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VOLUME 58

• ISSUE 1

• FALL 2014

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SPECIAL TRIBUTE ISSUE
TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

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SPECIAL TRIBUTE FOR THE 50TH ANNIVERSARY OF THE CIVIL RIGHTS ACT OF 1964

LETTER FROM THE EDITOR-IN-CHIEF

BY CADENE A. RUSSELL

Founded in 1955, the inaugural issue of the *Howard Law Journal* was published just one year after the landmark decision of *Brown v. Board of Education*. Rooted from its inception in a commitment to justice and equality, devoted to the ideals of *Brown*, and consistent with the mission of the law school, the *Journal* was dedicated to promoting the civil and human rights of all people. Today, fifty-nine years later, the *Howard Law Journal* membership continues to be committed to the purpose of its founding. Of the multitude of civil rights issues to which Howard University School of Law and the *Journal* are devoted, this issue is published in recognition of the enactment of Title VII of the Civil Rights Act of 1964. Thus, it is with great pride that I share with you Volume 58, Issue 1 of the *Howard Law Journal*.

This year marks the 50th Anniversary of the Civil Rights Act of 1964—a monumental decision which outlawed discrimination based on race, color, religion, sex, or national origin. During the 1950s and 1960s, while many people fought for social justice in the midst of the Civil Rights Movement, men, women and children still labored against socioeconomic disparities, the relegation of African Americans to “black only” establishments, the effects of forced segregation in public schools, discrimination by government agencies, and unfair treatment in employment practices. Understanding this plight, President John F. Kennedy voiced his support for a comprehensive civil rights bill in a nationally televised speech in 1963. Then, signed by President Lyndon B. Johnson on July 2, 1964, the Civil Rights Act was enacted for the very purpose of guaranteeing equal treatment of all Americans.

With the enactment of the Civil Rights Act, officials in the highest capacity of the U.S. government realized what law students and legal practitioners rising from the ranks of Howard University School of Law have

always understood: it was not merely enough to just open the floodgates of opportunity. “All our citizens must have the ability to walk through those gates. . . [T]his is the next and the more profound stage of the battle for civil rights. We seek not just freedom, but opportunity. We seek not just legal equity, but human ability; not just equality as a right and a theory, but equality as a fact and equality as a result.” President Johnson acknowledged this during his speech at Howard University in 1965.

Title VII of the Act encompasses numerous safeguards against discrimination in employment for Americans across the country. In particular, the law prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin. Title VII’s protections extend to (1) recruiting, hiring and advancement, (2) harassment and a hostile work environment, (3) compensation, conditions and privileges of employment, (4) segregation and classification of employees, and (5) retaliation by employers for an employee’s opposition to discrimination in the workplace. This legislation gives Americans the ability and the freedom to work without the unwanted stigmas that were fought against during the Civil Rights Movement and thereafter.

With this in mind, we begin this issue of Volume 58 with *Discrimination Law’s Dirty Little Secret: The Equal Opportunity Sexual Harasser Loophole*, where Professor David R. Cleveland discusses what has been termed the “equal opportunity harasser loophole.” This loophole is an understanding that while Title VII prohibits workplace harassment “based on sex,” this ban does not apply to a harasser who sexually harasses men and women equally and who fails to actually discriminate based on sex. Professor Cleveland explores various federal court interpretations of Title VII as embracing sexual harassment claims, and argues that the equal opportunity loophole presents a lingering weakness in the employment of an anti-discrimination regime of federal law, which requires legislative action.

Next, Sha-Shana Crichton, Professor of Law at Howard University School of Law, addresses gender based discrimination in *The Incomplete Revolution: Women Journalists - 50 Years After Title VII of the Civil Rights Act of 1964, We’ve Come A Long Way Baby, But Are We There Yet?*. In analyzing issues that women journalists have faced in the workplace over the last fifty years, Professor Crichton explores the gender gap in the media industry through examining gender equality laws. Professor Crichton also discusses various lawsuits of the 1970s and argues that while the resulting affirmative action plans motivated male-dominated newsrooms to change their old policies and institute new policies that favor gender equality, the change was only temporary. Professor Crichton attempts to answer the ulti-

mate question: how do we get to a place where a woman has equal opportunity in the workplace, where her level of access is based not on her sex but on her ability?

In Professor Ediberto Roman's *Love and Civil Rights*, Professor Roman addresses the state of mind needed to acknowledge and understand a Title VII claim, and embraces the analytical value of human understanding, including empathy, which is applicable within the context of accepting a Title VII claim. He argues that what is missing in contemporary legal discourse is the analytical tool and force of empathy, which is an emotion that assists us in understanding our surroundings. Professor Roman proposes that it is empathy and human understanding that allows members of society to listen, understand and agree with the causes of many disregarded groups such as African Americans during the 1960s, members of the LGBT community in the 1990s, and young undocumented youth today.

In Professor Khaled A. Beydoun's *Antebellum Islam*, he analyzes Title VII from the perspective of race and religion. Professor Beydoun discusses the marginalization of a particular group of people—Muslim Americans—as victims of racial and religious profiling and violence following the September 11 terrorist attacks on the United States. Professor Beydoun also addresses how the identity of Black American Muslims has been erased from this history. He argues that the omission of Muslim slaves from legal scholarship has undermined the focus on Black American Muslims as a specific community, and is largely due to the legal segregation of Black and Muslim identity during the Antebellum Era.

In addition to the important work surrounding Title VII from various law school faculty across the country, we are pleased to present diverse scholarship by student editors of the *Howard Law Journal* that discuss topics ranging from legal education to criminal law and civil procedure. First, in *Leaving No Law Student Left Behind: Learning to Learn in the Age of No Child Left Behind*, Christopher W. Holiman, a Senior Notes & Comments Editor, explores the impact of various teaching and education styles in law schools on student education and the learning process. Mr. Holiman argues that bar passage rates among law schools may improve and law students may effectively develop legal skills necessary to become proficient legal practitioners if law professors and administrators account for the different learning styles and experiences of students who matriculated during the era of the No Child Left Behind Act of 2001.

Next, in my very own Comment entitled *When Justice is Done: Expanding a Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of Brady v. Maryland*, I explore a well-established

legal concept as defined in *Brady v. Maryland* which requires prosecutors to disclose evidence that is material to a defendant's guilt or punishment, and I question whether a prosecutor's affirmative duty to disclose *Brady* evidence is being accomplished where there still continues to be some violations of the *Brady* doctrine. This Comment discusses the current remedies for defendants who have been wrongfully convicted due to these violations. Finally, this Comment argues that unrestrained *Brady* violations are caused by a lack of effective deterrence of prosecutor and law enforcement misconduct, and proposes a multi-fold approach to addressing *Brady* to safeguard against these constitutional violations.

Finally, Managing Editor Shakera M. Thompson, in *Rule 12(b)(6) and the Hurdle it Imposes for Gender Discrimination and Hostile Work Environment Sexual Harassment Claims*, explores hostile work environment sexual harassment claims and the policy implications of a proposed heightened pleading standard as set forth in *Bell Atlantic v. Twombly* and *Conley v. Gibson*. Ms. Thompson defines the contours of the evolution of the pleading standard for facts necessary to withstand a Rule 12(b)(6) motion and provides proposed solutions and alternatives to the heightened standard imposed by *Twombly*.

We are tremendously proud to share this issue with you. President Barack Obama once stated that the Civil Rights Act of 1964 has opened the "doors of opportunity for millions of Americans." However, discrimination based on race, color, religion, sex, or national origin in the workplace remains a present-day civil rights issue. President Obama, along with Presidents Kennedy and Johnson, remind us that we must continue to enact laws and promote legal scholarship that challenges the current rule of law. We must likewise encourage legal practitioners, academicians, and law students alike to be steadfast in our commitment to improving workplace equality. On behalf of the members of the *Howard Law Journal*, thank you for your continued support of our legal scholarship spanning these nearly sixty years. I truly hope Issue 1 of Volume 58 is both academically stimulating and enriching.

Cadene A. Russell
Editor-in-Chief
2014-2015

Discrimination Law's Dirty Secret: The Equal Opportunity Sexual Harasser Loophole

DAVID R. CLEVELAND*

ABSTRACT

Title VII prohibits workplace harassment “based on sex.” But this ban does not apply to an equal opportunity harasser—someone who sexually harasses men and women equally. Because “sex” as used in Title VII means male or female, a true equal opportunity harasser fails to discriminate based on sex and does not trigger the statute. The troubling truth is that, under Title VII, more harassment can actually yield less liability.

Commentators deny this equal opportunity harasser loophole exists, or declare it a dead or dying concept. Others claim it can be avoided by redefining well-established legal concepts. This is wishful thinking. Federal courts of appeals overwhelmingly accept and apply the equal opportunity harasser concept as a bar to liability. The relevant legal terms are too firmly established in Title VII jurisprudence to be redefined to eliminate the loophole.

Because re-interpretation cannot close this loophole, it presents a fundamental problem for using Title VII as a tool for eliminating sexual harassment. Only statutory amendment or new legislation can remedy it.

* Associate Professor of Law, Valparaiso University Law School. Professor Cleveland is grateful for the perspectives and input of his colleagues at Valparaiso, including Professors Rosalie Levinson, JoEllen Lind, Robert Knowles, D.A. Jeremy Telman, and David Herzig; his former colleagues at Nova Southeastern University: Professors Areto Imoukhuede and Olympia Duhart; and the participants in the Valparaiso University Law School's Regional Workshop, including Professors Scott Gerber, Diedre Keller, Shelley Cavalieri and Robert Katz. In addition, he would like to thank Christina P. Lehm for her outstanding research assistance and thoughtful comments and Karen Koelemeyer for her assistance in the technical preparation of this Article.

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INTRODUCTION

An equal opportunity harasser, one who sexually harasses both men and women equally, can come in several forms. Imagine a workplace run by three supervisors, each of whom is sexually inappropriate toward employees. The first supervisor directs inappropriate sexual conduct and advances toward both male and female employees equally out of sexual desire for individuals of both sexes. The second supervisor directs vulgar and belittling sexual comments and conduct toward all employees as a way to emphasize and enforce his power over them. The third supervisor, like Michael Scott from *The Office*, is simply ignorant of sexual boundaries and mores, and makes sexually inappropriate comments indiscriminately to individuals and groups, including clumsy attempts at flirting and joking, crude observations of a sexual nature, and other odd, but not malicious, conduct.

Each supervisor's conduct would qualify as sexual harassment under Title VII if directed at a man or a woman (or all men or all women) but because both sexes are treated equally, each harasser has a strong argument that his conduct is not "because of sex" and is therefore not discrimination. The perverse truth is that harassing more people leads to less liability under Title VII. Whether driven by desire, animus, or ineptitude, sexual harassment that would be prohibited against a single sex becomes permissible when directed at individuals of both sexes.

