

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84. See generally Dylan Matthews, *The Black/White Marijuana Arrest Gap*, In *Nine Charts*, WASH. POST (June 4, 2013), [https://www.washingtonpost.com/news/wonk/wp/2013/06/04/the-blackwhite-marijuana-arrest-gap-in-nine-charts/?utm\\_term=.C3925437cd36](https://www.washingtonpost.com/news/wonk/wp/2013/06/04/the-blackwhite-marijuana-arrest-gap-in-nine-charts/?utm_term=.C3925437cd36).

85. Zak Hughes, *Cannabis and Race*, DOPE MAGAZINE (Nov. 16, 2015), <https://www.dope-magazine.com/cannabis-and-race/>.

86. Vanita S. Snow, *From the Dark Tower: Unbridled Civil Asset Forfeiture*, 10 DREXEL L. REV. 69, 73 (2017).

87. Schieber, *supra* note 20, at 21.

88. Matt Zapotosky, et. al., *Use Of Legalized Marijuana Threatened As Sessions Rescinds Obama-Era Directive That Eased Federal Enforcement*, WASH. POST (Jan. 4, 2018), [https://www.washingtonpost.com/world/national-security/sessions-is-rescinding-obama-era-directive-for-feds-to-back-off-marijuana-enforcement-in-states-with-legal-pot/2018/01/04/b1a42746-f157-11e7-b3bf-ab90a706e175\\_story.html?utm\\_term=.57bba27f6912](https://www.washingtonpost.com/world/national-security/sessions-is-rescinding-obama-era-directive-for-feds-to-back-off-marijuana-enforcement-in-states-with-legal-pot/2018/01/04/b1a42746-f157-11e7-b3bf-ab90a706e175_story.html?utm_term=.57bba27f6912).

Sessions has also rescinded Obama-era DOJ guidance that “instructed federal prosecutors to limit the types of marijuana prosecutions they pursue in states that have legalized cannabis in some form.” Ed Chung, *Commentary: Jeff Sessions Is Just Wasting Time Cracking Down on Marijuana*, FORTUNE (Jan. 9, 2018), <http://fortune.com/2018/01/09/doj-jeff-sessions-marijuana-crackdown-cole-memo/>.

89. Schieber, *supra* note 20, at 21–22.

90. *Id.*

91. *Id.*

92. See *id.*

blacks and other minority groups would benefit most from an excessive fines test that takes into account an individual's financial circumstances. In addition, "Criminal Justice Debt," the monetary sanctions for convicted individuals imposed through fines and fees by the court, completely disregards an individual's ability to pay, forcing blacks with criminal backgrounds to become "permanent debtors."<sup>93</sup> Thus, it is difficult for returning citizens—who have already paid their dues to society—to make a successful transition back home because unsettled Criminal Justice Debt can adversely impact an individual's ability to vote, live, and work.<sup>94</sup>

Further, the asset forfeiture system's focus on drug-related crimes disproportionately affects blacks. This process has been described as "selective policing" because blacks are systematically deprived of property when the police disproportionately target blacks for stops and arrests.<sup>95</sup> Moreover, since 1996, arrests involving marijuana have exceeded arrests for other types of drugs. For example, in 2003, of the 2,952,797 pounds of drugs seized, 2,700,282 pounds (or 91 percent) were of marijuana.<sup>96</sup> The individuals arrested for these crimes are often low-level offenders because according to the ACLU, "of the 8.2 million marijuana arrests between 2001 and 2010, 88 percent were for *simply having* marijuana."<sup>97</sup> It is abundantly clear that drug enforcement that focuses on marijuana possession disproportionately impacts blacks because blacks are almost four times more likely than whites to be arrested for marijuana.<sup>98</sup> Thus, blacks are disproportionately impacted by asset forfeiture sought for drug arrests. Drug crimes are also often subjected to enhanced conspiracy charges,<sup>99</sup> and the asset

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93. McLean, *supra* note 35, at 886. For a discussion about the ability to pay fines generally see Alec Schierenbeck, *A Billionaire and a Nurse Shouldn't Pay the Same Fine for Speeding*, N.Y. TIMES (Mar. 15, 2018), <https://nyti.ms/2GwJQZZ>. In the article, the author compares the financial impact of a traffic ticket on Mark Zuckerberg, to its impact on a janitor who works at the Facebook headquarters. *Id.* ("For people living on the economic margins, even minor offenses can impose crushing financial obligations, trapping them in a cycle of debt and incarceration for nonpayment.")

94. McLean, *supra* note 35, at 886.

95. Snow, *supra* note 86, at 74, 96.

96. Tina L. Dorsey & Priscilla Middleton, *Drugs and Crime Facts*, U.S. DEP'T OF JUSTICE, <https://www.bjs.gov/content/pub/pdf/DCF.pdf>, (last visited Oct. 24, 2018).

97. ACLU, *Marijuana Arrests By The Numbers*, <https://www.aclu.org/gallery/marijuana-arrests-numbers>, (last visited Feb. 26, 2018) [hereinafter *ACLU Report*].

98. *Id.*

99. Justin Glawe, *How Drug Trafficking Conspiracy Laws Put Regular People in Prison for Life*, VICE (Sept. 30, 2015), [https://www.vice.com/en\\_us/article/vdxkj/how-drug-trafficking-conspiracy-laws-put-regular-people-in-prison-for-life-930](https://www.vice.com/en_us/article/vdxkj/how-drug-trafficking-conspiracy-laws-put-regular-people-in-prison-for-life-930) ("At the federal level, mandatory minimums were applied to trafficking conspiracies at the height of the drug panic in 1988, and courts were soon crowded with suspects accused of playing some role—no matter how trivial, incidental

forfeiture linked with such charges can be seriously disproportionate, as demonstrated by the long-line of cases leading up to the *Honeycutt* decision.

It is more than a coincidence that, in 2015, arrests for drug abuse offenses were the fourth most arrested offense<sup>100</sup> while revenue seized from drug abuse offenses is considered a “budgetary necessity” for police departments.<sup>101</sup> For instance, a 2016 comparison report of sixteen federal agencies indicates that the DOJ and Department of Health and Human Services (DHHS), received the most funding from drug-related asset forfeiture for their budgets—almost 8 million dollars and 9 million dollars, respectively.<sup>102</sup> Statistics and news reports, which chronicle prosecutorial and police department abuses, are evidence that the asset forfeiture program is not being used as it was originally intended.<sup>103</sup> A strong excessive fines test could reign in asset forfeiture abuses by requiring judges to carefully scrutinize forfeitures sought by prosecutors and urge that amounts seized be returned to victims and communities, instead of put in the pockets of law enforcement.

#### B. *Honeycutt v. United States*

With an understanding of the direct impact asset forfeiture has on blacks, this Section will evaluate the recent approach the Court took to address oppressive asset forfeiture in *Honeycutt*, to determine whether the decision can curtail the impact that civil and criminal asset forfeiture has on minorities. As illustrated by *Honeycutt*, judicial enforcement of asset forfeiture that does not rely upon the Excessive

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or arbitrary—in delivering drugs to the public. Many states have their own conspiracy laws, and even today, friends and acquaintances of actual traffickers can get sentenced to life in prison because of some vague connection to the legit players running the drug trade.”).

100. *Arrests By Race and Ethnicity*, FBI UNIFORM CRIME REP., <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43> (last visited Oct. 14, 2018).

101. Schieber, *supra* note 20, at 11; *see also* Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665, 669 (2018) (“Entire law enforcement departments operate under significant financial pressures and incentives to make arrests, regardless of their accuracy, to raise revenues from fines and court fees, or to obtain monies and other assets through civil and criminal forfeiture laws that directly result from arrests and convictions. The pressure to meet arrest numbers can certainly result in the arrests of innocents for crimes that never happened.”).

102. OFF. OF MGMT & BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 2018 241 TABLE 21-1 (2018), <https://www.gpo.gov/fdsys/pkg/GUDGET-2018-PER/pdf/BUDGET-2018-PER.pdf>. Other research has identified the DOJ as the agency that benefits the most from asset forfeiture. Snow, *supra* note 86, at 75.

103. Schieber, *supra* note 20, at 17.

Fines clause will see limited success. The Court in *Honeycutt*<sup>104</sup> took an arguably progressive step to reign in criminal asset forfeiture by limiting the joint and several liability of criminal co-conspirators to tainted goods directly or indirectly obtained as a result of the conspiracy.<sup>105</sup> Yet, the *Honeycutt* jurisprudence is lacking the support of a constitutional basis and does not adequately address the injustices of asset forfeiture.

### 1. Application of Joint and Several Liability Asset Forfeiture for Co-Conspirators

Within three years of the Drug Abuse Prevention Act's passage,<sup>106</sup> the *Pinkerton* doctrine—which holds co-conspirators who act in furtherance of the co-conspiracy, jointly and severally liable for the reasonably foreseeable consequences of the co-conspiracy—<sup>107</sup> began to be applied to co-conspirator criminal asset forfeiture. As explained in *United States v. Cano-Flores*, this application is inconsistent with the *Pinkerton*'s principles because the *Pinkerton* doctrine “is a doctrine which speaks only to a defendant's substantive liability, not to the consequences of such liability.”<sup>108</sup>

One of the earliest examples of an expansive approach to joint and several liability asset forfeiture under the Drug Abuse Prevention Act, occurred in *United States v. Benevento*.<sup>109</sup> In *Benevento*, the defendant argued that his seizure should be limited in proportion to the value he received because the other co-conspirators had a joint inter-

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104. See generally *Honeycutt v. United States*, 137 S. Ct. 1626 (2017).

105. *Id.* at 1635. It is arguable that, because criminal asset forfeiture cannot be sought without a criminal conviction, it is justified as a penalty against the deserving and culpable. Stefan Cassella, *Overview of Asset Forfeiture in the United States*, in 55 ASSET FORFEITURE, U.S. ATT'Y BULL. 20 (Jim Donovan ed., 2007), available at <https://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf>. Yet, this perspective overlooks the historic roots of the Excessive Fines Clause—which is applicable to asset forfeiture—that are tied to the principle that no fine should impoverish the wrong-doer. See Colgan *supra* note 35 and accompanying text. Also, as stated in *Cano-Flores*, asset forfeiture laws were not intended by Congress “to rank forfeiture maximization above all normal principles, such as the idea that the punishment should fit the crime.” *United States v. Cano-Flores*, 796 F.3d 83, 93 (D.C. Cir. 2015). The question—whether the punishment fits the crime—should consider the individual's financial circumstance because the seizure of a home for a low-income individual with a family of dependents, is vastly different from the seizure of the home of a wealthy individual who may have summer and winter vacation homes to spare.

106. The Drug Abuse Prevention Act was an early law that implemented powerful civil and criminal asset forfeiture systems. See generally *supra* note 25.

107. *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946).

108. *Cano-Flores*, 796 F.3d at 94 (emphasis added).

