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Letter from the Editor-in-Chief

It was time for a second issue, and Nadine and I sat in her office on the third floor of Notre Dame hall at the law school. We mulled over various prospects tentatively, and at one unexpected point realized that we had the potential for a simple, direct issue that could only be described in a phrase we have used often since: “heavy-hitting.”

This is issue two. It bleeds with social commentary; it presents poignant thoughts while eagerly seeking response; and its contributing authors boldly delve into topics that are rarely explored. This issue is an exploration into the outer limits of legal scholarship, and we at the *Howard Law Journal* can only thank our institution for enabling this intellectual expedition. Our tendency to embrace and feature such heavy-hitting topics comes from a tradition well-established by those who have emerged from Howard’s hallowed halls. It is our sincere hope that your read through this issue affirms that all who mark its pages are truly (and appropriately) “ever bold to battle wrong.”

Our issue opens with *Belief, Truth, and Positive Organizational Deviance*, a powerful piece by Professors Gregory S. Parks, Shayne E. Jones, and Matthew W. Hughey. The authors lead us through a detailed exploration of the practice of hazing in Black Greek-Letter Organizations. Particularly, they look into the social-psychological reasons why even the most respected people—people with the most to lose—take part in such behavior in the face of legal penalty, physical and emotional trauma, and even death.

Next, Professor Cassandra L. Hill gives us *The Elephant in the Law School Assessment Room: The Role of Student Responsibility and Motivating Our Students to Learn*. In her article, Hill guides us through a social science investigation into legal education and advocates that accreditors should shift focus from law professors to law students. She explains that students should be more involved in their learning through an active, responsible method.

We are pleased to present a strong collection of student-written pieces in this issue. The aforementioned Nadine Mompremier, our Executive Solicitations & Submissions Editor, gives us *Battle for the School Grounds: A Look at Inadequate School Facilities and a Call for a Legislative and Judicial Remedy*. Her piece investigates the struggle to provide American students with adequate learning facilities in both the charter school and public

school settings. In her analysis, Mompremier searches for legislative and judicial strategies in securing adequate school infrastructure funding.

In this issue, I humbly offer to our readers my own piece entitled *Pharaohs, Nubians, and Antiquities: International Law Suggests It's Time for a Change in Egypt*. Through the lens of international law, I seek to examine Nubian cultural life in Egypt and the historical narratives that affect (and often deny) Nubian association with *Kmt*, the ancient civilization popularly known as “ancient Egypt.” Ultimately, I suggest several ways for the Egyptian government to avoid breaching its vow to eliminate racial discrimination.

Senior Staff Editor Sean Preston give us *What Warrants the Revocation of Supervised Release?: Why the Term “Warrant” Has Given the Courts So Much Trouble*. Preston explores the experiences of those on supervised release and the often insurmountable difficulties they face in completing supervised release terms under the current scheme. Specifically, Preston analyzes a circuit split on the issue of whether revocation of supervised release meets the requirements of the Fourth Amendment’s Warrant Clause.

Jasmine Williams, Senior Notes & Comments Editor, closes our issue with *“Unemployed (and Black) Need Not Apply”: A Discussion of Unemployment Discrimination, Its Disparate Impact on the Black Community, and Proposed Legal Remedies*. Williams’ piece does exactly what its commanding title promises: it confronts the disconcerting trend of unemployment discrimination, distills its dire effects on the black community, and assesses what can be done in our legal system to counteract those effects.

With these pieces, the momentum of Volume 56 continues. We hope that you enjoy this chapter in our journey to uncover answers to heavy-hitting questions.

ANGELA M. PORTER
Editor-in-Chief
2012-2013

Belief, Truth, and Positive Organizational Deviance

GREGORY S. PARKS*
SHAYNE E. JONES**
MATTHEW W. HUGHEY***

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INTRODUCTION

On November 19, 2011, Robert Champion, a drum major in Florida A&M University's (FAMU) "Marching 100" band, collapsed on a bus following a band performance at the Florida Classic football game between FAMU and Bethune-Cookman.¹ Champion had complained about shortness of breath and failed eye-sight, and had apparently been vomiting before ultimately becoming unconscious.² He was non-responsive when authorities arrived and was later pronounced dead at a nearby hospital.³ An initial emergency caller told the dispatcher that Champion had been vomiting and that "His eyes [were] open but he [wasn't] responding."⁴ A second caller told the dispatcher that Champion was "cold."⁵ Other details pertaining to Champion's death were not immediately released.

By Tuesday, November 22, rumors had circulated on the FAMU campus and via social media that hazing had played a part in Champion's death.⁶ Law enforcement officials stated that they also believed some form of hazing to have occurred before the 911

1. Jordan Culver, *Hazing Rumors Surround Death of Fla. Student*, GARNETT NEWS SERVICE, Nov. 22, 2011, available at <http://web2.westlaw.com> (click "NewsRoom with Reuters" tab; then follow "All News Plus Wires" hyperlink under "Multi-Source News"; then search "hazing rumors surround death of Fla. student"; then follow "1. Hazing rumors surround death of Fla. student" hyperlink).

2. Brent Kallestad, *Fired FAMU Band Director: Hazing Warnings Ignored*, ASSOCIATED PRESS, Nov. 29, 2011, available at <http://web2.westlaw.com> (click "NewsRoom with Reuters" tab; then follow "All News Plus Wires" hyperlink under "Multi-Source News"; then search "fired FAMU band director: hazing warnings ignored"; then follow "4. Fired FAMU band director: hazing warnings ignored" hyperlink).

3. *Id.*

4. Mike Schneider & Gary Fineout, *Vomit in FAMU Student's Mouth Before He Dies*, ASSOCIATED PRESS, Dec. 1, 2011, available at <http://web2.westlaw.com> (click "NewsRoom with Reuters" tab; then follow "All News Plus Wires" hyperlink under "Multi-Source News"; then search "vomit in FAMU student's mouth before he dies"; then follow "2. Vomit in FAMU student's mouth before he dies" hyperlink).

5. *Id.*

6. Culver, *supra* note 1.

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emergency call was placed.⁷ Ultimately, suspicions that hazing had played a role in Champion's death were confirmed when Champion's death was ruled a homicide by the State Medical Examiner's Office in Orlando.⁸ According to that office, Champion's death was resultant of blunt-force trauma suffered during a hazing incident involving some members of FAMU's Marching 100.⁹ Champion endured such severe blows during the incident that he bled out into his soft tissue, particularly in his back, chest, shoulders, and arms. The autopsy further revealed that Champion had been vomiting profusely and had died within an hour from the time he suffered the injuries.¹⁰ Toxicology tests revealed no traces of drugs or alcohol in Champion's system.¹¹

Champion's death prompted a number of criminal and administrative inquiries. The initial investigation into the incident was led by the Orange County Sheriff's Office where, according to spokeswoman Deputy Ginette Rodriguez, more than forty people were interviewed and more than 1,000 man hours were logged by investigators during the course of the inquiry that began in November.¹² FAMU cooperated completely in the investigation and appointed its own independent task force discussed at length above. Ultimately, the investigation into Champion's death was handed over to the state of Florida.¹³ Less than two months later, thirteen people were charged

7. Frieda Frisaro, *Attorney Says Suit Planned in FAMU Band Death*, ASSOCIATED PRESS, Nov. 25, 2011, available at <http://web2.westlaw.com> (click "NewsRoom with Reuters" tab; then follow "All News Plus Wires" hyperlink under "Multi-Source News"; then search "'attorney says suit planned in FAMU band death'"; then follow "1. Attorney says suit planned in FAMU band death" hyperlink).

8. Gary Fineout, *Florida A&M Drum Major's Death Ruled a Homicide*, AUGUSTA CHRON., Dec. 17, 2011, at A4, available at <http://web2.westlaw.com> (click "NewsRoom with Reuters" tab; then follow "All News Plus Wires" hyperlink under "Multi-Source News"; then search "'Fla. A&M drum major's death ruled a homicide'"; then follow "1. Florida A&M drum major's death ruled a homicide" hyperlink).

9. *Id.*

10. Paul Flemming, *Autopsy: FAMU Drum Major Died Within One Hour of Hazing*, GANNETT NEWS SERVICE, Dec. 22, 2011, available at <http://web2.westlaw.com> (click "NewsRoom with Reuters" tab; then follow "All News Plus Wires" hyperlink under "Multi-Source News"; then search "'autopsy: FAMU drum major died within one hour of hazing'"; then follow "1. Autopsy: FAMU drum major died within one hour of hazing" hyperlink).

11. *Id.*

12. Jordan Culver, *Fla. Gets Death Investigation of FAMU Drum Major*, GANNETT NEWS SERVICE, Mar. 26, 2012, available at <http://web2.westlaw.com> (click "NewsRoom with Reuters" tab; then follow "All News Plus Wires" hyperlink under "Multi-Source News"; then search "'Fla. gets death investigation of FAMU drum major'"; then follow "1. Fla. gets death investigation of FAMU drum major" hyperlink).

13. *Id.*

with hazing crimes related to Champion's death.¹⁴ State Attorney Lawson Lamar said that eleven people were accused of death by hazing, a third-degree felony that can carry up to six years for defendants with no criminal record.¹⁵ Two others were charged with misdemeanor hazing.¹⁶ According to hazing expert Richard Sigal, an attorney and expert on hazing, to his knowledge, there are no other hazing cases that have resulted in that number of people being charged.¹⁷

Robert Champion's death merely reflects what has taken place within the very organizations that historically black college and university bands—as well as some other black student organizations—have mimicked, that being African American fraternities and sororities or black Greek-letter organizations (BGLOs). Consider the following stories:

Story 1: Karen Mills is a forty-eight year-old state trial court judge. She is in the third year of her four-year term as the National Head of Black Sorority. The sorority has 35,000 financially active members. Approximately sixty-five percent of that membership is alumnae members who attend monthly chapter meetings, volunteer for service projects, and engage in philanthropic endeavors within their communities. During Black Sorority's annual, National Convention, while in her hotel suite, Judge Mills calls the hotel room of the chapter president—Maureen Student—from Southern College and asks her to report to the judge's suite. When Ms. Student arrives, Judge Mills informs her that Kim Mills, the judge's daughter, intends to seek membership in Black Sorority through the Southern College chapter. Judge Mills instructs Ms. Student, "Make sure my daughter is made right—the old fashioned way. I want to make sure that she shares with me the same stories of overcoming adversity and bonding as I was able to share with my mother, who is also a member of Black Sorority." In short, Judge Mills instructed Ms. Student to make sure that Kim Mills was hazed and that the Southern College Black Sorority chapter members violate the anti-hazing statute in the state where their university is located.

14. Mike Schneider, *13 Charged in Hazing Death of Fla. Band Member*, ASSOCIATED PRESS, May 3, 2012, available at <http://web2.westlaw.com> (click "NewsRoom with Reuters" tab; then follow "All News Plus Wires" hyperlink under "Multi-Source News"; then search "'13 charged in hazing death of Fla. band member'"; then follow "1. 13 charged in hazing death of Fla. band member" hyperlink).

15. *Id.*

16. *Id.*

17. *Id.*

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Story 2: Ulysses Manigold was a 2L at a Top-Fifteen Law School. He heard that a friend of his, Peter Summers, was pledging a Black Fraternity, Manigold's fraternity. One evening, Manigold and the members of his undergraduate chapter visited the pledge session of Summers and his pledge (line) brothers. When Manigold entered the room, he instructed Summers to step out of the lined-up formation in which the pledges were ordered. Manigold asked Summers if he knew the poem "Invictus" by William Ernest Henley. In typical fashion, Summers responded, "We know the poem." Manigold then instructed Summers to remove his sweatshirt and T-Shirt; he further instructed Summers to recite the poem with intensity. As Summers proceeded, Manigold repeatedly struck him across the back with slaps, using as much force as he could muster. Manigold never stammered, and recited the poem flawlessly. Manigold demanded that Summers recite the poem again, only this time backwards. As he proceeded, Manigold again struck him across the back while another fraternity brother struck him across the chest. Summers proceeded more slowly this time, as not to make a mistake. By the time he was done, Summers chest was completely black and blue. The following year, while a 3L at a Top-Fifteen Law School, Manigold served as assistant dean of pledges for his undergraduate chapter. That semester, of the six members of the pledge line, five suffered injuries—one a broken jaw, one a broken hand, one a broken leg, one a hernia, and the final one a sprained back. The sole pledge who remained relatively healthy found himself paddled nightly with a cricket bat, swung often by Manigold.

Story 3: Neil Bryson graduated from a Top University and then a Top-Five Law School. By twenty-nine, he was a mid-level associate at an Elite Law Firm in a Big City. One day, he received a telephone call, informing him that his Black Fraternity chapter at a Top University had a pledge line. Bryson went back to the Top University for the weekend to "see" the pledges. What happened that weekend remains a mystery, but his chapter's moniker is "Merciless," and it is widely known within the fraternity for its brutal pledge sessions. When Bryson returned to the law firm on Monday morning, he had a message waiting for him from Bartholomew Neugent—a partner at the firm and also a fraternity brother of Mr. Bryson's who also pledged at the Top University. Mr. Neugent asked that Mr. Bryson stop by his office, noting that the matter was urgent. Mr. Bryson hastened to Mr. Neugent's office, entered, closed the door, and sat down. Mr.

Neugent asked if Mr. Bryson had gone to see the pledge line that past weekend, to which he answered in the affirmative. In response, Mr. Neugent did not suggest that anything was wrong with hazing the pledges. Instead, he encouraged Mr. Bryson to be more mindful of the fact that he has much more at risk now that he's a professional than he did as an undergraduate if a pledge were to be injured or report the hazing.

Each of these stories highlights a particular element of the culture within certain, elite black organizations—i.e., violent hazing. It is an element that puts lives at risk and yet persists and has persisted for generations. This is so despite the possibility of civil and criminal sanctions. As such, it raises the question: why does the law not constrain certain types of behavior, especially within organizations?

This Article extends the research on organizational behavior, organizational deviance, and more specifically, positive organizational deviance to non-corporate entities—i.e., BGLOs. Emotionally, financially, and physically active BGLO alumni make BGLOs particularly salient subjects of inquiry.¹⁸ In addition, BGLO membership has long-defined contemporaneous membership in the black middle- and upper-class.¹⁹ What makes these organizations appealing as an area of legal scholarship, aside from the crucial role that they and their collegiate and alumni members played in African Americans' quest for civil rights and social justice,²⁰ is violent hazing within their

18. See, e.g., Marcia D. Hernandez, *Sisterhood Beyond the Ivory Tower: An Exploration of Black Sorority Alumnae Membership*, in *BLACK GREEK-LETTER ORGANIZATIONS IN THE 21ST CENTURY: OUR FIGHT HAS JUST BEGUN* 253, 253 (Gregory S. Parks ed., 2008).

19. See E. FRANKLIN FRAZIER, *BLACK BOURGEOISIE* 94-95, 202-03 (1997); LAWRENCE OTIS GRAHAM, *OUR KIND OF PEOPLE: INSIDE AMERICA'S BLACK UPPER CLASS* 84 (1999).

20. See Marybeth Gasman, *Passive Activism: African American Fraternities and Sororities and the Push for Civil Rights*, in *BLACK GREEK-LETTER ORGANIZATIONS 2.0: NEW DIRECTIONS IN THE STUDY OF AFRICAN AMERICAN FRATERNITIES AND SORORITIES* 27, 27 (Matthew W. Hughey & Gregory S. Parks eds., 2011); Jessica Harris & Vernon C. Mitchell Jr., *A Narrative Critique of Black Greek-Letter Organizations and Social Action*, in *BLACK GREEK-LETTER ORGANIZATIONS IN THE TWENTY-FIRST CENTURY* 143, 143 (Gregory S. Parks ed., 2008); Robert L. Harris Jr., *Lobbying Congress for Civil Rights: The American Council on Human Rights, 1948-1963*, in *AFRICAN AMERICAN FRATERNITIES AND SORORITIES: THE LEGACY AND THE VISION* 213, 213 (Tamara L. Brown et al. eds., 2d ed. 2012); Robert E. Weems Jr., *Alpha Phi Alpha, the Fight for Civil Rights, and the Shaping of Public Policy*, in *ALPHA PHI ALPHA: A LEGACY OF GREATNESS, THE DEMANDS OF TRANSCENDENCE* 233, 233 (Gregory S. Parks & Stefan M. Bradley eds., 2012). For a review of mentor-mentee relationships of BGLO fraternity men around issues of social justice, see MURALI BALAJI, *THE PROFESSOR AND THE PUPIL: THE POLITICS OF W.E.B. DU BOIS AND PAUL ROBESON* (2007); RAWN JAMES, JR., *ROOT AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION* (2010).

ranks.²¹ We explore the issue of hazing within the framework of positive organizational deviance—positive intentional deviations from the behavior of a referent group at the organizational level—with two overarching questions in mind: what are the beliefs among BGLO members that undergird violent hazing within these groups, despite the constraint that the law seeks to place on such behaviors? And, to what extent are these beliefs well-founded? The latter question raises a broader inquiry about the complexity of prophylactic measures needed to minimize, if not eradicate, hazing within BGLOs.

In Section I, we examine the methods by which societies and organizations seek to control the behavior of their members. In Section II, we explore how the law has sought to constrain hazing, focusing on BGLO hazing as an exemplar. In Section III, we analyze the relationship between belief-systems about BGLO hazing among BGLO members and how those beliefs serve to perpetuate violent hazing within these organizations. In Section IV, we explore the various theories and research that explain the beliefs of BGLO hazing proponents as well as empirical tests of those theories. In Section V, we provide the results of our empirical research that explores (1) the beliefs that BGLO members have about the utility of hazing within their ranks and (2) the extent to which those beliefs are warranted. We close by trying to reconcile our empirical findings with BGLOs' organizational needs and the law.

I. SOCIAL CONTROL AND ORGANIZATIONAL DEVIANCE

Social control has been defined as “a process by which individuals are socialized and oriented towards norms.”²² Noted sociologist Donald Black built upon this proposition, arguing that the law itself is a form of social control.²³ One way that the law serves as a means of social control is by punishment.²⁴ “The infliction of punishment is a deliberate act intended to chastise or deter.”²⁵ Accordingly, there are

21. See, e.g., RICKY L. JONES, *BLACK HAZE: VIOLENCE, SACRIFICE, AND MANHOOD IN BLACK GREEK-LETTER FRATERNITIES* 1 (2004).

22. Spencer Millham et al., *Social Control in Organizations*, 23 *BRIT. J. SOC.* 406, 410 (1972) (quoting R.J. LAMBERT ET AL., *A MANUAL TO THE SOCIOLOGY OF THE SCHOOL* (1970)).

23. DONALD BLACK, *THE BEHAVIOR OF LAW* 6 (1976).

24. By way of example, for a review of social control theories that underlie criminal law, see DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 3-22 (1990).

25. *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985).

three ways in which punishment acts as a means for social control: (1) to deter the deviant by threatening the values he holds dear; (2) to act as a learning device and force the deviant to internalize the values of the law; and (3) to serve, through the publicity of punishment, as a reinforcement of the values of non-deviants.²⁶

However, there are many conditions where the law as punishment might be ineffective.²⁷ One is where the punishments established by the law cannot reach basic values of the deviant.²⁸ Also, where society has conflicting values, both the innocent and the guilty may suffer by punishment.²⁹ If there is a deviant group rather than a deviant individual, punishment could lead to a martyr effect and cause further deviation.³⁰ Certain value systems also have principles in place which lead to the refusal of the innocent party through collusion and perjury to press punishment.³¹ The law as punishment may also fail if the simple learning theory implied is not sufficient to bring about changes in values of the deviant.³² Lastly, the law as a punishment may not act as a deterrent if the deviant feels there is little chance of getting caught no matter how efficient the law may be.³³

Focusing on tort law, one study in particular examined the rate of likelihood that first-year law students would engage in a potentially tortious behavior after being presented with a series of vignettes.³⁴ The researchers hypothesized that the threat of tort liability serves only as a moderate deterrent, one that is weaker than criminal sanctions but stronger than a system with no social control at all.³⁵ The researchers concluded that the threat of criminal fines significantly reduced the respondents' willingness to engage in tortious behavior.³⁶ This was particularly surprising due to the fact that previous research has shown that criminal sanctions have a moderate deterrence ef-

26. Eugene Litwak, *Three Ways in Which Law Acts as a Means of Social Control: Punishment, Therapy, and Education*, 34 *SOC. FORCES* 217, 218 (1953).

27. *Id.* at 219.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. W. Jonathan Cardi et al., *Does Tort Law Deter Individuals? A Behavioral Science Study*, 9 *J. EMPIRICAL L. STUD.* 567, 571 (2012).

35. *Id.*

36. *Id.* at 587-88.

fect.³⁷ While the researchers did not reach a sweeping conclusion that tort law does not deter, their findings were consistent with the view.³⁸

Adding layer and nuance to the application of social norms, other scholars have explored the juncture at which social control and organizations meet.³⁹ Organizational behavior research suggests that societal norms are not necessarily penultimate in affecting organizational deviance.⁴⁰ Rather, dynamics and values internal to organizations may also have significant cache amongst organization members.⁴¹ As such, where law may serve as a norm-orienting factor in the lives of individuals, it may play a less significant role in shaping organization members' behavior—given organizational beliefs, culture, and needs.

While the juncture at which law and organizations meet has been fertile ground for scholarly inquiry,⁴² little legal scholarship focuses on the organizational behavior construct of “organizational deviance.” Organizational deviance occurs when an “organization’s customs, policies, or internal regulations are violated by an individual or a group that may jeopardize the well-being of the organization or its citizens.”⁴³ Organizational deviance can have a significant effect on an organization, including a legal effect.⁴⁴ It appears that at the individual level, deviant behavior within organizations distills to a combination of social psychological variables and organizational factors.⁴⁵

While considerable scholarly attention has been paid to organizational deviance, organizational behavior research pays scant attention

37. *Id.* at 591.

38. *Id.* at 598.

39. See, e.g., Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 *LAW & SOC'Y REV.* 23, 23-24 (1998).

40. See Jennifer Dunn & Maurice E. Schweitzer, *Why Good Employees Make Unethical Decisions: The Role of Reward Systems, Organizational Culture, and Managerial Oversight*, in *MANAGING ORGANIZATIONAL DEVIANCE* 39–68 (Roland E. Kidwell, Jr. & Christopher L. Martin eds., 2005).

41. See, e.g., Marne L. Arthaud-Day et al., *Direct and Contextual Effects of Individual Values on Organizational Citizenship Behavior in Teams*, 97 *J. APPLIED PSYCHOL.* 792, 792 (2012).

42. For example, in 1985, the *Oxford University Press* began publishing *The Journal of Law, Economics, & Organizations*. See *Archive of All Online Content*, *J.L. ECON. & ORG.*, <http://jleo.oxfordjournals.org/content/by/year> (last visited Feb. 12, 2013).

43. Mahmood A. Bodla & Rizwan Oaiser Danish, *Moderating Rome of Social Exchange Perceptions Between Perceived Organizational Politics and Antisocial Behavior*, 3 *J. ECON. & BEHAV. STUD.* 279, 281 (2011) (quoting Sandra L. Robinson & Rebecca J. Bennett, *A Typology of Deviant Workplace Behaviors: A Multidimensional Scaling Study*, 38 *ACAD. MGMT. J.* 555, 556 (1995)).

44. See generally Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 *AM. BUS. L.J.* 109 (2010) (exploring the question of whether business organizations can be held criminally liable).

45. Dane K. Peterson, *Deviant Workplace Behavior and the Organization's Ethical Climate*, 17 *J. BUS. & PSYCHOL.* 47, 48 (2002).

to how deviance may be defined by positive sets of behavior in addition to negative ones.⁴⁶ While Sagarin's research found over forty different definitions of deviance with only two being nonnegative,⁴⁷ Dodge broadened the study of organizational deviance to include "positive deviance."⁴⁸ In short, positive deviance is defined as "intentional behaviors that depart from the norms of a referent group in honorable ways."⁴⁹ In essence, positive deviant behaviors entail actions with honorable intentions, irrespective of the outcomes.⁵⁰ Positive deviant behaviors may consist of behaviors that organizations do not authorize, yet help the organization reach its overall goals.⁵¹

The growing interest in the study of positive organizational behavior derives, at least in part, from the increasing acknowledgment of positive organizational scholarship.⁵² As Cameron and colleagues describe, positive organizational scholarship focuses on the "dynamics that lead to developing human strength, producing resilience and restoration, fostering vitality, and cultivating extraordinary individuals, units and organizations."⁵³ While most positive organizational scholarship focuses on corporate entities, some organizational behavior scholars have turned their attention to other types of organizations. Case in point: Roberts and Wooten analyzed BGLOs through a positive organizational scholarship lens.⁵⁴

II. BGLO HAZING AND THE LAW

Hazing is defined as "the practice of subjecting initiates, whether to a fraternity, a service club, a school, or an interscholastic, collegiate

46. Gretchen M. Spreitzer & Scott Sonenshein, *Toward the Construct Definition of Positive Deviance*, 47 AM. BEHAV. SCIENTIST 828, 829 (2004).

47. *Id.* at 830 (citing EDWARD SAGARIN, *DEVIANTS AND DEVIANCE: AN INTRODUCTION TO THE STUDY OF DISVALUED PEOPLE* 830 (1975)).

48. David Dodge, *The Over-Negativized Conceptualization of Deviance: A Programmatic Exploration*, 6 DEVIANT BEHAV. 17, 18 (1985).

49. Gretchen M. Spreitzer & Scott Sonenshein, *Positive Deviance and Extraordinary Organizing*, in *POSITIVE ORGANIZATIONAL SCHOLARSHIP: FOUNDATIONS OF A NEW DISCIPLINE* 207, 209 (Kim S. Cameron et al. eds., 2003).

50. *Id.*

51. Steven H. Appelbaum et al., *Positive and Negative Deviant Workplace Behaviors: Causes, Impacts, and Solutions*, 7 CORP. GOVERNANCE 586, 587 (2007).

52. For more on positive organizational scholarship, see *OXFORD HANDBOOK OF POSITIVE PSYCHOLOGY AND WORK* (P. Alex Linley et al. eds., 2009).

53. Appelbaum et al., *supra* note 51, at 587 (quoting Kim Cameron et al., *What Is Positive Organizational Scholarship?*, UNIV. OF MICH.-ROSS SCH. OF BUS. (2005), <http://www.bus.umich.edu/positive/whatispos/>).

54. Laura Morgan Roberts & Lynn P. Wooten, *Exploring Black Greek-Letter Organizations Through a Positive Organizing Lens*, in *BLACK GREEK-LETTER ORGANIZATIONS IN THE 21ST CENTURY: OUR FIGHT HAS JUST BEGUN* 273, 273 (Gregory S. Parks ed., 2008).

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or professional sports team, to effortful, painful, or embarrassing rituals.”⁵⁵ Many policies and laws are now in place to curtail hazing. Forty-four states prohibit hazing by criminal statute requiring a specific mens rea that is either “knowingly,” “intentionally,” “willfully,” or “recklessly.”⁵⁶ These states make hazing punishable as a misdemeanor and, in a few instances, as a felony, depending on the severity of the harm.⁵⁷ Courts frequently wrangle with the issue of hazing under tort or negligence law and often find for the plaintiffs.⁵⁸

Nonetheless, hazing remains a pervasive problem in a variety of group settings.⁵⁹ The types of hazing incidents vary within each group. Some of the common activities initiates experience include beatings with paddles, binge drinking, sexual conquest assignments, performing tedious tasks, and running fool’s errands.⁶⁰ The hallmark of BGLO hazing, however, has been its brutality, resulting in injuries, deaths, civil suits, and criminal prosecutions.⁶¹ While brutality within BGLO initiatory practices dates back to just a decade after the founding of these organizations,⁶² the deadly outcomes and legal significance of them did not emerge until many decades later. Between the 1970s and 2000s, a handful of hazing deaths served to illuminate the challenges presented by hazing within BGLOs.

Robert Brazile. In 1977, Robert Brazile, a nineteen year-old sophomore pre-med student at the University of Pennsylvania, sought to join the university’s Omega Psi Phi Fraternity.⁶³ While pledging, he

55. Judy L. Van Raalte et al., *The Relationship Between Hazing and Team Cohesion*, 4 J. SPORT BEHAV. 491, 491 (2007), available at 2007 WLNR 23854782.

56. Richard J. Reddick et al., *The Harms and Hazards of Hazing: Medical, Sociocultural, and Legal Perspectives*, in ALPHA PHI ALPHA: A LEGACY OF GREATNESS, THE DEMANDS OF TRANSCENDENCE 279, 294 (Gregory S. Parks & Stefan M. Bradley eds., 2011).

57. *Id.*

58. *Id.* at 298.

59. See, e.g., Caroline F. Keating et al., *Going to College and Unpacking Hazing: A Functional Approach to Decrypting Initiation Practices Among Undergraduates*, 9 GROUP DYNAMICS: THEORY, RES. & PRAC. 104, 106 (2005) (discussing the widespread practice of hazing in military units, athletic teams and Greek Letter Organizations (GLOs)); Raalte et al., *supra* note 55 (discussing the prevalence of hazing in athletics and noting that such activity puts the athletes at physical and psychological risk).

60. See Keating et al., *supra* note 59, at 106.

61. See generally Matthew W. Hughey, *Brotherhood or Brothers in the “Hood”: Debunking the “Educated Gang” Thesis as Black Fraternity and Sorority Slander*, 11 RACE, ETHNICITY, & EDUC. 443 (2008) (exploring the controversial characterization of BGLOs as “educated gangs”).

62. Gregory S. Parks & Tamara L. Brown, “*In the Fell Clutch of Circumstance*”: *Pledging and the Black Greek Experience*, in AFRICAN AMERICAN FRATERNITIES AND SORORITIES: THE LEGACY AND THE VISION 437, 440 (Tamara L. Brown et al. eds., 2005).

63. Judith Valente, *Student’s Death During Hazing Is Investigated*, WASH. POST, Apr. 25, 1977, at A1.

“survived” the first seven weeks of the process despite sleeping for only a few hours most nights.⁶⁴ However, in April that year, he endured the Fraternity’s “Hell Week”—a final initiation where pledges were beaten and forced to do strenuous running.⁶⁵ Brazile collapsed in the fraternity house meeting room and died a few hours later at the campus hospital center.⁶⁶ Brazile’s death was later linked to a previously undetected heart ailment; however, the stigma associated with the pledge process persisted.⁶⁷

Nathaniel Swinson. In February 1978, Nathaniel Swinson, a twenty year-old Omega Psi Phi pledge died at North Carolina Central University during an off-campus initiation.⁶⁸ His death occurred after he was forced to run several miles and complete a battery of grueling exercises.⁶⁹ The autopsy revealed Swinson had sickle cell anemia and died from excessive physical stress.⁷⁰ While the North Carolina Central chapter was not officially recognized by the national body of Omega Psi Phi, members had appropriated the name during the pledge process at issue.⁷¹ No charges were filed in this incident.⁷²

Van Watts. In 1983, Van Watts, a junior from Birmingham, Alabama, died from alcohol poisoning following an initiation ceremony of the Omega Psi Phi chapter of Tennessee State University.⁷³ His blood-alcohol level was 0.52, five times the legal limit.⁷⁴ Watts had been coerced into drinking the alcohol and carried bruises on his dead body.⁷⁵ The party goers awoke in the morning to find Watts dead.⁷⁶ That morning, other initiates were observed leaving the home stagger-

64. *Id.*

65. *Id.*

66. *Id.*

67. Fawn Vrazo, *Their Bond Is More than a Fraternity*, PHILA. INQUIRER, Oct. 23, 1983, at K1.

68. 2 *N.C. Central Students Injured in Fraternity Hazing Incident*, CHARLOTTE OBSERVER, Feb. 24, 1989, at 3C, available at 1989 WLNR 1068518.

69. *Id.*

70. *Id.*

71. *Id.*

72. HANK NUWER, *WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING* 246 (2001).

73. Amy Green, *TSU Student’s Death Tied to Hazing Is Latest in Series for Fraternity*, COM. APPEAL, Mar. 31, 2001, at B3.

74. *Id.*; *Tenn. Fraternity Banned After Drinking Death*, PHILA. DAILY NEWS, Dec. 14, 1983, at 22.

75. *Tenn. Fraternity Banned After Drinking Death*, *supra* note 74.

76. *Fraternity Pledge Dies of Drinking*, MIAMI HERALD, Dec. 2, 1983, at 12A, available at 1983 WLNR 188448; *Ban on Fraternity in Death*, N.Y. TIMES, Dec. 15, 1983, at B14, available at 1983 WLNR 454815.

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ing and supporting each other, most likely due to the same punishment Watts received the night before.⁷⁷

Joel Harris. In the fall of 1989, Joel Harris, an eighteen year-old sophomore at Morehouse College, collapsed during an Alpha Phi Alpha fraternity ritual and later died at the hospital.⁷⁸ The ritual required the pledges to recite historical events of the fraternity.⁷⁹ Pledges that erred in their recitation were punished with an array of physical abuse.⁸⁰ One option was “Thunder and Lightning,” which involved getting hit in the chest and slapped in the face.⁸¹ Another method, called “Free Fall,” involved elbows, slaps, and punches to the chest.⁸² Harris eventually collapsed during a ritual involving slaps, blows, and punches.⁸³ The ritual lasted between three and five hours, and the post-mortem examination revealed two abrasions on Harris’s chest that looked like fingernail marks and may have come from a beating, although members denied striking Harris.⁸⁴ Harris died of an abnormal heart rhythm linked to congenital heart disease.⁸⁵

In honor of her late son, Harris’ mother, Adrienne C. Harris, vowed to crusade against hazing.⁸⁶ The National Pan-Hellenic Council, which represents eight traditionally black fraternities and sororities, responded within four months of Harris’s death by banning all “traditional” BGLO pledging.⁸⁷ At their summit, which took place just four months after Harris’s death, the council voted unanimously to eliminate pledging and related activities, including dressing alike, head shaving, and walking in straight lines.⁸⁸ The name of the initiation process was changed from “pledging” to “membership intake process,” and now involves merely making an application for mem-

77. *Ban on Fraternity in Death*, *supra* note 76.

78. Margaret L. Usdansky, *Judge’s Ruling Will Let Morehouse Hold New Hearing in Hazing*, ATLANTA J. & CONST., Nov. 3, 1989, at B3.

79. W. Steven Ricks, *Slaps, Blows a Part of Hazing Ritual*, *Examiner Reports*, ATLANTA J. & CONST., Oct. 26, 1989, at D5.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at D1.

84. *Id.*

85. *Id.*

86. Andy Miller, *Mother of Morehouse Student Who Died Vows to Begin Crusade Against Hazing*, ATLANTA J. & CONST., Oct. 20, 1989, at B9.

87. Lisa Frazier, *Rites of Passage: College Greeks Shun Hazing*, TIMES-PICTAYUNE, Sept. 9, 1991, at A1.

88. *Id.*

bership and being accepted without enduring the rigors of hazing and pledging.⁸⁹

Harold Thomas. Harold Thomas, a student at Lamar University, applied for membership to the University's Omega Psi Phi Fraternity.⁹⁰ During a pledge exercise, Harold died from heart failure following a six-mile run.⁹¹ His mother brought suit against the University, Omega Psi Phi, and David Smith, the individual fraternity member who had allegedly directed the hazing.⁹² The trial court granted summary judgment in favor of the University and the fraternity.⁹³ The appellate court, however, remanded the case with regards to the fraternity's liability—finding that there were genuine issues of material fact.⁹⁴ The existence of evidence that Thomas was pursuing membership in the group, that David Smith was acting for the organization, and that members had knowledge of Smith's activities and held him out as an authority figure to pledges (despite Omega's claim that Smith is not an official member) created issues that should be determined by a jury.⁹⁵

Michael Davis. In February 1994, Michael Davis and four other individuals were being initiated as brothers to the Southeast Missouri State chapter of Kappa Alpha Psi.⁹⁶ For seven consecutive days, fraternity members subjected the pledges to repeated physical abuse.⁹⁷ Davis and the other young men were slapped on their necks and backs, caned on their buttocks and feet, and beaten with heavy books and cookie sheets.⁹⁸ Active fraternity members kicked, punched, and body-slammed the five pledges.⁹⁹ By the final day of the initiation process, two of the five pledges dropped out, and the remaining three were put through a seven-station circuit of physical abuse.¹⁰⁰ At some

89. Cynthia Mitchell, *College Hazing Fails Every Test: Black Greek Letter Groups Meet, Vow to End Violence*, ATLANTA J. & CONST., July 14, 1990, at A9; see Rosemary Banks Harris, *Black Frats Give Up Pledging Issues of Hazing and Commitment Divide Members*, ORLANDO SENTINEL, Oct. 4, 1990, at E1.

90. *Thomas v. Lamar Univ.-Beaumont*, 830 S.W.2d 217, 218 (Tex. App. 1992).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 218-19.

95. *Id.* at 219.

96. *State v. Allen*, 905 S.W.2d 874, 875 (Mo. 1995).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

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point during this abuse, Davis passed out.¹⁰¹ He would never regain consciousness, and he died the following day.¹⁰² The autopsy revealed that Davis had suffered broken ribs, a lacerated kidney, a lacerated liver, and multiple bruises—the cause of death: subdural hematoma of the brain.¹⁰³

Missouri prosecutors charged Keith Allen, one of the active members, on five counts of hazing, which was a misdemeanor offense.¹⁰⁴ A jury found Allen guilty on all five counts, and he appealed, claiming that Missouri's hazing statute violated the First (right to association), Fifth, and Fourteenth (equal protection and due process) Amendments.¹⁰⁵ The Missouri Supreme Court affirmed his conviction, holding that the statute was valid.¹⁰⁶ In dicta, the Court observed that Allen's appeal was "little more than a casserole of constitutional catch phrases, unadorned by legal analysis."¹⁰⁷

Kristin High and Kenitha Saafir. In September 2002, Kenitha Saafir and Kristin High both drowned during a hazing episode brought about by the sorority members of Alpha Kappa Alpha.¹⁰⁸ The hazing incident required the sorority sisters to blindfold their pledges; dress them in black sweat suits, socks, and tennis shoes; and drive them to the beach late in the evening.¹⁰⁹ While still blindfolded and fully dressed, the pledges were forced to participate in exhausting calisthenics, and were then directed towards the ocean.¹¹⁰ Saafir's hands were tied and she protested that she could not swim, but she was still made to walk into the surf.¹¹¹ One local resident recalling the weather from that evening said "the ocean was ferocious that night Any reasonable person wouldn't have gone anywhere near that water."¹¹² Witnesses observed a large wave, which crashed and pulled Saafir under.¹¹³ Likewise, Kristin High also died as a result of

101. *Id.*; Tim Bryant, *Kick Sent Victim Down, Fraternity Brother Says*, ST. LOUIS POST DISPATCH, Aug. 26, 1994, at 2C, available at 1994 WLNR 681338.

102. *Allen*, 905 S.W.2d at 875.

103. *Id.*

104. *Id.*

105. *Id.* at 875-78.

106. *Id.* at 879.

107. *Id.* at 876.

108. Vincent Cinisomo-Lara, *Husband Sues Over Alleged Hazing Death—Courts: 2 Cal State L.A. Women Drowned Last Sept. in Reported Sorority Ritual*, LONG BEACH TELEGRAM, June 26, 2003, at A3.

109. *Id.*

110. *Id.*

111. *Id.*

112. Kristal Brent Zook, *Swept Away*, ESSENCE, Sept. 2003, at 185.

113. *Id.* at 182.

rough seas coupled with bound hands.¹¹⁴ High attempted to rescue Saafir, but was taken under in the process.¹¹⁵

High's family filed a \$100 million lawsuit against Alpha Kappa Alpha.¹¹⁶ However, two pledges who survived the hazing incident were unwilling to discuss any details about the night of High and Saafir's deaths.¹¹⁷ When High's car was discovered, all AKA paraphernalia and her mandatory pledge journal were missing.¹¹⁸ Her family says there is evidence she was a "slave," having to perform duties such as paint fingernails, buy and cook food, chauffeur, run errands, and braid hair for the big sisters.¹¹⁹ High's mother described her daughter as having lost "close to 30 pounds" by the time of her death.¹²⁰ No criminal charges were filed in the matter.¹²¹

Joseph Green. In January 2001, Joseph T. Green collapsed while being forced to jog around a track during an initiation ritual for the Tennessee State University chapter of Omega Psi Phi Fraternity.¹²² Green ran daily and was in good health with no history of asthma; however, following that early morning run, he was rushed to the hospital after suffering from cardiopulmonary distress and a temperature of 103.7 degrees.¹²³ He died at the hospital where it was determined he died from environmentally induced hyperthermia and an acute asthma attack.¹²⁴ Green's parents filed a \$15 million lawsuit against Omega Psi Phi and individual members, alleging that fraternity members ordered Green and seven other pledges to commit illegal hazing activities.¹²⁵ Green's parents settled out of court with the fraternity for a confidential sum.¹²⁶

114. *Coroner Confirms CSLA Students Drowned*, SAN GABRIEL VALLEY TRIB., Sept. 18, 2002.

115. Zook, *supra* note 112, at 182.

116. Derek Montgomery, *Alleged Hazing Incident at Cal State Leaves 2 Dead*, BADGER HERALD, Sept. 25, 2002, available at http://badgerherald.com/news/2002/09/25/alleged_hazing_incident.php.

117. Zook, *supra* note 112, at 182.

118. *Id.*

119. *Id.* at 183.

120. *Id.*

121. Montgomery, *supra* note 116.

122. Green, *supra* note 73.

123. *Id.*

124. *Id.*

125. *Frat Sued Over TSU Hazing Death*, OAK RIDGER, Jan. 10, 2002.

126. *Case Highlights: School Safety and Youth Safety*, BODE & GRENIER, LLP, <http://www.bode.com/CaseHighlights/SchoolSafetyandYouthSafety.html> (last visited Aug. 6, 2012).

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Donnie Wade II. In 2009, Donnie Wade II died following another pledge hazing incident.¹²⁷ Wade, a twenty year-old student at Prairie View A&M, was pledging Phi Beta Sigma at the time of his death.¹²⁸ As part of his “rites of passage,” members of the chapter placed Wade and his fellow pledges on a strict bread-and-water diet in addition to paddling and torturous exercise sessions.¹²⁹ These exercise sessions commenced promptly between four and five in the morning when fraternity members awoke the pledges and forced them to complete various exercises, e.g., pushups on their knuckles; lying on their backs while elevating their feet six inches off the ground; Indian runs—running in a line, with the last pledge required to sprint to the front of the line with the process being repeated; and Snake runs—running up and down the bleachers.¹³⁰ During one “exercise” session, Wade collapsed and never regained consciousness.¹³¹

Instead of calling an ambulance or driving Wade to the closest hospital, the members dropped Wade off at a hospital nearly forty miles away.¹³² It was determined that Wade died as a result of acute exertional rhabdomyolysis, which can be triggered by extreme exertion.¹³³ His death was further complicated by a sickle cell trait, which can predispose someone to acute exertional rhabdomyolysis.¹³⁴ While documentation of Wade’s pledge involvement was destroyed after his room was broken into (apparently to destroy evidence), his parents nonetheless settled a wrongful death suit with the fraternity.¹³⁵ A grand jury declined to indict a fraternity member linked to Wade’s death in October 2010.¹³⁶ However, several months later the press obtained a tape of that member tearfully saying, “I killed him. It’s my

127. Cindy George, *Family Settles Hazing Lawsuit, Parents Sued Fraternity After Their Son’s Death*, HOUS. CHRON., Sept. 16, 2010, at B2.

128. *Id.*

129. Cindy Horswell, *No Indictments in Death of Prairie View Student, Parents Decry Alleged Hazing of Fraternity Pledge*, HOUS. CHRON., Nov. 11, 2010, at B3.

130. Michael E. Young & Chris Dell, *Dead Son Was ‘So Afraid’ of Fraternity Hazing, Dad Says—Oak Cliff Man’s Collapse Prompts Investigation*, DALL. MORNING NEWS, Oct. 24, 2009, at 1A.

131. George, *supra* note 127.

132. *Id.*; Horswell, *supra* note 129.

133. George, *supra* note 127.

134. Cindy Horswell, *Autopsy Details Student’s Death at Prairie View Rare Exertion Condition Killed Fraternity Pledge*, HOUS. CHRON., Jan. 22, 2010, at B2.

135. George, *supra* note 127, at B2.

136. Danny Robbins, *Police Tape Raises New Issue In Prairie View A&M Death Frat Leader Not Indicted Despite Taking the Blame in Recording*, HOUS. CHRON., Jan. 23, 2011, at B2.

fault,” in a recorded interview with the police following the incident.¹³⁷

While these stories do not take account of the full range of BGLO hazing cases over the past several decades, even just the publicly accessible accounts, they highlight some important points: First, BGLO hazing is particularly violent. Second, legal sanctions—both criminal and civil—have been implicated in BGLO hazing incidents. Third, despite these legal sanctions violent BGLO hazing has persisted over the decades. That raises the question, “Why?”

III. BELIEFS, BGLOS, AND HAZING

Over the past twenty years, a handful of studies have helped explain why the law fails to constrain violent hazing within BGLOs. For example, in 1992, John Williams conducted a study which documented the perceptions of undergraduate members of BGLOs on the no-pledge policy for new member intake.¹³⁸ The following themes emerged from the study: Many of the activities designated as hazing by the National Pan-Hellenic Council—e.g., “walking in line, practicing steps, history sessions, dressing alike, and speaking in unison”—should not be considered as hazing.¹³⁹ The reduced period for membership intake did not provide initiates with sufficient time to learn the history and traditions of the organizations.¹⁴⁰ The no-pledge process would not improve the quality of members because it did not adequately screen applicants who were not committed to the organization’s members and ideals.¹⁴¹ Members initiated under the no-pledge process would not have strong bonds with one another.¹⁴² The no-pledge policy fosters disunity between pledged and non-pledged members; some non-pledged members feel left out because they do not share the experience of having pledged into the organization.¹⁴³ The need for respect is so great that undergraduate students are willing to participate in an underground pledge process.¹⁴⁴

137. *Id.*

138. John A. Williams, *Perceptions of the No-Pledge Policy for New Member Intake by Undergraduate Predominately Black Fraternities and Sororities* (1992) (unpublished Ph.D. dissertation, Kansas State University) (on file with author).

139. *Id.* at 93.

140. *Id.*

141. *Id.* at 93, 97.

142. *Id.* at 98.

143. *Id.* at 93.

144. *Id.*

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Walter Kimbrough's 1999 replication study found BGLO undergraduates more optimistic about the membership intake process than the undergraduates in Williams's 1992 study.¹⁴⁵ The study focused on four variables: chapter members' participation in new member selection; the ability of post-initiation education to instill new members with history and tradition; whether the no-pledge policy reduces lifelong commitment of new members; and whether current members could screen out uncommitted applicants.¹⁴⁶ Nearly 70% of respondents in the Williams-1992 study felt that the pledging policy provided undergraduates with less of a voice in the selection of new members; seven years later, in the Kimbrough-1999 study, this percentage decreased to 60%. Likewise, nearly 34% of the Williams-1992 sample felt that post-initiation education could instill new members with a sense of history and tradition, while 55% of Kimbrough's 1999 sample believed that post-initiation education was effective. In the Williams-1992 sample, more than two-thirds of respondents believed that the no-pledge policy would reduce lifelong commitment, whereas the sample from Kimbrough-1999 study showed a significant reduction to 56% who believed the no-pledge policy would reduce lifelong commitment.¹⁴⁷ The smallest amount of change between the 1992 and 1999 samples occurred with respect to the ability of the no-pledge policy to screen out uncommitted applicants. In 1992, 85% of respondents believed that members were not able to screen uncommitted aspirants under the new policy; 80% of the 1999 sample believed the same.¹⁴⁸

In sum, Kimbrough's study demonstrates that although undergraduates had a more favorable attitude toward the no-pledge policy, the basic assumptions about the benefits of pledging remain consistent among members of BGLOs. As Kimbrough notes, many of the study's respondents participated in a pledge process, demonstrating that more favorable attitudes toward the no-pledge policy have not translated into a reduction in hazing incidents.¹⁴⁹

Dwayne Scott's 2006 qualitative study investigated why black Greek-letter fraternity (BGLF) members impose acts of hazing upon prospective members during membership intake activities and why

145. WALTER M. KIMBROUGH, *BLACK GREEK 101: THE CULTURE, CUSTOMS, AND CHALLENGES OF BLACK FRATERNITIES AND SORORITIES* 80 (2003).

146. *Id.* at 84-85.

147. *Id.*

148. *Id.* at 85.

149. *See id.* at 89.

prospective members endure acts of mental and physical abuse in order to gain membership in the organization.¹⁵⁰ Scott's research revealed that BGLF members distinguish between pledging and hazing based on the purpose of the activity.¹⁵¹ Participants characterized abusive activity as pledging when the "acts could be tied to the organization's goals and objectives."¹⁵² The same abusive activity was characterized as hazing when it was employed for a superficial purpose.¹⁵³ Paddling an aspirant for failing to correctly execute an assignment or recite organizational history was considered pledging because the act was employed to make the aspirant more productive and accountable for his actions.¹⁵⁴ However, paddling an aspirant for failing to acknowledge a member's girlfriend was considered hazing because it did not directly or meaningfully relate to the fraternity.¹⁵⁵

BGLF members also cite tradition as a justification for hazing.¹⁵⁶ According to participants, many hazing acts are chapter-specific and have been passed down, in some cases, for decades.¹⁵⁷ Members therefore expect aspirants to "consent to, and actively participate in, certain hazing traditions."¹⁵⁸ Alumni members also contribute to the persistence of hazing at the undergraduate level. Participants explained that alumni often provide conflicting positions on hazing.¹⁵⁹ In formal settings, alumni denounce hazing.¹⁶⁰ In backstage social settings, however, alumni members express that the current membership process is unacceptable because it departs from tradition, is too short in duration, and does not provide meaningful interaction among all involved in the process.¹⁶¹ Moreover, alumni members often tell stories about their pledge experiences and describe the current membership process as "easy" in comparison to their own initiation

150. Dwayne J. Scott, *Factors that Contribute to Hazing Practices by Black Greek Letter Fraternities During Membership Intake Activities*, in BLACK GREEK-LETTER ORGANIZATIONS 2.0: NEW DIRECTIONS IN THE STUDY OF AFRICAN AMERICAN FRATERNITIES AND SORORITIES 235 (Matthew W. Hughey & Gregory S. Parks eds., 2011).

151. *See id.* at 238.

152. *Id.* at 246.

153. *See id.* at 238.

154. *See id.*

155. *See id.* at 246.

156. *See id.* at 238.

157. *See id.* at 239.

158. *Id.*

159. *See id.*

160. *See id.*

161. *See id.*

processes.¹⁶² Undergraduates interpret such statements from alumni as pressure to continue hazing.¹⁶³

Scott found that aspirants know hazing is not a formal condition of membership and are well-aware of the dangers of engaging in such activities.¹⁶⁴ He discovered, however, that aspirants willingly submit to hazing rituals in order to feel accepted by their peers.¹⁶⁵ This finding is consistent with the research of Kimbrough and Sutton, who concluded that fraternities exert more peer influence than non-fraternal organizations and thus aspirants are more likely to submit to hazing rituals to gain acceptance within the organization.¹⁶⁶

The bonding experience generated during membership intake is another factor contributing to hazing among BGLFs.¹⁶⁷ BGLF members believe that the difficulties associated with hazing forces aspirants to build meaningful relationships with one another and with chapter members.¹⁶⁸ These relationships, participants explained, are similar to those between biological family members.¹⁶⁹

Scott also found that aspirants endure hazing processes in order to gain respect from chapter members.¹⁷⁰ Participants explained that the level of respect a brother receives from his chapter members remain inextricably linked to the type of initiation process he experienced.¹⁷¹ “Paper brothers”—those who do not experience hazing—receive much less respect than brothers who endure abusive hazing processes.¹⁷² Participants noted, however, that “paper brothers” might gain more respect if they perform top-quality work on behalf of the organization.¹⁷³

BGLF members also believe that hazing solidifies important intrinsic values.¹⁷⁴ According to participants, hazing is an important means of socializing pledges to adopt the fundamental values of the organization.¹⁷⁵ Moreover, participants believed that enduring the

162. *See id.* at 246.
163. *See id.* at 240.
164. *See id.*
165. *See id.* at 240-41.
166. *See id.* at 241 (citation omitted).
167. *See id.*
168. *See id.* at 241-42.
169. *See id.* at 242.
170. *See id.*
171. *See id.*
172. *See id.* at 242-44.
173. *See id.* at 244.
174. *See id.*
175. *See id.*

hazing process builds character, allows pledges to better analyze and understand their strengths and weaknesses, and provides pledges with the discipline necessary to be successful.¹⁷⁶

To summarize, both members and aspirants believe that hazing has an appropriate place in the membership intake process. Hazing, according to members, provides a unique opportunity for bonding among all involved in the pledge process, inculcates important organizational values in aspirants, and is consistent with tradition and alumni desires. Aspirants believe that enduring hazing is necessary in order to gain acceptance and respect from fraternity members. The majority of participants in Scott's study "believed hazing will persist as long as collegiate chapters exist."¹⁷⁷

IV. SUPPORT FOR THE REASONING BEHIND BGLO HAZING

A number of theories support the contention that challenging experiences commit individuals to others who share in that experience concurrently as well as to organizations to which they seek membership. In subsection A, we explore the relevant research on hazing and undergraduate organizations. In subsection B, we explore how external threat and self-sacrifice come to bear on group cohesion. In subsection C, we explore the research on how the severity of initiation to an organization predicts attraction for said organization. In subsection D, we explore research on the Stockholm Syndrome—the extent to which bonding to one's captors in a hostage situation exists. In the final subsection, subsection E, we explore the research on how investment in social relationships facilitates commitment in those relationships.

A. Hazing Research and Undergraduate Organizations

Keating and colleagues proposed that "threatening initiation practices such as hazing rituals function to support and maintain groups in at least three ways: by promoting group-relevant skills and attitudes; by reinforcing the group's status hierarchy, and by stimulating cognitive, behavioral, and affective forms of social dependency in

176. *See id.* at 244-45.

177. *See id.* at 247.

group members.”¹⁷⁸ The following sections explain the rationale and results for each of these propositions.

1. Conceptual Overview and Hypotheses

As Keating explained, hazing, ranging from mild to severe, is typically a complex event and can have fun, embarrassing, disgusting, painful, and challenging facets.¹⁷⁹ The initial stages of an initiation may require “simple efforts that are only mildly arousing, such as turning out in particular attire for an occasion, spending time engaged in prescribed, social exchanges with group members, or waiting for extended periods of time before being interviewed by representatives of the group.”¹⁸⁰ Adopting a functional perspective, Keating posited that pursuance of particular goals orchestrates specific initiation processes.¹⁸¹ While initiates’ experiences will vary based on the mission of the group, Keating and colleagues found that initial compliance of early forms of hazing makes subsequent compliance (even with costly and violent consequences) more likely.¹⁸²

The initiation rituals of Greek-letter organizations (GLOs), athletic teams, and military units often activate feelings of threat.¹⁸³ Contrived threats, including hazing activities (e.g., physical challenges and social deviance), help create group identity and inspire obedience and devotion among group members.¹⁸⁴ Ostensibly, initiations that incorporate physical challenges or pain prepare initiates to withstand physical duress, while initiations that require social deviance carve out distinctions between in-group and normative groups in the minds and emotions of initiates.¹⁸⁵

The first proposition, that initiations cultivate group-relevant skills and attitudes, was tested by “unpacking” the initiation practices of college athletic teams and GLOs (both fraternities and sororities).¹⁸⁶ Keating and colleagues reasoned that because athletic team success depends on physical endurance, physical challenges would predominate induction practices.¹⁸⁷ On the other hand, they reasoned

178. Keating et al., *supra* note 59, at 105.

179. *See id.* at 110 (citation omitted).

180. *Id.* at 105 (citation omitted).

181. *See id.* at 106.

182. *See id.* at 105.

183. *See id.*

184. *See id.*

185. *See id.* at 106.

186. *See id.*

187. *Id.*

that since GLOs are dedicated to creating exclusive social networks, activities highlighting social deviance (and thus social distinctiveness), would typify the initiations of these groups.¹⁸⁸ Hence, they predicted that: (1) athletes would report relatively greater degrees of physical duress in their initiations than members of GLOs; and (2) members of GLOs would report initiation activities entailing more social deviance than members of athletic groups.¹⁸⁹

Keating posited that the second function of member initiation is to create and maintain the group's hierarchical authority and power structure.¹⁹⁰ Preserving group hierarchy requires that initiation rituals tune initiates' deferential responses to themselves.¹⁹¹ The specific prediction made was that "members of groups with more structured hierarchies, operationally defined by greater role diversity and power differences between leaders and new members, would report more severe initiation practices and more frequent engagement in initiation activities than groups with less hierarchy."¹⁹²

Keating argued that initiations provide a third function: promotion of the cognitive, behavioral, and affective forms of social dependency.¹⁹³ While earlier research confirmed this claim,¹⁹⁴ Keating posited a new explanation. She observed that dissonance theory is the standard explanation for why "initiation experiences that induce threat, duress, or discomfort rally rather than discourage the loyalties of those who endure them."¹⁹⁵ She noted, however, that replication studies failed to support the basic notion that severe initiations foster greater liking for the group,¹⁹⁶ and that subsequent field studies failed to find evidence of dissonance effects.¹⁹⁷ She concluded that "the formal evidence on hazing effects on social emotional bonds is quite mixed."¹⁹⁸

188. *Id.*

189. *Id.*

190. *Id.* at 107 (citation omitted).

191. *See id.*

192. *Id.*

193. *Id.*

194. *See id.* (citation omitted).

195. *Id.*

196. *See id.* at 110 (discussing Hautaluoma et al., *Early Socialization into a Work Group: Severity of Initiations Revisited*, 6 J. SOC. BEHAV. & PERSONALITY 725, 725 (1991)).

197. *See* Keating et al., *supra* note 59, at 110 (discussing Hein F. Lodewijkx & Joseph E.M.M. Syroit, *Severity of Initiation Revisited: Does Severity of Initiation Increase Attractiveness in Real Groups?*, 27 EUR. J. SOC. PSYCHOL. 275, 278 (1997) and Lodewijkx & Syroit, *Affiliation During Naturalistic Severe & Mild Initiations: Some Further Evidence Against the Severity-Attraction Hypothesis*, 6 CURRENT RES. SOC. PERSP. 90, 90 (2001)).

198. Keating et al., *supra* note 59, at 110.

Alternatively, Keating proposed that “attachment theory” explained individual attachments to social groups.¹⁹⁹ The attachment theory, as developed by Bowlby, proposes that humans are motivated to seek proximity to significant others in times of danger, stress, or novelty.²⁰⁰ Keating proposed that “a unique aspect of the attachment system, maltreatment effects, applies to human connections with groups” and can help explain how group initiations function to promote behavioral, cognitive, and emotional forms of “social dependency.”²⁰¹

Keating described “maltreatment effects” as the “phenomenon whereby harsh conditions trigger goal-directed responses in organisms seeking refuge from duress.”²⁰² When an individual feels threatened, one instinctively seeks out safety within a selected social network.²⁰³ Moreover, the social dependency fueled by maltreatment could aim toward the very agent of the threat.²⁰⁴ This research is grounded in earlier studies on maltreatment effects in parent-child dyads,²⁰⁵ and in a variety of non-human subjects.²⁰⁶ The researchers also point to the psychology literature on Stockholm Syndrome as anecdotal evidence that severe treatment can stimulate social bonds in humans.²⁰⁷

To summarize, Keating et al. explored what they call a social dependency interpretation of maltreatment effects. This interpretation suggests, “When maltreatment is connected to involvement with a defined group, the social dependency that it fuels will be manifested cognitively, emotionally, and behaviorally.”²⁰⁸ At the cognitive and emotional levels, the need to defend the sense of self against threat and uncertainty can be remedied by transforming the personal concept of the self into a group identity.²⁰⁹ At the behavioral level, dependency generated by maltreatment is likely displayed through compliance with group norms and attraction to group members.²¹⁰

199. *See id.* at 107.

200. *See id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* (citation omitted).

210. *Id.* at 108 (citations omitted).

2. Findings

Keating discovered that initiations create social dependency. The study measured group identity in two ways: importance of the group to the individual and importance of the individual to the group.²¹¹ Predictions were based on initiation experiences, taking into consideration the extent to which the initiation was perceived as fun or harsh.²¹² The regression analysis for the first measure revealed, as predicted, that harsh initiations were associated with enhanced perceptions of importance to the individual.²¹³ The data on social deviance, however, failed to disclose a relationship with this measure of identity.²¹⁴ The second measure revealed that perceived fun during initiations was associated with increased perceptions of individuated importance to the group.²¹⁵ In sum, the level of importance these individuals ascribed to the group they identified with most was predicted by both perceptions of fun and perceptions of initiation difficulty.²¹⁶ Accordingly, the researchers concluded that “social identity is a social-cognitive consequence of social dependency.”²¹⁷

Keating’s additional studies tested whether relatively severe inductions spawned conformity and attraction to group members as manifestations of social dependency.²¹⁸ On measures of conformity, the results showed that participants who experienced severe initiations conformed most by yielding to the pressure from the group.²¹⁹ Moreover, the participants who experienced a severe initiation showed signs of what the researchers construed as maltreatment effects: they maintained close proximity to confederates and had a more negative mood when confederates left them alone.²²⁰ The results also revealed that affective reactions (the desire to be in close proximity) were the stronger predictor of the participants’ tendency to conform to the group opinion.²²¹ With regards to social-emotional bonding, results revealed that those who experienced severe initiations perceived the confederates as more powerful than did those inducted via

211. *Id.*

212. *Id.* at 114.

213. *Id.* at 116.

214. *Id.* at 115.

215. *Id.*

216. *Id.*

217. *Id.* at 123.

218. *Id.* at 117.

219. *Id.* at 118.

220. *Id.* at 122.

221. *Id.* at 117-22.

innocuous procedures.²²² Participants in the severe condition also tended to report having more fun than those who received innocuous inductions.²²³ Perceptions of power, rather than aspects of compliance, were the more powerful predictor of compliance.²²⁴ Taken together, these results confirmed the dependence interpretation.²²⁵

Keating addressed the third proposition in full after having reviewed the data on each independent measure of social dependency.²²⁶ The results from the identity and conformity measures were compatible with a dependency explanation of maltreatment effects in that whether an individual identified with the group was based on his/her perception of the initiation experience.²²⁷ Measurements of more traditional attachment behaviors revealed that participants who experienced harsh treatment maintained close proximity to confederates and experienced negative affect after confederates left.²²⁸

In summary, Keating et al. contend that the overarching function of an initiation is to enhance dependency on the group. The dependency elicited from the maltreatment is expressed cognitively, behaviorally, and emotionally. These needs can be met by transforming individuated identity into group identity, conforming to group norms, and remaining in close proximity to group members.

In a later hazing study (via data from the Group Environment Questionnaire [GEQ], Team Initiation Questionnaire [TIQ], and Social Desirability Questionnaire [SED]),²²⁹ researchers sought to determine whether hazing is associated with enhanced team cohesion.²³⁰ The study found that hazing was negatively correlated with task attraction and integration, and unrelated to social attraction and integration.²³¹ These results indicate that “the more hazing activities the participants did or saw, the less they were attracted to the group’s task and the less bonding and closeness they felt about the group’s task.”²³² Appropriate team building activity was positively correlated with so-

222. *Id.* at 119.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 119-24.

227. *Id.* at 121.

228. *Id.*

229. Van Raalte et al., *supra* note 55, at 491.

230. *Id.* at 498-99.

231. *Id.* at 499.

232. *Id.*

cial attraction and group integration.²³³ Accordingly, these results (in addition to subsequent studies), confirm that hazing is negatively related to task cohesiveness and unrelated to social cohesiveness.²³⁴ In general, “the less hazing and the more team building that the athletes experienced, the higher the levels of their overall attraction and integration.”²³⁵

B. External Threat, Self-Sacrifice, and Group Cohesion

Cohesion refers to the factors that cause a group member to remain a member of the group.²³⁶ Research on the development of cohesion suggests that several factors may be important.²³⁷ First, simply assembling people into a group may be sufficient to produce some cohesion, and the more time people spend together the stronger the cohesion becomes.²³⁸ Second, cohesion is stronger in groups whose members like one another.²³⁹ Third, groups that are more rewarding to their members are more cohesive.²⁴⁰ Fourth, external threats to a group can increase the group’s cohesiveness, but only when everybody in the group is affected and people believe that they can cope with such threats more effectively by working together rather than alone.²⁴¹ Fifth, groups are more cohesive when leaders encourage feelings of warmth among followers.²⁴²

Cohesion can have several effects on a group and its members. One positive effect is that the group is easier to maintain.²⁴³ Studies also reveal a positive relationship between group cohesion and performance.²⁴⁴ Another generalization supported by research is that the presence of cohesion is associated with member behavior.²⁴⁵ Harry Prapavessis and Albert Carron examined the interrelationships among

233. *Id.*

234. *Id.* at 503.

235. *Id.* *But see id.* at 494 (collecting studies); *id.* at 503 (citing Lowdewijxk & Syroit, *supra* note 197).

236. Albert J. Lott & Bernice E. Lott, *Group Cohesiveness as Interpersonal Attraction*, 64 *PSYCHOL. BULL.* 259, 259 (1965) (citation omitted).

237. *Id.* at 260.

238. *Id.* at 260-62.

239. *See id.* at 261-70 (discussing examples such as propinquity, competence, real or perceived similarity).

240. *Id.* at 284 (citations omitted).

241. *See id.* at 264-66.

242. *Id.*

243. *Id.*

244. *Id.* at 277.

245. *See* Harry Prapavessis & Albert V. Cannon, *Sacrifice, Cohesion, & Conformity to Norms in Sport Teams*, 1 *GROUP DYNAMICS: THEORY, RES. & PRAC.* 231, 231 (1997).

sacrifice behavior, team cohesion, and conformity to group norms in sports teams.²⁴⁶ They found that sacrifice behavior—individual behavior that involves giving up prerogative or privilege for the sake of another person or persons without regard to reciprocity—was positively associated with task and group cohesion.²⁴⁷ Moreover, the researchers found that individual sacrifice behavior leads to increased social sacrifice, which in turn contributed to increased conformity to group norms.²⁴⁸ This result confirmed earlier findings.²⁴⁹

C. Severity of Initiation on Organizational Liking

Researchers have concluded that severe initiations facilitate greater liking for a group.²⁵⁰ There are a number of psychological perspectives that help explain this phenomenon. The research summarized in this section is based upon three theoretical perspectives: (1) cognitive dissonance theory; (2) affiliation theory; and (3) dependence theory.

1. Cognitive Dissonance Theory

Cognitive dissonance theory holds that under the proper conditions, inconsistency among cognitions causes an uncomfortable psychological tension.²⁵¹ A person experiencing dissonance seeks to reduce the tension, often by altering one or more cognitions to bring about a greater degree of consonance.²⁵² Elliott Aronson and Judson Mills were the first to deploy cognitive dissonance theory to explain the effects of severe initiations on liking for a group.²⁵³

No matter how attractive a group is to a person it is rarely completely positive, i.e., usually there are some aspects of the group that

246. *Id.* at 235-36.

247. *Id.* at 231, 235.

248. *Id.*

249. *See, e.g.,* Lott & Lott, *supra* note 236, at 301 (finding that uniformity is not always expected and a positive relationship between cohesiveness and conformity can be predicted).

250. Elliott Aronson & Judson Mills, *The Effects of Severity of Initiation on Liking for a Group*, 59 J. ABNORMAL & SOC. PSYCHOL. 177, 177 (1959); Harold B. Gerard & Grover C. Mathewson, *The Effects of Severity of Initiation on Liking for a Group: A Replication*, 2 J. EXPERIMENTAL SOC. PSYCHOL. 278, 278 (1966); John Schopler & Nicholas Bateson, *A Dependence Interpretation of the Effects of a Severe Initiation*, 30 J. PERSONALITY 633, 633 (1962).

251. *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 2 (1957) (discussing and explaining theory of cognitive dissonance).

252. *Id.* at 2-3.

253. *See* Hein F.M. Lodewijckx & Joseph E.M.M. Syroit, *Severity of Initiation Revisited: Does Severity of Initiation Increase Attractiveness in Real Groups?*, 27 EUR. J. SOC. PSYCHOL. 275, 278 (1997) (“Aronson and Mills . . . were the first to test experimentally the dissonance reduction hypothesis of the effects of a severe initiation on group attractiveness.”).

the individual does not like. If he has undergone an unpleasant initiation to gain admission to the group, his cognition that he has gone through an unpleasant experience for the sake of membership is dissonant with his cognition that there are things about the group that he does not like.²⁵⁴

Dissonance can be reduced either by denying the severity of the initiation or overvaluing the attractiveness of the group.²⁵⁵ Aronson and Mills posited a “severity-attraction hypothesis,” which predicted that individuals who undergo severe initiations find the group more attractive than those who undergo mild or no initiation.²⁵⁶ The findings of the experiment supported the severity-attraction hypothesis; that is, the subjects in the severe initiation condition evaluated the discussion more favorably than did the mild or control subjects.²⁵⁷ And in a subsequent study, Harold Gerard and Grover Mathewson controlled for the possible effects of heightened sexual arousal induced by the embarrassment test in the severe initiation condition.²⁵⁸ The results of this study were similar to those reported by Aronson and Mills and confirmed the severity-attraction hypothesis.²⁵⁹ Thus severe initiations facilitate greater liking for a group because they arouse dissonance in the initiates. Dissonance can then be reduced either by denying the severity of the initiation or overvaluing the attractiveness of the group. The more severe the initiation, the more difficult it will be for the individual to believe that the initiation was not very bad, and the more likely it is that he/she will reduce his/her dissonance by overvaluing the attractiveness of the group.

2. Criticisms of the Dissonance Findings

A study by Jacob Hautaluoma and Helene Spungin examined the contention that a severe initiation leads to greater liking for a group.²⁶⁰ In particular, they noted a potential bias in previous studies—they were based on samples composed mostly of women. Hautaluoma and Spungin therefore attempted to replicate the phe-

254. Aronson & Mills, *supra* note 250, at 177.

255. *Id.*

256. *Id.* at 180.

257. *Id.*

258. Gerard & Mathewson, *supra* note 250 (describing a study also discussed in Lodewijkx & Syroit, *supra* note 197, at 279).

259. *Id.*

260. Jacob E. Hautaluoma & Helene Spungin, *Effects of Initiation Severity and Interest on Group Attitudes*, 30 J. SOC. PSYCHOL. 245, 245 (1974).

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nomenon with both men and women samples.²⁶¹ Results indicated a gender by initiation condition interaction.²⁶² Specifically, men in the mild initiation condition evaluated the boring group most positively,²⁶³ a finding that suggests gender differences in the severe initiation phenomenon. However, the finding could result from several other factors.

First, the analysis of the initial interest measure showed that men began the experiment much less interested in joining the group than women, which might have affected the subsequent reactions of men to the initiation procedure.²⁶⁴ Second, subjects “who were most interested in joining before the initiation saw the initiation as more severe than did subjects who were little interested in joining.”²⁶⁵ Thus, the evaluations of the group could be a result of the differing perceptions of the initiation procedures.²⁶⁶ If the creation of dissonance is interpreted as dependent upon perceived severity of initiation, then men may have been less susceptible to the dissonance manipulation as a result of their lower initial interest level.²⁶⁷ In sum, Hautaluoma and Spungin’s results somewhat support earlier conclusions about the effects of severe initiations on liking for a group; women liked the group most after a severe initiation, while men like the group most after a mild initiation. Accordingly, gender and interest in joining the group are both potent variables that deserve further examination.²⁶⁸

A later study by Ward Finer, Jacob Hautaluoma, and Larry Bloom also criticized the severity-attraction hypothesis. The researchers compared the effects of severe, mild, and pleasant initiations on attraction to an interesting group.²⁶⁹ This study was unique in that prior studies examined only the effects of severe and mild initiations on attraction to an uninteresting group.²⁷⁰ Results of this study showed no main effect for initiation condition and liking for the interesting group.²⁷¹ Their only significant finding was that all of the sub-

261. *Id.*

262. *Id.* at 251

263. *Id.* at 251, 257.

264. *Id.* at 257.

265. *Id.* at 254.

266. *Id.* at 257.

267. *Id.*

268. *Id.* at 258.

269. Ward D. Finer, Jacob E. Hautaluoma & Larry J. Bloom, *The Effects of Severity and Pleasantness of Initiation on Attraction to a Group*, 111 J. SOC. PSYCHOL. 301, 301 (1980).

270. *Id.*

271. *Id.* at 302.

jects liked the discussion and members of the interesting group more than those of the boring group.²⁷² This data seems to suggest that dissonance is not created when individuals go through severe initiations in order to join an interesting group and, therefore, “attitude formation about initiation may be more complex than originally conceptualized.”²⁷³

3. Alternative Interpretations of the Dissonance Findings

Dependence Theory

Other interpretations have been offered for the results of the Aronson and Mills experiment. For example, Schopler and Bateson contend that the results could be explained in terms of Thibaut and Kelley’s interpersonal dependence theory.²⁷⁴ According to Thibaut and Kelley, all interpersonal relationships involve some degree of dependence and power.²⁷⁵ Dependence can be defined as the degree to which an individual relies on a given partner or relationship for the fulfillment of important needs, or the degree to which an individual “needs” a relationship.²⁷⁶ An individual’s level of dependence is based upon the degree to which that individual’s actions are influenced by the partner’s actions.²⁷⁷ When an individual’s outcomes in a given interaction are determined by his own actions, he will experience low levels of dependence on his partner.²⁷⁸ By contrast, when partner control or joint control determines an individual’s outcomes, the individual will experience high dependence on the partner.²⁷⁹

Schopler and Bateson found, as Aronson and Mills had before, that subjects who undergo severe initiations for membership in a group are more likely to conform to an experimenter’s expectation that they should like or dislike the group.²⁸⁰ The Schopler and Bateson experiment also revealed results that are inconsistent with the dissonance explanation of the severity-attraction relationship. According to dissonance theory, subjects in the severe initiation condition who felt most embarrassed by the initiation should have rated

272. *Id.*

273. *Id.*

274. Schopler & Bateson, *supra* note 250, at 633.

275. *Id.* at 634.