This loophole exists because Title VII is anti-discrimination legislation. It is not intended to regulate civility or sexual conduct as such. Sexual harassment violates the statute only when it is discriminatory, and a true equal opportunity harasser fails to discriminate based on sex.¹

This is not just a theoretical problem. Federal courts have repeatedly applied this loophole to reject a harasser's liability under Title VII.² The federal appellate courts are unable to close this loophole because of the U.S. Supreme Court's emphasis on the discrimination requirement and because the operative terms—such as “sex,” “discrimination,” and “based on”—have well-settled definitions in the Title VII context.³ Though they may dislike the results, the courts of appeals are unable to close the equal opportunity harasser loophole. However counter-intuitive or counter-productive the loophole is, it exists as a theoretical problem and practical defense in Title VII law.⁴

Though some commentators perceive the equal opportunity harasser concept as illusory or vanishing, the federal appellate courts have largely accepted it.⁵ The judicial inability to close the loophole calls out for legislative revision of Title VII or additional anti-discrimination legislation to avoid injustice and mounting difficulty in dealing with modern workplace sexual discrimination issues.⁶ This Article

1. Called variously “equal opportunity,” “indiscriminate,” or “bisexual” harassment. The last two are subsets of the first. Bisexual harassment refers to the narrow set of cases where the equal harassment is motivated by sexual desire. Indiscriminate harassment refers to cases where the harasser's conduct is inflicted on the entire workplace, or at least broadly, and without regard to whether males or females are being affected. Equal opportunity harassment refers to both of these subsets of conduct as well as any instance where a harasser harasses equally regardless of reason. This Article uses “equal opportunity” because it seeks to discuss the entire panoply of equal harassment.

2. *See infra* Section III.A.

3. *See infra* Section III.A.

4. *See, e.g.,* *Holman v. Indiana*, 24 F. Supp. 2d 909, 913–15 (1998), *aff'd* 211 F.3d 399, 403 (7th Cir. 2000) (ruling equal opportunity harassment is not “discrimination ‘because of sex’” as required for Title VII liability). Only the Ninth Circuit plainly disagrees with this principle. *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463–64 (9th Cir. 1994) (stating that even where a harasser “used sexual epithets equal in intensity and in an equally degrading manner” against both male and female employees, employees of both sexes may have a claim under Title VII).

5. *See infra* Section III. It is this popular narrative that the equal opportunity harasser is mythical, minute, or dead that makes it fairly dubbed a “secret,” when, in fact, it is a hole in the center of Title VII's anti-discrimination protection.

6. One author has suggested that “[c]ontemporary discrimination law is in the midst of a crisis of methodological and conceptual dimensions.” Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *YALE L.J.* 728, 731 (2011); *see also* Meredith Render, *Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 *HARV. J.L. & GENDER* 99, 104–05 (2006) (questioning whether “men” and “women” are relevant categories given modern feminist deconstructive and queer theory disaggregation of birth-sex and substan-

demonstrates that the loophole exists as not only a theoretical but also a practical matter, and it makes the case that judicial resolution is impossible and legislative resolution is needed.

The scope of Title VII has expanded since its passage to prohibit not only discriminatory hiring and corporate policies but also sexual harassment.⁷ Sexual harassment can be visited equally on members of both sexes in a way that sex-based hiring discrimination cannot, and so, courts have struggled with how to treat an “indiscriminate” or “equal opportunity” harasser.⁸ Courts hewing close to the plain meaning of the statute have found that an “equal opportunity harasser” does not implicate Title VII, but a few, taking a more purposivist approach, have rejected that reasoning.⁹ Other courts have attempted to avoid the question by perceiving a factual distinction in how harassment was differentially applied toward, or even experienced by, men and women, an approach that may resolve a single case but does not answer the doctrinal question.¹⁰ Most courts have accepted, however

tive gender qualities); Marlisa Vinciguerra, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1734 (1989) (expressing concern that the newer hostile work environment claim is muddling or obfuscating the more subtle *quid pro quo* harassment claims); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 441 (2000) (“The embarrassment that bisexuality causes sexual harassment jurisprudence is clear.”).

7. Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 814 (2002); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1452 (1984) (noting the initial narrow approach of course and the increasing, but not definitive, use of a broader conception of sexual discrimination).

8. See *infra* Section III (demonstrating circuit court efforts to apply the doctrine); see also Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101, 127 (2004) (examining six methods courts use to avoid the apparent gap in coverage of Title VII).

9. Compare *Holman*, 24 F. Supp. 2d at 916, *aff'd sub nom.*, 211 F.3d 399 (“Often the court is placed in the position of being the mediator between the reality of legal doctrine and the dictates of common sense. The court cannot deny that this is such a case. Certainly, the court is cognizant that to decide as it does creates an anomalous result in sexual harassment jurisprudence which leads to the questionable result that a supervisor who harasses either a man or a woman can be liable but a supervisor who harasses both cannot be. While the court finds that the equal opportunity harasser escapes liability in the present case, it is not condoning the existence of such conduct in the workplace. Simply put, the court concludes that, under current Title VII jurisprudence, conduct occurring equally to members of both genders cannot be discrimination ‘because of sex.’”) with *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 n.1 (D. Wyo. 1993) (quoting Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 352 (1990)) (rejecting the premise of equal opportunity harassment as contrary to Title VII’s purpose of remedying harassment, stating “if sexual harassment is sexual discrimination under Title VII, why are some perpetrators insulated? A savvy harasser need only note this anomaly and become an equal opportunity harasser . . .”).

10. *Steiner*, 25 F.3d at 1463–64 (rejecting the concept of an equal opportunity harasser in dicta); *EEOC v. Nat’l Educ. Ass’n*, 422 F.3d 840, 845–46 (9th Cir. 2005) (holding that the reaction of the victim can determine whether the conduct is “because of sex”); *Davis v. Cal. Dep’t of Corr. & Rehab.*, 484 F. App’x 124, 128 (9th Cir. 2012) (finding where female defendant’s subjec-

begrudgingly, that the loophole exists. Yet due to the counter-intuitive nature of the doctrine, commentators erroneously claim the doctrine is all but dead.¹¹

Part I of this Article recounts the origin and legislative history of Title VII's sexual discrimination provision. Part II explores how courts came to interpret Title VII as embracing sexual harassment claims. Part III thoroughly examines the relevant circuit rulings and reveals the persistence and broad application of the equal opportunity harasser exception.¹² Part IV argues that the equal opportunity loophole presents a lingering weakness in the federal law's employment anti-discrimination regime, a weakness that requires legislative action. The equal opportunity harasser doctrine is overwhelmingly accepted and applied. Far from being dead or dying, it is a doctrinally sound and practically applicable concept. The courts' grudging acceptance of this inescapable doctrine highlights the need for specific workplace harassment legislation and foreshadows greater problems on the horizon as Title VII law deals with more complicated issues of sex and sexual orientation.

I. THE ORIGIN OF TITLE VII'S SEXUAL DISCRIMINATION PROVISION

The Title VII prohibition on sexual discrimination in the workplace began as a single word added to the Civil Rights Act of 1964 and has expanded to a broad tool for remedying sex-based discrimination in the workplace. Representative Howard W. Smith, an outspoken and staunch opponent of the legislation, added the inclusion of "sex"

tive reaction to the harassment was different from her male colleagues rendered the conduct different and discriminatory).

11. See, e.g., John D. Bible, *The "Equal Opportunity Harasser": The Slow Demise of a Strange Concept?*, 61 LAB. L.J., no. 2, Summer 2010 (declaring a "discernible trend in recent cases toward rejecting, or at least figuring out a way to circumvent, this defense"); 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 5:41 (2014) ("[T]he weight of current authority now rejects the equal opportunity harasser defense."); Corporate Educational Services, *"Equal Opportunity" Harasser Defense Crashes and Burns Again*, 8 IOWA EMP. L. LETTER, no. 3, July 2001, at 3 (accepting the "theoretical correctness" of the doctrine but arguing it is exceedingly rare and universally inappropriate). But see David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993-2005*, 30 BERKELEY J. EMP. & LAB. L. 461, 493 (2009) (counting the number of federal appellate decisions with lengthy discussions of, or holdings on, the equal opportunity harasser from 1993-1997 and 1999-2005 to be 167).

12. See *infra* Section III.

as a prohibited basis for discrimination to Title VII.¹³ Although his reasons for adding “sex” to the Act are the subject of some historical debate,¹⁴ the meaning of the term “sex” in the bill has consistently meant an individual’s sex rather than “sex” as an activity.¹⁵ When Byrd’s amendment and the bill as a whole passed, the prohibition of conduct based on sex became law.¹⁶

While “sex” was a late addition, the term “discrimination” was more fundamental and long-standing in the bill. But its meaning was subject to some debate.¹⁷ Opponents of Title VII expressed concern that because the term “discrimination” was not defined in the bill, the administration would broadly interpret it to prohibit any numerical imbalance in the racial composition of an employer’s work force.¹⁸ The bill’s proponents disagreed and stressed that the discrimination outlawed by the bill referred only to a distinction or difference in treatment because of one’s race, sex, religion, or natural origin.¹⁹ Senators Clark and Case, who were bipartisan floor captains of Title VII

13. 110 CONG. REC. 2577–84 (1964). The bill was co-sponsored and championed by Representative Martha Griffith (D-MI), a fact often forgotten in the controversy surrounding Representative Smith’s motivations.

14. Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 138 (1997) (finding the insincere inclusion story “so prevalent that it is almost uniformly followed at the district, appellate, and supreme court levels” and noting that “[a]mong legal commentators, the conclusion that Congress amended sex discrimination to Title VII’s list of prohibited discriminatory bases as a joke is so widespread that it has become ‘the standard interpretation of the statutes’s history’”).

15. It is clear that “sex” as used in the original amendment and in subsequent case law refers to the state of being a male or female. Sex discrimination need not be sexual, in the sense of being amorous or prurient, to be actionable. See 110 CONG. REC. 2577–84 (1964); Charles R. Calleros, *The Meaning of “Sex”: Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55, 57–58 (1995).

16. Dawn Macready, *Statutory Construction as a Means of Judicial Restraint on Government: A Case Study in Bisexual Harassment Under Title VII*, 27 OHIO N.U. L. REV. 659, 663 (2001). Despite its obvious purpose to protect women, Title VII by its terms also protects men from sex-based discrimination. In fact, while of course, “[t]he lion’s share of sexual harassment situations features the man as the harasser and the woman as the harassee,” neither Title VII nor the EEOC Guidelines require a certain gender of harasser or harassee. *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1353–54 (7th Cir. 1995); see also Martha Chamallas, Essay, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN’S L.J. 37, 38 n.3 (1993) (discussing EEOC statistics).