109. See generally *United States v. Benevento*, 663 F. Supp. 1115 (S.D.N.Y. 1987).

est in the funds.<sup>110</sup> However, the court explained that the Drug Abuse Prevention Act “is broad enough to impose joint and several liability upon those who engaged in and furthered the criminal enterprise that produced the funds subject to forfeiture.”<sup>111</sup> Thus, the court rejected the defendant’s argument and began a nationwide shift away from the traditional legal principle, as artfully described in *Cano-Flores*, that “the punishment should fit the crime.”<sup>112</sup>

Since *Pinkerton* liability was declared permissible, the most outrageous penalties were not seen as violations of the Excessive Fines clause of the Eighth Amendment. For decades, when analyzing criminal asset forfeitures against co-conspirators pursued through the Drug Abuse Prevention Act, courts turned away from opportunities to evaluate the Excessive Fines clause because, as demonstrated in *United States v. Elder*, joint and several liability was determined as acceptable,<sup>113</sup> Courts’ reluctance to address the potential unconstitutionality of asset forfeitures permitted widely disproportionate and oppressive forfeitures. In *Elder*, the court declared that “it cannot be rationally suggested that the forfeitures were so grossly disproportionate” because the amount is minimal in relation to the “fines which could have been assessed.”<sup>114</sup> Thus, the government was able to seize “6,000 in currency, three automobiles, and residence” from the defendant.<sup>115</sup>

Although prosecutors were able to obtain excessive forfeitures from co-conspirators for decades, in *Cano-Flores*, the D.C. Court of Appeals rejected joint and several liability.<sup>116</sup> In *Cano-Flores*, the D.C. Court of Appeals remanded the forfeiture judgment of \$15 billion dollars back to the trial court to be recalculated to reflect the amounts *personally obtained* by the defendant.<sup>117</sup> Thus, *Cano-Flores* created the circuit split that would be resolved in *Honeycutt*.

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110. *Id.* at 1118.

111. *Id.*

112. *Cano-Flores*, 796 F.3d at 93.

113. *United States v. Elder*, 90 F.3d 1110, 1132–33 (8th Cir. 1996).

114. *Id.*; see also *United States v. Smith*, 966 F.2d 1045, 1056 (6th Cir. 1992) (“Even if we assume, however, that a forfeiture order under § 853 is subject to the Eighth Amendment’s prohibition, this order is neither ‘cruel and unusual’ nor grossly disproportionate to the crime.”).

115. *Elder*, 90 F.3d at 1132.

116. See generally *Cano-Flores*, 796 F.3d at 83.

117. *Cano-Flores*, 769 F.3d at 95–91 (emphasis added).

## 2. The *Honeycutt* Decision

In *Honeycutt*, two brothers were convicted under the Comprehensive Forfeiture Act of 1984 as co-conspirators.<sup>118</sup> One brother, who owned a store where his brother ran an illegal operation, but never financially benefited from the drug sales, brought suit challenging his asset forfeiture.<sup>119</sup> The Court held that because the defendant “never obtained tainted property as a result of the crime,” his participation “does not require any forfeiture.”<sup>120</sup> In the *Honeycutt* opinion, it seemed as if Sotomayor was invoking a proportionality argument akin to the *Bajakajian* test by analogizing the brother’s ownership of the store but receiving no financial benefit from the illegal activity, with a “college student” who would be liable for millions of dollars, even though the “mastermind” is the one that received the significant portion of the profits. However, her opinion stops short of applying an Eighth Amendment excessive fines test.<sup>121</sup> Nonetheless, Sotomayor takes serious issue with the possibility of the defendant’s punishment to “have no connection whatsoever” to his participation in the offense.<sup>122</sup>

The Court in *Honeycutt* struck down joint and several liability but it did not address the long-ignored Eighth Amendment questions produced by the joint and several justification,<sup>123</sup> although both parties in *Honeycutt* discuss the Eighth Amendment Excessive Fines questions in their appellate documents.<sup>124</sup> Soon after the Court’s decision, *Honeycutt* began to be used as a tool to combat unfair forfeitures.<sup>125</sup> However, prosecutors across the country continue to request exces-

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118. *Honeycutt*, 127 S. Ct. at 1630.

119. *Id.* at 1635.

120. *Id.*

121. *Id.* at 1632–33.

122. *Id.* at 1633 (explaining that the intent and plain language of the statute does not support joint and several liability).

123. See, e.g., *Cano-Flores*, 796 F.3d at 94 (“A forfeiture equal to a cartel’s gross take of \$15 billion, imposed on a mid-level manager such as Cano-Flores (or even a trivial courier) within a conspiracy—a result which appears to be commanded under the government’s interpretation of § 853(a)(1)—poses serious Eighth Amendment concerns.”).

124. See, e.g., Brief of Petitioner, *Honeycutt v. United States*, (No. 16-142), 2017 WL 371927, at 9 (“Joint-and-several liability yields excessive fines in violation of the Eighth Amendment.”).

125. See, e.g., *United States v. Groves*, No. 5:05-CR-195-1H, 2017 WL 6028339, at \*2 (E.D.N.C. Dec. 5, 2017) (“Given the decision in *Honeycutt*, the Government seeks to modify the position it took in its pending Amended Motion for Order of Forfeiture of Substitute Assets, DE# 67, which was opposed by the defendant. DE# 86. The unopposed second amended motion, which is intended to supersede the first amended motion, reflects the agreement of the parties that the forfeiture of substitute assets is limited to the funds *personally obtained* from the defendant from his illegal activity, that is, \$2,110.00.”) (emphasis added); Carolina Bolado, *Eleventh Circuit Vacates \$1.8 Million Forfeiture in Tax Return Fraud*, LAW360 (Oct. 18, 2017, 6:00 PM),

sive forfeitures,<sup>126</sup> despite the Court's and the public's clear disfavorable attitude toward disproportionate and unjust forfeitures.<sup>127</sup> Consequently, it remains unclear whether *Honeycutt* will truly be able to "[reverse] thirty years of wrongly construed forfeiture law," as was hoped.<sup>128</sup> The inability of *Honeycutt* to be a tool against disproportionate asset forfeitures demonstrates the need for the application of the Excessive Fines Clause.

### 3. *Honeycutt's* Inability to Produce Substantive Reform

*Honeycutt's* inability to produce substantive reform illustrates the need for the Court to take a new approach to combating unjust asset forfeitures through the application of an excessive fines test that protects vulnerable minorities. Despite the Court's decisions in *Honeycutt* to reject forfeiture of untainted assets and in *Leonard*, where Justice Thomas denounced disproportionate forfeitures, it is unclear whether prosecutors will be required to adhere to more legitimate practices. For example, several lower courts have declined to extend the *Honeycutt* decision or have applied its principles in a limited way, ultimately eliminating its protections for defendants.

In *United States v. Gardenhire*, a Pennsylvania federal district court adopted a distinctive analysis to support its grant of the seizure of a couple's home.<sup>129</sup> In *Gardenhire*, a married couple faced charges as co-conspirators for illegal drug distribution and money laundering.<sup>130</sup> The district court rejected the defendant's argument that only a portion of the proceeds should be seized because only a portion of

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<https://www.law360.com/whitecollar/articles/975796/11th-circ-vacates-1-8m-forfeiture-in-tax-return-fraud>.

126. See, e.g., Maxine Bernstein, *Prosecutors Want Court to Order Convicted Sex Trafficker to Forfeit \$600,000*, THE OREGONIAN (Oct. 24, 2017), [http://www.oregonlive.com/portland/index.ssf/2017/10/prosecutors\\_want\\_court\\_to\\_orde.html](http://www.oregonlive.com/portland/index.ssf/2017/10/prosecutors_want_court_to_orde.html), (describing "the proposed judgment 'excessive' and 'speculative.'").

127. See, *supra* notes 16, 18 and accompanying text.

128. Bernstein, *supra* note 126.

129. *United States v. Gardenhire*, 2017 WL 6371362, at \*12 (W.D. Pa. 2017). In connection with the entire conspiracy, the prosecution seized much more than the *Gardenhire* home. See Adam Brandolph, *Feds Bust 38 In Major Heroin Ring, Move to Seize Homes, Cars, Cash*, TRIB LIVE (May 22, 2015) <http://triblive.com/news/allegheeny/8423475-74/heroin-money-cash> ("Federal authorities say they will push to seize \$2.6 million in cash, four houses and a dozen vehicles related to a bust this week of a large-scale heroin ring that operated in the Pittsburgh area.").

130. Torsten Ove, *Feds Bust 38 In Major Heroin Ring, Move to Seize Homes, Cars, Cash*, PITTSBURGH POST-GAZETTE (May 22, 2015), <http://www.post-gazette.com/local/city/2015/05/22/Feds-bust-38-in-major-heroin-ring-move-to-seize-homes-cars-cash-pittsburgh/stories/201505220239>.

the goods were tainted.<sup>131</sup> The court cited the rationale in *Honeycutt*, which explained that forfeiture should be “based on the value of the tainted and untainted portions of the same.”<sup>132</sup> Instead of acknowledging the Court’s rationale in *Honeycutt* that, to be seized, the property must flow from the crime or be used in the crime itself,<sup>133</sup> the court in *Gardenhire* reasoned that the property was “acquired by the Gardenhires and renovated during the timeframe [of illegal activity], . . . [the house was purchased and renovated using drug proceeds . . . to store heroin and heroin proceeds, and some of his heroin trafficking activities took place there.”<sup>134</sup> *Honeycutt* was likely meant to stand against forfeiture of the Gardenhires’ home simply based on the fact that renovations occurred simultaneous to unlawful activity. Yet, *Honeycutt* was unable to protect the Gardenhires from forfeiture because, unlike under the Excessive Fines Clause, there was no consideration of whether the seizure would impoverish the wrongdoer.

C. An Improved Excessive Fines Test Would Work Better Than the *Honeycutt* Approach

An improved excessive fines test is a better approach to combat oppressive asset forfeiture because constitutional authority is more persuasive to courts and is applicable to both civil and criminal forfeitures. Thus, if an improved excessive fines test was applied, instead of *Honeycutt*, in the cases discussed above, the defendant’s might have received amendments to their forfeiture judgments. For example, the *Zumirez* excessive fines approach, which considers seizures of homes a harsher penalty than other seizures,<sup>135</sup> might have produced a different result in *Gardenhire*, where a home was seized from a husband and wife;<sup>136</sup> in *Leonard*, where the government seized the bill of sale for Lisa’s home, although she asserted the innocent-owner defense;<sup>137</sup> or in *Elder*, where the government seized the defendant’s residence because “at stake . . . [was] the security and privacy of the home and those who take shelter within it.”<sup>138</sup>

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131. *Gardenhire*, 2017 WL 6371362, at \*8.

132. *Id.*

133. *Honeycutt*, 127 S. Ct. at 1631–32 (emphasis added).

134. *Gardenhire*, 2017 WL 6371362, at \*12.

135. For more information about the *Zumirez* approach, see *supra* note 53 and accompanying text.

136. *Gardenhire*, 2017 WL 6371362, at \*12.

137. *Leonard*, 137 S. Ct. at 847.

138. *Zumirez*, 845 F. Supp. at 734.