276. *Id.* at 633-34.

277. *See id.* at 633-36.

278. *See id.*

279. *See id.*

280. *Id.* at 648.

the discussion group most favorably.²⁸¹ Contrary to this hypothesis, the opposite relationship was observed. Subjects in the severe condition who felt most embarrassed rated the group less favorably than those who felt less embarrassed.²⁸² This finding suggests that subjects in the Aronson and Mills experiment gave a high rating of the discussion group not to reduce dissonance, but to satisfy the experimenter's implicit expectation that they should like the group.²⁸³ More generally, it suggests that the subject-experimenter interaction is critical in determining how subjects will rate the group.²⁸⁴

Affiliation Theory

Lodwijckx and Syroit offered a different interpretation of the severity-attraction relationship. They argued that the severity-attraction relationship could best be explained by Schachter's work on affiliation under threat.²⁸⁵ According to affiliation theory, individuals who go through stressful or threatening situations will seek the company and comfort of others who have gone through similar situations and who share the same emotional experience.²⁸⁶ The need for affiliation arises when people do not know how to react or label their emotions in a given situation.²⁸⁷ In other words, people facing threat or danger affiliate in order to compare the appropriateness of their emotional reactions with the reactions of other people.²⁸⁸

Lodwijckx and Syroit's study showed a negative relationship between severity of initiation and attractiveness of the group.²⁸⁹ The results also revealed that severe initiations induce feelings of loneliness, depression, and frustration, and that these negative moods lead to lower attractiveness ratings of the group.²⁹⁰ Lodewijckx and Syroit contend these results are consistent with the earlier findings of Schopler and Bateson (a negative relationship between strong embarrassment and group attraction in their severe initiation condition).²⁹¹ The results of both studies contradict the dissonance hypothesis of the

281. *Id.* at 647.

282. *Id.*

283. *Id.* at 637.

284. *Id.* at 648.

285. Lodewijckx & Syroit, *supra* note 197, at 276.

286. *Id.* at 280.

287. *See id.* at 280-81.

288. *See id.* at 281.

289. *Id.* at 286.

290. *Id.* at 287-88, 294-96.

291. *Id.* at 296 (citing Schopler & Bateson, *supra* note 250, at 647).

effects of a severe initiation and indicate that loneliness, depression, frustration, and embarrassment are all important variables in the severity-attraction relationship because these negative moods lead to less favorable cognitions about the group.²⁹² It should be noted, however, that low attractiveness of the group does not necessarily mean that newcomers are willing to leave the group.²⁹³ There are other factors that might weigh equally in the decision to leave or to join. For example, the newcomers might also consider the “[t]he possibility of future friendship bonds with a few individual members and the likelihood of amelioration after the initiation is over” in determining whether they will remain in the group.²⁹⁴

D. Stockholm Syndrome

Stockholm Syndrome is a paradoxical psychological phenomenon wherein affectional bonds develop between hostages and their captors.²⁹⁵ Most individuals working in the field of crisis negotiation agree that “Stockholm Syndrome is an automatic, often unconscious, emotional response to the trauma of victimization.”²⁹⁶ The condition is not a result from a hostage’s rational choice that the most advantageous and safe form of behavior is to befriend his captor.²⁹⁷

Stockholm Syndrome usually consists of three components that may occur separately or in combination with one another: “(1) negative feelings on the part of the hostage toward authorities; (2) positive feelings on the part of the hostage toward the hostage-taker; and (3) positive feelings reciprocated by the hostage-taker toward the hostage.”²⁹⁸ These characteristics fall along a continuum, such that an individual may show different degrees of each.²⁹⁹ A 2005 study by Paul Wong suggests that individuals with any combination of the following characteristics are most vulnerable:

292. Lodewijkx & Syroit, *supra* note 197, at 296.

293. *Id.* at 298.

294. *Id.*

295. See Nathalie de Fabrique, Vincent B. Hassett, Gregory M. Vecchi & Stephen J. Romano, *Common Variables Associated with the Development of Stockholm Syndrome: Some Case Examples*, 2 J. VICTIMS & OFFENDERS 91, 92 (2007) [hereinafter *Common Variables*]; see also Keating et al., *supra* note 59, at 108 (discussing how severe treatment stimulates the development of Stockholm syndrome in individuals who are taken hostage).

296. *Common Variables*, *supra* note 295, at 92.

297. *Id.*

298. *Id.*

299. See *id.* at 92-97.

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[L]acking a clear set of core values that define one's identity; lacking a core sense of meaning and purpose for one's life; lacking a track record of overcoming difficulties; lacking a strong personal faith; feeling that one's life is controlled by powerful others; feeling unhappy with one's life circumstances; having a strong need for approval by authority figures; and wishing to be somebody else.³⁰⁰

Accordingly, researchers seeking a better understanding of Stockholm Syndrome should consider both the contextual variables and personality characteristics associated with its development.

A recent study by de Fabrique et al. examines the factors associated with the development of Stockholm Syndrome. First, previous research speculated that a key factor influencing the development of Stockholm Syndrome is the duration of the captivity.³⁰¹ The primary difficulty with this variable is determining what constitutes temporal significance.³⁰² Second, the researchers also cast doubt on the notion that hostage-takers must refrain from physically abusing or verbally threatening the hostage.³⁰³ Third, interpersonal communication and physical proximity are believed to influence the development of Stockholm Syndrome.³⁰⁴ Importantly, de Fabrique and his colleagues' review found that having multiple hostages co-present may have a positive relationship to the appearance of the syndrome. Accordingly, de Fabrique and colleagues suggest that future studies include "[a]n assessment of the personality characteristics of hostages involved in the same incidents where different outcomes occurred[.]" and "of those who have apparently resisted [the syndrome]."³⁰⁵

E. Investment Model

The investment model is a process-oriented theory, based on the constructs of traditional exchange theory and extends the basic principles of interdependence theory.³⁰⁶ Interdependence theory holds that satisfaction with and attraction to an association is a function of the discrepancy between the outcome value of the at-issue relationship and the individual's expectations concerning the quality of relation-

300. *Id.* at 98 (citation omitted).

301. *See id.* at 96.

302. *Id.*

303. *Id.* at 96-97.

304. *Id.*

305. *Id.* at 98.

306. Caryl E. Rusbult & Dan Farrell, *A Longitudinal Test of the Investment Model: The Impact on Job Satisfaction, Job Commitment, and Turnover of Variations in Rewards, Costs, Alternatives, and Investments*, 68 J. APPLIED PSYCHOL. 429, 430 (1983).

ships in general. The goal of the investment model is to predict an individual's degree of satisfaction with, and commitment to, a particular social relationship.³⁰⁷ Rusbult and Farrell applied the investment model to examine satisfaction, commitment, and turnover in employment relationships and found four variables to influence satisfaction, commitment, and turnover in the workplace: job rewards, job costs, alternative quality, and investment size.³⁰⁸

Satisfaction can be defined as the degree of positive affect associated with a relationship.³⁰⁹ Commitment, however, is a more complex phenomenon. Rusbult and Farrell's investment model posits that satisfaction, quality of alternatives, and investment size work together to produce job commitment.³¹⁰ Rusbult and Farrell define commitment as the "likelihood that an individual will stick with a job, and feel psychologically attached to it, whether it is satisfying or not."³¹¹ Investment size concerns the amount of resources put into a relationship and can be classified as either intrinsic or extrinsic.³¹² Intrinsic investments are resources put directly into the employment relationship (e.g., years of service, non-portable training, non-vested portions of retirement programs), whereas extrinsic investments are resources or benefits developed over time as a result of employment relationships (e.g., housing arrangements that facilitate travel to and from work, friends at work, extraneous benefits uniquely associated with a particular job).³¹³

Rusbult and Farrell's study confirmed the general proposition that employees experience greater job satisfaction when rewards exceed costs, while high rewards, low costs, greater investment of resources, and poor alternative quality induce greater job commitment.³¹⁴ The study also revealed that the process of change—declines in job rewards, increases in job costs, divestiture and poor alternative quality—is what distinguishes employees who stay from those who leave.³¹⁵ The results suggested that declines over time in job commitment mediates turnover.³¹⁶ Subsequent studies should

307. *See id.* at 437.

308. *Id.* at 430-31.

309. *See id.* at 430, 436.

310. *Id.*

311. *Id.* at 430.

312. *Id.*

313. *Id.* at 431.

314. *Id.* at 436.

315. *Id.* at 437.

316. *Id.*

find that decreases in rewards, increases in costs, divestiture, and improvements in alternative quality result in decreases in job commitment, and in turn, job turnover.³¹⁷

F. Making Sense of It All

While these findings underscore the fact that challenging initiatory experiences may serve to commit and bond fraternity and sorority members to each other and to their respective organizations, what about BGLOs? A casual observation of BGLO membership—given their unique structure (i.e., alumni membership and demand for life-long commitment and bonds across geographic space and time)—may suggest that challenging initiatory experiences do not help the organizations meet their membership objectives. But that is an empirical question, and no matter what the answer is, that answer has serious legal implications. If challenging initiatory experiences fail to bring BGLO membership needs into fruition, then the organizations should communicate this fact to their members in concert with the legal risks that hazing poses for the organizations and members. On the other hand, if these experiences bring BGLO membership needs into fruition, then the organizations should develop methods in which to better balance member recruitment with compliance with organizational legal constraints.

V. EMPIRICAL STUDY

There appears to be empirical evidence supporting the beliefs of those BGLO members who assert that “pledging” or violent hazing commits aspiring members to organizational ideals, the organizations, and each other. However, two issues remain. First, and this is mere speculation, it is doubtful that most BGLO members even apprise themselves of the literature reviewed in Section III. Second, if they have, none of this research has been focused on BGLOs, so it is unknown whether and to what extent this scholarship bears on these groups.

At least in theory, what propels this belief-system is anecdotal experience—a personal (or awareness of others who have a) commitment to their respective BGLO’s ideals, members, and the organization itself. What may also support this system of belief is, quite simply, a need for it.

317. *Id.*

In short, BGLO members may hold a biased belief that violent hazing has some utility.³¹⁸ Social cognition research notes the ways in which “hot” or “emotional” concepts have motivational influences on cognition.³¹⁹ Motivated cognition is self-deceptive.³²⁰ For example, challenges to one’s preexisting beliefs trigger negative effects, which in turn, results in an increase in the intensity of cognitive processing.³²¹ That added processing potentially results in new evidence that is more fitting with one’s already-held beliefs. When that new information is affirming of the already-held belief, the urgency dissipates, and the decision-making process ends.³²² In addition, motivated cognition may lead people to gather evidence that is consistent with the beliefs they already hold.³²³ Furthermore, the motivated manner in which people may engage in both of these processes (cognitive processing and seeking-out evidence) may lie outside of conscious awareness.³²⁴ In this section, we provide empirical methods in an attempt to provide answers about the effects of hazing on membership commitment within BGLOs.

A. Methods

1. Sample

The sample ($n=1,357$) was comprised by a female majority (62.1% female) and an overwhelming majority of African-Americans (90.9%), followed by Caribbean (2.8%), African (1.8%), Caucasian (1.1%), and self-identified “others” (3.4%). The mean age was 40.41 (standard deviation=12.9). 96.5% self-identified as heterosexual. 87.1% indicated they were Christian, followed by spiritual, but not

318. It is our contention that proponents of BGLO hazing may believe in hazing’s utility, absent supporting facts, because they are motivated to believe so. Still, a similar finding can be found among BGLO hazing opponents. Aside from the opponents’ moral and legal arguments, arguably, their assertions that hazing does not facilitate the types of commitments that proponents believe are often based on mere anecdotal evidence. Even hard data gleaned from specific BGLOs’ membership rolls often lack nuance, simply focusing on when BGLO members were initiated into their respective organizations.

319. See Shelley E. Taylor & Curtis D. Hardin, *Motivated Cognition: Phenomena in Search of Theory*, 10 *PSYCHOL. INQUIRY* 75, 75 (1999).

320. Emily Balcetis, *Where the Motivation Resides and Self-Deception Hides: How Motivated Cognition Accomplishes Self-Deception*, 2 *SOC. & PERSONALITY PSYCHOL. COMPASS* 361, 361 (2008).

321. Leonard S. Newman, *Motivated Cognition and Self-Deception*, 10 *PSYCHOL. INQUIRY* 59, 60 (1999).

322. *Id.*

323. *Id.* at 60-61.

324. *Id.* at 60-62.

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religious (7.5%), with others indicating Islam, Bahá'í, Judaism, none, or other.

2. Measures

Attitudes toward Membership Intake Process (MIP). There were eleven items ($\alpha=.91$) used to assess attitudes toward membership intake process as a form of initiation. Items included “MIP has effectively eliminated hazing within my fraternity/sorority,” and “[g]enerally, MIP is sufficient for the needs of my fraternity/sorority.” Items were scored from 1 (strongly disagree) to 7 (strongly agree), with higher values indicating more positive evaluations of MIP.

Membership Process: Participants were asked to describe the process by which they joined the fraternity or sorority. Choices were (1) pledging, (2) membership intake process (MIP), and (3) a combination of pledging and MIP. The modal category was a combination process (43.8%), followed by pledging (32.8%), and MIP only (23.4%).

Current Membership Type: The overwhelming majority (91.5%) of the respondents were alumni, while the remaining (8.5%) were college members.

Chapter Initiation Type: Most (74.1%) of participants indicated they were initiated through a college chapter, with the remaining (25.9%) initiated through an alumni chapter.

Ghost Membership: Members who pledged and crossed into a chapter, but were never initiated into the national organization are referred to as “ghost members.” Only 1.6% fell into this category.

Year of Initiation: There was a wide range of when participants were initiated, from 1945 to 2010 (mean=2002; median=1998).

Fraternity/Sorority: Paralleling gender, the majority of respondents were members of a sorority (60.5%).

Region: Participants were asked to indicate the state in which they were initiated. States were combined to represent major geographic regions in the United States and abroad. Nearly half (47.3%) indicated they were initiated in the southeast. The Midwest was the second most common region (21.0%), followed by the northeast and Washington D. C. (19.3%), southwest (5.0%), west (4.2%), and international (0.8%).

Type of College/University: Most participants (60.5%) attended Historically Black Colleges and Universities (HBCUs), followed by Predominantly White Institutions (PWIs) (38.3%).

Organizational Commitment: Organizational commitment was assessed by a modified version of an organizational commitment scale, developed by John P. Meyer and Natalie J. Allen.³²⁵ The items were adapted to apply to general organizational commitment, as opposed to workplace commitment specifically (which was the original intent of the measure). Three subscales comprise this measure. Affective commitment refers to being emotionally attached, content, and connected to one's organization (7 items; $\alpha=.85$). Continuance commitment (6 items; $\alpha=.80$) describes the fear, difficulty, or having a lack of other options that prevents one from leaving their organization. Lastly, normative commitment (revised) indicates the extent to which an individual feels a sense of obligation, guilt, and loyalty to one's organization (6 items; $\alpha=.88$).

Financially Active Members and Peers: Participants were asked to indicate whether they were currently financially active with their organization, as well as whether the peers with whom they crossed were financially active. These items were strongly correlated ($r=.78$), and thus summed to form a composite measure.

Grade Point Average: Respondents were asked to indicate their grade point average (on a four-point scale) at the end of their membership intake process. The mean GPA listed was 3.05 (standard deviation=.54).

Communication: Participants were asked to indicate how many of the individuals with whom they pledged and crossed have communicated in the last three months. The response categories included none (1), a few (2), some (3), most (4), and all (5). The mean score was 3.03, indicating that the average respondent remains in contact with most of the brothers/sisters with whom they crossed.

Organizational Participation: This construct was assessed with two items: (1) "In the past year, how many of your fraternity/sorority's national programs have you participated in?"; and (2) "In the past four years, how many of your fraternity/sorority's state, regional, or national conferences/conventions have you registered for and at-

325. JOHN P. MEYER & NATALIE J. ALLEN, COMMITMENT IN THE WORKPLACE: THEORY, RESEARCH, AND APPLICATION 116-24 (1997).

tended?” These items were strongly correlated ($r=.68$), and thus summed to form a composite measure.

Hazing Experiences: Participants were asked whether or not they were subjected to hazing as part of their initiation process. They were presented with a total of 27 different acts, ranging from relatively mild and positive (e.g., pledges required to perform community service) to severe and dangerous (e.g., pledges being hit with hands/feet, paddles, or other objects) forms of hazing. The mean number of different acts participants reported was 16.29 (standard deviation=7.44; range 0 to 27), indicating many participants were subjected to a wide variety of hazing behaviors.

3. Procedure

In order to reach as many individuals as possible, we sent emails to several listservs. In 2003, one of the authors began compiling an email list of BGLO members and chapters. From that time until the time of this study, the author selected email addresses from organizational directories and Yahoo! Groups as well as chapter, district, provincial and regional websites for Alpha Phi Alpha, Alpha Kappa Alpha, Kappa Alpha Psi, Omega Psi Phi, Delta Sigma Theta, Phi Beta Sigma, Zeta Phi Beta, Sigma Gamma Rho, and Iota Phi Theta. At the time of this study, the email list contained approximately 30,000 contacts. In the emails and listserv announcements, individuals were provided some basic information that indicated one of the study’s authors was conducting a study about experiences and opinions of Historically Black Colleges and Universities. Recipients were provided a hyperlink to the study.

Once a recipient clicked on the hyperlink, they were redirected to an online survey (using Qualtrics). The survey began with an explanation of the purposes and goals of the study, followed by a question inquiring as to whether or not they were interested in participating. If the recipient checked “yes,” they were redirected to an informed consent page (approved by an institutional review board). Recipients agreed to participate by clicking an acceptance to participate radio button. At that point, recipients became study participants and were asked a series of questions. As detailed above (under Measures), questions were descriptive (e.g., age, race, type of college attended), attitudinal (e.g., organizational commitment), and behavioral (e.g., experiences with hazing). Participants were provided with the opportunity to withdraw at any time. Anonymity was guaranteed.

Specifically, only one author of the study retained the data, which was de-identified by the Qualtrics computer system. Additionally, IP addresses were not collected—rendering submitted responses completely anonymous.

B. Results

1. Beliefs

The mean score on attitudes toward MIP was 40.64 (standard deviation=16.60; range of 12 to 84). This score indicates that many participants endorsed moderate levels of acceptance of MIP, with relatively few either not endorsing it or strongly endorsing it.

The core issues examined in this section are how different aspects of membership, organizational commitment and participation, and demographics are related to attitudes toward MIP. Analyses indicated that the process by which the participant joined the fraternity/sorority was significantly related to the endorsement of MIP ($F_{(2, 1378)}=47.03, p < .001$). Post hoc tests indicate that those who went through MIP had significantly higher evaluations of MIP than those who only pledged or did a combined pledge and MIP. College inductees ($t_{(503,997)}=-6.61, p < .001$) were significantly less likely to hold positive attitudes toward MIP. There were no significant differences in MIP attitudes among current college (as opposed to alumni) members, nor among those who were ghost members (compared to those who were initiated into the national chapter). Those who were initiated more recently ($r_{(1307)}=.06, p=.02$) and had a shorter pledge process ($r_{(1309)}=.10, p < .001$) were more likely to endorse MIP, although these relationships were weak. Lastly, sorority members were significantly more likely to endorse MIP than fraternity members ($t_{(1205,383)}=2.72, p=.007$).

Additionally, evidence demonstrated that there was strong correlation between geographic location of their BGLO chapter and their attitudes about the initiation process. There was significant variation in the endorsement of MIP across geographic regions ($F_{(5, 1372)}=9.37, p < .001$). Post hoc analyses indicate that respondents initiated in the northeast were significantly less likely to hold positive views of MIP compared to those initiated in the southeast, midwest, and southwest. There was no difference between those in the northeast and west. International inductees were more likely than all other regions to positively evaluate MIP. Moreover, the type of educational institution

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was significantly related to the endorsement of the continuation of hazing practices ($F_{(2, 1377)}=6.54, p < .001$). Post hoc tests reveal that those attending historically black colleges are significantly less likely to endorse MIP than those who attend predominantly white institutions. “Other” institutions were not significantly different from historically black colleges or predominantly white colleges.

Organization commitment and participation were largely unrelated to attitudes about MIP. For instance, those who held positive attitudes toward MIP scored higher on continuance commitment ($r_{(1366)}=.05, p=.046$), but lower on normative commitment ($r_{(1370)}=-.06, p=.032$). There was no relationship between MIP attitudes and affective commitment, organizational participation, or being (currently) financially active in the fraternity/sorority.

A variety of demographic factors were also examined. Race, sexual orientation, and religious affiliation were unrelated to views on MIP. Participants who were female ($t_{(1109.44)}=2.61, p=.009$) and older ($r_{(1291)}=.25, p < .001$) were significantly more likely to endorse the continued use of hazing in the future.

Given that the handful of empirical studies on BGLO members' attitudes about the means by which members were brought into the organizations found that beliefs about the utility of MIP in facilitating commitment to other members, the organizations, and their ideals,³²⁶ we explored those variables as well. We analyzed what percentage of members either agreed or disagreed with the following three questions that were part of the 11-item Attitudes toward MIP measure: (1) MIP is sufficient to build brotherhood/sisterhood among initiates to my fraternity/sorority (Agree, 30.6%; Disagree, 59.8%); (2) MIP is sufficient to help aspirants develop commitment to my fraternity/sorority (Agree, 34.1%; Disagree, 55.6%); and (3) Generally, MIP is sufficient for the needs of my fraternity/sorority (Agree, 27.0%; Disagree, 59.8%).

2. Truth

Several analyses were performed to assess whether the type of initiation was related to important and desired outcomes. Type of initiation was related to GPA ($F_{(2, 1440)}=52.68, p < .001$). Post hoc tests indicate that those who went through MIP had higher GPAs than those who pledged only and those who had a combined pledge and

326. See *supra* notes 138 to 177 and accompanying text.

MIP experience. Those with the combined pledge and MIP had significantly higher GPAs than those who pledged only.

Type of initiation was also related to financial participation of the study participants ($F_{(2, 1593)}=4.50$, $p=.011$) as well as the peers who crossed at the same time they did ($F_{(2, 1619)}=5.37$, $p=.005$). Specifically, those who went through MIP were less financially active than those who went through the combined pledge and MIP. Conversely, the financial activity of one's peers (who crossed at the same time) was higher among those who went through MIP compared to those who did the combined pledge and MIP.

Continued communication with individuals with whom one crossed was significantly related to type of initiation ($F_{(2, 1579)}=25.73$, $p < .001$). Post hoc analyses indicate that those who went through the combined pledge and MIP were significantly more likely to remain in touch with those with whom they crossed compared to both those who pledged only or those who went through MIP only.

For the most part, organizational participation and commitment were unrelated to the type of initiation. For instance, type of initiation was unrelated to organizational participation, continuance commitment, and normative commitment. The only significant relation was with affective commitment ($F_{(2, 1527)}=6.19$, $p=.002$). Those who went through MIP had lower ratings of affective commitment than those who pledged only or those who went through the combined (pledge and MIP) process.

A second set of analyses focused on whether being hazed was related to specific desired outcomes. Participants were asked whether or not they were subjected to hazing as part of their initiation process. They were presented with a total of 27 different acts, ranging from relatively mild and positive (e.g., pledges required to perform community service) to severe and dangerous (e.g., pledges being hit with hands/feet, paddles, or other objects) forms of hazing. The mean number of different acts participants reported was 16.29 (standard deviation = 7.44; range 0 to 27). These results indicate that many participants were subjected to a wide variety of hazing behaviors.

The next series of analyses focused on what factors related to being hazed. Those who experienced more types of hazing behavior were significantly, but weakly, more likely to be financially active with their organization, ($r_{(1324)}=.07$, $p=.013$), and have higher ratings on affective ($r_{(1343)}=.13$, $p < .001$) and normative ($r_{(1335)}=.14$, $p < .001$) commitment. Yet, being hazed was unrelated to continuance

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commitment. A slightly stronger positive relationship was observed between higher levels of hazing and staying in communication with those who initiated at the same time as the participant ($r_{(1328)}=.26$, $p < .001$). However, being hazed was negatively related to the financial activity of those with whom the participant was initiated ($r_{(1345)}=-.17$, $p < .001$). Lastly, one's level of hazing was unrelated to past year participation in national programs, as well as participation in state, regional, and national conference/conventions attended within the past four years.

CONCLUSION

Black Greek-letter organizations are unique entities with both a particular identity and set of needs. Scholars have argued that the BGLO identity is defined as personal excellence (largely defined in terms of high academic achievement), the development and sustaining of fictive-kinship ties (i.e., brotherhood and sisterhood), and dedication to uplifting African American communities.³²⁷ Accordingly, these organizations need members who are not only committed to these ideals but also committed, in practical ways, to the organizations themselves via dues payment, meeting attendance, and the like. These organizations require that such commitment be long-term if they are to measure-up to their identity-ideal. Their organizational needs, the beliefs among members about how these needs can best be actualized, the factual basis of these beliefs, and the growing constraints of the civil and criminal law, have created a conundrum for BGLOs.

The process by which BGLO members come into their organizations is a complicated matter. Ultimately, it appears that "pledging" has a negative relationship with academic performance among newly initiated BGLO members. Those who define the process by which they were brought into their organization as consisting of both MIP and pledging are more connected to those with whom they were initiated than those who simply pledged or went through MIP. Those who define the process by which they were brought into their organization as having some element of pledging are more financially active with their organization. The opposite must be said for those initiated with respondents. Having some "pledge" experience was also related to

327. See Felix M. Armfield et al., *Defining the "Alpha" Identity*, in ALPHA PHI ALPHA: A LEGACY OF GREATNESS, THE DEMANDS OF TRANSCENDENCE 23, 23-49 (Gregory S. Parks & Stefan M. Bradley eds., 2011) [hereinafter ALPHA PHI ALPHA].

greater affective commitment to one's BGLO than having, simply, gone through MIP. When focusing more specifically on what experiences individuals were subjected to in their pursuit of BGLO members—as opposed to, simply, what they labeled their “process”—those who experienced more hazing were slightly more likely to be financially active as well as be more affectively and normatively committed. Those who experienced more hazing were slightly more likely to stay in contact with those whom they were initiated. Being hazed, however, made those initiated with respondents less likely to be financially active. Importantly, being hazed had no relationship to recent participation in the community uplift activities that BGLOs are known for or for being engaged in the decision-making processes of the organizations. Finally, over fifty percent of BGLO members do not believe that the very process implemented by BGLOs to supplant hazing actualizes the needs of BGLOs, generally, and does not facilitate commitment to the organization or to other members.

In short, these findings contradict the arguments of “pledging” proponents—i.e., that it is a panacea for BGLO ills and is necessary to actualize BGLOs' ultimate identity. These findings also eschew the arguments that MIP advocates embrace—i.e., that “pledging” is an evil that, in total, must be abolished in order to preserve BGLOs. The reality, from this data, is that the story is much more complex. In order to realize BGLO founders' intentions related to personal excellence, fictive-kinship ties, and African American uplift, some elements of the old process are needed to identify, attract, select, and train new members. But they are insufficient to address a wider range of needs that BGLOs have. For example, if BGLOs wish to amplify their role in the areas of civil rights and public policy, they will need several things from their members: intelligence to identify and devise novel solutions to the problems facing African Americans as those problems evolve from decade to decade; dedication to each other that is meaningful and supports systematic cooperation toward problem-solving; a true desire to engage in uplifting activities; and a commitment to ensuring the longevity of the organization(s) that make all of this possible.

The crux of the challenge to BGLOs is that the law places constraints on the ways in which organizations like BGLOs initiate new members. Beliefs can be powerful motivating factors, shaping and driving people's behavior, even in regard to violating the law. This is particularly so when, within organizational contexts, people believe

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their behavior serves the highest ideals of the organization. An understandable response to such behavior is for an organization to internalize law and seek to regulate such behavior,³²⁸ often quite harshly. However, such an approach may be highly ineffective for BGLOs.³²⁹ What may prove a more effective tactic is a focus on what BGLO members claim to hold dear—i.e., their respective organizations. The passing reference, at an organization's national convention, about vague lawsuits pending against the organization does not suffice to curtail hazing within these groups. Rather, a deep education about both civil and criminal law governing these organizations, how they initiate members, and the impact of violations on the organizations, may prove more effective. This is particularly so if facts about the limits of “pledging” are articulated to BGLO members. This deep education, however, necessitates that BGLOs honestly embrace the hard facts as they pertain to what activities help shape the types of members they need. To the extent that these activities violate the law, the organizations must abolish them and find a cogent way to articulate this need for abolishment to its members. But they must also be creative in developing processes that are mindful of both the ceiling that the law (and other factors) place on what types of process they can craft as well as the interstices that are pregnant with possibilities between that ceiling and the conceptual floor.³³⁰

328. See generally Lauren B. Edelman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 L. SOC'Y REV. 941 (1999) (analyzing the ability of large beauracrat organization to internalize legal rules).

329. See Cardi et al., *supra* note 34, at 587-88 (finding that although the threat of potential criminal sanctions had a large and statistically significant effect on subjects' stated willingness to engage in risky behavior, the threat of potential tort liability did not).

330. Compare Reddick et al., *supra* note 56, at 279-311, with Oscar Holmes IV, *Hazing and Pledging in Alpha Phi Alpha: An Organizational Behavior Perspective*, in ALPHA PHI ALPHA 313-50 (2012).

The Elephant in the Law School Assessment Room: The Role of Student Responsibility and Motivating Our Students to Learn

CASSANDRA L. HILL*

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“[I]t is important to bear in mind that however talented and committed instructors may be and however attuned they are in assessing student outcomes, learning will occur most effectively if students join forces toward achieving desired learning in the end.”¹

INTRODUCTION

Much has been said lately about the American Bar Association’s (ABA) proposed shift² from input to output measures and its focus on increased assessment in law school education.³ This discussion and

1. Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 *RUTGERS L. REV.* 867, 981 (2009).

2. Steve Bahls, Chair, *Key Issues Considered by the Student Learning Outcomes Subcommittee*, Student Learning Outcomes Subcommittee of the Standards Review Committee, AM. BAR ASS’N (Dec. 15, 2009), available at www.aba-net.org/legaled/ (follow “Discussion of Key Issues” hyperlink); Donald J. Polden, *Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education*, AM. BAR. ASS’N (May 6, 2009), <http://www.abanet.org/legaled/committees/Standards%20Review%20documents/Principles%20and%20Goals%20Accreditation%205%206%2009.pdf>.

3. See David Barnhizer, *Redesigning the American Law School*, 2010 *MICH. ST. L. REV.* 249, 291-309 (2010) (discussing the ABA’s pending shift to outcome assessments in law schools and its potential impact on law schools); Erwin Chemerinsky, *Radical Proposals to Reform Legal Pedagogy*, 43 *HARV. C.R.-C.L. L. REV.* 595 (2009); James Podgers, *Sweeping Accreditation Review May Prompt ‘Sea Change’ in Law School Evals*, A.B.A. J. (June 3, 2009), available at http://www.abajournal.com/news/article/review_of_accreditation_standards_likely_to_bring_sea_change_to_how_law_sch/ (addressing the ABA’s comprehensive review of its standards); Sarah Randag, *ABA Effort to Add Outcomes to Accreditation Standards Roils Law Deans*, A.B.A. J. (Feb. 22, 2010), available at http://www.abajournal.com/news/article/aba_effort_to_add_outcomes_to_accreditation_standards_roils_law_deans/ (“A proposed shift in ABA law school accreditation standards away from “input” measures—such as student/faculty ratio or facilities—to student learning outcomes has law school deans talking; and worrying.”); Wegner, *supra* note 1, at 951 (“Another approach is increasingly emerging based on law schools’ own efforts to develop objectives and measures of desired educational outcomes. In some instances, initiatives of this

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the scholarship that has followed primarily address the ABA's accreditation standards and their impact on costs, faculty workload and tenure, curriculum design, formative assessments, and teaching strategies⁴—all important topics to the future of legal education.⁵ But a focus mainly on these topics, and not on the law student's role, in the context of performance measures and outcomes assessment minimizes the student's contribution and has the effect of characterizing the student as a passive recipient of professors' efforts to impart knowledge.

Incorporating varied and multiple assessment opportunities in a law school course requires much time from law professors to plan, coordinate, execute, and critique the exercise and assess students' performance.⁶ As professors work to identify and include both formative

sort have derived from efforts to comply with the ABA's new 'outcomes' requirements."); Nicholas Zeppos, Symposium, *The Future of Legal Education*, 60 VAND. L. REV. 325 (2007); Symposium, *The Opportunity for Legal Education*, 59 MERCER L. REV. 821 (2008) (morning session transcript); Jordan Furlong, *Re-Engineering Law Schools*, SLAW (Dec. 8, 2008), <http://www.slw.ca/2008/12/08/re-engineering-law-schools/> ("If the committee continues along this path with its final report, recommendations and implementation, it could end up triggering some of the most significant changes ever to the American legal education system and, shortly thereafter, to the American legal profession itself."); Jason Solomon & Nancy Rapoport, *How to Improve Legal Education*, TEX. LAW. 23, 23 (Aug. 10, 2009), <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202432864529> ("[The ABA is] taking an important step forward by moving toward greater reliance on outcome measures for accreditation. . . ."). See generally Harry Arthurs, *Law and Learning in an Era of Globalization*, 10 GERMAN L.J. 629 (2009). For example, in September 2009, the University of Denver Sturm College of Law hosted a conference that addressed better methods of student, teaching, and institutional assessment. See *Legal Education at the Crossroads*, v. 3.0, STURM C.L., <http://law.du.edu/index.php/assessment-conference> (last visited Jan. 9, 2013). Also, the Charlotte School of Law held a similar one-day conference on May 27, 2010. See *Assessment and Student Outcomes Conference – Implications of the Proposed ABA Standard on Student Learning Outcomes*, CHARLOTTE SCH. L., <http://mail.charlottelaw.edu/academics/academicscontent.aspx?ID=249> (last visited Jan. 9, 2013).

4. See, e.g., Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225 (2011); see also *Assessment*, SECOND DRAFT (Newsl. of the Legal Writing Inst.), Fall 2010, at 2 (including a variety of articles on "the effective use of outcome measures and assessments in teaching legal analysis, writing, research, and other lawyering skills" in light of the ABA's plan to make outcomes and assessments part of its accreditation standards); see also Barnhizer, *supra* note 3 (discussing the ABA accreditation prongs and how they could result in significant faculty reductions, higher faculty workloads, changes in tenure standards, and large-scale eliminations of the traditional law school research library).

5. See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 105-63, 235-63 (2007) [hereinafter BEST PRACTICES].

6. Mary A. Lynch, *An Evaluation of Ten Concerns About Using Outcomes in Legal Education*, 38 WM. MITCHELL L. REV. 976, 994 (2012) ("Incorporating assessment of student learning outcomes into law school culture will take more work, time, thinking, and energy on the part of faculty."); Sophie Sparrow, *Taking a Small Step Toward More Assessments*, L. TCHR. (Newsl. of the Inst. for L. Teaching and Learning) Fall 2009, at 1 (suggesting that professors take small manageable steps toward making their classes more "assessment-and learner-centered").

and summative assessment measures⁷ in their courses (such as quizzes, writing exercises, group work, and oral presentations) and set aside time to critique and grade students' work and provide them with feedback, often questions remain—what did their students do to prepare for the assessment? Did their students encounter any obstacles? Did their students regularly attend class and participate in study group sessions? What and how did their students contribute to their own learning and skill development?

Experts agree that students ideally should not be passive learners but should be actively involved and engaged in the learning process to improve their motivation to learn and promote academic success.⁸ At a recent conference on law school outcomes and assessment, Judith Wegner, one of the authors of the *Carnegie Report*,⁹ stated in her plenary address that law professors must think more about how to effectively convey to students the actual process of student learning—that

7. Formative assessments (or assessments for learning) provide teachers and students with feedback on students' academic progress, whereas summative assessments (or assessments of learning) evaluate a student's level of achievement at the end of a course or term. BEST PRACTICES, *supra* note 5, at 255-61; see Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Student Learning and Performance*, 15 BARRY L. REV. 73, 76-78 (2010) (explaining the forms and types of assessment and noting that the main purpose of assessment is to "determine whether students are learning what we believe they should be learning"); Emily Zimmerman, *What Do Law Students Want?: The Missing Piece of the Assessment Puzzle*, 42 RUTGERS L.J. 1, 9-12 (2010). Experts typically refer to the multifaceted roles that assessment plays in education; for example, one author identifies three distinct but interrelated purposes of assessment: assessment for learning which gives teachers information to modify teaching strategies, assessment as learning which develops metacognition skills in students, and assessment of learning which confirms whether students have achieved the curriculum outcomes. RETHINKING CLASSROOM ASSESSMENT WITH PURPOSE IN MIND 13-14 (Western and Northern Canadian Protocol 2006), available at <http://www.wncp.ca/media/40539/rethink.pdf> [hereinafter RETHINKING CLASSROOM ASSESSMENT]; see also Patrick Terenzini, *Assessment with Open Eyes: Pitfalls in Studying Student Outcomes*, 60 J. HIGHER EDUC. 644, 646-48 (1989) (discussing the lack of consensus on precisely what "assessment" means and identifying considerations to keep in mind to determine the kind of assessment sought). While acknowledging the various functions of assessments, this Article focuses on the main purpose of assessments in educational institutions (encompassed in all forms), which is "to discover if students have achieved the learning outcomes of the course studied," and considers the role of student responsibility in such determinations. BEST PRACTICES, *supra* note 5, at 235, 236.

8. Virginia DeRoma et al., *Procrastination and Student Performance on Immediate and Delayed Quizzes*, 124 REV. EDUC. RES. 40 (2003) ("[L]earners must be actively involved in the learning process if learning is to be successful."); Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 403 (1999); Gregory S. Munro, *How Do We Know if We Are Achieving Our Goals?: Strategies for Assessing the Outcome of Curricular Innovation*, 1 J. ASS'N LEGAL WRITING DIRECTORS 229, 236 (2002) ("Law students should be active participants in their education."); see Wegner, *supra* note 1, at 981.

9. The *Carnegie Report* is based on a 2007 study of legal education conducted by the Carnegie Foundation for the Advancement of Teaching ("Foundation"). W. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

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students must “put their own muscle and heart into the process of making choices and taking responsibility.”¹⁰ Students must understand, Wegner continued, that learning construction and a law school education are “not about memorizing content.”¹¹ The process of learning is more about the individual student “being responsible enough to construct knowledge.”¹² For students, Wegner recognized, navigating this new uncertainty and taking responsibility are not easy tasks, but they are fundamental to law school education.¹³

This Article grows out of my experiences teaching at two different law schools, participating in various law school assessments, and discussing assessment matters with colleagues, both locally and nationally. My proposal is straightforward: Given well-established assessment principles and essential elements of student learning, law professors and law schools must do more to effectively assess students’ responsibility for, and contributions to, their own learning, development, and eventual mastery of substantive law, lawyering skills, and ethical considerations. By taking the step to examine student input comprehensively, no one is seeking to place blame or shift total responsibility for learning onto students, as achievement of learning objectives is a shared responsibility on both professors and students.¹⁴ Rather, by assessing student input on each assignment or task (whether for course, program, or institutional assessment purposes or related to knowledge, skills, or values), law professors will have a more accurate picture of their teaching efforts and the effectiveness of the curriculum. Professors will be collecting data not only on students’ cognitive or subject-matter knowledge but also on students’ be-

10. *Moving Beyond Carnegie*, (Center for Excellence in Law Teaching Mar. 30, 2012), <http://www.celtconference2012.org/schedule/video.html> (Video of Judith Wegner at the Plenary Session at Albany Law Center for Excellence in Law Teaching (CELT) Inaugural Conference: Setting and Assessing Learning Objectives from Day One). Judith Wegner is a past president of the American Association of Law Schools, former dean of University of North Carolina School of Law, and former senior scholar at the Foundation. Wegner was the principal investigator on the Foundation’s major study on legal education, which led to the *Carnegie Report*.

11. *Id.*

12. *Id.*

13. *Id.*

14. See Bradley Toben, *What Should Our Students Justifiably Expect of Us as Teachers*, 33 U. Tol. L. Rev. 221, 231 (2001) (“A law school relies upon each of its faculty members to deliver to its students its most important programmatic product—teaching—in a fashion that recognizes and reflects the worth of the enterprise.”); cf. Michael Hunter Schwartz, *Teaching Law Students to Be Self-Regulated Learners*, 2003 MICH. ST. DCL L. Rev. 447, 449-50 (2003) (criticizing law professors’ views about why students fail to learn that both focus on students’ deficiencies and assert that there is nothing legal educators can do to help improve student learning).

havioral performance and development (such as course completion and hours spent on study).¹⁵

This Article is divided into four parts. Part I discusses the responsibility for learning shared between professor and student, examines several studies of student responsibility for learning in education, and highlights similar research conducted in the law school setting. Part II provides the many benefits of routinely considering student responsibility in learning and assessment. Part III presents several methods for documenting student perspectives and participation, and Part IV identifies strategies for motivating students to contribute to their learning. In this Article, the concept of student responsibility broadly refers to any contribution or input made by law students to achieve stated learning outcomes and encompasses everyday tasks from attending class and taking notes to more involved activities such as working with study groups and on writing projects and preparing for examinations.¹⁶ Student responsibility also refers to students' attitudes toward learning and their own perceptions about their roles.¹⁷

Assessment in law school education is long overdue and undoubtedly beneficial to designing curriculum and courses. Assessment also ensures that students achieve identified learning outcomes and are ready for the practice of law.¹⁸ But, unless law professors consider the level of responsibility their students have taken for their own education on each assessment measure and throughout their educational careers, any assessment results will lack proper context and may leave professors speculating as to the steps needed to target and improve students' academic and professional competency. This Article aims to inspire meaningful discussion and scholarship about law students' roles in and contributions to assessment plans in law schools—a similar conversation that is already underway in colleges, universities, and other educational programs.

15. See Marvin W. Peterson & Marne K. Einarson, *What Are Colleges Doing About Student Assessment? Does It Make a Difference?*, 72 J. HIGHER EDUC. 629, 631 (2001) (describing the types of assessment data collected by faculty including cognitive, affective, and behavioral); Terenzini, *supra* note 7, at 647 (listing the four basic dimensions of outcomes that could be assessed: knowledge, skills, attitudes and values, and behaviors).

16. See Linda M. Anderson & Richard S. Prawat, *Responsibility in the Classroom: A Synthesis of Research on Teaching Self-Control*, 40 EDUC. LEADERSHIP 62, 62 (April 1983) ("Responsibility is a complex concept involving a number of related issues, such as accountability and control, which psychologists have thought about and studied for some time.").

17. *Id.* ("Responsibility has both visible components (behavior) and invisible components (cognition, affect, and attitude).").

18. See Sparrow, *supra* note 6, at 1 ("Experts on learning tell us that the most effective learning environments are 'assessment centered.'").

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I. RESPONSIBILITY FOR LEARNING AND ASSESSMENT

“[A] more active and meaningful partnership is required between law schools and their students for improvements to occur.”¹⁹

“[R]esponsibility is a win-win game wherein two agents take responsibility for the same outcome even though neither is in complete control of all the variables. When two agents take such responsibility, the resulting synergy produces powerful results.”²⁰

Teaching is the “centerpiece enterprise” of any law school.²¹ So, it is very important for law professors to evaluate their own teaching and classroom strategies critically and routinely.²² And it is equally essential for law students to understand and embrace their role in the classroom.²³ There is a shared responsibility for learning and assessment in law school. As law professors prepare for their courses and reflect on their teaching, law students must also fully recognize their duty and responsibility for their own education.²⁴

A. Law Professors’ Input and Contributions Are Documented

Since law professors are not required to have formal teaching credentials or an advanced degree in education to teach in law school, they must be proactive about improving their teaching skills and placing student learning at the forefront of their teaching.²⁵ The ABA’s impending move toward increased assessment provides additional incentive for law professors to examine their teaching to improve student learning. Many law professors have already started to actively

19. Wegner, *supra* note 1, at 981.

20. Robert B. Barr & John Tagg, *From Teaching to Learning: A New Paradigm for Undergraduate Education*, CHANGE (Nov./Dec. 1995), available at <http://ilte.ius.edu/pdf/BarrTagg.pdf> (original edition in Change Magazine).

21. Toben, *supra* note 14, at 223; see Filippa Marullo Anzalone, *It All Begins with You: Improving Law School Learning Through Professional Self-Awareness and Critical Reflection*, 24 HAMLINE L. REV. 324, 328 (2001) (“Since teaching is an essential component of legal education’s mission, we need to know more about what the teacher brings to the table.”).

22. See Anzalone, *supra* note 21, at 370 (“[Law teachers] hold the answers to better teaching, to better understand student learning, within us.”).

23. See James Jay Brown, *Forging an Analytical Mind: The Law School Classroom Experience*, 29 STETSON L. REV. 1135, 1146-47 (2000) (describing students’ responsibility for self-learning).

24. *Id.*; see Barr & Tagg, *supra* note 20 (“Students, the co-producers of learning, can and must, of course, take responsibility for their own learning.”).

25. See Toben, *supra* note 14, at 221-24 (noting that very few law teachers have formal training and education and calling on law faculty to keep teaching at the center of our professional work).

engage in “pedagogical self-improvement”²⁶ and offer insights on how other professors can improve teaching and learning in law school.²⁷ The literature on law school pedagogy is replete with concrete suggestions and personal accounts of how law professors can develop their teaching and improve student learning.²⁸ Law professors attend teaching workshops and conferences. For example, each year, new law professors attend the American Association of Law Schools’s teaching conference²⁹ and many professors participate in the Institute for Law Teaching and Learning’s workshops on teaching, engaging, and assessing law students.³⁰ And, many legal writing and skills faculty regularly attend the national and regional legal writing conferences sponsored by the Legal Writing Institute (LWI).³¹

26. Stewart Harris, *Sometimes, We Really Do Suck*, L. TCHR. (Newsl. of the Inst. for L. Teaching and Learning) 1, 18 (Fall 2009) (detailing his methodology for reviewing student course evaluations and improving his teaching); see Alice Thomas, *Laying the Foundation for Better Student Learning in the Twenty-First Century: Incorporating an Integrated Theory of Legal Education into Doctrinal Pedagogy*, 6 WIDENER L. SYMP. J. 49, 126-27 (2000) (“Driven by a heartfelt desire to help more students learn better, teachers are looking for ways to make a difference.”); *Becoming a Great Teacher*, ASS’N AM. L. SCHS. (Newsl.) (Dec. 2009) (providing a series of short essays detailing classroom exercises and teaching strategies to become a great teacher); cf. Michael Hunter Schwartz, *The Little Lies We Tell Ourselves and Our Students: Seven Commonly Held Myths About Law School Teaching and Learning*, L. TCHR. (Newsl. of the Inst. for L. Teaching and Learning) 5, 8 (Spring 2011) (calling on law schools to offer concrete evidence of faculty work in teaching to support claims in marketing materials and elsewhere that their faculty are passionate about teaching).

27. Paul T. Wangerin, *Teaching and Learning in Law School: An “Alternative” Bookshelf for Law School Teachers*, 1994 GONZ. L. REV. 49, 50 (1994) (suggesting that teachers develop an alternate bookshelf that contains materials on teaching and learning and offers several works).

28. See GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* (Carolina Academic Press 1999); HOWARD E. KATZ & KEVIN FRANCIS O’NEIL, *STRATEGIES AND TECHNIQUES OF LAW SCHOOL TEACHING: A PRIMER FOR NEW (AND NOT SO NEW) PROFESSORS* (Aspen 2009); MADELEINE SCHACHTER, *THE LAW PROFESSOR’S HANDBOOK: A PRACTICAL GUIDE FOR TEACHING LAW* (Carolina Academic Press 2004); MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 169-87 (Carolina Academic Press 2009); Toben, *supra* note 14, at 221 (“The pedagogy of legal education is written about and discussed extensively in journals, legal education organization programs, accreditation and membership processes, and in many other venues.”).

29. For more information about the AALS New Law Teachers Conference, see http://www.aals.org/events_nlt.php. Notably, at the 2011 AALS Annual Meeting in New Orleans, Louisiana, several conference sessions addressed faculty teaching, student learning, and course and program assessment. See *Program for the 2011 AALS Annual Meeting*, ASS’N AM. L. SCHS., https://memberaccess.aals.org/eWeb/Dynamicpage.aspx?Site=AALS&WebKey=9eff27b-7614-458f-9afd-759dd0133f00&RegPath=EventRegFees&REg_evt_key=892be6b0-1b4a-4f8d-b200-6ee44ab0c66 (last visited Jan. 14, 2013). These sessions were attended by both skills and casebook faculty.

30. For a list of conferences sponsored by the Institute for Law Teaching and Learning, see <http://lawteaching.org/conferences/index.php>.

31. For a list of conferences sponsored by the LWI, see http://lwionline.org/lwi_conferences.html.

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In addition to participating in faculty development conferences, law professors carefully review their annual student evaluations.³² One professor even shared his process for reading his student evaluations and concluded that, even though it is sometimes painful, the critical reflection is worth the effort and moves him toward achieving “classroom nirvana.”³³ Further, law professors read books and articles on education³⁴ and even maintain teaching portfolios and journals.³⁵ Law professors also introduce new teaching strategies in their classrooms³⁶ and vary their techniques to reach different learning styles.³⁷ For example, professors have experimented with clicker technology,³⁸ wikis, Skype, online classrooms, YouTube, and Google Maps to reach, engage, and assess this new generation of law students.³⁹ Admittedly, law professors and law schools always can, and should, do more to improve their teaching and student learning⁴⁰ and, with the

32. Harris, *supra* note 26, at 18.

33. *Id.* at 19.

34. See Wangerin, *supra* note 27, at 50-51 (advocating for materials on teaching and learning in law schools and offering a helpful list of books to interested law teachers).

35. SCHWARTZ, SPARROW, & HESS, *supra* note 28, at 170-71.

36. See Danyne Holley, *Using the Syllabus as Course Synthesis and Teaching Plan*, in HESS & FRIEDLAND, *supra* note 28, at 28-29 (introducing the detailed sequential syllabus as an assessment model and opportunity for students to repeatedly practice critical thinking); Barbara Pinkerton Blumenfeld, *Can Havruta Style Learning Be a Best Practice in Law School?*, 18 WILLAMETTE J. INT'L L. & DISP. RESOL. 109, 110 (2010) (concluding that Havruta, a collaborative learning form, should be incorporated into the law school curriculum); Tonya Krause-Phelan et al., *Using Faculty Inquiry Process to Examine Student Responsibility for Learning*, 61 J. LEGAL EDUC. 280 (2011); *Assessment*, *supra* note 4 (providing helpful ideas for creating tools for student assessment of discrete skills); Stacy Caplow, *The Activity-Based Seminar*, L. TCHR. (Newsl. of the Inst. for L. Teaching and Learning) 1, 16-17 (Fall 2009).

37. See Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALBANY L. REV. 213 (1998); Paul Wangerin, *Learning Strategies for Law Students*, 52 ALBANY L. REV. 471 (1988); Karin Mika, *Using Visuals to Enhance Learning*, L. TCHR. (Newsl. of the Inst. for L. Teaching and Learning) 20 (Spring 2012); *Teaching to Different Learning Styles*, SECOND DRAFT (Newsl. of the Legal Writing Inst.) (Spring 2008) (providing several articles on innovative ways in which law professors make their teaching effective for all students).

38. Clicker technology is an audience response system that uses small handheld devices that communicate by infrared signal or radio frequency to their base. Pamela Rogers Melton, *Click to Refresh: Audience Response Systems in the Legal Research Classroom*, 17 PERSP.: TEACHING LEGAL RES. & WRITING, Spring 2009, at 175, 175. Use of clicker technology in the classroom promotes interactive learning, as students use clickers to answer their professor's questions and can receive immediate feedback. *Id.* at 176.

39. *Becoming a Great Teacher*, *supra* note 26, at 10-25.

40. See Dennis Honabach, *Small Scale Curriculum Mapping*, L. TCHR. (Newsl. of the Inst. for L. Teaching and Learning) 28, 29 (Fall 2011) (noting that “it’s the rare law school that has a curriculum map” that details the school’s educational goals and sequence in which students will achieve these goals); Toben, *supra* note 14, at 221 (acknowledging the remarkable strides made by law faculty to “bring the best in teaching to the students” but stating that “there remains a good deal of work to be done, on a school-by-school basis, to assure that every faculty member is devoting all the effort and commitment of which he or she is capable . . . to the teaching enterprise”).

support of their respective institutions, can continue to foster a culture of teaching and learning.⁴¹

B. Law Students' Input and Contributions Need to Be Documented

Law professors certainly are an integral part of the student learning and assessment process, but what about their students? Over my years of law school teaching at different institutions, I have gleaned some anecdotal evidence of law students' efforts toward their learning and assessment projects. These informal clues are varied and range from spotting several law students enthralled in study group discussions and writing assignments thoroughly marked with notes, comments, and self-edits to noticing unmarked copies of court cases that were assigned readings and textbooks that appear practically brand new and unopened by mid-semester. And, many of my colleagues have similar experiences, which we have shared in our offices and around the water cooler. However, there is very limited formal discussion on evaluating the law students' role and contribution to the learning and assessment process.

Several leading learning theory experts focus on ways in which law professors can train law students to be "self-motivated, reflective, lifelong learners[,]"⁴² which is a topic addressed further in Part IV of this Article. And, other authors have specifically examined the qualities of successful law students in general,⁴³ which may provide a helpful starting point for discussing assessment. In addition, the 2010 Law School Survey of Student Engagement did specifically ask law stu-

41. See SCHWARTZ, SPARROW, & HESS, *supra* note 28, at 183-87; Anzalone, *supra* note 21, at 371 ("Law schools must create space for dialogue about ways to improve pedagogy The responsibility of the academy is to provide the forum and incentives for faculty to become better teachers and to provide an atmosphere conducive to legal educators' continual learning in the art of teaching."); Toben, *supra* note 14, at 222 (discussing the law school dean's role to support and emphasize faculty's role in teaching). At Thurgood Marshall School of Law, professors may participate in a faculty development program, which encourages them to focus on teaching, learning, and assessment. Professors may receive a monetary stipend for completing a number of tasks including, but not limited to, identifying student learning outcomes for the course, assessing and reporting data for at least ten of the stated learning outcomes and skills, and reviewing student evaluations and identifying one area of improvement in teaching. Through this initiative, the administration encourages faculty to reflect on their teaching and provides an incentive for professors to work to improve their teaching and student learning.

42. Schwartz, *supra* note 26, at 87.

43. See, e.g., Anne Enquist, *Unlocking the Secrets of Highly Successful Legal Writing Students*, 82 ST. JOHN'S L. REV. 609, 611 (2008).

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dents about their preparedness for class.⁴⁴ But, none of these works directly examines why law student contribution is important to the assessment conversation or how law professors and institutions can begin to evaluate it.

There are several possible reasons as to why a discussion about law student contribution to learning and assessment is currently lacking. Given the very recent introduction of the assessment movement to law schools, many law professors and institutions may not have had the opportunity to create, shape, and implement assessment plans, let alone focus on students' efforts toward assessment. Only some law schools have started taking steps toward assessment by gathering faculty to draft agreed upon institutional and course outcomes,⁴⁵ and a few other schools have begun to organize and implement program assessment plans.⁴⁶ The next step should be to assess what students are doing as part of the process.

In addition to the newness of law school assessment, law professors and administrators may believe student contribution cannot be effectively and routinely measured without expending too much effort and resources. At times, such evaluation can seem time consuming and onerous given current workloads of both faculty and students. Insight into student contribution would require consistent input from students and careful tracking and recording of their responses. For example, at a recent teaching conference, one presenter shared her results of a semester-long study she conducted on law students' laptop

44. Law School Survey of Student Engagement, *Student Engagement in Law School: In Class and Beyond 7* (2010) (on file with author).

45. For example, William Mitchell College of Law instituted the Future of Legal Education Task Force in which a group of faculty examined the knowledge, skills, and professional attributes that graduates should have, valid evidence of achievement of outcomes, and how an outcomes-based educational approach would affect students, faculty, graduates, and employers. As another example, CUNY School of Law brought together first-year lawyering and doctrinal faculty to address student learning outcomes and assessment and prepare a list of lawyer competencies and priority table for its institution. See *Using Foundational Outcomes and Outcomes Assessment for First Year Law Students: Identifying Outcomes, Developing Formative Assessment Tools, and Engaging in Programmatic Assessment*, ALBANY LAW CENTER FOR EXCELLENCE IN LAW TEACHING (CELT) INAUGURAL CONFERENCE: SETTING AND ASSESSING LEARNING OBJECTIVES FROM DAY ONE (Mar. 30, 2012), <http://celtconference2012.org/images/materials/armstrongmaterials.pdf> (panel materials on file with author).

46. For example, at Thurgood Marshall School of Law, the administration and faculty participate in a number of assessment projects. The school hired a director of assessment, and under her direction and with the assistance of her support staff, she has led a program assessment involving the first-year Lawyering Process course, a course assessment involving the upper-level Business Associations course, and student focus groups. The school initiated these projects in an effort to determine whether its students had achieved a level of competency over the respective learning outcomes.

use in the classroom, in which she concluded that students' "off-task" laptop use did not significantly correlate to a lower course grade.⁴⁷ To complete the study and assessment, she had to employ six research assistants to observe students across several different classes.⁴⁸ She also needed a special timer-software to manually log students' actual "off-task" laptop behavior.⁴⁹ In addition, she enlisted an expert's help on statistical analysis.⁵⁰ Although her study results were quite interesting and insightful, session participants frequently commented on the enormity of the task she undertook to assess and report on student behavior. Embarking on similar studies of student behavior and contribution may appear to be too impracticable for law professors or costly to law schools.

Furthermore, the topic of student contribution toward assessment may be currently lacking since student effort, behaviors, and responsibility are generally viewed as phenomena over which faculty have little, or no, control and may be seen as rather elusive.⁵¹ Further, law professors and schools may worry that they will need to provide incentives for students to be forthcoming and honest about their study habits, time allocation, and attention to class matters. Analyzing student performance on exams, writing projects, or oral presentations may prove easier than reviewing students' "behind-the-scenes" work and preparation. Professors may design and control the assessment measure, know what content is involved, and know the skills that are being targeted but cannot effortlessly predict how their students will approach the evaluation. However, any concern that student contribution may be somewhat difficult to ascertain and document and could require a little prodding of students should not preclude it from being an integral part of law school assessment efforts and teaching. Further, there are some small steps professors and law schools may

47. Kim Novak Morse, *Redirecting Laptop Users' Attention: Lessons from the Field*, Conference of the Institute for Law Teaching and Learning: Engaging and Assessing Our Students (June 2, 2012) (handout on file with author). Morse broadly defined "off-task" behavior as any misuse of a laptop in class or any task or activity performed by the student on his or her laptop that the professor did not instruct the student to do, such as surfing the internet or playing games. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. See Candace Mueller Centeno, *A Recipe for Successful Student Conferences: One Part Time Sheets, One Part Student Conference Preparation Questionnaire, and a Dash of Partial Live Grading*, 18 *PERSP.: TEACHING LEGAL RES. AND WRITING*, Fall 2009, at 24, 24 ("Getting inside the head of a law student and gaining insight into how the student is using time . . . is not an easy task.").

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take to collect information about student preparedness and readiness for an assessment.

Lastly, a concerted effort and focus on law student input may not be a popular topic of discussion because law professors and law schools possibly fear being perceived as blaming students for their shortcomings or low academic performance.⁵² Addressing student responsibility for learning is not about blaming students or even shifting sole responsibility for learning onto students. Law professors of course play an important role in student learning and their teaching must be evaluated on a regular basis. However, at the same time, professors “must insist that students keep up their end of the bargain.”⁵³ Practically every law professor can definitely recall a number of law students with strong work ethic, intellectual curiosity, and a sheer drive to work hard, many of whom earned top grades in their classes, were selected to serve as their teaching assistants, and had fruitful legal careers, whether with law firms, government agencies, or public interest organizations. The efforts made by these students inside and outside the classroom would shed some light on how students can achieve academic success. And, a more thorough examination of all law students’ contributions to the educational process and each assessment opportunity would provide professors with greater understanding of what they can do to improve instruction across the curriculum.

A focus on law students’ contributions to their learning and the assessment process in no way absolves law faculty from their responsibility for student learning. This point deserves repeating—an examination of the law student’s role and perceptions on responsibility does not lessen the law professor’s critical role in achieving student learning by engaging in self-reflection, teaching development, classroom instruction, and innovative teaching. Rather, the information learned from a careful inspection of law students’ contributions (habits, study skills, process, effort, and motivation) completes the assessment cycle and provides insight on how law professors can work to build a culture of student responsibility for learning in law school while simultaneously improving student academic performance.

52. See Schwartz, *supra* note 14, at 450 (commenting that law professors’ view that learning outcomes could be improved if students “would only work harder” blames students for their own failures).

53. Christian C. Day, *Law Schools Can Solve the “Bar Passage Problem”—“Do the Work!”*, 40 CAL. W. L. REV. 321, 342 (Spring 2004) (discussing a number of common sense tactics and strategies to increase students’ bar passage rates and how professors must teach with patience).

By directly discussing these potential obstacles as a faculty and community, law professors and law schools can begin to design protocols for assessing student responsibility that address these challenges and concerns. Many law professors and law schools are likely willing to study and evaluate student input into learning but have not yet found a viable, comprehensive, and cost-effective means for doing so. Research conducted by other educational programs and a few select studies of law school education, such as the Law School Survey of Student Engagement, provide good starting points for understanding the importance of studying students' input and contributions and determining a process for documenting and evaluating their efforts.

C. Study of Student Responsibility for Learning in Education Programs Outside the Law School Context

The topic of student responsibility is a common subject in educational institutions outside of law school. Many scholars have extensively studied students' contributions to their own learning and surveyed students to determine how they use their time and to discern student perspectives on responsibility. These authors and educators understand the importance of investigating students' roles in the quest for improving education and learning, and, in turn, they have researched students' efforts and shared their findings with the academic community. In general, these studies have identified varying motivations for students to take responsibility for their work. They also have found that students' class attendance and punctuality, class participation, and completion of assignments and readings positively related to students' academic performance, and they concluded that students spend very little time studying or focusing on academic pursuits. The researchers employed several means to collect data, including class observations, individual and group interviews, surveys, daily time logs, journals, and professor feedback and perceptions and at times used mathematical equations and quotients to determine the effect that students' activities and input had on their academic performance. These studies, discussed below, underscore the significance of student input on academic performance and provide helpful guidance on how law professors and law schools can begin to evaluate students' contributions routinely.

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One study of student responsibility was conducted in the early 1990s by Charles Bacon, a professor of Education (Bacon Study).⁵⁴ Bacon worked with several students in a secondary school to determine what aspects of their education the students viewed as being their responsibility.⁵⁵ In particular, he observed and conducted interviews with sixth and seventh grade students at a single middle school for a period of four months. Bacon sought to distinguish between the philosophical notions of a student “being responsible” or “being held responsible.”⁵⁶ As Bacon explained, “[s]tudents who are being responsible will do the work without constant reminders or prodding” whereas “[s]tudents being held responsible will do the work only when someone is somehow forcing them to do so.”⁵⁷ During the four-month study, Bacon observed that students were oftentimes not actively engaged in learning and would do only the minimum when required to complete an assignment.⁵⁸

In his interviews with students, Bacon addressed three main questions: (1) Do they perceive school as a place for learning? (2) What understanding of responsibility for learning do middle school students have? (3) Do middle school students see themselves as being responsible?⁵⁹ From the responses he obtained, Bacon learned the students had different motivators for completing schoolwork and varying ideas as to what it means to be a responsible learner.⁶⁰ Overall, he concluded that “students did not perceive school as a place for learning” and that, although they felt responsible for learning, they in fact were being held responsible rather than being responsible.⁶¹ Bacon also noted that students frequently maintained they were being responsible even when they recognized they were failing the class.⁶² Given the results of his study, Bacon urged educators to emphasize to students that school is a place for learning, help students take responsibility, and incorporate more challenging and engaging exercises into schoolwork. The Bacon Study provided educators with a profile of the per-

54. See generally Charles S. Bacon, *Student Responsibility for Learning*, 28 *ADOLESCENCE* 199 (1993) (discussing that students must be held responsible for learning).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

ceptions and sense of responsibility held by students early in their educational careers.

Later, in 2005, two researchers turned to the subject of student effort and performance in a college course. Gregory A. Krohn and Catherine M. O'Connor, professors of Economics, conducted an empirical study on the relationship between student effort and student performance in an intermediate macroeconomics course (Krohn Study).⁶³ They measured students' effort by examining the hours spent on various course activities.⁶⁴ The students reported the number of hours they spent each week preparing for and attending class.⁶⁵ They voluntarily kept records of their hours attending class and meeting with the professor and teaching assistant (TA).⁶⁶ They also documented the time spent completing homework, reviewing class notes, and meeting with classmates.⁶⁷ For example, participating students indicated they spent an average of 8.1 hours per week on the course: 2.7 hours per week in class and meeting with the professor and 5.4 hours per week studying (which included completing homework, reviewing notes, and meeting with classmates and the TA).⁶⁸ The data also showed that some students "crammed" and reported zero hours for some weeks and a large number of hours for the weeks just before the exam.⁶⁹

Krohn and O'Connor employed rather complex mathematical equations to determine the effect that the students' various activities had on their academic performance.⁷⁰ The results revealed, for instance, that class attendance was positively related to students' end-of-the-year performance in the course (but not to their interim examination results).⁷¹ Interestingly, however, the professors found that study hours had a small negative effect on student performance.⁷² And, further inspection and disaggregation of the study hours revealed that the time spent studying class notes, in particular, had the only signifi-

63. See generally Gregory A. Krohn & Catherine M. O'Connor, *Student Effort and Performance over the Semester*, 36 J. ECON. EDUC. 3 (Winter 2005).

64. *Id.*

65. *Id.* at 9.

66. *Id.*

67. *Id.*

68. *Id.* at 10.

69. *Id.* at 11.

70. *Id.* at 5-9.

71. *Id.* at 11.

72. *Id.*

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cant negative effect on performance.⁷³ Krohn and O'Connor offered possible explanations for the puzzling result, such as the possibility that students were studying flawed notes and the more they reviewed them, the more they likely gained misconceptions.⁷⁴ As with the Bacon Study, Krohn and O'Connor's comprehensive examination of student behavior shed some light on student effort and performance and laid the groundwork for further studies.

Then, not much later at a college in Canada, another professor of Economics, Elijah M. James, developed the concept of a student responsibility quotient (SRQ), a composite index of a student's fulfillment of his or her responsibility, and used it to measure student performance in a college-level economics course (SRQ Study).⁷⁵ Research by several economists and academicians, including the Krohn Study, had addressed the "learning production function" in economics,⁷⁶ which showed the relationship of input factors to students' learning output.⁷⁷ This research had identified several inputs for student performance including, but not limited to, the method of instruction,⁷⁸ demographic variables, past experience in the study, absenteeism, level of education, personality, and attitude.⁷⁹ James continued this analysis and specifically examined the relationship between the SRQ and student performance.⁸⁰ The SRQ served as an input, a noted variable in the students' learning production.⁸¹ The SRQ considered not only class attendance and study time, which were addressed in the Krohn Study, but also class participation, punctuality, completion of assignments (just submission), and reading of the textbook and other assigned materials.⁸² The students' attendance, punctuality, and assignments were strictly objective components whereas the students'

73. *Id.*

74. *Id.*

75. See generally Elijah M. James, Student Responsibility Quotient and Performance in the Principles of Economics Course (May 19, 2004) (unpublished manuscript) (on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=556670.

76. *Id.* at 3.

77. *Id.* at 4.

78. James noted that several researchers have found that the method of instruction was an important determination of students' understanding of economics. *Id.*

79. *Id.* at 3.

80. *Id.* at 5.

81. *Id.* at 2.

82. *Id.* at 6-7.

participation and reading of assigned materials were subjective items.⁸³

For a seven-year period (1998 to 2004), James studied 1,600 students who were enrolled in different economics courses at a single college.⁸⁴ The students volunteered to participate in the study.⁸⁵ James used questionnaires to obtain most of the data for his study and administered them during the final week of class.⁸⁶ The following function was used to determine the effect of the SRQ on students' performance: Output = f (student responsibility, attitude, aptitude, work experience, demographics).⁸⁷ In other words, student performance was a function or product of their responsibility, attitude (motivation), aptitude (mathematical ability and high school grades), work experience, and demographics.⁸⁸ James learned that, on average, students performed their responsibility in the course at a level of 74.9%.⁸⁹ In addition, he discovered that the SRQ and the students' mathematical ability, high school economics grade, and motivation to learn economics impacted and predicted their performance in the course.⁹⁰ In particular, James found that students' fulfillment of their responsibilities for learning significantly affected their performance, as the SRQ was the best predictor of student performance in the course.⁹¹ James concluded, "Not only should [students] attend classes, but they should be punctual, participate in class activities, complete their assignments, and do any assigned reading."⁹²

Also around this time, Holley Hassel, a professor of Education, and Jessica Lourey, a General Education instructor, focused on the subject of college student responsibility (Hassel Study).⁹³ Their research was prompted, in part, by the growing perception that "more than ever, students expect[ed] to be catered to, to receive a B or better for merely paying for the class and making a good faith effort."⁹⁴

83. *Id.* at 7. Notably, James found the students' evaluation of the subjective items to be in harmony with the professor's perception. *Id.*

84. *Id.* at 8.

85. *Id.*

86. *Id.*

87. *Id.* at 14.

88. *Id.* at 14-19.

89. *Id.* at 9.

90. *Id.* at 19.

91. *Id.* at 20.

92. *Id.* at 22.

93. See generally Holly Hassel & Jessica Lourey, *The Dea(r)th of Student Responsibility*, 53 C. TEACHING 2 (2005).

94. *Id.* at 2.

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Hassel and Lourey surveyed more than 1,100 university students to determine their attitudes toward learning and accountability.⁹⁵ In their comprehensive examination of student performance, Hassel and Lourey asked students, among other things, to describe what kind of student they considered themselves to be, share their perceptions of students and teacher responsibilities, and provide the amount of time they spent per week studying for a three-credit college course.⁹⁶ Hassel and Lourey learned that apathy, absenteeism, and grade inflation contributed to students' lack of accountability.⁹⁷ And, to combat what the authors called the "dearth of student responsibility," the authors suggested several changes to reenergize college classrooms: explicit consequences for absenteeism, consistent grading across courses, elimination of the traditional extra-credit model, and reorganization of responsibility for retention and reenrollment.⁹⁸

Even after the Hassel Study, interest in student performance research continued. Recently, in 2011, two professors of Sociology, Richard Arum and Josipa Roska, published a comprehensive study on how much undergraduates really learned while they are in college (the CLA Study).⁹⁹ The professors sadly concluded there were many reasons to worry about the state of undergraduate learning in higher education.¹⁰⁰ In particular, Arum and Roska determined that students spent very little time studying, and as such, "it [wa]s no surprise that they [we]re not learning as much on average."¹⁰¹ Based on their research involving 2,322 students enrolled at twenty-four four-year colleges and universities,¹⁰² they found that students studied only twelve hours a week, and when combining study hours with class and lab time, students in their sample spent less than 16% (or one-fifth) of their reported time each week on academic pursuits.¹⁰³ These figures were significant since numerous studies have shown that what students *do* in higher education has a consequence for a range of student

95. *Id.*

96. *Id.* at 3.

97. *Id.* at 4-8.

98. *Id.*

99. See generally RICHARD ARUM & JOSIPA ROSKA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* (2011).

100. *Id.* at 2.

101. *Id.* at 120.

102. *Id.* at 20. These calculations are based on 168 hours—a full seven-day week. *Id.* The majority of students' time (51%) was devoted to socializing, retreating, and other non-academic activities, and 24% of their time was used for sleeping. *Id.*

103. *Id.* at 97.

outcomes.¹⁰⁴ Judging from students' use of time, the authors found that social and leisure activities appeared to be more important than academic pursuits.¹⁰⁵ Further, the more time students spent studying, the better they progressed on the Collegiate Learning Assessment (CLA) tool the professors used to periodically evaluate the students' development in critical thinking, reasoning, and writing during their college careers.¹⁰⁶

All of these studies, the Bacon Study, the Krohn Study, the SRQ Study, the Hassel Study, and the CLA Study, show how other educational programs directly address the concept of student responsibility, whether to better understand perceptions, predict or gauge student performance, or derive methods to improve students' efforts and motivation. Although these studies were conducted outside the law school arena, their findings and research cannot be undervalued. The fact remains that some of these student subjects have entered or may eventually enter law school. As one author commented, "[l]egal educators face a far more subtle problem, for unlike elementary school educators they do not work with a classroom of clean slates."¹⁰⁷ Thus, it would behoove legal educators to extend the discussion about law school assessment beyond learning outcomes and teaching strategies. Law professors and law schools should routinely document, review, and analyze law students' habits, contributions, and responsibility and consider this information as part of any assessment plan. As one study illustrated, multiple actors, including students themselves, contribute to student learning in higher education.¹⁰⁸

Moreover, it is particularly interesting that the studies noted above boldly embrace the concept of "student responsibility" and incorporate it throughout their work. Only just recently did a group of law professors at Thomas M. Cooley Law School convene a "faculty

104. *Id.* at 92.

105. *Id.* at 120.

106. *Id.* at 20, 98. The CLA consists of three assessment components: a performance task and two analytical writing tasks. *Id.* at 21.

107. Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943, 958 (1995-1996) (examining the basic methodology of legal education and concluding that professors should develop awareness of their students' learning habits).

108. As a result of the CLA study, the professors also advised that multiple actors contributed to the "current state of limited learning on college campuses[.]" including students' limited input into their learning and teacher's lax demands and expectations. ARUM & ROKSA, *supra* note 99, at 120.

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inquiry group”¹⁰⁹ to examine ways in which faculty can foster increased student motivation and responsibility in their classrooms.¹¹⁰ The topic of the inquiry group was “Building Student Responsibility for Learning,” and nine faculty members answered the call to participate in the process.¹¹¹ They investigated current literature on student motivation and responsibility, selected one teaching technique from their findings, implemented it in their course, assessed the changes, if any, distilled the technique made toward building student responsibility for learning, and shared their results with faculty both at Thomas M. Cooley Law School and nationally.¹¹² The faculty reported mixed results on the effectiveness of the teaching techniques with cooperative group work, for example, yielding promising results for building student responsibility.¹¹³ However, their research found that the practice of requiring students to summarize key points from the lecture for their peers did not affect the amount of responsibility students took for their own learning.¹¹⁴ This significant work may prompt similar faculty inquiry group studies in other law schools, resulting in further needed investigation of student input into assessment.

D. Law Professors Also Care About Students’ Habits and Responsibility

The study at Thomas M. Cooley Law School reflects the concern that law professors have about improving student learning through reflective teaching. Although scholarship about student responsibility for learning and assessment in law school education is not as prevalent as that for other educational institutions, the process of examining law students’ general habits and behaviors is not entirely new. In fact, several authors have identified characteristics and patterns that often predict academic success and promote better learning for law stu-

109. Krause-Phelan et al., *supra* note 36, at 280-81. For example, the faculty group may meet regularly to collaborate on curricula design, assignments, and assessments or to examine and analyze data on student performance. *Id.*; see also *Faculty Inquiry Toolkit*, Carnegie Found. (Aug. 20, 2008), <http://specctoolkit.carnegiefoundation.org/> [hereinafter *Carnegie Toolkit*] (stating that a faculty inquiry group or cycle is a nationally recognized process where a community of educators convenes to study, investigate, and discuss certain identified questions or goals that relate to better teaching and student learning).

110. Krause-Phelan et al., *supra* note 36, at 295.

111. *Id.* at 280.

112. *Id.* at 281-83.

113. *Id.* at 286.

114. *Id.* at 288.

dents.¹¹⁵ Other works have polled law students to ascertain general trends in law school education.¹¹⁶ Thus, the subject of law students' contributions to their own general academic performance is clearly of interest to many law professors.¹¹⁷

For instance, recently in 2008, Anne Enquist, a law professor and legal writing specialist, shared the results of a study she conducted to determine whether there were any real secrets to success in legal writing in law school (Enquist Study).¹¹⁸ She wondered why some students achieved higher grades in legal writing than other students.¹¹⁹ Did they simply work harder or smarter?¹²⁰ Did they have a natural aptitude for legal study or some other advantage?¹²¹ Enquist set out to find the answers and decided to examine the similarities and differences among six law students enrolled in the same second-year legal writing class.¹²² Two of the students were predicted to be highly successful A students, two of them were predicted to be moderately successful B students, and two of them were predicted to be marginally successful C students.¹²³ Enquist hoped to identify what led to the varying levels of success among the participating students.¹²⁴

115. See Anzalone, *supra* note 21, at 326-27 ("There is a fresh interest in the learning styles of law students and a sense that understanding them only improves the quality of law teaching."); Richmond, *supra* note 107, at 944 (concluding that law professors should develop an awareness of their students' learning habits). See generally Joanne Ingham & Robin A. Boyle, *Generation X in Law School: How These Law Students Are Different from Those Who Teach Them*, 56 J. LEGAL EDUC. 281 (2006) (reporting striking results about students' learning styles such as the finding that one-fourth of the students learn best while learning alone); Guy R. Loftman, *Study Habits and Their Effectiveness in Legal Education*, 27 J. LEGAL EDUC. 418 (1975) (evaluating the effectiveness of law students' study techniques); Michael J. Patton, *The Student, the Situation, and Performance During the First Year of Law School*, 21 J. LEGAL EDUC. 10 (1986) (generating ideas about factors which cause a student's performance in law school to vary significantly from his predicted performance).

116. See generally Law School Surveys of Student Engagement, available at www.lssse.iub.edu.

117. See Leah M. Christensen, *Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficiency of Our Law Students*, 33 LAW & PSYCHOL. REV. 57, 75 (2009) ("Those law students who achieved higher grades in law school had mastery-goal orientation despite law school's emphasis on performance goals."); James R.P. Ogloff et al., *More than "Learning to Think Like a Lawyer:" The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 99-102 (2000) (surveying the research on law students' study habits and resources that predict why some students succeed and others fail).

118. Enquist, *supra* note 43, at 611.

119. *Id.* at 610.

120. *Id.*

121. *Id.* at 611.

122. *Id.* at 611-12.

123. *Id.* at 611.

124. *Id.*

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The students were nominated by their first-year legal writing professors and then agreed to participate in the study.¹²⁵ The students committed to the following activities: (1) participating in weekly interviews regarding the writing assignments; (2) submitting all drafts for review; and (3) keeping detailed record of all activities related to the assignment, such as time spent on legal research, reading, class attendance, and conferences.¹²⁶ Enquist began her study by conducting initial interviews of the participants to learn about their academic backgrounds (LSAT scores and law school grade point average), perceived strengths and weaknesses in legal writing, and legal work experiences.¹²⁷ She then identified several possible predictors of academic success, including the student's level of effort.¹²⁸

After regular interviews with the students and reviews of their work, time logs, and assignment grades, Enquist found there were several factors that contributed to certain students' success and key pitfalls to avoid.¹²⁹ The students who earned good grades on their assignments faced some distractions but managed their time effectively, organized their research and course materials well, and used their professor, among other things, as a resource.¹³⁰ One of the pitfalls that Enquist identified was procrastination.¹³¹ Notably, all of the students claimed to be working at peak levels throughout the study; however, closer inspection revealed they had very different ideas about what it meant to work hard.¹³² How the students spent their time revealed more than the total hours expended.¹³³

The Enquist Study serves as a leading example of a law professor's interests in students' habits but such concern over student behavior even extends beyond a specific law school course and applies to legal education nationally. A series of Law Student Surveys of Stu-

125. *Id.* at 611-12.

126. *Id.* at 612.

127. *Id.* at 614-20.

128. *Id.* at 620.

129. *Id.* at 629.

130. *Id.* at 629, 662.

131. *Id.* at 638.

132. *Id.* at 624-25.

133. *See id.* at 624-63 ("Successful students were putting in well more than twice the hours of least successful students . . . Perhaps most intriguing, however, were the components of 'working smarter.'"). Also, with respect to students' attitudes toward their performance, Enquist recognized how one of the marginally successful students blamed her lack of success on the professor. *Id.* at 672. Once this student decided, in her mind, that the professor graded unfairly, "she seemed to relieve herself of responsibility for her performance in the course." *Id.* The student did, however, admit during the post-study interview that she did not manage her time well and should have met with the professor. *Id.* at 672-73.

dent Engagement (LSSSE) shows the national interest in law students' contributions to their own education. In the 2010 LSSSE, they analyzed data on how law students used their time.¹³⁴ The LSSSE distributed surveys and collected responses from nearly 25,000 law students at seventy-seven law schools. Of particular note, only 7%¹³⁵ of the first-year students surveyed reported that they frequently came to class unprepared. But 42% of first-year students indicated they never came to class without completing the readings or assignments, which suggests that a majority of respondents may have reported they came to class unprepared at least once.¹³⁶ In addition, the average student claimed to have spent twenty-seven hours per week studying or reading assigned materials.¹³⁷ Lastly, more than half of the students surveyed (57%) stated that they frequently worked harder than they thought they could to meet their professors' expectations.¹³⁸ More recently, in the 2011 LSSSE, which solicited information from more than 33,000 law students at ninety-five law schools, 41% of students reported that they never or only sometimes worked harder than they thought they could to meet a professor's standards or expectations.¹³⁹ And, two LSSSE surveys mention disappointing findings with respect to third-year law students' preparation for class, with at least one quarter (25%) of these students failing to read assigned materials for class.¹⁴⁰

These projects, the Enquist Study and the LSSSE, suggest that studying law students' contributions to their own education is not quite an unusual practice,¹⁴¹ and the results indicate that continued research into student responsibility is warranted. The Enquist Study and the LSSSE collect general information about law students and their habits that potentially enable students to succeed academically.

134. Law School Survey of Student Engagement, Student Engagement in Law School: In Class and Beyond 7 (2010) (on file with author).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Law School Survey of Student Engagement, Navigating Law School; Paths in Legal Education 8, 9 (2011) (on file with author).

140. Law School Survey of Student Engagement, Student Engagement in Law School: Enhancing Student Learning 8 (2009) (on file with author); Law School Survey of Student Engagement, Student Engagement in Law School: Preparing 21st Century Lawyers 7 (2008) (on file with author). The 2008 LSSSE survey also provides that eighty-five percent of third-year law students recognized that their law schools emphasized the need to spend significant amounts of time studying and on academic work. *Id.*

141. *But see* Ogloff, *supra* note 117, at 99-102 (stating there are a limited number of empirical studies that have investigated law students' study habits).

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As the 2009 LSSSE report stated, “[t]ime plus energy equal learning.”¹⁴² Such research also reveals to law professors what efforts, if any, can be made to motivate law students to learn and connect with the material. But how do law professors actually know what their particular students are doing to prepare for class and the various formative assessments given during the course? Bacon noted in his report on student responsibility that “[m]any teachers complain about the problem of getting students to be responsible for their own learning. If word of mouth is an indicator, this problem is serious and becoming more so.”¹⁴³ Is there a serious problem in law schools with student input? One way for law professors to truly know whether students are taking responsibility for their own education and actually putting in the work is to investigate and critique their efforts on a regular basis. Studies may confirm law professors’ speculations or yield surprising results. Either way, further inquiry would be the critical next step to studying the general habits of successful law students.

Despite the apparent interest in surveying student behaviors to improve overall performance, there seems to have been no concerted effort to date to routinely examine the relationship between law student input and performance on assessment measures and to consider student responsibility as a target area for needed improvement. Fortunately, the growing assessment movement in law school education provides the perfect opportunity for a comprehensive and systematic examination of law student responsibility. In addition, there are a number of compelling reasons for and benefits to embarking on this course.

142. Law School Survey of Student Engagement, *supra* note 140, at 7.

143. Bacon, *supra* note 54, at 199.

II. EVALUATION OF STUDENT RESPONSIBILITY IN LAW SCHOOL ASSESSMENT IS NEEDED AND BENEFICIAL

“Shift in responsibility from educator to student enhances student learning overall.”¹⁴⁴

The increased attention on the student outcomes assessment in postsecondary education was primarily initiated by external forces, namely federal and state governments and national commissions.¹⁴⁵ These entities sought accountability for funds and guarantees that institutions of higher education were providing a quality education, one that prepared students to enter the workforce.¹⁴⁶ Some of these same concerns that gave rise to increased assessment in educational institutions also serve as a basis for closely addressing law students’ input or contributions to their own educational process (as part of the assessment inquiry). For example, a shift in focus or, at least, an evaluation of student input along with teaching strategies would likely inspire more professors to think less about accountability concerns and instead embrace assessment practices. With a balanced approach, faculty would be more likely to commit the time, energy, and resources to conduct studies to improve student learning. Moreover, there are other pedagogical benefits to reviewing and tracking students’ input into their own learning, such as fully completing the assessment cycle, developing students’ metacognition skills, attaining a deeper understanding of law students’ educational experiences, and sufficiently preparing them for the workforce.

A. Get More Faculty on Board with Assessment

By specifically including law student contribution in the assessment inquiry, law schools can reduce any negative perceptions held by law professors about assessment and help them to view assessment as a worthwhile endeavor. When law professors hear the word “assessment,” “there is a natural assumption that it refers to tools for grading

144. Leah Christensen, *The Power of Skills: An Empirical Study of Lawyering Skills Grades as the Strongest Predictor of Law School Success (Or in Other Words, It's Time for Legal Education to Get Serious About Integrating Skills Training Throughout the Law School Curriculum if We Care About How Our Students Learn)*, 83 ST. JOHN'S L. REV. 795, 817 (2010) (arguing for law schools to combine skills and doctrine in every course to maximize student learning and preparedness for the practice of law).

145. SERBRENIA J. SIMS, *STUDENT OUTCOMES ASSESSMENT: A HISTORICAL REVIEW AND GUIDE TO PROGRAM DEVELOPMENT* 4 (1992).

146. *Id.*

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students or evaluating instructors.”¹⁴⁷ It is understandable that law professors associate assessment with an evaluation or critique of their teaching. The history of the assessment movement began with a call for more accountability in the classroom and with instruction.¹⁴⁸ Educators, along with their students’ work output, were the main focus of most assessment efforts. In the early years, assessment methods were even used to determine teachers’ salaries.¹⁴⁹ Furthermore, professors’ views on assessment are understandable because assessment of student learning naturally involves a critique of instruction and feedback for faculty, and “researchers have discovered that teachers at all levels resist [such] feedback[.]”¹⁵⁰ Teachers sometimes view feedback as judgment rather than as an impetus for positive change.¹⁵¹ And, the reasons for faculty resistance to feedback vary. As one author explained, they include a “fear of being less qualified than their colleagues, . . . a belief that teaching is too complex to evaluate . . . [and] that no perfect system exists to evaluating teaching, and the suspicion that evaluation doesn’t lead to improvement[.]” just to name a few.¹⁵²

As with the response to feedback, faculty resistance to assessment is common¹⁵³ and such resistance “can be, and has been the de-

147. Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 CLINICAL L. REV. 335, 335 (2010).

148. See Terenzini, *supra* note 7, at 654 (“The dominant theme in the chorus of demands for ‘accountability’ through assessment is the need to demonstrate that college and university attendance makes a difference, that students leave colleges and universities with knowledge, skills, attitudes, and values they did not have when they arrived.”).

149. George F. Madaus et al., *Program Evaluation: A Historical Overview*, in JOAN S. STARK & ALICE THOMAS, ASSESSMENT PROGRAM EVALUATION 23, 23-24 (1994). See generally R. Lance Hogan, *The Historical Development of Program Evaluation: Exploring Past and Present*, 2 ONLINE J. WORKFORCE EDUC. & DEV. 4 (Fall 2007), available at <http://wed.siu.edu/Journal/VolII/num4/volIInum4.php#four>.

150. Terri LeClercq, *Principle 4: Good Practice Gives Prompt Feedback*, 49 J. LEGAL EDUC. 418, 426 (1999).

151. *Id.*

152. *Id.*

153. See, e.g., Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269, 274-76 (2010) (“[F]aculty was resistant to and skeptical of assessment, with several members expressing views and concerns commonly articulated within the legal academy.”); see also James Anderson, *An Institutional Commitment to Assessment and Accountability*, in PETER HERNON & ROBERT E. DUGAN, OUTCOMES ASSESSMENT IN HIGHER EDUCATION: VIEWS AND PERSPECTIVES 19 (Libraries Unlimited 2004) (“Too often, faculty are hesitant about moving beyond their own frames of reference to assess higher-order learning outcomes that seem complex, seem unrelated to their work and instructional strategies, and have not been presented in a meaningful language to them.”); Robert Dugan, *Institutional Perspectives*, in HERNON & DUGAN, *supra*, at 238-39 (explaining how faculty may see assessment as a personnel issue or administrative ploy to evaluate their teaching); MARY E. HUBA & JANN E. FREED, LEARNER-CENTERED ASSESSMENT ON COLLEGE CAMPUSES—SHIFTING THE FOCUS FROM TEACHING TO LEARNING 16 (2000) (“[M]any faculty have been reluctant to engage in assessment because . . . assessment [has] been introduced as a requirement by external agencies

mise of assessment programs.”¹⁵⁴ In a recent article, Mary Lynch, the Director of the Center for Excellence in Law Teaching at Albany Law School, examined several concerns that law professors and law school administrators have about using outcomes assessment in legal education.¹⁵⁵ In particular, Lynch explained that some law professors fear that outcomes assessment “will be used to ‘blame individual professors unfairly’ when students do not meet learning objectives.”¹⁵⁶ Other assessment experts have confirmed this view, recognizing that faculty may have a fear they will be negatively evaluated based on assessments of students’ performance.¹⁵⁷ When students do not achieve stated learning outcomes, some professors believe the results could adversely affect their tenure, promotion, or salary decisions.¹⁵⁸

And, when such assessments reveal that students are struggling with the material, law professors and assessment experts may disagree as to the next steps to take. Assessment protocols dictate that the proposed course of action is for professors to “reflect and try new ways to help students learn” by incorporating new teaching strategies

. . . .”); Cecilia L. Lopez, *A Decade of Assessing Student Learning: What We Have Learned, and What Is Next*, in HERNON & DUGAN, *supra*, at 34-41 (describing several factors as to why involvement of faculty in assessment has been challenging); GREGORY S. MUNRO, *OUTCOMES ASSESSMENT FOR LAW SCHOOLS* 155-68 (2000) (discussing several obstacles to law school assessment including lack of faculty motivation and participation); BEST PRACTICES, *supra* note 5, at 36 (“The accountability movement in higher education is likely to force law schools to improve the preparation of students for practice, *whether or not all law teachers want to move in this direction.*”) (emphasis added); Ron M. Aizen, *Four Ways to Better 1L Assessments*, 54 DUKE L.J. 765, 769-72 (listing some barriers to changing the current law school evaluation system to one that incorporates a variety of assessments, such as professors’ lack of time, support and training).

154. Alice M. Thomas, *Consideration of the Resources Needed in an Assessment Program*, in STARK & THOMAS, *supra* note 149, at 233.

155. Lynch, *supra* note 6, at 982 (“Having been involved [in reform efforts] . . . I am fully aware that not everyone is pleased with these reform ideas. I have heard many a criticism, fear, and concern raised in response to them.”); see Katherine Mangan, *Law Schools Resist Proposal to Assess Them Based on what Students Learn*, CHRON. HIGHER EDUC. (Jan. 10, 2010) <http://chronicle.com/article/Law-Schools-Resist-Proposal-to/63494>.

156. Lynch, *supra* note 6, at 995. Lynch also mentioned that, according to these professors, outcomes assessment data could serve inappropriately as another means to evaluate individual faculty for tenure and/or promotion purposes. *Id.*

157. Maryann Jacobi, Alexander Astin, & Frank Ayala, Jr., *Increasing the Usefulness of Outcomes Assessments*, in STARK & THOMAS, *supra* note 149, at 702 (“Resistance from faculty is often cited as a reason that assessments of outcomes are inappropriate for a particular institution.”); Lopez, *supra* note 153, at 37 (“Some faculty fear that the results of assessment, especially those that reveal how many students have not learned what faculty had assumed, will somehow, someday, be used against them professionally.”); Alice M. Thomas, *Consideration of the Resources Needed in an Assessment Program*, in STARK & THOMAS, *supra* note 149, at 233. Thomas also explains that professors believe that classroom outcomes are essentially unmeasurable by anyone but them, fear a loss of individual prerogative and autonomy, and view assessment as busywork. *Id.*

158. Lopez, *supra* note 153, at 37.

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or adapting to different learning styles.¹⁵⁹ Law professors, however, may attribute students' poor performance on assessment measures, at least in part, to students' abilities and level of input and engagement rather than to the professors' teaching or the course curriculum. Michael Hunter Schwartz, a leading law school pedagogy expert, discussed law professors' differing views on why students fail to learn.¹⁶⁰ Schwartz explained that some law professors believe students simply cannot learn what they need to learn to be successful. Under this view, students come to law school "pre-programmed either to succeed or to fail,"¹⁶¹ and, thus, law schools cannot do anything to change their students' trajectory in school.¹⁶² Other law professors, according to Schwartz, think they are already making great strides teaching students as well as they can be taught.¹⁶³ And, still some other law professors claim that students could learn more and better if they worked harder.¹⁶⁴

All of these views admittedly focus on students' contributions or deficiencies and not on the teachers or the educational program.¹⁶⁵ Although a growing number of law faculty have adopted the position that poor student performance is due to inadequate teaching,¹⁶⁶ law professors' varying perceptions about students' limited contributions or lack of responsibility for their learning continue to exist¹⁶⁷ and deserve some attention. And, such faculty concerns over student input are not always based on mere speculation. For instance, two law professors at Thurgood Marshall School of Law committed their expertise, time, and resources to participate in a semester-long program assessment study, from which they concluded that student input was

159. MARY J. ALLEN, *ASSESSING ACADEMIC PROGRAMS IN HIGHER EDUCATION* 13 (2004) ("[Faculty] can use assessment results to make informed decisions about pedagogical or curricular changes, and they can use assessment data as baseline innovations for demonstrating the impact of curricular innovations."); SCHWARTZ, SPARROW, & HESS, *supra* note 28, at 136.

160. Schwartz, *supra* note 14, at 449.

161. *Id.*

162. *Id.*; Lopez, *supra* note 153, at 37-41 ("Some faculty and academic administrators . . . believe that nothing any faculty can do individually or collectively within a department will ever make a real difference in improving students' learning [given that] . . . students are endowed with differing degrees of academic aptitude, motivation and preparation . . . [and that] some will never 'be good students' or learn much.").

163. Schwartz, *supra* note 14, at 449.

164. *Id.* at 450.

165. *Id.* at 450-51.

166. *Id.* at 451.

167. See, e.g., Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201, 215 (1999) ("Many law professors look at a student's failure as evidence of the student's lack of intellectual ability to be an attorney.").

an important factor in student performance.¹⁶⁸ The professors examined students' development of knowledge and skills in their Business Associations course. The professors worked closely with the law school's Office of Assessment to design a comprehensive outcomes assessment plan. They started at the beginning by adopting the same course objectives and learning outcomes and casebook.¹⁶⁹ Although the professors used different course syllabi, they committed to having similar course coverage.¹⁷⁰ They incorporated joint assessment measures into their courses including a multistate performance examination and a common question on the course final examination.¹⁷¹ The assessments revealed several areas of needed improvement such as students' time management and their ability to apply law to facts and communicate their reasoning in an organized manner.¹⁷² The data and their close observations also showed that students in both sections of Business Associations struggled similarly on the assessments and, as such, seemingly implied that the "teaching method itself [wa]s not the most important factor in student performance[.]"¹⁷³ Rather, the professors observed that their students' input largely determined their level of success.¹⁷⁴

Law professors often lament the performance of their students on their coursework and on the bar examination. As Schwartz commented, "[t]alk to enough law professors and you get a sense that many law students do not perform as well as their professors hope the students will perform"¹⁷⁵ I, too, have discussed student performance issues with colleagues, both locally and nationally, who are passionate about teaching and I have heard faculty express dissatisfaction with their students' development over the course of the year. Teaching and curriculum changes may be needed, but a contingency of law professors clearly believe that student input is a factor, whether it is based on their observations or actual assessment studies. And, those who already share this perspective may not readily participate in

168. Marcia Johnson & Emeka Duruigbo, *Advancing Student Learning and Assessment Through Collaboration: One Semester's Results*, Texas Southern University Thurgood Marshall School of Law Teaching Forum (Apr. 2012) (on file with the author).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Schwartz, *supra* note 14, at 449.

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traditional, time-consuming assessment practices when they feel the cause of low student performance lies, at least in part, elsewhere.

“Faculty confidence [in assessment] is enhanced when they perceive an assessment process to be well planned, systematic, and meaningful to their values and work.”¹⁷⁶ Given this understanding, faculty’s documented apprehensions toward and potential resistance to assessment, and their views on why students fail to learn, law schools and law professors should broaden the scope of assessment practices to include not only students’ performance *output* but also students’ *input* into their own learning. Such a move forward and a more balanced approach to assessment would likely foster broad-based faculty buy-in to assessment and, at a minimum, either confirm or disprove faculty perceptions about students’ contributions to their studies.¹⁷⁷ By examining students’ behaviors and attitudes toward learning, more law professors may then see the futility of assessment and may have their fears about its fairness in practice and application alleviated.

B. Complete the Assessment Cycle

In addition to increasing faculty involvement in assessment, considering student input on any assessment measure is a natural component of an assessment cycle. As part of an assessment plan, professors, administrators, or institutions perform several integral steps: (1) they establish defined and measurable student learning outcomes; (2) they align those outcomes to instructional activities, tasks, and assessment methods; (3) they measure or analyze how well students achieved those outcomes; (4) they interpret the data collected; and finally, (5) they evaluate the impact of the results on the educational process and use the information to improve teaching and stu-

176. Anderson, *supra* note 153, at 20; Dugan, *supra* note 153, at 240 (“[I]t is important to determine what faculty members value in their discipline, teaching, research, and service, and then to relate assessment to those values.”); Fisher, *supra* note 4, at 235 (“Assessment should be used to answer questions in which faculty are interested and to affirm what they value about the law school.”).

177. For example, in response to faculty’s views that students would perform better if they worked harder, Schwartz emphasized that “many of our students study harder than we did when we were law students, and even among those who study unimaginably hard, there are still many who flunk out or fail the bar exam.” Schwartz, *supra* note 14, at 450. A close evaluation of students’ input during the course of their studies and various assessments would provide insight into students’ processes and behaviors, and as *Best Practices* provides, “[i]f a student is [truly] incapable of learning what we are trying to teach, the student should not be allowed to become a lawyer.” *BEST PRACTICES*, *supra* note 5, at 244.

dent learning.¹⁷⁸ The assessment process described is not linear, but rather it “is an ongoing and recursive process.”¹⁷⁹ Professors ideally complete several assessment cycles throughout the term of a course and over the span of their teaching careers, as they introduce new and different teaching strategies to ascertain whether better student learning is achieved.¹⁸⁰ Part of the data that professors, administrators, and institutions collect during these assessment cycles should address what students do as well as what faculty members do.¹⁸¹ The assessment cycle is incomplete without a simultaneous review of student contribution to learning.

Even assessment and learning theory scholars have long recognized the effect that student input has on assessment results and academic pursuits. For example, in discussing college assessment programs, T. Dary Erwin and Steven Wise indicated that “[w]hen no personal consequences are associated with test performance, many students are not motivated and consequently give less than full effort to the test.”¹⁸² Under such circumstances, a review of student performance on an assessment measure or test would not accurately reveal students’ actual competency levels. The data collected should be both accurate and complete to inform decisions about teaching and curriculum.

Student input also clearly affects law school academics. In examining law students’ behaviors, one study noted that “in addition to basic intelligence and aptitude for the study of law, surely the study habits a student develops relate in some way to her or his performance in law school.”¹⁸³ Thus, it only makes sense to ascertain, review, and consider students’ contributions and efforts as law professors and

178. CATHERINE M. MILLETT ET AL., A CULTURE OF EVIDENCE: AN EVIDENCE-CENTERED APPROACH TO ACCOUNTABILITY FOR STUDENT LEARNING OUTCOMES 10 (2008) (outlining seven steps in creating an evidence-based accountability system) available at http://www.ets.org/Media/Education_Topics/pdf/COEIII_report.pdf; SCHWARTZ, SPARROW, & HESS, *supra* note 28, at 136 (providing a four-step assessment cycle); see ALLEN, *supra* note 159, at 10 (identifying six basic steps underlining the assessment of student learning).

179. SCHWARTZ, SPARROW, & HESS, *supra* note 28, at 136.

180. *Id.*; PEGGY L. MAKI, ASSESSING FOR LEARNING: BUILDING A SUSTAINABLE COMMITMENT ACROSS THE INSTITUTION 5 (2004) (noting that the assessment cycle should be repeated after one has implemented changes or innovations).

181. See ARUM & ROKSA, *supra* note 99, at 117 (recognizing that both students and faculty have a role in impacting student learning in higher education).

182. T. Dary Erwin & Steven Wise, *A Scholar-Practitioner Model for Assessment*, in TRUDY W. BANTA ET AL., BUILDING A SCHOLARSHIP OF ASSESSMENT 70 (2002) (calling for further research on solutions to the motivation problem). As explained by Erwin and Wise, “[s]tudent motivation is a serious threat to validity in a number of testing contexts.” *Id.* at 71.

183. Ogloff, *supra* note 117, at 100.

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administrators make significant decisions about their legal education based on assessment data.

“Learning is a complex process—and thus, not surprisingly, myriad factors shape what and how much students learn in higher education.”¹⁸⁴ These factors include, but are not limited to, both professor and student input. *Best Practices for Legal Education* emphasizes that law faculty must ensure their teaching is both effective and successful while also the report acknowledges that, if a student is capable of learning but fails to do so, faculty may want to inquire about their students’ input as well as their own effort.¹⁸⁵ This dual inquiry is both logical and necessary given the basic steps underlying the assessment of student learning and the ultimate purpose of advancing student learning. And, information about student input helps to “present a fair picture of the context for student learning” in an institution.¹⁸⁶

Many law students may not yet possess the skills needed to organize and budget their time wisely, successfully avoid traps of procrastination, or sufficiently process a problem-solving assignment, and, at times, some students simply may lack the time, drive, or commitment to perform fully. Whatever the reason or effect on their input,¹⁸⁷ if law students do not commit to their learning and the assessment process or give their best efforts, “their test performances are likely to be affected adversely” and the professors are “unlikely to ascertain the true proficiency levels of the students.”¹⁸⁸

Law professors and administrators need to know what students did to perform and succeed academically, whether they encountered any challenges or whether they found ideal settings for their performance. Such information could inform decisions about law school curriculum, teaching methods, and even academic support interventions and programming. As Barbara Walvoord, an assessment expert, ex-

184. ARUM & ROKSA, *supra* note 99, at 117; BARBARA E. WALVOORD, ASSESSMENT CLEAR AND SIMPLE: A PRACTICAL GUIDE FOR INSTITUTIONS, DEPARTMENTS, AND GENERAL EDUCATION 9-10 (2004) (recognizing that student learning is affected by faculty, department, and institutional decisions and by factors beyond faculty control such as students’ reasons for pursuing higher education and the literary practices in their homes).

185. BEST PRACTICES, *supra* note 5, at 244 (suggesting that faculty ask, in particular, whether a student’s lack of competency is the fault of the student’s or the faculty’s).

186. WALVOORD, *supra* note 184, at 10 (noting that institutions may choose to collect information about those factors on learning beyond faculty’s control in order to present a fair picture of student learning).

187. See Barbara Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89, 106-08 (2003) (discussing student preparedness and engagement and possible reasons for lack thereof).

188. Erwin & Wise, *supra* note 182, at 70.

plained: “Assessment means basing decisions about curriculum, pedagogy, staffing, advising, and student support upon the best possible data about student learning and the factors that affect it.”¹⁸⁹ Thus, an examination of students’ input into their own learning as part of the assessment cycle is critical to obtaining complete results, recommending actions to improve student learning, and identifying the next steps for law professors and law schools to pursue in a methodical and comprehensive manner.

C. Minimize Assumptions and Develop Students’ Metacognitive Skills

Considering student responsibility in assessment also helps law professors avoid making assumptions and promotes the development of students’ metacognitive skills. “Assumptions are dangerous in higher education[,]”¹⁹⁰ and by addressing student responsibility, law professors and law schools show they are not making assumptions about the experiences, habits, and abilities law students bring with them to law schools or the challenges they may be facing. Sophie Sparrow, a law professor and an assessment scholar, recounted an incident where she fortunately first asked a student about his low level of effort rather than jumping to conclusions.¹⁹¹ She remarked that, upon talking to the student, she learned that many pressing demands (his family’s recent move across country and attempts to sell their old home and find a place to rent) prevented him from devoting sufficient time to his studies.¹⁹² Sparrow was glad that she had not made any assumptions about his lack of input.¹⁹³ It is dangerous for law professors to simply assume, without any evidence, that a student has shirked his or her responsibilities and did not complete assigned readings or put in enough hard work into a project. “[M]any of our students study harder than we did when we were law students and, even among those who study unimaginably hard,” there are still many who fail to succeed academically and professionally.¹⁹⁴ By specifically documenting or asking students about their input or progress on assigned tasks, law professors avoid making assumptions about students’ effort

189. WALVOORD, *supra* note 184, at 2.

190. Hassel & Lourey, *supra* note 93, at 6.

191. SCHWARTZ, SPARROW, & HESS, *supra* note 28, at 27.

192. *Id.*

193. *Id.*

194. Schwartz, *supra* note 14, at 450.

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or drive and can use the information obtained to make informed decisions about teaching, the curriculum, and even the course schedule.

In addition, tracking student behavior enables law professors to identify which teaching and learning styles resonate with a particular student or class.¹⁹⁵ Instead of assuming that lecture-style teaching is suitable and productive for every student, law professors can closely examine students' responsiveness to different assignments and teaching techniques. On which assignments or activities did students freely dedicate the most time? When did students seem to lose their momentum? When instructed to read several cases for class, did students commit the time to complete the assignment? Or, did students put in more effort when they were required to not only read the assigned cases but also apply the relevant legal principles to a client hypothetical and present their analysis to the class? Did any particular teaching or learning activity result in students assuming more responsibility?

For example, as part of the Faculty Inquiry Group at Thomas M. Cooley School of Law, Derek Witte, a Contracts professor, studied whether students in his class would be more engaged and take more responsibility for their learning if he required them to summarize key points from each class lecture and present the summary in the next class.¹⁹⁶ In the end, Witte concluded that this teaching technique improved students' level of engagement but did not impact the amount of responsibility students assumed for their learning.¹⁹⁷ As part of the same inquiry group, however, Joni Larson, a Tax and Business Organizations professor, received positive results and feedback from incorporating cooperative learning activities into her courses.¹⁹⁸ Such intentional assessments of student input and response to specific teaching strategies shed light on the learning style traits of law students and enable law professors to reach more students effectively.¹⁹⁹

Furthermore, examining student behavior and input on assessment measures encourages students to engage in metacognition. Metacognition, the practice of becoming aware about how one thinks

195. See Boyle & Dunn, *supra* note 37, at 213 (encouraging law professors to assess their students and diagnose their learning styles so that professors' instruction can respond to the various clusters of learning styles in their classes).

196. Krause-Phelan et al., *supra* note 36, at 286.

197. *Id.* at 288.

198. *Id.* at 283-86.

199. Researchers suggest that "professors who help law students understand their own learning styles and how to maximize their strengths will help students become better prepared for law practice." Ingham & Boyle, *supra* note 115, at 286; see Richmond, *supra* note 107, at 944 ("[L]aw professors should develop an awareness of their students' learning habits.").

and learns,²⁰⁰ is a fairly new concept to law schools. Teaching metacognitive ability helps students perform at a higher level and transition the skills they acquire in law school into their careers.²⁰¹ Many law students, as adult learners, bring wide-ranging experiences and skills with them to law school, and, for law professors, “understanding what experiences, biases, habits, and learning preferences each person brings” is the first step in developing students’ metacognitive skills.²⁰² Close tracking of students’ contributions to their learning aids in this endeavor. As students record their time, preparation, and input on assignments and assessments, they will routinely reflect on their practices and engagement, identify what works for them, and begin to take control of their learning and become self-regulated learners. Also, with regular focus on and review of student input, students can learn which past experiences or abilities they brought to law school that will increase their chances for academic success and which may hinder their progress.²⁰³ Essentially, the goal of any project to improve student responsibility for learning is not merely that students learn “but that they learn how to learn.”²⁰⁴

By collecting data on student input, law professors and institutions show they care about students’ development academically and professionally and emphasize the need for students to be self-regulated, motivated, and independent thinkers.

D. Attain Deeper Understanding of Student Learning Experience

In addition to developing students’ metacognitive skills, focusing on students’ input into their own learning allows law professors to learn more about their students’ experiences in law school and to identify ways in which professors can foster a supportive learning environment. Experts explain that law students encounter many challenges in law school, many of which may affect, and even hinder, their learning. For example, one author described the profound psychologi-

200. Deborah Zalesne & David Nadvorney, *Why Don't They Get It?: Academic Intelligence and the Under-Prepared Students as "Other,"* 61 J. LEGAL EDUC. 264, 268 (2011); Boyle & Dunn, *supra* note 37, at 220.

201. Kristina L. Niedringhaus, *Teaching Better Research Skills by Teaching Metacognitive Ability*, 18 PERSP.: TEACHING LEGAL RES. & WRITING, Winter/Spring 2010, at 113 (2010).

202. Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33, 57 (2006).

203. *Id.*; see also Joni Larson, *The Intersection of Andragogy and Distance Education: Handing over the Reins of Learning to Better Prepare Students for the Practice of Law*, 9 T.M. COOLEY J. PRAC. & CLINICAL L. 117, 134 (2007) (“Law school is vastly different from undergraduate.”).

204. Krause-Phelan et al., *supra* note 36, at 297.

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cal and academic effects that isolation produces in law students.²⁰⁵ Some isolated students continue to use learning strategies that assisted them in undergraduate school but have not helped them move forward in law school.²⁰⁶ They also do not have appropriate access to close-knit study groups and other important law school survival skills and information.²⁰⁷ During one faculty-student conference, in particular, I spoke with a student about her less-than-stellar performance on a writing assignment and learned that she took minimal advantage of in-class group discussions of the assignment and never worked with her classmates outside of class. She explained that she had a hard time forging relationships with her classmates and had not been invited to participate in any study groups. After discussing how she felt isolated from her classmates, I identified another student in the class with whom I believed she could make a connection. The next week, these two students met to discuss the assignments. With such periodic evaluation of students' study habits and contributions to their learning as part of an assessment plan, law professors could intervene and counteract the problems of isolation.

In addition, a consistent review of information about law students' input would provide insights into how students plan, allocate, and use their time. Law professors may be able to identify those students who procrastinate to their detriment, suffer from writer's block, or simply feel overwhelmed by the curriculum. Enquist found in her study of legal writing students that the "least successful student procrastinated when it came to doing the research"²⁰⁸ And this student fell even further behind when it came to her writing schedule.²⁰⁹ The student mistakenly believed that "she worked best when the deadline was breathing down her neck."²¹⁰ Also, in a recent survey conducted about a self-assessment and billing exercise used in my first-year legal writing course at Thurgood Marshall School of Law, one student reported that the exercise confirmed what he already knew—that he would "wait until the last minute" to complete the assignment.²¹¹ He also admitted that he "wasted a lot of time."²¹²

205. Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 678 (1994).

206. *Id.*

207. *Id.*

208. Enquist, *supra* note 43, at 672.

209. *Id.*

210. *Id.*

211. This informal survey was completed by a section of Thurgood Marshall School of Law's Lawyering Process class, the first-year legal writing course, on April 20, 2012 (on file with *How-*

Other students who participated in the same survey acknowledged that they back-loaded the work and waited until the deadline approached to get started.²¹³ And yet another student commented that it was difficult to assess the time she committed to the assignment because she suffered from a serious case of writer's block.²¹⁴ Such procrastination, lack of effective time management, and writing challenges could account for law students' less-than-stellar performance on assessment measures and other projects and should be documented by law professors.

Furthermore, routine inspection of law student input would provide law professors with information on the activities in which students are involved and their workload and, in turn, would give professors an opportunity to re-direct students' progress and, hopefully, reduce their stress. "Many students face situational stressors/demands such as personal problems, social activities, and work from other courses[,]” which can negatively impact students' study time.²¹⁵ One legal writing professor explained that students often face difficult choices when it comes to their studies. For example, “[s]ometimes [students] . . . ignore their legal writing to spend time with their kids, or because they are a month behind in contracts, or because they have to wait tables at night to pay the bills.”²¹⁶ Law professors are usually unaware of these challenges unless they ask their students directly or perhaps receive excuses or explanations from students for their non-performance. A willingness to ask students questions that may be somewhat uncomfortable for them (such as, what are you doing with your time?) and having the penchant to listen to the answers could provide law professors with a deeper understanding of the student experience. Notably, law students reportedly experience more anxiety than the general population.²¹⁷ One report even suggested that a sig-

ard Law Journal) [hereinafter “Thurgood Marshall Client Billing Survey”]. Students completed the survey anonymously. The Thurgood Marshall Client Billing Survey solicited narrative comments from the students and included questions that asked for the students' thoughts about the client billing exercise and their level of preparedness for class. This survey, while small and unscientific, provides some insights on law student behavior. All survey forms are on file with the *Howard Law Journal*.

212. *Id.*

213. *Id.*

214. *Id.*

215. DeRoma et al., *supra* note 8, at 42.

216. Mary Dunnewold, *Establishing and Maintaining Good Working Relationships with 1L Writing Students*, 8 PERSP.: TEACHING LEGAL RES. & WRITING, Fall 1999, at 4, 7.

217. Susan Daicoff, *Articles Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1375 (1997); Stephen B.

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nificant increase in law school assessment could potentially disadvantage students who are already struggling to manage their workload.²¹⁸ This unintentional consequence of over-assessment could be readily revealed to law professors if they simply inquired about their students' preparedness for assessments. Perhaps, changes to the curriculum and assignment due dates through a school-wide agreed upon schedule for assessments would greatly benefit student learning.²¹⁹

At other times, the issue with student performance may not be poor time management or an over-loaded schedule but rather the absence of sufficient and consistent preparation.²²⁰ One study of third-year law students taken during the last few weeks of class revealed the lack of time third-year students devote to their studies, arguably due to lack of engagement.²²¹ In particular, the authors found that at many law schools third-year students attended only about 60% of their large classes.²²² And, almost two-thirds of the third-year students reported studying less than twenty hours per week (as compared to approximately 11% of first-year law students).²²³ This lack of study time directly corresponded to their lack of preparedness for class.²²⁴ Most third-year students surveyed reported completing much less reading than their first year counterparts.²²⁵ Although research may attribute these figures to third-year students' lack of engagement,²²⁶ such detailed information is still critical to law professors' analysis of collected assessment data from the third-year students. Whether in a doctrinal or skills class, law professors need to know the effort level of their students to ascertain the next steps to take in the assessment

Shanfield & G. Andrew H. Benjamin, *Psychiatric Distress in Law Schools*, 35 J. LEGAL EDUC. 65, 69-73 (1985) (concluding that the distress experienced by law students was much greater than that suffered by medical school students for a variety of reasons such as competition among law students, large class sizes, and students' uncertainties about their career paths); see Ogloff, *supra* note 117, at 121-27.

218. Zimmerman, *supra* note 7, at 67.

219. *Id.* at 67 ("It is one thing to have multiple assignments in a single course; it is quite another thing to have multiple assignments in a number of courses simultaneously.")

220. Dunnewold, *supra* note 216, at 7 (recognizing that some students may not put much effort into the course).

221. Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 244, 246 (2001) (highlighting the engagement problem in the third year of law school and challenging the efficiency of, and value added by, that third year); Wegner, *supra* note 1, at 983 (discussing the study of third-year law students).

222. Gulati et al., *supra* note 221, at 244; Wegner, *supra* note 1, at 983.

223. Gulati et al., *supra* note 221, at 244; Wegner, *supra* note 1, at 983.

224. Gulati et al., *supra* note 221, at 245; Wegner, *supra* note 1, at 983.

225. Gulati et al., *supra* note 221, at 245; Wegner, *supra* note 1, at 983.

226. Gulati et al., *supra* note 221, at 246-47.

cycle, which could be curriculum reform, a change in teaching strategies, or the addition of motivational exercises for students.

Then, there may be law students who apparently use their time wisely and exhibit a good balance between spending time on reading assignments, reviewing class notes, and studying the material, but for some reason do not show the expected level of competency on key skills targeted by assessments. These students could be “under-prepared” students, as termed by experts.²²⁷ Although under-prepared students do the work, their performance on exams “indicate[s] that in some profound way . . . [they] cannot put the material together to understand what the law is and how it works.”²²⁸ These particular students cannot see the overall connections between the materials and have trouble synthesizing information.²²⁹ Thus, with under-prepared students, the concern is not necessarily about the amount of effort the students put forth in doing the work (they attend class and listen, take notes, stay up late, and read assignments), but rather about their legal reasoning and synthesis skills.²³⁰ In these cases, by closely investigating the students’ contributions toward their own learning, law professors would have the information needed to purposefully target students’ meta-cognition and academic intelligence.²³¹ With the data collected, law professors then would know they should devote more time on bridging the gap between some students’ readiness and the goals of the course²³² and possibly give less attention to student participation matters. Law professors would know what they are truly dealing with in the classroom and have much needed information to devise a course of improvement.

“Educational research demonstrates that students who take control of their learning and plan effectively are more successful learners than those who do not.”²³³ By examining law students’ role and contributions to assessment efforts on a regular basis, law professors and law schools will learn more about law students’ educational exper-

227. Zalesne & Nadvorney, *supra* note 200, at 267.

228. *Id.*

229. *Id.*

230. *Id.*

231. *See id.* at 265-70 (discussing academic intelligence and how meta-cognition can be the manner through which students develop the ability to adapt effectively to the legal pedagogy).

232. *Id.* at 265; Paul Bateman, *Toward Diversity in Teaching Methods in Law Schools: Five Suggestions from the Back Row*, 17 QUINNIPIAC L. REV. 397, 413 (1997) (“Effective teaching should include guiding students about the best way of studying the material.”).

233. Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 308 (2007).

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iences and can intervene to promote better student learning and engagement. This approach is consistent with the humanizing legal education movement which advocates the practice of teaching students, not subjects.²³⁴ Law students may experience a myriad of challenges during law school. Asking students about the process they took to prepare for class and complete assignments and other tasks gives law professors an opportunity to intervene when needed to help build students' study habits and time management skills, to reengage students, to direct them to academic support services, or to change teaching and assessment practices.

E. Better Prepare Practice-Ready Graduates for Current Economy and Workforce

Lastly, just as changes in the economy and workforce gave rise to increased attention on assessment in higher education,²³⁵ the recent recession in the United States and its effects on the job market serve as added incentives for legal educators to rethink traditional assessment approaches and carefully consider the student component.²³⁶ “[T]he recession is causing legal employers to put a premium on job candidates with practical skills—those on whom they will not have to spend time and money before they are ready to practice.”²³⁷ Thus, the legal job market now, more than ever, places emphasis on law school graduates who can practice law right away.²³⁸ As such, “gradu-

234. Louis N. Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing the Law School*, 5 CHARLESTON L. REV. 269, 290-93 (2011) (explaining Professor Barbara Glesner Fines's definition of humanizing legal education, which promotes a student-centered educational model); see Lynch, *supra* note 6, at 1005 (“Assessment can also assure that students from diverse backgrounds are learning in the most effective ways.”).

235. MUNRO, *supra* note 153, at 21-29; SIMS, *supra* note 145, at 13-19 (providing a detailed account of outcomes assessment efforts in the United States, federal and state initiatives, and influences by the accrediting agencies); F. King Alexander, *The Changing Face of Accountability: Monitoring and Assessing Institutional Performance in Higher Education*, 71 J. HIGHER EDUC. 411, 412 (2000) (“[Referencing the former U.S. Secretary of Education:] education, and increasingly higher education, has become an essential component of national economic investment strategy . . . [and] increasing educational investment to produce a highly educated and skilled workforce is a vital element for future economic growth.”).

236. See Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 623 (2010) (stating that recent economic conditions will likely fuel reexamination of current legal education).

237. Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 39 J. LEGAL EDUC. 598, 599 (2010); Wegner, *supra* note 236, at 623 (“The legal job market has been worse than difficult in the last year.”).

238. Thies, *supra* note 237, at 608.

ates with practical training will be best situated to succeed in the emerging job market.”²³⁹

Legal employers still review applications and resumes for traditional markers of success, such as strong academic credentials and law review and moot court experience, but also now look for acquisition of certain “softer” practice skills like teamwork and interpersonal skills and the ability to be a self-starter.²⁴⁰ In turn, law school practical training must encompass more than knowledge of the law and writing and trial skills.²⁴¹ Practical training must extend to the development of students’ emotional intelligence, professionalism, and sense of accountability and ownership,²⁴² just to name a few. One legal professional noted that “clients are . . . forcing us to justify the value of our first years, so we’ve got to make sure they become economically viable faster . . . and also . . . make clear to the students coming in that they own their own careers and they *have to take responsibility*.”²⁴³ And, another legal professional remarked that employers want the

239. *Id.* at 599.

240. *Industry Leaders Discuss the Future of Lawyer Hiring, Development, and Advancement*, Roundtable on the Future of Lawyer Hiring, Development, and Advancement, National Association of Legal Professionals (NALP) and the NALP Foundation (June 30, 2009) (comments by Carol Sprague, Director of Associate/Alumni Relations and Attorney Recruiting for Skadden and the President-Elect of NALP), available at <http://www.nalp.org/june24futureoflawyerhiringroundtable>.

241. Katy Montgomery & Neda Khatamee, *What Law Firms Want in New Recruits*, N.Y. L. J. (May 28, 2009), available at <http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202431018433> (on file with author) (explaining how legal employers look for “soft” skills in new recruits); see Foxhoven, *supra* note 147, at 336 (“Law schools cannot assume that just because a student has completed the requirements for a degree, the student possesses the requisite skills, values, and knowledge necessary to effectively transition to the practice of law.”).

242. *Future Holds More Student & Lawyer PD, Not Less: Emphasis Will Be on Practical Training, Business Skills*, Future of Lawyer Hiring, Development, and Advancement, National Association of Legal Professionals (NALP) and the NALP Foundation, NALP Bulletin (Sept. 2009) (statements made by Frederick Krebs, President of the Association of Corporate Counsel, and Michael Fitts, Dean of the University of Pennsylvania Law School), available at <http://www.nalp.org/june24futureoflawyerhiringroundtable>; James Levy, *Making Students Practice-Ready Is Not About Verisimilitude*, L. TCHR. (Newsl. of the Inst. for L. Teaching and Learning) 24, 25 (Fall 2011) (“Preparing students for practice is not about verisimilitude. It’s a much more difficult and nuanced task than that. It requires a careful melding of methodologies informed by the intellectual goals we have for our students along with those that model practical skills they’ll need as lawyers.”); see Tom Hentoff, *The Secrets of Superstar Associates*, LITIG., Spring 2006, at 24, 26; Desiree Moore, *Top 5 of a Superstar Associate*, NAT’L JURIST, Mar. 2012, at 30 (explaining how successful associates take ownership over projects and their careers by assuming initiative and anticipating the needs of supervisors and clients).

243. *Industry Leaders Discuss the Future of Lawyer Hiring, Development, and Advancement*, Roundtable on the Future of Lawyer Hiring, Development, and Advancement, National Association of Legal Professionals (NALP) and The NALP Foundation (June 30, 2009) (remarks from Scott Westfahl, Director of Professional Development for Goodwin Procter), available at <http://www.nalp.org/june24futureoflawyerhiringroundtable>.

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“scrappiness, common sense, and *drive*”²⁴⁴ that make a lawyer successful.

Law professors and law schools can work to ensure that their graduates are ready to “hit the ground running” not only by teaching students substantive law and certain technical aspects of practice but also by focusing on their students’ contributions to the learning process, thereby making self-assessment, self-learning, responsibility, and ownership second nature to all law graduates. “Empowered with self-assessments and skills training at the outset of their professional school training, students develop lawyering skills and emotional intelligence capacities that support their professional development later in their careers.”²⁴⁵

III. HOW TO DOCUMENT STUDENT RESPONSIBILITY

“[F]ully understanding students’ conceptions of responsibility requires research from an insider perspective, wherein students are able to describe exactly what their experiences in school and sense of responsibility are like.”²⁴⁶

Assessment plans and data provide teachers and institutions with needed information about their educational practices to improve student learning. Assessment programs also provide a means for students to learn about their own progress over time.²⁴⁷ Peggy L. Maki, a leading assessment scholar, has labeled this aspect of assessment the “second tier of assessment—a tier that holds students accountable for their own learning.”²⁴⁸ However, in order for students to take such responsibility for their learning, law schools and professors must first develop and publish their learning outcomes and share these out-

244. *How Much Change Will the Recession Bring to Recruiting*, Roundtable on the Future of Lawyer Hiring, Development, and Advancement, NALP Bulletin (Aug. 2009) (statements by Carol Sprague, Director of Associate/Alumni Relations and Attorney Recruiting at Skadden Arps law firm), available at <http://www.nalp.org/june24futureoflawyerhiringroundtable>.

245. Faith River James, *Engaging Law Students in Leadership*, 30 ST. LOUIS U. PUB. L. REV. 409, 412 (2011) (proposing the Assessment, Challenge, and Support Leadership Model in law school education); Krause-Phelan et al., *supra* note 36, at 297.

246. Bacon, *supra* note 54, at 199.

247. MAKI, *supra* note 180, at 68.

248. *Id.*

comes with their students.²⁴⁹ “[S]tudents need to know what we expect them to demonstrate along their continuum of learning.”²⁵⁰

So, to document and review student contribution to learning and assessment effectively, the initial step is for law professors to identify specific student learning outcomes in their course syllabi that establish clear goals for student behavior. That way, professors can ensure that the teaching strategies and assessment practices incorporated into their course are congruent and aligned with their stated goals. For example, law professors could provide that, by the end of the course, students will be able to take initiative for and ownership over course assignments and activities. Or, law professors could include in their list of learning outcomes that students will be able to regulate their own learning and preparation for class and assessment activities.²⁵¹

After identifying defined learning outcomes for law students’ responsibility for their learning, law professors can implement measures for tracking student input and progress over time. Such methodologies also serve as a means for assessing student responsibility. Law professors and administrators can adopt the methods of measurement used in prior educational studies of student responsibility such as in the Bacon Study, the Krohn Study, the Hassel Study, and the CLA Study. They can employ advanced quantification measures used by other institutions, such as the student responsibility quotient from the SRQ Study, or use more readily accessible methods to ascertain student input, such as surveys, interviews and focus groups, journals, attendance records, faculty logs, and simulated client billing exercises. These latter methods are likely less costly and time-consuming than developing a multi-year study of student responsibility using the performance formula designed by James for the SRQ Study. And, collectively, these individual measures will provide insight into various aspects of student behavior and evidence of their responsibility for learning, including their perspectives, attendance, class participation,

249. *Id.*; Fisher, *supra* note 4, at 242 (“Course outcomes should be included on the syllabus to help students track and control their own learning.”).

250. MAKI, *supra* note 180, at 68; Fisher, *supra* note 4, at 243 (“Students would be given a syllabus listing the course outcomes, so all students would know from the start what they were expected to achieve in the course.”); Hassel & Lourey, *supra* note 93, at 6 (“From the outset of the semester, if not sooner, we need to tell students what we want from them and what we intend to give them in return.”).

251. See HUBA & FREED, *supra* note 153, at 113 (addressing the need to identify important, non-trivial aspects of learning such as self-regulation).

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punctuality, completion of assignments and assigned readings, as no single variable could explain student performance on assessments.²⁵²

Surveys are frequently used by researchers and are a simple yet effective way to solicit information from students about their perspectives on responsibility for learning and input.²⁵³ In the Hassel Study, the professors distributed a survey that asked students to identify the item(s) they believed were a student's responsibility and those duties that belonged to an instructor in a course.²⁵⁴ The available items listed for the student responsibility question included tasks such as making an effort, having good study habits, following directions, meeting due dates, and being motivated.²⁵⁵ For the instructor responsibility question, sample items included displaying intellectual curiosity, providing valuable instruction, being enthusiastic and motivated, teaching relevant material, being consistent in grading, and offering extra credit.²⁵⁶ Law professors could design similar surveys for their classes, tailoring the surveys to the various aspects of law school learning and teaching, or instead use more open-ended questions to collect student feedback on responsible learning.

As an example, I prepared a survey for my course that asks students the following open-ended questions about responsibility for learning: (1) What is your professor's role in or responsibility for your legal education? What do you believe your professor's contribution should be? What steps should he/she take? (2) What is the student's role (or your role) in his/her education? What do you believe the student's contribution should be? (3) Is "motivation" the professor's duty or the student's responsibility? Students' responses to these questions can be quite enlightening, and when distributed at the start of a course, can serve as a helpful baseline for identifying any growth or change in students' perspectives over the course of the year. The questions discussed in this section are provided in the survey in Appendix A.²⁵⁷

252. See James, *supra* note 75, at 6-7.

253. See, e.g., James, *supra* note 75, at 8-9; Peterson & Einarson, *supra* note 15, at 613 (noting the various methods to collect assessment data including surveys); Krause-Phelan et al., *supra* note 36, at 287-88 (discussing use of anonymous survey questions to measure the level of responsibility that students took as regards to their own learning).

254. Hassel & Lourey, *supra* note 93, at 10-11.

255. *Id.* at 10.

256. *Id.* at 11.

257. See also Hess, *supra* note 8, at 416 (suggesting that professors distribute surveys to students before the start of class asking them to respond to a series of questions such as what role and responsibilities do they have to help achieve the goals of the course).

In addition to students' perspectives on responsibility, surveys or questionnaires can gather data about student attendance and contribution on assignments and assessments. Research has shown that students' level of accountability and academic performance can be measured by their presence in class on a regular basis.²⁵⁸ For instance, in the Hassel Study, the professors specifically asked students to identify the number of class days they missed.²⁵⁹ And, the SRQ Study found that students' attendance and punctuality were among the key predictors of academic performance.²⁶⁰ Whether or not a law professor has a formal attendance policy in place,²⁶¹ the professor can still document both students' attendance and punctuality to gauge their effort level in the course and on assessment measures.

Moreover, law professors can use surveys to inquire about students' preparation for class and work on assignments. My class survey on student responsibility, provided in Appendix A, includes several questions that address students' process. The survey requests that students provide a percentage from zero to 100 that represents how often they were prepared for class and reviewed relevant materials before class. In the past, students' responses have been as low as 50% for routine class preparedness and 5% for regular class review and as high as 100% and 95%, respectively.²⁶² The questionnaire also asks students when they began to work on writing assignments—immediately, within a few days or a week, more than one week later, a few days before the due date, or the weekend before the due date. Previous completed surveys revealed that, although most students began writing projects within a few days of them being assigned, a few students started the assignment much later, and even close to the due date. The information collected provided me with a more thorough understanding of student input on various assessment projects completed during the course and a better perspective on how to target discrete

258. Bateman, *supra* note 232, at 398 (“At law school the correlation between class attendance and class standing at the end of the first year is high.”); Day, *supra* note 53, at 340 (“If schools hold to attendance requirements and strive to make classes professionally sound, schools will likely help students pass the bar.”); Hassel & Lourey, *supra* note 93, at 4-5; *see* James, *supra* note 75, at 6, 22 (“For example, many researchers have shown that attendance has a positive effect on student’s performance in economics.”).

259. Hassel & Lourey, *supra* note 93, at 11.

260. James, *supra* note 75, at 22.

261. *See* Hassel & Lourey, *supra* note 93, at 5 (addressing the debate on compulsory attendance policies); Toben, *supra* note 14, at 227-28 (noting that failure to enforce an attendance policy sends the message that learning does not require any engagement).

262. The student responsibility survey was completed by a section of Thurgood Marshall School of Law’s Lawyering Process class during the 2011-2012 academic year.

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skills and improve student behavior, process, and motivation to promote learning and performance.

In addition to surveys or questionnaires, law professors can use student interviews to learn more about student input on particular assessment measures.²⁶³ Legal writing faculty routinely meet with their students about their progress and performance on assignments, and as such, they are uniquely positioned to inquire specifically about their students' perspectives and to gauge the amount of effort their students contribute on assignments and assessments.²⁶⁴ Like legal writing faculty, doctrinal professors can meet with their students throughout the course and can broaden any discussions to include not only the substance of the student's work but also the process the student undertook. Law professors can transform the student conference into an opportunity for process assessment²⁶⁵ and engage the student in a dialogue about their responsibility for, and contribution to, learning. If law professors do not have enough time for individual interviews, they can arrange student focus groups or group discussions to get a general impression about the class's effort level and the steps utilized by them.²⁶⁶ For meetings at the start of the course, law professors can begin the group session with the following question: Who do you believe is responsible for your achievement of course learning outcomes?²⁶⁷

Also, law professors can invite students to participate in journaling exercises where students reflect on their progress and academic performance and record their time spent on course activities.²⁶⁸ Professors can pose weekly questions for students to answer, ones that require students to think critically about their role in, and responsibil-

263. Bacon, *supra* note 54 (explaining how he used a nonstandardized interview format, in which students could help shape the interview format, to glean students perspectives on responsibility for learning).

264. Boyle & Dunn, *supra* note 37, at 221 (noting that legal writing courses and related conferences allow faculty to work with students' individual strengths).

265. Cassandra L. Hill & Katherine T. Vukadin, *Now I See: Redefining the Post-Grade Student Conference as Process and Substance Assessment*, 54 *How. L.J.* 1 (2010).

266. Elizabeth R. Peterson et al., *Who Is To Blame? Students, Teachers and Parents Views on Who Is Responsible for Students Achievement*, 86 *RES. EDUC.* 1 (Nov. 2011), available at <http://connection.ebscohost.com/c/articles/70101062/who-blame-students-teachers-parents-views-who-responsible-student-achievement> (opting to use focus groups over questionnaires to examine the degree of responsibility each group, students, parents, and teachers, took for learning outcomes to enable participants to freely identify responsible actors without being constrained by a forced choice format).

267. *Id.* at 5.

268. Niedringhaus, *supra* note 201, at 116 (encouraging journaling as a way for students to reflect on their learning process).

ity for, learning. Or, professors can encourage students to write freely and include descriptions of how they used their time and prepared for course assessments.

Similar to journal entries, time sheets or client billing exercises provide law professors with another way to record student input on assessment activities²⁶⁹ while simultaneously building students' sense of professional responsibility. I regularly use a client billing exercise to track students' use of time and their process on major assessment projects. After the writing assessment is assigned, students submit a weekly chart that details each task performed for the assignment and the time spent on the activity.²⁷⁰ Even though participation in the exercise is voluntary, almost every student submits a weekly chart. As additional incentive, I award students five bonus points for each submission. The charts I have collected show that students commit substantial time to the assessments but often procrastinate and devote the most hours close to the assignment due date. And, student feedback on the client billing exercise has confirmed this behavior. One student wrote that the exercise revealed how he "would wait until the last minute."²⁷¹ Another student commented that the exercise "more clearly demonstrated that . . . [he] procrastinate[d]."²⁷² The self-reported time sheets also have identified students' productive behaviors and helped to develop a habit of responsibility in students. One student learned that she was most effective on writing assessments when she broke a big project down into smaller segments.²⁷³ She also explained that the exercise forced her to work on the assignment a little each week, which benefitted her in the end.²⁷⁴ Similar time sheet exercises have been used in legal writing courses²⁷⁵ and can be easily adapted for use in a doctrinal class to track student input and progress on major assessments.

Although quite beneficial to both law professors and law students, documenting student behavior can be challenging at times.

269. Enquist, *supra* note 43, at 667 (describing the time sheets used in her study on effective habits of legal writing students).

270. Thurgood Marshall School of Law Lawyering Process Client Billing and Self-Assessment Exercise (on file with *Howard Law Journal*).

271. Thurgood Marshall Client Billing Survey Form, *supra* note 211.

272. *Id.*

273. *Id.*

274. *Id.*

275. See Centeno, *supra* note 51, at 24-26 (providing detailed guidance on how to design a time sheet exercise); Enquist, *supra* note 43, at 624 (explaining how students participating in a study logged all the hours they spent on their legal writing course).

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There is always concern over whether students are being honest and accurately recording their activities.²⁷⁶ Short of recording their students' every move, law professors will have to trust that the information provided is truthful and/or they can inquire further as to its accuracy when their students' submitted information is not in harmony with the professor's perceptions of student activity. For instance, a student may provide that he spent four hours researching the law for an assessment but, upon further discussion with the student, the professor may learn that a significant portion of this time was actually spent surfing the internet or talking to classmates in the library. Or, as the student shares his approach with the professor, the professor may instantly realize that the student did in fact work diligently on research during those recorded four hours.

Furthermore, to lessen any inclination for students to pad their hours spent on study or overstate their activities, law professors could maintain the tracking system separate from their grading or critiquing of the assignment.²⁷⁷ Professors could adopt a blind grading or critiquing process for all assessments or even use anonymous surveys. Professors also could hold any individual or group interviews after students have received their grades. In turn, students will have assurances that their grades will not be impacted by their reporting. Lastly, another way for professors to encourage their students to be candid and provide an honest self-assessment is for the professor to emphasize the learning objectives related to student responsibility and their connection to law school success and law practice.²⁷⁸ I often tell my students "Help me to help you be successful." This refrain seems to resonate with students and, in turn, they are more willing to share what they perceive as weaknesses or failures in order to receive guidance and feedback and become better learners.

In addition to students' subjective records of their input, law professors' perceptions of student behaviors are important to the evaluation of student input. As part of the Faculty Inquiry Group at Thomas M. Cooley Law School, Nelson P. Miller, a dean and law pro-

276. David Dunning, *Not Knowing Thyself*, CHRON. HIGHER EDUC., May 5, 2006, at B24 (explaining that students are likely to overestimate themselves even when they are trying to provide an accurate evaluation); see Greg Sergienko, *New Modes of Assessment*, 38 SAN DIEGO L. REV. 463, 484 (2001) ("Bias can be minimized by creating incentives for students to provide honest self-assessment. One incentive is made apparent when the instructor explains to students the role of self-assessment in their future careers and the lifelong benefits of doing it.").

277. Sergienko, *supra* note 276, at 484.

278. *See id.* at 484.

fessor, kept a teaching journal to evaluate the effect his learning activities had on student responsibility for learning.²⁷⁹ Even the SRQ Study highlighted the professor's perceptions and records of student activity, which were found to be consistent with the students' reports.²⁸⁰ Professors can observe student participation and readiness (such as whether students have their class materials handy, if there are any signs of reading or note-taking by students, whether students are answering questions in class, etc.) while they lead or facilitate class discussions. Professors then can record their observations regularly, both during and after class.

With relative ease and minimal administration, law professors and administrators can incorporate any of these methods into their course or curriculum to track and evaluate students' input on assessments immediately. Students can complete surveys or questionnaires, participate in interviews and journaling exercises, and complete time sheets. And, "[o]n a practical basis, [such] involvement encourages students to cooperate in the gathering of information, and to provide valid measurements of their performance."²⁸¹ Law professors also can contribute their observations of student behavior to track student input on assessment. Further, as law faculty begin to formally discuss students' contributions to their learning, they will likely identify other effective methodologies for documenting student responsibility in their schools. Through a more comprehensive and systematic review of student responsibility, similar to the research conducted by other institutions, law professors and law schools will obtain data that may fully explain student performance and enable law professors and law schools to specifically and intentionally target needed areas of improvement (whether teaching strategies, student motivation, or study habits) to better student learning and achieve stated learning outcomes.

IV. ENCOURAGING STUDENT RESPONSIBILITY FOR LEARNING AND MOTIVATION TO LEARN

"The best that teachers can do is to create conditions for learning. By proof and definition, learning is a student, not teacher, responsi-

279. Krause-Phelan et al., *supra* note 36, at 296.

280. James, *supra* note 75, at 7.

281. Alice M. Thomas, *Consideration of the Resources Needed in an Assessment Program*, in STARK & THOMAS, *supra* note 149, at 233.

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bility. Yet teachers must direct their efforts sensitively and wisely toward creating positive conditions.”²⁸²

As law professors and law schools adopt specific learning outcomes that address student responsibility and then begin to document student input into assessment projects, they also should work simultaneously to develop or reinforce students’ sense of responsibility for learning and motivation to learn.²⁸³ And, it can be quite challenging to motivate students to take initiative and give their best effort continually, especially as part of assessment where there are few or no personal consequences.²⁸⁴ Law professors and administrators, therefore, must work hard to design instruction and identify assessment methods that effectively foster positive conditions for student motivation and responsibility for learning.²⁸⁵ As scholars have noted, “[c]hange in student accountability and performance begins with the instructors, and the change has to be system-wide.”²⁸⁶

To get started, law professors can lay the groundwork at the beginning of their course by assigning reading materials that explain the uniqueness of the law school academic environment and encourage students to assume an active role in the learning process. One such work, *Forging an Analytical Mind: The Law School Classroom Experience*, was written by James Jay Brown, a law professor, for new law students.²⁸⁷ In his essay, Brown offers a detailed description of what law students should expect in the first year of law school and strategies for a successful transition from undergraduate education to professional school. In particular, Brown devotes significant time to discussing the law student’s role and responsibility for self-learning.²⁸⁸ After instructing students to prepare for each class to their best of

282. Krause-Phelan et al., *supra* note 36, at 295 (quoting Professor Nelson Miller’s reflections on his efforts to improve student responsibility for learning).

283. This Article advocates for increased student intrinsic motivation to master course material and develop skills. A student possesses intrinsic motivation where the task is inherently relevant and interesting to the student in its own right. M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139, 165-66 (2001). “Intrinsic motivation is choosing to do an activity for no compelling reason, beyond the satisfaction derived from the activity itself[.]” JAMES P. RAFFINI, 150 WAYS TO INCREASE INTRINSIC MOTIVATION IN THE CLASSROOM 3 (1996). Extrinsic motivation exists where the inspiration to act is due to some reward or punishment outside of the task itself such as course grades. Jacobson, *supra*, at 165-66.

284. Erwin & Wise, *supra* note 182, at 71.

285. *Id.* (noting that motivation in assessment is an area that deserves much attention and study).

286. Hassel & Lourey, *supra* note 93, at 8.

287. Brown, *supra* note 23.

288. *Id.* at 1147-49.

their abilities, Brown informs students that in law school they “will be treated as an adult; one who fully recognizes the duty and responsibility for their own education.”²⁸⁹ Brown does not suggest that law students will be on their own as they forge this new path but admonishes them to be self-motivated and self-starting, words that serve to instill a sense of responsibility in students and set the tone for a shared responsibility for learning between student and professor.

In addition to helpful readings on responsibility and motivation, law professors can set high expectations for learning and increase student-faculty contact to motivate students to learn and assume responsibility.²⁹⁰ Professors first establish and share their expectations with students in their list of specific learning outcomes for the course that focus on responsibility for learning and professional development. Next, professors can “raise standards at every level” and challenge students to strive for excellence to keep them engaged and motivated.²⁹¹ As Barbara Glesner Fines, law professor and pedagogy expert, wrote, “[t]o motivate students to achieve more, teachers must communicate their high expectations and enthusiasm for learning in terms that are positive, clear, consistent, and authentic.”²⁹² Raising expectations for student performance produces increased student learning and motivation.²⁹³ Moreover, if professors increase their contact with students, both in and out of the classroom, students will be motivated to work harder in their courses²⁹⁴ and to think more deeply about their experiences and the nuances of the law.²⁹⁵ In meetings, professors can ask students about their progress on assessments and, when needed, “help students get through the tough times and strengthen their commitment to the educational endeavor.”²⁹⁶ As a result, students who interact frequently with their professors will be-

289. *Id.* at 1147.

290. HUBA & FREED, *supra* note 153, at 22 (explaining how learner-centered assessment promotes high expectations); Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 950-51 (1997) (noting that students are motivated when teachers get to know them as people).

291. Paul Trout, *Disengaged Students and the Decline of Academic Standard*, ACAD. QUESTIONS, Spring 1997, at 46, 48 (attributing the cause of student disengagement at the primary and secondary level to low expectations and standards).

292. Fines, *supra* note 187, at 114.

293. See ARUM & ROKSA, *supra* note 99, at 119.

294. Gerald F. Hess, *Seven Principles for Good Practice in Legal Education*, 49 J. LEGAL EDUC. 367, 368-69 (1999).

295. Susan Apel, *Principle 1: Good Practice Encourages Student-Faculty Contact*, 49 J. LEGAL EDUC. 371, 378 (1999).

296. HESS & FRIEDLAND, *supra* note 28, at 15; Hess, *supra* note 294, at 369.

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come more invested in their learning and development and will have an additional incentive to perform well.²⁹⁷

Law professors also can adopt more active learning techniques in the classroom and include more self- and peer-assessment opportunities in their courses to build student responsibility for learning and to motivate students to learn.²⁹⁸ Active learning practices require students to be more than passive listeners and are founded on the premise that students learn the best when they take responsibility for their own education.²⁹⁹ And such activities motivate students to learn because they “capture students’ attention and minimize distraction.”³⁰⁰ Students become so enthralled in active learning experiences that they have little opportunity to withdraw mentally.³⁰¹ The exercises discussed in Part III to document student responsibility for learning also serve as forms of assessment that motivate students to learn and build responsibility for learning.³⁰² By participating in surveys and interviews on responsibility, journal activities, and client billing exercises, students not only actively reflect on their learning but also better understand what does and does not work well for them.³⁰³ These activities encourage students to become self-regulated learners and assume control over, and more responsibility for, their learning.

Other active learning exercises also inspire students to take initiative and assume more responsibility for their own learning. For instance, scholars have suggested that law professors incorporate into their courses student learning contracts that give students a significant

297. Hess, *supra* note 294, at 369; Enquist, *supra* note 43, at 671 (noting that successful students used their professor as a key resource for their learning and found ways to access her to ask questions).

298. Krause-Phelan et al., *supra* note 36, at 282 (discussing the pillars of student motivation including engaged and active learning).

299. Hess, *supra* note 8, at 402, 417; see HUBA & FREED, *supra* note 153, at 36 (addressing active involvement of learners); Tom Cobb, *Public Interest Research, Collaboration, and the Promise of Wikis*, 16 PERSP.: TEACHING LEGAL RES. & WRITING 1, 5 (2007) (advising faculty to add active learning techniques to their classes that encourages students to take responsibility for learning); Munro, *supra* note 8, at 236 (“Law students should be active participants in their education.”).

300. SCHWARTZ, SPARROW, & HESS, *supra* note 28, at 90.

301. *Id.* at 91. Schwartz also provides several techniques for motivating law students. *Id.* at 93.

302. See RETHINKING CLASSROOM ASSESSMENT, *supra* note 7, at 7 (noting that assessment practices can “enhance student motivation by . . . reinforcing the idea that students have control over, and responsibility for, their own learning”), available at <http://www.wncp.ca/media/40539/rethink.pdf>; Lasso, *supra* note 7, at 93-95.