17. *United Steelworkers v. Weber*, 443 U.S. 193, 231–52 (1979) (Rehnquist, J., dissenting); see also H.R. REP. NO. 88-914, at 68 (1964), reprinted in 1964 U.S.C.C.A.N. 2431, 2436.

18. The debate on this issue preceded the introduction of “sex” as a protected class, but the opponents’ arguments apply perforce to this issue as well.

19. See, e.g., 110 CONG. REC. 5423 (1964) (remarks of Sen. Humphrey); 110 CONG. REC. 7477 (1964) (Bipartisan Civil Rights Newsletter submitted by Title VII proponents); 110 CONG. REC. 12617 (1964) (remarks of Sen. Muskie).

in the Senate, submitted an interpretative memorandum that confirmed this view:

It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by [Title VII] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin.²⁰

The requirement of discrimination based on sex (or another protected classification) is plainly stated in the bill itself. The contours of Title VII's sexual discrimination prohibition have developed over time, but this requirement remains fundamental to sexual discrimination claims.²¹

For the first several years after its enactment, Title VII was "narrowly applied to prohibit women from being shut out of certain segments of the workforce because of their sex."²² The guiding principle seemed to be promoting "equal access to the job market for both men and women" with little concern for their actual employment conditions.²³ This narrowness was short-lived, however, as the law was soon held to prohibit sexual harassment.²⁴ Despite some initial skepticism by federal district courts,²⁵ the circuit courts accepted sexual harass-

20. 110 CONG. REC. 7213 (1964).

21. MacKinnon, *supra* note 7, at 815 ("It was judicial engagement with the experiences of sexually harassed women presented to courts on an equality theory, in phenomenological depth and one case at a time, that made it happen. In this real sense, sexual harassment law is a women's common law."); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 702 (1997); Andrea Meryl Kirshenbaum, "Because of . . . Sex": *Rethinking the Protections Afforded under Title VII in the Post-Oncale World*, 69 ALB. L. REV. 139, 143-44 (2005).

22. Kirshenbaum, *supra* note 21, at 139.

23. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971).

24. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) ("Congress was deeply concerned about employment discrimination founded on gender, and intended to combat it as vigorously as any other type of forbidden discrimination. . . . [B]latantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964."); H.R. REP. NO. 92-261, at 4-5 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2140 ("Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.") *see also* *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 n.2 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *Calleros*, *supra* note 15, at 57.

25. *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) ("[Sexual harassment] is not, however, sex discrimination within the meaning of Title VII even when the purpose is sexual."); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd on other grounds*, 600 F.2d 211 (9th Cir. 1979) (holding sexual harassment outside the scope of Title VII noting "flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction

ment as sexual discrimination under Title VII where plaintiffs demonstrated a company policy or permissiveness toward sexual harassment that discriminated against one sex.²⁶ During this time, the law's reach was further expanded to increase an employer's responsibility for the actions of others regardless of the employer's policies or knowledge.²⁷ Similarly, Title VII was read to prohibit not only *quid pro quo* sexual advances but also hostile work environment, same-sex, and sex-stereotyping harassment.²⁸

Throughout this development of Title VII, the requirement of discrimination based on sex has remained a central tenet. The statute provides that it is unlawful "to discriminate against any individual . . . because of such individual's . . . sex."²⁹ Including sexual harassment in Title VII jurisprudence has led to two difficulties that make the equal opportunity harasser loophole possible. First, it must be determined there was discrimination, and second, that the discrimination was because of the individual's sex. The former issue is often treated as an-

plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the Courts to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definable employee group."); *Williams v. Saxbe*, 413 F. Supp. 654, 661 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978) (holding summary judgment was inappropriate where plaintiffs alleged an employment policy permitting sexual discrimination but noting "[W]hat the statute is concerned with is not interpersonal [sic] disputes between employees"); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163-64 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) ("It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act. . . . [A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.").

26. *See, e.g., Corne v. Bausch & Lomb, Inc.*, 562 F.2d 55 (9th Cir. 1977) (vacating lower court rejection of sexual harassment as sexual discrimination); *Barnes*, 561 F.2d at 1001 (MacKinnon, J., concurring) (examining at length the common law basis for vicarious liability of employers and finding no basis for such liability in the common law and very narrow statutory exception allowing it under Title VII); *Tomkins*, 422 F. Supp. at 556-57 (holding employer liable for its response to reported harassment but not for the employee's harassment under principles of *respondeat superior*).

27. *Miller*, 600 F.2d at 213 (holding employer liable for actions of a supervisor under *respondeat superior* even when the conduct violated employer policy); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 74-75 (1986) (holding the employer liable for actions of a supervisor even when the supervisor was acting without authority and the employer had no actual notice of the harassment).

28. *See Walsh, supra* note 11, at 494 ("[E]qual opportunity harassment was either more common following 1998 or more likely to attract judicial attention. The latter seems more probable."). *See generally Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (permitting Title VII claims based on same-sex harassment); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (permitting Title VII claims based on sex-stereotyping); *Meritor*, 477 U.S. 57 (permitting Title VII claims based on hostile work environments).

29. 42 U.S.C. § 2000e-2(a) (2012).

swered by showing employment detriment or severe harassment. The latter issue has, since the earliest opinions on the issue, been treated as a “but for” test: liability exists only when the conduct would not have occurred but for the victim’s sex.³⁰

This “but for” test presents a doctrinal problem, however. If there is a requirement that the conduct would not have occurred but for the victim’s sex, then a harasser who assails both sexes avoids the statute’s ambit.³¹ This so-called “equal opportunity harasser” bears less liability despite engaging in more harassing conduct. From one perspective, this is galling³² and “so counterintuitive that commentators who usually seem far apart on the political spectrum—such as Robert Bork and Catherine MacKinnon—can agree that this result is anomalous.”³³ However, from another perspective, it is exactly what the anti-discrimination statute and its interpretive judicial opinions require.³⁴

Despite its increasingly broad reach, courts consistently remind litigants that Title VII is not a general workplace code of conduct.³⁵ In

30. *Barnes*, 561 F.2d at 990.

31. *See, e.g., id.* (noting that under a “but for” approach, male employees would not be subject to the type of harassment as their female counterparts, therefore gender is an important factor when discussing the purviews of Title VII).

32. Later cases used strong language to criticize *Barnes*’ early enunciation of the loophole, but none provided any reasoned argument against its validity. *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (“Only by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination where a bisexual supervisor harasses men and women alike.”); *Ryzek v. Guest Servs., Inc.*, 877 F. Supp. 754, 761 n.6 (D.D.C. 1995) (observing in dicta, while avoiding the question, the court noted the “*Barnes* court’s interpretation of Title VII would lead to bizarre results and some rather provocative trial testimony”); *see also* Macready, *supra* note 16, at 675 (“The idea that bisexual harassment is not actionable because both sexes are treated equally, albeit badly is absurd on its face.”).

33. Yoshino, *supra* note 6.

34. *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Scalia, Bork, and Starr, dissenting from denial of rehearing en banc) (suggesting that the equal opportunity harasser loophole is unavoidable given the “because of sex” requirement and that this indicates that Congress did not intend Title VII to extend to sexual harassment); *Holman*, 24 F. Supp. 2d at 916, *aff’d sub nom. Holman*, 211 F.3d 399 (“Certainly, the court is cognizant that to decide as it does creates an anomalous result in sexual harassment jurisprudence which leads to the questionable result that a supervisor who harasses either a man or a woman can be liable but a supervisor who harasses both cannot be. . . . Simply put, the court concludes that, under current Title VII jurisprudence, conduct occurring equally to members of both genders cannot be discrimination ‘because of sex.’”); *see generally*, *Bifulco v. United States*, 447 U.S. 381, 401 (1980) (Burger, J., concurring) (“Our compass is not to read a statute reach what we perceive—or even what we think a reasonable person should perceive—is a ‘sensible result’; Congress must be taken at its word unless we are to become statute revisers.”).

35. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2455 (2013) (noting Title VII’s limitation to severe conduct as opposed to a general civility code); *Oncale*, 523 U.S. at 80–82 (1998) (setting forth several safeguards in Title VII jurisprudence that guard against creation of a “general civility code for the American workplace”); *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 467 (6th Cir. 2012) (“Title VII is not ‘a general civility code for the American workplace.’ Instead, the focus in a sexual harassment claim is ‘whether members of one sex are exposed to disadvan-

recognizing hostile work environment and same-sex harassment claims, the Supreme Court noted that not every uncomfortable workplace supports a claim under Title VII.³⁶ The requirement is that the harassment be discrimination because of sex.³⁷ Since the earliest cases accepting sexual harassment as sexual discrimination under Title VII, courts have not focused on the desires or intentions of the harasser, but on whether women were treated differently than men.³⁸ Differential treatment is the *sine qua non* of discrimination, but it is also the component missing from the equal opportunity harasser scenario. The concept that makes sexual harassment a subset of sexual discrimination logically excludes the conduct of the equal opportunity harasser.

The Supreme Court in *Meritor Savings Bank, FSB v. Vinson* established that sexual harassment was sex discrimination and put the focus squarely on the issue of differential treatment regardless of the harasser's intention.³⁹ Similarly, in *Oncale v. Sundowner Offshore Services, Inc.*, even as the Supreme Court explicitly permitted same-sex harassment claims, it affirmed the requirement that the conduct be

tageous terms or conditions of employment to which members of the other sex are not exposed.' In other words, the conduct of jerks, bullies, and persecutors is simply not actionable under Title VII unless they are acting because of the victim's gender.") (internal citations omitted); Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1301–02 (11th Cir. 2007) (stating the requirement that harassment be "based on sex" prevents Title VII from becoming a "general civility code"); Berry v. Delta Airlines, Inc., 260 F.3d 803, 808 (7th Cir. 2001) ("Title VII proscribes only workplace discrimination on the basis of sex, race, or some other status that the statute protects; it is not a 'general civility code' designed to purge the workplace of all boorish or even all harassing conduct.").

36. *Oncale*, 523 U.S. at 80 ("Respondents and their amici contend that recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace. But . . . Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] . . . because of . . . sex'"); *Meritor*, 477 U.S. at 67 ("[N]ot all workplace conduct that may be described as 'harassment' [is actionable under] Title VII."); see also Kristin H. Berger Parker, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment*, 102 Nw. U. L. REV. 945, 949 (2008) (noting that ambient harassment such as the indiscriminate display of pornography or use vulgar language is traditionally less likely to support a Title VII claim).

37. 42 U.S.C. § 2000e-2 ("It shall be an unlawful employment practice for an employer (1) to . . . discriminate against any individual . . . because of such individual's . . . sex."); *Oncale*, 523 U.S. at 81 ("Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimin[ation] . . . because of . . . sex.'"); *Meritor*, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"); see also *Oncale*, 523 U.S. at 81 (Thomas, J., concurring) ("I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'"). This requirement is sometimes phrased as "based on sex" or "on the basis of sex." These terms are synonymous. See 42 U.S.C. § 2000e(k).