Other examples of *Honeycutt*'s ineffectiveness are found in a line of cases where procedural technicalities have been used to block defendants' requests to amend their forfeiture judgments.<sup>139</sup> In *United States v. Ball*, a federal district court in Michigan rejected a defendant's claim that his forfeiture judgment could not stand, pursuant to *Honeycutt*, because "the property . . . actually acquired as a result of the crime was approximately \$20,000 and that the additional \$130,000 contemplated by the forfeiture order accounts for property obtained solely by his co-conspirators."<sup>140</sup> The Court barred the defendant's claim, explaining that under 28 U.S.C. § 2255, "[a] prisoner in custody . . . claiming the right to be released" must challenge the validity of his sentence by showing it "was imposed in violation of the *Constitution* or laws of the United States."<sup>141</sup> The defendant's challenge might have prevailed if *Honeycutt* had instead invoked the Eighth Amendment prohibition against excessive fines. Thus, because a forfeiture of \$150,000 for only \$20,000 of involvement is evidently disproportionate to the total fine (especially under the factors discussed in Part III) it would have been imposed in violation of the Constitution.

The way courts have maneuvered around *Honeycutt*'s holding to allow disproportionate forfeitures to continue, illuminates the need for an expansive and well-defined excessive fines test. There are several examples where judges have refused to apply *Honeycutt* in non-criminal asset forfeiture contexts. For example, in *U.S. v. Gooden*, a Kentucky district court held that *Honeycutt* did not apply because the defendant's assets were seized pursuant to an order of restitution, not forfeiture.<sup>142</sup> Thus, the Government was permitted to seize \$1,084,196.75, although it was argued that the full scope of the defendant's individual criminal liability for the co-conspiracy was \$205,683.10.<sup>143</sup> In addition, in *United States v. Verdieu*, *Honeycutt* was held only "to apply to forfeiture with respect to persons convicted of

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139. See, e.g., *United States v. Ball*, No. CR 14-20117, 2017 WL 6059298, at \*2 (E.D. Mich. Dec. 7, 2017) ("Moreover, at least three courts recently have denied motions to vacate raising *Honeycutt* arguments under section 2255(a).").

140. *Id.* at \*1.

141. *Ball*, 2017 WL 6059298, at \*2; 28 USC § 2255 (2018) (emphasis added); see also *Spencer v. United States*, 727 F.3d 1076, 1084 (11th Cir. 2013) (explaining that "laws of the United States" apply to "change[s] in the applicable circuit law that occurred after the defendant was convicted and sentenced the first time, even though the defendant had raised and lost that very issue in the trial court and on appeal.") Thus, if the law was considered applicable to the defendant's claim, his motion might have been successful.

142. *United States v. Gooden*, No. CR 5: 15-05-DCR, 2018 WL 276131, at \*3 (E.D. Ky. Jan. 3, 2018).

143. *Gooden*, 2018 WL 276131 at \*1.

certain serious drug crimes,” thus it did not apply to civil or administrative forfeitures.<sup>144</sup> In contrast, if the court had applied the Excessive Fines Clause, the defendant’s challenge might have been successful because the Excessive Fines Clause is applicable to civil and criminal forfeitures. Also, in *Hernandez v. Brewer*, the court stated that *Honeycutt* only applies to “certain forfeiture mechanisms” and “does not represent a significant change of the law.”<sup>145</sup> Thus, due to the Court’s inability to produce substantive change under excessive fines or *Honeycutt* jurisprudence, the Court should revisit and improve the Excessive Fines Clause.

### III. SOLUTION: RECOMMENDATIONS FOR IMPROVING THE EXCESSIVE FINES TEST AS A PROTECTION AGAINST DISPROPORTIONATE AND OPPRESSIVE ASSET FORFEITURE

Scholars have disagreed about the best way for courts to combat asset forfeiture. Under the excessive fines jurisprudence, there is tension in the courts about whether it is best to compare the proposed fine to the nature of the offense or to the particular circumstances of the defendant.<sup>146</sup> Further, it is clear that individual rulings like *Honeycutt* will be viewed by courts as insignificant<sup>147</sup> and will be unable to bring about substantive change. However, the Excessive Fines Clause is backed by constitutional authority that courts could not so easily deny.<sup>148</sup> Thus, a refined proportionality standard could be a more powerful tool to protect low-income and minority individuals.

To interpret the *Bajakajian* standard for disproportionality of a proposed forfeiture, some argue that judges should look to the sentencing guidelines to gauge how the proposed forfeiture compares to the maximum penalty.<sup>149</sup> However, the Excessive Fines Clause was originally concerned with an individual’s circumstance and ability to pay the fine. Further, asset forfeiture disproportionately impacts the vulnerable in society and can have a drastic impact on a family’s or a community’s stability. Thus, it is of utmost importance that a defen-

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144. *United States v. Verdieu*, 2017 WL 5988449, at \*2 (quoting *Honeycutt*, 137 S. Ct. at 1631).

145. *Hernandez v. Brewer*, No. CV-1101945-PHX-JAT, 2017 WL 6554673, at \*5 (D. Ariz. Dec. 22, 2017).

146. McLean, *supra* note 35, at 834.

147. *See supra* note 130 and accompanying text.

148. *See supra* note 128 and accompanying text.

149. Pimentel, *supra* note 27, at 545.

dant's social and economic position be considered in determining whether a fine is disproportionate under *Bajakajian*. In addition, another critical consideration are incentives for law enforcement to abuse the system. By diverting funding seized from the checkbooks of prosecutors and police departments, judges can diminish opportunities for asset forfeiture abuse.

A. Factor-Based Proportionality Tests to Protect Defendant's and Their Dependents or Other Innocent Third Parties

1. For Defendants—Proportionality in Respect to the Defendant's Individual Circumstance

As discussed in Part One, the English Bill of Rights considered a fine excessive if it would “impoverish the wrong doer.”<sup>150</sup> Some courts have acknowledged that the “deprivation of livelihood” is a factor to be considered when determining whether to set aside a criminal forfeiture.<sup>151</sup> Yet, many modern day courts generally do not regard an individual's circumstances, such as an ability to pay, as a relevant consideration under the Excessive Fines Clause.<sup>152</sup> This is a troubling stance for courts to take because it disproportionately harms black individuals, the lowest income-earning population. Thus, blacks are in dire need for the court to consider their individualized circumstance.

An improved excessive fines test would implement weighing various factors, like the *Zumirez* approach.<sup>153</sup> Yet, instead of weighing the harshness of the offense or the degree of the property's involvement as *Zumirez* proposes, the factors to be considered should reflect the defendant's socio-economic background to remedy the disproportionate impact forfeiture has on low-income and minority individuals.

The factors to be considered should be: (1) the financial status of the accused, (2) the impact of the accused crime on the community, (3) the age and past criminal record of the accused, (4) the degree of the accused's participation in the offense, and (5) whether the accused

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150. Colgan, *supra* note 35, at 297.

151. *United States v. Sepúlveda-Hernández*, 752 F.3d 22, 37 (1st Cir. 2014).

152. *See, e.g., United States v. Ponzo*, 853 F.3d 558, 590 (1st Cir. 2017).

153. For more information, *see supra* note 55. Under the *Zumirez* approach, “three factors should be weighed, with one no factor being dispositive: (i) the inherent gravity of the offense compared with the harshness of the penalty; (ii) whether the property was an integral part of the commission of the crime; and (iii) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use.” *Zumirez*, 845 F. Supp. at 734.

preyed on innocent victims. Such factors would ensure that the test was not too lenient on dangerous or high-level criminals, while permitting judges to consider the nature of the offense and the defendant's ability to be rehabilitated.

The first consideration, the accused's financial status, aims to reduce the impact asset forfeiture has on blacks as the lowest income earning racial group. This standard would be modeled under the First Circuit approach that permits the defendant to "raise whether the forfeiture order is so excessive under the Eighth Amendment that it would, in extreme cases, effectively deprive the defendant of his or her future livelihood."<sup>154</sup>

The second consideration, the impact of the accused crime on the community, slightly mirrors the gravity of the offense approach in *Zumirez*. However, it is distinct because it focuses the determination of gravity on the communal impact of the offense. It is important to consider both the proposed forfeiture and the communal impact of the crime, due to the types of offenses blacks are most commonly charged. For example, victimless crimes, like individual drug usage or possession, for which blacks are disproportionately arrested and convicted, should not implicate asset forfeiture because they have inherently less "moral gravity."<sup>155</sup> Moreover, studies indicate that the physical or mental harm caused by high-volume marijuana usage is distinguishable from many criminal defendants who are often low-level dealers.<sup>156</sup> This factor would ensure that an improved excessive fines test protects blacks from oppressive forfeiture because defendants could put forth scientific information or social studies about the limited societal impact of marijuana-related offenses.

The third and fourth considerations, which would require judges to examine the defendant's past encounters with the law and the degree of their participation in the offense, are aimed at sorting out and protecting low-level dealers. If a low-level dealer was similar to the individual described in Sotomayor's illustration in *Honeycutt*, a "col-

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154. *Aguasvivas-Castillo*, 668 F.3d at 16.

155. Skorup, *supra* note 1, at 457 (suggesting that this approach would lessen law enforcement costs for electronic surveillance and sting operations).

156. Douglas Main, *Regular Marijuana Use Linked To Economic And Social Problems*, NEWSWEEK (Mar. 23, 2016, 5:04 PM), <http://www.newsweek.com/regular-marijuana-use-linked-economic-and-social-problems-440107> (finding an adverse effect of marijuana usage for heavy-smokers but explaining that such "findings don't apply to light or occasional smokers" and that "only a small fraction of marijuana users— around 9 percent— . . . become dependent on it).

lege student” who made a minimal profit from selling marijuana,<sup>157</sup> they would not be subject to forfeiture because they would only be a dealer, and not the criminal-mastermind.

This weighed-factors approach would enforce the original purpose of asset forfeiture laws which aimed to take down King Pins. Also, the consideration of whether the defendant preyed upon innocent victims would serve to ensure that the test is not abused by wrongdoers who should be subject to monetary sanctions. This factor would keep individuals who have inflicted serious harms from abusing an overbroad excessive fines test.<sup>158</sup> Some prosecutors argue for a test that focuses on “comparing the property’s value to the maximum statutory fine for the alleged underlying offense.”<sup>159</sup> However, such a test is insufficient because it does not consider the person’s involvement in the alleged action, and ignores the proportionality rationale of *Bajakajian* and the resonant fairness rationale applied in *Honeycutt*.

## 2. For Dependents & Innocent Third Parties

An improved excessive fines test would also take special consideration of unknowing or innocent family members who would be adversely affected by forfeiture. Scholarly discourse has indicated that the fundamental values of the Excessive Fines Clause would have been strictly opposed to forfeiture that imposed “severe harm on an offender’s children.”<sup>160</sup> It is necessary to provide more protection for the accused’s family, who are likely innocent of any wrongdoing, and who could spiral into poverty if a house or car is taken away. In assessing the proportionality of the forfeiture, the court could inquire about (1) the number of dependents the defendant has; (2) whether the dependents rely on the proposed seized assets for food, transportation, or shelter; and (3) whether forfeiture would impoverish the dependents.

For example, if the prosecution aimed to seize a car, the defendant could submit affidavits or testimony from his or her dependents

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157. *Honeycutt*, 137 S. Ct. at 1631–32.

158. For example, in one case, judges reasonably based sanction charges of \$8.7 million on case study findings that estimated the average cost of a tobacco-related personal injury to be \$6,983 per case for over 1,000 inappropriately filed claims. Alison Frankel, *How Florida Judges Devised \$9.1 Million Sanction Against Tobacco Plaintiffs’ Lawyers*, REUTERS WESTLAW (Oct. 19, 2017), <https://static.reuters.com/resources/media/editorial/20180725/englesanctions—frankel.pdf>.

159. Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. PA. J. CONST. L. 1111, 1132 (2017).

160. McLean, *supra* note 35, at 899.

who could explain how the car is the family's only mode of transportation and is needed by the defendant's spouse to take kids to school or drive to work. Under these facts, the court should deny the prosecution's asset forfeiture motion because without an ability for the spouse to get to work, the family would be without income and impoverished. This examination would ensure that the car wouldn't facilitate unlawful activity, but support basic and essential daily life functions of the offender's dependents. Similarly, the court should carefully scrutinize forfeitures of homes because of the "longstanding notion that homes are sanctified places."<sup>161</sup>

It is necessary to employ the Excessive Fines Clause—which is applicable to civil and criminal asset forfeiture—because other methods are often unable to protect family members, such as the innocent-owner defense raised by Lisa in *Leonard*.<sup>162</sup> In *Leonard*, Lisa, lost her home when her son and his girlfriend were pulled over for speeding and following another car too closely.<sup>163</sup> Lisa claimed that she was an innocent owner because the home had been purchased by her own income as an IRS employee, and not drug proceeds.<sup>164</sup> Yet, the Court held that she did not demonstrate that she "(a) acquired or perfected her ownership interest before or during the act or omission giving rise to forfeiture; and (b) did not know and reasonably should not have known of that act or omission."<sup>165</sup> Thus, courts must be able to reduce forfeiture by considering the potential impact the seizure could have on the defendant's dependents.

#### B. Divert Funds from Being Abused by Law Enforcement

A major criticism of the asset forfeiture system is that it has devolved into a system of financial incentives for law enforcement.<sup>166</sup> In order to promote accountability, funds seized under asset forfeiture should not be indiscriminately funneled into the pockets of prosecutors and police. Instead, the funds should be diverted from law en-

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161. Lydia E. Ellsworth, *Pennies from Heaven or Excessive Fines from Hell? Commonwealth v. 1997 Chevrolet Keeps Civil Asset Forfeiture's Threat to Homeownership in Purgatory*, 63 VILL. L. REV. 125, 154 (2018) (explaining that "Homeownership provides individuals and families with security, safety, and wealth.").

162. See *Currency*, *supra* note 2, at \*1 (describing the factual background of *Leonard v. Texas*).

163. *Id.*

164. *Id.*

165. *Id.* at \*4.

166. See *supra* notes 10–11, 26, and accompanying text for a discussion about law enforcement financial incentives.

forcement, back to the victims of crime and the communities detrimentally impacted by the War on Drugs. This solution would stifle the ability of police departments and prosecutors to abuse seized assets because less could be absorbed into their own budgets.

1. Increased Attentiveness to the Percentage of Seized Revenue to be Returned to Victims

Although the FBI claimed that “returning assets to victims of crime is a top priority of the Department of Justice Asset Forfeiture Program,”<sup>167</sup> in 2016, 79 percent of DEA cash seizures were fully deposited in the Asset Forfeiture Fund and only 4 percent was fully returned to the owner, lien-holder, or victim.<sup>168</sup> There are several contributing causes to the limited percentage of assets being returned to victims. Although the Attorney General has the authority to restore seized assets to victims,<sup>169</sup> victims have the burden of petitioning the court to receive the funds after they are notified by mail or publication that the funds are available.<sup>170</sup> Moreover, the ability of victims to receive the seized assets are limited. Under one method, termed restitution, the amount that can be awarded to victims depends on the statute under which the property is forfeited.<sup>171</sup>

An improved excessive fines test would require that courts evaluate the percentage of the seized forfeiture revenue to be returned to victims, to determine the reasonableness of the amount sought. Under this approach, courts would be more likely to grant forfeiture requests of prosecutors who ensure that at least 50 percent of forfeiture revenue will go to the victim or their family. Judges should take an approach that requires prosecutors, in their asset forfeiture motions, to demonstrate whether the applicable charging statute permits victim restitution and mandate that prosecutors who choose to not seek such available forfeiture for victims, explain their decision.

Under the scheme proposed above, it would be ensured that restitution programs would not only be offered to billionaires or big

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167. *What We Investigate*, *supra* note 6.

168. *OIG Report*, *supra* note 32, at 14.

169. ASSET FORFEITURE POLICY MANUAL, DEP'T OF JUST. ASSET FORFEITURE & MONEY LAUNDERING SEC. 1, 161 (2017), available at <https://www.justice.gov/criminal-afmls/file/839521/download> [hereinafter *DOJ Article*].

170. *Id.* at 162.

171. *Id.*

banks, but all people subject to a criminal fine.<sup>172</sup> Also, such programs could potentially be applied as a compromise to shorten prison sentences.

## 2. Prioritize the Return of Funds to Black Communities Harmed by the War on Drugs

A better way to put an end to drug violence and substance abuse, is to lift up the black communities hit the hardest by the failed war on drugs.<sup>173</sup> As discussed in Part I, the War on Drugs was not effective in eliminating drug violence and substance abuse in its increase of asset forfeiture. Instead, the War on Drugs had a disproportionately detrimental effect on black communities.<sup>174</sup> Due to the War on Drugs, it is the norm in many communities for black youth to grow up in single-parent homes, as the other parent serves a lengthy sentence for minor possession.<sup>175</sup> Further, because drugs remain illegal, the drug-selling enterprise is profitable, and thus, is often a preferred employment option for black youth who would otherwise work low-wage jobs.<sup>176</sup> Moreover, black communities are significantly impacted by the collateral consequences of arrest or criminal records, such as difficulties finding work or housing, making it nearly impossible for black communities to rise out of poverty.<sup>177</sup> Thus, the money seized through asset forfeiture should be poured back into communities harmed by the War on Drugs' failings.

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172. A recent example of restitution offered to big banks occurred in 2014 when JPMorgan Chase was ordered to pay \$1.7 billion to Ponzi scheme victims. The funds were ordered pursuant to the authority of the Bank Secrecy Act and the money was paid out to those who were harmed by problematic mortgage securities. See Eyder Peralta, *JPMorgan Chase To Pay \$1.7 Billion To Madoff Victims*, NPR (Jan. 7, 2014, 9:32 AM), <https://www.npr.org/sections/thetwo-way/2014/01/07/260442151/jpmorgan-chase-to-pay-1-7-billion-to-madoff-victims>.

173. The war on drugs has also been called the “racist” war on drugs. See, e.g., *Race and the Drug War*, DRUG POL’Y ALL., <http://www.drugpolicy.org/issues/race-and-drug-war> (last visited Mar. 21, 2018).

174. See Veronique de Rugy, *How the War on Drugs Fails Black Communities*, REASON, (July 14, 2016), <https://reason.com/archives/2016/07/14/how-the-war-on-drugs-fails-black-communi>. (describing the war on drugs as the “most insidious” nationwide policy negatively impacting blacks).

175. *Id.*

176. *Id.* It is clear that there is a misunderstanding about the financial incentives for crime. For example, the *DOJ Attorney Guidance* instructs prosecutors that “[o]rganized criminals are motivated by one thing—profit. Greed drives the crimes.” *DOJ Attorney Guidance*, *supra* note 23, at 1. Such an analysis of an individual’s motivation is one-sided. Greed does not motivate drug offenders—survival does. The analysis provided in the *DOJ Attorney Guidance* lacks a fully informed perspective and empathy.

177. *Race and the Drug War*, *supra* note 173.

There is an “untapped potential for greatness that our young people possess just waiting to be explored and unleashed” in black communities.<sup>178</sup> With proper funding and opportunities, black youth can overcome the barriers to success caused by poverty. Funding from asset forfeiture could be used to conduct research—as little exists now—on the direct and indirect ways drug violence impacts youth.<sup>179</sup> Funding could also be used to implement job training, after school tutoring programs, and STEM enrichment programs for underprivileged minority youth.<sup>180</sup> It is not uncommon for parents in poor areas to be unable to provide their children with educational programming, due to the fact that such programs are only available in wealthy communities.<sup>181</sup> Further, society, in general, could benefit from STEM programs being inclusive because technological advancements inarguably improve lives.<sup>182</sup>

## CONCLUSION

With a strong Eighth Amendment excessive fines test, defense attorneys would finally have an effective tool to combat oppressive forfeiture.<sup>183</sup> Alternative approaches, like *Honeycutt*, are simply una-

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178. Danielle Hildreth, *Why STEM Education Is So Important for African American Youths*, L.A. SENTINEL (Dec. 23, 2015), <https://lasentinel.net/why-stem-education-is-so-important-for-african-american-youths.html>.

179. Cooley-Strickland, et. al, *Community Violence and Youth: Affect, Behavior, Substance Use, and Academics*, 12 CLINICAL CHILD FAM. PSYCHOL. REV. 127, 127 (2009).

180. The need to utilize asset forfeiture revenue to “facilitate change and growth . . . and to help create better outcomes for children and families” is recognized in the international community. Rattan Mall, *One-Time Grant From Civil and Criminal Forfeiture Proceeds to Stop Violence, Promote Indigenous Healing*, VOICE (Apr. 20, 2018), <https://www.voiceonline.com/one-time-grant-from-civil-and-criminal-forfeiture-proceeds-to-stop-violence-promote-indigenous-healing/>. For example, in Britain, approximately 6.5 million dollars of asset forfeiture revenue will be used to help victims of domestic violence, heal intergenerational harms in indigenous families, and deter children from gang involvement through mentorship programs. *Id.*

181. On January 13, 2018, I had a conversation with Mrs. Gabriel Jones, the mother of a seven-year-old, in Desoto, Texas. Mrs. Jones expressed frustration that she could not enroll her child in a summer program that would help develop her son’s interests in building and architecture because such programs are only available in wealthy neighborhoods located several miles away. See also Janeen Ellsworth, *Poor Schools Face “Double Disadvantage” in STEM Education*, REMAKE LEARNING (Aug. 15, 2015), <https://remakelearning.org/blog/2017/08/15/double-disadvantage/> (explaining that “only twenty-six percent of high school seniors in the U.S. attend schools that offer some type of computer science course” and high-poverty schools “don’t offer a full range of STEM courses, and don’t have adequate equipment to conduct experiments; in other words, the basics which low-poverty districts would consider foundational necessities.”).

182. Hildreth, *supra* note 178 (explaining that STEM education will permit advancements in technology that would “enhance the lives of future generations”).

183. The connection between the race of criminal defendants (46 percent of all people convicted of a drug crime are black) and the impact of asset forfeiture on blacks cannot be ignored. Kim Farbota, *Black Crime Rates: What Happens When Numbers Aren’t Neutral*, HUFFPOST

ble to produce substantive change because they are not based on a strong constitutional foundation. An excessive fines test that considers the socio-economic background of the defendant would protect minorities and low-income individuals from being victim to forfeitures which are beyond their ability to pay. Further, since the Excessive Fines Clause is applicable to both civil and criminal asset forfeiture, it could provide protection to all individuals, including victims like Lisa Leonard who must currently rely on ineffective protections like the innocent-owner defense.