303. See Hess, *supra* note 294, at 409, 416 (addressing journals and survey/questionnaires).

role in determining course content and process,³⁰⁴ learning portfolios that require students to reflect on and select their best work,³⁰⁵ gaming techniques that combine education and play,³⁰⁶ and simulation and role-playing exercises where students respond to lawyering situations³⁰⁷ to increase student motivation. As students become more involved in their learning process, they naturally become more motivated to learn and work harder.³⁰⁸

Examples of active learning from my own teaching experiences that have proven successful include cooperative and collaborative learning activities and the problem method, a teaching technique that forces students to “grapple with course material before class” and work to solve problems in class.³⁰⁹ Students who work together cooperatively and collaboratively increase their involvement in and contribution to their own education.³¹⁰ Cooperative and collaborative learning can be accomplished with students in pairs or groups.³¹¹ Students in my class work in small groups on peer editing assignments, editing exercises, fact investigation and legal analysis drills, and major writing projects, just to name a few. Such group or team work requires students to prepare effectively in advance of class and come to class ready to assume their respective roles in their teams to ensure

304. Bateman, *supra* note 232, at 421-24; see Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1048-49 (1985).

305. See HUBA & FREED, *supra* note 153, at 243, 263 (stating that using portfolios for program assessment also promotes student ownership of and investment in their learning); Foxhoven, *supra* note 147, at 346-47.

306. Jennifer L. Rosato, *All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques into the Law School Classroom*, 45 J. LEGAL EDUC. 568, 570, 571 (1995).

307. Hess, *supra* note 290, at 410-12; see SCHWARTZ, SPARROW, & HESS, *supra* note 28, at 91, 93 (“Engaging students in role-plays can be particularly effective for motivating students.”).

308. Bateman, *supra* note 232, at 422.

309. Craig Anthony Arnold, *How Do Students Really Learn? Problem-Solving, Modern Pragmatism, and Property Law*, 22 SEATTLE U. L. REV. 891, 892 (1999); see also Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 94 (2002) (promoting cooperative learning as a means to increase student motivation to learn about a subject); Wegner, *supra* note 1, at 975 (advocating use of the problem-solving method).

310. Hess, *supra* note 294, at 369; Krause-Phelan et al., *supra* note 36, at 283-85 (examining the benefits of group work on engaged learning and student responsibility); see Scott G. Paris & Julianne C. Turner, *Situated Motivation*, in PAUL PINTRICH ET AL., *STUDENT MOTIVATION, COGNITION, AND LEARNING: ESSAYS IN HONOR OF WILBERT J. McKEACHIE* 213, 226-27 (1994) (“[M]otivational research has shown that classrooms in which students have . . . opportunities to collaborate with others all enhance students’ determination, effort, and thoughtful engagement.”); Sophie Sparrow, *Team-Based Learning—An Overview*, L. TCHR. (Newsl. of the Inst. for L. Teaching and Learning) 1, 1 (Spr. 2010) (“If you want your students to take responsibility for their learning . . . try using team-based learning.”).

311. Blumenfeld, *supra* note 36, at 121. See generally Randall, *supra* note 167 (describing various approaches to and benefits of cooperative learning in law schools).

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success on the assignment.³¹² Furthermore, through group work, students hold each other accountable and learn to depend on one another.³¹³

Similar to cooperative and collaborative work, the problem-centered approach fosters active, not passive, learning,³¹⁴ requires students to be fully prepared for class, and promotes self-directed or independent learning.³¹⁵ With problem-based learning, students (typically in small groups) work on legal problems, as opposed to just focusing on reading cases, and discover effective solutions on their own.³¹⁶ In my class, students often work on client hypotheticals for homework (reading and applying the relevant case law) and bring their arguments to class for group discussion. This method of instruction “shifts the responsibility for learning from professors to students” and “enhances student learning overall.”³¹⁷ Application of the problem method is popular in skills classes and equally beneficial to doctrinal courses. Students not only acquire skills and knowledge as they solve problems but also “become responsible for their own learning, which enhances their motivation and self-efficacy.”³¹⁸

Learning theory experts encourage faculty to use “pedagogical techniques that transform the traditional classroom into one in which students take more responsibility for the success of their own education.”³¹⁹ The teaching strategies discussed above strive to motivate students and build their responsibility for learning but, by no means, serve as an exhaustive list of valuable exercises. Hopefully, increased focus on student responsibility in law school assessment will inspire individual faculty to form inquiry groups, like the one at Thomas M.

312. Lynn Herndon, *Help You, Help Me: Why Law Students Need Peer Teaching*, 78 UMKC L. REV. 809, 825 (2010).

313. *Id.* at 825; see Blumenfeld, *supra* note 36, at 119.

314. Arnold, *supra* note 309, at 900-01 (emphasizing the pedagogical features of the problem method).

315. Roach, *supra* note 205, at 690.

316. Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 250 (1992); Stephen Nathanson, *Designing Problems to Teach Legal Problem-Solving*, 34 CAL. W. L. REV. 325, 326 (1998) (“In the problem-centered approach, teachers are focused on meeting students’ learning needs through curriculum design, by promoting student responsibility for their own learning, and by devoting resources to developing students’ problem-solving skills.”).

317. Christensen, *supra* note 144, at 817.

318. *Id.* at 817, 819; Gabriel A. Moens, *The Mysteries of Problem-Based Learning: Combining Enthusiasm and Excellence*, 38 U. TOL. L. REV. 623, 623-25 (2007); Nathanson, *supra* note 316, at 326.

319. DeRoma et al., *supra* note 8, at 42 (“[L]earners must be actively involved in the learning process if learning is to be successful.”).

Cooley Law School, and organize discussion panels and workshops to identify additional teaching techniques that enhance student motivation and responsibility and suit their school's student needs. As Judith Wegner remarked, "engagement with teaching is essential in order to engage students."³²⁰

CONCLUSION

What could law professors and law schools do if they had comprehensive, accurate, and useful information about student responsibility in law school assessment? They could use the data to target students' progress, development, and motivation strategically and to improve both teaching and learning significantly. The assessment movement now taking place in law schools provides a unique opportunity to begin conversations and dialogues about the learning that students are experiencing and students' commitment to their own progress.³²¹ "Student responsibility is not simply a school-based imperative. It encompasses a broader imperative that law students and lawyers acquire and maintain a capacity to sustain their continuing professional development."³²² By incorporating student contribution into the assessment process and formula, we achieve a more complete, holistic evaluation of the learning process and instill a collaborative effort toward academic and professional competence—law professors and law students working together to promote student learning. As we embark on increasing and improving assessment in law schools, let us make sure our approach and evaluations are as good and complete as they can be.

320. Wegner, *supra* note 1, at 979.

321. HUBA & FREED, *supra* note 153, at 76-77 (emphasizing that assessment is a beginning of conversations, in particular, about learning); Wegner, *supra* note 1, at 887 ("Too often assessment is seen as the end of the story, when in fact, it provides a means of continuing improvement."). As Huba and Freed also noted, "[i]n coming together to contemplate their collective impact and how to assess it, large numbers of faculty have begun to discuss their TEACHING—something that most had previously taken for granted, carried out privately, and seen little reason to improve." HUBA & FREED, *supra* note 153, at xii.

322. Krause-Phelan et al., *supra* note 36, at 297.

APPENDIX A

Student Responsibility Survey

Please answer the questions to the best of your ability. Please be frank, as the survey is anonymous. Feel free to use the back of the page. Thank you. Professor Hill

1. What is your professor's role in or responsibility to your legal education? What do you believe your professor's contribution should be? What steps should he/she take?

2. What is the student's role (or your role) in his/her legal education? What do you believe the student's contribution should be?

3. Think about your law school classroom experience to date. Did you feel connected to or a part of the discussions that took place in class? Yes or No. Explain.

4. Any suggestions on how to encourage active learning and participation in the classroom?

5. How often were you fully prepared for class (i.e. completed assigned readings, homework, etc.)? Please provide a percentage between 0% and 100%: _____

6. How often did you review relevant material before class (even assigned readings and notes from weeks before the class)? Please provide a percentage between 0% and 100%: _____

7. Please complete the following sentence. In general, when I received a writing assignment in LP, I began working on it by reading the instructions, cases and fact pattern:

- a. Immediately (that night for homework)
- b. Almost immediately (within a few days of it being assigned)
- c. About a week after it was assigned
- d. More than one week after it was assigned
- e. A few days before the due date
- f. The weekend before the due date

8. Do you have any suggestions on how to motivate or encourage students to prepare regularly for class, exams, or any law school assessments? Were there any challenges to such regular preparation (such as class scheduling, family obligations, etc.)?

9. Are there any successful strategies that professors use to help keep you on track for completing assignments in a timely manner? What helped you? What didn't work as well?

10. Looking at the question above, is "motivation" the professor's duty or the student's responsibility? Yes or No. Please explain.

COMMENT

Battle for the School Grounds: A Look at Inadequate School Facilities and a Call for a Legislative and Judicial Remedy

NADINE F. MOMPREMIER*

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INTRODUCTION

Imagine sending your child to a school where the roof continually leaks or the toilets and sinks do not work. Better yet, imagine allowing your child to attend school in a warehouse, in an overcrowded classroom, or a building that is almost 100 years old and has only seen minor repairs during its history. That is the reality for many students in low-income communities throughout the country, whether they are enrolled in public or charter schools.¹ Although their teaching methods are different, one thing remains the same—schools' inability to access adequate facilities is detrimental to the success of the schools and the children who attend them because "the quality of the physical environment in which children learn is a critical education . . . factor that contributes to their academic success and well-being."²

Public schools,³ especially those in low-income areas, teach students in decrepit buildings with access to very little resources.⁴ Charter schools, because they depend on private funding, struggle to open because they cannot fund their facilities.⁵ This inability to fund and find buildings has led some charter schools to look to buildings already owned by public schools, sometimes having to share the space, or use buildings of now-closed public schools.⁶ Public school supporters then claim that charter schools are infringing on their resources, while charter school supporters argue that they are themselves lacking resources.⁷ The lack of adequate facilities for both institutions is one issue that contributes to the hostility between the two institutions.

1. Take, for instance, City College, a high school in Baltimore, Maryland, where students are surrounded by toilets that do not work. In the city itself, forty-five schools were closed for about thirty-five days because of various infrastructure problems including carbon monoxide leaks and electricity shortages. Erica L. Green & Julie Scharper, *Candidates Would Spend More on Schools*, BALT. SUN (Aug. 7, 2011), http://articles.baltimoresun.com/2011-08-07/news/bs-md-ci-campaign-issue-education-20110807_1_mayor-stephanie-rawlings-blake-school-buildings-city-schools.

2. FAITH E. CRAMPTON & DAVID C. THOMPSON, *BUILDING MINDS, MINDING BUILDINGS: SCHOOL INFRASTRUCTURE FUNDING NEED* iii (2008), available at <http://www.aft.org/pdfs/psrp/bmmbfunding1208.pdf>.

3. In this Comment, district schools will be referred to as public schools and the terms "public school," "traditional public schools," and "district schools" will be used interchangeably.

4. See, e.g., DEP'T OF BLDGS. & GROUNDS, *MANCHESTER PUBLIC SCHOOLS: FACILITIES CRITICAL ASSESSMENT* 5, 8, 38 (2012), available at http://boe.townofmanchester.org/files/Facilities_Critical_Assessment_Pres_010912.pdf (describing the boilers that need to be replaced, deteriorating restrooms, and roofs that need to be replaced at various schools around the city).

5. See discussion *infra* Part II.A.2.

6. See discussion *infra* Part III.A.

7. See discussion *infra* Part II.A.2.

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Research shows that when it comes to supporting public education, facilities funding is often ignored.⁸ Generally, when people look to education disparities, they look at teachers, standardized testing scores, and other resources;⁹ but facilities are an important educational resource that helps determine the status of the aforementioned categories. The lack of educational resources exists throughout the country, and both charter and public schools—especially those in low-income communities—need assistance to help achieve their educational goals.¹⁰

Although there are many disparities in school funding, this Comment argues that the need for school resources—particularly school facilities—is reaching a peak, and the education system is nearing a tug-of-war as it pertains to the need and availability for adequate facilities. This Comment suggests that lack of funding is the biggest contributor to this inadequacy. As it stands, the system is unequal; the inequalities contradict the states' education clauses; and to alleviate it, schools need the assistance of both the judicial and legislative systems to implement stronger and more effective remedies.

In this resource distribution debate, because facilities remain a common problem to both institutions, this Comment also suggests that supporters of both institutions join together and work in conjunction to gain better and equal access to facilities funding. The schools will have to lobby together for resources and start finding common ground in order to discuss ways to allocate resources in the various school districts so that they can continue to co-exist.

There are several solutions to this potential tug-of-war. However, before solutions can be addressed, it is important first to analyze facilities funding of the secondary education system of the country. Part I discusses school facilities and why they matter. Part II then discusses facilities financing and the divide between charter and public school facilities funding. It also addresses how the federal government has contributed to facilities funding. Part III focuses on the current tug-of-war and its future. It analyzes where schools struggle the most, and it discusses a case study on co-locations, a common trend in distribut-

8. See INST. FOR EDUC. & SOC. POLICY, *THE FINANCE GAP: CHARTER SCHOOLS AND THEIR FACILITIES* 7 (2004), available at <http://steinhardt.nyu.edu/smsAdmin/uploads/001/117/FinanceGap.pdf>.

9. See generally *Achievement Gap*, EDUC. WK., <http://www.edweek.org/ew/issues/achievement-gap/> (Aug. 3, 2004) (describing the causes of the achievement gap).

10. See discussion *infra* Part I.A.

ing school facilities in urban areas. Finally, Part IV discusses possible solutions, including litigation, state and local action, and assistance from the federal government.

I. EDUCATIONAL FACILITIES GENERALLY

A. Facilities: Why Do They Matter?

Many factors contribute to the type of education that a student receives while in school, but facilities are a resource that affects the availability of other resources for students such as space, technology, and laboratories. Indeed, there are a number of factors that influence educational achievement, some of which have nothing to do with the educational system.¹¹ But for the factors that do, school systems have taken steps to improve educational achievement by: holding schools and school districts more accountable for outcomes; expanding the pool of qualified teachers; supporting programs that give parents a choice; and putting more pressure on schools to improve.¹² Therefore, addressing disparities and inadequacies in educational funding may not completely improve educational outcomes,¹³ but it is a step that can help alleviate some of the disparities and bigger problems facing the education system.

Evidence shows that there is a relationship between the conditions of school buildings and student achievement.¹⁴ “Inadequate school facilities represent an important breakdown in the provision of meaningful educational opportunity to all children, and they have serious adverse impacts on local communities.”¹⁵ As Doctors Faith

11. Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL’Y 351, 353 (2011).

12. ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES* 3 (2009).

13. Darby & Levy, *supra* note 11, at 353.

14. One researcher summarized this finding:

In a 2000 report on school facilities, the U.S. Department of Education summarized that research by concluding that environmental conditions in schools, including poor lighting, inadequate ventilation, and inoperative heating—affect the learning, health and morale of students and staff. Other studies and litigation from states around the country—focusing on class size, lack of science labs, or school safety—have also highlighted the importance of facilities as an essential component of student learning, and have revealed stark disparities between schools in high- and low-income communities.

MOLLY A. HUNTER, *PUBLIC SCHOOL FACILITIES: PROVIDING ENVIRONMENTS THAT SUSTAIN LEARNING* 1 (2006), available at http://www.schoolfunding.info/resource_center/issuebriefs/facilities.pdf.

15. DAVID ARSEN & MARY MASON, *THE ROLE OF STATE COURTS IN SECURING SCHOOL FACILITY ADEQUACY AND EQUITY* 1 (2010), available at http://education.msu.edu/epc/documents/Mason_Arsen_2010_The_Role_of_State_Courts_in_Securing_School_Facility_Adequacy_and_Equity_policy_report_31.pdf.

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Crampton and David Thompson stated in their recent school facilities funding report, “[a]dequate levels of fiscal investment in school infrastructure are essential to ensure that all students and staff have access to a physical environment conducive to learning; that is, one that is safe, healthy, and educationally appropriate.”¹⁶ Finding and accessing fiscal investment for school infrastructures is a difficult task that plagues many schools, and the problem starts with local funding.

Most, if not all, school districts are supported by real property taxes.¹⁷ Since local governments use property taxes as source of revenue, poor communities with a smaller property tax base have less funding to support their school districts.¹⁸ This means that students in low-income communities get the least amount of resources, even though they have the highest needs.¹⁹ For example, students in these communities are less likely to have well-qualified teachers.²⁰ Substandard facilities are another one of those least supported resources in these school districts,²¹ as “[f]abulous school facilities [are] built in suburban areas while low-income children . . . are left behind in outdated and often dilapidated structures.”²² Since low-income schools have fewer resources, it is not surprising that other studies have shown that students in better facilities learn better and have better testing results.²³ This implies that if more investments were made to school facilities and low-income neighborhoods, there would be a chance to improve educational achievement since investments would be made to those that need it most.

16. CRAMPTON & THOMPSON, *supra* note 2, at iii.

17. See Fed. Educ. Budget Project, *Background & Analysis: School Finance*, NEW AM. FOUND. (Dec. 13, 2012), <http://febp.newamerica.net/background-analysis/school-finance>.

18. *Id.*

19. See *id.*; see also Joy Resmovits, *School Districts Shortchange Low-Income Schools: Report*, HUFFINGTON POST (Dec. 1, 2011), http://www.huffingtonpost.com/2011/12/01/school-funding_n_1122298.html (“Low-income students need extra support and resources to succeed, but in far too many places . . . allocating resources are perpetuating the problem rather than solving it . . .”).

20. *Education & Socioeconomic Status*, AM. PSYCHOL. ASS’N (2012), <http://www.apa.org/pi/ses/resources/publications/factsheet-education.aspx> (explaining that the best qualified teachers tend to migrate out of low-income communities or that students in low-income schools are less likely to have well-qualified teachers).

21. See Fed. Educ. Budget Project, *supra* note 17.

22. ARSEN & MASON, *supra* note 15, at 1.

23. See Himanshu Kothari, *Facilities Financing: Monetizing Education’s Untapped Resource* 4 (Future of Am. Educ. Project, Working Paper 2011-04, 2011) (“New studies have found that classrooms with the most daylight had on average a 20 to 26 percent faster learning rate. In another study of the Seattle Public School District, students in the classrooms with the largest window area or the most daylight tested 9 to 15 percentage points higher than those with the least window area or daylight.”).

The White House also recognizes that students in poor school buildings are more likely to struggle academically.²⁴ Various studies show that poor facilities contribute to health problems such as asthma attacks and drowsiness; poor staff and student morale; and lower student achievement scores.²⁵ One study found that students attending schools in poor conditions had test scores eleven percent lower than students attending schools in excellent conditions and six percent lower than students attending schools in fair conditions.²⁶ Studies also found that students at run-down schools attended fewer days at school.²⁷ Again, because schools in low-income communities get the fewest resources, it is not surprising that students in low-income communities tend to have lower standardized testing scores.²⁸ As these schools are not receiving funding, and because parents have access to fewer resources in these communities, they are more likely to deal with these problems and fall into the achievement gap.²⁹

Unfortunately, poor facilities do not just affect the students, but they affect the teachers as well. Several studies have found a correlation between the quality of the school facility and the likelihood that teachers will leave a school.³⁰ These problems have an impact on stu-

24. See DOMESTIC POLICY COUNCIL ET AL., EDUCATION & THE AMERICAN JOBS ACT: CREATING JOBS THROUGH INVESTMENTS IN OUR NATION'S SCHOOLS 3 (2011), available at http://www.whitehouse.gov/sites/default/files/aja_ed_state_by_state_report_final.pdf.

25. MUSTAPHA A. BELLO & VIVIAN LOFTNESS, ADDRESSING INADEQUATE INVESTMENT IN SCHOOL FACILITY MAINTENANCE 2 (2010), available at <http://repository.cmu.edu/cgi/viewcontent.cgi?article=1050&context=architecture>.

26. *Id.* at 4; see also DOMESTIC POLICY COUNCIL ET AL., *supra* note 24, at 4 (listing studies showing significant differences in standardized test scores for students that attend school in new/renovated buildings compared to those in older buildings).

27. BELLO & LOFTNESS, *supra* note 25, at 5; see also DOMESTIC POLICY COUNCIL ET AL., *supra* note 24, at 3-4 (“Students in schools that need structural repairs are more likely to miss days of school and more likely to drop out of school.”).

28. See *Achievement Gap*, *supra* note 9.

29. *Id.* (“Many experts . . . assert[] that achievement gaps are the result of more subtle environmental factors and ‘opportunity gaps’ in the resources available to poor versus wealthy children. Being raised in a low-income family, for example, often means having fewer educational resources at home . . .”). *Contra id.* (noting that poor children who have engaging learning environments at home do not have the same achievement gap problems as other poor children).

30. See BELLO & LOFTNESS, *supra* note 25, at 5. Teachers may find it difficult to teach and meet the needs of their students without adequate facilities and resources. See BARNETT BERRY ET AL., CTR. FOR TEACHING QUALITY, UNDERSTANDING TEACHER WORKING CONDITIONS: A REVIEW AND LOOK TO THE FUTURE 12 (2008), available at http://www.teachingquality.org/pdfs/TWC2_Nov08.pdf. One study found that facility quality was a major factor in determining whether teachers decided to remain in their positions. *Id.* In addition, another study found that some teachers reported, “poor conditions have led them to consider changing schools.” *Id.* In addition, the American Federation of Teachers has encouraged teacher’s unions to play a vital role in making schools the best possible learning environments and improving the conditions in school buildings. See *School Building Conditions: Turning Crumbling Buildings into Environ-*

dents and teachers regardless of their schools. However, before a detailed discussion can be provided as to the current state of facilities, it is important to note some of the funding formulas and the differences between public and charter schools.

1. Funding Formulas in K-12 Education

Funding for schools varies, but the common theme seems to be that it is insufficient. Although school districts spent \$49.4 billion on school building operation and maintenance in 2009, most school districts agree that they do not have the funding available to keep pace with the needed repairs and renovations, regardless of whether the funding came from federal, state, or local governments.³¹

States are primarily responsible for K-12 public education, but the federal government, as of late, has taken on a more significant funding and policymaking role.³² In a number of states, the education budgets are the largest expenditures.³³ With that said, every state has its own formula and system for funding education, which leaves the state and local school districts to share responsibility for providing a level of funding necessary for a basic education.³⁴ This funding depends largely on property values, and not only varies state to state, but also varies from district to district, and from year to year.³⁵ Despite the millions of dollars allocated for education, inequalities in revenues-per-pupil exist within many school districts;³⁶ and two-thirds of Americans believe that increasing funding will lead to higher student learning.³⁷ Unfortunately, the desire and push for more funding has taken a step back because education budgets are drastically feeling the effects of the 2008 Recession.³⁸ This funding, which is even more

ments for Learning, AM. FED'N TCHRS, <http://www.aft.org/issues/healthsafety/buildingminds/conditions.cfm> (last visited Oct. 7, 2012).

31. See DOMESTIC POLICY COUNCIL ET AL., *supra* note 24, at 1.

32. Darby & Levy, *supra* note 11, at 354; see also *Education in the Nation: Examining the Challenges and Opportunities Facing America's Classrooms: Hearing Before the Comm. on Education and the Workforce*, 112th Cong. 16-17 (2011) [hereinafter *Education in the Nation*] (statement of Lisa Graham Keegan, Founder, Education Breakthrough Network) (indicating that the federal spending on education increased by 425 percent from 1980).

33. Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 571 (2004).

34. *School Finance*, EDUC. WK. (Aug. 4, 2011), <http://www.edweek.org/ew/issues/school-finance> (Aug. 4, 2004) [hereinafter *School Finance*].

35. Obhof, *supra* note 33, at 571; see also FED. EDUC. BUDGET PROJECT, *supra* note 17 (providing an overview of K-12 school finances).

36. Obhof, *supra* note 33, at 574-75.

37. HANUSHEK & LINDSETH, *supra* note 12, at 4.

38. See Kothari, *supra* note 23, at 2; see also discussion *infra* Part IV.B.

limited, has to be distributed throughout the entire education system. This Comment will next look at how facilities are financed and the problems facing schools seeking funding for their facilities.

II. FACILITIES FINANCING AND ITS IMPORTANCE

A. Facilities Financing Is Inadequate

States vary in the way they fund charter and public school facilities.³⁹ In many cases, students end up attending schools in substandard facilities because state policies limit the amount of funding available to them specifically for facilities, particularly those in urban and rural areas.⁴⁰ A 1998 study showed that on average, school buildings in the United States were over forty-two years old, although schools are only expected to have a life expectancy of thirty years.⁴¹ In order to meet student needs, a study conducted by the National Education Association showed that the education system needed over \$320 billion to repair existing schools and to build new infrastructures with updated technology;⁴² and of that total, \$268 billion was needed to specifically help with larger enrollments and repair aging buildings.⁴³ A 2000 study noted that 19% of schools' original buildings were in less than adequate conditions; 50% of schools had at least one building characteristic, such as roofing or plumbing, that was inadequate and needed to be fixed; and 76% percent of schools just needed funding for repairs and renovations.⁴⁴ Compared to the estimates made by the Government Accountability Office between 1995 and 1997 where they found that \$112 billion was needed to improve educational facilities,⁴⁵ it is apparent that the problem has progressed over time. In order to understand where this need comes from, it requires a better understanding of the struggles that each particular school system faces.

39. GARY MIRON & JESSICA L. URSCHEL, *EQUAL OR FAIR? A STUDY OF REVENUES AND EXPENDITURES IN AMERICAN CHARTER SCHOOLS* iii (2010), available at <http://nepc.colorado.edu/files/EMO-RevExp.pdf>.

40. *See id.* at 12.

41. CAROL CASH & TRAVIS TWIFORD, *IMPROVING STUDENT ACHIEVEMENT AND SCHOOL FACILITIES IN A TIME OF LIMITED FUNDING 2* (2010), available at <http://cnx.org/content/m23100/latest/>.

42. Kothari, *supra* note 23, at 3.

43. *Id.*

44. DOMESTIC POLICY COUNCIL ET AL., *supra* note 24, at 1.

45. MARNIE S. SHAUL, *GEN. ACCOUNTING OFFICE, CHARTER SCHOOLS: LIMITED ACCESS TO FACILITY FINANCING* (2000), available at <http://www.gao.gov/assets/240/230805.pdf>.

1. Public School Facilities

Providing adequate facilities for public schools is an enormous task. In the United States, there are more than 98,000 public schools educating approximately 57 million students.⁴⁶ On average, there are about 470 students in public elementary schools and there are about 704 students at secondary schools.⁴⁷ Throughout history, federal, state, and local funding have run disproportionately. Between 2005-06 and 2007-08, federal funding fell from 9.1% to 8.2% of education funds; state funding rose from 46.5% to 48.3%; and local funding declined from 44.4% to 43.5% of total funding.⁴⁸ In addition, in 2009, the federal government provided about \$100 billion to state education systems.⁴⁹

Almost all of facilities funding comes from state and local taxes, with federal funds accounting for less than eighty-six cents per \$1,000 of state and local funding.⁵⁰ In addition, public school facilities primarily get their funding from issuing or selling municipal bonds, or through local tax revenues.⁵¹ School districts' abilities to build schools are based on residents' property taxes.⁵² Some states also allow for local sales taxes to be used for school facilities.⁵³ Minnesota and Florida are two states that directly provide funding for school facilities.⁵⁴ Several states, however, do not allocate funds for school facilities, and a few do not separate the budgets to allow for facilities funding.⁵⁵ Nebraska, Nevada, Oklahoma, and South Dakota are the only four states that do not allocate funds to their local school districts for public

46. *Fiscal Year 2011 Budget Summary – Feb. 1, 2010*, U.S. DEPARTMENT EDUC., <http://www.2.ed.gov/about/overview/budget/budget11/summary/edlite-sections5.html> (last modified Feb. 1, 2010); see *Digest of Education Statistics: 2011*, NAT'L CENTER EDUC. STAT., http://nces.ed.gov/programs/digest/d11/ch_2.asp (last visited Sept. 16, 2012).

47. *Fiscal Year 2011 Budget Summary*, *supra* note 46; see *Digest of Education Statistics*, *supra* note 46.

48. *Digest of Education Statistics: 2010*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/programs/digest/d10/ch_2.asp (last visited Sept. 16, 2012).

49. *Digest of Education Statistics: 2011*, *supra* note 46, at ch. 4. At the time this Comment was completed, there were no numbers available to show how it affected state education funding.

50. MARY FILARDO & SEAN O'DONNELL, 21ST CENTURY SCHOOL FUND, FEDERAL SPENDING ON PK-12 SCHOOL FACILITIES (2010), available at http://www.ncef.org/pubs/federal_spending_on_school_facilities.pdf.

51. SHAUL, *supra* note 45, at 8.

52. *Id.*

53. See *id.* (noting that Florida is one state that allows a .05 sales tax, subject to voter approval, for facilities).

54. *Id.* at 8-9.

55. *Id.*

school facilities.⁵⁶ For the states that do provide some assistance, they may finance construction, pay for debt service, distribute funds to all school districts, provide funds for specific projects, or give loans to the school districts.⁵⁷

Despite the availability of these funds, many of these public institutions are decrepit and in need of their own development.⁵⁸ The amount of necessary repairs ranges anywhere from 37% in Georgia to 91% in Washington D.C., with the total need averaging around 50-59%.⁵⁹ Ninety percent of the annual costs for maintenance repair and operations come from local and state funding sources, whereas 10% comes from the federal government.⁶⁰ Therefore, one can conclude that because the majority of the funding comes from state and local funding, and because the funding is still inadequate, there is a question as to whether states can increase their allocations to education or whether federal funding can supplement this inadequacy.

Some public schools have started looking for alternative ways to deal with this problem. For example, some schools have looked to using private funding to aid in their goal to get more funding for their facilities.⁶¹ Private funding eliminates the red tape that comes with garnering state and federal funds, the bureaucracy, and relying on voters' support.⁶² It can be given directly to a school or district, which eliminates all the rules and regulations that come with spending government money.⁶³ As will be noted in the discussion of charter school facilities, this private funding is not always reliable, nor is it the best answer, but it may help with current shortfalls, even if the aid is temporary.

2. Charter School Facilities

Charter schools have the least access to facilities funding from federal, state, and local authorities because most districts do not dis-

56. TEX. LEGISLATIVE COUNCIL, STATE ROLES IN FINANCING PUBLIC SCHOOL FACILITIES 3 (2006), available at <http://www.tlc.state.tx.us/pubspol/OnlineFinancePubSch.pdf>.

57. *Id.* For more information on the three categories of facilities funding practices—revenue source, form of state aid, and oversight, see *id.* at 3-14.

58. BELLO & LOFTNESS, *supra* note 25, at 3; see, e.g., David Moran, *Manchester Public Schools in 'Rough Shape'*, MANCHESTER PATCH (Jan. 10, 2012), <http://manchester.patch.com/articles/manchester-public-schools-in-rough-shape>.

59. BELLO & LOFTNESS, *supra* note 25, at 3.

60. FILARDO & O'DONNELL, *supra* note 50.

61. See INST. EDUC. & SOC. POLICY, *supra* note 8, at 5.

62. *Id.*

63. *Id.*

tribute the entire equivalent of funding to charter schools that they would to public schools.⁶⁴ Studies show that facilities funding is the biggest cause of charter school funding disparities, and further, it creates a significant problem for their development and sustainability.⁶⁵ For the most part, charter schools do not receive initial funding dedicated to covering the cost of securing a facility.⁶⁶ Overall, as of 2010, even though about \$50 billion was spent on facility acquisition and construction, many schools needed everything from minor upgrades to major overhauls to make their facilities better, making the \$50 billion figure less than enough to implement these needed changes.⁶⁷ In addition, in nearly seventy-five percent of states where charter schools exist, the charter schools do not receive per-pupil allocations for facilities the way public schools do.⁶⁸ A United States General Accounting Office Report conducted in 2000 stated that “charter schools often could not access these sources of facilities funding because they operated outside the school district and that, while alternative sources for such funding existed, they were typically inadequate to meet facility needs.”⁶⁹ Because they do not receive per-pupil allocations, it is not easy for those organizations and people looking to start schools to obtain the funds they actually need to start because they find it difficult to obtain revenue from other sources.⁷⁰ “Charter schools typically have been thin on revenue streams, thin on funds dedicated for facilities, and thin on the history that creditors look for when evaluating loan risk.”⁷¹ Charter schools are then required to find funding to offset the cost of their facilities whether it is through the state, grants, or donations.⁷²

Another reason why charter school funding may be inadequate is that they rely more on private funding than traditional public schools

64. See Jeanette Curtis, *A Fighting Chance: Inequities in Charter School Funding and Strategies for Achieving Equal Access to Public School Funds*, 55 HOW. L.J. 1057, 1070 (2012).

65. *Id.*

66. Greg Rubio, *Surviving Rodriguez: The Viability of Federal Equal Protection Claims by Underfunded Charter Schools*, 2008 U. ILL. L. REV. 1643, 1661-62 (2008).

67. CASH & TWIFORD, *supra* note 41, at 2.

68. ILENE BERMAN, NGA CTR. FOR BEST PRACTICES, *ACHIEVING EXCELLENCE AT SCALE: STATE SUPPORT FOR HIGH-PERFORMING CHARTER SCHOOL EXPANSION 3* (2009), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/0904CHARTERSCHOOLEXPANSION.PDF>; jsessionid=DD8225BADFFB84CBB170157CD9AA479.

69. Rubio, *supra* note 66, at 1663.

70. See *The Changing Field of Facilities Financing*, NAT'L CHARTER SCH. RES. CENTER (May 1, 2010), <http://www.charterschoolcenter.org/newsletter/changing-field-facilities-financing>.

71. *Id.*

72. PBS, *Charter School FAQ*, CLOSING THE ACHIEVEMENT GAP, <http://www.pbs.org/closingtheachievementgap/faq.html> (last visited on Sept. 22, 2011).

do.⁷³ Although private funding is at times unreliable, charter schools are more apt to obtain and rely on funding from private sources because of their “community roots, entrepreneurial spirit, and flexibility to create new partnerships.”⁷⁴ In addition, some charter schools look to fundraising to raise funds; and they may accept grants from corporations, foundations, and other organizations that are looking to support their growth.⁷⁵ This private funding, however, is not substantial enough to sustain the schools.⁷⁶

This inability to obtain facilities funding hurts charter schools in more ways than one.⁷⁷ Facilities funding is crucial to starting and running a charter school including the costs of meeting building codes, other local regulations, and insurance issues.⁷⁸ Another important factor is that charter schools receive funding from local districts based on spending levels from the previous year; therefore, once inflation is factored in, charter schools eventually get less funding than public schools.⁷⁹ Public schools, on the other hand, are able to cover their facility costs through local taxes, state appropriations, or by selling tax-exempt bonds.⁸⁰ Although funding for public school resources can shift according to state budget allocations, it is still more stable than the private contributions.⁸¹

73. See James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 872 (2007) (“[C]harter schools’ reliance on private philanthropy is possibly the Achilles heel of this quasi-market reform.”).

74. MIRON & URSCHER, *supra* note 39, at 15.

75. See U.S. GOV’T ACCOUNTABILITY OFFICE, DISTRICT OF COLUMBIA CHARTER SCHOOLS: CRITERIA FOR AWARDING SCHOOL BUILDINGS TO CHARTER SCHOOLS NEEDS ADDITIONAL TRANSPARENCY 17 (2011) [hereinafter “GAO DC REPORT”].

76. *Id.*

77. Because of their inability to access funding, charter schools are forced to concentrate their energies on obtaining and maintaining facilities rather than just student performance. Curtis, *supra* note 64, at 1070.

78. Rubio, *supra* note 66, at 1662-63.

79. MIRON & URSCHER, *supra* note 39, at 3.

80. Rubio, *supra* note 66, at 1663.

81. Forman, Jr., *supra* note 73, at 873 n.187. As in any situation, however, some schools are more successful than others are. *Id.* at 873; see, e.g., U.S. DEP’T OF EDUC. OFFICE OF INNOVATION & IMPROVEMENT, SUCCESSFUL CHARTER SCHOOLS 30 (2004), available at <http://www2.ed.gov/admins/comm/choice/charter/report.pdf> (describing BASIS School, which in 2003, was the only school in Arizona whose students’ median scores on the Stanford 9 math test were above the ninetieth percentile); *K-8 Charter Schools: Closing the Achievement Gap*, CORE KNOWLEDGE, http://www.coreknowledge.org/mimik/mimik_uploads/documents/358/Closing%20the%20Achievement%20Gap%20Carl%20C%20Icahn%20Charter%20School.pdf (last visited Jan. 14, 2013) (displaying the results of the 2005-06 English language arts exam, which showed that the students scored at least forty percent higher than students in other public schools, despite its location in the South Bronx).

Some people also see investing in charter schools as a risk because they are sometimes unable to get stable enough to secure permanent facilities.⁸² In order to solve this problem, many charter schools moved into various locations, such as retail facilities, former or current churches, cafeterias, and gyms and ran their schools in these locations.⁸³ In New York City, for example, this practice is frequent.⁸⁴ Similarly, in Washington, D.C., some charter schools opened in surplus D.C. school buildings, shared spaces with other schools, and even operated in warehouses.⁸⁵ Some of these schools succeed despite their facilities because they have other resources. The Carl C. Icahn Charter School, for example, in Bronx, New York, was built out of modular portables on an empty lot, is located across the street from a homeless shelter, and is protected by a metal fence that is topped by curled barbed wire.⁸⁶ Despite these conditions, parents see the school as a sanctuary for their children.⁸⁷ These disparate learning conditions for children in charter schools should not be the norm.

As one can see, public and charter schools fund their facilities differently and have different access to facilities financing. Although most of this funding comes from local and state funding, the federal government also contributes to facilities funding.

B. Federal Government's Role in Funding Facilities

In the past, the federal government has not played an active role in funding educational facilities because it views school facilities as an issue for local school districts, rather than as a federal government issue.⁸⁸ The Department of Education contributes about 8.2% of its

82. Kothari, *supra* note 23, at 8.

83. BERMAN, *supra* note 68, at 3.

84. See generally Rick Docksai, *Charter School Co-Location Creating Tensions in NYC*, HEARTLANDER MAG. (Mar. 15, 2010), <http://news.heartland.org/newspaper-article/2010/03/15/charter-school-co-location-creating-tensions-nyc> (discussing how charter schools that open in public school buildings only pay rent rather than purchase the entire building and receive free building maintenance and janitorial services).

85. See GAO DC REPORT, *supra* note 75, at 6.

86. Deana R. Peterson, *Leaving No Child Behind: Why Were Charter Schools Formed and What Makes Them Successful?*, 12 J. GENDER RACE & JUST. 377, 383-84 (2009).

87. See *id.* (describing Icahn charter as a “huggy, kissy, school”); see also U.S. DEP’T OF EDUC. OFFICE OF INNOVATION & IMPROVEMENT, *supra* note 81, at 53 (explaining that parents like The School of Arts and Sciences because it is grounded in the principles of how children learn and it allows them to be highly involved in their child’s education).

88. See FILARDO & O’DONNELL, *supra* note 50, at 12 (“There is no staff dedicated to this issue at the U.S. Department of Education. There is more staff time focused on this at the Department of Energy and the Environmental Protection Agency than at the U.S. Department of Education.”).

budget annually for PK-12 public education operating costs, but less than one-tenth of a percent of the total capital outlay for facilities actually comes from federal funds.⁸⁹ Despite this, there are four types of federal programs that provide some school facility support for both charter schools and public schools: (1) dedicated federal grants for improving public school facilities; (2) allowable federal grants that are primarily for public charter schools; (3) dedicated federal tax credits or loans for improving public school facilities; and (4) allowable federal tax credits or loans that are not targeted granted to public school facilities, but are for school districts in particular.⁹⁰ Each of these categories is then divided further into subgroups that allocate funds to schools.⁹¹ Outside of these programs, the federal government has generally only provided charter schools with some additional support.

When the federal government has provided funding to schools, it has been able to successfully distribute funds that can be allocated towards school facilities. Unfortunately, when it has, the focus has primarily been on charter schools. During start-up, charter schools get some federal funding through the Public Charter School Program, which allocates funds to states to help charter schools fund facilities or capital improvements.⁹² In addition, in 2004, the Department of Education awarded four states grants for facilities funding for their charter schools through the State Charter School Facilities Incentives Grants Program.⁹³ The program was created to help states assist charter schools in paying for facilities.⁹⁴ This funding gave these states a head start, allowing them to be further ahead than other states in funding charter school buildings.⁹⁵ The four states awarded these grants were

89. *Id.*

90. *Id.* at 4.

91. Dedicated grant funding includes programs such as the Credit Enhancement for Charter School Facilities Program; the State Charter School Facilities Incentive Grants Program; the Impact Aid Discretionary Construction Grant Program; and the Impact Aid Facilities Maintenance Program. *Id.* at 5. Allowable Federal Grants include programs such as the Government Services Fund; the Headstart Program; and the State Energy Program Grants. *Id.* at 8. Dedicated Tax Programs include the Qualified Zone Academy Bonds and the Qualified School Construction Bonds. *Id.* at 11. Finally, Allowable Tax Programs include the Build America Bonds, the Clean Renewable Energy Bonds, and the Rural Community Facilities Program. *Id.* at 12.

92. MIRON & URSCHEL, *supra* note 39, at 12.

93. Dep't of Educ., *State Charter School Facilities Grants*, <http://www2.ed.gov/programs/statecharter/performance.html> (awarding grants to four states in 2004 and two states in 2009) (last modified Apr. 21, 2011).

94. *Id.*

95. See Holly Alexander, *Facilities Funding: Some New Tools for the Never-Ending Challenge*, CHARTER SCHOOLS TODAY, <http://www.charterschoolstoday.com/facilities-funding> (last visited Apr. 1, 2012).

Battle for the School Grounds

California, Minnesota, Utah, and Washington, D.C.⁹⁶ These states now lead the way in charter school facilities laws and serve as role models for facilities financing.⁹⁷

The Grants Program was designed to provide grants to eligible states to help them establish or enhance per-pupil facilities aid programs for charter schools.⁹⁸ In order to be eligible, a state must have enacted a state law authorizing per-pupil facilities aid for charter schools.⁹⁹ Points were then awarded on categories such as the need for facility funding; the quality of the plan; the likelihood that the proposed grant project would result in a new facilities aid program or enhance an existing one; and the state's experience in addressing the facility needs of charter schools through means of their own.¹⁰⁰ It was made very clear, however, that this program was meant to supplement state and local funds, and could not be the only source of facilities funding for the selected schools.¹⁰¹ Each state then went and used their award differently.

California used its award to provide cash grants to recipients of the Charter School Facilities Program, a grant program the state had in place to provide charter schools with new construction or renovation funding.¹⁰² Washington, D.C., divided its grant award between charter schools that enrolled at least sixty-five percent of students who participated in the free and reduced-cost lunch program;¹⁰³ schools that demonstrated that twenty-five percent of the student population resided within the boundaries of a transformation school; persistently

96. *State Charter School Facilities Grants: 2004 Awards*, U.S. DEPARTMENT OF EDUC., <http://www2.ed.gov/programs/statecharter/2004awards.html> (last modified Apr. 21, 2011).

97. See NAT'L ALLIANCE FOR PUB. CHARTER SCH., MEASURING UP TO THE MODEL: A RANKING OF STATE CHARTER SCHOOL LAWS 6 (2011), available at http://www.publiccharters.org/data/files/Publication_docs/NAPCS_LawRankings_V12_Full.pdf_20110330T165043.pdf (listing District of Columbia, California, and Colorado as leaders in facilities funding who have laid a strong foundation for solving facilities problems schools face). For further discussion on these states and their laws, see discussion *infra* Part IV.B.

98. 74 Fed. Reg. 2569, 2569 (Jan. 15, 2009).

99. *Id.* at 2570.

100. *Id.* at 2572.

101. *Id.* at 2570.

Funds under this program must be used to supplement, and not supplant, State and local public funds expended to provide per pupil facilities aid programs, operations, financing programs, or other programs, for charter schools. Therefore, the Federal funds provided under this program, as well as the matching funds provided by the grantee, must be in addition to the State and local funds that would otherwise be used for this purpose in the absence of this Federal program.

Id.

102. *Summary of California State Charter School Facility Law*, U.S. DEPARTMENT EDUC., <http://www2.ed.gov/policy/elsec/leg/statecharter/lawca.html> (last modified June 20, 2007).

103. *Id.*

dangerous schools; and to schools that failed to meet Adequate Yearly Progress for two consecutive years.¹⁰⁴ Minnesota used its funding to fund building improvement grants, augment state appropriations for lease aid, provide technical assistance for selecting appropriate facilities, and disseminate information about the best use of the facilities.¹⁰⁵ Finally, Utah used its grant to help charter schools lower the percentage of funds that they spend on facilities and maximize the amount that is spent on maintenance and operations.¹⁰⁶ The federal government implemented the last Grants Program in 2009, and California and Indiana were awarded grants.¹⁰⁷ This was especially beneficial to charter schools, but it again does not change the fact that public schools need assistance too and that the grants only went to charter schools. These programs therefore show that while the federal government has tried to provide funds in the past, its efforts are not enough to support the need for adequate facilities for both public and charter schools.

III. THE TUG-OF-WAR OVER ADEQUATE FACILITIES: WHERE, WHAT, HOW

In many districts, there is a lot of contention between charter schools and public schools. Those who oppose charter schools see them as a threat to traditional public schools, finding that providing parents with school choice provides privileges for students and parents whose race or class leave them in better positions to choose schools.¹⁰⁸ Not to mention, charter schools also seem to be placed on a pedestal and are expected to achieve more than public schools.¹⁰⁹ Others also fear that traditional public schools will lose political power as more

104. *Id.*

105. *Summary of Minnesota State Charter School Facility Law*, U.S. DEPARTMENT EDUC., <http://www2.ed.gov/policy/elsec/leg/statecharter/lawmn.html> (last modified Nov. 21, 2006).

106. *Summary of Utah State Charter School Facility Law*, U.S. DEPARTMENT EDUC., <http://www2.ed.gov/policy/elsec/leg/statecharter/lawut.html> (last modified May 13, 2008). Schools in Utah were using 47% of their allowance to fund initial facility costs, although they should have been using only 10%. The grant helped change that to 21%, leaving 79% to be used on maintenance and operations rather than essential facility costs. *Id.*

107. *State Charter School Facilities Grants*, U.S. DEPARTMENT EDUC., <http://www2.ed.gov/programs/statecharter/performance.html> (last modified Apr. 21, 2011) (awarding grants to four states in 2004 and two states in 2009). This funding was expected to last through 2013. *Id.*

108. See Forman, Jr., *supra* note 73, at 840.

109. See Anna M. Phillips, *Charter School Finds that 'C' Means Closing*, N.Y. TIMES, Jan. 12, 2012, at A1 ("For the first time, New York City is closing a charter school for the offense of [the school] simply being mediocre."). This pedestal, some believe, is unnecessary because they claim that they achieve these feats because they push out students with behavioral issues. See Bill Turque, *In D.C. Charter Schools, a Wide Variety of Challenges*, WASH. POST, Dec. 22, 2011, <http://>

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advantaged families leave the traditional public school system.¹¹⁰ Here, the most important concern is that some critics argue that charter schools threaten funding for public schools.¹¹¹ This fear exists for several reasons and is apparent in several school districts across the country.

As stated earlier, funding is needed for both traditional public schools and charter schools. The impact has already been felt in several areas. In situations where charter schools have tried to receive funding from their districts in order to fund facilities, they were met with opposition.¹¹² For example, in Florida last year, public schools did not receive any money from the state for additions or necessary repairs for their 3,000 aging schools, whereas the 350 charter schools were allocated \$55 million for their facilities.¹¹³ When school board members complained about the lack of funding for the public schools, legislators responded by stating that since those schools received funding several years ago, they did not need the funding now.¹¹⁴ Although it was true that they received funding several years ago, one superintendent actually claimed that the school districts needed funding for roofing and air conditioner repairs, painting, plumbing work, carpeting, and other maintenance.¹¹⁵ Not only did school board members find this unfair, but residents were also unhappy with the decision, reasoning that because there are less charter schools than there are public schools, it is easier to allocate and share funding between the charter schools, which allows more money to be allocated to each institution.¹¹⁶ This in turn is unfair to public schools because they will then have less money to allocate to their schools even though they have to distribute their funds to more schools.

In Washington, D.C., however, the problem extended the other way. Charter schools were upset that public schools received an extra

[/www.washingtonpost.com/local/education/at-dc-charter-schools-a-wide-variety-of-challenges/2011/12/16/gIQA5skgBP_story.html?tid=WP_ipad](http://www.washingtonpost.com/local/education/at-dc-charter-schools-a-wide-variety-of-challenges/2011/12/16/gIQA5skgBP_story.html?tid=WP_ipad) [hereinafter Turque, *Variety of Challenges*].

110. See Forman, Jr., *supra* note 73, at 867 (suggesting that privileged parents leaving the district schools for charter schools will leave less support for district schools and that less political support for district schools might result in less funding).

111. *Id.*

112. See, e.g., *Sugar Creek Charter Sch., Inc. v. State*, 712 S.E.2d 730, 732-33 (N.C. App. Ct. 2011).

113. Dave Weber, *Charters Get \$55 Million for Upkeep, Other Schools Get Zero*, ORLANDO SENTINEL (July 25, 2011), http://articles.orlandosentinel.com/2011-07-25/news/os-charter-school-construction-dollar20110724_1_traditional-schools-john-pavelchak-charter-schools.

114. *Id.*

115. *Id.*

116. See *id.*

\$21 million in funding, even though D.C. law requires equal funding for charter and public schools.¹¹⁷ Despite these laws, when the District Chief Financial Officer revised his budget, he only included additional funding for the public schools, claiming that it was within his right to do so.¹¹⁸ The Executive Director of the D.C. Association of Chartered Public Schools recognized the public schools' needs, but she did not want the needs of the charter schools to be ignored.¹¹⁹ D.C. officials countered by claiming that while the laws do indicate that appropriations are to be uniform when they are intended to be the main source of funding, they were unclear as to whether mid-year appropriations had to be uniform as well, therefore the extra funding allocations were acceptable.¹²⁰ These situations are just two examples of the battle between charter schools and public schools for funding. Some of these situations also escalated to court battles.¹²¹

Recently, in North Carolina, charter schools, students, and parents sued the state, several counties, and boards of education, claiming that the schools received disparate and discriminatory treatment because they were denied the same funds allocated to public schools for their facilities.¹²² The appellate court ultimately dismissed their claim, finding that the schools had no legal rights to receive the same funding allocations as the public schools.¹²³ In reaching its decision, the court found that the North Carolina constitution did not call for equal funding, but rather it calls for “a sound basic education and does not preclude the creation of schools or other educational programs with attributes or funding options different from those associated with traditional public schools.”¹²⁴ In some cases, the allocation and fight for resources stretches even further—sometimes both the charter and public schools are located in the same buildings—and that creates another problem of its own.

117. See Bill Turque, *Charters Challenge Fairness of \$21 Million to DCPS*, WASH. POST (Jan. 5, 2012), http://www.washingtonpost.com/blogs/dc-schools-insider/post/charters-challenge-fairness-of-21-million-to-dcps/2012/01/04/gIQA6FWGdP_blog.html [hereinafter Turque, *Challenging Fairness*].

118. *Id.*

119. *See id.*

120. *See id.*

121. *See* discussion *supra* Part IV.A.

122. *See* Sugar Creek Charter Sch., Inc. v. State, 712 S.E.2d 730, 732-33 (N.C. App. Ct. 2011).

123. *See id.* at 744.

124. *Id.* at 741.

A. Co-Locations: A Success or Failure?

Co-locations are one way legislators have tried to deal with this intersection between charter schools and traditional public schools in several cities. Co-location is the placing of two or more schools into one building.¹²⁵ “Classrooms with peeling paint and insufficient resources sit on one side [of a hallway], while new computers, brand-new desks and up-to-date textbooks line the other. One group of students has air conditioning and smartboards, while others *under the same roof* have neither air nor working Wi-Fi.”¹²⁶ In this respect, charter and traditional public schools share the same resources and buildings, but in reality, public schools are forced to accommodate for the charter schools.¹²⁷ In New York City alone, almost 900 out of 1,700 schools share spaces, and of that number, 102 charter schools share spaces with district schools.¹²⁸ Unsurprisingly, most of the controversy arises over the schools that share locations with charter schools rather than the district schools that share spaces.¹²⁹ New York is not the only city with co-located schools. New Orleans is in the process of providing more co-located schools,¹³⁰ and in Los Angeles, the practice is also growing.¹³¹

Research shows that on average, co-location saves charter schools \$2,712 per student in facility, utility, and school safety costs.¹³² These savings occur because the charter schools end up paying a rental fee rather than purchasing the buildings outright; therefore, they get free building-maintenance and janitorial services.¹³³ Co-locations benefit charter schools in many ways, but one primary way is that they narrow

125. See Docksai, *supra* note 84.

126. Ben Wrobel, *Co-Location of Charter and Traditional Schools Creates Disparities*, NEW ORLEANS TRIB. (Dec. 29, 2011), <http://www.tribunetalk.com/?p=878> (emphasis added).

127. See NYC COAL. FOR EDUC. JUSTICE, REALITY CHECK: THE IMPACT OF CO-LOCATION ON A SAMPLE OF SCHOOLS (2010), available at <http://www.nyccej.org/wp-content/uploads/2010/02/reality-check.pdf>.

128. Phillips, *supra* note 109.

129. *Id.* Some co-locations have two schools set up in the building, while some have four or more. See NICHOLLE MANNERS & URSULINA RAMIREZ, OFFICE OF BILL DE BLASIO PUB. ADVOCATE FOR THE CITY OF N.Y., CONSENSUS FOR REFORM: A PLAN FOR COLLABORATIVE SCHOOL CO-LOCATIONS 4 (2011), available at http://advocate.nyc.gov/files/Consensus_for_Reform.pdf.

130. See Wrobel, *supra* note 126.

131. See generally Julie Washington, *Unanswered Questions About Co-Location*, UNITED TEACHERS L.A. (June 13, 2008), <http://www.utla.net/node/1375> (discussing concerns regarding co-location and its effects on teachers); see also Wrobel, *supra* note 126 (“Co-location plans are also being considered in other states and countries nationwide, from Florida to Texas.”).

132. Docksai, *supra* note 84.

133. *Id.*

the charter school funding gap.¹³⁴ Although charter schools benefit from these arrangements, it makes one wonder what effect this has on public school students who realize they do not have access to the same resources that charter school students have. “These actions [co-locating charter schools with existing traditional public school facilities] are creating a two-tier system in which charter schools expand at the cost of existing schools that continue to serve the lowest-income students, English language learners, and students in special education.”¹³⁵ Co-locations can lead to visible disparities, division, and tension among students, and they can cause successful and necessary elective programs such as art and music to be moved out of the school to make room for the charter schools; and they can also raise issues about competition between the schools and student recruitment.¹³⁶

Teachers in Los Angeles raised concerns in 2008 about newly-enacted legislation regarding co-locations. They were concerned about whether sharing space would negatively affect learning at their schools, and in particular, they were concerned about whether they would be able to focus on student achievement.¹³⁷ They also expressed concerns about facility usage; and they asked questions about restroom use, playground access, and traffic patterns.¹³⁸ They also raised specialized concerns about the use of personnel and their schedules, disciplinary procedures, and whether they share responsibility in cases of emergency—an especially strong concern.¹³⁹

Likewise, co-locations raise very serious concerns for parents. In New York, many parents complained about the way the Department of Education proposed their co-locations.¹⁴⁰ Parents complained that because of these co-locations, traditional public school students were forced to comply with shorter recess and library hours and other miscellaneous changes to accommodate the charter schools.¹⁴¹ These complaints even caused the NAACP to get involved.

134. According to the Independent Budget Office, district public schools received \$16,678 per student in public support in the 2008-2009 school year. Charters received \$13,661 per student housed outside of a public school building and \$16,373 if housed inside a public building—differences of \$3,017 per student and \$305 per student, respectively. *See id.*

135. *See* NYC COAL. FOR EDUC. JUSTICE, *supra* note 127.

136. *See* Wrobel, *supra* note 126; *see also* Robin Potash, *What Is Co-location? What Is Prop. 38? And How Do They Affect Us?*, UNITED TEACHERS L.A., June 22, 2012, available at <http://www.utla.net/node/3716>.

137. Washington, *supra* note 131.

138. *Id.*

139. *Id.*

140. *See* MANNERS & RAMIREZ, *supra* note 129, at 1.

141. Wrobel, *supra* note 126.

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The NAACP filed a class-action lawsuit challenging New York City's decision to close several public schools and co-locate schools because they caused inequities in the children's education.¹⁴² The NAACP says it joined the lawsuit in order to ensure that students in district schools had the same access to facilities the way the charter schools did.¹⁴³ Parents claimed that co-locations led to "separate and unequal" facilities because the charter schools not only took over special education classrooms, playgrounds, and libraries, but students in district schools were forced to eat lunch at 10:00 a.m. and have gym once a week, among other things.¹⁴⁴ Some sentiments were even stronger: "Co-locations have introduced a new form of segregation into the schools in which district students are treated as 'second-class citizens.'"¹⁴⁵ The lawsuit was ultimately settled, but NAACP's involvement shows some of the worries caused by inequalities associated with co-locations.

The battle and feelings about co-locations, particularly in New York City, has definitely been contentious, especially since the Department proposed co-locating an additional sixty-six schools for the 2010-11 academic year despite a five-year plan to invest \$4.5 billion to construct 105 new school buildings and \$5.3 billion for upgrades.¹⁴⁶ These battles also reached legislators. City Council members complained about the battles that erupted because of the co-locations in their districts.¹⁴⁷ While the Department of Education claimed that most co-locations were amicable, several councilmembers completely disagreed.¹⁴⁸ One councilmember threatened to sue the Department of Education over a proposed co-location in her district, and another councilmember was angry about a proposed co-location that went to a charter school rather than one of the district schools that was seeking to expand.¹⁴⁹

142. See *Mulgrew v. Bd. of Ed. of the City Sch. Dist. of the City of N.Y.*, 2011 WL 1889620; Wrobel, *supra* note 126.

143. Maisie McAdoo, *NAACP Says Inequality at Heart of Co-Location Lawsuit*, UNITED FED'N TEACHERS (June 9, 2011), <http://www.uft.org/news-stories/naacp-says-inequality-heart-co-location-lawsuit>.

144. *Id.*

145. *Id.*

146. MANNERS & RAMIREZ, *supra* note 129, at 4.

147. Anna M. Phillips, *City Councilmembers Say Co-Location Complaints Come to Them First*, SCHOOLBOOK (Apr. 19, 2012, 7:44 PM), <http://www.schoolbook.org/2012/04/19/city-council-members-say-co-location-complaints-come-to-them-first/>.

148. *Id.*

149. *Id.*

Despite the problem in New York, in several cities the practice of co-location seems to be working. In Washington, D.C., the government chose to lease public school buildings to charter schools on a “right to first offer” policy.¹⁵⁰ These buildings, however, are those determined by the District of Columbia Public Schools that they no longer need, which does not completely impede on available or needed resources by the public schools.¹⁵¹ By December 2010, eighteen buildings were occupied, or scheduled to be occupied, by charter schools.¹⁵² Even this procedure in itself, raises questions as to the conditions that these buildings are in when they are awarded to charter schools, but at least the students are not forced to share spaces the way students in New York have to.

In New Orleans, Louisiana, almost all charter schools are located in public school facilities, free of charge.¹⁵³ The charter schools do not have much say, however, over their locations and the conditions of the facilities provided to them.¹⁵⁴ In Chicago, Illinois, thirty-two charter schools are located in Chicago Public Schools’ (CPS) facilities, with twenty charter schools sharing spaces with public schools and twelve in their own buildings.¹⁵⁵ Under the Shared Facility Policy, both schools have to sign and agree to a Memorandum of Understanding and Shared Agreement, which: (1) defines the principles by which the schools operate and identifies what portions of the campus are designated as common areas; (2) describes the space to be utilized by each school; and (3) explains the financial obligations of each.¹⁵⁶ Those charter schools that share facility space pay \$1 rent, but they also have to pay a facilities service fee based on the percentage of space they occupy.¹⁵⁷ Despite this fee, the rent makes location in a CPS building the most affordable way for charter schools to operate in Chicago.¹⁵⁸ In addition, the Agreement helps ensure that facility usage and planning is focused on earlier rather than later.

150. GAO DC REPORT, *supra* note 75, at 17.

151. *Id.* at 17-18.

152. *Id.* at 19.

153. MARIA C. SAZON, NAT’L ALLIANCE FOR PUB. CHARTER SCHS., MAKING ROOM FOR NEW PUBLIC SCHOOLS: HOW INNOVATIVE SCHOOL DISTRICTS ARE LEARNING TO SHARE PUBLIC EDUCATION FACILITIES WITH CHARTER SCHOOLS 21 (2011), available at http://www.publiccharters.org/data/files/Publication_docs/2011%20NAPCS%20Facilities%20Report%20-%20Making%20Room%20for%20New%20Public%20Schools_20110513T104057.pdf.

154. *Id.*

155. *Id.* at 10.

156. *Id.* at 11.

157. *Id.* at 12.

158. *Id.*

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In Denver, Colorado, Denver Public Schools (DPS) implements a program that annually identifies buildings that are operating significantly below capacity and recommends them for campus sharing.¹⁵⁹ Their Shared Campuses Policy helps reduce the cost of underutilized space, avoid unnecessary new construction and maintenance costs, promote high-performing schools, and allow new schools to be created without having to build new facilities.¹⁶⁰

It is hard to say whether co-locations will help alleviate the facilities problem because educational and funding disparities already exist between charter schools and public schools.¹⁶¹ As noted in the N.Y.C. Public Advocate's report, co-locations will probably never be popular.¹⁶² Therefore, it is important that the Department of Education in all cities implement co-locations that better serve all students.¹⁶³ In order for school co-locations to exist efficiently, there should be a collaborative process, comprehensive educational facilities planning, and space design modifications.¹⁶⁴ As the Public Advocate for New York City recommended, the DOE should detail how the co-locations will affect instructional space, programming, and the overall educational culture of school buildings.¹⁶⁵ Parents, teachers, and community members should understand what these co-locations are and what it will mean to their students.¹⁶⁶ The DOE should develop uniform standards for co-locations and seek assistance in ensuring that all schools have adequate space to support classroom instruction as well as activities outside the classroom.¹⁶⁷ A better engagement of all parties involved may make co-locations a better solution, but in the meantime, it is evident that there is a lot of work that needs to be done.

159. *Id.* at 15.

160. *Id.*

161. *See* discussion *supra* Part II.A.

162. *See* MANNERS & RAMIREZ, *supra* note 126, at 5 (discussing community opposition to co-locations).

163. *See id.*

164. *Id.* at 3-4.

165. *Id.*

166. *See id.* at 5.

167. *See id.* at 22.

IV. WHAT IS THE SOLUTION?

A. Is Litigation the Answer?

The education clauses of various state constitutions has allowed plaintiffs to argue in court that education is a “fundamental right” and that inequity in funding directly violates a state’s obligation to provide “suitable” funding for education.¹⁶⁸ Since some courts used these provisions to create an individual right to an education or to an adequately funded education in their state,¹⁶⁹ court involvement in school funding cases has generally led to legislative reforms.¹⁷⁰ State courts throughout the country saw challenges from local districts compelling states to improve their school facilities.¹⁷¹ These cases dealt with wide funding disparities between rich and poor districts; while others rested on claims that the facilities in some districts were too inadequate to meet the outcomes required by the state.¹⁷² Adequacy is based on whether states should provide enough funding for all students to be able to meet academic expectations.¹⁷³ Inadequate facilities not only include common problems such as unstable structures, crumbling plaster, and broken plumbing systems, but also a lack of space for libraries, computer labs, or science labs.¹⁷⁴

Recent cases, based primarily on state adequacy challenges have been successful.¹⁷⁵ These successful cases invoked remedies such as requiring state legislatures to establish an equitable way to fund “adequate” school facilities.¹⁷⁶ For example, in Alaska, Arizona, New Mexico, and Idaho, courts were ordered to change the methods of financing school construction and other capital expenses.¹⁷⁷ Other

168. See Darby & Levy, *supra* note 11, at 360. Although the Supreme Court held in *San Antonio v. Rodriguez* that education is not a fundamental right, every state has an education clause in its state constitution. See Aaron Jay Saiger, *School Choice and States’ Duty to Support “Public” Schools*, 48 B.C. L. REV. 909, 909 (2007). Some states view education as a fundamental right; others may just state that education is advantageous. See MOLLY A. HUNTER, EDUC. L. CTR., STATE CONSTITUTION EDUCATION CLAUSE LANGUAGE, available at <http://pabarerc.org/pdf/Molly%20Hunter%20Article.pdf> (last visited Oct. 20, 2011) (listing provisions of state education clauses).

169. Darby & Levy, *supra* note 11, at 363.

170. See John Dinan, *School Finance Litigation: The Third Wave Recedes*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION 96 (Joshua M. Dunn & Martin R. West eds., 2009).

171. ARSEN & MASON, *supra* note 15, at 1.

172. *Id.*

173. See *School Finance*, *supra* note 34.

174. ARSEN & MASON, *supra* note 15, at 5.

175. *Id.*

176. *Id.* at 2.

177. Dinan, *supra* note 170, at 100.

courts required legislatures to institute new programs, such as pre-kindergarten classes, or change school district officials and governance.¹⁷⁸ The courts, it seems, are responding this way because they have recognized that because state constitutions make education a state responsibility, states should take the steps to ensure an adequate education for all children.¹⁷⁹

State courts made some progress in compelling legislative reform in school finance systems.¹⁸⁰ In some cases, increased school spending reduced spending disparities and centralized school governance, despite some opposition to court involvement in the school finance movement.¹⁸¹ This increased funding generally took the form of increased state spending in property-poor districts or increased state taxes.¹⁸² Massachusetts, for example, has shown some significant improvement, but it is difficult to determine whether that is because of the court remedy, legislation enacted by the state, or both.¹⁸³ In states like Kentucky and Wyoming, however, it seems like judicial remedies in fact imposed significant change in student achievement.¹⁸⁴

Recently, a few courts addressed charter school and public school facility usage. In *Ridgecrest Charter School v. Sierra Unified School District*,¹⁸⁵ the Ridgecrest Charter School filed suit against the Sierra Sands Unified School District because it gave the school 9.5 different classrooms separated by sixty-five miles to accommodate 223 students.¹⁸⁶ Ridgecrest claimed that this violated the Charter School Act of 1992, which requires not only that public school districts make their facilities available to charter schools, but also that the facilities be on or adjacent to a school site.¹⁸⁷ If the facilities could not be on the same site, then the amount of space should be minimized to ensure the safety of the students.¹⁸⁸

After reviewing the Charter School Act, legislative intent, and the facilities request legislation, the court concluded that the school district's discretion "must comport with the evident purpose of the

178. *Id.* at 100-101.

179. ARSEN & MASON, *supra* note 15, at 3.

180. Dinan, *supra* note 170, at 101.

181. *Id.* at 101-02.

182. *Id.* at 104-05.

183. HANUSHEK & LINDSETH, *supra* note 12, at 5.

184. *See id.*

185. *Ridgecrest Charter Sch. v. Sierra Unified Sch. Dist.*, 130 Cal. App. 4th 986, 991 (2005).

186. *Id.*

187. *Id.*

188. *Id.*

Act to equalize the treatment of charter and district-run schools with respect to the allocation of space between them.”¹⁸⁹ Therefore, the district must give the needs of the charter school the same consideration of the district-run schools.¹⁹⁰

Even more recently, in *Bullis Charter School v. Los Altos School District*, the court held that the school district violated its obligations to ensure that its facilities were shared equally among the public schools and charter schools when Bullis Charter School sought to open in the Los Altos School District.¹⁹¹ In California, Proposition 39 requires that facilities be “shared fairly” among all students, and that a school district must respond to a facilities request by offering “reasonably equivalent” facilities to the charter schools seeking facilities.¹⁹² Proposition 39 was voted on by California voters and had the effect of requiring districts to “make facilities available to charter schools operating in the district that will accommodate all the charter school’s in-district students.”¹⁹³ What is also important to note in this decision is that the court stated that in making a facilities offer, the school district must make a “good faith effort” to consider and accurately measure all of the facilities that the charter school is being compared to and accurately describe those facilities—that is how “reasonably equivalent” facilities will be achieved.¹⁹⁴ This was a significant victory for charter schools, but the decision worried some people.¹⁹⁵ They believe that it will impose an even higher burden on school districts to provide more facilities, including those that already struggle to meet their burdens to provide adequate facilities.¹⁹⁶

Invoking the judiciary system to help alleviate the funding burdens has both positive and negative effects, but alone it is not enough.¹⁹⁷ Courts do not and cannot enact legislation; therefore, they

189. *Id.* at 1001.

190. *Id.*

191. *Bullis Charter Sch. v. Los Altos Sch. Dist.*, 200 Cal. App. 4th 1022, 1029 (2011).

192. *Id.*

193. *Id.* at 1039-40.

194. *Id.* at 1030; see also Devon B. Lincoln & Edward Sklar, *Court of Appeal Rules that Prop 39 Requires All Space Be Considered in Making a Facilities Offer to a Charter School*, LAZONO SMITH NEWS BLOG (Nov. 7, 2011), <http://lozanosmith.wordpress.com/2011/11/07/court-of-appeal-rules-that-prop-39-requires-all-space-be-considered-in-making-a-facilities-offer-to-a-charter-school/>.

195. See Lincoln & Sklar *supra* note 194.

196. See *id.*

197. See Curtis, *supra* note 64, at 1080 (“[I]t appears that the judiciary is not the most effective venue for pursuing equal funding claims for charter schools. However, if the legislature has already provided a clear intent or unambiguous statutory language, which lends authority to the judiciary to interpret an equal funding regime, then charter schools may be successful.”).

can only provide a necessary impetus for action.¹⁹⁸ In addition, they do not specify the policy remedies in great details in their holdings; therefore, a lot, if not all, of the responsibility falls on the state legislatures.¹⁹⁹

B. State and Local Action

As noted earlier, several states have been successful in enacting school facilities legislation.²⁰⁰ Minnesota, Utah, California, and Washington, D.C. lead the way in facilities legislation.²⁰¹ Colorado has been able to support both public and charter schools with its legislation. In 2008, it implemented the Building Excellent Schools Today Grant Program which provided all public schools, open for at least five years, grants that they could apply for to construct new schools, renovate existing facilities, and improve and address safety hazards, health concerns, and overcrowding.²⁰² Then in 2010, Colorado appropriated \$5 million to the Charter Schools Capital Construction Fund, which could be used for construction, renovation, financing, or purchasing or lease of facilities of charter schools.²⁰³

Action by the legislatures is necessary to assure that existing disparities in school facilities do not get worse.²⁰⁴ Laws that help both public and charter schools are needed since several legislatures have only taken steps to make accessing facilities a bit easier for charter schools.²⁰⁵ For example, Georgia law requires local school boards to make unused facilities available to charter schools for free.²⁰⁶ The boards have to renovate, repair, and maintain the facilities, but the terms of the facilities are subject to negotiation between the school board and the charter school, leaving some discretion and independence in the process.²⁰⁷ The downside to this bill however, is the fact that the school boards do not have this same obligation if there is no available unused facility,²⁰⁸ and nothing has been done to help the public schools.

198. See ARSEN & MASON, *supra* note 15, at 9.

199. *Id.*

200. See discussion *supra* Part II.

201. See discussion *supra* Part II.

202. SAZON, *supra* note 153, at 14.

203. *Id.*

204. *Id.* at 8.

205. See discussion *supra* Part II.B.2.

206. SAZON, *supra* note 153, at 8.

207. See *id.*

208. *Id.* at 9.

Louisiana law also requires local school boards to make vacant school facilities available to charter schools,²⁰⁹ and they provide zero-interest loans to charter schools that can be used for facility acquisition, upgrades, and repairs.²¹⁰ In New Orleans however, the government is focused on rebuilding after Hurricane Katrina and has made strides to repair the old and dilapidated buildings in New Orleans.²¹¹ The Louisiana Board of Elementary and Secondary Education, the Recovery School District, and the Orleans Parish School Board developed a School Facilities Master Plan to renovate and rebuild school facilities in New Orleans.²¹² The Plan consists of six phases of construction over ten years and focuses on constructing new schools.²¹³ The first phase is expected to be completed in 2014 and will result in twenty-two new schools and ten renovated schools for the use of both charter and public schools.²¹⁴ This Plan could set the stage for other school districts and should be used as an example for other districts as to how charter and public schools can renovate and build. “Perhaps for the first time in American public education, a state is setting out to create in its largest city a first-rate stock of public education facilities that will be available to all kinds of public schools, not just those run by the traditional district.”²¹⁵ This should be the goal for school districts nationwide, whether the schools are located in rural or urban areas and low-income or suburban communities.

In Arizona, the legislature enacted a statute that established standards for adequate school facilities and the state used state revenues to fund them.²¹⁶ The Students FIRST statute set basic specifications for school buildings, established a School Facilities Board, and created separate state funding mechanisms for “new facilities,” “building renewal,” and “deficiencies corrections.”²¹⁷ The School Facilities Board would develop the adequacy guidelines for school buildings; assess school facilities; and approve the distribution of funds to the school

209. *Id.* at 20.

210. *Id.*

211. *Id.* at 22.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 23.

216. ARIZ. REV. STAT. ANN. § 15-2001 (1998); see Molly A. Hunter, *Building on Judicial Intervention: The Redesign of School Facilities Funding in Arizona*, 34 J.L. & EDUC. 173, 188 (2005) [hereinafter Hunter, *Redesign of School Facilities*].