38. L. Camille Hebert, *Sexual Harassment as Discrimination "Because of . . . Sex": Have We Come Full Circle?*, 27 OHIO N.U. L. REV. 439, 446 (2001).

39. *Meritor*, 477 U.S. at 65–67.

both “discrimination” and “because of sex.”⁴⁰ The Court took particular care to emphasize the requirements of discrimination and sex-based conduct: “Title VII prohibits ‘discriminat[ion]. . . because of . . . sex’ in the ‘terms’ or ‘conditions’ of employment.”⁴¹ Responding to arguments from Respondents and Respondent-favorable *amici*, who claimed recognizing liability for same-sex harassment would transform Title VII into a general civility code, the Court made clear that these requirements present a limitation on the scope of Title VII:

We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”⁴²

The Court was so adamant about this point that some commentators expressed concern that the Court had heightened the requirement and made claims more difficult for plaintiffs.⁴³ A recent study suggests, however, that, while the “because of sex” element has gained greater prominence after *Oncale*, the actual outcomes for plaintiffs have changed very little.⁴⁴ Still, the Court’s emphasis on requiring discrimination because of sex brings into strong focus the problem of the equal opportunity harasser. These are the precise characteristics that equal treatment undermine, and, as commentators have observed, “the Court’s language in *Oncale* provides at least tangential support for the equal opportunity harasser defense.”⁴⁵

40. *Oncale*, 523 U.S. at 80–81 (“A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”).

41. *Id.* at 79–80 (quoting in part 42 U.S.C. §2000e) (ellipses, italics, and quotations in *Oncale*).

42. *Id.* at 80 (quoting in part *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

43. See Walsh, *supra* note 11, at 466–69 (collecting scholarly commentary expressing a general belief that *Oncale* strengthened the “because of sex” requirement to the detriment of plaintiffs).

44. See *id.* at 492 (“Plaintiffs encountered greater difficulty showing discriminatory intent in post-1998 cases featuring equal opportunity harassers, same-sex harassers, and harassers with some type of personal animus toward the plaintiff. On the other hand, plaintiffs fared slightly better or no worse in cases where a substantial portion of the harassment was not explicitly sexual in nature, the harassment involved sexually charged surroundings, or a credible neutral motive was advanced for a tangible employment action taken against the plaintiff.”).

45. Allan H. Weitzman, *Employer Defenses to Sexual Harassment Claims*, 6 DUKE J. GENDER L. & POL’Y 27, 43 (1999). A pair of scholars have gone further to state that: “In *Oncale*, the

Throughout the development of Title VII's sexual discrimination provision, the loophole for equal opportunity harassers has persisted. Conduct toward victims of both sexes undermines any claim that the conduct was done "because of sex." It also undercuts the more fundamental requirement that there be discrimination.

II. EARLY EQUAL OPPORTUNITY HARASSMENT JURISPRUDENCE

The conceptual problem of how to deal with equal opportunity harassment has bedeviled Title VII jurisprudence since interpretation of the statute expanded into prohibiting sexual harassment.⁴⁶ Over the years, that problem has moved from hypothetical, to actual, to divisive. When faced with actual claims of equal treatment toward both sexes, federal courts are presented with a choice: accept the equal opportunity harasser exception as doctrinally inescapable, reject it as unsound policy, or avoid making that decision by finding factual distinctions to distinguish each case from a true equal opportunity harasser.⁴⁷

The problem of equal opportunity harassment was recognized early in the Title VII sexual harassment jurisprudence. In *Barnes v. Costle*, the court distinguished conduct by heterosexual supervisors towards members of the opposite sex and homosexual supervisors towards members of the same sex from "a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair."⁴⁸ In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.⁴⁹ Likewise, in *Bundy v. Jackson*, the court was presented with the argument that sexual harassment was not discrimi-

Supreme Court held that where sexual banter and indiscriminate sexual touching are directed at both genders, the conduct is not actionable." Mary Ann Connell & Donna Euben, *Evolving Law in Same-Sex Sexual Harassment and Sexual Orientation Discrimination*, 31 J.C. & U.L. 193, 222 (2004).

46. See generally MacKinnon, *supra* note 7.

47. See *infra* notes 64–68, 70–75, 85–59.

48. *Barnes*, 561 F.2d at 990 n.55.

49. *Id.* Because this case arose in an era when desire-based quid pro quo harassment was dominant and broader hostile work environment harassment was not yet recognized by courts, the term "bisexual harasser" rather than "equal opportunity harasser" was more apt. In modern jurisprudence, desire-based bisexual harassment is a subset of the broader class of equal opportunity harassment. See Yoshino, *supra* note 6, at 441 n.469 ("The bisexual harassment exemption is thus a subset of the equal opportunity harassment exemption.").

nation under Title VII because the sexes of the harasser and victim could change from one instance to the next.⁵⁰ It rejected this suggestion, but noted that while a supervisor who harasses men and women alike would evade the reach of the statute, it viewed that as a *reductio ad absurdum* argument.⁵¹

As sexual harassment law expanded beyond *quid pro quo* harassment into hostile work environment claims, the importance of sexual desire of the harasser lessened and disparate treatment became the primary determinant of whether the conduct was “because of sex.”⁵² However, the issue of a harasser who visits harassment upon both sexes equally remained a concern, albeit a hypothetical one. For example, while holding that hostile work environment claims constitute sexual discrimination under Title VII, the Eleventh Circuit in *Henson v. Dundee* noted how equal opportunity harassment fails to meet the “because of sex”⁵³ element and falls outside Title VII’s scope: “There may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, the sexual harassment would not be based upon sex because men and women are accorded like treatment.”⁵⁴ The court noted explicitly that, “[a]lthough the plaintiff might have a remedy under state law in such a situation, the plaintiff would have no remedy under Title VII.”

Each of these references, though stated in majority opinions, was merely dicta.⁵⁵ In each instance, the court attempts to use the possibility of a bisexual or equal opportunity harasser to demonstrate the logical limit of “because of sex.” One early opinion, a dissent from a denial of rehearing in the D.C. Circuit, goes further, using the hypothetical equal opportunity harasser to demonstrate the logical limit of Title VII as sexual harassment legislation.⁵⁶ Judge Bork writes:

Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as “discrimination.” Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly

50. *Bundy*, 641 F.2d at 942 n.7.

51. *Id.*

52. Hebert, *supra* note 38, at 447.

53. The Eleventh Circuit in *Henson* and other cases and commentators use “based on sex.”

54. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (internal citations omitted).

55. *Id.*

56. *Vinson*, 760 F.2d at 1333 n.7 (Stork, J., dissenting).

disapprove. The artificiality of the approach we have taken appears from the decisions in this circuit. It is “discrimination” if a man makes unwanted sexual overtures to a woman, a woman to a man, a man to another man, or a woman to another woman. But this court has twice stated that Title VII does not prohibit sexual harassment by a “bisexual superior [because] the insistence upon sexual favors would . . . apply to male and female employees alike.” Thus, this court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible. Had Congress been aiming at sexual harassment, it seems unlikely that a woman would be protected from unwelcome heterosexual or lesbian advances but left unprotected when a bisexual attacks. That bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender. If it is proper to classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary doctrines.⁵⁷

Judge Bork’s dissent expressed concern about the use of Title VII as a sexual harassment regulation and highlighted the equal opportunity harasser problem first noted nearly a decade before in *Barnes v. Costle*.⁵⁸ But no separate sexual harassment legislation was passed and the subsidiary doctrines of sexual harassment as sexual discrimination were not adjusted to address the issue. Instead, the equal opportunity harasser problem lingered as a doctrinal loophole in the heart of Title VII’s sexual harassment jurisprudence.⁵⁹

In the early 1990s, the federal courts faced their first real claims of equal opportunity harassment. In *Kopp v. Samaritan Health System, Inc.*, the employer Samaritan claimed the alleged harasser was hostile toward all employees, particularly when he perceived employee mistakes or mismanagement, and was not based on sex.⁶⁰ The

57. *Id.* (internal citation omitted).

58. *Id.* at 1331.

59. Throughout the existing opinions and commentary, the problem is variously called the equal opportunity “exemption,” “exception,” and “defense.” It is not a “defense” in the sense of being an affirmative defense; rather, it is a lack of a required element of the claim—that the discriminating conduct be because of sex. “Defense” is correct in the general sense of an argument interposed by the defendant to avoid liability. “Exemption” and “exception” seem more apt, generally, as long as one recognizes that this lack of reach of the statute is not intentional or necessarily consistent with its goals. Thus, terms like “doctrine,” “loophole,” and “problem” seem to this author more accurate. “Defense” will be used when reporting court decisions that use it and in the more colloquial sense.

60. *Kopp v. Samaritan Health Servs., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993).

Eighth Circuit held that the harasser's conduct toward men and women was quantitatively different as well as qualitatively different.⁶¹ Thus, this early case presented a defendant's claim of equal opportunity harassment, it did not present a factually-supportable equal opportunity harasser—one who treats both men and women equally, albeit badly.⁶²

The following year, the Ninth Circuit, in *Steiner v. Showboat Operating Co.*, also heard an appeal of summary judgment based on the equal opportunity harasser defense.⁶³ The supervisor (Trenkle) in *Steiner* made hostile comments toward men and women, but as in *Kopp*, the circuit court found those comments far more hostile toward women than men.⁶⁴ Trenkle's comments toward men, though derogatory and crass, were not related to their being men, but his comments toward Steiner and other female employees were female-specific pejoratives.⁶⁵ Again, this case failed to present a true equal opportunity harasser, though the *Steiner* court offered some dicta expressing skepticism about the viability of such a loophole: “[E]ven if Trenkle used sexual epithets equal in intensity and in an equally degrading manner against male employees . . . we do not rule out the possibility that *both* men and women working at Showboat have viable claims against Trenkle for sexual harassment.”⁶⁶ Much like the initial dicta involving hypothetical equal opportunity harassers in *Barnes* and *Bundy*, there is no analysis or support for this casual comment.⁶⁷

61. *Id.* (holding that the sexual harassment of female employees was more frequent and more aggressive, often involving physical contact and harm toward women as opposed to merely a raised voice of insult toward men).