Moreover, if prosecutors are required to put a portion of any forfeiture obtained toward victims and victims harmed by the War on Drugs, there would be less revenue flowing into the pockets of law enforcement, ultimately eliminating or reducing the financial incentive that has motivated asset forfeiture abuses. Although there are likely legislative efforts that must be implemented as well, as the defender and interpreting voice of the Constitution, it is time for the Court to improve and utilize the Excessive Fines Clause in order to truly take a stand against asset forfeiture abuses.

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(Sept. 2, 2016), [https://www.huffingtonpost.com/kim-farbota/black-crime-rates-your-st\\_b\\_8078586.html](https://www.huffingtonpost.com/kim-farbota/black-crime-rates-your-st_b_8078586.html). Any tool provided to defense attorneys lends support to uplifting black communities because blacks are disproportionately targeted by police, prosecuted, and subject to forfeiture.

## NOTE

# What are Those Ingredients you are Mixing Up Behind your Veil?

BARRI DEAN\*

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### INTRODUCTION

In April 2016, Pfizer, Inc., an American global pharmaceutical giant headquartered in New York City, announced new restrictions on the distribution of its medications that have previously been used to perform capital punishment by lethal injection in the United States.<sup>1</sup>

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1. *Pfizer's Position on Use of Our Products in Lethal Injections for Capital Punishment*, PFIZER UPDATE (GLOBAL POL'Y & INT'L PUB. AFF., PFIZER INC.), Apr. 2016, <https://www.pfizer.com/files/b2b/GlobalPolicyPaperLethalInjection.pdf>.

In fact, it has even restricted third parties from redistributing its products to any correctional facility in the United States.<sup>2</sup>

In total, over thirty pharmaceutical manufacturers have prevented the sale and use of their medicines to carry out the death penalty by lethal injection.<sup>3</sup> For example, Custopharm, Inc. prohibits fulfilling drug orders that are believed to be used in an execution to be distributed to correctional facilities.<sup>4</sup> Custopharm, Inc. requests its distributors and wholesalers to follow the same protocol.<sup>5</sup> Athenex, a pharmaceutical manufacturer, stated, “[we do] not want any of our products used in capital punishment” when faced with similar situations involving its products for lethal injection.<sup>6</sup>

Because of pharmaceutical companies’ outlaw of their products for lethal injections, all potential Federal Drug Administration (FDA)-approved drugs that have typically been used for executions are now blocked.<sup>7</sup> Since the 1970’s, prisons have used many of these now blocked drugs as part of a three-drug lethal injection protocol.<sup>8</sup> This protocol consists of: “(1) sodium thiopental, ‘a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection,’ (2) a paralytic agent, which ‘inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration,’ and (3) potassium chloride, which ‘interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.’”<sup>9</sup>

Unable to obtain these drugs from reputable FDA sanctioned sources, most prisons have implemented an alternative method of execution departing from the three-drug protocol. For instance, prisons in Virginia use compound pharmacies to blend drugs for lethal injection.<sup>10</sup> Other state prisons, like those in Georgia and Alabama, are

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2. *Id.*

3. Ty Alper, *The United States Execution Drug Shortage: A Consequence of Our Values*, 21 BROWN J. WORLD AFF. 27, 27–28 (2014). See also *Industry statements and action on execution drugs*, REPRIEVE (last visited Apr. 12, 2018), <https://reprieve.org.uk/case-study/manufacture-action-on-execution-drugs/> (“Over thirty global healthcare companies have now taken steps to prevent their medicines being misused in lethal injection executions across the USA.”).

4. *Industry Statements and Action on Execution Drugs*, REPRIEVE, <https://reprieve.org.uk/case-study/manufacture-action-on-execution-drugs/> (last visited Apr. 12, 2018).

5. *Id.*

6. *Id.*

7. Alper, *supra* note 3.

8. *Baze v. Rees*, 553 U.S. 35, 44 (2008). See *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-lethal-injection> (last visited Apr. 12, 2018).

9. *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015).

10. Alper, *supra* note 3, at 30. See *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-lethal-injection> (last visited Apr. 12, 2018).

using foreign suppliers or the “black market” to smuggle the drugs into the United States.<sup>11</sup> These unorthodox methods have not gone unnoticed, however. In fact, Georgia and Alabama, among other state prisons, were raided in 2011 by the Drug Enforcement Agency for the importation of drugs from foreign countries, essentially drug smuggling.<sup>12</sup> In another case, in the District of Columbia, a group of death row inmates incarcerated in Arizona, California, and Tennessee, brought an action against the FDA and the United States Department of Health and Human Services (“HHS”) under the Federal Food, Drug, and Cosmetic Act (“FDCA”). They alleged the drugs planned to be used in their executions were imported from foreign manufacturers and therefore violate the FDCA.<sup>13</sup> The district court entered summary judgment and the appellate court affirmed. The appellate court permanently enjoined the FDA from allowing the importation of apparently misbranded or unapproved drugs. The Court further ordered the FDA to notify state correctional departments that the use of imported drugs (that are not approved) is unlawful.<sup>14</sup>

Further complicating matters surrounding lethal injection are the new statutes that are essentially hiding pertinent information. State legislatures have passed numerous “secrecy statutes” that prevent any information regarding the protocols, drugs, and personnel involved in executions from being disclosed.<sup>15</sup> This level of secrecy creates an arduous problem, if not impossible, for scrutiny. In addition, inmates on death row do not have access to critical information to ensure their constitutional right to Due Process, under the Eighth Amendment, is not abridged.

This note explores: (1) the use of compound pharmacies for the supply of drugs used in lethal injection; (2) secrecy laws that hide pertinent information about the drug sources; (3) current methods of exe-

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11. See Jeffery E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC, June 2015, <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/>.

12. *Id.*

13. *Beaty v. Food & Drug Admin.*, 853 F. Supp. 2d 30, 32 (D.D.C. 2012). It is unlawful to introduce a misbranded or unapproved new drug into interstate commerce. Misbranded drugs, among other things, are drugs “manufactured, prepared, propagated, compounded, or processed in an establishment not duly registered” with the FDA. Unapproved drugs are drugs that are neither “generally recognized, among experts . . . as safe and effective” for its labeled use, nor approved by the FDA.

14. *Id.*

15. Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 B.U. L. REV. 427, 430 (2015).

cution in place by correctional facilities; and (4) violations of the U.S. Constitution and international treaties.

## I. THE CURRENT STATE OF DEATH PENALTY

There are death penalty laws in over thirty-one states in the United States, but in 2016, only five of these states carried out an execution.<sup>16</sup> Traditionally, lethal injection was carried out using a three-drug protocol, but with pharmaceutical companies now refusing to provide these deadly combinations of paralytics and fast-acting sedatives, prisons struggle to obtain execution drugs that pass constitutional muster.<sup>17</sup> Thus, the number of executions across the country has dropped significantly.<sup>18</sup>

### A. Historical Three-Drug Protocols

In 1977, the first bill suggesting lethal injection was proposed.<sup>19</sup> Now thirty-six states use lethal injection,<sup>20</sup> and the majority of these states prefer to use a three-drug protocol.<sup>21</sup> This three-drug protocol consists of an anesthetic (usually sodium thiopental, until pentobarbital was introduced at the end of 2010).<sup>22</sup> Anesthetics are fast-acting sedatives that induce a deep, comalike unconsciousness when given in large amounts.<sup>23</sup> “Although executioners invariably achieve death, the mechanisms of death and the adequacy of anesthesia are unclear.”<sup>24</sup> These drugs are increased sometimes ten-fold from their common dosage resulting in immense pain and burning until death follows.<sup>25</sup>

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16. Deborah W. Denno, *Courting Abolition: Courting Death: The Supreme Court and Capital Punishment*, by Carol S. Steiker and Jordan M. Steiker. Cambridge, Mass.: Belknap Press of Harvard University Press. 2016. Pp. 390. \$29.95, 130 HARV. L. REV. 1827, 1827 (2017).

17. Julie Vandiver, *Eleven Years of Lethal Injection Challenges in Arkansas*, 70 ARK. L. REV. 409, 410–11 (2017).

18. Denno, *supra* note 16, at 1845.

19. *Id.* at 1862.

20. *Id.*

21. *Id.*

22. *Baze*, 553 U.S. at 44.

23. *Id.*

24. Teresa A. Zimmers et al., *Lethal Injection for Execution: Chemical Asphyxiation?*, PLoS MED (2007) <https://doi.org/10.1371/journal.pmed.0040156>.

25. *The Estate of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1105 (10th Cir. 2016).

B. Alternative Methods Being Used

In 2010, Hospira, Inc., the sole manufacturer of sodium thiopental in the United States, discontinued domestic production of the drug due to an “unspecified raw material supply problem.”<sup>26</sup> This issue resulted in global implications. Italian authorities threatened legal action if Hospira could not prevent the drug from being used in executions, so Hospira subsequently ended production in Italy.<sup>27</sup> In explaining its decision, Hospira noted it had never “condoned” use of thiopental in executions.<sup>28</sup> Similarly, in 2011, the Danish company Lundbeck, Inc., the world’s sole producer of injectable pentobarbital, announced that it would not sell the drug to prisons for use in executions and would require its customers to pledge the same.<sup>29</sup> Lundbeck subsequently sold the exclusive rights to pentobarbital to Akorn, Inc., an American company, with the express condition that it not sell pentobarbital for use in executions for a given period.<sup>30</sup>

As a result of the inability to get the traditional drugs used, states have resorted to unconstitutional alternative methods to carry out executions.<sup>31</sup> Currently, fourteen states — Alabama, Arizona, Delaware, Florida, Georgia, Idaho, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Virginia — use or have used pentobarbital as a single drug to carry out lethal injection.<sup>32</sup> Another method used is compound pharmacies.<sup>33</sup> Ten states: South Dakota, Missouri, Texas, Georgia, Oklahoma, Virginia, Ohio, Mississippi, Pennsylvania, and Colorado, use or have used compounding pharmacies to mix drugs used for lethal injection.<sup>34</sup> The states with the most barbaric alternative methods are Mississippi, Oklahoma, Utah, Tennessee, and New Hampshire, which allow for use of firing squad, hanging, electrocution, and nitrogen hypoxia<sup>35</sup> if

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26. Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1380 (2014).

27. *Id.* at 1380–81.

28. *Id.* at 1381.

29. *Id.*

30. *Id.*

31. Alper, *supra* note 3, at 27–28.

32. *State by State Lethal Injection*, DEATH PENALTY INFO. CTR. (last visited Apr. 12, 2018), <https://deathpenaltyinfo.org/state-lethal-injection>.

33. *Id.*

34. *Id.*

35. See Tom McNichol, *Death By Nitrogen*, SLATE (May 22, 2014, 11:47 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/05/death\\_by\\_nitrogen\\_gas\\_will\\_the\\_new\\_method\\_of\\_execution\\_save\\_the\\_death\\_penalty.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/death_by_nitrogen_gas_will_the_new_method_of_execution_save_the_death_penalty.html). Causes death by asphyxiation from lack of oxygen.

the state is unable to obtain traditional lethal injection drugs.<sup>36</sup> Because of the dangers already associated with the use of these drugs, it is imperative that there be a ban on the use of these alternative methods.