217. Hunter, *Redesign of School Facilities*, *supra* note 216, at 190.

districts.²¹⁸ The Board members, appointed by the governor, would represent different facets important to school construction such as school architects, school construction experts, or an elected member of a school board familiar with school finance.²¹⁹ Unfortunately, this project only benefitted public schools as opposed to both public and charter schools.²²⁰ Whereas traditional public schools would have to meet the standards created by the Board to be eligible, charter schools would not have the opportunity to; instead, they would just receive \$400 per pupil to help with their needs.²²¹

During the first few years of operation, the Board was able to distribute over \$500 million to school districts for new construction and \$50 million for renovations, and they were able to obtain over \$70 million worth of donated land for new school construction.²²² Despite not including charter schools in its legislation, districts were happy with the work of the Board because all the districts were receiving some state funding to improve their facilities.²²³

Ohio is another state that has an institution particularly for facilities funding. The Ohio Facilities Construction Commission (OFCC) consists of the Ohio School Facilities Commission (OSFC), which maintains the K-12 construction and renovation program.²²⁴ The OSFC was established in 1997 and administers Ohio's K-12 school construction and renovation program.²²⁵ It implements new construction models for schools and helps maintain some consistency throughout the state for the building and renovation of schools.²²⁶ By January 2012, the OSFC had opened 919 new or renovated buildings and had addressed the facilities needs in 214 of Ohio's 613 school districts.²²⁷

Similarly, the New Jersey Schools Development Authority, originally the Schools Construction Corporation, was created in 2002 to

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 192.

223. *Id.* at 197.

224. Press Release, Ohio Sch. Facilities Comm'n, Ohio Facilities Construction Commission Begins Operations (Sept. 10, 2012), available at <http://www.osfc.ohio.gov/MediaCenter/News/OFCCOrganizationalMeeting.aspx>.

225. Press Release, Ohio Sch. Facilities Comm'n, School Facilities Commission Prepares for Launch of New Agency (Aug. 23, 2012), available at <http://www.osfc.ohio.gov/MediaCenter/News/CommissionMeetingAugust232012.aspx>.

226. See Press Release, Ohio Sch. Facilities Comm'n, *supra* note 224 (describing how the program will help all public facilities construction in the state).

227. OHIO FACILITIES CONSTRUCTION COMMISSION, <http://www.osfc.ohio.gov/Home.aspx> (last visited Sept. 17, 2012).

“streamline the approach to school construction and move projects to completion” after the New Jersey Supreme Court held that New Jersey must provide 100% of funding for all school renovation and construction projects in special-needs school districts.²²⁸ After some much-needed reform,²²⁹ the agency started to meet its original goals. By September 2009, the agency had completed 613 projects in their districts including fifty new schools and forty-four additions and renovations and/or rehabilitations.²³⁰ And since the program was enacted, approximately 85% of school districts benefitted from the grants.²³¹

These agencies show that active state involvement does help school districts reach their school facilities goals, and with agencies that paid attention to allocations to both public and charter school facilities, there is an opportunity there for comprehensive and efficient growth. Gaining legislative support for programs and agencies like those mentioned above will not be easy, unfortunately, because of the current recession.²³²

Budget cuts are affecting state revenues and affecting states’ abilities to respond to court action.²³³ They are also affecting the education system’s ability to respond.²³⁴ These cuts have targeted everything from personnel to maintenance.²³⁵ In some states, the lack of funding affected education funding prior to 2008. District 7 in Illinois, for example, saw a five-year state funding decline of approximately \$7.2 million, or more than thirty-six percent of their allocated budgets.²³⁶ Not only has state funding declined, but so has property tax revenue. The district saw a major decline in property tax revenue where growth was at \$2.6 million in 2007-08 to a stark loss where growth was at a negative \$181,000 in 2011-12 meaning that the prop-

228. See *About SDA*, SCHOOLS DEV. AUTHORITY, <http://www.njsda.gov/GI/Overview.html> (last visited Sept. 17, 2012).

229. After a few years, the agency was found to have its inefficiencies. It was vulnerable to “waste, fraud and abuse of taxpayer dollars.” See *id.*

230. *Id.*

231. *Id.*

232. See CASH & TWIFORD, *supra* note 41, at 2 (“It’s January 2009, the economic look is formidable, school divisions are being forced to make drastic cuts in their budgets, the state of school buildings is deteriorating yet school divisions are forced to defer maintenance or new construction, and the cry for improved educational outcomes is rising.”).

233. See Darby & Levy, *supra* note 11, at 365.

234. See INST. EDUC. & SOC. POLICY, *supra* note 8, at 4 (noting that state budget cuts have severely limited education funding and depleted money available for capital spending).

235. CASH & TWIFORD, *supra* note 41, at 3.

236. Ed Hightower, *Cuts Are All Schools Can Do Now*, BELLEVILLE NEWS-DEMOCRAT, Jan. 8, 2012, at A5.

erty values sharply declined.²³⁷ This led to three options at the beginning of the 2011-12 academic year: (1) go back to the taxpayers and ask for an increase in taxes; (2) enter into deficit spending or borrow money at a high interest rate; or (3) continue to reduce expenditures and operate with the funds they have available.²³⁸ District 7 is just one example of districts across the country having to make difficult decisions about how they plan to fund their schools. In other cases, the economy has affected districts' abilities to raise needed tax revenue to support renovations or new facilities.²³⁹ No tax revenue or public support means that the problem will stay at a standstill.

In order to deal with the recession, in 2009 the federal government granted \$100 billion in education aid through the American Recovery and Reinvestment Act.²⁴⁰ However, once the funding ran out,²⁴¹ state legislatures again began cutting into their education budgets.²⁴² By the middle of 2011, eighteen states cut education funding to K-12 education, totaling about \$1.8 billion.²⁴³ Three states cut about \$300 million, and several others already cut their 2012 budgets.²⁴⁴ A report by the National Governors Association and the National Association of State Budget Officers stated that states would be spending \$2.5 billion less on K-12 education in 2012 than they did in 2011,²⁴⁵ which leads to the question—is there any other way to get financial support?

C. Federal Government's Support

Another suggestion is to have the federal government increase its role and provide more funding for school facility financing.²⁴⁶ The

237. *Id.*

238. *Id.*

239. See INST. EDUC. & SOC. POLICY, *supra* note 8, at 5; see also ARSEN & MASON, *supra* note 15, at 8 (“Any policy initiative to provide state support for school facilities in low-wealth communities will likely require the state to raise additional revenues, something which is never politically popular but all the more difficult to undertake in the midst of [Michigan’s] current economic downturn.”).

240. See *School Finance*, *supra* note 34.

241. PHIL OLIFF ET AL., CTR. ON BUDGET & POLICY PRIORITIES, NEW SCHOOL YEAR BRINGS MORE CUTS IN STATE FUNDING FOR SCHOOLS 1 (2012), available at <http://www.cbpp.org/files/9-4-12sfp.pdf> (noting that although federal government aid reduced the severity of cuts, Congress allowed the aid to expire before the states could recover from the recession).

242. *Id.*

243. *Id.*

244. *Id.* (“States have made steep cuts to education funding since the start of the recession and, in many states, those cuts deepened over the last year.”).

245. *Id.*

246. See SHAUL, *supra* note 45, at 16-20.

federal government has been very supportive of charter school expansion through proposed/enacted legislation that supports the needs of charter schools, rather than addressing the needs of both charter and public schools.²⁴⁷ However, if the federal government wants to support education, it should support both institutions rather than favor one over the other. The opportunity is there for the federal government to offer support to both institutions and still meet their goals of education reform.

As early as 2000, the Government Accountability Office recognized that the federal government can expand its role to help charter schools access facility funding, and some of these options can be geared not only towards charter schools, but public schools as well.²⁴⁸ Because funding is limited due to the state of the economy, the most feasible solutions would include grants, such as the successful Facilities Incentives Grants Program.²⁴⁹ Grants are payments from the federal government to state and local governments, organizations, or individuals to help them finance activities that fulfill certain federal goals that do not require repayment.²⁵⁰ Grants are flexible and can include provisions that encourage state and local spending; they can be tailored to specific needs or general programs; and they can be used to partially or completely fund the districts' need for facilities.²⁵¹ As with any program that has government involvement, there would be a lot of oversight needed with this solution.²⁵² Yet, the last federal grant initiative dedicated particularly to facilities funding was successful.²⁵³ If the federal government implemented more programs that focused on both institutions and used the same formulas like that of the Facilities Incentive Grants Program and distributed to participating states accordingly, there would be an opportunity for the federal government to provide a more balanced allocation to school facilities in general and help supplement the need for both institutions.

President Obama recognized this problem of inadequate school facilities and focused on the need for better school facilities in "The

247. See *supra* discussion Part II.B (describing the federal grants awarded to states for charter school development).

248. See SHAUL, *supra* note 45, at 16-20 (listing grants, direct loans, loan guarantees, a revolving loan pool, tax-exempt bonds, and tax credits as ways that government can increase its role).

249. See discussion *supra* Part II.B.

250. SHAUL, *supra* note 45, at 17.

251. *Id.*

252. *Id.*

253. See discussion *supra* Part II.B.

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American Jobs Act” that he proposed in September 2011.²⁵⁴ The plan focused on school renovations and job training in order to boost the economy.²⁵⁵ A December 2011 report released by the White House detailed the Act.²⁵⁶ The American Jobs Act included a proposal to invest \$25 billion to renovate and modernize at least 35,000 public schools.²⁵⁷ The Plan called for funds to upgrade existing public school facilities as well as for safer, healthier, and technologically advanced schools.²⁵⁸ The plan focused 40% of the funds to the 100 largest high-need public school districts.²⁵⁹ Although the funds could not be used for new construction, states would be granted maximum flexibility in choosing their projects, repairs, and upgrades.²⁶⁰ Most importantly, if the Plan was passed by Congress, the states would receive the funding within three to six months of its enactment with a twenty-four month timeframe to use the funds, thereby allowing for construction to get started quickly rather than waiting for years for disbursement of the funding.²⁶¹ Had this plan been passed, states would be able to both renovate current dilapidated schools through this funding and construct new institutions through their own state budgets that were saved by federal government support.

Although Congress did not pass the Jobs Act, it did take steps to support public school facilities.²⁶² The Fix America’s Schools Today Act of 2011 (FAST) was proposed in the House of Representatives “to provide assistance for the modernization, renovation, and repair of elementary and secondary school buildings in public school districts . . . to support the achievement of improved educational outcomes in those schools”²⁶³ The Act would have appropriated \$25 billion in grant funding to states to modernize, renovate, and repair elementary and secondary school facilities.²⁶⁴ Similarly, the 21st Cen-

254. See Michael A. Memoli, *Obama to Propose ‘American Jobs Act’ in Speech to Congress*, L.A. TIMES (Sept. 8, 2011), <http://articles.latimes.com/2011/sep/08/news/la-pn-obama-jobs-20110908>.

255. *Id.*

256. DOMESTIC POLICY COUNCIL ET AL., *supra* note 24, at 7-10.

257. *Id.* at 1.

258. *Id.* at 7.

259. *Id.*

260. *Id.*

261. *Id.* at 8 (“[S]tates would be expected to get funds to districts within 3 to 6 months of enactment and the districts would have to expend the funds within 24 months of enactment.”).

262. See Press Release, *Rebuild America’s Schools, Modernizing Schools in America Will Generate Jobs* (Oct. 10, 2011), [available at http://www.rebuildamericasschools.org/](http://www.rebuildamericasschools.org/).

263. H.R. 2948, 112th Cong. (1st Sess. 2011).

264. *Id.* § 106.

tury Green High-Performing Public School Facilities Act was proposed to provide grants to states to “modernize, renovate, or repair public school facilities, based on their need for such improvements, to be safe, healthy, high-performing, and up-to-date technologically.”²⁶⁵ Unfortunately, both pieces of legislation did not make it out of their committees.²⁶⁶ This shows, however, a form of commitment to improving the structures and environments of America’s schoolchildren.

CONCLUSION

As this Comment has shown, funding disparities exist for both traditional public schools and charter schools,²⁶⁷ and this problem is not going away anytime soon. Thirteen years into the twenty-first century, it is evident that technology plays a major role in the future of educating children. However, while some school districts are providing children with iPads in brand-new and renovated classrooms²⁶⁸ and others are learning in buildings that are decades old, moldy, or in places not initially designed to be school facilities at all, the argument for educational equality only gets stronger. Students will only be able to take advantage of these advances in technology if they have the facilities to support them. It is reasonable to expect that reform will not come quickly and it will not be easy; nor is this the only feasible form of reform.²⁶⁹ “[R]eality dictates that there are extreme cases in which the judicial branch must engage with the state legislature to seek a solution to the manner and funding of public education within a given state.”²⁷⁰ Educational disparities make for an extreme case. Disadvantaged schoolchildren will never be able to achieve the equalities that are owed to them if they are not given the opportunity to receive them. Collaboration between the institutions to demand more resources will at least help alleviate overcrowding and make the distri-

265. H.R. 3490, 112th Cong. § 101 (1st Sess. 2011).

266. See *Bill Summary & Status*, <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:/temp/~bdS2OB:@@X—/home/LegislativeData.php?n=BSS;c=112—> (last visited Sept. 20, 2012).

267. See Kothari, *supra* note 23, at 12.

268. See, e.g., Gianna Toboni, *Apple iPad: Learning Tool for Kindergarten Students? Schools Try Them*, ABC NEWS (Sept. 14, 2011), <http://abcnews.go.com/Technology/apple-ipad-learning-tool-kindergarten-maine-tennessee-south/story?id=14509290#.Ttbzp7Ik67s> (explaining that school districts in Maine, Tennessee, and South Carolina are trying a pilot program that introduces iPads into the classroom).

269. See Bruce D. Baker & R. Craig Wood, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas*, 27 U. ARK. LITTLE ROCK L. REV. 125, 167 (2004).

270. *Id.* at 168.

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bution of resources more equitable.²⁷¹ Without the public, parents, teachers, and other educators advocating for better facilities and explaining why decrepit or barely-existent facilities that children are learning in need to be replaced, the plea for better, equal, and adequate facilities will not be heard. Investing and encouraging the investment of adequate educational facilities is a step that will only help resolve the vicious cycle of inequalities that started generations ago and remains steadfast in our education system today.

271. INST. EDUC. & SOC. POLICY, *supra* note 8, at 33.

COMMENT

Pharaohs, Nubians, and Antiquities: International Law Suggests It's Time for a Change in Egypt

ANGELA M. PORTER*

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* J.D. Candidate, Howard University School of Law, Class of 2013. I dedicate this Comment to my father, Douglas V. Porter, who nurtured my interest in all things Kemet and never let me quit on anything. I would like to thank my gracious advisor, Dean Lisa Crooms-Robinson, for pushing me; you helped me earn the title of "The Infamous Ms. Porter" at the Library of Congress. Dr. Greg Carr, I can't even begin to thank you for all that you've taught me; I could write another Comment just about that. I hope this footnote will suffice for the time being. Finally, to my family (especially Barbara L. Porter, Joseph, Tamara, Alexis, Sara-Louise, and Britanni), thank you for inspiring me and making me smile.

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INTRODUCTION

“Speak Maat, Do Maat, since it is important, it is great, and it endures.”¹

1. JACOB H. CARRUTHERS, MDW NTR—DIVINE SPEECH: A HISTORIOGRAPHICAL REFLECTION OF AFRICAN DEEP THOUGHT FROM THE TIME OF THE PHARAOHS TO THE PRESENT 163 (2d ed. 1995) (providing an excerpt of Carruthers’ unpublished translation of the Kemetic tale, the *Nine Petitions of the Farmer*). *Maat* is a Kemetic concept that is difficult to define exactly; Asante and Abarry attempt to define it in this way: “*Maat* recurs in most African societies as the influence of right and righteousness, justice and harmony, balance, respect, and human dignity.” AFRICAN INTELLECTUAL HERITAGE: A BOOK OF SOURCES 59 (Molefi Kete Asante & Abu S. Abarry eds., 1996) [hereinafter AFRICAN INTELLECTUAL HERITAGE]. Russ

Between 1,985 and 1,773 BC, these words were written in a story entitled *The Nine Petitions of the Farmer Whose Speech Is Good*.² The story details a property dispute between a farmer, Khun Inpu (or “the one protected by the final judge”), and a wealthy man, Nemtynakht (or “strong robber”).³ In the story, the wealthy man steals the farmer’s belongings after devising a scheme to justify the theft.⁴ The farmer petitions the city official, Rensi, and after nine speeches, Rensi is compelled to have the farmer’s eloquent speeches recorded and presented to the *per-aa* (or “pharaoh”).⁵ Finally, the *per-aa* orders the official to rule in the farmer’s favor, and the official awards the wealthy man’s entire estate to the farmer.⁶

Today, the Egyptian government assumes the role of Nemtynakht, while the indigenous Nubians⁷ are placed in Khun Inpu’s unfortunate position; the Arab Egyptian-dominated government solely owns and manages ancient property to which the Nubians have a significant connection, while the Nubians have little say or consideration in determining what happens to their tangible cultural heritage.⁸ Egypt’s Law 117 textually ignores the cultural connection that the Nubians have to antiquities, and Nubians are virtually absent in the agency executing antiquities law.⁹ Furthermore, the Egyptian gov-

VerSteeg, author of *Law in Ancient Egypt*, describes *Maat* as “the Egyptian abstract sense of justice [that] guided the King’s command.” RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* 17-18 (2002).

2. CARRUTHERS, *supra* note 1, at 143.

3. *Id.* at 143-52.

4. *Id.* at 150-51.

5. *Id.* at 153-65. The word pharaoh comes from the Kemetic term *per-aa*, which literally means “the great house.” *Pharaoh*, *ENCYCLOPEDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/455117/pharaoh>. It was originally used to identify the royal palace, but by the New Kingdom era, it was used as a synonym for the Kemetic king. *Id.* However, *per-aa* was never the king’s formal title. *Id.*

6. CARRUTHERS, *supra* note 1, at 165.

7. The term “Nubian” is a modern term, and it is unclear whether the people of ancient *Nbu* or Kush used or exhibited the language or ethnicity denoted by the modern term “Nubian” or if that term is merely projected backward. DAVID O’CONNOR, *ANCIENT NUBIA: EGYPT’S RIVAL IN AFRICA*, at xii (1993). The modern-day group known as the Nubians are a population indigenous to Egypt. *See* BRUCE G. TRIGGER, *HISTORY AND SETTLEMENT IN LOWER NUBIA* 16 (1965) [hereinafter TRIGGER, *HISTORY AND SETTLEMENT*]. The Nubians are the result of a mixture with other populations “from a surprising variety of places.” *Id.* The majority of the population is Muslim and speaks Nubian as a first language. *Id.* at 16, 18.

8. *See* discussion *infra* Part II.

9. *See* S. DERSSO, *INT’L LABOUR ORG. & AFRICAN COMM’N ON HUMAN & PEOPLES’ RIGHTS, EGYPT: CONSTITUTIONAL, LEGISLATIVE AND ADMINISTRATIVE PROVISIONS CONCERNING INDIGENOUS PEOPLES* 20 (2009) [hereinafter EGYPT: INDIGENOUS PEOPLES]. *See generally* Law No. 117 of 1983 (Antiquities Protection Law), *Al-Jarida Al-Rasmiyya*, 11 Aug. 1983, art. IV (Egypt) [hereinafter Egypt Law 117 Original], available at http://www.unesco.org/culture/natlaws/media/pdf/egypt/egypt_law117_1983_engtof.pdf.

ernment has neglected and excluded the Nubians.¹⁰ This is a problem under international law, especially if the Nubians' cultural connection to "ancient Egyptian" history is systematically ignored, as it has been in Egyptology.¹¹ Egypt's legal approach to antiquities must change because, by ignoring the Nubian cultural connection to "ancient Egyptian" antiquities, Egypt is racially discriminating against the Nubians, which violates Egypt's international legal obligations and the fundamental principal of *maat* (justice).¹²

The upheaval of the 2011 Egyptian Revolution provides an opportunity for participants, scholars, and advocates to reflect on the country's treatment of its people to identify opportunities for improvement.¹³ This Comment proposes that the Egyptian government seize this period of change by properly acknowledging the Nubians and their connection to ancient cultural remains through inclusion in Egypt's antiquities system and law. By doing this, the country will live up to its international obligations and eliminate any racial discrimination that it may be perpetuating. In making this recommendation, it is important to review the history of Egypt's antiquities system up to the time of the Egyptian Revolution.

Part I of this Comment describes the history and structure of Egypt's antiquities laws. It also describes Egypt's relevant international obligations under the (1) Convention on the Elimination of All Forms of Racial Discrimination, (2) the International Covenant on Economic, Social and Cultural Rights, and (3) the United Nations Declaration on the Rights of Indigenous Peoples. In Part II, this Comment argues that the current state of Egypt's antiquities system is inconsistent with its international obligations. Part II considers (1) whether Egypt's exclusion of the Nubians stems from Egyptological superiority narratives and (2) analyzes which narratives Egypt could adopt without violating international law. Finally, Part III of this Comment proposes potential solutions that promote Nubian inclusion and Egyptian compliance with CERD, ICESCR, and UNDRIPs.

10. See discussion *infra* Parts II.C, II.D.

11. See discussion *infra* Part II.

12. See discussion *infra* Part II.

13. See Nevine El-Aref, *Heritage at What Cost?*, AL-AHRAM WKLY. (Cairo), Jan. 12–18 2012, <http://weekly.ahram.org.eg/2012/1080/eg42.htm?mid=57> [hereinafter El-Aref, *Heritage*] (mentioning the 2011 Egyptian Revolution and changes that have been made in Egyptian governance since).

I. BACKGROUND: KEMET, EGYPTIAN ANTIQUITIES LAW, AND EGYPT'S INTERNATIONAL OBLIGATIONS

The “ancient Egyptian” cultural record includes papyri decorated with stories like the Nine Petitions of the Farmer, passed down four thousand years to us through the work of ancient *sešw* (or scribes).¹⁴ It consists of many other items that have similarly withstood the tests of thousands of years.¹⁵ From antiquities found in Egypt, we learn about Kemet, the ancient civilization popularly known as “ancient Egypt.”¹⁶ The Kemetic people influenced and greatly contributed to most aspects of modern society, including law,¹⁷ mathematics,¹⁸ medicine,¹⁹ astronomy,²⁰ religion,²¹ art,²² writing,²³ architecture,²⁴ and

14. See ALAN GARDINER, *EGYPTIAN GRAMMAR: BEING AN INTRODUCTION TO THE STUDY OF HIEROGLYPHS* 27, 37, 58 (3d ed. 1957) (demonstrating that the ancient Egyptian word for scribe is likely pronounced *sešw*, and pluralizing requires the addition of the suffix *-w*); *Papyrus with Part of the Tale of the Eloquent Peasant*, BRITISH MUSEUM, http://www.britishmuseum.org/explore/highlights/highlight_objects/aes/p/papyrus_with_part_of_the_tale.aspx (last visited Nov. 23, 2012) (“The *Tale of the Eloquent Peasant* is . . . from the Middle Kingdom (2040-1750 BC).”).

15. See generally Ian Shaw, *Introduction to THE OXFORD HISTORY OF ANCIENT EGYPT* 1, 1-16 (Ian Shaw ed., 2000) (explaining that the book creates a historical account of ancient civilization in the Nile Delta through examination of its surviving tangible record and artifacts).

16. See generally *id.* Throughout this Comment, the word Kemet and its variants will be used to refer to the ancient Nile river valley civilization popularly called “ancient Egypt.” The term “kmt” dates back to 3100 BC AFRICAN INTELLECTUAL HERITAGE, *supra* note 1, at 6. “Egypt” comes from the later Greek word “Aigyptos.” *Id.* Aigyptos is the Greek translation of “Hekaptah,” a Kemetic phrase that the Greeks tried to emulate after noticing many “temples of the diety Ptah” during their visits to Kemet from 800 B.C. forward. *Id.* This Comment prefers the older, native term for the ancient country. Kemet is translated to mean “the black land.” *Id.*; see also GARDINER, *supra* note 14, at 57 (listing *kmt* as the transliteration for “the Black Land, i.e. Egypt”). This Comment will use the terms “Kemet,” “Kemetic,” and “Kemetics,” recognizing that these terms are adaptations to the ancient word “kmt” and are not confirmed representations of how “kmt” was adapted or pronounced. This Comment does not use the phrase “ancient Kemet” because it is redundant, as Kemet is an ancient civilization that did not survive into modernity. Also, many of the quotes and references to citations in this Comment will employ the term “ancient Egypt” or simply “Egypt” as to respect and avoid distortion of the cited author’s choice to use the more popular term.

17. See generally VERSTEEG, *supra* note 1 (detailing Kemet’s contribution to the legal field).

18. “[T]he Rhind Mathematical Papyrus from Egypt, dating back 4,000 years ago . . . is the oldest mathematical treatise on record.” *Editorial*, in *EGYPT: CHILD OF AFRICA* 1, 4 (Ivan Van Sertima ed., 1994); see also Alim Gaynor, *Blacks: The Founders of Medicine Mathematics and Astronomy*, MISS. LINK, Feb. 21, 2008, at 16 (explaining that the Rhind papyrus indicates that the Kemetic people knew the exact formula for the volume of a cylinder and sphere). The African contribution to math and engineering is “little known, or attributed to other peoples.” Beatrice Lumpkin, *Mathematics and Engineering in the Nile Valley*, in *EGYPT: CHILD OF AFRICA*, *supra*, at 323.

19. See, e.g., Gaynor, *supra* note 18, at 16 (“Egyptians were writing medical textbooks as early as 5,000 years ago.”).

20. “[T]he earliest identifiable calendar date we have is 4241 B.C. from Egypt’s famed Sothic calendar, the one still in use today.” Charles S. Finch III, *Nile Genesis: Continuity of Culture from the Great Lakes to the Delta*, in *EGYPT: CHILD OF AFRICA*, *supra* note 18, at 35, 47. The Kemetic people used a 365-day calendar with twelve months of thirty days plus five extra

engineering.²⁵ Evidence of this magnificent civilization lies within a tangible record of ancient artifacts.²⁶ Papyri, reliefs, temples, statues, mummified remains, household items, stelae, food items, and clothing all tell us about ancient lives and culture.²⁷

days devoted to divine figures. Gaynor, *supra* note 18, at 16. They also found a solution for the extra $\frac{1}{4}$ day that the modern calendar resolves with a leap-day every four years: a leap-year every 1,460 years. *Id.* Ancient Greek writer and traveler Herodotus wrote that priests of Heliopolis and Memphis, Egypt acknowledged Egyptian creation of the earliest calendar:

[T]he priests agreed with one another in saying that the Egyptians were the first of all men on earth to find out the course of the year, having divided the seasons into twelve parts to make up the whole; and this they said they found out from the stars: and they reckon to this extent more wisely than the Hellenes, as it seems to me, inasmuch as the Hellenes throw in an intercalated month every other year, to make the seasons right, whereas the Egyptians, reckoning the twelve months at thirty days each, bring in also every year five days beyond number, and thus the circle of their season is completed and comes round to the same point whence it set out.

HERODOTUS, AN ACCOUNT OF EGYPT 9 (G.C. Macaulay trans., Arc Manor 2008). The Kemetic people also knew how to align monuments with the stars. *See* Gaynor, *supra*, at 18.

21. *See, e.g.*, THE OXFORD HISTORY OF ANCIENT EGYPT, *supra* note 15, at 82, 273 (describing phases of religious development in Kemet).

22. *See, e.g.*, W.E.B. DU BOIS, THE NEGRO 45-46 (Humanity Books 2002) (1915) (“Before the reign of the first recorded king, five thousand years or more before Christ, there had already existed in Egypt a culture and *art* arising by long evolution from the days of paleolithic man, among a distinctly Negroid people.”) (emphasis added).

23. *See, e.g.*, THE OXFORD HISTORY OF ANCIENT EGYPT, *supra* note 15, at 78, 81-82 (describing the development of writing in Kemet).

24. *See, e.g., id.* at 282-83, 69-70, 120 (explaining different architectural phases in Kemetic history).

25. Additionally, the Greeks and Romans, who influenced Western civilization, were taught by the Kemetic people. *See* James Cuno, *Introduction to WHOSE CULTURE? THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES 27* (James Cuno ed., 2009) (“Greek culture itself bears the imprint of other cultures: Egypt and the lands eastward toward India . . .”); *see also* Gaynor, *supra* note 18, at 16 (explaining that ancient Greek physician Galen studied in Egyptian medical schools). *See generally* ERIC HORNUNG, HISTORY OF ANCIENT EGYPT: AN INTRODUCTION (David Lorton trans., Cornell University Press 1999) (1978) (providing a history of Kemet and including its relationships with other civilizations). Hornung describes the two cultures of Greeks and Egyptians, respectively, as “the younger, western one with its open attitude and the self-contained eastern one that bore the burden of thousands of years of history and had answers from primeval times at hand for all questions.” *Id.* at 146. Members of archeological organizations asserted in an amicus brief that Kemetic civilization “inspired and influenced the very Graeco-Roman cultures that are the well-springs of Western heritage.” Brief for Archaeological Institute of America et al. as Amici Curiae Supporting Appellee, United States v. Schultz, 333 F. 3d 393 (2d Cir. 2003) (No. 02-1357). Africana scholars write that “Egypt remains the most important civilization of antiquity in its impact on European and African civilizations.” AFRICAN INTELLECTUAL HERITAGE, *supra* note 1, at 4; *see also* CHEIKH ANTA DIOP, THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY 230 (Mercer Cook ed. & trans., 1967) (“The Greeks merely continued and developed, sometimes partially, what the Egyptians had invented.”); Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 Wis. L. REV. 1003, 1030 n.118 (1995) (citation omitted) (“The ancient African civilizations of Egypt, Ethiopia, and Nubia, among others, were respected, envied, and imitated by western cultures.”).

26. *See generally* Shaw, *supra* note 15.

27. *See generally id.*

Today, Kemet is long gone, and in its place sits Egypt, a country that is transforming as a result of demands from its people during the 2011 Egyptian Revolution.²⁸ Thousands of years separate Egypt from Kemet, both culturally and demographically.²⁹ Over time, different cultural groups have developed in the country, some indigenous, others developing because of various foreign occupations.³⁰ However, the Egyptian government often imposes equal treatment on its varied population and affords little recognition to the heterogeneity of its citizenry.³¹ One example of this—and the primary focus of this Comment—is Egypt’s antiquities system.³²

A. Egyptian Antiquities Law over the Years

The history of Kemetic antiquities is a tumultuous one.³³ In the 1600s, Europeans carried out exploration missions in southern Egypt.³⁴ Exploration accelerated when Napoleon Bonaparte led his Egyptian conquest in 1798.³⁵ The French ventured into Egypt to attack British interests in the Mediterranean and India.³⁶ While digging fortifications, they found the famous Rosetta Stone.³⁷ In 1801, the British took the Rosetta Stone as a spoil of war, marking the beginning of major European export of Kemetic antiquities from Egypt.³⁸

In 1836, Europeans founded “the Egyptian Society” for European travelers in Egypt, which amassed a library of Egyptological resources.³⁹ While the Society helped foster European interest in Kemet, scholar Riffa al-Tahtawi was largely responsible for creating

28. See El-Aref, *Heritage*, *supra* note 13 (mentioning the Egyptian Revolution).

29. See Wiley Henry, *Africa’s Own: Egypt*, TRI-STATE DEFENDER (Memphis, Tenn.), Apr. 21, 1999, at 1B (quoting Ivan Van Sertima who makes the point that modern Egypt and ancient Egypt are two completely different civilizations).

30. Cf. EGYPT: INDIGENOUS PEOPLES, *supra* note 9, at 3-4, 14-16 (explaining what “indigenous” means and that the Nubians are an indigenous group in Egypt).

31. See discussion *infra* Part II.A.

32. See generally Law No. 117 of 1983, as amended by Law No. 3 of 2010, (Promulgating the Antiquities’ Protection Law), *Al-Jarida Al-Rasmiyya*, 14 Feb. 2010 (Egypt) [hereinafter Egypt Law 117 Amended] (outlining Egypt’s antiquities patrimony law).

33. See Dan Duray, *Pyramid Scheme: What’s Next for Egypt’s Artifacts?*, N.Y. OBSERVER, Aug. 23, 2011, available at <http://www.observer.com/2011/08/pyramid-scheme-what%E2%80%99s-next-for-egypt%E2%80%99s-artifacts/>.

34. DONALD MALCOLM REID, *WHOSE PHARAOHS? ARCHAEOLOGY, MUSEUMS, AND EGYPTIAN NATIONAL IDENTITY FROM NAPOLEON TO WORLD WAR I*, at 27 (1997).

35. *Id.* at 1.

36. *Id.* at 31.

37. *Id.*

38. *Id.*

39. *Id.* at 49.

that interest in his fellow Egyptians.⁴⁰ Meanwhile, the Egyptian Pasha Muhammed Ali viewed Kemetic antiquities mainly as “bargaining chips to be exchanged for European diplomatic and technical support.”⁴¹

In 1830, French Egyptologist Jean-François Champollion asked Ali to protect endangered antiquities in Egypt because many ancient temples had disappeared as a result of antiquities dealing.⁴² Ali responded by blaming the Europeans, citing European precedent to ban export of antiquities and ordering their collection for display in Cairo.⁴³ European archaeologists took the ban as a joke and continued smuggling antiquities out of Egypt, with obelisks as “the most spectacular prizes of all.”⁴⁴ Nevertheless, many view Ali’s decree as the founding of Egypt’s Antiquities Service and the Egyptian Museum.⁴⁵

It took several attempts to truly establish the Egyptian Museum, however.⁴⁶ Ali’s successor, Ottoman governor Abbas I, only “paid sporadic attention to antiquities,” and many were given as a gift to the Sultan in Turkey.⁴⁷ Abbas’s successor Said continued the trend by giving away the government’s collection of antiquities to Archduke Maximilian of Austria in 1855.⁴⁸

Egyptologist Auguste Mariette excavated for Said.⁴⁹ During his time in Egypt, Mariette re-founded the Egyptian Antiquities Service and tried to prevent the loss of antiquities, but he ultimately could not.⁵⁰ He voiced his frustration that only five obelisks remained in Egypt, and when he died, the Egyptian cabinet declared that “hereafter no Egyptian monument shall be given to any power or to any city whatever not forming a part of the Egyptian territory.”⁵¹

40. *Id.* at 50.

41. *Id.* at 54.

42. *Id.* at 41, 54-55. For example, the Temple of Dendera had been quarried to build a cloth factory. *See id.* at 55.

43. *Id.*

44. *Id.* at 57.

45. *Id.* at 56.

46. *See id.* at 58.

47. *Id.*

48. *Id.* at 100.

49. *See id.*

50. *Id.* at 100, 102.

51. *Id.* at 102-03.

As time went on, archaeology played a significant role in shaping Egyptian national identity.⁵² The Egyptian public's interest in Kemet really began to grow in the 1800s.⁵³ It was during this time when Egyptian scholars began to participate in Western-dominated Egyptology.⁵⁴ As a result, in the mid-1800s, Egypt began adopting Kemetic symbols as part of its national identity.⁵⁵

While Egypt was developing this connection to Kemet, Europe still dominated in the field of Egyptology: the Institut égyptien (a "learned society"), the Antiquities Service, and the Egyptian Museum were all the results of European interest and influence.⁵⁶ Europe also dominated Egypt itself, as Britain took political control of Egypt when it colonized the country in 1882.⁵⁷ Egypt, at this time, also remained connected to the Ottoman Empire.⁵⁸

In 1883, Egypt's antiquities law declared all antiquities and museum objects property of the state, and the Antiquities Service was housed in the Ministry of Public Works.⁵⁹ The next year, the Ottoman antiquities law moved the Antiquities Service to the Ministry of Education, implying that antiquities were at that time viewed "as part of the national patrimony."⁶⁰ Egyptians slowly gained participation in the Antiquities Service: at its founding in 1860, fourteen percent of the Antiquities Service was Egyptian, and in 1890, that number grew to thirty-one percent.⁶¹

Britain severed Egypt's loose ties to Istanbul and the Ottoman Empire in 1914 and declared Egypt a British protectorate.⁶² Five years later, the 1919 Egyptian Revolution forced Britain to eventually

52. See *id.* at 2. "Ancient Egypt" was "an inspiration for a modern Egyptian renaissance." *Id.* at 8.

53. See *id.* at 118.

54. *Id.* at 95-96. For example, Al-Tahtawi wrote a history of ancient Egypt in Arabic. *Id.* at 95.

55. See *id.* at 95-96, 119. Al-Ahram, the government newspaper, appeared in 1876 and adopted "the pyramids" as its name. *Id.* at 95-96, 118. Also, Egypt's official postage displayed a pyramid and sphinx as symbols from 1867 to 1914. *Id.* at 96.

56. *Id.* at 97. European prevalence is also evidenced by the original Egyptian Museum's Beaux Arts neoclassical architectural design. *Id.* at 192 ("An Egyptian architect and indigenous design were out of the question.").

57. See Terje Tvedt, *The Nile and the British Road to Imperialism*, AL JAZEERA, <http://www.aljazeera.com/programmes/struggleoverthenile/2011/05/201153181349369966.html> (last modified June 12, 2011).

58. See REID, *supra* note 34, at 175.

59. *Id.*

60. *Id.*

61. *Id.* at 189.

62. *Id.* at 119, 292.

give Egypt more autonomy in 1922; this was the same year that Tutankhamun's famous tomb came to light, and Egypt, in its limited independence, was able to keep the tomb's contents; pass stricter antiquities exportation laws; "Egyptianize" museums and the Antiquities Service; and empower Egyptian Egyptology through education and training of its universities.⁶³

In 1951, Egypt adopted "Law No. 215 Concerning Antiquities' Protection" (Law No. 215), which sought to more strictly retain antiquities within its borders.⁶⁴ In 1952, the political climate was ripe for military leader Gamal Abdel Nasser's military takeover.⁶⁵ A reshuffle in power resulted in the end of British occupation in 1954.⁶⁶ With that, Egypt won full control of Kemetic antiquities and museums, and ninety-four years of French control of the Antiquities Service came to an end.⁶⁷ That same year, the country beamed with pride as the step pyramid at Saqqara and *per-aa* Khufu's solar boat were discovered by *Egyptian* archaeologists.⁶⁸ Four years later, the Antiquities Service finally moved to the Ministry of Culture and National Guidance, where it has remained since.⁶⁹

Despite its retention concerns, Egypt temporarily changed Law No. 215 immediately before the construction of the Aswan High Dam.⁷⁰ Nasser supported construction of the dam in 1960 because it would industrialize Egypt and make the country self-sufficient after years of simple basin irrigation and foreign rule.⁷¹ The dam, however, would inundate a large area called Lower Nubia, which was rich in Kemetic artifacts and monuments.⁷²

To incentivize excavation and salvage these artifacts, the country lifted its restrictions on the removal of antiquities.⁷³ At this time, Egypt employed a system allowing foreign excavation teams to dig in

63. *Id.* at 293.

64. Egypt Law 117 Original, *supra* note 9, at art. IV; John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, ENVIRONS ENVTL. L. & POL'Y J., Fall 2004, at 1, 52.

65. REID, *supra* note 34, at 293.

66. *Id.*

67. *Id.* at 294. Mustafa Amer became the first Egyptian to direct the Antiquities Service. *Id.*

68. *Id.*

69. *Id.* at 175.

70. See Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT'L L. 183, 206 (2003).

71. *Id.* at 202-03.

72. *Id.* at 205.

73. *Id.* at 206.

more areas and take a fifty percent share of antiquities from an archaeological dig in Egypt.⁷⁴ Under this “partage” system, an Egyptian government official would go to an archaeological dig site, select “culturally significant artifacts” for the government to keep, and then—in two piles—evenly split the remaining antiquities with the archaeologist.⁷⁵ Thus, foreign archaeologists and excavation teams shared their finds with the Egypt’s national museums.⁷⁶

Nasser was succeeded by military officers Anwar al-Sadat and Hosni Mubarak.⁷⁷ In 1983, under the presidency of Mubarak, Egypt returned to strict retention when it passed The Law on the Protection of Antiquities, which is often referred to as “Law 117.”⁷⁸ Egyptian Law 117 was the lawmakers’ answer to some of Egypt’s cultural ownership goals.⁷⁹ The law is a vesting statute and an anti-possession statute—vesting in the state all ancient property found therein.⁸⁰ It nationalizes ancient artifacts,⁸¹ regardless of who discovers those artifacts;⁸² thus, foreign excavation teams in Egypt must turn over their finds to the Egyptian government.⁸³ The law also nationalizes Egypt’s antiquities museums and stores.⁸⁴

As for artifacts privately owned in Egypt, the law requires that they be registered, recorded, and kept within Egypt’s borders.⁸⁵ Law 117 also criminalizes smuggling antiquities out of Egypt.⁸⁶ Furthermore, trade in antiquities is strictly prohibited, and upon adoption of Law 117, traders were given one year to get rid of the ancient contra-

74. Duray, *supra* note 33; Wangkeo, *supra* note 70, at 206.

75. Duray, *supra* note 33.

76. See James Cuno, *Preface* to JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE, at xxxiii (2008) [hereinafter Cuno, *Preface*].

77. REID, *supra* note 34, at 293.

78. See Egypt Law 117 Original, *supra* note 9, at art. IV; EGYPT: INDIGENOUS PEOPLES, *supra* note 9, at 5; Cohan, *supra* note 64, at 67.

79. See Zahi Hawass, *Introduction* to Egypt Law 117 Amended, *supra* note 32, at 4 (“[W]e have taken a serious step in order to preserve the heritage of Egypt.”); Cohan, *supra* note 64, at 51 (“In order to combat looting of archaeological sites and advance policies supporting the retention of cultural property, many nations have enacted ‘umbrella’ retention laws that declare archaeological materials to be national property.”).

80. See generally Egypt Law 117 Amended, *supra* note 32 (outlining Egypt’s antiquities retention law).

81. See Egypt Law 117 Original, *supra* note 9, at art. 6 (“All antiquities are considered public property . . .”).

82. See Egypt Law 117 Amended, *supra* note 32, at art. 35.

83. See *id.* at art. 34, 35.

84. See *id.* at art. 28.

85. Egypt Law 117 Original, *supra* note 9, at art. 8 (“Anyone who does not notify the Authority of what he has of antiquities for registration . . . is considered an unlawful possessor . . .”); see also Cohan, *supra* note 64, at 67.

86. Cohan, *supra* note 64, at 67.

band they possessed.⁸⁷ Law 117 also reaches private ownership of real estate that may be “archaeological[ly] importan[t].”⁸⁸ If a person’s land is likely to contain antiquities, the government can confiscate that land.⁸⁹ In compensating those who previously owned the confiscated land, the government is not required to take into account the value of the antiquities found on that land.⁹⁰

Before the 2011 Egyptian Revolution, the Egyptian government actively enforced Law 117 through a department devoted specifically to antiquities.⁹¹ This arm of government, whose precursor was the Antiquities Service, was known as the Supreme Council of Antiquities (“SCA”).⁹² It consisted of a Board of Directors (“SCA Board”) and two permanent committees which focused on different types of antiquities found in Egypt.⁹³ The SCA Board made recommendations regarding the registration of specific antiquities.⁹⁴

Zahi Hawass became Secretary General of the SCA in 2002.⁹⁵ He instituted a catalogue system for artifacts; constructed storage units and new museums; and trained temple guards.⁹⁶ Hawass was a proponent of antiquities law reform, and he supported amendments to Law 117.⁹⁷ He expressed a need for harsher penalties to stop antiquities trafficking.⁹⁸ On February 14, 2010, under President Hosni Mubarak’s administration, Egyptian Law No. 3 (Law 3) went into effect.⁹⁹ Law 3 made possession of antiquities illegal:¹⁰⁰ possessors had

87. See Egypt Law 117 Original, *supra* note 9, at art. 7 (“Trade in antiquities shall be prohibited from the date of effecting said law and present tradesmen are hereby granted a one year period of grace to arrange their circumstances and to dispose of antiquities they have.”).

88. Egypt Law 117 Amended, *supra* note 32, at art. 18; Egypt Law 117 Original, *supra* note 9, at art. 18.

89. See Egypt Law 117 Amended, *supra* note 32, at art. 18; Egypt Law 117 Original, *supra* note 9, at art. 18 (“Lands owned by individuals may be expropriated for their archaeological importance.”).

90. Egypt Law 117 Amended, *supra* note 32, at art. 18, 23.

91. Patty Gerstenblith, *The McClain/Schultz Doctrine: Another Step Against Trade in Stolen Antiquities*, CULTURE WITHOUT CONTEXT (Illicit Antiquities Research Ctr.), Autumn 2003, www.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue%2013/gerstenblith.htm.

92. Egypt Law 117 Amended, *supra* note 32, at art. II, 5.

93. See *id.* at art. II, 7, 12.

94. *Id.* at art. II, 12.

95. *Recovering Stolen Treasures*, SUPREME COUNS. ANTIQUITIES, http://www.sca-egypt.org/eng/rst_mp.htm (last visited Nov. 24, 2012).

96. Nevine El-Aref, *New Law on the Way*, AL-AHRAM WKLY. (Cairo), 27 Oct. – 2 Nov. 2005, <http://weekly.ahram.org.eg/2005/766/he1.htm> [hereinafter El-Aref, *New Law*].

97. *Recovering Stolen Treasures*, *supra* note 95.

98. El-Aref, *New Law*, *supra* note 96.

99. See Egypt Law 117 Amended, *supra* note 32, at 10; *Recovering Stolen Treasures*, *supra* note 95.

100. See Egypt Law 117 Amended, *supra* note 32, at art. 9.

one year to turn their antiquities over to Hawass's storehouses.¹⁰¹ With Law 3, Hawass was also awarded his wish of harsher penalties for antiquities offenses.¹⁰²

Pursuant to these two laws, the SCA routinely prosecuted individuals who were found to deal in post-1983 antiquities.¹⁰³ Since the 2011 Egyptian Revolution, however, the SCA has been in a state of flux.¹⁰⁴ Its name and structure have repeatedly changed, and it has undergone new leadership multiple times.¹⁰⁵ It is now called the Ministry of State for Antiquities (MSA), and is led by Antiquities Minister Mohamed Ibrahim.¹⁰⁶

As the tourism industry, which employs tens of thousands of Egyptians, continues to boom in Egypt, antiquities governance becomes more important.¹⁰⁷ However, Egyptian national identity is becoming less associated with Kemet.¹⁰⁸ Today, there is a dual Islamic and "ancient Egyptian" identity.¹⁰⁹ Furthermore, "most Egyptians [are] far more at home with Arab and Islamic than with ancient Egyptian legacies"¹¹⁰ The tension between the two national identities "has no end in sight."¹¹¹ This abbreviated history reveals that while France, Britain, Germany, Italy, and later Egypt participated in archaeology and Egyptology, Nubian Egyptians were left in the shadows.¹¹² Their identity and their involvement in the antiquities system are notably absent in Egypt's antiquities chronology.

101. El-Aref, *New Law*, *supra* note 96.

102. *See id.*

103. *See* Gerstenblith, *supra* note 91.

104. El-Aref, *Heritage*, *supra* note 13 ("In the many changes of 2011 the MSA replaced the SCA, and vice versa.").

105. *Id.* ("Meanwhile, the official body, the Supreme Council of Antiquities (SCA), then under the umbrella of the Ministry of Culture, swung between a Ministry of State for Antiquities (MSA) and an independent SCA body affiliated to the cabinet.").

106. Nevine El-Aref, *Major Project to Document All Egypt's Sites Starts with Beni Hassan Tombs*, AHRAM ONLINE (Cairo), July 2, 2012, <http://english.ahram.org.eg/NewsContent/9/40/46726/Heritage/Ancient-Egypt/Major-project-to-document-all-Egypt-sites-starts.aspx> (describing the Ministry of State for Antiquities).

107. REID, *supra* note 34, at 295-96.

108. *Id.*

109. *See id.* at 295. For example, currency bears both Islamic and pharaonic monuments. *Id.*

110. *Id.*

111. *Id.* at 296.

112. *See id.* at 403 (mentioning the word "Nubia" in the index of a comprehensive history book only twice). *See generally id.* (detailing the history of Egyptology and Egypt's antiquities structure).

B. International Law Regarding Racial Discrimination and Culture

The Constitution of the Arab Republic of Egypt provides that treaties “shall have the force of law after their conclusion, ratification and publication”¹¹³ This text suggests that treaties do not require enabling legislation to have the force of law in Egypt.¹¹⁴ The Convention on the Elimination of All Forms of Racial Discrimination (CERD) attempts to eliminate racial discrimination in all of its manifestations.¹¹⁵ CERD defines “racial discrimination” as

any . . . exclusion . . . or preference based on race, . . . [or] descent . . . which has the purpose or effect of nullifying or impairing the recognition, . . . on an equal footing, of human rights and fundamental freedoms in the political, economic, social, *cultural*, or any other field of public life.¹¹⁶

This discrimination can be intentional but also by effect.¹¹⁷ Additionally, discrimination may occur as a result of treating groups with similar circumstances differently or treating groups with varying circumstances equally.¹¹⁸ Finally, the CERD Committee has expressly stated that CERD applies to indigenous groups.¹¹⁹

State Parties to CERD must review their current laws and regulations and nullify those that perpetuate racial discrimination.¹²⁰ Additionally, State Parties to CERD “condemn all propaganda . . . which are based on ideas or theories of superiority of one race or group of

113. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 151. At the time of publication of this Comment, Egypt is about to write a new constitution (after June 2012).

114. EGYPT: INDIGENOUS PEOPLES, *supra* note 9, at 10.

115. *See generally* International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195, *available at* <http://www2.ohchr.org/english/law/cerd.htm> (last visited Mar. 9, 2012) [hereinafter CERD] (promoting human dignity and equality and outlining an agreement to eradicate threats to those core principles).

116. *Id.* at art. 1(1) (emphasis added).

117. United Nations, Comm. on the Elimination of Racial Discrimination, General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination, ¶ 7, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009) [hereinafter General Recommendation No. 32].

118. *See id.* ¶ 8.

119. *See* United Nations, Comm. on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples, ¶ 2, U.N. Doc. A/52/18, annex V (Aug. 18, 1997) [hereinafter General Recommendation No. 23], *available at* [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument).

120. CERD, *supra* note 115, at art. 2(1)(c).

persons of one color or ethnic origin”¹²¹ Egypt is a State Party to CERD, having acceded to the international convention in 1967.¹²²

Another international treaty pertaining to culture is the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹²³ Article 15 of ICESCR asserts that the State Parties to the Covenant “recognize the right of everyone . . . to take part in cultural life . . . [and] enjoy the benefits of scientific progress and its applications.”¹²⁴ ICESCR’s General Comment No. 21 defines “cultural life” as an idea that considers “individuality and otherness.”¹²⁵ Furthermore, in the context of minority groups, State Parties are required to recognize minority groups within the State as an important and distinct component of the State’s own larger culture and identity.¹²⁶ For indigenous groups especially, ICESCR demands State action securing the right of groups to “maintain, control, protect and develop their cultural heritage”¹²⁷ Egypt is a State Party to ICESCR as well, having signed the treaty in 1967 and ratified it in 1982.¹²⁸ However, the United Nations Economic and Social Council (ECOSOC) has observed that it is unclear whether Egypt has domestically implemented ICESCR.¹²⁹

As a State Party to these two treaties, Egypt is required to submit reports periodically regarding its efforts to achieve the aims set out in the treaties.¹³⁰ For CERD, Egypt reports to the Committee on the

121. *Id.* at art. 4.

122. See Reports Submitted by States Parties Under Article 9 of the Convention, Apr. 11, 2001, ¶ 3, U.N. Doc. CERD/C/384/Add.3, [hereinafter Egypt Report to CERD]; see also United Nations, Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Egypt, 08/15/2001, paras. 278-279, U.N. Doc. A/56/18; CERD, 59th Sess. (2001) [hereinafter CERD Report on Egypt], available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.para.278-297.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.56.18.para.278-297.En?Opendocument).

123. See generally International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www2.ohchr.org/english/law/cescr.htm> (last visited Nov. 25, 2012) [hereinafter ICESCR] (outlining cultural rights of citizens of the treaty’s state parties).

124. *Id.* at art. 15(1)(a)-(b).

125. See United Nations, Econ. & Soc. Council, General Comment No. 21: Right of Everyone to Take Part in Cultural Life, ¶ 12, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

126. See *id.* ¶ 32.

127. *Id.* ¶ 37.

128. Egypt Report to CERD, *supra* note 122, at para. 6; see United Nations, Econ. & Soc. Council, Comm. on Econ., Soc., and Cultural Rights, Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Egypt, May 23, 2000, at para. 12, U.N. Doc. E/C.12/1/Add.44; ICESCR (2000) [hereinafter ICESCR Report on Egypt], available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.44.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.44.En?Opendocument); see also EGYPT: INDIGENOUS PEOPLES, *supra* note 9, at 11.

129. See ICESCR Report on Egypt, *supra* note 128, at para. 12; EGYPT: INDIGENOUS PEOPLES, *supra* note 9, at 10.

130. See CERD, *supra* note 115, at art. 9(1); ICESCR, *supra* note 123, at art. 16-17.

Elimination of Racial Discrimination (CERD Committee).¹³¹ Egypt must report its ICESCR progress to ECOSOC.¹³²

Another important treaty to which Egypt is required to adhere is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIPs).¹³³ Adopted by the United Nations General Assembly in 2007 with Egypt's favorable vote,¹³⁴ UNDRIPs recognizes that (1) indigenous peoples have been discriminated against and oppressed in various aspects of life, and (2) there is a need to hold State Parties to treaties and agreements establishing the rights of indigenous peoples.¹³⁵ It prohibits discrimination based on indigenous *origin or identity*.¹³⁶

UNDRIPs provides that indigenous groups have the right to "participate fully, if they so choose" in the cultural life of their respective States.¹³⁷ Moreover, it requires State Parties to take measures to prevent or provide redress for actions that have the "aim or effect of depriving [indigenous groups] of their integrity as *distinct* peoples, or of their cultural values or ethnic identities."¹³⁸ One of the key provisions of UNDRIPs relevant to the Nubians and antiquities in Egypt is contained in article 11: "Indigenous peoples have the right to . . . maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."¹³⁹

Despite Egypt's status as a State Party to CERD, ICESCR, and UNDRIPs, no Egyptian legislation addresses the rights of indigenous or marginalized peoples.¹⁴⁰ Egypt's constitution is silent about the rights of indigenous peoples, containing only an implicit notion that there are smaller groups within the purportedly homogenous Arab

131. CERD, *supra* note 115, at art. 8-9.

132. ICESCR, *supra* note 123, at art. 16(2).

133. G.A. Res. 61/295, U.N. Doc. A/61/L.67 (Sept. 13, 2007) [hereinafter UNDRIPs].

134. *See id.*; *see also* INT'L LABOUR ORG. & THE AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS, THE RIGHTS OF INDIGENOUS PEOPLES IN 24 AFRICAN COUNTRIES 8 (2009) [hereinafter ILO, RIGHTS OF INDIGENOUS].

135. *See* ILO, RIGHTS OF INDIGENOUS, *supra* note 134, at 1-2; *see also* UNDRIPs, *supra* note 133, at art. 37 ("Indigenous peoples have the right to the recognition, observance and enforcement of treaties . . .").

136. UNDRIPs, *supra* note 133, at art. 2 ("Indigenous peoples and individuals are free and equal to all other peoples and . . . have the right to be free from any kind of discrimination . . . in particular that based on their indigenous origin or identity.").

137. *Id.* at art. 5.

138. *Id.* at arts. 8(2), 38 (emphasis added).

139. *Id.* at art. 11(1).

140. ILO, RIGHTS OF INDIGENOUS, *supra* note 134, at 35.

state.¹⁴¹ Unfortunately, Egypt has not met its treaty obligations. Meeting the requirements of these instruments is the first step toward inclusion in the antiquities structure to which the Nubians are entitled.

II. TO BE COMPLIANT WITH CERD, EGYPT MUST
INCLUDE THE NUBIANS AND ITS ANTIQUITIES BODY
MUST ADOPT A NEUTRAL EGYPTOLOGICAL NARRATIVE

Considering CERD, ICESCR, and UNDRIPs, Egypt's antiquities system racially discriminates against Nubian Egyptians.¹⁴² This is because Egypt's antiquities law and structure exclude Nubian Egyptians.¹⁴³ The Egyptian government has a legal problem: it has noticeably ignored the needs of its minority groups and vulnerable communities.¹⁴⁴

Upon reviewing Egypt's CERD reports in 2001, the Committee on Elimination of Racial Discrimination (CERD Committee) noticed and expressed concern at the lack of information contained therein about the Nubians and other cultural groups.¹⁴⁵ The Committee expressed this concern after noting Egypt's view that its population was homogenous.¹⁴⁶ The Committee then recommended that Egypt provide information on small ethnic groups like the Nubians and their ability to preserve their culture.¹⁴⁷

This ignorance of minority needs extends to Egypt's antiquities law. Law 117, as amended by Law 3, describes the structure of the SCA, which consists of two "Competent Permanent Committee[s]": "the permanent committee concerned with the ancient Egyptian, Greek and Roman Antiquities [and] the permanent committee concerned with Islamic and Coptic monuments."¹⁴⁸ There is no mention of concern for Nubian antiquities here.¹⁴⁹ In fact, the term "Nubian" is not used once in the thirty-nine-page legislation, despite the presence of Nubian artifacts in Egypt.¹⁵⁰ This is probably due to Egypt's

141. *See id.* at 18.

142. *See* discussion *infra* Part III.

143. *See* discussion *infra* Part III.

144. *See* CERD Report on Egypt, *supra* note 122, at paras. 286, 293; ICESCR Report on Egypt, *supra* note 128, at para. 13.

145. CERD Report on Egypt, *supra* note 122, at para. 286.

146. *Id.*

147. *Id.* at para. 293.

148. Egypt Law 117 Amended, *supra* note 32, at art. II, 7.

149. *Id.* at art. II.

150. *See generally id.* (exhibiting no use of the term "Nubian" throughout the Egypt antiquities legislation document).

claims of cultural homogeneity, as the CERD Committee noted in its concerns and recommendations.¹⁵¹

This section will explore reasons why Egypt should recognize and involve its Nubian population in its antiquities system. It will explain that the Nubians are a culturally distinct group in Egypt and that they have a stake in Kemetic history. This section will also explore the lack of Nubian presence in the Egyptian antiquities system and discuss how this exclusion violates CERD. Finally, this section will examine the role that Egyptology might play in Nubian exclusion and its relationship to CERD.

A. Nubians Are a Distinct Indigenous Cultural Group, and Egypt Is Not as “Homogenous” as It Purports to Be

In 1965, Egyptologist B.G. Trigger stated that “[t]he present-day Nubians are linguistically and culturally distinct from the Egyptians.”¹⁵² In 2011, Journalist Tom Begg wrote that, “[i]n spite of the huge changes that swept across the region down the millennia, the Nubians retained their own distinct language, customs and culture until the present day.”¹⁵³ Despite the fact that the Nubians make up a distinct community in Egypt, the Nubian community and its history are often overlooked, in and outside of Egypt.¹⁵⁴ Representatives of the Egyptian government have maintained that Egypt is a culturally homogenous country without a major minority population.¹⁵⁵

In its report to the CERD Committee, Egypt stated that, as a country, it “[did] not have any main ethnic minorities.”¹⁵⁶ Its report went on to state that “[t]here is full homogeneity among all the groups and communities of which the Egyptian population consists since they all speak the same language . . . and Arab culture predominates in all

151. CERD Report on Egypt, *supra* note 122, at para. 286. The CERD Committee has been very active in analyzing State Party reports and recommending appropriate treatment of indigenous peoples. See ILO, RIGHTS OF INDIGENOUS, *supra* note 134, at 9.

152. TRIGGER, HISTORY AND SETTLEMENT, *supra* note 7, at 16 (forming this conclusion as a result of his studies in Egypt).

153. Tom Begg, *What Next for Egypt's Forgotten Minority? Egypt's Government Can No Longer Ignore the Grievances of Its 3 Million-Strong Nubian Community*, THINK AFRICA PRESS (July 14, 2011), <http://thinkafricapress.com/egypt/what-next-egypts-forgotten-minority>.

154. See Idris Weusi, *The Overlooked Civilization of Nubia*, MICH. CITIZEN, Feb. 7, 2003, at B1; see also Egypt Report to CERD, *supra* note 122, at para. 334.

155. United Nations Committee on the Elimination of Racial Discrimination, *Summary Record of the First Part (Public) of the 1484th Meeting*, Aug. 10, 2001, para. 29, U.N. Doc. CERD/C/SR.1484 (Sept. 17, 2002) [hereinafter CERD 1484th Mtg.].

156. Egypt Report to CERD, *supra* note 122, at para. 334; see also CERD 1484th Mtg., *supra* note 155, at para. 29.

its geographical regions”¹⁵⁷ This notion is also reflected in Egypt’s constitution, which similarly refers to the Egyptian people as one Arab nation and fails to recognize culturally distinct groups like the Nubians.¹⁵⁸

Egypt’s purported homogeneity does not seem to be an accurate account of the reality on the ground.¹⁵⁹ Upon reviewing Egypt’s report, one CERD Committee Member noted that Egypt’s homogeneity assertions seemed to ignore indigenous groups in Egypt, like the Nubians.¹⁶⁰ Even within Egypt’s report, the country’s alleged homogeneity seemed unrealistic due to the report’s mention of the presence of Nubians in Egypt.¹⁶¹

Egypt’s claims of homogeneity seem to spring from the state’s perception that diversity is a threat.¹⁶² Regardless of its purpose, the assertion that there is a homogenous “Egyptian” culture is not only inaccurate; it does not effectively serve communities like the Nubians in Egypt.¹⁶³ Ahmed Ragheb, lawyer and Head of the Hisham Mubarak Law Center, critiqued Egypt’s ousted military regime in January 2012, stating that the government marginalized minority issues in Egypt by “tying them to the idea of the unity of the state,” and shunning advocacy for minority rights as attempts to divide the state.¹⁶⁴ Furthermore, Ragheb urged, “[w]e need to redefine the Egyptian national fabric *We are not one entity or one culture like the ousted regime has been telling us; we are based on diversity not homogeneity.*”¹⁶⁵ Elham Eidarus, Popular Socialist Alliance Party Representative agreed: “[t]he failing . . . theory of having a unified development

157. Egypt Report to CERD, *supra* note 122, at para. 334; *see also* CERD 1484th Mtg., *supra* note 155, at para. 29. It is important to note that the Nubians do not speak Arabic as a first language. *See* TRIGGER, HISTORY AND SETTLEMENT, *supra* note 7, at 16. Rather, they speak various dialects of Nubian. *Id.*

158. *See* ILO, RIGHTS OF INDIGENOUS, *supra* note 134, at 18 (explaining that Egypt’s constitution represents the country as a homogenous Arab nation).

159. *See generally* *Military Rule Failed Us, Say Nubian Youth*, DAILY NEWS EGYPT, Jan. 19, 2012, available at <http://dailynewsegypt.com/2012/01/19/military-rule-failed-us-say-nubian-youth/>.

160. CERD 1484th Mtg., *supra* note 155, at para. 36. Scholar Ivan Van Sertima sees the Nubians as a native group within Egypt. *See* Henry, *supra* note 29, at 1B. He compares Egypt to America in that both countries’ true natives are scarce. *Id.*

161. *See* CERD 1484th Mtg., *supra* note 155, at para. 29.

162. *See* Elizabeth A. Smith, *Tributaries in the Stream of Civilization: Race, Ethnicity, and National Belonging Among Nubians in Egypt* (2006) (Ph.D. dissertation abstract, New York University), AAT 3222006.

163. *See* *Military Rule Failed Us, Say Nubian Youth*, *supra* note 159.

164. *Id.*

165. *Id.* (emphasis added).

plan for the entire country regardless of the cultural, socioeconomic, demographic specificity of every area in Egypt *has to change*.”¹⁶⁶

Why would the Egyptian government present this homogeneity in its international discourse and domestic laws, such as Law 117? And why does Law 117 and the prevailing discourse superimpose Egypt—a modern idea—over the ancient civilization of Kemet?¹⁶⁷ Blogger Ahmed Awadalla blames Arab nationalism as ideological justification for declaring homogeneity and discriminating against minorities.¹⁶⁸ Howard University’s Dr. Mario Beatty argues that this purported homogeneity and backward projection is more about economics than cultural ties.¹⁶⁹ For tourism—one of Egypt’s main industries—to prevail, Kemetic civilization must be married to the modern Egyptian state.¹⁷⁰ What better fiction¹⁷¹ to perform this marriage than a consistent, un-

166. *Id.* (emphasis added).

167. It is error to superimpose modern Egypt on the pharaonic Kemetic civilization: as anthropologist, linguist, and author Ivan Van Sertima warns, “[m]odern Egypt is not to be confused at all with Egypt of the pyramids.” Henry, *supra* note 29, at 1B (internal quotation marks omitted).

168. Ahmed Awadalla, *Lessons from Nubia, REBEL WITH A CAUSE* (May 15, 2012), <http://rwac-egypt.blogspot.com/2012/05/lessons-from-nubia.html#more>. “Nubians are accused of separationism when they speak up for their rights.” *Id.*

169. Interview with Mario Beatty, Professor, Howard University Department of Afro-American Studies, in Washington, D.C. (Feb. 6, 2012).

170. *Id.*; see Amina Abdul Salam, *New Antiquities Project*, EGYPTIAN GAZETTE, July 5, 2012, available at <http://213.158.162.45/~egyptian/index.php?action=news&id=26640&title=New%20antiquities%20project> (affirming that tourism is prominent in Egypt’s economy, and it needs to be protected in the face of declines that resulted from the Egyptian Revolution).

171. This homogenous “Egyptian” identity is a fiction for three reasons. First, to superimpose “Egypt” on ancient times is fallacious because the idea “Egypt” came about *after* the age of the pharaohs (*per-aa-w*). See GARDINER, *supra* note 14, at 37, 75 (explaining that pluralizing requires the addition of the suffix *-w* and that the term for pharaoh is *per-aa*). Back then, the term “Kemet” was used to describe the inhabited Nile valley region famous now for its pyramids, hieroglyphs, and mummies. *Id.* at 57, 611 (providing the original characters for *kmt*, representing Egypt, and translating those characters as “*Kmt* the Black Land, i.e. Egypt”). “Egypt” was first used in 800 BC (then *Aigyptos*) to describe the country whose territory encompassed the Nile valley region and desert land to its east and west. AFRICAN INTELLECTUAL HERITAGE, *supra* note 1, at 6; see also EGYPT: INDIGENOUS PEOPLES, *supra* note 9, at 3. Second, the presumed unbroken “Egyptian” identity was indeed broken by the number of empires that ruled the land where Kemet once was. See *id.* Between 525 BC and the present, Persian, Roman, Byzantine, Arab, Ottoman Turkish, French, and British powers ruled the land where Kemet previously was. See *id.* at 3-4; see also Henry, *supra* note 29, at 1B (“Egypt has been invaded a half dozen times.”). These powers influenced the country and people living in it. EGYPT: INDIGENOUS PEOPLES, *supra*, at 3 (“Egypt has a very ancient history and civilization that is influenced by the many historical powers that at various times ruled over it.”). It was only after the 1952 Revolution, led by the Committee of the Free Officers’ Movement, when Egypt became an independent Republic able to develop an identity under self-rule. See *id.* at 5. Third, the “Egyptian” fiction is especially erroneous because Egypt is not culturally homogenous. See *generally id.* (examining rights on the premise that there is a group of indigenous peoples in Egypt). At one point in ancient times—about 3200 BC—Nile valley inhabitants expressed a consistent culture. See *id.* at 3 (“The Union of the Southern Kingdom of Upper Egypt, which was under the influ-

broken, monolithic Egyptian identity that has withstood thousands of years.¹⁷² Breaking this fictional identity threatens the state's economic wellbeing.¹⁷³ However, as Gamal Nkrumah states, “[i]t is the height of hypocrisy to lure Western tourists to Pharaonic ruins when the original Egyptians are themselves living in poverty as outcasts.”¹⁷⁴

The world cannot ignore and Egypt cannot dispute that there are groups within Egypt whose cultures are distinct from the majority (e.g., the Nubians, Copts, Berber, Bedouin, and Beja).¹⁷⁵ While these cultural groups are small compared to the majority Arab Egyptian population, Egypt is not fully homogenous, as it purported to be in its CERD report.¹⁷⁶ Rather, it is home to indigenous groups with distinct cultures.¹⁷⁷ Nevertheless, Egypt's stance in its reporting to international bodies confirms that it is uninterested in its own diversity.¹⁷⁸

All of these actions result in racial discrimination pursuant to CERD.¹⁷⁹ In its General Recommendation No. 32, the CERD Committee emphasized that discrimination in effect includes treating “in an equal manner persons or groups whose situations are objectively different.”¹⁸⁰ Furthermore, the Committee requires States to achieve “non-discrimination” and take special measures to remedy past discrimination.¹⁸¹ To achieve non-discrimination, Egypt must consider characteristics of groups within its population.¹⁸² By purporting to be

ence of Nubians, was united with the Northern Kingdom of Lower Egypt, leading the rise of a unified kingdom circa 3200.”). However, the minority of unconquered, indigenous southern inhabitants—the group now called Nubians—retained a culture more consistent with that of the ancients. *Id.*; see also Fatimah L.C. Jackson, *Anthropological Measurement: The Mismeasure of African Americans*, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 154, 162 (2000) (describing the Nubians as an “indigenous Nilotic group[]” that contrasts with Egyptian Arabs).

172. Interview with Mario Beatty, *supra* note 169.

173. See Smith, *supra* note 162.

174. Gamal Nkrumah, *Nubians Muscling in: Rioting in Aswan Has Put a Long-Festering Nubian Question on the Front Burner for Egypt*, AL-AHRAM WKLY. (Cairo) (Sept. 8-14, 2011), <http://weekly.ahram.org.eg/2011/1063/eg8.htm>.

175. See CERD Report on Egypt, *supra* note 122, at para. 286; EGYPT: INDIGENOUS PEOPLES, *supra* note 9, at 3, 6 (2009). The Berber, Nubian, Bedouin, and Beja represent one percent of the population, collectively. *Id.* at 6. “It’s time for us to realize that values of democracy and diversity must be respected and should never be taken away under any ideological guise or notion.” Awadalla, *supra* note 168.

176. See discussion *supra* Part II.A.

177. See discussion *supra* Part II.A.

178. Symposium, *Plenary Session Transcript*, 40 U.C. DAVIS L. REV. 1275, 1281 (2007) (“States are more often than not illiberal and uninterested in preserving cultural diversity within them. At least historically we have seen that problem in Egypt with the Nubians.”).

179. See General Recommendation No. 32, *supra* note 117, ¶ 8.

180. *Id.*

181. See *id.* ¶¶ 5, 8.

182. *Id.* ¶ 8.

homogenous and ignoring the presence of Nubians in its reports and its laws, Egypt is treating all of its citizens in an equal manner and ignoring that certain minority groups with distinct cultures and traditions deserve attention and representation. This is racial discrimination.¹⁸³

B. Nubians Have a Stake in Kemetic Cultural Property Decisions

While Egypt's laws have strengthened its hold over Kemetic antiquities, scholarship in Egyptology and science has weakened Arab Egypt's supposed primacy in cultural and genealogical connection to Kemet. Recent studies, scholarship, and scientific evidence show that today's Nubian population is representative of Kemetic and ancient Nubian populations.¹⁸⁴ Scientists have presented evidence demonstrating that the Nubian population probably did not have "racial intrusions" from the Mesolithic to the Early Christian periods.¹⁸⁵ A study based on skull variations by A.C. Berry, R.J. Berry, and P. Ucko demonstrated an "amazing [genetic] closeness" between the Kemetic and ancient Nubian populations.¹⁸⁶

Beyond this genetic affinity lies a type of continuity more relevant to this Comment: cultural continuity.¹⁸⁷ The ancient Nubians were geographically, culturally, linguistically, and ethnically connected to the Kemetians.¹⁸⁸ The people living in southern Egypt today who characterize themselves as "Nubian" exhibit a dramatic cultural unity—not only to ancient Nubia (*Nbu* or *Ta-Seti*)¹⁸⁹ but to Kemet as

183. See *id.* ¶¶ 7-8.

184. See Dana Reynolds-Marniche, *The Myth of the Mediterranean Race*, in EGYPT: CHILD OF AFRICA, *supra* note 18, at 109, 110; discussion *infra* Part II.D.2.

185. Reynolds-Marniche, *supra* note 184, at 118; see also Jackson, *supra* note 171, at 162-63 (stating in a scientific article that Nubians are an indigenous group in Egypt).

186. Reynolds-Marniche, *supra* note 184, at 119.

187. Interview with Mario Beatty, *supra* note 169; see Maurice E.R. Munroe, *UnAmerican Tail: Of Segregation and Multicultural Education*, 64 ALB. L. REV. 241, 291 (2000).

188. See Munroe, *supra* note 187, at 293 (explaining that ancient Egypt had a "close cultural link" with the civilization that had formed in the south—Nubia). There was a geographical, cultural, and ethnic closeness between the ancient Nubians and Kemetic people. *Id.*; see also O'CONNOR, *supra* note 7, at xi ("Both the Nubian world view and modes of cultural expression were always unique, even when *Egyptian art, language, and concepts became part of the cultural vocabulary used by the Nubians.*") (emphasis added).

189. See *supra* note 7 (pointing out the uncertainty surrounding use of the term "Nubian"); see also Frank J. Yurco, *Egypt and Nubia: Old, Middle, and New Kingdom Eras*, in AFRICA & AFRICANS IN ANTIQUITY 28, 28-31 (Edwin M. Yamauchi ed., 2001) (using the Kemetic term *Ta-Seti*—translating to "land of the bow"—to describe ancient Nubia).

well.¹⁹⁰ Thus, Nubians in Egypt would likely find a cultural connection to the vast majority of what would be characterized as “ancient Egyptian” antiquities, precisely the type of antiquities with which Law 117 and the MSA are concerned.¹⁹¹ It follows that the Nubian community should be involved in determining the affairs of “ancient Egyptian” antiquities.