62. *Compare Kopp*, 13 F.3d at 269 (finding conduct primarily directed at women) with *Engstrand v. Pioneer Hi-Bred Int'l, Inc.*, 946 F. Supp. 1390, 1404 n.13 (S.D. Iowa 1996), *aff'd* 112 F.3d 513 (finding that the record “supports the inference that Brewer was abusive primarily to men” and granting summary judgment regarding the female plaintiff's Title VII claims) and *Lenzen v. Workers Comp. Reinsurance Ass'n*, 705 F.3d 816, 822 (8th Cir. 2013) (“By contrast, if Smith was a supervisor who indiscriminately berated the work performance of all her subordinates, as alleged, she may have been guilty of poor management but was not guilty of unlawful discrimination against a protected segment of that work force.”).

63. *Steiner*, 25 F.3d at 1462–63.

64. *Id.* at 1464.

65. *Id.*

66. *Id.*

67. At most, *Steiner* points to circuit authority, *Ellison v. Brady*, 924 F.2d 872, 878–79 (9th Cir. 1991) to suggest the standard of a “reasonable woman” and that “conduct that many men consider unobjectionable may offend many women.” But nothing about that point compels or even supports a rejection of the equal opportunity harasser exception, and the “reasonable woman” standard was implicitly rejected in favor of a “reasonable person” standard in *Harris*, 510 U.S. at 21 (applying a “reasonable person” standard); *see also Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir. 1996) (“[T]he Supreme Court has employed the ‘reasonable person’

A more direct opposition to the idea of an equal opportunity harasser was made in the District of Wyoming case, *Chiapuzio v. BLT Operating Corp.*⁶⁸ Faced with claims by four employees, two male and two female, that their supervisor, Eddie Bean, had created a hostile work environment, the employer defended by claiming that Bean's actions were not discrimination based on sex.⁶⁹ The court rejected this defense stating, "this Court reasons that the equal harassment of both genders does not escape the purview of Title VII in the instant case."⁷⁰ To support this reasoning, the court noted that the harasser's comments were gender-driven, intended to demean, and would suffice in separate suits by each plaintiff against the employer.⁷¹ None of these reasons provide a compelling basis for rejecting the equal opportunity harasser exception.

First, while the comments were gender-driven, in the sense that they were sexual in nature and different words were offered to the male and female employees, that supports only the distinction offered in *Kopp* and *Steiner*, that the conduct was factually different and equal harassment was not present.⁷² Second, while Bean's comments may have been intended to demean, the motivation for the conduct is not relevant under modern Title VII jurisprudence.⁷³ Harassment may be driven by disparagement, desire, or no identifiable motivation at all; what matters for liability is whether the treatment is discriminatory.⁷⁴ That is, whether individuals of one sex were subjected to conditions the other sex was not.⁷⁵ Finally, the court was plainly mistaken in its supposition that plaintiffs' cases would fare any better individually in separately filed cases.⁷⁶ The defendant in each case would merely ad-

standard in a hostile work environment case. . . . Courts of appeals addressing the issue after *Harris* have used a 'reasonable person' standard.").

68. *Chiapuzio*, 826 F. Supp. at 1337-38.

69. *Id.* at 1336 ("Defendant BLT essentially argues that Bell harassed both male and female employees alike and, therefore, he could not have discriminated against the plaintiffs at bar based on gender.").

70. *Id.* at 1337 (including both limiting language—"in this case"—but also offering a fair broad attack on the premise of an equal opportunity harassment exception to Title VII liability).

71. *Id.* at 1336-38.

72. *See Kopp*, 13 F.3d at 269; *see also Steiner*, 25 F.3d at 1463.

73. *See Chiapuzio*, 826 F. Supp. at 1336. *But see Oncale*, 523 U.S. at 79-80.

74. *Oncale*, 523 U.S. at 80-81 (holding that the intentions of the harasser were not determinative and a plaintiff could show desire, animus, or comparative mistreatment as equal, alternative grounds for a claim).

75. *Id.* at 80; *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

76. *Chiapuzio*, 826 F. Supp. at 1338.

duce the same evidence of equal harassment and defend on the same failure to establish a necessary element—harassment based on sex.⁷⁷ *Chiapuzio's* reasoning does not support a rejection of the equal opportunity harasser doctrine.

The fundamental mistake of the *Chiapuzio* court is found in its statement, borrowed in part from a book review by John J. Donohue III: “Where a harasser violates both men and women, ‘it is not unthinkable to argue that each individual who is harassed is being treated badly because of gender.’”⁷⁸ This relies on two incorrect assumptions about Title VII law. First, the context of the quote from Professor Donohue follows an assumption that “sex is both a gender and a function or activity,” which is a linguistically true statement but not accurate to what “sex” uniformly means in Title VII jurisprudence.⁷⁹ Title VII is concerned with equal treatment of the sexes in the employment setting, not with regulating the function or activity of “sex.”⁸⁰ Second, Title VII is not concerned with individuals being “treated badly”; it is anti-discrimination legislation concerned with equality and not a general workplace code of conduct.⁸¹ In addition, the *Chiapuzio* court’s entire line of reasoning was based on an assumption that the Supreme Court was moving away from a requirement of harassment “because of sex,” when later cases such as *Oncale*

77. Many cases involve only one of the many allegedly harassed employees. *See, e.g.,* *Lenzen v. Workers Comp. Reinsurance Ass’n*, 705 F.3d 816, 822 (8th Cir. 2013); *Steiner*, 25 F.3d at 1462; *Kopp*, 13 F.3d at 265, 267; *Engstrand v. Pioneer Hi-Bred Int’l, Inc.*, 946 F. Supp. 1390, 1404 n.13 (S.D. Iowa 1996), *aff’d* 112 F.3d 513. Inherent in the employer’s argument in each equal opportunity harasser case is that there are other employees who were equally harassed.

78. *Chiapuzio*, 826 F. Supp. at 1337 (quoting in part John J. Donohue, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1611 n.134 (1992)).

79. Compare Donohue, *supra* note 78, at 1611 n.134 (“A colorable argument can still be made that the bisexual harasser discriminates against his or her victims because of their sex. Sex is both a gender and a function or activity. A bisexual individual who singles out employees for bad treatment because of their sexual attributes is concerned with sex as a function or activity. Even if the bisexual harasser violates equal numbers of men and women, it is not unthinkable to argue that each individual who is harassed is being treated badly because of their sex.”) with MacKinnon, *supra* note 7, at 828 (“Distinguishing between sexist abuse that is sexual and sexist abuse that is not sexual is a dubious and, in most if not all real situations, a largely impossible venture. Thankfully, separating them was rendered unnecessary by an early leading D.C. Circuit precedent holding that gender-based harassment is gender-based discrimination, whether or not anything explicitly sexual was involved.”) (citing *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988); *McKinney v. Dole*, 765 F.2d 1129, 1138–39 (D.C. Cir. 1985)); *see also* 110 CONG. REC. 2577–84 (1964); Calleros, *supra* note 15, at 57.

80. “Sex” as used in the original amendment and in subsequent case law refers to the state of being a male or female. Sex discrimination need not be sexual, in the sense of being amorous or prurient, to be actionable. *See* 110 CONG. REC. 2577–84 (1964); Calleros, *supra* note 15, at 57.

81. *See Oncale*, 523 U.S. at 80.

v. Sundowner Offshore Services show that the requirement remains critically important.⁸²

On the other end of the spectrum, the Seventh Circuit in *Holman v. Indiana* upheld summary judgment based on the equal opportunity defense, focusing on both the requirement of “because of sex” and the requirement of “discrimination.”⁸³ Steven and Karen, employees of the Indiana Department of Transportation, alleged that their supervisor had sexually harassed each of them individually and on separate occasions including both physical touching and sexual propositioning.⁸⁴ The Seventh Circuit reviewed their claims and the applicable Title VII case law, including the recently decided *Oncale v. Sundowner Offshore Services, Inc.*, which permitted same-sex harassment claims and reaffirmed the Title VII requirement of discrimination and disparate treatment.⁸⁵ In rejecting the Holmans’ claims for lack of discrimination based on sex, the court stated:

We do not think, however, that it is anomalous for a Title VII remedy to be precluded when *both* sexes are treated badly. Title VII is predicated on discrimination. Given this premise, requiring disparate treatment is consistent with the statute’s purpose of preventing *such* treatment. It is likewise consistent with the statute’s plain language. If anything, it would be anomalous *not* to require proof of disparate treatment for claims of sex *discrimination* (of which sexual harassment is a subset) To do so would change Title VII into a code of workplace civility, and the Supreme Court has already rejected such an interpretation of Title VII.⁸⁶

The court noted that the supervisor’s conduct toward both plaintiffs was essentially the same and rejected plaintiffs’ suggestion that further discovery might reveal differences in the mechanics of the sex-

82. Compare *Chiapuzio*, 826 F. 2d at 1336 (suggesting a movement away from a disparate treatment or “but for” analysis) with *Harris*, 510 U.S. at 25 (“The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”); see also *Oncale*, 523 U.S. at 81 (“Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because of . . . sex.’”).

83. *Holman v. Indiana*, 211 F.3d 399, 402–03 (7th Cir. 2000), *cert. denied*, 531 U.S. 880 (2000). Though the Seventh Circuit initially expressed disapproval of the equal opportunity harasser in *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996), the approval in *Holman* is the modern pole star in the circuit.

84. *Id.* at 401.

85. *Id.* at 402 (citing *Oncale*, 523 U.S. 75 at 75).

86. *Id.* at 404 (emphasis in original).

ual conduct proposed, finding such differences would be “unremarkable” and not legally significant.⁸⁷

Federal courts in the modern era, following *Oncale* and *Holman*, are presented with a choice: to accept the equal opportunity harasser defense as *Holman* did, to reject it as doctrinally unsound as *Chiapuzio* did, or to avoid making that decision by finding factual distinctions between the conduct as *Kopp* and *Steiner* did. Despite the suggestion of some observers, the doctrine is not a dead or dying one; federal circuit courts overwhelmingly accept the doctrine and apply it when harassment is effectively equal.⁸⁸

III. CURRENT CIRCUIT JURISPRUDENCE ON THE EQUAL OPPORTUNITY HARASSER

Most circuits accept the equal opportunity harasser doctrine as an unavoidable consequence of Title VII's discrimination-based-on-sex requirement.⁸⁹ The Ninth Circuit, however, refuses to apply it.⁹⁰ Still others remain on the fence, referencing the issue without addressing it or factually distinguishing conduct toward men and women, which avoids confronting the doctrinal loophole.⁹¹ Finally, in at least two circuits there are too few cases on this issue overall and scarcely any by which to judge their position.⁹²

A. Circuits Accepting the Equal Opportunity Harasser Concept

Several circuits have ruled that an equal opportunity harasser does not trigger Title VII's protections because the harassment, how-

87. *Id.* at 406 n.7 (noting that different gender-based comments are not inherently unequal).

88. *See infra* Part III.

89. Specifically, the Second, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have accepted the equal opportunity harasser doctrine as such.

90. *See Steiner*, 25 F.3d at 1463–64 (suggesting in dicta, treated as law of the circuit in subsequent cases, that even equal harassment toward men and women is actionable under Title VII).