### C. Pharmacodynamics

Pharmacodynamics is the study of the relationship between drug concentration at the site of action and the resulting effect, including the time course and intensity of therapeutic and adverse effects.<sup>37</sup> Essentially, it is the study of how drugs will be processed within the body and the resulting side effects.<sup>38</sup> The effect of a drug present at the site of action is determined by a drug's binding with a receptor.<sup>39</sup> Receptors are present on neurons and cause various responses. For instance, drugs that bind to receptors on cardiac muscle can affect the intensity of the heart's contraction.<sup>40</sup> For most drugs, the concentration at the site of the receptor determines the intensity of a drug's effect.<sup>41</sup> However, other factors can and do affect drug response.<sup>42</sup> The effect of the drug can depend on the following: density of receptors on the cell surface, the mechanism by which a signal is transmitted into the cell by second messengers (substances within the cell), or regulatory factors that control gene translation and protein production.<sup>43</sup> This multilevel regulation results in variation of sensitivity to drug effect from one individual to another, and also determines enhancement of or tolerance to drug effects.<sup>44</sup>

The medical community has opined on the dangers of using drugs for unintended purposes. A potential problem is the pharmacodynamics of these drugs have not been tested for efficacy. Because of the lack of knowing the desired outcome, potential unwanted side effects are very concerning and place the prisoner at risk for extreme bodily harm. This could arguably result in cruel and unusual punishment. It is therefore imperative that the correct dosage and drug selections are individualized for each person.

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36. Joseph T. DiPiro et al., Concepts in Clinical Pharmacokinetics 1.

37. *Id.*

38. *Id.*

39. *Id.* at 2

40. *Id.*

41. DiPiro, *supra* note 36.

42. *Id.* at 2.

43. *Id.*

44. *Id.* at 3.

### *What are Those Ingredients*

For instance, Midazolam, one of the drugs used, is a short-acting benzodiazepine central nervous system depressant. Pharmacodynamic properties of midazolam and its metabolites, which are similar to those of other benzodiazepines, include sedative, anxiolytic, amnesic, and hypnotic activities. Midazolam was not designed to be used for lethal injection and is being administered in unintended ways by unqualified personnel. This was evident when an Oklahoma execution, using midazolam, resulted in unintended side effects. The prisoner was declared unconscious, and the remaining drugs in the protocol were administered.<sup>45</sup> Unexpectedly, the prisoner began “twitching and convulsing” and tried rising from the table, stating, “Oh, man” and “I’m not.” Observers in the room heard him say, “somethings wrong.”<sup>46</sup> He began to “buck and writhe, as if he was trying to raise himself from the gurney[,] . . . [and he] next tried to raise his head and shoulders away from th[e] gurney [while] clenching his teeth and grimace[ing] in pain.”<sup>47</sup> The doctor present declared him dead forty-three minutes after the administration of the midazolam.<sup>48</sup> In the preceding executions in Oklahoma, the prisoner died within six to twelve minutes from the administration of the first drug.<sup>49</sup> The midazolam was supposed to render the prisoner unconscious, inhibiting his ability to feel the effects of the subsequent drugs. However, because these drugs are not tested for their effect in the given amount, the prisoners suffer from cruel and unusual pain.

Another instance of a botched execution involving the improper administration of drugs is when a correctional facility in Oklahoma administered Potassium Acetate when the intended drug to be administered was potassium chloride.<sup>50</sup> Potassium Acetate is used to replenish electrolytes, as well as well as a urinary and systemic alkalizer.<sup>51</sup> The intended drug, potassium chloride, is intended to interfere with the electrical signals that stimulate the contractions of the heart. This induces cardiac arrest because of the very high dosages directly into

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45. Fallin, 841 F.3d 1098, 1105–06 (10th Cir. 2016).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Matt Ford, *An Oklahoma Execution Done Wrong*, ATLANTIC (Oct. 8, 2015), <https://www.theatlantic.com/politics/archive/2015/10/an-oklahoma-execution-done-wrong/409762/>.

51. *Potassium Acetate*, NAT’L CTR. FOR BIOTECHNOLOGY INFO. PUBCHEM COMPOUND DATABASE; CID=517044 (last accessed Apr. 13, 2018), <https://pubchem.ncbi.nlm.nih.gov/compound/517044>.

the vein.<sup>52</sup> Approximately eight months after this botched execution, another inmate was scheduled to be executed when personnel determined once again the incorrect drug Potassium Acetate was received instead of Potassium Chloride.<sup>53</sup> These botched executions prove it is critical for the drugs to be tested and approved by the FDA. Additionally, prisoners should be privy to information regarding the exact methods, drugs, and personnel being used to carry out the death penalty.

#### D. Compounding Pharmacy

With drug shortages and actions by pharmaceutical manufacturers, it is increasingly difficult for prisons to obtain the traditional drugs used for lethal injection.<sup>54</sup> As a result, at least ten states are currently using compounding pharmacies to obtain these drugs.<sup>55</sup>

Compounding is a practice when a licensed pharmacist or licensed physician (or a person under their supervision) combines, mixes, or alters ingredients of a drug to create a medication tailored to the needs of an individual patient.<sup>56</sup> The major problem with compounding is pharmacies do not encounter the same rigorous approval process for their products that large manufacturers encounter.<sup>57</sup> This, in turn, leads to extreme issues of safety and efficacy of compound pharmacies products.<sup>58</sup> “[T]he simple truth about any drug is that unless you know how it was made — where and from what and by whom — you cannot know what it is.”<sup>59</sup> Compounding pharmacies processes are just not as formal and rigorous as that of FDA-approved drugs manufactured by pharmaceutical companies.<sup>60</sup> Traditional drug manufacturers undergo rigorous checks and regulatory procedures. Even a compounding pharmacy operating in good faith can make critical mistakes due to the lack of regulation and over-

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52. Baze, 553 U.S. at 44.

53. Ford, *supra* note 48.

54. Alper, *supra* note 3, at 27–28.

55. *Id.*

56. *Prescription Requirement Under Section 503A of the Federal Food, Drug, and Cosmetic Act*, U.S. DEP’T OF HEALTH & HUM. SERVICES FOOD & DRUG ADMIN. (Dec. 2016), <https://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM496286.pdf>.

57. *Compounding Pharmacies And Lethal Injection*, DEATH PENALTY INFO. CTR. (last visited Apr. 12, 2018), <https://deathpenaltyinfo.org/compounding-pharmacies>.

58. *Id.*

59. By Michael Scott Leonard, ‘cloudy’ Injection Halts Execution As Courts Reject Lethal-Injection Challenges, 10 WESTLAW J. MEDICAL MALPRACTICE 9 (2015).

60. *Id.* at 2.

sight.<sup>61</sup> The International Academy of Compounding Pharmacists issued a statement expressing their disdain for the use of compound pharmacies for lethal injection drugs:

While the pharmacy profession recognizes an individual practitioner's right to determine whether to dispense a medication based upon his or her personal, ethical and religious beliefs, the International Academy of Compounding Pharmacists discourages its members from participating in the preparation, dispensing, or distribution of compounded medications for use in legally authorized executions.<sup>62</sup>

In 2015, a planned execution was stopped when phenobarbital, supplied by a compounding pharmacy, was noted to be cloudy.<sup>63</sup> According to an anesthesiologist at University Hospitals Case Medical Center in Cleveland, the cloudiness could indicate contamination, or a particulate ingredient did not fully disintegrate.<sup>64</sup> This is not the first-time compounding pharmacies drugs have been under scrutiny. In fact, Massachusetts lawmakers successfully voted on a law to restrict compounding pharmacies when contaminated drugs from a compounding pharmacy caused the death of sixty-four American citizens and severe illnesses in hundreds more.<sup>65</sup>

States often keep important details of their execution procedures secret from the inmates and the public. This is perhaps because they know their drugs and methods cannot be trusted.<sup>66</sup> As states' procedures have become more haphazard and inconsistent in recent years, this problem has reached a critical point.<sup>67</sup> Indeed, as states increasingly rely on unregulated compounding pharmacies for their drugs, the lack of transparency has grown even more pronounced.<sup>68</sup>

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61. *Id.* at 3–4.

62. *IACP Position On Compounding Of Lethal Injection Drugs*, INT'L ACAD. OF COMPOUNDING PHARMACIES (Mar. 24, 2015), [http://c.ymcdn.com/sites/www.iacprx.org/resource/resmgr/Position\\_Statements/IACP\\_Position\\_Statement\\_Leth.pdf?hhSearchTerms=%22lethal+and+injection%22](http://c.ymcdn.com/sites/www.iacprx.org/resource/resmgr/Position_Statements/IACP_Position_Statement_Leth.pdf?hhSearchTerms=%22lethal+and+injection%22).

63. Gilliam Mohny, *Kelly Gissendaner: Explaining the 'Cloudy' Drug That Stopped Georgia Execution*, ABC NEWS TODAY (Mar. 3, 2015 1:10 PM), <http://abcnews.go.com/Health/georgia-execution-explaining-cloudy-drug-stopped/story?id=29357024>.

64. *Id.*

65. Elizabeth Barber, *After Drug Deaths, Massachusetts Lawmakers Seek To Curb Compounding Pharmacies*, REUTERS (July 3, 2014 5:36 PM), <https://www.reuters.com/article/us-usa-massachusetts-meningitis/after-drug-deaths-massachusetts-lawmakers-seek-to-curb-compounding-pharmacies-idUSKBN0F82J920140703>

66. Berger, *supra* note 24, at 1388.

67. *Id.*

68. *Id.*

E. Secrecy Laws

But with several states now relying on experimental and sometimes secret drugs to execute inmates utilizing ad hoc procedures legislators are swiftly passing unconstitutional secrecy laws to provide anonymity to the correctional facilities.<sup>69</sup> A state law shrouding the makers of lethal injection drugs is a form of prior censorship and an interference with the public's right to freedom of speech and freedom of the press under the First Amendment.<sup>70</sup> It is imperative that information about the drugs, policies, and methods of lethal injection are available. When the government can hide behind a veil a prisoner is left without recourse in the court system to ensure his constitutional rights are not violated. Hugo Bedau, a distinguished philosopher and ardent abolitionist said it best: “[t]he relative privacy of executions nowadays means that the average American literally does not know what is being done when the government, in his name and presumably on his behalf, executes [someone].”<sup>71</sup>

State secrecy sometimes extends to events that transpire during executions.<sup>72</sup> When the execution does not go as planned states often draw the blinds of the execution chamber so that witnesses cannot see what is happening.<sup>73</sup> Also, the intravenous access catheter is often covered with a sheet or towel, making it impossible to see problems as they develop.<sup>74</sup> For instance, during an execution at a correctional facility in Oklahoma, a sheet was used to cover the access site concealing an area of swelling “larger than a golf ball.”<sup>75</sup> Swelling of this nature signals that the drugs are infiltrating the surrounding tissues requiring removal of the intravenous access line immediately.<sup>76</sup> State

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69. German Lopez, *Ohio's Legislature Just Voted To Make Its Executions More Secretive*, VOX (Dec. 17, 2014 6:41 PM), <https://www.vox.com/2014/12/17/7411149/death-penalty-bill-ohio>.