C. Exclusion: Nubians Are Underrepresented in the Egyptian Government

CERD’s definition of racial discrimination includes “any . . . exclusion” of color-, ethnic- or descent-based groups that prevents enjoyment of cultural freedom.¹⁹² The Nubians are one such descent-based group.¹⁹³ Egypt’s international legal discourse, its silent antiquities statute, and its antiquities structure exclude the Nubian Egyptians from participating in the preservation of their culture.¹⁹⁴

Law 117 provides that the SCA “is the exclusive authority concerned with all that is related to antiquities’ affairs” in Egypt.¹⁹⁵ The Minister of Culture makes significant decisions that impact Nubian Egyptian life.¹⁹⁶ For example, the Minister of Culture ultimately decides which antiquities are registered,¹⁹⁷ and he or she can play a role in the building projects and easements allowed on lands near archaeological sites.¹⁹⁸ Furthermore, only the SCA (before the Egyptian Revolution) was responsible for maintaining and restoring antiquities.¹⁹⁹ The SCA also authorized and regulated all excavations and searches for antiquities in Egypt.²⁰⁰ From these duties, it is apparent

190. Interview with Mario Beatty, *supra* note 169. It is unclear whether the modern community calling themselves Nubian Egyptians descended from ancient Nubians or Kemetians (popularly called “ancient Egyptians”). See O’CONNOR, *supra* note 7, at xii.

191. Egypt Law 117 Amended, *supra* note 32, at art. II, 5.

192. See *supra* note 116 and accompanying text. Egypt’s own constitution defines “racial discrimination” in almost exactly the same terms. See Egypt Report to CERD, *supra* note 122, at para. 11(c).

193. See discussion *supra* Part II.A.

194. See discussion *supra* Part II.C.

195. Egypt Law 117 Amended, *supra* note 32, at art. II, 5.

196. See generally *id.* (containing several clauses defining the many duties of the Minister of Culture).

197. *Id.* at art. 12.

198. *Id.* at art. 16 (“Upon recommendation of the competent Minister in cultural affairs . . . [the] Supreme Council for Planning and Urban Development is entitled to arrange easement on real-estates adjacent to the archaeological sites . . .”).

199. *Id.* at art. 30.

200. *Id.* at art. 32.

that the SCA (now MSA) directly affects the Nubian interest in preservation of their ancient cultural items.

The Nubian Egyptian population of approximately three million is severely underrepresented in Egypt's antiquities governance because it is underrepresented in Egyptian government generally.²⁰¹ Blogger Ahmed Awadalla attested to this in his "attempt to explore not-so-often-discussed taboo issues in Egypt" when he wrote that "the issue of Nubian rights is an often neglected and poorly understood issue"²⁰² Nubian Egyptians have expressed their frustrations with underrepresentation in the Egyptian government as a whole, claiming that the government has failed to address Nubian concerns since Egypt's military rule was established in the 1960s.²⁰³ Currently, school curricula exclude Nubian cultural heritage, and because Nubian language is not taught in any Egyptian schools, it is at risk of becoming extinct.²⁰⁴

Nubian activists have complained that Egypt's new constituency laws give Nubians even less representation in parliament than they had before.²⁰⁵ It is also notable that no Nubians were on the committee that was assembled in April 2012 to write Egypt's new constitution.²⁰⁶ In this way, "as usual, Nubians were excluded from participating in shaping their country's future"²⁰⁷ Fatima Imam, a Nubian Egyptian woman, laments this point, saying "[u]nfortunately,

201. Begg, *supra* note 153; see Julia Simon, *How the Nubians View Egypt's Elections*, WORLD, Nov. 29, 2011, available at <http://www.theworld.org/2011/11/nubian-egypt-elections/> (putting the population at two million); see also Khaled Diab, *Hope for the Egyptian Nubians Dammed by the Dam: Half a Century After the Inundation, Nubians May Finally Have the Prospect of Compensation for the Loss of Their Homeland*, GUARDIAN, Apr. 21, 2012, <http://www.guardian.co.uk/commentisfree/2012/apr/21/egypt-nubians-dam>.

202. Awadalla, *supra* note 168. Awadalla claims that the Nubians participated in the 2011 Revolution and championed their cause amidst a history of discrimination, but nevertheless "little attention is given to them." *Id.*

203. See *Military Rule Failed Us, Say Nubian Youth*, *supra* note 159.

204. Awadalla, *supra* note 168.

205. Nkrumah, *supra* note 174.

206. See Aya Batrawy, *Citing Islamists, Egypt's Coptic Church Pulls Out of Constitution Committee*, HUFFINGTON POST (Apr. 2, 2012, 1:35 PM), http://www.huffingtonpost.com/2012/04/02/egypts-coptic-church-pulls-out_n_1396619.html; see also Kristen Chick, *Egyptian Court Ruling Raises Stakes in Presidential Race*, CHRISTIAN SCI. MONITOR, Apr. 11, 2012. There were also no Bedouins on the committee, and twenty-five public figures pulled out of the committee in protest, arguing that the committee did not represent the country's diversity. Batrawy, *supra*.

207. Awadalla, *supra* note 168 (emphasis added).

we live in a society that does not see us and does not recognize that we share this country.”²⁰⁸

With all of these actions and accounts, it is clear that the Egyptian government is excluding the Nubians from participating generally. In turn, this broad exclusion means that the Nubians are also excluded from MSA and other bodies that make cultural decisions. This exclusion of the Nubians violates CERD Article 1(1).²⁰⁹ One cannot be sure what ideology or paradigm drives Nubian exclusion, but the next section will examine different Egyptological ideologies and explore which are acceptable under CERD.

D. What Is Egypt’s Paradigm? An Analysis of Egyptological Superiority Narratives Against CERD Article 4(a)

In its most recent report regarding Egypt, the CERD Committee noted that Egypt did not comply with Article 4(a) of CERD, which requires the country to pass laws punishing “dissemination of ideas based on racial superiority.”²¹⁰ The CERD Committee observed, in its 2011 General Recommendation concerning racial discrimination against people of African descent, that “it has become evident from the examination of the reports of States parties to the Convention that people of African descent continue to experience racism and racial discrimination.”²¹¹ The committee then recognized that people of African descent²¹² have “[t]he right to their cultural identity,” the right

208. *Fatima Imam: Diary [of an] Egyptian Black*, SHOROUK NEWS (Apr. 9, 2012, 10:55 PM), <http://www.shorouknews.com/menbar/view.aspx?cdate=09042012&id=f3cbafd4-d6d1-46a6-889e-e3c12698b005>.

209. See CERD, *supra* note 115, at art. 1(1).

210. CERD Report on Egypt, *supra* note 122, at para. 287.

211. United Nations, Comm. on the Elimination of Racial Discrimination, General Recommendation No. 34 Adopted by the Committee: Racial Discrimination Against People of African Descent, at 1, U.N. Doc. CERD/C/GC/34 (Oct. 3, 2011) [hereinafter General Recommendation No. 34].

212. The CERD Committee defines “people of African descent” as “those referred to as such by the Durban Declaration and Programme of Action and who identify themselves as people of African descent.” *Id.* The Durban Declaration and Programme of Action (DDPA) explains that slavery, the transatlantic slave trade, and colonialism, have all contributed to racism and racial discrimination, and “Africans and people of African descent . . . continue to be victims of [these historical events and] their consequences.” See United Nations, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, ¶¶ 13-14 (2001). From these descriptions and definitions, a strong argument can be made that, based upon the prevailing international discourse after transatlantic slavery, the implications of colonialism in Egypt, the history of Egypt, and the differences in skin color and attitudes springing therefrom, the Nubians can be considered a “people of African descent” regardless of the fact that they are in an African country and notwithstanding the fact that Egypt’s majority population is technically of African descent. More information would be needed to assess whether a substantial number of the majority Egyptian population identifies itself as people of African descent, and

to protect “their traditional knowledge and their cultural and artistic heritage.”²¹³

In Egypt, justification for Law 117 is an argument that Kemetite artifacts are part of Egypt’s heritage because there is cultural continuity between the ancient and modern civilizations within Egypt’s borders.²¹⁴ Cultural continuity can mean one of two things. It can mean continuity from Kemet to modern Arab Egypt, excluding continuity to modern Nubian Egyptians. This meaning is reinforced by Egyptological and anthropological theories suggesting that Kemetians looked like modern Arab Egyptians, and did not consist of black Africans.²¹⁵ These theories form a superiority narrative that denies Nubian Egyptians and other black Africans their claim to Kemetite culture and genealogy.²¹⁶ Alternatively, the continuity argument could mean continuity from Kemet to many different cultural groups, an idea supported by more neutral Egyptological theories and supporting inclusion of the Nubians.²¹⁷

To which narrative do the MSA and Egyptian legislators subscribe? They must be careful, because the superiority narrative violates Article 4(a) of CERD, while the latter narrative does not.²¹⁸ In the following two sections, this Comment will survey some of the narratives within Egyptology—the ethnocentric, race-based superiority narratives and the neutral, inclusionary narratives—and their theoretical relationship to actions in Egypt. The following sections will not analyze the narratives for their truth; it merely seeks to assess their flaws and strengths as a way to posit whether they comply with Article 4(a) of CERD. Based on this assessment, this Comment will recommend to the Egyptian government which narratives to adopt or endorse.

confirmation is needed to confirm that the Nubians identify themselves as people of African descent. However, in the absence of sound and timely studies seeking these findings, the argument is strong that the minority of black Africans in Egypt are those people of African descent with which the DDPA and CERD Committee are concerned.

213. General Recommendation No. 34, *supra* note 211, ¶ 4(b), (c).

214. Cuno, *Introduction*, *supra* note 25, at 2.

215. See discussion *infra* Part II.D.1.

216. See Munroe, *supra* note 187, at 297 (“[T]he view that blacks are inferior is passed on by the notion that the ancient Egyptians were not black.”); see also discussion *infra* Part II.D.i.

217. See discussion *infra* Part II.D.ii. The issue of race in Kemet is a confusing one complicated by modern ideas superimposed on earlier times. It is even more confusing when one contemplates the ancient Nubians (or “Kushites”) and where the modern Nubians fall in the equation.

218. See discussion *infra* Parts II.D.1, II.D.2.

1. Racist and Ethnocentric Egyptological Ideas Forming the Superiority Narratives Prohibited by Article 4(a) of CERD

Egyptology is a field historically fraught with racism.²¹⁹ What reads as such a sweeping and damaging conclusion has been asserted by numerous scholars from diverse backgrounds. For example, Physicist John Pappademos stated that “historians of science have, with few exceptions, allowed the influence of racism to distort their scholarship to such an extent that the importance to science of the Black civilization of the Nile valley has been neglected and denied.”²²⁰

Another scholar, Martin Bernal, has written that “European Nationalist” scholars attempted to whiten Kemet to resolve their opposing cognitive tensions of respect for ancient African achievement and simultaneous racial supremacist thought.²²¹ Bernal also asserted that scholars and historians attempted to erase connections between ancient Greece and Kemet for the same racist reasons.²²² Are these assertions overcritical or unfounded? The idea that Egyptology was—and may continue to be—tainted by racism ought to be examined here, for the implications of discriminatory Egyptological thought may bleed into the Egyptian government’s legal stance toward the Nubian people.²²³

Almost a century ago, W.E.B. Du Bois asked “[o]f what race, then, were the [ancient] Egyptians?”²²⁴ Before and since he posed that question, scholars have searched for the answer.²²⁵ Scholars have written that “the more Egypt is seen as a society of significance to human civilization, the more its origins are disputed”²²⁶ The debate surrounding the ethnic origins of ancient “Egyptians” draws

219. See John Pappademos, *The Newtonian Synthesis in Physical Science and its Roots in the Nile Valley*, in *EGYPT: CHILD OF AFRICA*, *supra* note 18, at 305, 313; cf. Jackson, *supra* note 171, at 162-63 (suggesting generally that scientists searching for descent from Africa to Europe purposefully ignore the indigenous Nubians and focus on descent from Egyptian Arabs for racist reasons).

220. See Pappademos, *supra* note 219, at 305, 313.

221. Asa G. Hilliard III, *Bringing Maat, Destroying Isfet: The African and African Diasporan Presence in the Study of Ancient KMT*, in *EGYPT: CHILD OF AFRICA* *supra* note 18, at 127, 131. See generally, MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION, VOLUME I: THE FABRICATION OF ANCIENT GREECE 1785-1985* (1987) (arguing that the African contribution to classical Greek civilization is purposely obscured due to racist reasons).

222. Hilliard III, *supra* note 221, at 131.

223. Cf. STUART TYSON SMITH, *WRETCHED KUSH: ETHNIC IDENTITIES AND BOUNDARIES IN EGYPT’S NUBIAN EMPIRE 14-15* (2003).

224. DU BOIS, *supra* note 22, at 43.

225. See *infra* Part II.D.1.

226. *AFRICAN INTELLECTUAL HERITAGE*, *supra* note 1, at 4.

from relatively modern ideas about race, which categorize races into “black” and “white.”²²⁷ As a result, Egyptological “studies . . . have in some cases degenerated into acrimonious wrangling over who owes what to whom in a cultural sphere and the ingratitude in failing to acknowledge the alleged debt.”²²⁸ The participants of this “acrimonious wrangling” are the Eurocentrists and the Afrocentrists.²²⁹

In nineteenth-century America, the majority belief in academic and popular culture was that the ancient Egyptians were racially and culturally dominated by Caucasian influence.²³⁰ Because blacks were seen as inferior, “ancient Egyptians could not be black.”²³¹ As one participant in this denial, Jacques Joseph Champollion-Figeac once stated that “two physical traits of black skin and kinky hair are not enough to stamp a race as negro.”²³² As a result of this cognitive dissonance, many early Eurocentric Egyptologists categorized the Kemetite people as races other than black or African.²³³

Egyptologist Charles G. Seligman (1873-1940) subscribed to the “Hamitic Hypothesis,” which asserted that African civilizations were actually created by the Hamites, descendants of the Biblical Noah’s middle child, Ham.²³⁴ Seligman asserted that “[t]he . . . Hamites were pastoral ‘Europeans’ . . . better armed as well as quicker witted than the dark agricultural Negroes.”²³⁵ Other respected scholars, like Grafton Elliot Smith (1871-1937), claimed that the Kemetians belonged to “the Brown race.”²³⁶ This theory was largely based on the observation that the Kemetians colored themselves brown on temple

227. *Id.* at 3. These ideas, and thus the entire debate, would probably be vastly different or perhaps nonexistent if not for African enslavement. *Id.* (“There probably would never have been a question about the Africanity and blackness of the ancient Egyptians had Africans never been enslaved by Europeans.”).

228. DONALD B. REDFORD, *FROM SLAVE TO PHARAOH: THE BLACK EXPERIENCE OF ANCIENT EGYPT*, at x (2004).

229. *Id.*

230. WALDO E. MARTIN, JR., *THE MIND OF FREDERICK DOUGLASS* 204 (1984) (“In the increasingly racist milieu of nineteenth-century Euro-America, the concept of the ancient Egyptians as a people dominated racially, culturally, and politically by Caucasians, or at worst, a Caucasoid-dominated mixture, curried scholarly and popular favor.”).

231. Munroe, *supra* note 187, at 296.

232. CHEIKH ANTA DIOP, *ORIGIN OF THE ANCIENT EGYPTIANS* (1989) [hereinafter *DIOP, ORIGIN*], available at http://www.melanet.com/clegg_series/diop.html.

233. See generally Runoko Rashidi, *From the Center to the Fringe: The Persistence of Racial Myths in Physical Anthropological Theory*, in *EGYPT: CHILD OF AFRICA*, *supra* note 18, at 105 (discussing the various racial classification attempts of early Egyptologists).

234. *Id.* at 105-06.

235. *Id.* at 106 (internal quotation marks omitted).

236. *Id.*; see also *DIOP, ORIGIN*, *supra* note 232 (“Elliott Smith classes . . . Proto-Egyptians as a branch of what he calls the brown race.”) (internal quotation marks omitted).

reliefs and papyri.²³⁷ Instead of conceding that the brown paint meant the Kemetians were black Africans, scholars made up an entirely new race altogether.²³⁸ That separation enabled Smith to one day suggest that “there is a profound gap that separates the Negro from the rest of mankind, including the Egyptian.”²³⁹

The creation of new, illusory racial categories continued with the mysterious “Mediterranean race,” Giuseppe Sergi’s (1841-1936) term for the group to which the Kemetite people belonged.²⁴⁰ By championing the concept of the Mediterranean race, scholars like Sergi “sought to attribute Eurasian and Aryan origins to all of the earliest complex societies.”²⁴¹ The primary basis for Mediterranean race theory was the analysis of apparent cranial similarities between the remains of certain groups.²⁴² Scholars connected the peoples of Ethiopia and Somalia to Southern Italians and Nordic peoples, due to the similarities in their long skulls.²⁴³ This theory is much like the “Aryan” theory, which posited that black Africa, Semitic Asia, and all of Europe belonged to a white race responsible for modern culture.²⁴⁴ Finally, there was William Flinders Petrie’s idea of the “dynastic race . . . a superior white or at best brown” race from the north that built the pyramids and performed other great Kemetite achievements.²⁴⁵ Walter Emery championed Petrie’s “dynastic race” as late as 1961.²⁴⁶

Much of Eurocentric Egyptology was supported by polygenism,²⁴⁷ which rested on craniology or phrenology work by Samuel G.

237. See Reynolds-Marniche, *supra* note 184, at 112.

238. See generally *id.* (discussing the origins and motives of the Mediterranean race myth).

239. *Id.* at 113 (quoting Grafton Elliot Smith). Smith also asserted that there was “only a minute Negroid element in the earliest Egyptians.” *Id.* (paraphrasing Smith).

240. Rashidi, *supra* note 233, at 106.

241. Reynolds-Marniche, *supra* note 184, at 109. Reynolds-Marniche “debunks” the Mediterranean racial myth by examining modern archaeological studies that contrasted ancient European, Southwest Asian, and North African skeletal and cranial remains. See generally *id.*

242. See generally *id.* (discussing the origins and motives of the Mediterranean race myth).

243. *Id.* at 110.

244. DU BOIS, *supra* note 22, at 34.

245. SMITH, *supra* note 223, at 14.

246. *Id.* A similar theory survived even longer: a “Professor Gallab” stated in 1974 that the early Kemetite was Caucasian, and the Negro culture of Kemet arrived later. UNESCO, THE PEOPLING OF ANCIENT EGYPT AND THE DECIPHERING OF MEROITIC SCRIPT: PROCEEDINGS OF THE SYMPOSIUM HELD IN CAIRO FROM 28 JANUARY TO 3 FEBRUARY 1974, at 81 (1978) [hereinafter UNESCO PROCEEDINGS]. Cheikh Anta Diop and Théophile Obenga sharply criticized Gallab for his theory. *Id.* at 87.

247. Polygenism was the idea that there was more than one human creation. MARTIN, JR., *supra* note 230, at 226. It rejected the idea that all mankind derived from one group. *Id.*

Morton, Josiah Nott, George R. Gliddon, and Louis Agassiz.²⁴⁸ Their work posited that Caucasians had larger crania and larger brains, and therefore were more intelligent than other races, especially blacks.²⁴⁹ Because these men also argued that Kemetians were mixed with a superior Caucasian component, they concluded that Kemetite intelligence and achievement should be accredited to the Kemetians' Caucasian-ness.²⁵⁰

Today, “[m]ost Egyptologists, anthropologists, and historians . . . still find it hard to accept the fact that Egypt was once a predominantly Black civilization,” claims scholar Dana Reynolds-Marniche.²⁵¹ Commentators continue to classify “ancient Egyptians” as “Caucasoid” or a “mixed race,” and deny that they were black Africans.²⁵² Sociologist Nathan Glazer, for example, stated in 1997 that the notion that Kemetians were black Africans is an “extravagant enhancement of the role of black Africa in World history.”²⁵³

It would be unfair to posit that the aforementioned Eurocentrists were the only Egyptologists creating superiority narratives. As Redford said, there are also extreme Afrocentrists in this discussion.²⁵⁴ Stuart Tyson Smith, author of *Wretched Kush*, pointed out that the Afrocentrists merely reversed the direction of the Eurocentric movement.²⁵⁵ They chose to use the same rhetoric and assumptions that the Eurocentrists used, instead of refuting those racist assumptions by pointing to the considerable evidence that Kemetite civilization developed in Africa and interacted with other African cultures.²⁵⁶

However, it is difficult to harshly critique early Afrocentrists because their appeals were a necessary reaction to the outrageous Eurocentric narrative. Where one group asserted that the Kemetians were a “non-African Caucasian-dominated hybrid,” another group

Monogenists, too, believed in Caucasian superiority; they just found that non-Caucasians like the Negro were a “degeneration from the Caucasian original.” *Id.* at 228.

248. *See id.* at 226.

249. *Id.*

250. *Id.* at 226-27.

251. Reynolds-Marniche, *supra* note 184, at 119-20.

252. *See* Munroe, *supra* note 187, at 295-96. Munroe points out the irony of classifying the Kemetians as “mixed race” when juxtaposed with the readiness to classify mixed race African Americans as “light-skinned” black. *Id.* (“Perhaps it is easier to associate ‘blackness’ with crime as opposed to unique achievements.”).

253. *Id.* at 242 n.1, 296 (citation omitted) (internal quotation marks omitted).

254. *See supra* note 229 and accompanying text.

255. SMITH, *supra* note 223, at 14. Smith refers to Cheikh Anta Diop as an Afrocentrist. *See id.* However, I have placed him in a category of his own, somewhere between Afrocentrist and neutral. *See infra* Part II.D.1.

256. SMITH, *supra* note 223, at 14.

felt the need to rise up and rebut the notion.²⁵⁷ Thus, the Afrocentric paradigm was a counterbalance to the skewed and damaging Eurocentric message.²⁵⁸ This is why St. Clair Drake called early Afrocentrists “vindicationists,” scholars whose goal was to “[d]efend . . . the Negro Against Vicious Assaults.”²⁵⁹

W.E.B. Du Bois was one of the most notable vindicationists.²⁶⁰ In 1915, Du Bois examined and dispelled the Eurocentric theories in his work, *The Negro*, stating that “it is certainly proved to-day beyond doubt that the so-called Hamites of Africa, the brown and black curly and frizzly-haired inhabitants of North and East Africa, are not ‘white’ men if we draw the line between white and black in any logical way.”²⁶¹ Du Bois’s projections on Kemet were always anchored in black Africa.²⁶² To him, Kemet was “always palpably Negroid,” both in phenotype and culture.²⁶³ Similarly, Howard University historian Chancellor Williams also took an Afrocentric approach when he referred to the Great Sphinx at Giza and its African features in forming his conclusion that the Kemetians—and the *per-aa* Khafre, specifically—were “Negro[es].”²⁶⁴

The attempt to claim the Kemetians as Negroid was meant to achieve a necessary element in a larger Afrocentric syllogism, with the conclusion being that the American Negro can claim Kemet. It was under this logic that Frederick Douglass, Martin Delany, William

257. See MARTIN, JR., *supra* note 230, at 206. Many racist Egyptological ideas were “widespread until the 1930s, and Afro-American leaders felt duty-bound to combat them.” 1 ST. CLAIR DRAKE, *BLACK FOLK HERE AND THERE: AN ESSAY IN HISTORY AND ANTHROPOLOGY* 132 (1987). Egyptology was therefore “a crucial arena in the persisting struggle between anti-black racists and those black intellectuals who considered themselves to be vindicationists.” *Id.*

258. The counterbalance involved criticizing evolutionists who constantly asserted that blacks were “closest to the ape” and attacking proponents of Aryan, Hamitic, and other superior race theories. DRAKE, *supra* note 257, at xvii.

259. *Id.* Furthermore, Afrocentrism was not only a counter to Eurocentric Egyptology, it was an opportune source for pride for African descendants. See MARTIN, JR., *supra* note 230, at 207.

260. DRAKE, *supra* note 257, at xvii.

261. DU BOIS, *supra* note 22, at 34.

262. See *id.* at 37.

263. See *id.* “The truth is, rather, that Egypt was herself always palpably Negroid, and from her vantage ground as almost the only African gateway received and transmitted Negro ideals.” *Id.* Du Bois expounded on this idea:

They [the Kemetians] certainly were not white in any sense of the modern use of that word—neither in color nor physical measurement, in hair nor countenance, in language nor social customs. They stood in relationship nearest the Negro race in earliest times, and then gradually through the infiltration of Mediterranean and Semitic elements became what would be described in America as a light mulatto stock of Octoroons or Quadroons.

Id. at 43-44.

264. DRAKE, *supra* note 257, at 134.

Wells Brown, and Edward W. Blyden “all argued that the ancient Egyptians were primarily a Negroid people,” and thus the Negro should be credited with their ancient achievements.²⁶⁵ As noble as it was, the vindicationist mission was also a quest for entitlement, and it, too, is a narrative that can be used to exclude and discriminate.²⁶⁶ Accordingly, it runs afoul of Article 4(a).²⁶⁷

While the more extreme Eurocentric and Afrocentric positions in Egyptology have been abandoned, there are still Eurocentrists and Afrocentrists in the field, and neither camp sets for neutral, empirical work.²⁶⁸ Looking through the lens of Article 4(a), the point is clear: the language arising out of these narratives violates human rights norms as a matter of law. The injury caused by these narratives is subscription; the narratives justify racial entitlement to an ancient culture, the “acrimonious wrangling” of which Redford warned.²⁶⁹ These narratives drive arguments that one group is entitled to the Kemet legacy (which includes its antiquities). Ultimately, these narratives do not seek some sort of truth; rather, by using ancient achievement, they further the predefined goals of raising and lowering stature along racial or cultural lines.

The superiority narratives not only spawn ideas of entitlement, they fuel acts of exclusion.²⁷⁰ For example, Smith likens the method of the Eurocentrists and Afrocentrists to those of Nazi scholars and other movements where ethnic superiority was supported by anthropological research.²⁷¹ Smith’s assertion emphasizes how scholarly discourse can reinforce, justify, or legitimize real conflict and the human rights violations that come with it.²⁷² This is likely the precise fear of Article 4(a). Accordingly, legislators and MSA officials in Egypt

265. MARTIN, JR., *supra* note 230, at 203. Blyden said in 1866, “I felt that I had a peculiar heritage in the Great Pyramid built . . . by the enterprising sons of Ham, from which I descended.” *Id.*

266. What made scholars like Douglass Afrocentric was the impulse to award to one modern racial group the rightful claim to Kemet at the exclusion of all others. *See id.* at 205. The debate was a fight between white and black over Kemet.

267. Today, when ethnocentrism in science is not tolerated and where societies have promulgated rules like Article 4(a) of CERD, *both* the Eurocentric and Afrocentric messages become dangerous because they justify exclusion, mistreatment, and entitlement at any cost.

268. *See* REDFORD, *supra* note 228, at x.

269. *Id.*

270. SMITH, *supra* note 223, at 14-15.

271. *Id.* (pointing to conflicts in the Balkans, conflicts concerning the Celtic ethnic group, conflicts in Palestine, and other examples of “ethnic polarization”).

272. *See id.*

should ensure that superiority narratives do not guide their decisions about antiquities or any other government action.

2. The Special Case of Cheikh Anta Diop

Some scholars call Cheikh Anta Diop an Afrocentrist.²⁷³ I conclude that he is not. Diop is not completely neutral, but he comes from a more neutral philosophy than an ethnocentric one. Thus, I place him in a special category—a “neutral zone” for those who have vindicationist goals but also work according to neutral methodology—even though he may lean toward the Afrocentric side of the spectrum. Diop is neutral and compliant with Article 4(a) because of his methodology and desire for critique.

His Afrocentric conclusion—that Kemetite people were originally black Africans as the modern Nubians are—was supported by a variety of evidence.²⁷⁴ Diop supported his conclusion with assertions by ancient writers, ancient artists, modern linguists, and modern interpreters of archaeological evidence.²⁷⁵ He referred to skeletal- and skin-fragment melanin evidence (his “melanin dosage test”);²⁷⁶ Professor Louis Leakey’s work;²⁷⁷ Gloger’s law;²⁷⁸ blood group evidence; iconographic data; and ancient written sources by Kemetians and other groups.²⁷⁹

For example, Diop pointed to the Kemetians’ artistic depictions, in which they painted themselves like the Nubians: dark-skinned brown or black with similar dress.²⁸⁰ They also signified a connection

273. See, e.g., *id.* at 14.

274. DIOP, *ORIGIN*, *supra* note 232. Diop supported his hypothesis that the Kemetians were black Africans with studies that supported blackness through osteological measurements, blood groups, ancient testimony, and linguistic affinity. *Id.*

275. See Reynolds-Marniche, *supra* note 184, at 120.

276. DIOP, *ORIGIN*, *supra* note 232. Diop conducted a melanin dosage test on the skin of Kemetite mummies, which resulted in finding that the Kemetians possessed melanin in their derma at levels “non-existent in the white-skinned races.” *Id.* Diop wanted to test more famous mummies, but he was denied access to the Cairo Museum’s royal mummies. *Id.*

277. *Id.* Based on Professor Louis B. Leakey’s work, Diop summarized that “beings morphologically identical with the man of today” lived “at the sources of the Nile and nowhere else.” *Id.*

278. *Id.* Diop concluded, based on Gloger’s law regarding climate and pigment, that the earliest people “were ethnically homogeneous and negroid.” *Id.* He also states that the only two routes out of the cradle of Africa for these early people to move were the Sahara and the Nile valley. *Id.*

279. UNESCO PROCEEDINGS, *supra* note 246, at 76-78.

280. See Munroe, *supra* note 187, at 294; see also CHEIKH ANTA DIOP, *CIVILIZATION OR BARBARISM: AN AUTHENTIC ANTHROPOLOGY* 66 fig.17 (Yaa-Lengi Meema Ngemi trans., Harold J. Salemson & Marjolijn de Jager eds., 1981) (showing an ancient image called the “table of races”).

to the Nubians through their language; for example, the Kemetians called ancient Nubia *Ta-Kenset* or “placenta-land,” suggesting genealogical descent from the land of the Nubians.²⁸¹ The Kemetians’ ancient contemporaries also agreed that they were black Africans.²⁸² Ancient Graeco-Latin authors Herodotus, Diodorus Siculus, Aristotle, Lucian, Apollodorus, Aeschylus, Achilles Tatius, Strabo, Diogenes Laertius, and Ammianus Marcellinus all described the Kemetians as “black” or “dark[]” skinned.²⁸³

Diop’s presentation at the 1974 United Nations Educational, Scientific and Cultural Organization (UNESCO)²⁸⁴ Symposium revealed his findings and sparked lively debate.²⁸⁵ In fact, Diop sought critique and debate about his work,²⁸⁶ and that attribute makes him more neutral than not. In the end, UNESCO adopted resolutions requesting scholars to perform more research like Diop’s.²⁸⁷

281. See Gaynor, *supra* note 18, at 16.

282. See AFRICAN INTELLECTUAL HERITAGE, *supra* note 1, at 3.

283. *Id.*; see also DIOP, ORIGIN, *supra* note 232. Herodotus stated that the Kemetians were “black-skinned” in *Histories*, Book II. AFRICAN INTELLECTUAL HERITAGE, *supra* note 1, at 4; see also DU BOIS, *supra* note 22, at 44 (“Herodotus, in an incontrovertible passage, alludes to the Egyptians as ‘black and curly-haired’—a peculiarly significant statement from one used to the brunette Mediterranean type”) (footnote call number omitted). Aristotle mentions the Egyptians’ black skin in *Physiognomonica*. AFRICAN INTELLECTUAL HERITAGE, *supra*. “Æschylus, mentioning a boat seen from the shore, declares that its crew are Egyptians, because of their black complexions.” DU BOIS, *supra*. Unlike later Egyptologists, these contemporaries had actually seen the Kemetians with their own eyes. AFRICAN INTELLECTUAL HERITAGE, *supra*, at 5.

284. UNESCO.ORG, <http://www.unesco.org/new/en/> (last visited Nov. 28, 2012) (providing the full name for the acronym UNESCO).

285. UNESCO PROCEEDINGS, *supra* note 246, at 82. A “Professor Shinnie” critiqued Diop’s use of classical writings—that the ancient writers referred to the Kemetians as “black” should not be used because “black” is a subjective description. *Id.* at 78. Professor Abdelgadir M. Abdalla also refuted Diop in stating that it was not important to determine if the Kemetians were Negroid, and that the Afrocentric approach to Egyptology was flawed because the Kemetians detested the Nubians (who were black) and depicted the Nubians as different from themselves. *Id.* at 81. It is interesting that Abdalla assumed that to “detest” or distinguish a black race, one must be non-black. This is a flawed assumption because different groups of black people can distinguish and detest one another, just as different groups of Europeans have done. Black people are of different cultures and complexions; they can go to war and they can unite. Abdallah’s arguments thus reveal his own racial paradigm, one that views blacks as monolithic.

286. In a frustrated retort to the refutations to his ideas, Diop stated that the counterarguments lacked “critical rigour” and were “not based on the facts.” UNESCO PROCEEDINGS, *supra* note 246, at 86. “Professor Diop felt that the objections which had been advanced against his ideas did not amount to positive and soundly argued criticisms.” *Id.* at 88.

287. See UNESCO PROCEEDINGS, *supra* note 246, at 102. UNESCO recommended “[t]hat the Egyptian authorities do everything in their power to facilitate the necessary study of examinable *vestigis of skin*” *Id.* (emphasis added). This suggests that Diop created a new scientific standard in Egyptology, and there was a clear need to follow up on his melanin dosage test. See *id.*

Undoubtedly, some of Diop's statements and conclusions reveal an Afrocentrist or vindicationist bent. However, because of his varied methodology and evidence and because the reactions to his work have not refuted it with similar evidence,²⁸⁸ it would be unfair to call him a complete Afrocentrist. His method—namely the melanin dosage test and its corroborating evidence—and his demand for sound critique show a desire to discover the truth about the Kemetians' appearance and relationship to black Africa. Therefore, much of his work complies with Article 4(a), and he cannot be dismissed in a conversation about Kemet.

3. Counteracting Superiority Narratives with Neutral Scholarship: Egyptological Ideas that Comply with Article 4(a) of CERD

Over time, thoughts about Kemetite ethnicity have evolved from speculative ethnocentrist hypotheses to more informed, neutral analyses, partially because “[e]vidence about Egypto-Nubian relations has increased markedly in the last quarter century.”²⁸⁹ Based on a survey of what could be classified as neutral Egyptology narratives, there are a couple of unifying features of neutrality: (1) recognition of bias and methodological error; and (2) emphasis on culture rather than race. With those features, Kemet scholars are able to set forth more sound conclusions.

The first feature of neutral scholarship—recognition of bias and methodological error—was exhibited by W.Y. Adams, who stated that the Nubians can be black or white; it all depends on the “prejudices of one's time or temperament.”²⁹⁰ Stuart Tyson Smith is another Kemet scholar who could be classified as neutral under Article 4(a) due to his recognition of methodological error. In his 2003 book *Wretched Kush*, Smith conducts a cautious study of ethnicity and ethnic stereotypes in antiquity and considers the flaws of ethnic ideas, ethnic philosophy,

288. The conclusion published in the UNESCO discussions stated that the debate at the symposium was unbalanced because “not all participants had prepared communications comparable with the *painstakingly researched contributions of Professors Cheikh Anta Diop and Obenga.*” *Id.* (emphasis added). This quote acknowledges the methodology of Diop's work.

289. Yurco, *supra* note 189, at 28.

290. FRANK M. SNOWDEN, JR., *BEFORE COLOR PREJUDICE: THE ANCIENT VIEW OF BLACKS* 16 (1983). Similarly, Nicole Blanc stressed the significance of divorcing one's studies about Kemet from “the inheritance of the nineteenth century and the first half of the twentieth, or by the racial assumptions associated therewith.” UNESCO PROCEEDINGS, *supra* note 246, at 74. Professor Säve-Soderbergh, too, thought that race was an “outmoded notion” that was inappropriate to use in any attempt to characterize the ancients. *Id.* at 76.

and extreme ethnocentrism.²⁹¹ Frederick Douglass recognized bias when he acknowledged that his description of race was “an American description,” one that operated under the “one-drop rule” of blackness.²⁹² His acknowledgement is important because it reveals that any attempt to racialize a people must also analyze the lens and orientation of the racializer.²⁹³

Some scholars have also recognized methodological errors or limitations. Du Bois is one of those scholars;²⁹⁴ he recognized the difficulty of presenting his own conclusions about African peoples: “so little is known and so much is still in dispute.”²⁹⁵ The work of Professor Jean Vercoutter is likely neutral in recognizing methodological unreliability—he acknowledged how little was known generally in Egyptology.²⁹⁶ He stated at the 1974 UNESCO Convention that (1) physical anthropological data was largely unreliable with respect to ancient Egypt, and (2) craniometry—on which early Eurocentrists relied—was no longer considered a reliable method of research.²⁹⁷

The second feature of neutrality is emphasis on culture rather than race. This feature is marked by scholarly focus on the “African” attributes of the Kemetians, as opposed to the black or “Negroid” attributes.²⁹⁸ It reflects neutrality because it unites groups under an overarching idea of Africa, as any phenotypic group could belong to Africa by participating in a unified African culture. Egyptologist B.G. Trigger believed that classifying ancient Nile valley inhabitants into racial categories was “an act that is arbitrary and wholly devoid of historical or biological significance.”²⁹⁹ Trigger’s study of Nubia did not grapple with race, but rather with relationship.³⁰⁰

291. See generally SMITH, *supra* note 223.

292. See MARTIN, JR., *supra* note 230, at 205-06. Douglass saw Kemetians as Negroid because they were at least *partially* Negroid. Others, however, racialized under a rule of “intermediate caste,” where degrees of Negro mattered and racial mixture made the ancient Egyptians a race of their own. See *id.*

293. See *id.*

294. While I have classified some of Du Bois’ narrative as Afrocentric (or “vindicationist,” as discussed *supra*), much of what he wrote could also fall into the neutral category.

295. DU BOIS, *supra* note 22, at 36.

296. See UNESCO PROCEEDINGS, *supra* note 246, at 73.

297. *Id.*

298. See, e.g., *id.* at 78. Professor Jean LeClant took a neutral stance by divorcing the ideas of race and culture. *Id.* at 80. His conclusion that Kemetic civilization had a strong African character therefore escapes the risk of championing racial superiority and violating CERD. See *id.*

299. SNOWDEN, JR., *supra* note 290, at 16 (quoting B.G. Trigger) (internal quotation marks omitted).

300. See BRUCE G. TRIGGER, NUBIA UNDER THE PHARAOS 149 (1976) [hereinafter TRIGGER, NUBIA].

Frederick Douglass, who had his Afrocentric moments but was probably more neutral by the standards of his time, saw Africa as having one *culture* and one people, as Europe or Asia have.³⁰¹ As an ethnologist, he believed that “the people of Africa have an African character,” a character that the Kemetians shared.³⁰² Du Bois also emphasized this point.³⁰³ Finally, Vercoutter made a cultural point when he “remarked that, in his view, Egypt was African in its way of writing, in its culture and in its way of thinking.”³⁰⁴

With recognition of bias and emphasis on culture in mind, it is important to explore what scholars in the neutral realm have suggested about the Kemetians and ancient Nubians. Snowden found that the Kemetians described their southern neighbors in political and military terms, not in racial or color terms.³⁰⁵ Teeter, editor of *Before the Pyramids*, acknowledged in 2011 that the study of predynastic Kemet is dramatically evolving, and discoveries are constantly taking place.³⁰⁶

Trigger’s work indicates the Kemet-Nubian relationship changed throughout Kemet history; parts of ancient Nubia were a part of Kemet depending on the time period.³⁰⁷ Ancient Nubians were a part of the Kemet community.³⁰⁸ Therefore, ancient Nubia cannot be cleanly severed from Kemet. Additionally, Théophile Obenga’s groundbreaking work³⁰⁹ is neutral under Article 4(a) because of its methodology.³¹⁰ Obenga compared pharaonic Egyptian

301. MARTIN, JR., *supra* note 230, at 205.

302. *Id.* Additionally, much of Douglass’ work was based on linguistic affinity between the Kemetians and other African groups. *Id.* This was much like Obenga’s later work. *See infra* text accompanying note 311.

303. *See* DRAKE, *supra* note 257, at xviii.

304. UNESCO, *supra* note 246, at 88. Furthermore, Vercoutter rejected a racial paradigm when he concluded that it was incorrect to speak of either a “white” or “Negro” population in ancient Egypt. *Id.* at 73-74.

305. SNOWDEN, JR., *supra* note 290, at 37-42. One contrary point is the Hymn of the Aten, however. *See id.* at 39. This hymn, often attributed to the per-aa Akenaten, stated (according to one translation) that the “skins” of the Syrians, the Nubians, and the Kemetians were “distinguished.” *Id.*

306. BEFORE THE PYRAMIDS 9 (Emily Teeter ed., 2011).

307. *See* TRIGGER, NUBIA, *supra* note 300, at 149.

308. *See id.*

309. As a result of Obenga’s study, UNESCO recommended more linguistic study of African languages “in order to establish all possible correlations between African languages and ancient Egyptian.” UNESCO PROCEEDINGS, *supra* note 246, at 103.

310. *See generally* Théophile Obenga, *The Genetic Linguistic Relationship Between Egyptian (Ancient Egyptian and Coptic) and Modern Negro-African Languages*, in UNESCO PROCEEDINGS, *supra* note 246, at 65 (seeking to determine the cultural origin of the Kemetians by analyzing comparative linguistic evidence). Like Diop, Obenga may have Afrocentric conclusions, but

language with modern African languages to determine the existence of “a cultural connection” between the Kemetians and other African peoples.³¹¹ His findings strongly suggest the existence of that connection.³¹²

Frank J. Yurco is another scholar who could be considered neutral under Article 4(a). Yurco points to the discovery of a cemetery in Lower Nubian (Qustul) and the work of Keith Seele, Carl DeVries, and Bruce Williams, who interpreted the Qustul cemetery artifacts to suggest that the Nubian kings buried there were “proto-pharaohs.”³¹³ This means that Kemet had cultural origins in ancient Nubia.³¹⁴ The kings buried at Qustul may represent “the earliest ancestors of the kings who eventually unified Egypt, ca. 3100 B.C.”³¹⁵ Yurco’s study is one that could guide Egyptian legislators and the MSA because he conducts a systematic analysis of the evidence without being driven by racial assumptions.³¹⁶

The aforementioned neutral narratives are what should guide any approach to Kemetite antiquities because—unlike the Eurocentric and Afrocentric narratives—they seek some sort of truth that is unrelated to racial superiority. They contain no implicit denigration of Africans or Europeans. Therefore, they do not promote superiority, exclusion, or entitlement, so they comply with Article 4(a). Moreover, these neutral narratives support inclusion of all groups in the Kemetite antiquities dialogue because these narratives transcend racial categories. They suggest that many groups, inside and outside of Egypt’s modern

his methodology pushes him into the neutral zone. *See id.* (describing Diop’s sound methodology).

311. *Id.*

312. *Id.*

313. Yurco, *supra* note 189, at 28-31. Williams argued that the earliest Kemetite pharaohs were the “ideological and cultural heirs, perhaps even the actual descendants of the Nubian pharaohs . . .” *See O’CONNOR, supra* note 7, at 21.

314. *See* Yurco, *supra* note 189, at 34 (“I would agree with Williams, that the Qustul documentation, and its early dating, suggests strongly that the mainstream pharaonic tradition stemmed from Qustul, although clearly the Classic A-Group tradition is jointly Nubian and Upper Egyptian Napadan.”). Before Yurco furthered Bruce Williams’ theory about Kemet’s Nubian origin, David O’Connor critiqued it. *See O’CONNOR, supra* note 7, at 21. Surveying the evidence found in Nubian tombs at Qustul, O’Connor attempted to discredit what he called Williams’ “exciting” theory. *Id.* While O’Connor systematically walked through the analysis, he seemed to prematurely dismiss any claims of a Kemetite-Nubian connection. *See id.* at 2, 21. Eight years later, Yurco stated: “That these kings were proto-pharaohs is beyond dispute . . .” Yurco, *supra*, at 31. He dismissed objections—like O’Connor’s—to the Qustul cemetery conclusions. *Id.* at 32-33.

315. Yurco, *supra* note 189, at 32.

316. *See id.* at 28-31.

boarders, are interested parties regarding Kemetic history and its tangible legacy.

What we can safely conclude from the neutral narratives is that, for much of Kemet's history, the Kemetic phenotype was not monolithic.³¹⁷ Rather, the Kemetians were diverse, and ancient Nubians were part of the Kemetic mix.³¹⁸ Thus, any community maintaining that it possesses a cultural or genealogical relationship to Kemet *or* ancient Nubia probably actually does. In turn, that community has some sort of interest in the outcome of decisions about Kemetic antiquities. Accordingly, many of the attempts to classify, entitle, and exclude groups based on their relationship to the Kemetians are wrong.³¹⁹

Depending on the Egyptological evidence relied upon by the MSA and Egyptian legislators, the Egyptian government's ignorance of the Nubian Egyptian connection to Kemetic artifacts could be construed as an adoption of superiority narratives. Egypt should make every effort to use neutral Egyptological narratives as support for its actions. As those neutral narratives support inclusion, the Egyptian government should include the Nubians in all antiquities dialogue, in turn becoming compliant with its international obligations and avoiding discrimination in the interest of *maat* (justice). Furthermore, Egypt should commit to recognizing its own diversity and embrace that diversity through inclusion.

317. See SNOWDEN, JR., *supra* note 290, at 40.

318. As discussed in Part II.D.2 of this Comment, the ancient Nubians were culturally intertwined with the Kemetians, and some have argued that they were the Kemetians' predecessors. Yurco concluded that, based on the Qustul cemetery, "Nubia played a significant role in the development of the pharaonic Egyptian tradition and it is also the earliest known source for the kingship that later evolved in Upper Nubia (Kush)." Yurco, *supra* note 189, at 34. Furthermore, the ancient Nubians' dark skin did not determine their status in society. See SNOWDEN, JR., *supra* note 290, at 40; see also Alexander Francis Chamberlain, *The Contribution of the Negro to Human Civilization*, in SELECT DISCUSSIONS OF RACE PROBLEMS: A COLLECTION OF PAPERS OF ESPECIAL USE IN STUDY OF NEGRO AMERICAN PROBLEMS 87, 87 (J.A. Bigham ed., 1916) (explaining the presence of dark-skinned Nubians at all levels of life, from the harem to the royal palace); SMITH, *supra* note 223, at 22 (citing Snowden) ("[T]he ancient Egyptians. . . did not make skin color a definitive criterion for racial discrimination . . .").

319. See SNOWDEN, JR., *supra* note 290, at 40.

III. RESOLUTION: MAAT AND EDUCATION.
RENSI AND PER-AA.

“All Nubians want is to be recognized and respected as one of Egypt’s most ancient cultures and peoples, the direct descendants of the Pharaohs.”³²⁰

Egyptian Journalist Gamal Nkrumah

The Egyptian government has made strides in its relationship with its Nubian citizens. However, much more needs to be done to avoid violations of CERD, ICESCR, and UNDRIPs as well as to ensure the racist narrative of Egyptology does not prevent Nubian people from participating in decisions governing their cultural property.

A. Progress: A Positive Start, But More Action Required

Egypt has made some efforts to prioritize Nubian heritage in its antiquities governance.³²¹ One of the early efforts was Egypt’s call to UNESCO and the world community for assistance in excavating and preserving Nubian artifacts before the 1960 construction of the Aswan High Dam.³²² Despite the international support that ensued and the successful preservation of sites like the temples at Abu Simbel and Philae,³²³ the Aswan High Dam efforts failed in one key respect: they did not account for the connection between Nubian artifacts and the “living Nubian community.”³²⁴ When the Aswan High Dam was built, the international community showed more concern about Nubian relics than it did for the Nubian people.³²⁵ Furthermore, Egypt has capitalized on the surviving Nubian cultural property by making the temple of Abu Simbel a major tourist attraction and by creating the

320. Nkrumah, *supra* note 174.

321. *See* discussion *infra* Part III.A.

322. *See* Wangkeo, *supra* note 70, at 206. The Egyptian government asked archaeological teams to focus on excavating in Nubia for five years. *Id.* at 205. UNESCO launched its campaign to save Nubian monuments in 1959. *Id.* at 207.

323. *See id.* at 205; *see also* Yurco, *supra* note 189, at 28 (“A world-wide effort was mounted to salvage the threatened temples, from the entire area to be flooded by the lake.”). “[B]ecause of the various Aswan Dam projects, Egyptian Nubia is one of the best surveyed regions in all of Africa as far as the cultures subsequent to the Neolithic period are concerned.” TRIGGER, HISTORY AND SETTLEMENT, *supra* note 7, at iii. It is important to note that Nubian artifacts and communities in Sudan were also lost to Lake Nasser. *See* Wangkeo, *supra*, at 207. Sudan’s campaign to save Nubian artifacts was not as successful as Egypt’s: there was less international enthusiasm. *Id.* Fewer archaeologists were interested in excavating in Sudan. *Id.*

324. *Id.* at 227 (emphasis added). The connection between Nubian people and Nubian antiquities seems to be often ignored. *See id.*

325. *Id.*

Nubian Museum.³²⁶ It is unclear whether and to what extent the Nubian people benefit from these successful tourist centers.

It is clear that, in the end, the Nubian community suffered a great loss as the Aswan High Dam destroyed over 100 Nubian villages, leaving 33,000 Nubians displaced and the Nubian community divided by relocation.³²⁷ The lake created by the dam's inundation ("Lake Nasser") covered Nubian areas of Egypt and Sudan that had not been extensively surveyed for artifacts; thus, an irreplaceable historical record of Nubian civilization was lost.³²⁸

After the 2011 Egyptian Revolution, the Egyptian government has made efforts to remedy its relations with the Nubians and generally include Nubian people in state governance.³²⁹ For example, in late 2011 and early 2012, Nubians in Egypt protested outside of the cabinet building in Egypt.³³⁰ The government answered these protests in February 2012 by announcing that it would compensate Nubians for the lands they lost as a result of Aswan High Dam construction.³³¹

In February 2012, the new Prime Minister of Egypt, Kamal Al-Ganzoury, met with an assembly called the "Nubia committee."³³² The committee included several governmental leaders and Nubian representatives.³³³ Their meeting focused on development of the Nubian region (southern Egypt), and the government offered 5,000 acres of land to the Nubian community.³³⁴ This meeting signifies progress in the Egyptian government's recognition of Nubian people.³³⁵

The Egyptian government has also made some efforts specifically regarding recognition of Nubian culture.³³⁶ At the Future of Culture conference held in February 2012, attendees discussed plans for restructuring the Ministry of Culture in Egypt.³³⁷ This dialogue con-

326. *Id.* at 209.

327. Weusi, *supra* note 154, at B1; *see* Wangkeo, *supra* note 70, at 206.

328. *See id.* at 205.

329. *See Egypt to Compensate Nubians for 20th Century Evictions*, BIKYA MASR (Egypt), Feb. 22, 2012.

330. *Id.*

331. *Id.*

332. *Egypt: Prime Minister, Dr. Kamal Al-Ganzoury, Held Nubia Committee Meeting*, MENA REP., Feb. 11, 2012.

333. *Id.*

334. *Id.*

335. *Cf. id.*

336. *See, e.g.,* Farah Montasser, 'The Future of Culture' Seeks Solution to 'Identity Confusion', AHRAM ONLINE (Cairo), Feb. 24, 2012, <http://english.ahram.org.eg/NewsContent/5/35/35290/Arts—Culture/Stage—Street/The-Future-%20of-Culture-seeks-solution-to-identity-c.aspx> (detailing the Future of Culture conference).

337. *Id.*

tained one demand from participants that military officers be ousted from the Ministry.³³⁸ One participant in particular, cultural activist Basma El-Husseiny, proposed to restructure the Ministry of Culture by making all cultural organizations and activities in Egypt independent while lessening the role of the Ministry to a more advisory one.³³⁹ These conversations—in which structural and practical changes are offered for Egypt’s cultural and antiquities system—can be the start of Egypt’s inclusion of the Nubians in decisions regarding ancient cultural property.

Another effort was seen during the 2012 presidential race in Egypt.³⁴⁰ During his campaign, unsuccessful presidential candidate Abdel Moneim Aboul Fotouh promised to establish “an independent body” in Egypt that could address and seek to eliminate all forms of discrimination.³⁴¹ One particular goal of the body would have been to address the omission of Nubians and Copts in school curricula.³⁴² Fotouh’s proposal is the type of planning that needs to occur to create an Egyptian populace that is more inclusive and apt to recognize the connection that Nubians have to Egyptian antiquity and culture.

These acts recognize Egypt’s neglect of the Nubian people, but all fall short of truly acknowledging the Nubian community’s significant cultural connection to Kemetic history. As was forgotten in the period preceding the construction of the Aswan High Dam, the Nubian community is connected to its antiquities.³⁴³ Thus, members of that community should always be participants in action and conversation concerning their cultural heritage.

B. Egypt Should Adhere to CERD and Respond to the Recommendations

Egypt should first respond to the Committee on the Elimination of Racial Discrimination’s (“the CERD Committee”) most recent concluding observations, issued on August 15th, 2001.³⁴⁴ Currently,

338. *Id.* (“El Askar (military officers) should be out of the [culture] ministry. . . we must put an end to Mubarak’s police state.”) (internal quotation marks omitted).

339. *Id.* (“The ministry from now on should only supervise and assist any cultural activity; and not restrict or limit and most importantly not to produce . . .”).

340. See Yolande Knell, *Egypt Candidate: Moderate Islamist, Abdel Moneim Aboul Fotouh*, BBC NEWS: MIDDLE EAST, Apr. 13, 2012.

341. *Id.*

342. See *id.*

343. See Wangkeo, *supra* note 70, at 227.

344. See CERD Report on Egypt, *supra* note 122; EGYPT: INDIGENOUS PEOPLES, *supra* note 9, at 12-13.

Egypt is delinquent in its reporting to CERD, with the last report due in 2006.³⁴⁵ Additionally, Egypt's reports must be more thorough; rather than maintain its assertions that it is a culturally homogenous country, Egypt must recognize and provide information about its minority and indigenous groups.³⁴⁶

Second, Egypt must adopt temporary special measures in its antiquities system in order to get the Nubians on the proper footing with respect to their cultural property.³⁴⁷ A focused attempt to include the Nubians in the MSA or other governing body would not violate CERD because, pursuant to Article 1(4), these "special measures" to ensure the advancement of a previously disadvantaged group are not considered a form of racial discrimination.³⁴⁸ The Egyptian government should make this attempt, specifically in the area of antiquities, as cultural property is integral to a people's preservation of their history. One special measure Egypt can adopt could take the form of a program or "preferential regime[]" in hiring for the MSA or whichever entity the MSA evolves to become.³⁴⁹ In addition to special measures, Egypt should establish certain permanent rights for its indigenous peoples with respect to culture and all areas of life.³⁵⁰

It seems appropriate to view the Nubians as a group of people of African descent within Egypt. The CERD Committee asserted that people of African descent internationally, especially indigenous groups, have "[t]he right to prior consultation with respect to decisions which may affect their rights."³⁵¹ This could mean that the Nubians, as an indigenous population of African descent within a majority mixed population, should have a permanent right to consultation with respect to protecting their tangible cultural heritage.³⁵²

345. EGYPT: INDIGENOUS PEOPLES, *supra* note 9, at 12-13.

346. *See* General Recommendation No. 23, *supra* note 119, ¶ 6 ("The Committee further calls upon States parties with indigenous peoples in their territories to include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention.").

347. *See* General Recommendation No. 32, *supra* note 117, ¶ 11.

348. CERD, *supra* note 115, at art. 1(4).

349. *See* General Recommendation No. 32, *supra* note 117, ¶ 13.

350. *See id.* ¶ 15.

351. General Recommendation No. 34, *supra* note 211, ¶ 4(d); General Recommendation No. 23, *supra* note 119, ¶4(d) ("The Committee calls in particular upon States parties to . . . [e]nsure that members of indigenous peoples have equal rights in respect to effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.").

352. *See* General Recommendation No. 34, *supra* note 211, ¶ 4(c) ("People of African descent live in many countries of the world, either dispersed among the local population or in communities, where they are entitled to exercise, without discrimination . . . [t]he right to the

Accordingly, at the very least, the Egyptian government under CERD is responsible for including the Nubians in dialogues about Kemetite antiquities. CERD also requires the Egyptian government to actively seek to improve the Nubian situation and protect Nubians from discrimination by its government entities.³⁵³

In addition to consulting with Nubian groups in antiquities decisions, Egypt should also adopt explicit constitutional language prohibiting discrimination toward indigenous groups like the Nubians.³⁵⁴ This would comply with the CERD Committee's General Recommendation No. 29, which addresses the fact that constitutions like Egypt's only imply the presence of indigenous or minority groups.³⁵⁵ Furthermore, Egyptian legislators and MSA officials should use sound, neutral Egyptological narratives and findings to change the way they view ancient history; mention of the Nubians in Law 117 would be a step forward, but the ideal solution would be for Egypt to recognize the "ancient Egyptians" as Kemetians—members of a culture much too distant to bear the name of any modern civilization—and omit any language of false entitlement suggesting reliance on superiority narratives.³⁵⁶

Finally, efforts in the area of education seem appropriate to remedy neglect and attitudes toward Nubians with respect to Kemetite antiquities.³⁵⁷ The CERD Committee has recommended special educational measures to assist in eliminating racism against people of African descent.³⁵⁸ Under CERD, these measures could include (1) ensuring that all students are exposed to Nubian history and under-

protection of their traditional knowledge and their cultural and artistic heritage."); *see also supra* note 212 (explaining that a strong argument exists for Nubians to be considered "people of African descent" within Egypt, despite the fact that Egypt is technically an African country and all of its inhabitants could claim to be of African descent).

353. *See* General Recommendation No. 34, *supra* note 211, ¶¶ 8, 11 ("The Committee recommends that States parties adopt the following measures: . . . Review, adopt and implement national strategies and programmes with a view to improving the situation of people of African descent and protecting them against discrimination by State agencies and public officials, as well as by any persons, group or organization.").

354. *See* United Nations, Comm. on the Elimination of Racial Discrimination, General Recommendation No. 29: Article 1, Paragraph 1 of the Convention (Descent), ¶ 2, (Nov. 1, 2002) [hereinafter General Recommendation No. 29].

355. *See generally id.*; *see also* ILO, RIGHTS OF INDIGENOUS, *supra* note 134, at 35.

356. *See* discussion *supra* Part II.D.2.

357. *See* General Recommendation No. 34, *supra* note 211, ¶ 66.

358. *See id.* ("Include in textbooks, at all appropriate levels, chapters about the history and cultures of peoples of African descent and preserve this knowledge in museums and other forums for future generations, encourage and support the publication and distribution of books and other print materials, as well as the broadcasting of television and radio programmes about their history and cultures.").

stand the modern Nubians' cultural connection to Kemetic people; (2) updating and changing written labels in museums to correctly recount Kemetic history according to neutral Egyptological narratives; (3) adapting any official tour guide training or official literature to reflect any modern Nubian connection to Kemet; and (4) supporting publication and television broadcasting furthering neutral Egyptological narratives and supporting the modern Nubian cultural connection to Kemet.³⁵⁹ All of these measures could counteract any acceptance of superiority narratives, ensuring compliance with Article 4(a) of CERD.

C. Egypt Should Ratify the International Labour Organization's Convention No. 169

The International Labour Organization's Convention No. 169 ("ILO 169") is a treaty that would only serve as a positive mechanism with respect to the Nubian cultural situation in Egypt.³⁶⁰ Under ILO 169, the Nubians would likely be classified as "tribal peoples" in Egypt.³⁶¹ ILO 169 would significantly benefit Nubians in Egypt because the treaty would require Egypt to consult tribal peoples regarding cultural issues that affect them.³⁶² For example, the treaty would require the Egyptian government to "establish means by which [the Nubians] can freely participate . . . at all levels of decision-making in . . . administrative and other bodies responsible for policies and programmes which concern them."³⁶³

As this Comment has argued, cultural issues, "policies and programmes" that concern Nubians include the vast majority of issues regarding "ancient Egyptian" antiquities because the Nubians exhibit cultural continuity with Kemet, a civilization that the Egyptian state and the world have referred to as "ancient Egypt."³⁶⁴ Thus, because Law 117 creates and defines the SCA as being the sole entity concerned with "ancient Egyptian" antiquities, and because all things "ancient Egyptian" have a close significance to modern Nubian cul-

359. *See id.*

360. *See generally* *Convention No. 169*, INTERNATIONAL LABOUR ORG., <http://www.ilo.org/indigenous/Conventions/no169/lang—en/index.htm> (last visited Mar. 9, 2012) (summarizing the key features of the convention).

361. *See id.*

362. *See id.*

363. Indigenous and Tribal Peoples Convention, 1989, art. 6(1)(b), June 27, 1989, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314.

364. *Id.*

ture, under ILO 169, the SCA—now MSA—would inevitably have to consult the Nubians and allow them to participate in cultural decisions.

Currently, Egypt is only bound by ILO No. 107, an earlier, less stringent version of ILO 169 that has only been applied to the Bedouin population—not to the Nubians—in an “integrationist” sense, failing to recognize or celebrate cultural differences.³⁶⁵ As of the time of publication of this Comment, Egypt has not ratified ILO 169.³⁶⁶ ILO 169 would potentially force the Egyptian state to recognize the Nubian linkage to a treasured and lucrative past.³⁶⁷ However, this is precisely what must occur in the interest of eliminating racial discrimination in all respects.

D. Petitioning to Rensi: Egypt Should Assemble a Special Tribunal or Include More Nubians in Antiquities Governance

UNDRIPs provides that State Parties must consult with indigenous groups and include these groups in decision-making that would affect their rights, such as decisions about cultural property.³⁶⁸ Furthermore, CERD requires State Parties to protect and provide remedies to citizens through “competent national tribunals and other State institutions.”³⁶⁹ Under these requirements, the MSA, whose primary concern is cultural property, cannot be a competent institution if it does not take into consideration Egypt’s various cultures. The best way to ensure those cultural views are expressed is to ensure that minority cultures are members of the MSA (or whatever future body governs antiquities in Egypt).

Not only should a more inclusive tribunal or body be assembled, but its decisions should be guided by a goal to determine and promote historical truth. There are two core interests that should guide the governing body’s allocation of ancient property in Egypt: (1) *maat*—or morality—and (2) education. The interest in *maat* would include recognition of any cultural continuity between a current population and its ancestry. It is morally right to allow the Nubians to benefit from their connection to their cultural history by having the opportu-

365. See ILO, RIGHTS OF INDIGENOUS, *supra* note 134, at 18.

366. See *Convention No. 169*, *supra* note 360.

367. See *id.*

368. See UNDRIPs, *supra* note 133, at arts. 18, 19.

369. CERD, *supra* note 115, at art. 6.

nity to participate in the process that determines the fate of Kemetic antiquities.

Second is the interest in education. Museums and other entities displaying cultural property seek to educate to an extent, but cannot present radical educational ideas that go against popular discourse without betraying their economic interests.³⁷⁰ This fiscal limit on education is undoubtedly occurring in Egypt. While appeasing tourists and museum visitors is a valid economic interest, the paramount interest of justice should require a goal of educating accurately and widely forever. Egypt should adopt an educational model that considers these three tenets, and all three tenets must require inclusion of and collaboration with the Nubian people of Egypt.

1. Educating Accurately: Pursuing the Truth

First, there is the ideal of *accurately* educating by communicating a message as close to the truth as possible. This truth can only be arrived at through communication between diverse parties, one of which should be the Nubians because of their strong cultural tie to Kemetic antiquities. Furthermore, educating accurately would involve presenting antiquities in context. Salima Ikram, a professor of Egyptology, argued that removing an artifact or mummy from Egypt is thus removing it from its context.³⁷¹ She argues that doing this destroys an artifact's meaning and damages its benefit to "the sum of human knowledge."³⁷² Archaeologists also emphasize the significance of context to studying antiquities: "[w]hether we focus upon the lives of pharaohs or ordinary citizens, the centrality of archaeological materials is crucial and can only be heightened when we are presented with *contextualized artifacts*."³⁷³

Egypt can educate accurately by displaying Kemetic artifacts in their original Nile valley context, as this gives observers an idea of the true story of each artifact because the artifacts are surrounded by their

370. See Henrietta Lidchi, *The Poetics and the Politics of Exhibiting Other Cultures*, in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 202 (Stuart Hall ed., 1997) ("[I]f museums have to appeal to the public, their messages have in some way to concord with the collective view of this audience, since their survival depends on making the collection, the exhibition and the museum meaningful to this pre-defined group . . .").

371. Mette Eriksen, *International Smugglers Increasingly Target Egypt's Artifacts*, ALMASRY ALYOUM, Sept. 2, 2011, www.almasryalyoum.com/en/node/491642.

372. *Id.*

373. See Brief for Archaeological Institute of America et al. as Amici Curiae Supporting Appellee, at 6 United States v. Schultz, 333 F. 3d 393 (2d Cir. 2003) (No. 02-1357) (emphasis added).

original environment. The highest level of accuracy would be seen at the artifact's discovery site. Finally, any captions or messages describing the artifacts, temples, and monuments should accurately convey which population created those artifacts (e.g., the Kemetic civilization, not "ancient Egyptian") and that population's fate in history (e.g., its relationship to Egypt's modern cultural composition, including the Nubians).

2. Educating Widely: Dispersal of Antiquities

The next tenet goes beyond including the Nubians in Egypt's antiquities system: there is an ideal of educating the *widest audience possible*. This aspect corresponds with the aim of the 1970 UNESCO Convention, which encourages the "interchange of cultural property among nations" for worldwide education and cultural enrichment.³⁷⁴ Those in favor of dispersal of Kemetic antiquities often present moral arguments concerning education.³⁷⁵ Some debaters emphasize the simple value of sharing and benefiting others.³⁷⁶ John Tierney, columnist for the *New York Times*' "Science Times" section, advocates for a system whereby Egypt would share duplicitous artifacts with other countries.³⁷⁷ He asks, "why not let those objects be displayed and enjoyed by people overseas?"³⁷⁸

James Cuno champions dispersal of antiquities into the world's encyclopedic museums—museums that collect items from around the world as opposed to items only from their local country.³⁷⁹ These encyclopedic museums are a beacon of light for their visitors, exposing them and educating them about peoples and places they may never otherwise see.³⁸⁰ Cuno cautions that patrimony laws like Law 117 hinder the development and inhibit the creation of such encyclopedic museums.³⁸¹ Furthermore, patrimony laws attack the ideals and values

374. See Cohan, *supra* note 64, at 58. The Preamble to the 1970 UNESCO Convention expresses that "the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and insures mutual respect and appreciation among nations." *Id.* (internal quotation marks omitted).

375. See generally John Tierney, *Who Should Own the Rosetta Stone*, N.Y. TIMES, NOV. 16, 2009, tierneylab.blogs.nytimes.com/2009/11/16/who-should-own-the-rosetta-stone/ (discussing dispersal of Kemetic antiquities for the benefit of international education).

376. See generally *id.* (advocating for the international dispersal of Kemetic antiquities).

377. See *id.*

378. *Id.*

379. See Cuno, Preface, *supra* note 76, at xxxi.

380. See *id.*

381. See *id.* at xxxii.

behind the encyclopedic museums: education, cultural understanding, and the sharing of ideas.³⁸² Cuno reasons that ancient artifacts are important to the entire world, not just to the “governments . . . of modern nations with jurisdiction over them.”³⁸³ Thus, nationalist legal instruments like Law 117 “claim ownership of the world’s ancient heritage.”³⁸⁴

A tribunal or body governing antiquities in Egypt can educate widely by connecting with people who may not have the means to travel to the Nile valley or remote locations within Egypt. This translates to an interest in displaying the artifacts out-of-context. Out-of-context locations can include museums in the Nile valley that are far from the artifacts’ actual discovery sites. For example, an artifact taken from the remote site of Amarna, Egypt can be displayed in the more populous city of Luxor, Egypt. The out-of-context location could also be any museum or exhibit around the world. To make this happen more readily, a diverse tribunal (one including members of the Nubian community) could reanalyze some of the aims of laws like Law 117 and consider loosening Egypt’s strict hold on all of its artifacts. What is important is that the widely-communicated message is one that is accurate and not fiscally limited; the message should be molded by diverse points of view. In other words, “homogenous” Egypt should not tailor the message; rather, this task should be left to a diverse group of individuals who genuinely seek to reconstruct Kemet for the world.

3. Educating Forever: Prioritizing Preservation

Finally, the antiquities system must have a goal of educating *for as long as possible* to generations and generations of people. This tenet takes special note of preservation interests and favors museums with the best conservation facilities and most stable financial support.³⁸⁵ Egypt’s patrimony laws and goals of retaining all antiquities do not protect against other threats to antiquities such as natural dis-

382. *See id.*

383. *See id.* at xxxiv.

384. *See id.* at xxxii.

385. After the interest of keeping things in context, there should also be an interest in preservation of the artifacts. For example, if there is a statuary set that has been kept in an open-air museum in Aswan, Egypt, but hundreds of these statuary sets exist, now the interest should simply be in preservation. Therefore, it would not be wrong to export these redundant artifacts to other locales, so long as they are going to technologically sophisticated museums to ensure their preservation. *See Cohan, supra* note 64, at 57 (“The appetite for legal antiquities in the marketplace might be nourished and black market trading reduced if public institutions in source

aster, warfare, and accident.³⁸⁶ Threats like warfare become even more salient in light of events like the 2011 Egyptian Revolution. Law 117 will not protect Kemetic antiquities from these threats.³⁸⁷ Dispersal will.³⁸⁸

Furthermore, many retention or patrimony laws can actually cause various problems that adversely affect antiquities, as Professor John Alan Cohan notes.³⁸⁹ One of those problems is over-retention, or “hoarding,” which involves the warehousing and decay of duplicitious antiquities that are already well-represented in national museums.³⁹⁰ There is often no promise that these stored artifacts “will ever be studied, published, or displayed.”³⁹¹

Museums outside of Egypt provide potentially ideal facilities to preserve the antiquities and give the curious and the scholarly an opportunity to view history without having to travel far.³⁹² Opponents to Law 117 argue that Egypt’s antiquities should be dispersed because museums outside of Egypt have superior resources and are thus a better, more-protective home for the artifacts.³⁹³ Those who argue for dispersal because of better preservation facilities outside of Egypt may soon be silenced by the possibility that Egypt itself will have the best preservation facilities: the completion of the Grand Egyptian Museum in Cairo and its unrivaled conservation center.³⁹⁴

The three educational ideals of accuracy, dispersal, and preservation must be balanced against one another when it comes time to decide who should own or at least keep particular Kemetic artifacts. The point is that this balancing act should be performed by a diverse, competent tribunal that includes all parties with an interest in the antiqui-

nations engaging in hoarding were to release some of the reputedly large supplies of marketable antiquities they now hold in storage.”).

386. See Cuno, *Introduction*, *supra* note 25, at 3.

387. See *id.*

388. See *id.*

389. See generally Cohan, *supra* note 64. Throughout the article, Cohan describes various issues that arise out of retention laws, repatriation efforts, and other legal sources in the field of archaeology. See generally *id.*

390. *Id.* at 56.

391. *Id.*

392. See generally Tierney, *supra* note 375 (listing preservation and better facilities as a benefit of artifact dispersal to other museums).

393. See David Bollier, *Who Should Own Antiquities?*, ON THE COMMONS (May 1, 2009), <http://onthecommons.org/who-should-own-antiquities>.

394. See generally Nevine El-Aref, *Grand Egyptian Museum Construction Work to Resume Next Week*, AHARAM ONLINE (Cairo), Jan. 9, 2012, <http://english.ahram.org.eg/NewsContent/9/44/31234/Heritage/Museums/Grand-Egyptian-Museum-construction-work-to-resume-.aspx>.

ties. However that diverse tribunal is composed, it should undoubtedly include Nubian Egyptians.

E. Sending Eloquent Speeches to the *Per-Aa: Maat* and Education Intertwined Create an International Tribunal to Decide the Fate of Kemet Antiquities

Egypt should have a domestic tribunal or body like the MSA, but the idea of a tribunal can also extend into the international sphere. Thus, weighing the concerns of *maat* and “educating accurately, widely, forever” can be a job for a carefully selected non-governmental body or tribunal, free from political concerns and loyal to academic concerns.³⁹⁵ This organization or governing body could provide the benefit of neutrality to the system, as opposed to the bias that national governments or domestic organizations may possess from generations of argument.³⁹⁶ At the very least, the *maat* and educational concerns could mean that the tribunal provides a declaration of the relationship between Kemet artifacts, Nubian people, and other African peoples.

Professor Cohan elaborates on the point that an international tribunal might support vesting certain property to cultural groups (e.g., the Nubians) rather than states with arbitrary borders (e.g., Egypt):

[I]n view of changing national boundaries during the course of history, the tribunal may encounter difficulties in determining which specific claimed properties should be returned and to which cultural group they should be returned. The strongest historic cultural link seems to provide the most appropriate basis for determining cultural group-specific claims, and if that group has a modern-day counterpart, the property’s destination may be fairly clear.³⁹⁷

This assertion provides support for an international tribunal’s determination of where antiquities should go if there are paralyzing disputes that fall along cultural lines verses country borders.³⁹⁸ This tribunal could be useful when “cultural group specific” claims arise and polarizing conflict occurs in the domestic tribunal. An international tribunal could at least place pressure on the Egyptian government to ensure controversial decisions are decided in the interests of justice and education. Nevertheless, allocating artifacts based on cul-

395. See Cohan, *supra* note 64, at 99 (“[R]eliance on impartial third parties may be more productive than bilateral negotiations or diplomatic efforts.”).