91. Specifically, the Eighth and D.C. Circuits remain on the fence regarding this issue.

92. Specifically, the First, Third, and Federal Circuits reflect too few and too passing references to the doctrine to establish any sense of a law of the circuit. *See Blethen v. Maine General Rehab. & Nursing Care*, No. 1:11-CV-00277-DBH, 2012 WL 4325824, at *24 (D. Me. Aug. 1, 2012), *report and recommendation adopted*, No. 2:11-CV-277-DBH, 2012 WL 4327053 (D. Me. Sept. 18, 2012); *Tardif-Brann v. Kennebec Valley Cmty. Action Program*, No. Civ. 04-132-B-S, 2005 WL 1712421, at *3 n.6 (D. Me. July 21, 2005), *report and recommendation adopted*, No. CIV. 04-132BS, 2005 WL 1961363 (D. Me. Aug. 16, 2005); *Chaloult v. Interstate Brands Corp.*, No. 02-249-P-C, 2003 WL 21803319, at *23–*25 (D. Me. Aug. 6, 2003), *report and recommendation adopted*, No. 02-249-P-C, 2003 WL 22102148 (D. Me. Sept. 10, 2003); *see generally* *Gamboa v. Dep't of Treasury*, No. 94-3129, 47 F.3d 1182 (Fed. Cir. Jan. 13, 1995) (unpublished table decision) (lacking any discussion of an equal opportunity harasser); *Carosella v. U.S. Postal Serv.*, 816 F.2d 638 (Fed. Cir. 1987) (lacking any discussion of an equal opportunity harasser).

ever deplorable, is not discrimination because of sex. The Seventh Circuit directly stated and applied the equal opportunity harasser defense in *Holman v. Indiana*, and it has continued to do so since.⁹³ The firm language and clear application of the doctrine in *Holman* has led to frequent litigation of the issue within the Seventh Circuit. In *Holman v. Indiana*, the Northern District of Indiana moved beyond considering the hypothetical equal opportunity harasser to ruling that plaintiffs' claims were not legally sound because the harassment was equally visited on both sexes.⁹⁴ It rejected some circuit authority predating the *Oncale* decision that implied that discrimination or disparate treatment was not required under Title VII when the conduct was sexual in nature.⁹⁵ The Seventh Circuit affirmed the dismissal on equal opportunity harassment grounds, noting that: 1) prior circuit authority before and after *Oncale* acknowledged the defense; 2) the dictates of *Oncale* in requiring discrimination because of sex were clear; and 3) the conduct toward each plaintiff was essentially the same.⁹⁶ The decision emphasized multiple times that Title VII is predicated on discrimination based on sex, and the unavoidable result of that requirement is that "Title VII does not cover the 'equal opportunity' or 'bisexual' harasser because such a person is not discriminating on the

93. The term "defense" is used here in the broad sense of a claim made by the defendant to avoid liability. See *supra* text accompanying note 59. The Seventh Circuit has even applied the concept in other Title VII contexts, as well as in similar discrimination contexts. See *Yannick v. Hanna Steel Corp.*, 653 F.3d 532, 546 (7th Cir. 2011) (racial discrimination claim under § 1981); *Pavone v. Brown*, 165 F.3d 32, at *6 (7th Cir. 1998) (unpublished table decision) (racial and disability discrimination); *Ballard v. Solid Platforms, Inc.*, No. 2:10 CV 238, 2012 WL 1066760, at *14 (N.D. Ind. Mar. 27, 2012) (Title VII age and disability discrimination claim); *R.S. ex rel. Sims v. Bd. of Sch. Dirs. of Pub. Sch. of City of Milwaukee*, 02-C-0555, 2006 WL 757816, at *8 (E.D. Wis. Mar. 22, 2006) (Title IX claim); *Utomi v. Cook Cnty.*, No. 98 C 3722, 2001 WL 914465, at *3 (N.D. Ill. Aug. 14, 2001) (citing directly to *Oncale* for the proposition that indiscriminate racial comments do not violate Title VII).

94. *Holman*, 24 F. Supp. 2d at 913–15 (N.D. Ind. 1998), *aff'd*, 211 F.3d 399, 403 (7th Cir. 2000) (ruling equal opportunity harassment is not "discrimination 'because of sex'" as required for Title VII liability).

95. *Id.* (citing disapprovingly *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *judgment vacated*, 523 U.S. 1001 (1998); *McDonnell*, 84 F.3d 256; *Miller v. Vesta*, 946 F. Supp. 697 (E.D. Wis. 1996)). The Supreme Court in *Oncale* rejected this notion and reemphasized the requirement of disadvantageous terms or conditions because of sex. *Oncale, Inc.*, 523 U.S. at 79–80.

96. *Holman*, 211 F.3d at 403 (citing *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1011 (7th Cir. 1999) ("Although we readily acknowledge that the fact finder could infer from such evidence that Jemison's harassment was bisexual and therefore beyond the reach of Title VII."); *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996) ("Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex.")).

basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).”⁹⁷

Numerous district court cases in the Seventh Circuit have applied the equal opportunity harasser doctrine to reject Title VII claims.⁹⁸ Many more reaffirm the doctrine in dicta.⁹⁹

However, the Seventh Circuit is not unreflective in applying the doctrine. For example, in *Kampmier v. Emeritus Corp.*, the court denied summary judgment sought on equal opportunity harasser grounds because the plaintiff presented evidence that the harassing conduct toward female employees was “far more severe and prevalent,” which created a more disadvantageous working condition for her.¹⁰⁰ Likewise, in *Venezia v. Gottlieb Memorial Hospital, Inc.*, the court rejected claims of equal opportunity harassment made by a husband and wife against their employer.¹⁰¹ Like the Holmans, each spouse complained of sexual harassment, and sought to hold their employer liable.¹⁰² In the Venezias’ case, however, the harassment was visited on them by different fellow employees, with some overlap in

97. *Id.*

98. *See* Jones v. Lake Cnty. Sheriff’s Dep’t, 2:11-CV-356-TLS, 2014 WL 3928405 (N.D. Ind. Aug. 11, 2014) (rejecting liability for a harasser who “made vulgar and offensive comments to male and female officers alike”); Walton v. Van Ru Credit Corp., No. 10-344, 2011 WL 6016232, at *7 (N.D. Ill. Dec. 2, 2011); Treat v. Tom Kelley Buick Pontiac GMC, Inc., 710 F. Supp. 2d 777, 797 (N.D. Ind. 2010); Morke v. Archer Daniels Midland Co., No. 10-CV-94-SLC, 2010 WL 2403776, at *1 (W.D. Wis. June 10, 2010); Milligan v. Bd. of Trs., No. 09-CV-320-JPG-CJP, 2010 WL 2649917, at *6 (S.D. Ill. June 30, 2010), *aff’d sub nom.*, Milligan v. Bd. of Trs. of S. Ill. Univ., 686 F.3d 378 (7th Cir. 2012); Davis v. Genova Prods., Inc., No. 4:07 CV 40, 2009 WL 585909, at *6 (N.D. Ind. Mar. 3, 2009); Armintrout v. Bloomingdale’s Pizza, Inc., No. 04 C 313, 2007 WL 837279, at *4 (N.D. Ill. Mar. 13, 2007); Brown v. Colgate-Palmolive Co., No. 104CV0782DFHWTL, 2006 WL 517684, at *11 (S.D. Ind. Mar. 2, 2006); Donlow v. SBC Commc’ns, Inc., No. 05-C-0548, 2006 WL 1479548, at *2 (E.D. Wis. May 25, 2006); Hayes v. Exec. Mgmt. Servs., Inc., No. 1:04-CV-1572-DFH-TAB, 2006 WL 1897959, at *5 (S.D. Ind. July 11, 2006); Dees v. Bob Evans Farms, Inc., No. 03-CV-850-DRH, 2005 WL 1610656, at *4-5 (S.D. Ill. July 7, 2005); Coughlin v. Wrigley Mfg. Co., LLC, No. 02 C 7849, 2004 WL 1064735, at *7 (N.D. Ill. May 7, 2004); Caines v. Vill. of Forest Park, No. 02 C 7472, 2003 WL 21518558, at *2 (N.D. Ill. July 2, 2003); Rayl v. Decision One Mortg. Co., No. IP01-0337-C-K/H, 2003 WL 21989992, at *6 (S.D. Ind. Aug. 19, 2003); Jensen v. Associated Milk Producers, Inc., No. 00-C-586-C, 2001 WL 34377574, at *5 (W.D. Wis. June 14, 2001).

99. *See* Swidnicki v. Brunswick Corp., 12 C 3987, 2014 WL 883538 (N.D. Ill. Mar. 6, 2014) (reaffirming the doctrine applies when harassment is equal but holding the defendant’s conduct toward the female plaintiff “more severe and prevalent”); Collins v. Louis Jones Enters., Inc., No. 05 C 1237, 2006 WL 408091, at *3 (N.D. Ill. Feb. 16, 2006); Owens v. Ragland, 313 F. Supp. 2d 939, 945 (W.D. Wis. 2004); Lyon-Scott v. Henderson, No. 99 C 7797, 2001 WL 185029, at *2 n.4 (N.D. Ill. Feb. 22, 2001); Rushing v. United Airlines, 919 F. Supp. 1101, 1107 n.9 (N.D. Ill. 1996).

100. *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 940–41 (7th Cir. 2007).

101. *Venezia v. Gottlieb Memorial Hosp., Inc.*, 421 F.3d 468, 471–72 (7th Cir. 2005).

102. *Id.* at 471.

offenders and some anonymous conduct.¹⁰³ The court ruled that while an individual equal opportunity harasser would evade liability, separate harassers were liable because each discriminated because of sex.¹⁰⁴ District courts within the circuit have likewise reaffirmed the law of the circuit but limited application of the defense to facts that demonstrate equal harassment.¹⁰⁵

Likewise, the Fourth Circuit has applied the defense as a bar to liability. In *Lack v. Wal-Mart Stores, Inc.*, the Fourth Circuit rejected a male employee's hostile work environment claim because the supervisor's conduct was not based on sex.¹⁰⁶ Instead, it found that the supervisor's comments were uniformly crass and indiscriminately visited on all those in his presence, regardless of sex.¹⁰⁷ The supervisor's comments seemed to be made for his own entertainment regardless of the target or audience, and the court held that sexual discrimination requires differential treatment based on sex and not merely content of a sexual nature.¹⁰⁸ The court unambiguously viewed the conduct as equal opportunity harassment, which it held to fall outside the scope of Title VII: "Bragg was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike. While the female employees' complaints do not, as a matter of law, preclude Lack's claim,

103. *Id.*

104. *Id.* at 471–72. *See also*, *Orton-Bell v. Indiana*, 759 F.3d 768, 775 (7th Cir. 2014) (rejecting some evidence as non-discriminatory because it related to sexual intercourse and not sex as in "female," but accepting other evidence as discriminatory because it was lewd, directed at plaintiff, and based on her sex).