70. Jeremy Kohler, *Ruling Could Clarify Missouri's Executioner Secrecy Law*, ST. LOUIS POST DISPATCH (Feb. 6, 2014), [http://www.stltoday.com/news/local/crime-and-courts/ruling-could-clarify-missouri-s-executioner-secrecy-law/article\\_3c44f0b4-1e31-58ed-93af-11915e9358b5.html](http://www.stltoday.com/news/local/crime-and-courts/ruling-could-clarify-missouri-s-executioner-secrecy-law/article_3c44f0b4-1e31-58ed-93af-11915e9358b5.html).

71. AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 9.

72. Berger, *supra* note 26, at 1390–92.

73. *Id.*

74. *Id.*

75. *Id.*

76. See generally *George v. Montefiore Medical Center*, 2013 WL 11068421 (N.Y. Sup.) (Infiltration is the infusion of fluid and/or medication outside the intravascular space, into the surrounding soft tissue. Generally caused by poor placement of a needle or angiocath outside of the vessel lumen. Clinically, you will notice swelling of the soft tissue surrounding the IV, and the skin will feel cool, firm, and pale. Small amounts of IV fluid will have little consequence, but certain medications even in small amounts can be very toxic to the surrounding soft tissue.)

secrecy in lethal injection has become so pervasive that some states withhold their reasons for secrecy.<sup>77</sup> For example, Texas Attorney General Greg Abbott announced that the Texas Department of Criminal Justice “must withhold” information about the pharmacists supplying drugs to the State correctional facility, citing a “threat assessment” from the Texas Department of Public Safety as the reason.<sup>78</sup> However, he refused to release the assessment, stating it was “law enforcement sensitive information.”<sup>79</sup>

Many states conceal the most vital information needed to determine the safety of their executions, including the qualifications of the person inserting the catheter into the inmates’ veins, the qualifications of the person mixing the drugs, the qualifications of the person monitoring the inmate’s anesthetic depth, the chemical properties of the actual drugs used, and the amounts of the drugs to be injected.<sup>80</sup> For example, the execution protocol in Oklahoma is conspicuously silent on several issues bearing directly on the risk of pain.<sup>81</sup>

The state of Missouri has taken secrecy to a new level engaging in a wide-ranging scheme — involving code names and envelopes stuffed with cash — to hide the fact that it paid a troubled pharmacy for the drugs it used to execute inmates.<sup>82</sup> The state has faced at least six lawsuits involving inmates fighting to identify the pharmacy’s identity.<sup>83</sup> What’s even more shocking about the way in which Missouri goes about getting its lethal injection drugs is the fact that high-ranking corrections officers go to clandestine meetings exchanging envelopes full of cash for vials of pentobarbital.<sup>84</sup> Over the last four years, Missouri has spent more than \$135,000 in such drug deals.<sup>85</sup>

Missouri is not alone when it comes to secrecy laws. For instance, in Arizona, the protocol for secrecy states, in part:

The anonymity of any person . . . who participates in or performs any ancillary function(s) in the execution, including the source of

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77. Berger, *supra* note 26, at 1390–92.

78. *Id.* at 1391.

79. *Id.*

80. *Id.*

81. Berger, *supra* note 26, at 1391.

82. Chris McDaniel, *Missouri Fought For Years To Hide Where It Got Its Execution Drugs. Now We Know What They Were Hiding*, BUZZFEED (Feb. 20, 2018 4:55 AM), [https://www.buzzfeed.com/chrisdaniel/missouri-executed-17-men-with-drugs-from-a-high-risk?utm\\_term=.fanDMbaeje#.tj2QAGVxbx](https://www.buzzfeed.com/chrisdaniel/missouri-executed-17-men-with-drugs-from-a-high-risk?utm_term=.fanDMbaeje#.tj2QAGVxbx).

83. *Id.*

84. *Id.*

85. *Id.*

the execution chemicals, and any information contained in records that would identify those persons are, as required by statute, to remain confidential and are not subject to disclosure.<sup>86</sup>

Similar protocols are on the books in many states. Another example of a secrecy law is in the state of Georgia. The statute reads as follows:

The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret.<sup>87</sup>

However, Ohio seems to have taken secrecy to new heights. In 2014, Ohio enacted a bill with four key provisions that completely foreclose the possibility of inmates knowing if their constitutional rights are potentially being violated. The provisions consist of the following<sup>88</sup>:

- (1) Identities of persons who assist in carrying out executions by lethal injection must be kept confidential.
- (2) Excludes from the definition of “public record” and prohibits the disclosure of any information or record that identifies or reasonably leads to the identification of any individual that makes, supplies, or administers drugs or equipment used in executions by lethal injection or who participates in carrying out such executions, other than the Director of Rehabilitation and Correction and prison wardens.
- (3) Prohibits a licensing authority from taking disciplinary action against a licensee for participating in, consulting regarding, performing any function with respect to, or providing any expert opinion testimony regarding an execution by lethal injection.
- (4) Voids contracts that either prohibits the sale, distribution, or transfer of any drug to a governmental entity for use in an execution by lethal injection or are designed to prevent a governmental entity from obtaining a drug for use in such an execution.

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86. A.R.S. § 13-757(C).

87. Ga. Code Ann. § 42-5-36(d)(2).

88. Ohio Rev. Code Ann. § 2949.221 (West).

These laws amount to nothing more than a cover-up of dangerous and unconstitutional execution processes.

F. First Amendment and Right of Access

Although there is no explicit right of access granted by The First Amendment, this right has evolved as First Amendment jurisprudence has evolved. The prisoner should have a right to know the details of their execution. When determining what right exists the courts use a two-prong analysis.<sup>89</sup> First, the “experience prong” requires courts to determine “whether the place and process have historically been open to the press and general public.” Second, the logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.”<sup>90</sup> If these factors are found access is favored; meaning a qualified right of access under the First Amendment arises.<sup>91</sup>

This right of information has played out in the courts recently. In November of 2017, the Supreme Court of Arkansas held that the state statute governing confidentiality in executions requires public disclosure of the manufacturer of the drugs being used.<sup>92</sup> However, the court blocked disclosure of the lot, batch, and control numbers that could lead to the identification of other sellers and suppliers in the chain of distribution.<sup>93</sup> In another case, the Oklahoma Supreme Court granted a stay of execution to a prisoner because he was not given the information about the drugs that would be used to carry out his execution.<sup>94</sup> The plaintiffs in the case argued the Department of corrections blocked not only the source of the drugs but also the identity of the drugs.<sup>95</sup> They argued the prohibition “violates their due process rights by denying them both notice of the process by which they will be executed and meaningful access to the courts to challenge that process.”<sup>96</sup> Further, they argued that the provision is unconstitutional “because it precludes judicial review of the Department of Corrections’ lethal-injection procedures and violates the Supremacy

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89. *Guardian News & Media LLC v. Ryan*, No. CV-14-02363-PHX-GMS, 2017 WL 4180324, at \*1 (D. Ariz. Sept. 21, 2017).

90. *Id.*

91. *Id.*

92. *Arkansas Dep’t of Correction v. Shults*, 529 S.W.3d 628, 633 (Ark. 2017).

93. *Id.*

94. *Fallin*, 841 F.3d at 1113.

95. *Lockett v. Evans*, 356 P.3d 58, 59 (Ok. 2014).

96. *Id.*

Clause of the United States Constitution by blocking Plaintiffs' ability to vindicate their Eighth Amendment right against cruel and unusual punishment."<sup>97</sup> The Oklahoma Supreme Court lifted the stay when the prisoner was provided the identity and dosage of the drugs to be used in his execution.<sup>98</sup>

Secrecy laws are unconstitutional for many reasons. But the main reason is they foreclose a prisoner's opportunity to obtain needed information to protect a threatened constitutional right. How can a prisoner bring forth an Eighth Amendment rights violation when the prisons, with the aid of state legislators, have hidden the necessary information from them?

#### G. The Eighth Amendment

Courts on numerous occasions both assume and assert the constitutionality of capital punishment. The courts are asked to decide whether methods of carrying out sentences of death stand under the Eighth Amendment. Until *Furman*, the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution.<sup>99</sup> Although this issue was presented and addressed in *Furman*, it was not resolved by the Court.<sup>100</sup> The Court split on how they would decide the constitutionality of the death penalty falling into the purview of the Eighth Amendment with four Justices stating they would have held that capital punishment is not unconstitutional *per se*; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed.<sup>101</sup> In a later decision, the Court held that the punishment of death does not invariably violate the Constitution.<sup>102</sup>

Throughout the years, the history of the prohibition of "cruel and unusual" punishment has been reviewed at length.<sup>103</sup> The phrase cruel and unusual punishment first appeared in the English Bill of

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97. *Id.*

98. Fallin, 841 F.3d at 1113-14.

99. *Furman v. Georgia*, 408 U.S. 239-40 (1972).

100. *See generally* *Gregg v. Georgia*, 428 U.S. 153, 168-69 (1976).

101. *Id.*

102. *Id.* at 169.

103. *Id.*

Rights of 1689, which was drafted by Parliament at the accession of William and Mary.<sup>104</sup> The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved.<sup>105</sup> In the earliest cases raising Eighth Amendment claims, the Court focused on specific methods of execution to determine whether they were too cruel to pass constitutional muster.<sup>106</sup> However, the constitutionality the Court looked at was not the sentence of death itself, but to evaluate the mode of executions similarly to “torture” and other “barbarous” methods.<sup>107</sup> Thus, it seems the clause forbidding “cruel and unusual punishments” is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.<sup>108</sup>

It is also clear from the Eighth Amendment precedent that the Eighth Amendment has not been regarded as a static concern.<sup>109</sup> As Mr. Chief Justice Warren said in an oft-quoted phrase, “(t)he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>110</sup> Assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.<sup>111</sup> Public perceptions of standards of decency with respect to criminal sanctions are not conclusive, however.<sup>112</sup> But it gives us an idea of what the outer limits are in relation to what is considered cruel and unusual under the Eighth Amendment standards.

The Supreme Court recently weighed in on the requirements to bring forth a death penalty claim. Under the *Baze v. Reese* test, an inmate can bring a claim of cruel and unusual punishment via the Eighth Amendment if they can show there is a subjection to a risk of

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104. Gregg, 428 U.S. at 169. See Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 853 (1969).

105. Gregg, 428 U.S. at 169.

106. *Id.* at 170.

107. See Gregg, 428 U.S. 153, 170 (1976). See also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (holding failure of initial execution attempt was an “unforeseeable accident” the second execution attempt did not violate the Eighth Amendment); *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death . . .”); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (“(I)t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . .”).

108. *Furman*, 408 U.S. at 429–30.

109. Gregg, 428 U.S. at 172–73.

110. *Id.*

111. *Id.* at 173.

112. *Id.*

future harm, or there is actual infliction of pain.<sup>113</sup> To establish that a risk of exposure violates the Eighth Amendment, however, the conditions presenting the risk must be “sure or very likely to cause serious illness and needless suffering,” and give rise to “sufficiently imminent dangers.”<sup>114</sup> Furthermore, an inmate is required to show there are alternative means of execution. The test under *Baze* requires specific allegations concerning the superiority, legality, feasibility, and availability of those alternative methods.<sup>115</sup> The issue comes in when the policies, procedures, and drugs used for the execution are shielded by secrecy laws. Since states have enacted these laws, prisoners are foreclosed from bringing forth claims under the standard laid out in *Baze* because they do not know what drugs and/or sources of drugs are even going to be used to determine the risk of exposure.