396. See *id.* (“[P]arties may become deeply entrenched in their positions.”).

397. *Id.* at 101.

398. See discussion *supra* Part II.

tural group can become a difficult and flawed exercise,³⁹⁹ and an international tribunal could ensure that interests in educating—not allocating—ultimately prevail.

The international tribunal should have diverse but relevant membership, with members from all around the international community and experts in various fields from classical African studies to archaeology, museum studies to education, biomedical science to law.⁴⁰⁰ This diverse membership would not only aid in sound deliberation, but it would strengthen the international tribunal's credibility, jurisdiction, and enforcement.⁴⁰¹

CONCLUSION

With the 2011 Egyptian Revolution, the time has come for Egypt to reassess the legal and political treatment of its minority populations with respect to their cultural property.⁴⁰² The Nubians in Egypt are a distinct indigenous group with a cultural connection to both the ancient Nubian and Kemetic civilizations that have made modern-day Egypt prosperous.⁴⁰³ The Egyptian government, in its legal structure and rhetoric, has ignored Nubian cultural distinctions and imposed an idea of cultural homogeneity across the state.⁴⁰⁴ This ignorance is eerily similar to the ignorance exhibited by Egyptological superiority narratives.⁴⁰⁵ However, a close connection between the Nubians and Kemet does exist, and it should be recognized and embraced by the controlling group: inclusion and consultation are required, at the very least.⁴⁰⁶ Egypt's obligations to CERD, ICESCR, UNDRIPs only support this recommendation.⁴⁰⁷

399. SMITH, *supra* note 223, at 33 (“The correlation of artifacts with specific groups has been a central problem in studies of ancient ethnic identity . . .”). Ethnicity is dynamic, fluid, multifaceted, overlapping, and ever-changing in its nature. *See id.* Because of this, it is difficult to select a corresponding ethnic group for each artifact, especially when the artifacts represent a shared cultural identity (which the ancient Nubians and Kemetians had). *Id.* Therefore, educating, not allocating, is a more appropriate priority.

400. *See* Cohan, *supra* note 64, at 99 (“[T]he tribunal would need to have substantial international membership in order for it to have jurisdictional validity.”).

401. *See id.* (“[T]he tribunal would need to have substantial international membership in order for it to have jurisdictional validity.”).

402. *See* El-Aref, *Heritage*, *supra* note 13 (reviewing some changes in Egyptian Government that have occurred since the Egyptian Revolution of 2011).

403. *See* discussion *supra* Part II.A.

404. *See* discussion *supra* Part II.A.

405. *See* discussion *supra* Part II.D.

406. *See* discussion *supra* Part II.B.

407. *See* discussion *supra* Part I.A.

Pharaohs, Nubians, and Antiquities

Egypt's antiquities system should be inclusive of not only Arab Egyptians but also Nubian Egyptians, who undoubtedly have an interest in their historical record.⁴⁰⁸ Egypt can do this by (1) intentionally including members of the Nubian community in its department governing antiquities (the MSA); (2) changing its international rhetoric and acknowledging Nubians as indigenous Egyptians; and (3) making all efforts to dispel the racist superiority narratives that disconnect and exclude groups from "ancient Egyptian" history.⁴⁰⁹ Additionally, Egypt can become a party to more progressive international treaties such as ILO 169, and an international tribunal can be created to check the Egyptian government's decisions regarding the world's classical African heritage.⁴¹⁰ If these measures are employed, the Egyptian government will shed its role as "strong robber," and *maat* will be restored.⁴¹¹

408. See discussion *supra* Part III.

409. See discussion *supra* Part III.

410. See discussion *supra* Part III.

411. See CARRUTHERS, *supra* note 1, at 143-52, 163 (providing a portion of the Kemetic tale, *Nine Petitions of the Farmer*, with references to Nemtynakht—which means "strong robber"—and the concept of *maat*).

COMMENT

What Warrants the Revocation of Supervised Release?: Why the Term “Warrant” Has Given the Courts So Much Trouble

SEAN G. PRESTON*

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INTRODUCTION

Years after a term of parole ends, the long arm of the Criminal Justice system can pull a person back in without affording an individual commonly recognized Fourth Amendment protections.¹ When a parole officer alleges that the parolee has violated a condition of pa-

1. This Comment discusses a federal statute regarding supervised release, 18 U.S.C. § 3583(i). Supervised release is called parole in other jurisdictions, and this Comment generally uses them interchangeably—though the author strives to insert the term which will ensure the most clarity within context.

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role, the officer can inform the court and request a warrant for a revocation hearing. The warrant remains active as long as the court issued the arrest warrant while the parolee was still on parole. But while the statute requires the issuance of such a warrant, the circuits are split as to whether arrest warrants issued for these former parolees must meet the Fourth Amendment's Warrant Clause requirements.²

One example, Melissa,³ pled guilty to a violation of the United States Immigration laws—a single count of conspiracy to smuggle an illegal alien into the United States.⁴ In 2004, a district court sentenced Melissa to a year in prison and three years on parole for this crime of conspiracy.⁵ While persons on parole agree to be subjected to many conditions of release,⁶ parole officers can impose even more restrictive conditions.⁷ Melissa's parole officer created an additional condition of Melissa's release, which was more restrictive than the previously established conditions.⁸ And after just three months of limited freedom, the parole officer alleged a violation of this newly created condition and moved for revocation of Melissa's supervised release.⁹ Although required by the Fourth Amendment, the officer's allegations were not supported by "Oath or Affirmation."¹⁰

The court issued an arrest warrant for Melissa that did not meet the requirements of the Fourth Amendment.¹¹ The arrest warrant re-

2. Compare *United States v. Vargas-Amaya*, 389 F.3d 901, 906 (9th Cir. 2004) (holding that warrants under § 3583(i) must have been supported by Oath or affirmation) with *United States v. Garcia-Avalino*, 444 F.3d 444, 445 (5th Cir. 2006) (explicitly refusing to follow the Ninth Circuit's reasoning in *Vargas-Amaya* and refusing to apply the Fourth Amendment's Warrant Clause requirements to § 3583(i)).

3. Melissa's story is based closely on the story of Migdalia Collazo-Castro. The citations to Melissa's story all regard the life of Migdalia Collazo-Castro.

4. *United States v. Collazo-Castro*, 660 F.3d 516, 517 (1st Cir. 2011); see also Tom Egan, *Despite Lack of Oath, Warrant Ruled Valid by 1st U.S. Circuit Court of Appeals*, R.I. LAW. WKLY., Oct. 6, 2011.

5. Migdalia Collazo-Castro was sentenced similarly, though rather than "parole," federal courts now use the term "supervised release." See *Collazo-Castro*, 660 F.3d at 517; Egan, *supra* note 4.

6. HOWARD ABADINSKY, PROBATION AND PAROLE: THEORY AND PRACTICE 257 (Kim Davies et al. eds., 8th ed. 2003); DEAN J. CHAMPION, PROBATION, PAROLE AND COMMUNITY CORRECTIONS 298-300 (Kim Davies et al. eds., 4th ed. 2002).

7. ADADINSKY, *supra* note 6, at 261.

8. See *Collazo-Castro*, 660 F.3d at 517; Egan, *supra* note 4.

9. *Collazo-Castro*, 660 F.3d at 517.

10. *Id.*

11. See *id.*; Egan, *supra* note 4. See generally U.S. CONST. amend. IV (outlining the right of people to be free from unreasonable search and seizure). From the court documents, it seems apparent that Puerto Rico uses the term "Probation Officer" for the supervisor of persons on supervised release. See *Collazo-Castro*, 660 F.3d at 517. Because of differences in the jurisdictions and because this Comment deals more closely with the concept of parole, I am choosing the term "Parole Officer" to avoid confusion.

mained stagnant and unenforced over Melissa for years; Melissa's parole was not revoked until five years later—more than two years after her term of parole had been set to conclude.¹² In the fall of 2011, the United States Court of Appeals for the First Circuit held that the five-year-old warrant did not have to comply with the requirements of the Fourth Amendment.¹³

Time served in prison is characterized by heavy rules and restrictions. By contrast, time spent in the parole system (on supervised release) is characterized by relative freedom subject to expiring conditions of release.¹⁴ Prison physically rules a person's life, thus making the rules of prison more difficult to violate than the occasionally mandated conditions of parole. By this line of thought, a sentence including parole may be more difficult to complete without a violation than a sentence that only includes prison. Melissa may have been better off refusing parole for an extended term in prison. Under this alternative, if available, she could have more easily been guaranteed an on-time release assuring her the rights and protections of everyday citizens and criminal defendants.

To enter a program of supervised release (such as parole) prisoners must agree to certain conditions that the court, and subsequently their parole officers, place on their release.¹⁵ These express conditions come in two types: the standard conditions applicable to all persons on release, and the special conditions that relate to the underlying offense and the particular offender.¹⁶ Standard conditions contain basic restrictions on the defendant's association with criminals and drug or alcohol use but may be as menial as how soon a parolee must file a change of address form with the parole officer.¹⁷ Special conditions may include restrictions regarding possession of a weapon and home detention, and can go as far as mandating restitution.¹⁸

12. See *Collazo-Castro*, 660 F.3d at 517-18 (revoking Mrs. Collazo-Castro's term of supervised release on May 5, 2010, even though the term of supervised release had been scheduled to end on February 11, 2008); Egan, *supra* note 4.

13. *Collazo-Castro*, 660 F.3d at 519.

14. ABADINSKY, *supra* note 6, at 257; CHAMPION, *supra* note 6, at 299-300.

15. ABADINSKY, *supra* note 6, at 257.

16. *Id.* (“[Conditions are usually] tailored to the individual requirement of a particular offender.”).

17. *Id.* (“[Standard conditions include:] [r]estriction on travel, [a]ssociating with other offenders, [d]rug or alcohol use, [e]mployment, and [r]esidence.”); see also CHAMPION, *supra* note 6, at 299-300.

18. CHAMPION, *supra* note 6, at 300 (citation omitted) (“[P]ossession of weapons, restitution, fines, debt obligations, access to financial information, community confinement, home detention, community service, occupational restrictions, substance abuse program participation,

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Persons on supervised release must recognize that any violation of these numerous conditions could result in revocation of their release and ultimately send them back to prison.

There are two types of violations for a person on supervised release: a new-offense violation and a technical violation.¹⁹ A new offense violation is the prosecution of a new crime.²⁰ A technical violation is a violation of a condition of supervised release.²¹ Many of the conditions are criminal acts, such as the possession of a weapon²² (assuming the person on release is a felon). This blends some new offense violations and technical violations, and can make the two indistinguishable. Because there is general applicability of criminal statutes, it is unclear why the conditions of parole include additional criminal activity.²³

In Melissa's case, she admitted to her parole officer that she committed a violation; the officer then unilaterally created an even more restrictive condition of her release.²⁴ Technical violations are usually more numerous, but any violation may result in a revocation hearing and ultimately having the term of parole extended or the violator sent back to prison.²⁵ However, title 18 of the U.S. Code, section 3583 extends the jurisdiction of courts to hold revocation hearings past the expiration of a person's term of supervised release only if said courts issued a warrant for the person during the term.²⁶

Parole terms have a start date and duration.²⁷ It follows that a term has an expiration date; although for many parolees, it may not always feel like it. While it may seem obvious that a court could send a parolee back to prison for a violation during the term of parole,²⁸ it

and mental health program participation.”). As an example “persons with a history of sex offenses against children will be prohibited from areas where children typically congregate, such as playgrounds.” ABADINSKY, *supra* note 6, at 257.

19. ABADINSKY, *supra* note 6, at 260.

20. *Id.*

21. *Id.*

22. 18 U.S.C. § 922 (2006).

23. And raises the question of why persons on parole would not be afforded the same protections as members of the general public.

24. *United States v. Collazo-Castro*, 660 F.3d 516, 517 (2011).

25. 18 U.S.C. § 3583(i) (2006).

26. *Id.* (“The power of the court to revoke a term of supervised release for violation of a condition . . . extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration . . .”).

27. For example, Mrs. Collazo-Castro's term of supervised release started February 11, 2005, and was set for a duration of three years; thus her expiration date should have been February 11, 2008. *Collazo-Castro*, 660 F.3d at 517; *see also* Egan, *supra* note 4.

28. *See* 18 U.S.C. § 3606 (2006).

should surprise most that § 3583 extends this power years beyond the completion of parole.²⁹ Section 3583 requires (1) that the court issue a warrant during the term of supervised release; and (2) that the warrant be based on allegations that the person violated a condition of release.³⁰ The question that continues to give the circuits trouble in these situations is whether such a warrant must adhere to all the same requirements laid out in the Fourth Amendment's Warrant Clause.³¹

The Warrant Clause of the Fourth Amendment applies to arrest warrants and reads in relevant part that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons . . . to be seized.”³² By the text, a warrant requires “probable cause,” “Oath or affirmation,” and must be sufficiently particular so as to protect against overreaching general warrants.³³ Additionally, a neutral and detached magistrate must issue a warrant, and police officers must execute it reasonably.³⁴ At issue in Melissa's case is whether the Fourth Amendment applies to warrants issued under § 3583(i) so that the warrant must be “supported by Oath or affirmation.”³⁵

Supervised release and parole are relatively synonymous; each is served after a term of imprisonment.³⁶ Melissa was, and is now still, on supervised release.³⁷ Supervised release grew out of parole but is

29. *See id.* § 3583(i) (“The power of the court to revoke a term of supervised release for violation of a condition . . . extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration . . .”).

30. *Id.* (Jurisdiction “extends beyond the expiration of the term of supervised release . . . if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.”).

31. *Compare* United States v. Vargas-Amaya, 389 F.3d 901 (9th Cir. 2004) (holding that a warrant for arrest of supervised release was not required to comply with the Fourth Amendment), *with* United States v. Garcia-Avalino, 444 F.3d 444 (5th Cir. 2006) (holding that a warrant for arrest for supervised release must comply with the oath and affirmation requirement of the Fourth Amendment).

32. U.S. CONST. amend. IV.

33. *Id.*; *see also* ANDREW TASLITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 236-37 (Robert C. Clark et al. eds., 4th ed. 2010).

34. TASLITZ ET AL., *supra* note 33, at 236.

35. *See* U.S. CONST. amend. IV (“[N]o Warrants shall issue [unless] supported by Oath or affirmation . . .”). This Comment examines the requirement within § 3583(i) that a warrant be issued in order to extend jurisdiction “beyond the expiration of the term of supervised release.” 18 U.S.C. § 3583(i).

36. *See* Samson v. California, 547 U.S. 843, 850 (citing United States v. Reyes, 283 F.3d 446, 461 (2d Cir. 2002)).

37. Egan, *supra* note 4; *see also* United States v. Collazo-Castro, 660 F.3d 516, 517-18 (2011).

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tacked on, at the time of sentencing, to the end of a prison term.³⁸ Parole constitutes an early release from prison.³⁹ Stated another way, supervised release does not replace a part of incarceration like parole does,⁴⁰ but is “given *in addition to* any term of imprisonment imposed by a court.”⁴¹ Parole is an early release from prison before the prisoner completes the entire sentence, with the understanding that the parolee must adhere to certain rules and conditions during the balance of the person’s sentence.⁴² In this way, parole is very similar to a term of supervised release. Also similar, parole officers carry out supervision of persons on supervised release.⁴³

Probation is another type of conditional release from custody, but courts sentence probation in place of incarceration rather than following a term of imprisonment. The Supreme Court noted that “parole [and by extension, supervised release] is more akin to imprisonment than probation;”⁴⁴ and that because of this distinction, “parolees [and persons on supervised release] have fewer expectations of privacy than probationers.”⁴⁵

“[S]ome degree of [Fourth Amendment] protection” extends to probationers, parolees, and persons on supervised release.⁴⁶ The alleged purpose of supervised release and parole are very similar; both purport to intend to “improve the odds of a successful transition from the prison to liberty.”⁴⁷ But when courts carve away at parolees’ rights while giving increased responsibility to parole officers, a term of release becomes more difficult to complete than prison and undermines any purpose of the parole system.

This Comment discusses the implications, considerations, and courts’ holdings for a person in Melissa’s position. Part One of this

38. *Samson*, 547 U.S. at 850 (citing *United States v. Reyes*, 283 F.3d 446, 461 (2d Cir. 2002)).

39. *Id.*

40. *Id.* (“[F]ederal supervised release, . . . in contrast to probation, is meted out in addition to, not in lieu of, incarceration.” (internal quotation marks omitted)).

41. 1 NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 5:11, at 5-22 (2d ed. 1999).

42. *Samson*, 547 U.S. at 850 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (“The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide[s] by certain rules during the balance of the sentence.”)).

43. 18 U.S.C. § 3601 (2006).

44. *Samson*, 547 U.S. at 850; see *CHAMPION*, *supra* note 6, at 259-60 (comparing parole and probation).

45. *Samson*, 547 U.S. at 850.

46. *Id.* at 857 (Stevens, J., dissenting) (“Our prior cases have consistently assumed that the Fourth Amendment provides some degree of protection for probationers and parolees. The protection is not as robust as that afforded to ordinary citizens . . .”).

47. *Johnson v. United States*, 529 U.S. 694, 708-09 (2000).

Comment discusses much background information, including some history of the parole system and the importance of the Warrant Clause. Part Two of this Comment discusses the circuit split and each circuit's reasoning regarding the meaning of "warrant" within 18 U.S.C. § 3583(i). Part Three of this Comment attempts to flesh out the implications of each of the circuits' holdings while concluding that the direction of the First Circuit in Melissa's case actually makes supervised release unreasonably difficult to complete and frustrates the system as a whole.

I. THE PAROLE SYSTEM AND THE WARRANT CLAUSE

A. Past and Current Treatment of Parolees and Persons on Supervised Release

Historically, parole started as a means of releasing prisoners of war who promised to stop fighting in the current conflict.⁴⁸ The roots of the United States parole system are often attributed as starting in Elmira, New York in the 1870s.⁴⁹ The Elmira Reformatory was initiated to reform first-time offenders and to release them back into society once they had shown enough progress in the areas of discipline, conduct, and employability in mainstream society.⁵⁰ The Elmira System included uniforms and marching, and was copied in other states around the country.⁵¹

The number of parolees greatly expanded during the Great Depression and the 1930s.⁵² This was due in large part to the cost of imprisonment.⁵³ By 1944 all states had parole systems to allow for the early release of the lowest-risk prisoners.⁵⁴ Congress overhauled the federal parole system in 1992 to make way for supervised release.⁵⁵

The true purpose behind parole is a matter of great debate. Some officials are skeptical of parole's ability to rehabilitate⁵⁶ and point to parole as a means of controlling prison populations.⁵⁷ There are two basic approaches, or models, to measuring the success of pa-

48. ABADINSKY, *supra* note 6, at 212.

49. *See* ABADINSKY, *supra* note 6, at 214; CHAMPION, *supra* note 6, at 262.

50. ABADINSKY, *supra* note 6, at 214; CHAMPION, *supra* note 6, at 262.

51. ABADINSKY, *supra* note 6, at 216 (citation omitted).

52. *Id.*

53. *Id.* at 470–71.

54. CHAMPION, *supra* note 6, at 264.

55. *Id.* at 116.

56. *Id.* at 264 (citation omitted).

57. ABADINSKY, *supra* note 6, at 471.

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role systems.⁵⁸ Some jurisdictions measure their success under a service model, while many prefer the more punitive control model.⁵⁹ Under the service model, “success is measured by the delivery of, or by referral to, services, such as education, training, employment, and counseling, and client-consumer satisfaction with the level of service.”⁶⁰ While under the control model, “success is measured according to the agency’s ability to hold the offender accountable for his or her behavior.”⁶¹

The driving purpose behind the Elmira Reformatory was to rehabilitate persons by encouraging them to receive training for employment and instilling discipline that the prisoners could apply to their everyday lives.⁶² Once the parole system received such an influx in population following the Great Depression, rehabilitation was no longer the focus as officials felt the burden of dealing with an excessive prison population.⁶³ Throughout this history of parole systems, “the role of the parole officer has become increasingly varied and complex”⁶⁴ with some believing that parole today is less a process of reintegration into society and more an indicator of a lessened legal status.⁶⁵ With the restructuring of the entire parole system in the late 1980s and early 1990s, many parole officers may feel the need to justify their positions and adopt the more punitive control model.

The control model shows the utility of the parole system pertaining to its effectiveness in punishing persons on supervised release.⁶⁶ While parole officers may not have the final say in what happens to a person on supervised release, judges are likely to take the parole officer’s recommendations.⁶⁷ Once on supervised release, a person’s sole contact for re-integration and rehabilitation is his or her parole officer. Such judicial deference to a greatly empowered officer leaves open vast channels for abuse.

58. *Id.* at 469.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 214; CHAMPION, *supra* note 6, at 262.

63. ABADINSKY, *supra* note 6, at 472.

64. CHAMPION, *supra* note 6, at 117.

65. ABADINSKY, *supra* note 6, at 472 (citation omitted).

66. *Id.* at 469.

67. CHAMPION, *supra* note 6, at 117.

B. The Fourth Amendment and the “Oath or Affirmation” Requirement

1. The Purpose Behind the Fourth Amendment

Historically, the Fourth Amendment is aimed at protecting citizens against the types of general warrants experienced under British rule.⁶⁸ One scholar contends that the Fourth Amendment was not inspired by “a single idea but [rather] a family of ideas whose identity and dimensions developed in historical context.”⁶⁹ James Madison warned members of the House of Representatives to protect against general warrants.⁷⁰ Under British law the colonists had seen the use of general warrants in the form of far-reaching “writs of assistance” that gave permanent discretion for searches without suspicion.⁷¹ Such writs caused widespread resistance in America; in the years approaching the American Revolution, both the colonists and the British citizens grew to condemn general warrants.⁷² Before the ratification of the Fourth Amendment, many of the States had already enacted “legal protections against general warrants.”⁷³ This state action later had “profound influence [on] the drafters of the Fourth Amendment.”⁷⁴

The Fourth Amendment sets limits on government intrusions into private affairs.⁷⁵ The framers of the Fourth Amendment, including James Madison, focused most of their attentions on the search warrant, which affected their personal dwellings more so than the intrusion by arrest warrants.⁷⁶ The Fourth Amendment’s primary principle is to limit the government’s power over individuals,⁷⁷ so that the government cannot arbitrarily interfere with an individual’s life.⁷⁸ Al-

68. James A. Adams, *The Supreme Court’s Improbable Justification for Restriction of Citizens’ Fourth Amendment Privacy Expectations in Automobiles*, 47 *DRAKE L. REV.* 833, 833 (1999). According to Adams, “Fourth Amendment rights were granted . . . in the context of suspicion about abuse of governmental power.” *Id.* at 835.

69. WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 6021791, pt. 4, at 1555 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Service).

70. THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT 19–20* (2009). This was due, in part, to the potential abuse of pairing general warrants with the power to tax. *Id.*

71. THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 30 (2008) (citations omitted).

72. *Id.* at 31, 520.

73. *Id.* at 32.

74. *Id.*

75. MCINNIS, *supra* note 70, at 4.

76. CUDDIHY, *supra* note 69, pt. 4, at 1556.

77. MCINNIS, *supra* note 70, at 5.

78. *Id.*

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though one professor argues that neither the language used in the Fourth Amendment, nor the historical context, indicates that warrants are a constitutional requirement,⁷⁹ others would certainly disagree. Regardless, in Melissa's case, § 3583(i) mandates that the court must issue a warrant in order to extend the jurisdiction of the court to revoke a term of supervised release past the expiration of the term of supervised release.⁸⁰

2. The Choice to Include "Oath or Affirmation"

American law has long recognized that affidavits for warrants must be supported by an oath or affirmation, as well as the availability of evidentiary suppression if there are material falsehoods in an affidavit.⁸¹ In 1806, the United States Supreme Court considered a warrant "invalid when [it was] *not* supported by oath."⁸² Some seventeenth century laws in England required complaints be filed under oath, while other laws did not.⁸³ But regardless of the apparent historical inconsistency in the sworn facts requirement, Americans took steps to protect against writs of assistance and other abuses of discretion by requiring an oath or affirmation.⁸⁴

Prior to the Bill of Rights and the Fourth Amendment, one Anti-Federalist made a recommendation of how to guard against abuses of government, including that all warrants be "supported by oath."⁸⁵ The Fourth Amendment's oath or affirmation language borrows from the 1776 Pennsylvania Constitution.⁸⁶ And James Madison's original Fourth Amendment draft included the language "supported by oath or affirmation" similarly found in the ratified Fourth Amendment.⁸⁷ The clause mandating oath or affirmation has strong roots in American history.

79. CLANCY, *supra* note 71, at 520.

80. 18 U.S.C. § 3583(i) (2006).

81. CLANCY, *supra* note 71, at 551 (citations omitted).

82. *Id.* at 551 n.7 (emphasis added) (citing *Ex parte* Burford, 7 U.S. 448 (3 Cranch 448) (1806)). This was affirmed in 1933 when the Supreme Court recognized that "[t]he facts or circumstances from which probable cause is found must be presented under oath or affirmation. Mere affirmation of belief or suspicion is not enough." *Nathanson v. United States*, 290 U.S. 41, 47 (1933).

83. CUDDIHY, *supra* note 69, pt. 3, at 855.

84. MCINNIS, *supra* note 70, at 19.

85. *Id.* (quoting RICHARD HENRY LEE, LETTERS FROM THE FEDERAL FARMER (1787)).

86. CUDDIHY, *supra* note 69, pt. 4, at 1477, 1477 n.226; *see also id.* at 1660 (citing and further explaining the authorship of the Pennsylvania Constitution) (citations omitted).

87. MCINNIS, *supra* note 70, at 20 (citations omitted).

3. Swearing to Facts: The Importance and Purpose of Oath or Affirmation

“An oath preserves the integrity of the warrant process.”⁸⁸ There are three basic ways to swear before a judge or magistrate.⁸⁹ The first way is by a written affidavit where the swearing officer may review his or her statement to ensure accuracy and inclusion of all relevant facts.⁹⁰ Secondly, a person administers an oath by simply swearing to the honesty of the statement, although the officer runs the risk of excluding pertinent information or misstating the truth without an opportunity to review the material.⁹¹ Finally, an officer may swear over the telephone.⁹² Regardless of the method used, the Fourth Amendment requires declarants to swear that the statement is accurate and truthful to the best of their knowledge.⁹³ The oath process requires only that a person be *in the presence* of the magistrate, as *face-to-face* interaction is not required.⁹⁴

After the administration of the oath or affirmation there is an assumption that the information provided will be true.⁹⁵ Defendants may challenge false information deliberately or recklessly given, but such a challenge will likely be difficult.⁹⁶ The “true test” of whether an oath has been properly administered is whether perjury could be charged.⁹⁷ While many Americans may want to respond to false testi-

88. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.3(e), at 521 (4th ed. 2004) (quoting *State v. Tye*, 248 Wis. 2d 530 (2001) (“An oath preserves the integrity of the . . . warrant process.”)).

89. MCINNIS, *supra* note 70, at 64.

90. *Id.*

91. *Id.*

92. *Id.* But this can be more complicated because swearing over the phone requires the conversation in which both the officer and the magistrate clearly identify themselves to be taped and either recorded or later transcribed by the judge or magistrate who approved the warrant. *Id.* See generally *People v. Fournier*, 793 P.2d 1176 (Colo. 1990) (finding that a facsimile was acceptable); Justin H. Smith, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 VAND. L. REV. 1591 (2002) (exploring the movement in telephone warrants).

93. LAFAVE, *supra* note 88, § 4.3(e), at 519; MCINNIS, *supra* note 70, at 64.

94. LAFAVE, *supra* note 88, § 4.3(e), at 519, 519 n.58 (citation omitted).

95. MCINNIS, *supra* note 70, at 64.

96. *Id.* A four prong test must be proved whereby the person challenging the warrant must establish that (1) the statements included were false, (2) they were knowingly or recklessly included, (3) the false statements were necessary in order to find probable cause, and (4) that probable cause does not exist without the false statements. *Id.* at 64–65 (citations omitted).

97. LAFAVE, *supra* note 88, § 4.3(e), at 520. The “courts must guard against the police’s abuse of authority.” CLANCY, *supra* note 71, at 381. The problem of police perjury has been widely discussed. See Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bad and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 233 (1998); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 379–86 (1998);

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mony with more strict repercussions for perjury, Professor Thomas Clancy warns that using Fourth Amendment jurisprudence to try and curb perjury is not the solution and will only: (1) hamper our police force; (2) lead to more creative lying; and (3) punish the good police officers that are simply doing their job.⁹⁸ Still, “noncompliance with the oath or affirmation requirement” is more than just a “technical irregularity.”⁹⁹ An oath is as an “essential component of the Fourth Amendment . . . [intended] to impress upon the swearing individual [a] sense of obligation to tell the truth.”¹⁰⁰

C. Types of Warrants: Criminal Versus Administrative

While criminal defendants have the protections of the Fourth Amendment, Congress exercises much of its power regarding public health, safety, and welfare through the use of administrative agencies.¹⁰¹ Fifty years ago, the United States Supreme Court held that the Fourth Amendment is aimed at criminal investigations, and thus the Fourth Amendment should not be applied to administrative conduct.¹⁰² Administrative conduct is considered only in the “peripheral” of the Fourth Amendment, rather than the Amendment’s focus.¹⁰³ More recently the Supreme Court has held that the Fourth Amendment applies to administrative *inspections*, but in doing so the Court gutted the probable cause requirement and did not discuss any need for an oath or affirmation.¹⁰⁴ Since Supreme Court doctrine allows both administrative searches and lesser warrants for these searches, some law enforcement officers may seek administrative warrants to avoid the stricter standards of a traditional search warrant. Courts have rejected arguments that such abuse occurs.¹⁰⁵

Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 775 (1997).

98. CLANCY, *supra* note 71, at 382; see Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996) (illustrating “creative lying”).

99. LAFAYE, *supra* note 88, at 520.

100. *Id.* at 521 (quoting *State v. Tye*, 248 Wis. 2d 530 (2001)).

101. WILLIAM E. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* § 14:1 (2d ed. 2012).

102. See *Frank v. Maryland*, 359 U.S. 360, 364-65 (1959). Administrative agencies are not held to the same standards and requirements that the Fourth Amendment recognizes. RINGEL *supra* note 101, at § 14:1. Agencies often have the right to conduct inspections related to their purpose. *Id.*

103. RINGEL, *supra* note 101, at § 14:1.

104. See *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 531 (1967); See *v. Seattle*, 387 U.S. 541, 543 (1967).

105. See generally *United States v. Prendergast*, 585 F.2d 69 (3d Cir. 1978) (rejecting the argument that administrative warrants were sought strategically to avoid the higher probable

Federal courts are split on whether they even have jurisdiction to review matters pertaining to administrative warrants.¹⁰⁶ The Fifth Circuit found that it had no jurisdiction to hear such matters,¹⁰⁷ while the First Circuit decided that defendants must exhaust all administrative remedies before a court could hear such a challenge.¹⁰⁸ Finally, the Seventh Circuit found that it could review administrative search warrants as long as it was prior to an entry of final order.¹⁰⁹

The courts have gutted fundamental warrant requirements to make way for administrative agencies.¹¹⁰ These administrative agencies perform functions for the public welfare and safety.¹¹¹ Given these two considerations it is understandable that a court may feel inclined to similarly gut the warrant requirement regarding the United States Parole system, which similarly functions to reduce the potential risk to public welfare and safety. This is especially true given the system's shift in focus from rehabilitation and reintegration toward protecting the public welfare.¹¹² But § 3583 resides in the Criminal Code and explicitly gives federal courts jurisdiction over persons on supervised release.¹¹³ Section 3583 should not be as similar to any law that guides a true administrative agency, though some courts have used such arguments to limit the warrant requirements regarding persons on supervised release.¹¹⁴

cause burden of a full search warrant); *United States v. Goldfine*, 538 F.2d 815 (9th Cir. 1976) (rejecting the argument that administrative warrants were sought strategically to avoid the higher probable cause burden of a full search warrant).

106. RINGEL, *supra* note 101, at § 14:3.

107. See *Marshall v. Shellcast Corp.*, 592 F.2d 1369, 1372 (5th Cir. 1979).

108. See *In re Worksite Inspection of Quality Prods., Inc.*, 592 F.2d 611, 616 (1st Cir. 1979).

109. See *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1344 (7th Cir. 1979).

110. See generally *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967) (holding that the standard of probable cause is lower for administrative searches); See *v. City of Seattle*, 387 U.S. 541 (1967) (holding that the standard of administrative warrantless entry of private residence also applied to commercial buildings). But it should be recognized that research has not yielded any instances where a court has termed a warrant under § 3583(i) to be an administrative warrant.

111. RINGEL, *supra* note 101, at § 14:1.

112. See *supra* Part I.A.

113. E.g., 18 U.S.C. § 3583(i) (2006).

114. See discussion *infra* Part II.

II. WHAT THE CIRCUITS HAVE SAID
REGARDING § 3583(i)

A. Some Circuits Have Avoided the Issue

Several circuit courts have heard the issue of whether warrants enforced under § 3583(i) must be supported by oath or affirmation.¹¹⁵ The Sixth, Eighth, and Eleventh Circuits have exclusively avoided the issue of whether warrants for persons on supervised release require the support of oath or affirmation as provided in the Fourth Amendment.¹¹⁶ In *United States v. Madden*, the Sixth Circuit dismissed the defendant's argument quickly using the Plain-Error Standard of Review because the defendant had not previously raised the argument.¹¹⁷ In *United States v. Jackson*, the reference to a federal indictment formed the basis for a violation of the terms of supervised release and thus the Eighth Circuit did not require an oath or affirmation to support the allegation.¹¹⁸ In *United States v. Presley*, the Eleventh Circuit simply distinguished a "summons" from a "warrant" and held that an oath was not required for a summons under § 3583.¹¹⁹

The issue of whether to apply the Fourth Amendment's Warrant Clause to warrants for persons previously on supervised release is both narrow and controversial. The issue is narrow because it requires that a warrant be issued on less than sworn facts during a person's term of supervised release, and a court seeks to enforce the warrant after the term of supervised release has expired.¹²⁰ And the issue is controversial because a decision on the issue results either in carving away at the already lessened protections for the person on supervised release or further hindering the justice system in its duty of protecting the public interest at large.¹²¹ For these reasons it is understandable why courts would avoid deciding this issue when feasible.¹²²

115. *E.g.*, *United States v. Collazo-Castro*, 660 F.3d 516, 523 (1st Cir. 2011); *United States v. Jackson*, 358 F. App'x 755, 756 (8th Cir. 2009); *United States v. Madden*, 515 F.3d 601, 606 (6th Cir. 2008); *Sherman v. U.S. Parole Comm'n*, 502 F.3d 869, 871 (9th Cir. 2007); *United States v. Jeremiah*, 493 F.3d 1042, 1045 (9th Cir. 2007); *United States v. Presley* 487 F.3d 1346, 1348 (11th Cir. 2007); *United States v. Garcia-Avalino*, 444 F.3d 444, 445 (5th Cir. 2006) .

116. *See Jackson*, 358 F. App'x at 756; *Madden*, 515 F.3d at 606; *Presley*, 487 F.3d at 1348.

117. *Madden*, 515 F.3d at 608-09.

118. *Jackson*, 358 F. App'x at 756.

119. *Presley*, 487 F.3d at 1348.

120. *See* 18 U.S.C. § 3583(i) (2006) (extending jurisdiction to revoke supervised release when an arrest warrant was issued during the person's term of supervised release yet acted upon after the term had expired).

121. A court may decide the matter on another issue so to avoid the constitutional question.

122. *See, e.g.*, *Jackson*, 358 F. App'x at 756; *Madden*, 515 F.3d at 608-09; *Sherman v. U.S. Parole Comm'n*, 502 F.3d 869, 871 (9th Cir. 2007); *United States v. Jeremiah*, 493 F.3d 1042, 1045

B. The Ninth Circuit Held that Warrants for Revocation Must Be Supported by Sworn Facts

In late 2004, the Ninth Circuit was the first circuit to declare a position on this issue in *United States v. Vargas-Amaya*.¹²³ However, like other courts, the Ninth Circuit has often elected to decide cases on other grounds where available.¹²⁴ In *Vargas-Amaya*, the Ninth Circuit held that jurisdiction to revoke a term of supervised release requires a warrant that is “based on facts *supported by oath or affirmation*.”¹²⁵ While the court conceded that a person on supervised release has lesser Fourth Amendment protections,¹²⁶ the court emphasized that the same requirements posed by the Fourth Amendment’s Warrant Clause must apply to § 3583 by looking at the common meaning of “warrant,” and citing the broad application of the Fourth Amendment.¹²⁷ Furthermore, the Ninth Circuit underlined the importance of how a term is used, and the importance that courts use terms consistently when compared with the United States Constitution.¹²⁸ The Court held that a warrant enforced under § 3583(i) on less than sworn facts is invalid.¹²⁹ The Ninth Circuit’s argument follows.

(9th Cir. 2007); *Presley*, 487 F.3d at 1348; *United States v. Castro-Sanchez*, 135 F. App’x 96, 97 (9th Cir. 2005); *see also* *United States v. Prepetit*, 816 F. Supp. 2d 121, 125 (D.D.C. 2011) (dismissing because the motion to vacate judgment was time-barred).

123. *United States v. Vargas-Amaya*, 389 F.3d 901, 906 (9th Cir. 2004) (holding that warrants under §3583(i) must have been supported by oath or affirmation).

124. *Compare Sherman*, 502 F.3d at 871 (distinguishing the issue because the warrant was not issued by a judge or magistrate), *and Jeremiah*, 493 F.3d at 1045 (dismissing the issue because the person was arrested during the term of supervised release), *and Castro-Sanchez*, 135 F. App’x at 97 (revoking the order of the district court revoking Castro-Sanchez’ supervised release), *with Vargas-Amaya*, 389 F.3d at 906 (holding that warrants under §3583(i) must have been supported by oath or affirmation).

125. *Vargas-Amaya*, 389 F.3d at 902 (emphasis added) (“We hold that the district court lacked jurisdiction to consider the alleged violations of supervised release because the warrant issued during the term of Vargas’ supervised release was not based on facts supported by oath or affirmation, as required by the Fourth Amendment.”).

126. *Id.* at 906 (conceding that a person is subject to lesser Fourth Amendment protection while on supervised release, but a person on supervised release is still protected by the Fourth Amendment).

127. *Id.* at 904 (“Thus, where a warrant is issued unsupported by oath or affirmation, it is invalid under the Fourth Amendment.”).

128. *Id.*

129. *Id.* at 907.

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1. “Warrant” Has a Common Meaning.

The starting place for any statutory construction is plain meaning.¹³⁰ Judges will give words their plain meaning and no construction or further interpretation is necessary if the words Congress chose are clear.¹³¹ Section 3583(i) requires a warrant.¹³² The drafters of statutes will include definitions of any terms that the drafters of the statute desire to clarify the meaning, or to avoid the use of common or ordinary meaning.¹³³ Section 3583 does not have a corresponding definition section.¹³⁴ The Ninth Circuit asserted that without a definition of the term *warrant* within the statute, they would use the ordinary meaning of the term.¹³⁵

In *Vargas-Amaya*, the defendant contended that warrant meant “a document that is based upon probable cause and supported by sworn facts.”¹³⁶ The Ninth Circuit recognized that arrest warrants under the Federal Rules of Criminal Procedure require a complaint that may be filed with an affidavit.¹³⁷ And while recognizing that both complaints and affidavits require sworn facts, the Ninth Circuit looked to Black’s Law Dictionary, not to define a warrant but rather to define complaint and affidavit to underscore the requirements of a sworn declaration in both.¹³⁸ The Ninth Circuit believes that, unless otherwise instructed, the widely accepted definition of warrant must be used and requires an oath or affirmation to support the facts.

Secondarily, the Ninth Circuit recognized warrant as a term of art,¹³⁹ and asserted that where Congress uses a term of art such as

130. ABNER MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 9 (Aspen 1997). “The starting point in interpreting a statute is its language, for if the intent of Congress is clear, that is the end of the matter.” *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993).

131. MIKVA & LANE, *supra* note 130, at 10; *see also Good Samaritan Hosp.*, 508 U.S. at 409 (“The starting point in interpreting a statute is its language, for if the intent of Congress is clear, that is the end of the matter.”).

132. 18 U.S.C. § 3583(i) (2006) (emphasis added) (“The power of the court to revoke a term of supervised release for violation of a condition of supervised release . . . extends beyond the expiration of the term of supervised release . . . [if] a *warrant* . . . has been issued on the basis of an allegation of such a violation.”).

133. MIKVA & LANE, *supra* note 130, at 166.

134. *Vargas-Amaya*, 389 F.3d at 904.

135. *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir.1999) (holding that a term should be given its ordinary meaning in the absence of a statutory definition).

136. *Vargas-Amaya*, 389 F.3d at 904 (“Vargas contends that the plain meaning of the term ‘warrant’ means a document that is based upon probable cause and supported by sworn facts.”).

137. *Id.* at 905.

138. *Id.*

139. *Id.* at 904.

warrant, it is assumed that Congress intended to incorporate the common definition, meaning, and legal tradition of the term.¹⁴⁰ In treating the term as a term of art, rules of statutory construction require application of all the meanings our laws and criminal justice system give it.¹⁴¹ The court further reasoned that the Warrant Clause of the Fourth Amendment to the United States Constitution asserts that “no Warrants shall issue (unless) supported by Oath or affirmation.”¹⁴² Thus the founding document of our nation incorporates sworn facts as a foundational requirement for a warrant. The Ninth Circuit emphasized that § 3583(i) requires the issuance of a full-fledged warrant.

2. The Fourth Amendment’s Warrant Clause Has Broad Application and Reach

The Fourth Amendment to the United States Constitution provides that “no Warrants shall issue, but upon probable cause, *supported by Oath or affirmation*, and particularly describing the place to be searched, and the persons or things to be seized.”¹⁴³ The Ninth Circuit asserted that the Supreme Court has affirmed that *every* warrant must meet the requirements of the Warrant Clause, specifically the “oath or affirmation” requirement.¹⁴⁴ The court went on to recognize that the Federal Rules of Criminal Procedure identify the necessity, both implicitly and explicitly, of sworn facts as required by the Fourth Amendment’s Warrant Clause.¹⁴⁵ The Ninth Circuit further emphasizes that the Supreme Court has made it clear that statutes

140. *Id.* (“It is a well-established canon of statutory construction that when Congress uses a term of art, such as ‘warrant,’ unless Congress affirmatively indicates otherwise, we presume Congress intended to incorporate the common definition of that term.”); *see also* *Carter v. United States*, 530 U.S. 255, 264 (2000) (“Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.”) (quoting *Morisette v. United States*, 342 U.S. 246, 263 (1952)).

141. *Carter*, 530 U.S. at 264.

142. U.S. CONST. amend. IV (emphasis added).

143. *Id.*

144. *Vargas-Amaya*, 389 F.3d at 904 (citing *Groh v. Ramirez*, 540 U.S. 551, 556-57 (2004) (“[T]he Supreme Court recently affirmed that every warrant must meet the requirements of the Warrant Clause, and be based upon probable cause, supported by oath or affirmation.”)).

145.

[For example, t]he Federal Rules of Criminal Procedure discuss two situations where arrest warrants may issue. Rule 4(a) provides that an arrest warrant may issue only ‘[i]f the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it.’ Because both affidavits and complaints are signed under oath, Rule 4 embodies the

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cannot authorize the use of warrants that do not meet the requirements of the Fourth Amendment.¹⁴⁶ The court concluded that the Warrant Clause requirements are widely and uniformly applied in American law, and therefore all warrants must be supported by *oath or affirmation*.

3. The Effect of Past Tense When Referring to a Warrant

Both the Fourth Amendment and the Federal Rules of Criminal Procedure speak to warrants in the present-tense.¹⁴⁷ The Ninth Circuit recognized that the past-tense phrase in § 3583(i) indicated that a warrant had already been issued.¹⁴⁸ The Ninth Circuit stated that “Congress’ use of the past tense [in § 3583(i)] stands in contrast to the Fourth Amendment, and Rules four, nine, and forty-one of the Federal Rules of Criminal Procedure, which discuss the requirements for issuing an arrest warrant in the present tense.”¹⁴⁹ Therefore, the court found that § 3583(i) does not speak to the requirements for issuing a warrant, but rather assumes that a valid warrant has already been issued because of the use of past tense language when referring to the warrant.¹⁵⁰ The court underlined that the purpose of § 3583(i) was only to retain jurisdiction to revoke supervised release after the term of supervised release has expired, not to shed any meaning on the term warrant.¹⁵¹ The Ninth Circuit therefore believed that it was im-

Fourth Amendment’s requirement that a warrant must be based upon probable cause, support by oath or affirmation.

. . . Rule 9(a) provides that an arrest warrant may issue ‘if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it.’ An information is not filed under oath; thus, the Advisory Committee Notes explain that ‘[t]he provision of rule 9(a) that a warrant may be issued on the basis of information only if the latter is supported by oath is necessitated by the *Fourth Amendment to the Constitution of the United States*.’

Id. at 905 (citations omitted).

146. *Id.* at 906 (“[T]he Supreme Court has made clear that no statute can purport to authorize the issuance of any warrant based upon less than that required by the Fourth Amendment.”) (citing *Nathanson v. United States*, 290 U.S. 41, 47 (1933)).

147. *Id.* (“U.S. CONST. amend. IV (‘no Warrants shall issue’); FED. R. CRIM. P. 4(a) (‘the judge must issue an arrest warrant.’); FED. R. CRIM. P. 9(a) (‘The court must issue a warrant’); FED. R. CRIM. P. 41(d) (‘a magistrate judge or a judge . . . must issue the warrant if there is probable cause’).”)

148. *Vargas-Amaya*, 389 F.3d at 905 (“Section 3583(i) refers to the issuance of a warrant in the past tense by using the words ‘has been issued.’”).

149. *Id.* at 906.

150. *Id.* (“The use of past tense in § 3583(i) implies that the statute does not relate to the requirements for issuing a warrant at all, but rather pertains to the court’s jurisdiction if an arrest warrant has already been validly issued.”)

151. *Id.* at 903.

proper to read meaning into § 3583(i)'s use of the term *warrant* because the statute only required that a warrant had already been issued in order for the true function of § 3583(i) to operate.

4. Which Construction Must Prevail Under Constitutional Avoidance

If the Ninth Circuit had ruled that a warrant may issue under § 3583(i) on less than the requirements of the Fourth Amendment, then it would have gone against the Supreme Court's constitutional construction in *Nathanson v. United States* and that the Warrant Clause applies to all warrants.¹⁵² The Ninth Circuit sought to avoid an interpretation that would have implicated a possible conflict with the Constitution.¹⁵³ This rule of constitutional avoidance is a long understood canon of constitutional construction.¹⁵⁴ Lessening the requirements for a warrant under § 3583(i) would make practically any warrant sufficient to extend a court's jurisdiction past the term of supervised release.¹⁵⁵ The Ninth Circuit held that "not all warrants or summonses will extend the district court's jurisdiction to revoke supervised release" and § 3583(i) must be construed in a way that avoids any constitutional problem.¹⁵⁶

C. The Fifth Circuit's Rationale for Allowing a Warrant on Unsworn Facts

In early 2006, the Fifth Circuit announced its opinion in *United States v. Garcia-Avalino* in clear opposition to the Ninth Circuit's holding regarding § 3583(i)'s Warrant Clause.¹⁵⁷ In *Garcia Avalino*,

152. *Nathanson v. United States*, 290 U.S. 41, 47 (1933).

153. Under the constitutional-doubt canon of statutory construction, "[i]f a statute is fairly susceptible of two constructions, one of which leads the court to doubt gravely the statute's constitutionality, then we must adopt the construction that avoids the serious constitutional problem." *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003); see *Vargas-Amaya*, 389 F.3d at 906; *Hurston v. Dir. OWCP*, 989 F.2d 1547, 1544 (9th Cir. 1993) ("We are required by traditional canons of statutory construction to avoid a literal interpretation of a statute that leads to an absurd result or that is contrary to Congress' constitutional power.").

154. *MIKVA & LANE*, *supra* note 130, at 24 ("Statutes should be read to avoid Constitutional questions.").

155. An additional argument could have been made that a construction allowing virtually all warrants to issue would render the statutory requirement of a warrant completely unnecessary.

156. *Vargas-Amaya*, 389 F.3d at 906 ("Therefore, in order to avoid any constitutional problems with § 3583(i), we construe it to mean that not all warrants or summonses will extend the district court's jurisdiction to revoke supervised release. Instead, the warrant issued must have been based upon sworn allegations that the person violated a condition of supervised release.").

157. *United States v. Garcia-Avalino*, 444 F.3d 444 (5th Cir. 2006).

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the Fifth Circuit explicitly refused to follow the Ninth Circuit's reasoning in *Vargas-Amaya* and refused to apply the Fourth Amendment's Warrant Clause requirements to § 3583(i).¹⁵⁸ In that decision, the court asserted that the term warrant does not imply a need for an oath or affirmation.¹⁵⁹ The Fifth Circuit pointed to statutes that authorize warrants on less than an oath or affirmation;¹⁶⁰ the court ultimately found that persons on supervised release have less protection afforded to them by the Fourth Amendment than typical criminal defendants.¹⁶¹ The Fifth Circuit's argument follows.

1. "Warrant" Must Mean Something Less than "Oath or Affirmation"

The Fifth Circuit asserted that the Ninth Circuit's opinion rested on the Fourth Amendment's requirement of an oath or affirmation, as well as multiple statutes that similarly require sworn statements for arrest warrants.¹⁶² The Fifth Circuit made the distinction that the existence of an *explicit* oath or affirmation requirement does not necessarily mean that the very word warrant *implicitly* requires that a warrant must be based on sworn facts.¹⁶³ For example, the oath or affirmation requirement modifies the word "warrant" discussed within in the Fourth Amendment.¹⁶⁴ If "oath or affirmation" modifies "warrant," then the term "warrant" requires less than oath or affirmation.¹⁶⁵ The Fifth Circuit found that the examples provided by the Ninth Circuit support the notion that "a valid warrant need not be supported by sworn facts unless a specific statutory provision requires

158. *Id.* at 445.

159. *Id.*

160. *Id.* at 445-46.

161. *Id.* at 446.

162. *Id.* at 445 (citing U.S. CONST. amend. IV; FED. R. CRIM. P. 4, 9) ("[T]he Ninth Circuit pointed to the Fourth Amendment's Oath or affirmation requirement and multiple statutes that require arrest warrants to be based upon sworn statements.").

163. *Id.* ("Explicit oath or affirmation requirements, however, are not proof that there is an implicit sworn-facts requirement embedded in the very meaning of the word 'warrant' as a legal term.").

164. U.S. CONST. amend. IV. The other modifier with the "Warrant Clause" is probable cause. *See id.*

165. The Warrant Clause was read by the Ninth Circuit as describing that all valid warrants require both probable cause and support by oath or affirmation. *United States v. Vargas-Amaya*, 389 F.3d 901, 904 (9th Cir. 2004). The Clause could conversely be read as it was here by the Fifth Circuit explaining that certain warrants for criminal purposes have the additional requirement that they be supported by probable cause and oath or affirmation. U.S. CONST. amend. IV. This second position is adopted by the Fifth Circuit in *Garcia-Avalino*, and implies that a warrant, at its heart, means something issued on less than probable cause and oath or affirmation. *Garcia-Avalino*, 444 F.3d at 445.

such support.”¹⁶⁶ Thus, the Fifth Circuit concluded that the explicit requirement of an oath or affirmation within the Fourth Amendment and throughout the Federal Rules of Criminal Procedure indicates that the *absence* of such an explicit requirement elsewhere shows the lack of a sworn facts requirement in a warrant.¹⁶⁷

2. Examples of Statutes that Authorize Warrants Without “Oath or Affirmation”

The Fifth Circuit identified the following two statutes that do not require sworn facts in order to authorize warrants.¹⁶⁸ First, § 3148(b) governs persons on pretrial release and requires only a motion by the government in order for a district court to issue an arrest warrant for such persons.¹⁶⁹ Secondly, the court cited § 3606 which governs persons on parole.¹⁷⁰ Because parole is so similar to supervised release, the comparison between the two statutes and how courts have treated them is pertinent.¹⁷¹

The Fifth Circuit took a closer look at the predecessor to the current § 3606: former § 717, which governed parolees.¹⁷² Section 717 authorized wardens, not neutral and detached magistrates, to issue arrest warrants for the arrest of those on parole.¹⁷³ The Fourth Circuit’s previous construction of § 717 did not require warrants for persons on parole to have the support of sworn facts.¹⁷⁴ Although this line of

166. *Garcia-Avalino*, 444 F.3d at 445 (“[S]uch examples suggest the converse, i.e. that a valid warrant need not be supported by sworn facts unless a specific statutory provision requires such support. *Garcia-Avalino* cites, and we can find, no statute that does not contain a sworn-facts requirement but that has been read to require support by sworn facts anyway.”).

167. *Id.* at 445-46.

168. *Id.* at 445 (“[A]t least two statutes have authorized the issuance of a warrant not supported by sworn facts.”).

169. *Id.* at 445-46 (“Pursuant to 18 U.S.C. § 3148(b), a district court may issue a warrant for the arrest of someone on pretrial release based solely on a motion by the government.”).

170. 18 U.S.C. § 3606 (2006).

171. *Samson v. California*, 547 U.S. 843, 850 (2006). Parole represents an early release from prison, while supervised release is tacked on at sentencing.

172. *Garcia-Avalino*, 444 F.3d at 446.

173. *Id.* (“18 U.S.C. § 717 . . . authorized wardens to issue warrants for the arrest of parolees.”)

The other statute, while not currently in effect, is closer in legal context. 18 U.S.C. § 717, the predecessor statute to today’s 18 U.S.C. § 3606, authorized wardens to issue warrants for the arrest of parolees and contained no express sworn-facts requirements. Construing § 717, the Fourth Circuit expressly held that a warrant issued for the arrest of a parolee did not need to be supported by sworn facts.”

Id. at 446 (citing *Jarman v. United States*, 92 F.2d 309, 310-11 (4th Cir. 1937)).

174. *Jarman*, 92 F.2d at 310-11. The Fourth Circuit also found that warrants for retaking of parolees are not true arrest warrants that must comport with the Fourth Amendment. *Id.* at 311.

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reasoning undercuts the distinction from § 3583,¹⁷⁵ the Fifth Circuit found that the existence of these other statutes showed the permissibility of arrest warrants for persons on supervised release on less than sworn facts.

3. Persons on Supervised Release Receive Less Protection than Typical Criminal Defendants

The Fifth Circuit stressed that persons on parole or supervised release “do not enjoy the full spate of constitutional rights enjoyed by criminal defendants.”¹⁷⁶ Other circuits already found that persons on supervised release may receive fewer constitutional rights.¹⁷⁷ Similarly, the Fifth Circuit previously held that revocation proceedings for persons on parole, probation, or supervised release do not receive the Sixth Amendment right to a speedy trial.¹⁷⁸ The court discounted the Ninth Circuit’s insistence that the Fourth Amendment protects such persons.¹⁷⁹ The Fifth Circuit asserted that case law did not support the proposition that one constitutional provision *must* be maintained for persons on supervised release, when other provisions had been discarded.¹⁸⁰ The Fifth Circuit relied on the “relaxed constitutional norms that apply in revocation hearings” to support their holding that the Warrant Clause did not apply in full force to warrants issued for revocation hearings.¹⁸¹

175. Namely, the distinction that is mentioned is that § 3583(i) regards persons after a term of supervised release has ended.

176. *Garcia-Avalino*, 444 F.3d at 446 (citing *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 n.5, 365-66 (1998)).

177. *Id.* (“Other courts, including this one, that have considered the constitutional status of parolees and supervised releasees have also concluded that such persons do not enjoy the full spate of constitutional rights enjoyed by criminal defendants.”); *see also Scott*, 524 U.S. at 365 n.5, 365-66 (quoting *Morrissey v. Brewer*, 408 U.S. 471 (1972)) (“[Parolees in parole revocation hearings are] not entitled to the ‘full panoply’ of rights to which criminal defendants are entitled”); *United States v. Tippens*, 39 F.3d 88, 89 (5th Cir. 1994) (explaining that the Sixth Amendment right to a speedy trial does not apply to parole, probation, or supervised release revocation proceedings); *United States v. Polito*, 583 F.2d 48, 54 (2d Cir. 1978) (stating that parolees “are different from other citizens and they may, in certain circumstances, possess fewer constitutional rights.”); *Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir. 1963) (noting that the Sixth Amendment does not extend to parole revocation hearings).

178. *Tippens*, 39 F.3d at 89.

179. *Garcia-Avalino*, 444 F.3d at 446.

180. *Id.*

181. *Id.* at 447.

D. First Circuit Rejects Oath Requirement and Joins Fifth Circuit

In 2011, the First Circuit heard Melissa's case and adopted the Fifth Circuit's reasoning that a warrant issued under § 3583(i) did not require the support of sworn facts.¹⁸² Most courts chose to avoid the issue if possible;¹⁸³ but the First Circuit took the issue head-on, recognized the circuit split, and ultimately sided with the Fifth Circuit.¹⁸⁴ First, the court argued that it is § 3606 that "actually [governs] the issuance of warrants."¹⁸⁵ The First Circuit then took a look at several dictionary definitions of the term warrant, and argued that the plain meaning of warrant did not indicate a sworn facts requirement in this case.¹⁸⁶ Perhaps most problematic of the First Circuit's opinion is that courts should regard parole officers with heightened credibility, thus removing any real need for sworn facts.¹⁸⁷ The reasoning of the First Circuit follows.

1. Section 3606 Rules Warrants in this Case

The First Circuit looked to § 3606, and not § 3583(i), for an indication of the requirements surrounding the issuance of arrest warrants for supervised release revocation hearings.¹⁸⁸ Section 3606 reaches further than § 3583. Section 3606 recognizes that "[a] probation officer may make such an *arrest . . . without a warrant*" if "there is *probable cause* to believe that . . . a person on supervised release has violated a condition of . . . release"¹⁸⁹ Section 3606 further allows the most recent court of record to issue a warrant for the arrest of a person on release.¹⁹⁰ The First Circuit looked at § 3606's predecessor (§ 717) in more detail than the Fifth Circuit.¹⁹¹ The court quoted a D.C. Circuit opinion, regarding § 717, that made a firm distinction be-

182. United States v. Collazo-Castro, 660 F.3d 516, 519 (1st Cir. 2011).

183. See cases cited *supra* note 115.

184. *Collazo-Castro*, 660 F.3d at 522-23.

185. *Id.* at 519.

186. *Id.* at 520.

187. *Id.* at 523.

188. *Id.* at 519.

189. 18 U.S.C. § 3606 (2006) (emphasis added).

190. *Id.*

191. The First Circuit applied the Reenactment Rule in presuming that Congress must have known "that the parole statute had no oath requirement" as previously decided by the D.C. Circuit. *Collazo-Castro*, 660 F.3d at 522; see also BLACK'S LAW DICTIONARY 1059 (abr. 8th ed. 2004) ("[The Reenactment Rule is] 'a principle of statutory construction that when reenacting a law, the legislature implicitly adopts well-settled judicial or administrative interpretations of the law'"). Thus, when Congress passed § 3606, and failed to add such a requirement, Congress must not have intended there to be such a requirement for the arrest warrants regarding persons on parole (and by extension, supervised release).

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tween an arrest for an alleged commission of a crime and the retaking of a person who was essentially *still a prisoner*.¹⁹² The D.C. Circuit held that under § 3606's predecessor there is no "Oath or affirmation" requirement for arrest warrants to retake persons on parole.¹⁹³ Thus, the First Circuit took a prior holding that there was no oath requirement in § 3606 to conclude that there was no congressional intent to require sworn facts in § 3583(i).¹⁹⁴ So, even though Melissa's time on supervised release already expired, the Court equated her to an escaped prisoner.

2. The Plain Meaning of "Warrant" Is Not Universal

The First Circuit took up a plain meaning argument for its position in the middle of discussing § 3606.¹⁹⁵ The Ninth Circuit dealt with plain meaning at the beginning of *Vargas-Amaya*,¹⁹⁶ and the Fifth Circuit dismissed any plain meaning argument to the contrary in its holding in *Garcia-Avalino*.¹⁹⁷ The First Circuit first stated the common principle that the starting point for statutory interpretation is the language itself, and then consulted three dictionaries to decipher the meaning of "warrant."¹⁹⁸ The court looked at Black's Law Dictionary, the Random House Dictionary, and the Oxford English Dictionary.¹⁹⁹ None of the dictionary definitions consulted by the First Circuit included a requirement for oath or affirmation; in fact, none of the definitions even mentioned the concept of sworn facts.²⁰⁰ In recognizing that the Oxford English Dictionary's definition was unchanged since the 1971 edition, the First Circuit assumed that the 1984 Congress likely used that dictionary as the "definitional backdrop"

192. *Collazo-Castro*, 660 F.3d at 522 (citing *Story v. Rives*, 97 F.2d 182, 188 (D.C. Cir. 1938) (ultimately asserting that persons on supervised release have lessened Due Process rights)).

193. *Id.* at 521 (examining 18 U.S.C. § 717 (1946) as interpreted by the D.C. Circuit Court in *Story*, 97 F.2d at 188).

194. *Id.* at 522 ("In light of this legislative history, the failure to include an oath or affirmation requirement in section 3606 and the inclusion of a probable cause requirement demonstrates congressional intent not to require sworn facts."). This passage seems to imply the application of the common canon of construction—*expressio unius est exclusio alterius*—applied as "expressing one thing shows the intent to exclude another thing unexpressed." See generally MIKVA & LANE, *supra* note 130, at 24 (noting that this canon deems explicit exceptions as exclusive).

195. *Collazo-Castro*, 660 F.3d at 519-21.

196. *United States v. Vargas-Amaya*, 389 F.3d 901, 903 (9th Cir. 2004).

197. *United States v. Garcia-Avalino*, 444 F.3d 444, 447 (5th Cir. 2006).

198. *Collazo-Castro*, 660 F.3d at 519-20.

199. *Id.* at 520 (citing BLACK'S LAW DICTIONARY 1722 (9th ed. 2009); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2144 (2d ed. unabr. 1987); 19 OXFORD ENGLISH DICTIONARY 929 (2d ed. 1989)).

200. *Id.*

when drafting the Sentencing Reform Act, which added §§ 3606 and 3583 to title 18.²⁰¹ And because Congress may have used that definition, one could assume there was no intention of including a sworn facts requirement.²⁰²

Melissa argued to the First Circuit that the term “warrant” was a *term of art*.²⁰³ A known canon of construction is that “[words] or phrases that have received judicial construction before enactment are to be understood according to that construction.”²⁰⁴ The Ninth Circuit took up a similar argument, referencing the construction of warrants under the Fourth Amendment and the Federal Rules of Criminal Procedure.²⁰⁵ The government responded that the term “warrant” cannot be a term of art in this context because courts had been inconsistent regarding whether the support of oath or affirmation in the context of persons on supervised release is required.²⁰⁶ The First Circuit agreed with the government’s argument and the Fifth Circuit’s reasoning in holding that the Fourth Amendment and the Federal Rules of Criminal Procedure do not prove “an implicit sworn-facts requirement” in the term “warrant.”²⁰⁷

The distinction was further made by the First Circuit by pointing out that arrest warrants under the Fourth Amendment and Federal Rules of Criminal Procedure issue only under complaints or affidavits, while under § 3583(i) a warrant may issue by a *mere* motion filed with the district court for “a person charged with violating a condition of release.”²⁰⁸ The court supported this reasoning by emphasizing that “[a] warrant for the arrest [of a person on supervised release],” whether supported by sworn facts or not, “may be triggered [by something as trivial as] failure to inform of a change of address.”²⁰⁹ The court did not believe that the reporting of such minor activity should require the “heightened sworn-facts crucible” of the Fourth Amend-

201. *Id.* (citing OXFORD ENGLISH DICTIONARY 3691 (compact ed. 1971)).

202. *Id.*

203. *Id.*

204. MIKVA & LANE, *supra* note 130, at 24.

205. *United States v. Vargas-Amaya*, 389 F.3d 901, 904 (9th Cir. 2004).

206. *Collazo-Castro*, 660 F.3d at 520.

207. *Id.* at 520-21.

208. *Id.* at 521 (citing 18 U.S.C. §3148(b) (2006)). This line of reasoning appears in different form at the beginning of the opinion when the First Circuit endorsed the reasoning of the Fifth Circuit in *Garcia-Avalino*, and declared that it would add one additional line of reasoning. *Id.* at 518.

209. *Id.*

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ment,²¹⁰ “especially when the arrest warrants are requested by the [trustworthy] United States Probation Officers.”²¹¹

3. Parole Officers Are Credible as to Not Require Oath or Affirmation

The First Circuit concluded its opinion by asserting that Parole Officers deserve heightened credibility.²¹² Additionally, the court held that persons on supervised release have less Fourth Amendment protections than those granted to everyday citizens.²¹³ Though the Supreme Court previously conceded that persons on supervised release do not deserve the typical due process rights,²¹⁴ the Supreme Court stated that revocation hearings still require “some orderly process, however *informal*.”²¹⁵ The First Circuit decided that district court supervision of parole and probation officers sufficed for the necessary checks and balances and the due process needed in the revocation process.²¹⁶

The Court overlooked the separation of powers issue or any conflict of interest. The Court relied on the parole officers’ “unique role” in that they function as an arm of the court, thus requiring less safeguards.²¹⁷ The First Circuit held that “an oath or affirmation is not required either to ensure credibility or to impress the officer[s] with the consequences of failing to tell the truth,” but the court only reasoned that the district court *should typically* know an officer’s credibility in *most* circumstances.²¹⁸ Melissa’s fate swung in the balance of what should typically be known in most circumstances, rather than the assurance of due process.

Finally, at the end of the opinion, the First Circuit points out that an oath or affirmation is desirable. Tucked into the last paragraph of the opinion, the First Circuit conceded that it is still “best practice to seek a revocation warrant based on sworn facts.”²¹⁹ The court did not state why it is the best practice but rather used a footnote to assure

210. *Id.*

211. *Id.* This topic is discussed further in the following section. See *infra* Part II.D.3.

212. *Collazo-Castro*, 660 F.3d at 523.

213. *Id.* at 522 (citing Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 365 n.5 (1998)).

214. *Scott*, 524 U.S. at 365 n.5, 365-66.

215. *Collazo-Castro*, 660 F.3d at 522 (citing *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (emphasis added)).

216. *Id.* at 523.

217. *Id.*

218. *Id.*

219. *Id.*

the legal community that petitions from parole officers for such hearings are now essentially made under oath or affirmation, even though petitions are not constitutionally required.²²⁰ While future persons on supervised release are better assured that § 3583 warrants will be supported by sworn facts, Melissa's only outlet became the United States Supreme Court.

4. The Supreme Court Denies Certiorari

On February 21, 2012, the United States Supreme Court denied Melissa's petition for writ of certiorari.²²¹ Although circuit splits are a common issue decided by the Supreme Court, one may find that, like the First Circuit, many jurisdictions have taken note of this issue and resolved it with simple affirming language at the end of standard warrant request forms.²²² But for Melissa, she remains on supervised release more than eight years after her one-year prison sentence.

III. CONSEQUENCES OF HOLDINGS

A. The Ninth Circuit's Position Has Practical Consequences

The Ninth Circuit granted the defendant his freedom and underlined that the term "warrant" receives the Fourth Amendment construction unless otherwise proved. The defendant is now, in theory, going to receive the same rights and protections as any other criminal defendant rather than being subject to control by parole officers. Strengthening the rights around § 3583(i) puts added pressure on the parole officer and the district courts to hold all revocation hearings within the term of supervised release. The Ninth Circuit precludes any district court from reviewing any alleged violation of the conditions of supervised release after the term, unless there is a warrant for arrest under § 3583(i) support by an oath or affirmation. A defendant may go free in the name of due process, but "it is quite difficult to predict accurately one's risk to the public or general dangerousness."²²³ And this holding limits the district court's ability to consider the full circumstances and consequences of releasing a particular defendant from supervised release after the expiration of the term. But such a holding would have set Melissa free.

220. *Id.* at 523 & n.4. The question remains whether this practice essentially moots the issue at hand. See discussion *infra* Part.III.A.

221. *Collazo-Castro v. United States*, 132 S. Ct. 1593, 1593 (Feb. 21, 2012).

222. *E.g.*, *Collazo-Castro*, 660 F.3d at 523 n.4.

223. *CHAMPION*, *supra* note 6, at 299.

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Similarly, other persons currently in custody, whether actual or constructive, may petition for rehearing pursuant to this holding. Persons in actual custody consist of those in prison due to a revocation of supervised release after the term of release had expired, due to a warrant unsupported by oath or affirmation. Persons in constructive custody will consist of those, like Melissa, who are back on supervised release due to a revocation, similarly supported by an insufficient warrant that took place after the term of supervised release. Given that many, or at least some, of these persons may not be ready to reenter society, it may not be in society's best interest to take that choice away from judges on what some may consider a mere technicality.²²⁴ In the case of the release of prisoners who are appealing this issue following the Ninth Circuit's holding, the law is set and the judge is further removed from being able to consider this on an individual basis.

A common sense consequence of the Ninth Circuit's holding is a strict re-examination of the revocation process. When persons on supervised release receive the same warrant protections as criminal defendants, parole officers must take the steps necessary to ensure proper protocol. If parole officers' main goal is to hold persons on supervised release accountable for their violations, then they will have to ensure that they strictly follow the same warrant protocol as with criminal defendants in order to effectively use § 3583(i). The First Circuit points out that this change already happened in Melissa's district, and it may be the case that some districts have recognized this issue and added similar language to the forms that parole officers submit in order to request a warrant for a revocation hearing.²²⁵

The Ninth Circuit helped to define the role of parole officers. Built into the structure of the United States Constitution is the fundamental concept of separation of powers.²²⁶ Each branch represents a different function of government. Behind the inclusion of the Fourth Amendment is the understanding that the government cannot act unchecked.²²⁷ The parole officer functions as a member of the Executive Branch, and each step that the courts take to carve away at the

224. *See id.* (discussing the difficulty in judging a person's risk to society).

225. *Collazo-Castro*, 660 F.3d at 523 n.4. Once the proper language is added, indicating that the parole officer swears to the information that he or she is providing, the narrow issue presented becomes moot. *See, e.g., id.*

226. *Compare* U.S. CONST. art. I (detailing the powers of the Legislative Branch), *and* U.S. CONST. art. II (detailing the powers of the Executive Branch), *with* U.S. CONST. art. III (detailing the powers of the Judicial Branch).

227. *See* discussion *supra* Part I.B.1.

judicial checks and balances for parole officers is a further step that confuses the role of parole officers.²²⁸ The Ninth Circuit's holding underscores that the parole officer is a member of the Executive Branch and subject to all the checks, balances, and review of the judicial branch.

Persons on supervised release, like Melissa, rely heavily on their parole officers. The parole officers are the gatekeepers to freedom and often the sole source of interaction between the parolee and the court. The officer therefore already has so much power over the person on release—the risk of abuse is great. By keeping the parole officer wholly in the executive function, the Ninth Circuit helped to regulate the power imbalance, if only just a little, between the parole officer and person on supervised release.

B. The Substantive Implications of the Fifth and First Circuits' Position

Because of the ruling of the First Circuit, Melissa still serves supervised release even though she should have completed it years ago. One of the reasons for the push toward a system of supervised release was the overcrowding of prisons.²²⁹ Supervised release differs from traditional parole because it is part of the original sentence and hence part of the punishment.²³⁰ The parole system is argued to function either for the rehabilitation and reintegration of convicted criminals or to punish criminals.²³¹ The holding in Melissa's case makes it more difficult to complete a term of supervised release and results in the crowding of the parole system, thus defeating either purpose. The holding, showing great deference to parole officers,²³² combined with the sometimes arbitrary conditions put on persons on supervised release,²³³ creates a disheartening environment that a person on release may feel hard-pressed to escape.

Section 3583 does not define, or in any way expressly qualify, the use of the term "warrant" as used in part (i). Nor does the statute

228. Consider the problematic nature of administrative agencies, which some argue operate in all three branches.

229. ABADINSKY, *supra* note 6, at 471.

230. *Samson v. California*, 547 U.S. 843, 850 (2006) (citing *United States v. Reyes*, 283 F.3d 446, 461 (2d Cir. 2002)).

231. It should also be noted that the increased workload on parole officers can only decrease the efficiency in the parole system and reduce the amount of time and attention given to each parolee.

232. See *Collazo-Castro*, 660 F.3d at 523.

233. See ABADINSKY, *supra* note 6, at 257.

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indicate that the warrant required is any type of lesser warrant, such as an administrative warrant.²³⁴ When the Fifth and First Circuits held that a warrant issued for § 3583(i) did not require the support of an oath or affirmation, the circuits undermined the importance of swearing to facts. One professor argues that because officers are required to later testify under oath at a trial, it is the “pre-authorization [of warrants] that arguably diminishes lying and not the oath requirement.”²³⁵ But the mere exercise of swearing to facts gives a person an added opportunity to consider his or her claims and the validity of those claims.²³⁶ Finally, the threat of perjury adds an additional level of accountability as well as reason to tell the truth.²³⁷ The Fifth and First Circuits chose to disregard the importance of swearing to facts.

The First Circuit’s reasoning that parole officers work closely with the local judges and thus have an added incentive to tell the truth indicates that parole officers are left more or less unchecked. A neutral and detached magistrate must issue a warrant in order to check the power of government.²³⁸ The Fifth and First Circuits have shifted some of the magistrate’s power to parole officers who are certainly not neutral.²³⁹ The assurance of the accuracy of the information that parole officers provide is a check on the parole system that the judiciary is responsible for maintaining. Peeling away the oath requirement presents a blatant separation of powers problem.²⁴⁰ This added trust only serves to increase the power given to parole officers at the expense of the rights of a person on supervised release. The courts must maintain the checks and balances on parole officers; the costs are too high and the effects may run too deep.