105. *Carboni v. RBC Fort Wayne Cmty. Sch. Corp.*, 1:12-CV-167-TLS-RBC, 2014 WL 4585987 (N.D. Ind. Sept. 15, 2014) ("Because Title VII only prohibits 'discrimination' because of sex, 'inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit.');" *Chaparro v. City of Chicago*, 11 C 2659, 2014 WL 2619468 (N.D. Ill. June 12, 2014) (holding most of the defendant's conduct to be non-discriminatory because it was indiscriminate and not based on plaintiff's gender, noting that: "the record reflects that Roney and Bonadurer were "equal opportunity harassers"); *Morke v. Archer Daniels Midland Co.*, No. 10-CV-94-SLC, 2010 WL 2403776, at *1 (W.D. Wis. June 10, 2010) (dismissing amended complaint for failure to state a claim noting that sexual discrimination not merely sexual language is required and that "Title VII does not prohibit "equal opportunity" harassment, where both sexes are equally mistreated"); *Coolidge v. Consol. City of Indianapolis*, No. IP 01-1836-C-M/S, 2003 WL 22327830, at *12 n.6 (S.D. Ind. Sept. 25, 2003) ("Although he was vulgar in front of men, he saved his sexual solicitations and inappropriate physical conduct for women."); *Geist v. Glenkirk*, No. 01 C 0700, 2001 WL 1268574, at *6 (N.D. Ill. Oct. 23, 2001) (holding that the relative treatment of men and women was not sufficiently established to permit dismissal so early in the litigation); *Bowers v. Radiological Soc'y of N. Am., Inc.*, 101 F. Supp. 2d 691, 694–95 (N.D. Ill. 2000) (finding the use of gender-specific profanity and gender-specific physical contact to stand out as being "because of sex" among the "bubbling fountain of profanity" the supervisor visited upon the workplace).

106. *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 260–62 (4th Cir. 2001).

107. *Id.* at 262.

108. *Id.* at 260 (citing *Oncale*, 523 U.S. at 80).

they do present an imposing obstacle to proving that the harassment was sex-based.”¹⁰⁹ The Fourth Circuit held that a plaintiff must show a meaningful difference in the treatment of the sexes and not merely sexually tinged mistreatment dealt irrespective of the individual’s sex.¹¹⁰

In cases where the conduct is not equal, the Fourth Circuit has rejected application of the equal opportunity harasser doctrine while affirming its existence. For example, in *E.E.O.C. v. R&R Ventures*, decided the month after *Lack*, the court rejected a claim of equal opportunity harassment, finding that while the supervisor may “sometimes have been abusive toward male employees . . . [he] directed his sexually pointed comments exclusively to the young women who worked for him.”¹¹¹ The supervisor in *R&R Ventures* reserved his sexual curiosity and derision for his female employees, fully eliminating any argument that the treatment was equal or not sex-based.¹¹² Similarly, in *Ocheltree v. Scollon Productions, Inc.*, the Fourth Circuit, sitting *en banc*, faced a close question of whether the conduct was directed toward a particular employee based on sex.¹¹³ This case involved numerous co-workers speaking and behaving in a generally lewd and vulgar manner.¹¹⁴ The *en banc* court reinstated a jury verdict finding that sex-based harassment and much of the daily vulgarity, three instances in particular, were “aimed at Ocheltree because of her sex—specifically, . . . to make her uncomfortable and self-conscious as the only woman in the workplace . . . and . . . was intended to provoke Ocheltree’s reaction as a woman.”¹¹⁵ The dissent disagreed with this factual conclusion noting three male employees also objected to the level of crudeness in the shop demonstrating an indiscriminate treatment of all employees.¹¹⁶ But the majority was highly deferential to the jury’s factual findings that Ocheltree as a woman was singled out

109. *Id.* at 262 (internal citation omitted).

110. *Id.*

111. *EEOC v. R&R Ventures*, 244 F.3d 334, 338–39 (4th Cir. 2001).

112. *Id.* at 339.

113. *Ocheltree v. Scollon Prods. Inc.*, 335 F.3d 325, 338–43 (4th Cir. 2003) (*en banc*).

114. *Id.* at 328–30.

115. *Id.* at 332.

116. *Id.* at 336. (Niemeyer, J., concurring) (“The remainder of the conduct relied upon by the majority must be characterized as general work conditions that both males and Ocheltree experienced. The majority fails to explain how these generally coarse conditions discriminated against one person or one sex. . . . [T]he generally ugly atmosphere, albeit normally unacceptable, did not violate Title VII because these general conditions did not discriminate.”).

for mistreatment.¹¹⁷ A single judge wrote to concur in the judgment, finding the three instances of harassment directly aimed at the plaintiff sufficient, but wrote separately to reiterate the possibility of an equal opportunity harasser when the conduct was equal.¹¹⁸ District courts within the Fourth Circuit have employed the doctrine stated in these decisions to limit liability where appropriate.¹¹⁹

The Fifth Circuit has likewise viewed the equal opportunity harasser as outside the reach of Title VII. In *Ray v. Tandem Computers, Inc.*, the court rejected plaintiff's claims of discrimination, finding them "undermined by her statement that Keister was an even-handed harasser, treating all of his employees poorly. Title VII does not exist to punish poor management skills; rather, it exists to eliminate certain types of bias in the workplace."¹²⁰ The court found determinative, "Tandem's evidence that other similarly situated employees, both male and female, were treated the same."¹²¹

In *Butler v. Ysleta Indep. Sch. Dist.*, decided just after the Supreme Court's decision in *Oncale*, the Fifth Circuit, without using the terms "equal opportunity" or "indiscriminate" harasser, rejected a claim of sexual harassment in part because the conduct was inflicted on both men and women.¹²² Relying heavily on *Oncale's* emphasis on the requirement of disadvantageous conditions for one gender, the court ruled that the employee's "sending of offensive materials to both men and women is evidence that the workplace itself, while perhaps more sexually charged than necessary, was not sexually charged in a way that made it a hostile environment for either men or women."¹²³ The Fifth Circuit has reaffirmed this position in a recent pair of cases.

First, in *Reine v. Honeywell International Inc.*, the Fifth Circuit ruled that while the allegations easily proved that the supervisor, Gautreau, was insulting and demeaning, infliction of harassment upon

117. *Id.* at 331 (citations omitted) (stating the requirement that there be "no legally sufficient evidentiary basis" for the jury's verdict" and that "[j]udgment as a matter of law is proper only if 'there can be but one reasonable conclusion as to the verdict'").

118. *Id.* at 336 (Niemeyer, J., concurring).

119. *Jordan v. Radiology Imaging Assocs.*, 577 F. Supp. 2d 771, 780 (D. Md. 2008) (holding that supervisor's comment about "working parents" was gender-neutral and not sex discrimination); *EEOC v. Pentman, LLC*, No. 2:01CV00043, 2002 WL 548858, at *1 (W.D. Va. Apr. 12, 2002) (noting that the allegation that defendant was an equal opportunity harasser would be an "obstacle to the EEOC's case").

120. *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 435 n.19 (5th Cir. 1995).

121. *Id.* at 435.

122. *Butler v. Ysleta Indep. Sch. Dist.*, 161 F.3d 263, 270-71 (5th Cir. 1998).

123. *Id.*

both male and female employees undercut any claim of sex discrimination.¹²⁴ The court adopted both the doctrine and nomenclature of the equal opportunity harasser defense in rejecting plaintiff's claim: "Testimony from numerous employees—male and female—demonstrates that Gautreau was an 'equal opportunity' harasser. When the conduct is equally harsh towards men and women, there is no hostile work environment based on sex."¹²⁵ The plaintiff could not meet the burden of showing the supervisor's treatment of female employees was any different or more severe than his treatment of male employees, and thus, Title VII did not apply.¹²⁶ Second, in *E.E.O.C. v. Boh Brothers Construction Co., L.L.C.*, the Fifth Circuit rejected a claim of sex discrimination by Woods against his supervisor Wolfe and their employer BOH Bros.¹²⁷ A panel of the Fifth Circuit noted that, "although Woods may have been Wolfe's primary target, he was by no means his only target. Nor was Wolfe the sole offender. To the contrary, misogynistic and homophobic epithets were bandied about routinely among the crew members, and the recipients, Woods included, reciprocated with like vulgarity."¹²⁸ Accordingly, the court held, "there is insufficient evidence that Wolfe 'acted on the basis of gender' in his treatment of Woods."¹²⁹

Finally, a federal district court in Texas rejected a claim of racial and gender harassment under Title VII finding that a co-worker's indiscriminate cursing, though it bothered plaintiff in particular, was directed at every person in the office regardless of race, gender, or other characteristic.¹³⁰ In that case, *Hairston v. Geren*, the district court diligently collected cases, both binding upon it and persuasive to it, to illustrate that a claim for discrimination cannot rest on indiscriminate conduct.¹³¹ Finally, in several district court cases within the Fifth Cir-

124. *Reine v. Honeywell Int'l Inc.*, 362 F. App'x 395, 397 (5th Cir. 2010).

125. *Id.* (citing *Butler*, 161 F.3d at 270–71); accord *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 806 n.2 (5th Cir. 1996) ("Sex-neutral hostile conduct cannot be used to support a hostile environment claim. Title VII does not protect employees from hostile conduct that is not based on their protected status.").

126. *Reine*, 362 F. App'x at 397–98.

127. *EEOC v. Boh Bros. Constr.*, 689 F.3d 458, 463 (5th Cir. 2012), *rev'd* 731 F.3d 444 (5th Cir. 2013) (en banc).

128. *Id.* at 462.

129. *Id.* Upon rehearing en banc, the court reinstated the plaintiff's claim on sex-stereotyping without addressing the equal opportunity harasser analysis, an omission the five-judge dissent decried. *See Boh Bros. Constr. Co.*, 731 F.3d at 457, 473 (5th Cir 2013) (en banc).

130. *Hairston v. Geren*, No. C-08-382, 2009 WL 3585411, at *5–6 (S.D. Tex. Oct. 26, 2009).