#### H. Medical and International Community

The right to life and the right not to be subjected to cruel, inhuman or degrading punishment are set forth in the Universal Declaration of Human Rights, other international human rights instruments, and many national constitutions.<sup>116</sup> Many civilized nations have concluded that the death penalty violates this inherent right.<sup>117</sup> In 1990 the Hungarian Constitutional Court declared that the death penalty violates the “inherent right to life and human dignity” as provided under the country’s constitution.<sup>118</sup> Additionally, in 1995 the South African Constitutional Court declared the death penalty to be incompatible with the prohibition of “cruel, inhuman or degrading treatment or punishment” under the country’s interim constitution.<sup>119</sup> The UN Special Rapporteur on Torture has stated that “there is no categorical evidence that any method of execution in use today complies with the prohibition of torture and cruel, inhuman or degrading treat-

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113. *Baze*, 553 U.S. at 49–50.

114. *Id.*

115. Leonard, *supra* note 59, at 2.

116. David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFFALO HUM. RTS. L. REV. 1, 10 (1999).

117. Eric Prokosch, *Human Rights v. The Death Penalty: Abolition and Restriction in Law and Practice*, AMNESTY INT’L, Dec. 1998, at 10.

118. *Id.*

119. *Id.*

ment in every case.<sup>120</sup> Even if the required safeguards are in place, all methods of execution currently used can inflict inordinate pain and suffering.<sup>121</sup> States cannot guarantee that there is a pain-free method of execution.<sup>122</sup> With the issues outlined above — lack of FDA regulations on the drugs being used and complete foreclosure of the inmate’s ability to know the details of the drugs/protocol used in his execution — there is no way that the current state of the death penalty in the U.S. lines up with International standards.

The current methods of lethal injection also do not comport with standards outlined by the medical community. Correctional facilities, even when permitted by statute to consider other drug options, have not revised their choice of lethal drugs, despite new developments in and knowledge about anesthesia and lethal chemical agents.<sup>123</sup> The traditional three-drug protocol itself was not without issues. In fact, each drug in the traditional three-drug protocol called for such massive dosages that could alone cause the death of the prisoner. According to anesthesiologists, highly-skilled medical doctors who specialize in placing patients in the state of controlled unconsciousness, the people administering the drugs lack necessary medical expertise, noting the correct dose of these drugs can be difficult to administer correctly.<sup>124</sup> Such inherent procedural problems might lead to insufficient anesthesia in executions, an assertion supported by low postmortem blood thiopental levels and eyewitness accounts of problematic executions.<sup>125</sup> Anesthesiologist are prevented from participating in executions and risk losing certification by the American Board of Anesthesiologist (“ABA”) if found to have participated.<sup>126</sup> The ABA further stated doing so in order to cause a patient’s death is a violation of their fundamental duty as physicians to do no harm.<sup>127</sup>

Medical doctors are not the only ones with issues as to the use of medical professionals for executions and the methods used to carry

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120. OLIVER ROBERTSON, STRENGTHENING DEATH PENALTY STANDARDS, PENAL REFORM INT’L 1, 23 (Feb. 2015), [https://www.penalreform.org/wp-content/uploads/2015/02/PRI\\_Strengthening\\_death\\_penalty\\_standards\\_WEB.pdf](https://www.penalreform.org/wp-content/uploads/2015/02/PRI_Strengthening_death_penalty_standards_WEB.pdf).

121. *Id.*

122. *Id.*

123. HUMAN RIGHTS WATCH, SO LONG AS THEY DIE, HUM. RTS. WATCH 1, 2 (Apr. 2006), <https://www.hrw.org/report/2006/04/23/so-long-they-die/lethal-injections-united-states>.

124. *Id.*

125. Zimmers, *supra* note 24.

126. Baze, 553 U.S. at 46.

127. J. Jeffery Andrews, Commentary, *Anesthesiologists and Capital Punishment*, AM. BD. OF ANESTHESIOLOGY (May 2014), <http://www.theaba.org/pdf/CapitalPunishmentCommentary.pdf>.

out those executions. Prisoners in the United States are executed by means that the American Veterinary Medical Association regards as too cruel to use on dogs and cats.<sup>128</sup> Drugs like potassium chloride, within a minute after it enters the prisoner's veins, will cause cardiac arrest. Without proper anesthesia, however, the drug acts as a fire moving through the patient's veins. Potassium chloride is so painful that the American Veterinary Medical Association prohibits its use for euthanasia unless a veterinarian establishes that the animal being killed has been placed at a deep level of unconsciousness by an anesthetic agent.<sup>129</sup> Medically unsound procedures continue to be used in the U.S. to carry out the death penalty by lethal injection against both the recommendations of the International and Medical Community. These adopted procedures do not make sure the prisoner is in fact deeply unconscious from the anesthesia before the paralyzing second and painful third drugs are administered. With secrecy laws in place hiding the details of these procedures, there is an even greater concern.

## II. THE DEATH PENALTY IS JUST NOT WORKING

A total of seven states in the past fifteen years have abolished the death penalty.<sup>130</sup> Officials are starting to rethink capital punishment.<sup>131</sup> For instance, in 2015 the Nebraska Legislature repealed capital punishment.<sup>132</sup> In Orlando, Florida, Denver, and Colorado, prosecutors have stated they are not seeking the death penalty in their capital cases.<sup>133</sup> Animal euthanasia protocols were rigorously evaluated and governed by professional, institutional, and regulatory oversight.<sup>134</sup> In stark contrast, lethal injection for humans was designed and implemented with no clinical or basic research.<sup>135</sup> Further, based on available records, no ethical or oversight groups have ever evaluated the protocols and outcomes in lethal injection.<sup>136</sup> The Interna-

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128. SO LONG AS THEY DIE, *supra* note 123.

129. *Id.* Unconsciousness is a "surgical plane of anesthesia" marked by non-responsiveness to noxious stimuli.

130. Glossip, 135 S. Ct. at 2774.

131. See SO LONG AS THEY DIE, *supra* note 123.

132. Glossip, 135 S. Ct. at 2774.

133. Frances Robles, *Lock 'Em Up? Prosecutors Who Say 'Not So Fast' Face a Backlash*, N.Y. TIMES, <https://www.nytimes.com/2017/03/30/us/aramis-ayala-prosecutors-death-penalty.html> (last visited Apr. 16, 2018).

134. Zimmers, *supra* note 24.

135. *Id.*

136. *Id.*

tional Community has also weighed in stating that the death penalty must be administered in a way that is free from cruel, inhuman or degrading punishment.<sup>137</sup>

Public opinion of the death penalty has also dropped according to the October 2017 Gallup poll on capital punishment, which found that “Americans’ support for the death penalty has dipped to a level not seen in 45 years.”<sup>138</sup> The poll results show that 55% of Americans support the death penalty for a person convicted of murder, however, that is a 5 % drop from the 2016 poll.<sup>139</sup> The poll also reported an opposition to the death penalty at 41%, the highest level in 45 years.<sup>140</sup> The last time Gallup reported higher opposition to the death penalty was 51 years ago, in May 1966, when 47% of respondents said they opposed capital punishment.<sup>141</sup> There is a reflection in the party lines on the death penalty.<sup>142</sup> The polls showed that among supporters of the death penalty 72% were Republicans, as compared to 58% Independents and 39% Democrats.<sup>143</sup>

The opinions of the International Community, Medical Professionals, and the public are promising, but the most recent precedent set by the Supreme Court shows we have a long way to go. The Supreme Court’s decision in *Baze v. Rees*, as noted above, specifically requires the prisoner to proffer some “feasible, readily implemented” alternative as part of his affirmative case.<sup>144</sup> Thus, conditioning the Eighth Amendment on the existence of a workable remedy.<sup>145</sup> This, however, is misguided.<sup>146</sup> By requiring the prisoner to bring forth some workable alternative the remedial concerns shift the Eighth Amendment’s focus in method-of-execution cases from the inmate’s risk of pain to the difficulty the state might have reforming its method.<sup>147</sup> The inmate should be limited to showing the current policy of execution is, in fact, a violation of the Eighth Amendment be-

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137. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT* 125 (1988).

138. Jeffrey Jones, *U.S. Death Penalty Support Lowest Since 1972*, GALLUP.COM, <http://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx> (last visited Apr. 16, 2018).

139. *Id.*

140. *Id.*

141. *Id.*

142. *See id.*

143. *Id.*

144. Berger, *supra* note 26, at 1379.

145. *Id.* at 1378–79.

146. *Id.* at 1379.

147. *Id.*

cause it inflicts pain or will very likely cause serious illness and needless suffering which will give rise to sufficiently imminent dangers. The onus should not be left up to the prisoner to ensure he is free from cruel and unusual punishment but left up to those who are placed in charge of facilitating the execution. If the correctional facilities are not up to the task of ensuring inmate safety, which judging by the ad hoc lethal injection procedures in place over the last several years, that responsibility should be taken out of the facilities' hands.

### CONCLUSION

Although supporters of lethal injection believe the prisoner dies painlessly, there is mounting evidence that prisoners may experience excruciating pain during their executions. This should not be surprising given that necessary steps to ensure a painless execution have not been undertaken by the correctional community. This is further compounded by the correctional facilities' ability to hide behind secrecy laws. Correctional facilities use a sequence of drugs and a method of administration that were created with minimal expertise and little deliberation three decades ago, and even then, was adopted unquestioningly by state officials with no medical or scientific background. Little has changed since then. Now, correctional facilities are using compound pharmacies that lack the oversight drugs approved by the FDA undergo. When a drug is mixed up at a compound pharmacy, the ingredients and procedure used are unknown, significantly increasing the likelihood that the execution will cause the prisoner to suffer cruel and unusual punishment.

Moreover, the courts cannot ensure that the protocols and drugs being used in executions comply with the Eighth Amendment prohibition against cruel and unusual punishment because of secrecy laws. The question of whether inmates possess a constitutional right to know how they will be executed has recurred frequently in the district courts and will continue to arise. This issue has gained momentum and received widespread attention from the mainstream media. However, the U.S. Supreme Court seems to evade this issue.<sup>148</sup> It is important to note that this veil the correctional facilities are able to hide behind, with the assistance of state legislatures, makes possible for the prisons to hide every scintilla of information about the origins and true nature of their lethal injection drugs from, the public, the courts,

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148. *Id.* at 1373.

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and most importantly the prisoner himself.<sup>149</sup> Executions can be botched when there is a departure from the established protocol for the method of execution.<sup>150</sup> From 1890 to 2010 a total of three percent of all executions were botched in the United States.<sup>151</sup> Lethal injection is carried out using medications originally designed to save and improve the lives of patients. These medications are being used against the recommendations of licensed medical professionals who are trained in the administration of these drugs. Further, the International community is against this inhumane treatment. Although this is not a new topic of discussion and aside from whether the death penalty should or should not be present, most can agree that if there is a death penalty it should be administered in the most humane way. That is not what is currently happening with correctional facilities using ad hoc medical procedures, smuggling drugs into the U.S., and going through the back door to compound pharmacies to have unknown drugs mixed up to execute prisoners.

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149. Leonard, *supra* note 59, at 1.

150. SARAT, *supra* note 71, at 5.

151. *Id.*