C. The True Purpose and Place of Supervised Release (Punitive Vs. Therapeutic)

Supervised release and parole are difficult to complete. While the program offers prisoners a modicum of freedom, the conditions render that life far restricted. Persons on release do not receive full due process rights, courts treat them as though they are still prison-

234. *See supra* Part I (presenting an explanation of administrative warrants).

235. CLANCY, *supra* note 71, at 520 n.332.

236. LAFAYE, *supra* note 88, at 513.

237. *See, e.g.*, 18 U.S.C. § 1621 (2006) (making perjury by a witness a crime); FED. R. EVID. 603 (requiring a witness to give an oath or affirmation to testify truthfully).

238. TASLITZ ET AL., *supra* note 53, at 236-37.

239. CLANCY, *supra* note 71, at 520.

240. *See id.*

ers.²⁴¹ It should not surprise that convicts are quick to agree when faced with the choice of remaining behind bars or taking that modicum of freedom in return for signing away certain rights.²⁴² Even with the restricting conditions, parole officers may still create more stringent conditions.²⁴³ A single violation, as reported by the parole officer, may result in revocation of supervised release. And revocation of supervised release will result in prison time of up to the entire original sentence. This attribute alone makes supervised release more difficult to complete than prison.

While the harshness of prison versus supervised release is up for debate, supervised release is certainly more difficult to complete than prison. Persons on supervised release must self-police rather than falling in line and taking daily orders from prison guards. Persons on supervised release must ensure they do not associate with other convicts.²⁴⁴ Oftentimes their family and friends may fall into this category. Similarly they are restricted in their movements and even a local residential change requires a *prompt* change of address form be filed with the parole officer.²⁴⁵ Alternatively, prisoners do not have these same types of concerns. And many of the concerns in prison will never result in an extended sentence. It is easier for a person to keep his or her nose clean in prison than while serving a term of supervised release.

The parole officer is in a unique position to both assess how well the person on supervised release follows the conditions of release as well as prescribe additional and more difficult conditions in instances that the parole officer deems it necessary. There are conditions in prison, but it is very doubtful that they are as numerous, all-encompassing, and far-reaching as the conditions put on a person on supervised release. Nor is it likely the single individual can have such a

241. *United States v. Collazo-Castro*, 660 F.3d 516, 522 (1st Cir. 2011) (citing *Story v. Rives*, 97 F.2d 182, 188 (D.C. Cir. 1938) (asserting that persons on supervised release have lessened Due Process rights)).

242. *ABADINSKY*, *supra* note 6, at 257.

243. *See id.* at 261.

244. *See, e.g., id.* at 259 (citing the prohibition of affiliation with any gang members as a standard condition); *CHAMPION*, *supra* note 6, at 298 (recognizing that persons on supervised release must receive permission from their probation or parole officer in order to have any contact with a prisoner).

245. *CHAMPION*, *supra* note 6, at 298.

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broad and overreaching influence over the future prisoner as a parole officer has over persons on supervised release.²⁴⁶

The purpose of supervised release resides somewhere between punishment and rehabilitation (transition). The Control model approach to supervised release is much easier to measure than the Service model.²⁴⁷ In the Control model, one must account both for the persons on supervised release who get into trouble and how the system holds those persons accountable for their actions.²⁴⁸ Within the Service model, the parole officer has to not only track the progress of the persons on supervised release but track those persons after they complete supervised release to ensure their successful reintegration into society.²⁴⁹ Additionally, the measurements under the Service model require extensive qualifying of concepts such as “successful integration,” and thus the Service model becomes very objective.²⁵⁰ Supervised release seems much more punitive than therapeutic, and there are built-in incentives that make it that way. A punitive purpose increases the likelihood of persons returning to prison, continually adding to prison and parole populations and burdening the system as a whole.

CONCLUSION

While it is doubtful that any convicted person looks forward to serving time in prison or time on supervised release, most convicts enter the correctional system with hopes and dreams of repaying their debt to society and being released back into society. Few receive their sentences with the difficulties of supervised release in mind. Still fewer anticipate that their parole officer will be able to not only create additional and more difficult conditions of their release, but also to overwhelmingly and unilaterally influence the judge to extend their sentences. Convicted persons would not willingly enter the system of release if they fully appreciated the power that the system and one parole officer would wield over them.

It is more likely that persons enter supervised release under this oppressive reality because they have no real choice—the other option

246. *Id.* at 117. In the case of extending a term of supervised release or revoking a term of supervised release, judges are likely to take the recommendation of the parole officer. *Id.*

247. ABADINSKY, *supra* note 6, at 469.

248. *Id.*

249. *Id.*

250. *Id.*

is bars and concrete—and they lack any political power to compel change a system that grows only more oppressive. Persons choose to endure the overreaching power of the parole officer, despite the sense of overbearing unfairness, because there is recognition that somewhere along the line they have done wrong. But the reality for a person trying to complete a term of supervised release is a far cry from the Due Process ideal imbedded in the American psyche as a fundamental right.

COMMENT

“Unemployed (and Black) Need Not Apply”: A Discussion of Unemployment Discrimination, Its Disparate Impact on the Black Community, and Proposed Legal Remedies

JASMINE A. WILLIAMS*

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INTRODUCTION

It is a sociological cliché [sic] that racial antagonism is intensified in periods of economic distress. . . . Because race is an important consideration in the competition for jobs, we can expect that whites and Negroes have attempted to shift the burden of the depression upon each other, but that as usual the dominant group has been more successful.¹

This statement was written in 1940 in reference to race and class during the Great Depression; however, the pattern it describes is just as clear today in American society.² The overall unemployment rate has been extremely high over the last few years.³ The average unemployment rate climbed from 5.8 percent in 2008 to 9.6 percent in 2010.⁴ Throughout the “Great Recession,” the unemployment rate for the black community has been twice that of the population as a

1. Arthur B. Ross, *The Negro Worker in the Depression*, 18 SOC. FORCES 550, 550 (1940). It is well known that the depression hit the black population harder than the white population. The story told again and again in reports of the F.E.R.A., the W.P.A., and state relief agencies, in censuses of the unemployed, and in the literature and propaganda of black organizations —greater unemployment, disproportionate relief rolls, and small reemployment.
Id. at 551.
2. See generally Barry Eichengreen & Kevin H. O’Rourke, *A Tale of Two Depressions*, ADVISOR PERSP. (Apr. 21, 2009), http://economicforumonline.org/_source/downloads/ataleoftwo-depressions.pdf (discussing the differences and similarities between the Great Depression of the 1930s, the current recession, and its effect on the global economy).
3. See Press Release, U.S. Bureau of Labor Statistics, U.S. Dep’t of Labor, Worker Displacement: 2007-2009 (2010) (discussing the rate of job displacement from January 2007 to December 2009); *United States Employment Rate*, TRADING ECON., <http://www.tradingeconomics.com/united-states/unemployment-rate> (last visited Mar. 7, 2012).
4. *Labor Force Statistics from the Current Population Survey*, U.S. DEP’T OF LABOR, http://www.bls.gov/cps/prev_yrs.htm (last updated Mar. 9, 2012).

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whole.⁵ In many black communities, unemployment has hit what some consider “crisis proportions.”⁶ It is likely that the true unemployment rate is even higher than officially reported.⁷

The unemployment disparity between the black community and the general community is not surprising because it reflects the status quo existing long before the recession began.⁸ Several factors, such as racial discrimination and access to education, are offered to explain the gap.⁹ The country’s desire to find a solution to fix the current unemployment problem has exposed a hiring practice with the potential to greatly exacerbate the already disturbing disparity between unemployment in the black community and unemployment in the overall community—discrimination against the unemployed.¹⁰

The controversy of discrimination against the unemployed was brought to public attention in 2010 when a recruiter hired by Sony Ericsson to staff its Atlanta headquarters stated in a job posting, “[n]o unemployed candidates will be considered at all.”¹¹ After this incident garnered wide public attention, the National Employment Law

5. See LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, U.S. DEP’T OF LABOR, REP. 1032, at 2 (2010) [hereinafter LABOR FORCE CHARACTERISTICS].

6. David R. Jones, *Unemployment in Black and White*, N.Y. AMSTERDAM NEWS, July 23, 2009, at 5; see also Harry Bradford, *10 Cities Where Black Unemployment Is Rising Fastest: EPI*, HUFFINGTON POST (Oct. 5, 2011, 6:13 PM), http://www.huffingtonpost.com/2011/10/05/top-10-cities-where-black-unemployment-rising-fastest_n_996396.html#es_share_ended.

7. Jeremy B. White & Daniel Tovrov, *American Unemployment: The Scope of the Problem*, INT’L BUS. TIMES (Nov. 2, 2011), <http://www.ibtimes.com/american-unemployment-scope-problem-364304>.

8. LABOR FORCE CHARACTERISTICS, *supra* note 5, at 36.

9. See Robert W. Fairlie & William A. Sundstrom, *The Racial Unemployment Gap in Long-Run Perspective*, 87 AM. ECON. 306, 308 (1997); Christian E. Weller & Jaryn Fields, *The Black and White Labor Gap in America: Why African Americans Struggle to Find Jobs and Remain Employed Compared to Whites*, CTR. AM. PROGRESS (July 25, 2011), http://www.americanprogress.org/issues/2011/07/black_unemployment.html (“It is now painfully clear that African Americans are still facing depression-like unemployment levels. Policymakers should obviously address the overarching problem . . . but there are unique structural obstacles that prevent African Americans from fully benefiting from economic and labor market growth—obstacles that deserve particular attention when unemployment rates for African Americans stand at the highest levels since 1984.”).

10. See Gary Haber, *Feds Going After Companies that Won’t Hire Unemployed*, BALT. BUS. J. (Dec. 9, 2011), <http://www.bizjournals.com/baltimore/print-edition/2011/12/09/feds-going-after-companies-that-wont.html> (“Workers’ rights advocates say the practice of not considering the unemployed hits particularly hard on minorities . . .”). While this discriminatory private practice has recently been exposed, it is probably a long-standing hiring practice. This Comment speaks exclusively about discrimination against the unemployed in hiring, but there is evidence that unemployed individuals face discrimination in other capacities as well. See generally Andrew Fagg, *Higher Car Insurance Premiums for Unemployed Criticised*, BBC NEWS U.K., <http://www.bbc.co.uk/news/uk-16652779> (last updated Jan. 21, 2012) (discussing how the unemployed are charged more for car insurance).

11. Michael Saltzman, *Are the Unemployed Victims of Discrimination?*, WALL ST. J., Nov. 25, 2011, at A15.

Project (NELP)¹² published a report in July of 2011 reviewing the most prominent online job-listing websites over a four-week period.¹³ NELP researchers found that there were over 150 employment ads listed on Internet job sites that stated, “unemployed need not apply,” or listed “currently employed” under required job qualifications.¹⁴ Although the study done by NELP was fairly limited in scope, it nevertheless showed that “small, medium and large employers, for white collar, blue collar, and service sector jobs, at virtually every skill level” excluded the unemployed.¹⁵ Because this practice is used across a large segment of the job market¹⁶ and there are record numbers of unemployed people in the United States today,¹⁷ the proper way to resolve this problem is the subject of great debate.¹⁸ Lost in the debate, however, is sufficient focus on how to remedy the disparate impact these discriminatory hiring practices have on the African American community.

The public response has generally been outrage, especially among job seekers.¹⁹ Lawmakers have responded by enacting legislation to stop such practices in hiring advertisements.²⁰ For example, New Jersey enacted a law banning language that discriminates against the unemployed in job advertisements,²¹ and several states have similar

12. NELP is an advocacy organization that “promote[s] policies and programs that create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing through improved benefits and services.” *Background*, NAT’L EMP. L. PROJECT, http://www.nelp.org/index.php/content/content_about_us/background/ (last visited Oct. 23, 2012). NELP’s mission is to help restore the promise of economic opportunity in the 21st century economy. *Id.*; see also Saltsman, *supra* note 11, at A15; Haber, *supra* note 10.

13. NAT’L EMP’T LAW PROJECT, BRIEFING PAPER: HIRING DISCRIMINATION AGAINST THE UNEMPLOYED: FEDERAL BILL OUTLAWS EXCLUDING THE UNEMPLOYED FROM JOB OPPORTUNITIES, AS DISCRIMINATORY ADS PERSIST 2 (2011), available at <http://www.nelp.org/page/UI/2011/unemployed.discrimination.7.12.2011.pdf?nocdn=1>. These websites included Career-Builder.com, Indeed.com, Monster.com, and Craigslist.com. *Id.* “Staffing firms were prominently represented among those companies identified with the practice of excluding unemployed job seekers, accounting for about half of all the postings.” *Id.*

14. *Id.*; see also Mike Tobin, *In Startling Job Trend, Unemployed Need Not Apply*, FOX NEWS (Oct. 7, 2011), <http://www.foxnews.com/us/2011/10/07/on-job-hunt-unemployed-need-not-apply/> (“[L]awmakers and activists say employers are reaching out only to job candidates who already have jobs. They call it discrimination against the unemployed.”).

15. NAT’L EMP’T LAW PROJECT, *supra* note 13.

16. *Id.* at 1.

17. See LABOR FORCE CHARACTERISTICS, *supra* note 5.

18. See Saltsman, *supra* note 11.

19. NAT’L EMP’T LAW PROJECT, *supra* note 13, at 3 fig.1.

20. *Id.* at 6; Saltsman, *supra* note 11. See generally Editorial, *Targeting the Unemployed*, N.Y. TIMES, Dec. 13, 2011, at A34 (discussing unemployment rates in the context of unemployment benefits).

21. N.J. STAT. ANN. § 34:8B-1 (West 2011).

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legislation pending.²² President Obama also included a measure banning such advertisements and creating a civil cause of action against employers who discriminate based on employment status in his 2011 Jobs Act.²³

While many people view this as a serious problem that must be solved, there are also many individuals who believe that the potentially adverse effects of this alleged “unemployment discrimination” have been greatly exaggerated.²⁴ Some argue that the statistics used by NELP and other studies do not accurately reflect the limited scope of the practice.²⁵ Regardless of how miniscule an effect this practice is believed to have, during these times of high unemployment and economic distress, any barrier to employment has the potential to be destructive to society. According to Michael Hirsch, “42.4 percent of the nation’s 13.9 million unemployed workers have been out of a job for more than six months. That’s by far the highest share of long-term unemployed since the government started keeping records a half-century ago.”²⁶ “Expert[s] . . . warn[] that the longer a person goes jobless, the greater the atrophy in skills and ambition, and the more likely that person is to drop out of the workforce entirely.”²⁷

22. See Eric Swanson, *Kansas Democratic Leaders Unveil Jobs Package*, DODGE GLOBE (Dec. 21 2011), <http://www.dodgeglobe.com/news/local/x2127215118/Kansas-Democratic-leaders-unveil-jobs-package> (discussing a Kansas jobs proposal that would prohibit discrimination against unemployed job-seekers).

23. American Jobs Act of 2011, S. 1549, 112th Cong. (2011). In October of 2011, the Jobs Act in its entirety died in Congress. Obama is now attempting to enact portions of the legislation separately.

24. See Saltsman, *supra* note 11.

The lack of evidence for a nationwide epidemic is compounded by the fact that the NELP report took words out of context. For example, national recruiter Kelly Services placed the following ad in the St. Louis area: “Currently employed but lacking growth in terms of responsibilities and technical proficiencies? If so, Kelly IT Resources-St. Louis wants to talk to you!” NELP zeroed in on “currently employed,” counted it as discriminatory, and ignored the rest of the posting. Common sense dictates that marketing to the currently employed looking to advance does not signal a rejection of the unemployed.

Id.

25. *Id.* (“Last year, in the same month that NELP used for its data this year, there were three million job posts available online. NELP’s sample, in other words, represents 0.005% of one month’s job postings. Monster.com found a similar result, announcing this summer that ‘less than one one-hundredth of one percent of the postings on Monster had any language excluding the unemployed.’”).

26. Michael Hirsh, *The Left-Behinds: How Three Decades of Flawed Economic Thinking Have Helped to Create Record Numbers of Long-Term Unemployed and Undermine America’s Middle Class*, NAT’L J., <http://www.nationaljournal.com/magazine/america-s-left-behinds-the-long-term-unemployed-20111117?mrefid=mostViewed> (last updated Nov. 21, 2011).

27. *Id.* (“Along the way, ‘long-term unemployed’ has increasingly become a synonym for ‘unwanted.’ As industries die, skills atrophy, and ambition fades, especially among older workers. In a new era of jobless growth, fiscal austerity, and the relentless drive for productivity, employers get pickier about whom they hire. Workers who don’t retrain quickly at a high enough

In 2011, the Equal Employment Opportunity Commission (EEOC) released a report showing that job hiring discrimination complaints reached a record high.²⁸ This report indicates that “[t]he . . . [EEOC] received just shy of 100,000 charges from citizens during the 2011 fiscal year, the most logged in a single year in the agency’s 46-year history”²⁹ This report does not include claims related to discrimination on the basis of employment status.³⁰ Employment discrimination experts attribute the increase in discrimination to the strained economy, claiming “less scrupulous employers have more opportunities to discriminate in their hiring.”³¹ It is clear that even if employers discriminating based on employment status affect a small percentage of jobseekers, taken in the aggregate with the heightened discrimination related to the economy, it is a serious issue that must be addressed.

Discrimination against the unemployed is having a negative impact on the job-seeking community in general.³² However, it is having an *extremely* adverse impact on the black community.³³ There are many proposed solutions to this problem, although few propose to address the effect of the practice in the black community. These several prominent proposed remedies can be divided into two categories: pri-

level or those who are stuck with an underwater mortgage and can’t move right away for a job opportunity quickly become long-term unemployed. U.S. companies have grown so brazen about avoiding the long-term unemployed that many place ads for only ‘currently employed’ applicants. Sen. Richard Blumenthal, D-Conn., and Rep. Rosa DeLauro, D-Conn., have introduced bills seeking to bar the practice as illegal discrimination.”)

28. Dave Jamieson, *Job Discrimination Reports Hit All Time High*, HUFFINGTON POST (Nov. 16, 2011, 3:47 PM), http://www.huffingtonpost.com/2011/11/16/job-discrimination-compla_n_1097875.html.

29. *Id.*

30. *Id.*

31. *Id.*

32. *See id.*

The EEOC’s numbers reflect the severity of the economic downturn At times like this, when job loss makes workers especially vulnerable, employers bent on breaking the law are even more likely to do so[.] The strong report the EEOC has released . . . underscores how critical it is for America’s workers that we maintain robust laws and regulations to ensure protection of basic labor standards.

Id.

33. Email from Rashad Robinson, Exec. Dir., Color of Change, to author (Aug. 25, 2011, 2:31 PM) (on file with author).

At a time when more than 9% of Americans are out of work, during the worst economic downturn since the Great Depression, no one should have to have a job in order to get a job. This type of discrimination hurt’s everyone who is looking for work. But Black people are nearly twice as likely to be unemployed as White folks. And Latinos are also unemployed at a higher rate than Whites. Whether it’s intended or not, discrimination against the unemployed *is* discrimination against Black and Latino Americans.

Id.

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vate suits and legislative remedies. Private suits describe the proposal to create a cause of action that would allow applicants to bring lawsuits for discrimination based on unemployment status. Legislative remedies refer to proposed remedies such as hiring tax incentives and government-sponsored work training programs.

This Comment argues that a private cause of action is an inadequate and unrealistic remedy to address the problem of unemployment discrimination. Part I discusses the nature of the problem as it pertains to the black community. Part II describes the proposed private cause of action remedy, the history of employment discrimination, the approach courts have taken in response to this issue under Title VII, and the application of Title VII standards to a proposed cause of action for discrimination based on unemployment status. Part III discusses legislative proposed remedies and their viability. Part IV addresses some of the qualities necessary for an appropriate remedy. Lastly, Part V summarizes the remedies discussed and their potential for success.

I. NATURE OF THE PROBLEM AND ITS EFFECT ON THE
BLACK COMMUNITY

There has been a continuous economic struggle for the black community in this country as a result of the lingering effects of enslavement and disenfranchisement. The Recession has only exacerbated these previously existing economic challenges. The Recession began roughly in the late 2000s,³⁴ and there are several differing theories as to how it began.³⁵

The current Recession’s effect on the black community has been compared to the impact of the Great Depression.³⁶ In a discussion of the Great Depression, several explanations were offered for the higher unemployment rates of black workers both during and after-

34. See Edmund L. Andrews, *Recession Began Last December, Economists Say*, N.Y. TIMES, Dec. 2, 2008, at A1.

35. See Jacob Weisberg, *What Caused the Economic Crisis? The 15 Best Explanations for the Great Recession*, SLATE MAG. (Jan. 9, 2010), http://www.slate.com/articles/news_and_politics/the_big_idea/2010/01/what_caused_the_economic_crisis.html (“There are no strong candidates for what logicians call a *sufficient* condition—a single factor that would have caused the crisis in the absence of any others. There are, however, a number of plausible *necessary* conditions—factors without which the crisis would not have occurred.”).

36. Bradford, *supra* note 6 (“[T]he percentage of currently unemployed African Americans is more than double that of whites, comparing more closely in some cities to those of the Great Depression.”).

wards.³⁷ One such reason for the higher unemployment rates amongst black people that has been explored is labor market discrimination.³⁸ “[L]abor market discrimination, in the sense of unequal treatment of equally qualified workers, manifested itself in the form of discriminatory employment policies during the Great Depression. A related argument is that racist attitudes hardened during the Depression, worsening existing labor market discrimination.”³⁹ Equally qualified black workers were “last hired and first fired.”⁴⁰ This premise is just as true today.⁴¹ According to the Center for American Progress,

[T]he unemployment rate among African Americans rises faster than that of whites during a recession[, and] . . . the unemployment rates for African Americans tend to start to rise earlier than those of whites – and those rates tend to stay higher for longer than those of whites. This phenomenon can be described as “first fired, last hired” and is one of the key structural obstacles facing African Americans in the labor market.⁴²

Recent statistics clearly show the economic and social effects of the discrimination African Americans faced in this country.⁴³ As of 2010, the overall poverty rate was 15.1 percent, however, 27.4 percent of African Americans were living in poverty.⁴⁴ In 2010, the U.S. Bureau of Labor Statistics reported that unemployment among whites was 8.7 percent and unemployment among blacks was 16 percent.⁴⁵ The same study has also documented the unemployment statistics for the black and white communities since 1972.⁴⁶ The rate of unemployment for the black community has exceeded, and often doubled, that of the white community every year since 1972.⁴⁷

37. William A. Sundstrom, *Last Hired, First Fired? Unemployment and Urban Black Workers During the Great Depression*, 52 J. ECON. HIST. 415, 415-16 (1992).

38. *Id.* at 420.

39. *Id.*

40. *Id.*

41. Christian E. Weller & Jaryn Fields, *The Black and White Labor Gap in America: Why African Americans Struggle to Find Jobs and Remain Employed Compared to Whites*, CTR. AM. PROGRESS (July 25, 2011), <http://www.americanprogress.org/issues/labor/report/2011/07/25/9992/the-black-and-white-labor-gap-in-america/>.

42. *Id.*

43. Trymaine Lee, *Number of Americans Living in Poverty Hits 52-Year High, 27.4 Percent of Blacks Under the Poverty Line*, HUFFINGTON POST (Sept. 13, 2011, 6:39 PM), http://www.huffingtonpost.com/2011/09/13/number-of-americans-livin_n_960345.html.

44. *Id.*

45. LABOR FORCE CHARACTERISTICS, *supra* note 5, at 2.

46. *See id.* at 8.

47. *Id.*

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Given the social and economic challenges plaguing the black community, it is clear that a hiring practice penalizing the unemployed can be especially devastating. The disproportionate number of unemployed individuals in the black community, coupled with the other factors previously discussed, highlight the fact that this new form of hiring discrimination can adversely affect the black community and trigger extensive collateral consequences. The disproportionate lack of jobs leads to a lack of income --which leads to desperation -- which increases crime in the black community, adding to an incarceration rate for blacks that is already disproportionately high.⁴⁸ It is crucial that an adequate remedy be developed and implemented.

II. THE PROPOSED PRIVATE CAUSE OF ACTION

A. Proposed Cause of Action for Hiring Discrimination Based on Employment Status

The Fair Employment Act of 2011 was one of the first pieces of legislation proposed in response to the trend of employers showing a preference for job candidates who are currently employed.⁴⁹ The bill, sponsored by Rep. Henry Johnson, would amend Title VII of the Civil Rights Act of 1964 to forbid employers from discriminating based on employment status.⁵⁰ The bill proposes that Title VII be amended to include the phrase “employment status.”⁵¹ Under the bill, “unemployment status” means “being unemployed, having actively looked

48. See William Darity Jr. & Samuel L. Myers, Jr., *The Impact of Labor Market Prospects on Incarceration Rates*, in PROSPERITY FOR ALL? THE ECONOMIC BOOM AND AFRICAN AMERICANS 279, 280 (Robert Cherry & William M. Rogers III eds., 2000) (“[T]here has indeed been a long-term pattern of higher incarceration rates accompanying higher unemployment rates However, data . . . in more recent years reveals a marked departure from this pattern. A more detailed analysis of recent patterns of black imprisonment across states suggest that tightness of labor markets not only fails to dampen the impact of unemployment on incarceration rates, it can even worsen those impacts.”). See generally MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY (2007) (discussing the disparate incarceration rates among African Americans and other minorities).

49. H.R. 1113, 112th Cong. (2011).

50. *Id.* The Fair Employment Act is distinct from the Fair Employment Opportunity Act of 2011 (FEOA). Compare H.R. 2501, 112th Cong. (2011) with H.R. 1113. FEOA ultimately has the same objective of “prohibit[ing] discrimination in employment on the basis of an individual’s status or history of unemployment.” H.R. 2501. However, FEOA proposed that the law be enforced under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219. *Id.* This Comment exclusively discusses the Fair Employment Act.

51. H.R. 1113 § 2.

for employment during the then most recent four-week period, and currently being available for employment.”⁵²

The 2011 American Jobs Act included a similar provision.⁵³ The provision, titled “Prohibition of Discrimination in Employment on the Basis of an Individual’s Status as Unemployed,” seeks to: (1) prohibit employers from disqualifying an applicant because of that person’s status as unemployed; (2) prohibit employers and employment agencies from publishing or posting advertisements that indicate that an unemployment status disqualifies an applicant from consideration; and (3) eliminate the burdens imposed on commerce created by such practices.⁵⁴ The provision explicitly states that employers are still permitted to consider employment history as a consideration in hiring.⁵⁵ This statement in the Act underlines the problem that will occur in enforcing this measure: what standards will be used to determine when an employer has focused too heavily on an individual’s status as unemployed?⁵⁶ If a new cause of action is enacted, courts will likely use the framework for a cause of action under Title VII of the Civil Rights Act of 1964.

B. History and Development of Title VII

Racism was still prevalent in the United States after desegregation, and several statutory measures were taken to eliminate discrimination.⁵⁷ The Civil Rights Act of 1964 (“the Act”), for example, was

52. *Id.*

53. American Jobs Act of 2011, S. 1549, § 373(7), 112th Cong. (2011).

54. *Id.* § 372(b)(1)-(3).

55. *Id.* § 374(d).

Nothing in this Act is intended to preclude an employer or employment agency from considering an individual’s employment history, or from examining the reasons underlying an individual’s status as unemployed, in assessing an individual’s ability to perform a job or in otherwise making employment decisions about that individual. Such consideration or examination may include an assessment of whether an individual’s employment in a similar or related job for a period of time reasonable proximate to the consideration of such individual for employment is job-related or consistent with business necessity.

Id.

56. Laura Basset, *New Bill Would Ban Discrimination Against the Jobless*, HUFFINGTON POST (Mar. 13, 2011, 6:50 PM), http://www.huffingtonpost.com/2011/03/16/new-bill-would-ban-discrimination-against-jobless_n_836687.html.

Johnson said if the bill passes, the burden of proof would be on the plaintiff to show that he or she was discriminated against based on employment status. While this kind of discrimination may be difficult to prove, Johnson said, he thinks the legislation will stop employers from using discriminatory language in their job ads and refusing to look at résumés from jobless applicants.

Id.

57. See 42 U.S.C. § 2000e (2006) for an example of legislation passed to ensure equal rights for racial minorities.

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created, in part, to remedy discrimination in employment.⁵⁸ Title VII of the Act was created specifically to target employment discrimination.⁵⁹ The provision makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”⁶⁰ The purpose of Title VII is to “assure equality of employment opportunities, and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”⁶¹ Title VII created a private right of action for employees who felt they were victims of employment discrimination.⁶² Although this remedy was unavailable to individuals prior to Title VII’s enactment, and it serves as a deterrent to discrimination by employers, a plaintiff bringing a cause of action under this title has a high burden to overcome to benefit from this remedy.⁶³ This has been the case for all the currently existing classes protected by Title VII and will most certainly be the same should Title VII be amended to protect individuals based on employment status. This Comment explores two Title VII claims: disparate impact and disparate treatment. These are the two standards for claims most relevant to this issue.

C. Disparate Treatment Cause of Action Under Title VII

1. Explanation of the Law

“[T]he modern era of employment discrimination law began with the enactment of Title VII of the Civil Rights Act of 1964.”⁶⁴ Immediately after its enactment, Title VII was a source of some confusion for the courts.⁶⁵

None of the various federal statutes designed to promote the goal of equal employment opportunity has been the basis of more litigation, nor the subject of more intense and wide-ranging judicial and academic scrutiny, than Title VII of the Civil Rights Act of

58. *Id.*

59. *Id.* § 2000e-2(a).

60. *Id.* § 2000e-2(a)(1).

61. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

62. *Id.* § 2000e-2.

63. *See McDonnell Douglas*, 411 U.S. at 800.

64. JOEL WM. FRIEDMAN, *THE LAW OF EMPLOYMENT LAW DISCRIMINATION: CASES AND MATERIALS* 2, 16 (Robert C. Clark et al. eds., 8th ed. 2011) (“There were, however, some legal restrictions on discrimination against minorities before the modern civil rights statutes.”).

65. *Id.* at 17-18.

1964, as amended by the Equal Employment Opportunity Act of 1972, the Pregnancy Discrimination Act of 1978, the Civil Rights Act of 1991, and the Lilly Ledbetter Fair Pay Act of 2009.⁶⁶

The language of Title VII was viewed as extremely expansive, which is one of the reasons for the explosion of Title VII litigation after its enactment.⁶⁷ When courts interpreted the statute to restrict the reach of Title VII, Congress would often respond by amending the law.⁶⁸

Congress failed to provide a definition for “discriminate” even though it used the term repeatedly in the statute.⁶⁹ It was clear that the statute forbade explicit exclusion of individuals from jobs based on race.⁷⁰ “[However,] in the absence of an overt, ambiguous policy of exclusion, many important interpretive questions remained unanswered.”⁷¹ The absence of a statutory definition left the courts with the task of formulating a workable concept of unlawful discrimination. “For a quarter of a century, the Supreme Court and the lower federal courts struggled with the task of formulating and refining a framework for analyzing discrimination claims.”⁷²

Title VII of the Civil Rights Act was originally enacted to prevent intentional employment discrimination.⁷³ Its principle nondiscrimination provision holds employers liable only for disparate treatment.⁷⁴ “Disparate-treatment cases present the most easily understood type of

66. *Id.* at 17 (footnotes omitted) (citations omitted).

67. *Id.*

68. *Id.* (“[O]n several occasions when the Supreme Court interpreted this statute in a manner that perceptibly constricted the scope of its substantive and procedural provisions, Congress amended the law to expand its applicability.”).

69. *Id.* at 59.

70. *Id.*

71. *Id.* In relevant part:

But in the absence of an overt, unambiguous policy of exclusion, many important interpretive questions remained unanswered. They included the following: (1) in the absence of an employer’s formal policy of excluding a protected class, what kind of proof must the plaintiff muster to establish unlawful discrimination?; (2) if the employer was motivated by both unlawful bias *and* by a legitimate factor, such as the applicant’s relative qualifications, has a violation the [sic] Title VII occurred?; (3) can unlawful discrimination occur in the absence of a loss of pay or job status or other tangible employment benefit?; (4) does an employer violate the Act when it implements a policy, such as a minimum height and weight requirement or passage of a standardized test, that disproportionately affects one gender or racial group but is not intended to discriminate?; and (5) does an employer whose current hiring or promotion practices are affected by the lingering effects of discrimination that occurred prior to the effective date of Title VII thereby violate Title VII?

Id.

72. *Id.*

73. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

74. *Id.*

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discrimination and occur where an employer has treated a particular person less favorably than others because of a protected trait.”⁷⁵ Under a disparate treatment cause of action, a plaintiff must establish that the defendant had discriminatory intent or motive for taking the action.⁷⁶

In *McDonnell Douglas Corp. v. Green*,⁷⁷ the Supreme Court described the burden-shifting framework for a Title VII claim. The complainant in a Title VII trial has the initial burden of establishing a prima facie case of racial discrimination.⁷⁸ The complainant can establish a case for racial discrimination by showing: “(i) . . . he belongs to a racial minority; (ii) . . . he applied and was qualified for a job for which the employer was seeking applicants; (iii) . . . despite his qualifications, he was rejected; and (iv) . . . after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”⁷⁹

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer-defendant to assert a “legitimate, nondiscriminatory reason for the complainant’s rejection.”⁸⁰ Once the employer meets this burden, the employee must have an opportunity to show that employer’s reason for the complainant’s rejection was a pretext.⁸¹ In other words, the complainant must establish that the employee did not apply the same reasoning to all individuals.⁸²

At first glance, the standard does not seem to create an unreasonable burden for the plaintiff to overcome. However, the Court has interpreted this standard to not only emphasize the plaintiff’s burden

75. *Id.* (internal quotation marks omitted).

76. *Id.*

77. 411 U.S. 792 (1973). In *McDonnell Douglas Corp.*, Green, a black civil rights activist, brought suit against McDonnell, an aerospace and aircraft manufacturer. *Id.* at 794. He was previously employed there as a mechanic and laboratory technician but was laid off. *Id.* Green later participated in a peaceful (yet illegal) civil rights protest. *Id.* He applied for reemployment and was denied. *Id.* at 796. Green claimed he was denied because of his race. *Id.* McDonnell asserted he was denied because of his participation in the illegal demonstrations. *Id.* The Court held that Green established a prima facie case of discrimination and McDonnell met the burden of having an explanation for the decision. *Id.* at 804. However, the Court found that Green must then be given an opportunity to establish that the employer’s stated reason for rejection was pretextual. *Id.*

78. *Id.* at 802 (holding that a plaintiff who brings a Title VII claim has the burden of establishing a prima facie case of racial discrimination and that the accused employer then has the burden of rebutting the claim by showing a nondiscriminatory reason for the action).

79. *Id.*

80. *Id.*

81. *Id.* at 804.

82. *Id.*

of persuasion, but also to significantly lower the employer's burden.⁸³ The Court further developed this burden-shifting framework in *Texas Department of Community Affairs v. Burdine*.⁸⁴ The plaintiff brought an action alleging that her employer's failure to promote her and her subsequent termination was a result of sex discrimination in violation of Title VII.⁸⁵ The district court ruled in favor of the defendant, finding that there was no evidence to support a claim "that either decision had been based on gender discrimination."⁸⁶ On appeal, the Fifth Circuit Court of Appeals affirmed the lower court's decision that the failure to promote the plaintiff was not a result of discrimination.⁸⁷ However, the Court of Appeals reversed the lower court's finding that the defendant had rebutted the plaintiff's prima facie case of gender discrimination.⁸⁸

The court reaffirmed its previously announced views that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment action and that the defendant also must prove by objective evidence that those hired or promoted were better qualified than the plaintiff.⁸⁹

The court found that "the [defendant's] testimony did not carry . . . these evidentiary burdens."⁹⁰

The Supreme Court reversed the Court of Appeals stating that the Court of Appeals did not apply the correct evidentiary standard.⁹¹ The Supreme Court restated the burden-shifting framework established in *McDonnell Douglas* and noted "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."⁹²

The Court stated that the plaintiff's burden of establishing a prima facie case is not a difficult one.⁹³ The purpose of the prima

83. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-08 (1993); see also *Texas Dep't Cmty. Affairs v. Burdine*, 450 U.S. 248, 248, 258 (1980) (holding that in rebutting the employee's claim of discrimination, the employer only had the burden of explaining the nondiscriminatory reasons for its actions and did not have the burden of persuading the court beyond a preponderance of the evidence that there was a legitimate, nondiscriminatory business purpose for the action).

84. *Burdine*, 450 U.S. at 248.

85. *Id.* at 250-51.

86. *Id.* at 251.

87. *Id.*

88. *Id.* at 252.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 253.

93. *Id.*

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facie case is to “eliminate[] the most common nondiscriminatory reasons for the plaintiff’s rejection.”⁹⁴ Once the plaintiff has established a prima facie case, he or she has created a “presumption that the employer unlawfully discriminated against the plaintiff.”⁹⁵ The court must enter judgment for the plaintiff if the trier of fact finds the plaintiff’s case persuasive and the employer does not articulate a reason to rebut the presumption of discrimination.⁹⁶

When the burden shifts to the defendant, the defendant must produce evidence that the employment decision occurred because of a nondiscriminatory reason.⁹⁷ “[However], [t]he defendant need not *persuade* the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.”⁹⁸ The Court stated that the employer’s explanation must be “*legally sufficient* to justify a judgment for the defendant. If the defendant carries this burden of *production*, the presumption raised by the prima facie case is rebutted”⁹⁹

The Court continually emphasized that at all times the plaintiff has the burden of persuasion.¹⁰⁰

We have stated consistently that the employee’s prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this immediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision has not been motivated by discriminatory animus.¹⁰¹

In order to justify the framework, the Court of Appeals asserted several reasons why such a standard would not hinder the plaintiff.¹⁰² The Court stated that in order for the defendant to rebut the inference of discrimination arising from the prima facie case, the employer’s ex-

94. *Id.*

95. *Id.* at 254.

96. *Id.*

97. *Id.*

98. *Id.* (emphasis added).

99. *Id.* at 255 (emphasis added).

100. *Id.* at 256. (“[Plaintiff] . . . now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing the employer’s proffered explanation is unworthy of credence.”).

101. *Id.* at 257.

102. *Id.*

planation of “its legitimate reasons must be clear and reasonably specific.”¹⁰³ In addition, the Court also acknowledged that an employer accused of employment discrimination has an incentive to persuade the fact finder that its decision was lawful.¹⁰⁴ Lastly, the Court asserted that liberal discovery rules and the plaintiff’s ability to access the EEOC’s investigatory documents should assist the plaintiff in proving the offered explanation was false.¹⁰⁵

The Court’s explanation of the burdens of the plaintiff and defendant in a Title VII case shows that the plaintiff faces an uphill battle in recovering for a claim of discrimination. Establishing that the plaintiff was qualified for a job and that the circumstances gave rise to an inference of unlawful discrimination are difficult facts for a plaintiff to establish.¹⁰⁶

The Supreme Court’s decision over ten years later in *St. Mary’s Honor Center v. Hicks* further highlights a Title VII plaintiff’s tough burden. The plaintiff in *Hicks*, a correctional officer formerly employed at a halfway house, brought a Title VII action alleging that he was demoted and ultimately discharged because of his race.¹⁰⁷ The plaintiff presented evidence that he had been unfairly subjected to severe discipline as a result of a contentious relationship that developed when a new supervisor was hired.¹⁰⁸ The lower court found that the explanations the employer asserted for the plaintiff’s demotion and ejection were not the true reasons for his dismissal.¹⁰⁹ The court “nonetheless held that the respondent had failed to carry his ultimate burden of proving that his *race* was the determining factor in the . . . decision . . . to demote and then to dismiss him.”¹¹⁰ “[T]he District Court concluded that ‘although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated.’”¹¹¹

103. *Id.* at 258.

104. *Id.*

105. *Id.* (“Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is the pretext. We remain confident that the McDonnell Douglas framework permits the plaintiff meriting relief to demonstrate intentional discrimination.”).

106. See FRIEDMAN, *supra* note 64, at 64.

107. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 504-05 (1993).

108. *Id.*

109. *Id.* at 508.

110. *Id.*

111. *Id.* (alterations in original).

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The Court of Appeals reversed the lower court’s decision, stating, “[o]nce [respondent] proved all of [petitioner’s] proffered reasons for the adverse employment actions to be pretextual, [respondent] was entitled to judgment as a matter of law.”¹¹² The Court of Appeals held that

[b]ecause all of the defendants’ proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of race.¹¹³

However, the Supreme Court held that the trier of fact’s rejection of the employer’s asserted legitimate, nondiscriminatory reasons for its challenged actions did not entitle the employees to judgment as a matter of law under the *McDonnell Douglas* scheme applicable to discriminatory treatment cases.¹¹⁴ “By producing *evidence* (whether ultimately persuasive or not) of non-discriminatory reasons, petitioners sustained their burden of production and thus placed themselves in a ‘better position than if they had remained silent.’”¹¹⁵

In summary, when the plaintiff establishes a *prima facie* case under the *McDonnell Douglas* framework a presumption of discrimination is created.¹¹⁶ To rebut the presumption, the defendant must only produce evidence that the employment decisions in question were made “for a legitimate nondiscriminatory reason” to avoid a judgment against them.¹¹⁷ “The defendant must clearly set forth through the introduction of admissible evidence reasons for its actions, which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.”¹¹⁸ While the *McDonnell Douglas* standard shifts the burden of *production* to the defendant, the plaintiff still has the critical burden of persuading the trier of fact that the defendant intentionally discriminated.¹¹⁹

112. *Id.* (alterations in original).

113. *Id.* at 508-09 (citations omitted).

114. *Id.* at 511.

115. *Id.* at 509.

116. *Id.* at 506 (alterations in original).

117. *Id.* at 506-07 (internal quotation marks omitted).

118. *Id.* at 507.

119. *Id.* (internal quotation marks omitted).

The Court is clearly rigid on the premise that the employee bringing the action has the ultimate burden of proof, and the burden of proof seems to favor an employer in a Title VII action. Not only does a typical claimant often lack the resources required to successfully establish such a claim, but proving a discriminatory intent to rebut an employer's plainly implausible purported "business purpose" is also a tremendous burden.

2. Application of Disparate Treatment Standard to Unemployment Discrimination

It is well settled that a plaintiff's burden under Title VII is very high.¹²⁰ For classes of characteristics, such as race and gender, that are well accepted as "protected" for the purposes of employment discrimination litigation, it is much easier for a plaintiff to establish his or her status as a member of a protected class.¹²¹ However, the other factors required to establish a prima facie case of employment discrimination are much more challenging for the plaintiff to meet. In establishing discrimination based on unemployed status, a plaintiff would have an additional hurdle to overcome. And since, as the Job Act states, it is acceptable for an employer to consider employment history and experience as relevant factors, it will be almost impossible for a plaintiff to successfully distinguish discrimination based on unemployed status from mere consideration of qualifications.¹²²

If courts opt to use the current standards applied in Title VII for a disparate treatment claim in a cause of action alleging discrimination based on unemployment, the plaintiff's burden would be even higher. Even if employers were banned from explicitly expressing a preference for currently employed applicants, it would be almost impossible to prove that an employer did not use unemployment status as a consideration in hiring. Additionally, it would not be a challenge for an

120. Bassett, *supra* note 56.

The state of the law is pretty tough on claimants in Title VII cases to prevail, but nevertheless, we do have successful claimants, and this legislation will simply put employers on notice that it's not in their best interest to run ads saying "no unemployed people need apply". . . .

Laura Bassett, *New Bill Would Ban Discrimination Against the Jobless*, HUFFINGTON POST (Mar. 16, 2011, 6:50 PM), http://www.huffingtonpost.com/2011/03/16/new-bill-would-ban-discrimination-against-jobless_n_836687.html.

121. The protected class categories are race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a)(1) (2006).

122. American Jobs Act of 2011, S. 1549, 112th Cong. § 374(d) (2011).

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employer to merely assert a business necessity or another plausible reason for the action.

Many questions remain unanswered relating to how this cause of action would be addressed by the courts. Would the applicant potentially have a cause of action simply for submitting an application, or would the cause of action not arise until the applicant was interviewed and subsequently denied a position? It would be interesting to speculate as to how the courts would treat an employment discrimination claim based on unemployment status using the disparate treatment framework. There are many unemployed people who have dealt with the problem of unemployment discrimination firsthand.¹²³ Willa Booker is one of those people.¹²⁴ Ms. Booker is a fifty-three-year-old African American woman.¹²⁵ She resides in Chicago and has been unemployed for more than two years.¹²⁶ She has twenty years of experience as a hospital administrator.¹²⁷ Suppose Ms. Booker applied for a position with an employer, Hospital E, and her qualifications met the specified criteria perfectly.¹²⁸

In situation A, she submits her resume, cover letter, and application. A few weeks later, she receives a letter in the mail thanking her for her interest but informing her that they are unable to further consider her candidacy. Because she strongly feels that her qualifications were perfect for the position, and her resume and cover letter were absolutely flawless, she believes she has been discriminated against. At that point, she can bring a claim against Hospital E for hiring discrimination.

As an African American woman, Ms. Booker is clearly a member of a protected class within the current meaning of Title VII, but it is unclear what relationship her protected status will have on her task of establishing a prima facie case. As a racial minority, she is faced with the issue of establishing that the failure to hire was based on her long-term unemployed status and not based on her race or gender. After

123. See Cheryl Corley, *For Black Americans, a Longer Time Without Work*, NAT'L PUB. RADIO (Dec. 23, 2011), <http://www.npr.org/2011/12/23/144129125/for-black-americans-a-longer-time-without-work>.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* Ms. Booker was previously earning \$50,000, annually, and is currently receiving \$300 per month in public assistance. *Id.*

128. See generally *id.* (drawing facts partially from Corley, *supra* note 123; but note, most facts were created by the author specifically for the purposes of exploring a Title VII analysis in the unemployment discrimination context and are not based on any true events).

she files a claim with the EEOC, an investigation will ensue. In order for there to be cause, the investigation must show that the position remained open for a period of time after she was denied employment, and the person that was ultimately hired was employed at the time he or she applied.¹²⁹ Assuming the investigation reveals the position remained open for an extended period of time and that the person who was ultimately hired for the position was equally or less qualified for the position and employed elsewhere at the time he applied, Ms. Booker would have successfully established a cause of action under the *McDonnell Douglas* framework.

Now that she has met her initial burden of establishing a prima facie case, it is up to Hospital E to rebut her claim by showing that the hiring decision was for a legitimate business purpose.¹³⁰ The Court has established that Hospital E need only assert a business purpose and then the burden shifts back to Ms. Booker to persuade the trier of fact that the asserted purpose was not the true reason for the decision. Ultimately, she has the burden to prove that the explicit reason for rejecting her was to discriminate against her based on her status as unemployed.

Because of the nature of the status of “unemployed” and the current state of our nation’s job market, there are many “business purposes” Hospital E could assert that would make it extremely hard for Ms. Booker to challenge. The hospital can claim that it received an extremely large number of highly qualified applicants and in order to make screening more efficient it selected a number of candidates to interview at random. Any reason Hospital E asserted would be difficult for Ms. Booker to overcome.

In situation B, Ms. Booker received an interview after submitting her application, and Hospital E still did not hire her. Again, the investigation showed that she was denied the position, and the position remained open until a person who was employed elsewhere at the time who applied eventually filled it. At this point, Ms. Booker has an even higher burden to overcome. Hospital E has even more potential reasons to assert for not hiring her after the interview. The hospital may claim her interview did not go well or she did not have the requisite social skills they were looking for. And unless there has been some recording of the interview, which is highly unlikely, there would

129. *Cf. St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

130. *Id.* at 506-07.

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be no way for Ms. Booker to rebut the hospital’s defense or substantiate her allegations. Additionally, interviews are extremely subjective, so even a recording of an interview is not likely to provide any support for Ms. Booker’s case. Again, the plaintiff is at a great disadvantage.

D. Disparate Impact Cause of Action Under Title VII

Although Title VII was intended to end *intentional* discrimination,¹³¹ the Court in *Griggs v. Duke Power Co.* interpreted the Act to also “prohibit . . . employers’ facially neutral practices that, in fact, are discriminatory in operation.”¹³² Under Title VII, “practices, procedures, or tests neutral on their face and even neutral in terms of intent cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”¹³³ In *Griggs*, the Court established a plaintiff’s burden of proof in a disparate impact cause of action under Title VII.¹³⁴ As part of the Civil Rights Act of 1991, Title VII was amended to codify a plaintiff’s burden in disparate impact cases.¹³⁵

Under the disparate impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”¹³⁶ An employer can rebut a claim of discrimination by establishing that the practice is job related.¹³⁷ If the defendant meets this burden, “a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and

131. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

132. *Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009) (holding that a test for firefighters that disqualified blacks at a higher rate than white employees was not subject to disparate impact liability under Title VII).

133. *Griggs*, 401 U.S. at 430.

134. *Id.*

135. 42 U.S.C. § 2000e-2(k) (2006).

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if (i) a complaining party demonstrated that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Id.

136. *Ricci*, 557 U.S. at 578 (challenging the city’s refusal to promote individuals who scored well on a promotion exam because the test results indicated the exam was discriminatory) (internal quotation marks omitted).

137. *Id.*

serves the employer's legitimate needs."¹³⁸ The Court stated that, "[t]he touchstone is business necessity. If an employment practice that operated to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."¹³⁹ The employer must show the measures having a disparate impact "bear a demonstrable relationship to successful performance of the jobs for which it was used."¹⁴⁰

A disparate impact claim for discrimination against the unemployed could potentially be brought today without amending Title VII. Some hiring practices that have been historically challenged as having an adverse disparate impact on the black community include arrest records and inquiries into credit history.¹⁴¹ The effect of unemployment discrimination on black applicants is parallel to the effect of employers requiring reporting of criminal arrests on job applications. Because African Americans are arrested at a higher rate than the general population, use of such criteria would exclude blacks from certain employment positions at a much higher rate.¹⁴² Under a disparate impact theory of discrimination, the plaintiff may have a better chance of success than under a disparate treatment theory (assuming there are statistics available that can indicate a sufficiently disproportionate effect on black applicants).¹⁴³

E. Revisiting Title VII Plaintiff Standards

In order to stay true to the core purpose for which Title VII was enacted, lawmakers should examine how effective employment discrimination laws have been at resolving the issue of discrimination. It is questionable whether or not these current standards adequately

138. *Id.*

139. *Id.* at 431.

140. *Id.*

141. See Russell J. Davis, Annotation, *Employer's Consideration of Background or "Character" Investigation of Applicant for Employment, Including Inquiry into Credit Record, Military Service Record, and the Like, as Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964, as Amended* (42 U.S.C. §§ 2000e et seq.), 40 A.L.R. FED. 473 (1978). See generally Annotation, *Consideration of Arrest Record as Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964* (42 U.S.C. §§ 2000e et seq.), 33 A.L.R. FED. 263 (1977).

142. EEOC, POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 1 (1990), available at http://www.eeoc.gov/policy/docs/arrest_records.html ("[U]se of arrest records as an absolute bar to employment has a disparate impact on some protected groups. Such records alone cannot be used to routinely exclude persons from employment.").

143. It is unlikely that such statistics would be available because it would require employers to follow up and keep detailed records on applicants.

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protect the classes they are meant to protect, so unless the framework is adjusted, a new private cause of action could never be a viable solution to discrimination based on employment status. The great disparity in unemployment rates can be explained by several factors relating to race, class, and economics, but discrimination in employment has a major role.¹⁴⁴ In order to properly effectuate the purpose of Title VII, courts should reevaluate the plaintiff’s burden. The complexity of balancing employers’ and employees’ interests is well understood. It is clear that courts have constantly struggled with developing the appropriate framework to properly adjudicate employment discrimination claims. There are many conflicting interests involved, but a standard must be reasonable for both sides.

Currently, once the plaintiff establishes that the alleged employment action occurred because of his or her protected status, the employer need only present evidence that the action was for a legitimate purpose.¹⁴⁵ This standard is unacceptable. It makes it excessively difficult for a plaintiff to win if the employers need only present evidence of a legitimate business purpose that may or may not be persuasive.¹⁴⁶ Part of the purpose of Title VII is to deter employers from utilizing discriminatory employment practices. This can only be accomplished if the standards are more reasonably balanced for both sides.

Other countries have utilized more reasonable plaintiff burdens for employment discrimination cases.¹⁴⁷ The European Union’s Council Directive for Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin suggests a much more plaintiff-friendly standard for employment discrimination claims.¹⁴⁸ In creating a standard for a petitioner’s standard of review in an employment discrimination case, the directive advises that:

(1) Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be pre-

144. See Williams E. Spriggs & Rhonda M. Williams, *What Do We Need to Explain About African American Unemployment?*, in PROSPERITY FOR ALL? THE ECONOMIC BOOM AND AFRICAN AMERICANS 188, 188 (Robert Cherry & William M. Rogers III eds., 2000) (discussing generally many factors that contribute to black unemployment including race and economics).

145. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993).

146. *See id.*

147. *See* Council Directive, 2000/43, art. 8, 2000 O.J. (L 180) 5.

148. *Id.*

sumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

(2) Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.¹⁴⁹

The directive allows and seemingly encourages Member States to enact measures that allow for a reasonable burden of proof required for a plaintiff to succeed on an employment discrimination claim.¹⁵⁰ The directive is written in favor of allowing the employer to bear the burden of establishing there was no discrimination.¹⁵¹

If a civil cause of action to prohibit discrimination based on employment status is to be enacted, the only way it could be successful at solving the problem is if the current employment discrimination framework is altered to strike a more reasonable balance.

F. Other Criticisms of a Private Cause of Action

Plaintiffs in employment discrimination cases lose at much higher rates than other plaintiffs.¹⁵² A statistical study confirmed that plaintiffs in employment discrimination cases “win a lower proportion of cases during pretrial and at trial. Then, more of their successful cases undergo appeal. On appeal, they have a harder time both in upholding their successes and in reversing adverse outcomes.”¹⁵³ Between the years 1998 and 2006, Title VII cases made up nearly seventy per-

149. *Id.*

150. *See id.*

151. *Id.*

152. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POL'Y REV. 103, 103 (2009) [hereinafter *Bad to Worse*]; see also Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); Kevin M. Clermont et al., *How Employment Discrimination Plaintiffs Fare in Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 547 (2003).

Litigants in these “jobs” cases appeal more often than other litigants, with the defendants doing far better on appeal than the plaintiffs. These troublesome facts might help explain why today many fewer plaintiffs are undertaking the frustrating route into federal district court, where, relatively often, plaintiffs must pursue their claims all the way through trial, and where, at both pretrial and trial, these plaintiffs lose more often than other federal plaintiffs.

Bad to Worse, *supra* at 103.

153. *Bad to Worse*, *supra* note 152, at 103.

A starker fact is that the defendants’ reversal rate far exceeds the plaintiffs’ reversal rate That is, the appellate courts reverse plaintiffs’ wins below far more often than defendants’ wins below. The statistically significant differential exists for appeals from wins at the stage of pretrial adjudication (thirty percent compared to eleven percent), and it becomes more pronounced for appeals from wins at the trial stage (forty-one percent compared to nine percent).

Id. at 111.

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cent of employment discrimination cases in U.S. District Courts.¹⁵⁴ Plaintiffs in these cases had a success rate of 10.88%.¹⁵⁵ Plaintiffs also have difficulty surviving on appeal — a favorable verdict for the plaintiff is likely to be reversed while an adverse outcome is unlikely to be reversed.¹⁵⁶ It is clear that there is an anti-plaintiff sentiment among courts in employment discrimination cases.¹⁵⁷ An employment discrimination plaintiff already has a significant burden to overcome in addition to this biased sentiment.

Aside from the challenges a plaintiff would face in a cause of action based on unemployment discrimination, a hiring discrimination cause of action based on unemployment status under the Jobs Act has been viewed unfavorably by many, and it has serious obstacles to overcome. There has been much criticism of making the “unemployed” a protected class.¹⁵⁸ Many people believe creating a cause of action allowing individuals to sue employers because they refuse to hire them will only make the job crisis worse.¹⁵⁹ Some believe such a cause of action will discourage employers from merely interviewing those that are long-term unemployed for fear that if the applicant is not hired they will be subject to litigation.¹⁶⁰ Some believe it will

154. *Bad to Worse*, *supra* note 152, at 116-17 fig.6 (2009).

155. *Id.* at 117.

156. *Id.* at 103.

157. *See id.* at 118.

158. *See* Adam Levin, *Memo to Obama: Push for Jobs, Don't Shove Employers*, ABC NEWS (Oct. 1, 2011), <http://abcnews.go.com/Business/jobs-bill-solve-discrimination-chronically-unemployed/story?id=14642946>; *see also* Saltsman, *supra* note 11.

With so many still out of work, the Obama administration and its allies in Congress are considering legislation to make it illegal to discriminate against hiring the unemployed. It's a bad idea aimed at solving an exaggerated problem.

One component of the President's American Jobs Act, patterned on a bill introduced by Reps. Rosa DeLauro (D., Conn.) and Hank Johnson (D., Ga.), would make employment status a new protected class—like age, race or sex—when it comes to hiring.

Id.

159. *See* Levin, *supra* note 158; Iain Murray, *The Unemployment Discrimination Myth*, BLOG COMPETITIVE ENTER. INST. (Oct. 18, 2011), <http://www.openmarket.org/2011/10/18/the-unemployment-discrimination-myth/>. Murray is of the opinion that unemployment discrimination is not a “real” problem and that the government is exaggerating the problem. *Id.*

160. *See* Levin, *supra* note 158.

What about the disgruntled, unqualified job applicant with the unfettered ability to sue a prospective employer on the basis of discrimination based on . . . job status? It would mean full employment for lawyers, but I do not believe that it will solve the unemployment problem that we face as a nation. If anything, it may well raise yet another barrier to those who are pounding the pavement at a time when we should be encouraging employers to stop outsourcing or using overtime and part-time staff instead of actually hiring the right person for the job. Honestly, I'm a bit concerned that the proposed rule may eventually amount to a federally protected right to employment.

Id.

cause a great increase in litigation for employers.¹⁶¹ Others have said that it will create more jobs for law firms but not small businesses.¹⁶²

Another argument is that allowing unemployed individuals to bring suit against employers claiming they were not hired as a result of their unemployment status has the effect of posing an unreasonable burden on employers to keep extensive records of their applicants in order to prepare for potential litigation. Also, requiring employers to justify hiring decisions generally poses an unfair burden as well.

Another consideration is the potential expense on the court system if another employment discrimination cause of action is created.¹⁶³ Courts already see an extremely large number of employment discrimination cases.¹⁶⁴ Over seventy thousand Title VII claims were brought before the EEOC in 2011.¹⁶⁵ Of those claims, 66.7 percent were found to have no reasonable cause after the EEOC's initial investigation.¹⁶⁶ Because of the administrative process required in order to bring a private cause of action,¹⁶⁷ employment discrimination claims are already costly on the United States court system. An additional type of claim has the potential to place further drain on the court's already scarce resources.

These are legitimate concerns. The key to creating a solution that is not unduly burdensome is to implement solutions that give employers incentives to hire the long-term unemployed and to allow for a reasonable employer burden but to also make the burdens on plaintiffs more reasonable. Along with all the other difficulties a private cause of action could potentially cause, it is also likely that a plaintiff

161. Saltsman, *supra* note 11, at A15; *see* Levin, *supra* note 158.

162. Saltsman, *supra* note 11, at A15 ("The proposed legislation to address . . . [this problem] would create a tremendous new liability for employers while doing little to lower the unemployment rate. The only employment it would spur is in law firms eager to represent applicants convinced they were denied a job because they didn't already have one.").

163. *See* Michael Nelbauer, *Cost, Cases to Rise with D.C. Unemployed Anti-Discrimination Law*, WASH. BUS. J. (Jan. 31, 2012, 11:10 AM), <http://www.bizjournals.com/washington/blog/2012/01/cost-cases-to-rise-with-dc.html>.

164. *See* EEOC, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 CHARGES (INCLUDES CONCURRENT CHARGES WITH ADEA, ADA AND EPA) FY 1997 – FY 2011, *available at* <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> (last visited Sept. 1, 2012).

165. *Id.*

166. *Id.*; *see also* *Definition of Terms*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm> (last visited Oct. 21, 2012) (stating that a private party may still exercise his right to bring a private cause of action if the EEOC makes a no reasonable cause determination).

167. *See* *Definition of Terms*, *supra* note 166. A person must first bring a claim before the EEOC within 180 or 300 days of the alleged discriminatory action, depending on the state. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002).

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would have a hard time recovering in a private suit, making it hard to justify the expense of costly litigation. The only way to create a private cause of action that would provide an adequate remedy to victims of unemployment discrimination would be to lower the plaintiff’s burden, a step our employment discrimination jurisprudence has proven is highly unlikely to occur. The best way to remedy this problem would be to focus on implementing programs that encourage job development and creating incentives for employers to hire the unemployed. Such solutions have a much greater chance of success than any of the proposed private causes of action.

III. LEGISLATIVE AND ADMINISTRATIVE PROPOSED
REMEDIES TO THE UNEMPLOYMENT
DISCRIMINATION PROBLEM

A. Employment Development Programs

Several programmatic solutions have been proposed to address the problem of unemployment discrimination.¹⁶⁸ One potential solution is a program that allows individuals to work for potential employers free of charge for a set number of hours in hope that the individual will become employed. Georgia implemented such a program.¹⁶⁹ The Georgia Works Program allows job seekers to train with potential employers and work up to twenty-four hours a week for as long as eight weeks on a volunteer basis.¹⁷⁰ The program gives potential employers an opportunity to assess the applicants at no cost and there is no obligation to hire a trainee.¹⁷¹ According to the Georgia Department of Labor website, about sixty percent of participants have received paying jobs through the program.¹⁷²

President Obama proposed a similar program as part of the 2011 American Jobs Act titled the Bridge to Work Program.¹⁷³ The Act

168. See generally Editorial Board, *Torn From the Front Page: Turn Debate Over the Unemployed into Fight for Job Creation*, FLINT J. (Dec. 15, 2011, 5:37 AM), http://www.mlive.com/opinion/flint/index.ssf/2011/12/torn_from_the_front_page_turn.html (arguing for a focus on job creation instead of maintaining unemployment benefits).

169. Errin Haynes, *Georgia Job Program Has Bipartisan Potential*, CHARLESTON GAZETTE, Sept. 8, 2011, at P3A.

170. *Id.*; see also Jeff Newman, *Cardin Endorses Job Match Project; Program Helps Unemployed Find New Jobs*, S. MD. NEWSPAPERS ONLINE (Dec. 14, 2011), <http://www.somdnews.com/article/20111214/NEWS/712149647/1055/cardin-endorses-job-match-project&template=southern-Maryland>.

171. See Newman, *supra* note 170.

172. *Id.*

173. American Jobs Act of 2011, S. 1549 § 324, 112th Cong. (2011).

provides funds and guidelines for states to set up programs similar to the Georgia Works Program that allow people receiving unemployment benefits to become part of a work-training program and work at no cost to employers, preparing them to potentially become employed after a specified time period.¹⁷⁴

A program of this type has great potential to help remedy the unemployment disparity. The training and experience can make the job candidate more marketable for future opportunities. It may also help close the gap in a candidate's work history if he or she has been unemployed for an extended period of time. Although the purpose of the program is not to give employers free labor, employers benefit in being able to assess potential employees in a more practical and realistic setting. Potential employees are less likely to be denied based on superficial grounds and more likely to be assessed for their actual demonstrated work ability.

B. Employer Tax Incentives

Another potentially successful remedy to address the unemployment disparity issue is tax incentives for hiring long-term unemployed individuals. This is not a new concept. In 2010 Congress enacted the Hiring Incentive to Restore Employment Act (HIRE Act).¹⁷⁵ Under that statute employers who hired unemployed workers before the end of the year could qualify for a 6.2% payroll tax incentive.¹⁷⁶ The statute had the effect of exempting participating employers from their share of Social Security taxes on wages paid to newly hired workers who were previously unemployed and hired after a specified date.¹⁷⁷

The 2011 American Jobs Act proposed a \$4,000 tax credit to employers for hiring individuals who have been looking for employment for over six months.¹⁷⁸ This solution has tremendous potential to be successful. It is well documented that the government has great power to affect the behavior of its citizens through its power of taxation. However, this provision has also been aggressively criticized. In its current state, the provision allows the employer a tax break only

174. *Id.*

175. Pub. L. 111-147 (2010).

176. INTERNAL REVENUE SERV., IR-2010-33, TWO NEW TAX BENEFITS AID EMPLOYERS WHO HIRE AND RETAIN UNEMPLOYED WORKERS (2010).

177. *Id.*

178. Press Release, White House Office of the Press Secretary, Fact Sheet: The American Jobs Act (Sept. 8, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/08/fact-sheet-american-jobs-act>.

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for the year the long-term unemployed individual was hired.¹⁷⁹ This creates a paradox because it gives the employer an incentive to then let go of the employee and hire a new unemployed candidate in order to continue to take advantage of the tax break.¹⁸⁰ This issue can be remedied by potentially redistributing the current tax incentive so that instead of a \$4,000 tax break for the year the employee is hired, the employer can instead receive a decreased tax break over the course of several years. A less persuasive remedy to this paradox would be to only allow employers to be eligible for a limited number of these particular tax breaks in order to deter employers from firing and hiring to repeatedly take advantage of the incentive.

C. Prohibiting Express Preference for Employed Applicants

Several states have enacted legislation making job advertisements that express a preference for currently employed applicants illegal.¹⁸¹ New Jersey passed such a law,¹⁸² and it became effective on June 1,

179. *See id.*

180. *See id.*

181. *E.g.* Ben Boychuk & Pia Lopez, *Head to Head: Should State Outlaw Requirements that Job Applicants Be Employed?*, SACRAMENTO BEE, Jan. 25, 2012, at 15A; Betty Jackson, *Employment Related Bills Pending in Florida's 2012 Legislative Session*, EXAMINER (Jan. 18, 2012), <http://www.examiner.com/workplace-issues-in-orlando/employment-related-bills-pending-florida-s-2012-legislative-session>.

Senate Bill 518 filed by Senator Nan Rich (Democrat, Sunrise), and House Bill 815 filed by Representative Betty Reed (Democrat, Tampa), otherwise known as the Fair Employment Opportunity Act, would prohibit employment discrimination against the unemployed. “Unemployed” is defined by the Act as “a person’s present or past unemployment, regardless of the length of time the person was unemployed.” Employers with 15 or more employees would be covered, and individuals could be liable as employers. The purpose of this legislation is to “prohibit an employer or employment agency from considering a person’s status as an unemployed person when screening that person for or filling a position, except when a requirement related to employment status is a bona fide occupational qualification reasonably necessary to successful performance in the job, and to eliminate the burdens imposed on commerce by excluding unemployed persons from employment.” The Act would be enforceable by the Attorney General.

Id.; *see* Ariel Edwards Levy, *California Considers Outlawing Discrimination Against Unemployed*, HUFFINGTON POST (Jan. 23, 2012), http://www.huffingtonpost.com/2012/01/23/california-employment-discrimination_n_1224464.html?ref=mostpopular; *New Legislation Would Fight Discrimination Against Unemployed*, COLUMBUS BUS. FIRST (Jan. 27, 2012, 6:00 AM), <http://www.bizjournals.com/columbus/print-edition/2012/01/27/new-legislation-would-fight.html> (“The Ohio Fair Employment Act would bar employers from posting ads that say applicants must be currently or recently employed.”).

182. N.J. STAT. ANN. § 34:8B-1 (West 2011); *see also* *Unemployed Deserve Equal Chance From Employers*, NAPA VALLEY REG. (Feb. 3, 2012, 12:00 AM), http://napavalleyregister.com/news/opinion/editorial/unemployed-deserve-equal-chance-from-employers/article_392cd094-4e2c-11e1-be39-0019bb2963f4.html (“Michael Allen, D-Santa Rosa, introduced Assembly Bill 1450 in January. The legislation would make it illegal for an employer to advertise a hiring preference for a candidate who is already employed somewhere else. It would also make it illegal to intentionally refuse to consider a candidate based on current work status.”).

2011.¹⁸³ Violators are subject to a fine no more than \$1,000 for the first offense, \$5,000 for the second offense, and \$10,000 for each subsequent offense.¹⁸⁴ The governor's message attached to the statute states that nothing in the act creates a private cause of action or allows an individual to sue an employer for violation of the act.¹⁸⁵ While on its face this statute provides less protection for individuals by precluding a cause of action, this approach to ending unemployment discrimination is favored because it avoids increased litigation for employers and the challenge of defining a plaintiff's burden to be successful under such a cause of action. New Jersey legislators recognize that the statute may be a challenge to enforce, but it sends a message that such discrimination will not be tolerated.¹⁸⁶ The 2011 Jobs Act also proposes a similar provision on the federal level.¹⁸⁷

Legislation banning a company from overtly expressing preference for currently employed applicants should be refined and enacted. The penalty perhaps should be somewhat harsher in order to encourage compliance and to effectively deter discrimination. Also, refinement is required to include companies that may not advertise a preference for employed applicants but utilize it as a major consideration for hiring. It would be unfair to impose an expensive burden on employers to report hiring strategies and require employers to keep records on all applicants. However, perhaps a more reasonable yet persuasive penalty would be to subject repeat violators to close monitoring of the company's hiring practices in order to look for patterns of discrimination based on employment status.

V. OTHER POTENTIALLY SUCCESSFUL SOLUTIONS

A. More Solutions Tailored to African Americans

There is no single action sufficiently adequate to solve the problem of discrimination against the unemployed. There must be several measures in place simultaneously to counter this unique and complex problem. All of the legislative and administrative remedies previously explored should be refined and implemented. However, there should

183. N.J. STAT. ANN. § 34:8B-1 (West 2011).

184. *Id.*

185. *See id.*

186. *Discrimination Against the Unemployed Now Banned in New Jersey: Are More Expansive Federal Protections Far Behind?*, DUANE MORRIS (Sept. 19, 2011), http://www.duanemorris.com/alerts/discrimination_against_unemployed_now_banned_in_new_jersey_4215.html (last visited Sept. 1, 2012).

187. American Jobs Act of 2011, S. 1549 § 364, 112th Cong. (2011).

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be a special focus on the way this problem affects the black community. There should be more work programs and subsidized employment programs tailored specifically to minorities.¹⁸⁸ Currently, the participants in these programs are limited to individuals receiving a form of government-provided unemployment compensation. However, organizations interested in promoting the welfare and progression of the black community should be eligible for government funds to create and run such programs. Such programs would be better equipped to prepare black job seekers for positions in a way that is more tailored to their individual unique needs, making it more likely that an individual would be successful in securing employment through the program. Allowing organizations to run such programs will also allow for more African Americans to be aware of the opportunity and subsequently take advantage of it. Presumably, it will increase the number of African Americans in the pool of potential workers participating companies have to select from.

B. Eliminating Incentives to Discriminate

Another approach is to attempt to eliminate some of the incentives employers have for discriminating against jobless individuals. There are several reasons offered to explain why employers exclude unemployed individuals from job opportunities.¹⁸⁹ One is that because of large numbers of unemployed individuals seeking employment and the limited number of positions available, employers use long-term unemployment as a filter to easily narrow the field of viable candidates.¹⁹⁰ Another reason is that employers presume that people currently employed likely have a stronger work ethic.¹⁹¹

While these are very troubling reasons for excluding well-qualified applicants from consideration, they are valid reasons. They are valid in the sense that they make an employer's burden in the hiring process much lighter. In order to deter employers from utilizing this

188. Although race neutral programs aimed at unemployment discrimination inherently benefit African Americans because of their disproportionate representation among the unemployed, the benefit of programs tailored to African Americans would be that the programs would be more able to follow black cultural norms, making individuals in the program more comfortable ultimately allowing blacks to better benefit from such a program.

189. NAT'L EMP'T LAW PROJECT, *supra* note 13, at 5; Claire Gordon, *Employer Explains Why He Won't Hire the Unemployed*, AOL JOBS (Oct. 12, 2012, 7:39 AM), http://jobs.aol.com/articles/2012/10/12/employer-explains-why-he-wont-hire-the-unemployed/?icid=maing-grid%7Cmain5%7Cd139%7Csec3_inkl&pLid=220022&a_dgi=aolshare_facebook.

190. NAT'L EMP'T LAW PROJECT, *supra* note 13, at 5.

191. *Id.*

convenient method of hiring discrimination, there must be an incentive that significantly outweighs the convenience. The proposed legislation in its current state does not adequately achieve that goal. These laws are not likely to subject employers to any serious penalties, and they do not offer anything to counter-balance the expenditure of time, energy, and resources that goes into carefully screening large numbers of applicants.

CONCLUSION

Discrimination against the unemployed is having a terrible effect on our society. Unemployment rates are at sustained highs, and it is well-settled that the longer an individual remains unemployed, the more likely the individual is to never re-enter the work force. With African Americans having an extremely disproportionate rate of unemployment compared to that of the general population, discrimination against the unemployed is having a *devastating* effect on the African American community. It is clear that employment discrimination is still a major issue in our country today. The standards the courts apply for plaintiffs and employers are extremely complicated. An attempt to apply these standards to a claim as ambiguous as discrimination based on unemployment status would be a disaster. Also, even the classes that have historically received protection based on the authority of Title VII have great difficulty prevailing in court. A private cause of action will not be able to solve the problem for the black community or the general population. Emphasis for solving this problem should be on harsher penalties for employers that expressly discriminate against the unemployed in job ads, more job training programs, more employer tax incentives for hiring the unemployed, and programming specifically tailored to the needs of African Americans.

Whether or not these suggested measures are considered, at the very minimum it is important that the problem of unemployment discrimination be addressed. It must be addressed not only as it pertains to the community in general, but it must also be addressed based on the disproportionate effect it has on the black community. The African American community has a special interest in finding a viable solution. It is more than just jobs on the line; it is the future of the black community that is in jeopardy.