131. *Id.* (collecting cases).

cuit, equal opportunity harassment was raised by the defendant but not analyzed or ruled upon by the court.¹³²

The Sixth Circuit seems to accept the doctrine, and it has been applied to preclude liability by the district courts within the circuit, but no published appellate decision has done so. In *E.E.O.C. v. Harbert-Yeargin, Inc.*, the Sixth Circuit ruled on a same-sex harassment case in the wake of *Oncale v. Sundowner Offshore Services*, and, while the facts did not present an issue of equal opportunity harassment, both the majority and dissent discuss the hypothetical possibility of such a claim.¹³³ The defendant supervisor, Davis, was alleged to have “goosed” the plaintiff, a practice that discovery revealed to be prevalent between the male employees of Harbert-Yeargin.¹³⁴ The majority notes, “although the law does not always follow the dictates of common sense, it is hard for me to come to grips with the fact that if Davis had been an equal opportunity gooser, there would be no cause of action here.”¹³⁵ The dissent responds to this complaint by suggesting, “this is the essence of the Supreme Court’s decision in *Oncale*, where it held that ‘the critical issue, Title VII’s text indicates, is whether members of one sex are subjected to disadvantageous terms or conditions of employment to which members of the other sex are not.’”¹³⁶ It also notes the Seventh Circuit’s (then) recent decision in *Holman v. Indiana*, applying the equal opportunity harasser doctrine to dismiss a Title VII claim.¹³⁷

132. *Cabrera v. Jacobs Tech., Inc.*, No. H-10-1069, 2011 WL 1882517, at *2 (S.D. Tex. May 17, 2011) (mentioning defendant avers its employee was an “equal opportunity harasser” but deciding on other grounds without analysis of the issue); *Williamson v. Am. Nat’l Ins. Co.*, 695 F. Supp. 2d 431, 462–63, 463 n.31 (S.D. Tex. 2010) (dismissing this pro se litigation on other grounds but noting that the plaintiff himself referred to one of the defendant’s employees as “an equal opportunity harasser” who was well known for picking on many employees and being indiscriminate in his abusive conduct toward “males, females, people with different racial backgrounds, those with disabilities and those without disabilities”); *Hairston v. Geren*, No. C-08-382, 2009 WL 3585411, at *5–7 (S.D. Tex. Oct. 26, 2009).

133. *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 507–08, 520 (6th Cir. 2001). This case features a lead opinion that is an unlabeled dissent and a majority opinion that incorporates a doggerel patterned on the Mother Goose rhyme about Georgie Porgie. It is not a model of clarity in appellate decision-making and leads to an incomprehensible passage in *Lavack v. Owen’s World Wide Enter. Network, Inc.*, 409 F. Supp. 2d 848, 854 (E.D. Mich. 2005) (dictum) (“However, it is established in the Sixth Circuit that the Court will not find grounds for an actionable gender discrimination claim when no cause of action would have existed if Defendant had been an “equal opportunity” harasser.”).

134. *Harbert-Yeargin, Inc.*, 266 F.3d at 507.

135. *Id.* at 520 (noting in the accompanying footnote, “[i]t is not disputed that this is a correct statement of the law”).

136. *Id.* at 507–08 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

137. *Id.* at 508 (citing *Holman*, 211 F.3d at 399).

Another panel of the Sixth Circuit, in *Gallagher v. C.H. Robinson Worldwide, Inc.*, refused to find the defendant's employees' conduct indiscriminate and equal, repeatedly citing the "patently degrading" and "anti-female" nature of the conduct.¹³⁸ Reversing the district court's finding that the conduct was indiscriminate, irrespective of the plaintiff's presence let alone her sex, and not "because of sex," the appellate court reasoned that the conduct reflected an anti-female animus that subjected women to greater disadvantage in the workplace than men.¹³⁹ Such an analysis claims to avoid a harasser's motivations, which is consistent with *Oncale*, but it reintroduces that issue by characterizing the comments themselves as "degrading" or "anti-female" and speculating on their relative differential effect on the sexes.¹⁴⁰ In this way, it accepts the existence of an equal opportunity harasser defense, while making very subtle judgments about equality of not just the conduct but how it is received.¹⁴¹

The district courts in the Sixth Circuit have applied the equal opportunity defense more directly. For example, in *Moorer v. Summit County Department of Job and Family Services*, the Northern District of Ohio states unequivocally that Title VII does not cover the equal opportunity harasser because such harassment is by definition not based on sex.¹⁴² The allegation by Moorer, the female plaintiff, apparently paralleled a separate complaint filed against the same supervisor by a male co-worker.¹⁴³ The court's opinion does not reveal the conduct in the male co-worker's complaint or compare it closely to plaintiff's allegations; it notes only that plaintiff has failed "to show that

138. *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 271 (6th Cir. 2009).

139. *Id.* at 271–72. The court acknowledged that some female employees were unoffended by the conduct and that one woman, Angela Sarris, was one of the worst offenders. Nevertheless, the court opined that those women might be more "calloused" and "not a reasonable person," and a jury might find that women, or the plaintiff because she is a woman, experienced a disadvantage based on their sex.

140. *Id.*

141. *See id.* This seems untenable. While the court disregards the female workers who are seemingly unaffected and willing participants who "are willing and able to participate in the offensive conduct on equal terms with the male co-workers" as "callous" and possibly not "reasonable" persons, it may well be that their responses are normal and that the plaintiff's reception is the unreasonable and "unusually sensitive" one. This is not to condone the conduct by the C.H. Robinson employees, which seems deplorable, but only to suggest that if the legal test is whether females are subjected to disadvantages in the terms and conditions of employment, it is stacking the deck to remove some females involved from consideration based on speculation about whether they properly represent females.

142. *Moorer v. Summit Cnty. Dep't of Job & Family Servs.*, No. 5:10CV457, 2011 WL 2746098, at *5 (N.D. Ohio July 14, 2011).

143. *Id.*

Defendant Ladd treated men and women differently.”¹⁴⁴ With a clear enunciation of the law by the appellate court and applications by the district courts of the circuit, the equal opportunity harasser defense is viable in the Sixth Circuit.

The Tenth Circuit has taken a different approach, largely accepting the existence of the doctrine without ever using the terminology “equal opportunity harasser” or its synonyms. Instead, it examines equal or differential harassment in each case as part of the “based on sex” element under Title VII.¹⁴⁵ The famous refutation of the doctrine by the District of Wyoming, in *Chiapuzio v. BLT*, has not been followed by the Circuit, and has not been cited by a single opinion by or within the Circuit.¹⁴⁶ Instead, the Tenth Circuit very clearly requires the plaintiff to show differential harassment, examining the difference in treatment between men and women in the workplace.¹⁴⁷

For example, in *Stahl v. Sun Microsystems*, the Tenth Circuit rejected a claim of sexual harassment because the plaintiff failed to show the workplace was unfair toward women in general or plaintiff as a woman in particular.¹⁴⁸ The court noted no disparity in treatment between men and women, in terms of salaries or working conditions, and found plaintiff’s firing was based on poor performance and lack of cooperation with management, not her sex.¹⁴⁹ In *Penry v. Federal Home Loan Bank of Topeka*, the court dismissed a sexual harassment claim, despite the use of sexually related comments, because the alleged harasser was generally vulgar and inappropriate without regard to his audience:

144. *Id.*; see also *Berry v. Maker’s Mark Distillery, Inc.*, 3:12CV-185-JHM, 2014 WL 1761922 (W.D. Ky. Apr. 30, 2014) (noting it is established in the Sixth Circuit that “no cause of action would have existed if Defendant had been an ‘equal opportunity’ harasser”); *Mahan v. Peake*, No. 07-15223, 2009 WL 174130, at *4 (E.D. Mich. Jan. 23, 2009) (citing *Harbert-Yeargin, Inc.*, 266 F.3d at 505 508 and *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) (stating that equal conduct toward members of both genders could not be considered as sexually discriminating conduct)); *Myers v. Office Depot, Inc.*, No. 06-CV-11252, 2007 WL 2413087, at *4 (E.D. Mich. Aug. 21, 2007) (holding that attempting to kiss a male employee and sexually propositioning and appraising female employees was equal opportunity harassment precluding sex discrimination claims).

145. 42 U.S.C. § 2000e-2(a)(2012).

146. *Chiapuzio*, 826 F. Supp. at 1337 (“[E]qual harassment of both genders does not escape the purview of Title VII in the instant case.”).

147. *Bundy*, 641 F.2d at 942 n.7. The issue is never a defense on which the defendant bears a burden and always a claim that an element is lacking, but there is a subtle difference between courts that wait for the defense to raise the claim and those where it is actively looking for the plaintiff to establish the issue. This subtle distinction is one reason that clearer federal legislation on this issue is needed.

148. *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10th Cir. 1994).

149. *Id.*

The vast majority of Waggoner's behavior set forth in the plaintiffs' 200-paragraph statement of facts seems motivated by poor taste and a lack of professionalism rather than by the plaintiffs' gender. What made the plaintiffs' environment hostile, if anything, was not the gender-based incidents but instead the gender-neutral antics perpetrated by Waggoner throughout his four-year career at FHLB.¹⁵⁰

Similarly, in *Riske v. King Soopers*, the Tenth Circuit dismissed a sexual harassment claim because the plaintiff failed to establish that men and women were treated any differently by their supervisor: "the trial transcript reflects that one of these co-workers testified that Mr. Katzenberger treated women 'pretty coldly, the same as everyone else.'"¹⁵¹ In *Gross v. Burggraf Construction Co.*, the Tenth Circuit examined a lengthy record of coarse, crude, profane, and vulgar language in the context of a construction site.¹⁵² The court found that a single inadmissible female-specific expletive and a single admissible comment suggesting violence toward women were insufficient gender-based conduct to support a hostile work environment claim.¹⁵³ In every other instance, the conduct was issued from supervisor to employee or from employee to employee without regard for the sex of any individual involved.¹⁵⁴ The decisions of the district courts within the Tenth Circuit follow this same analytical method, examining the plaintiff's claim for evidence that mistreatment was sex-based and not inflicted without regard to sex.¹⁵⁵

150. *Penry v. Fed. Home Loan Bank of Topeka*, 155 F.3d 1257, 1263 (10th Cir. 1998).

151. *Riske v. King Soopers*, 366 F.3d 1085, 1091-92 (10th Cir. 2004); *see also* *Bateman v. United Parcel Serv., Inc.*, 31 F. App'x 593, 598 (10th Cir. 2002) ("Plaintiff has totally failed to point to anything in the record suggesting that she was subjected to disciplinary action . . . because of her gender."); *Pascouau v. Martin Marietta Corp.*, 185 F.3d 874, *5-7 (10th Cir. 1999) (unpublished table decision) (finding the lewd and vulgar jokes and conduct of plaintiff's employers was not based on gender).

152. *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537-46 (10th Cir. 1995).

153. *Id.* at 1547.

154. *Id.*

155. *See* *Hindman v. Thompson*, 557 F. Supp. 2d 1293, 1303 (N.D. Okla. 2008) (denying liability because "Thompson was indiscriminate in terms of who might be affected by the fact that he was committing such acts"); *Foster v. Thompson*, No. 05-CV-305-TCK-FHM, 2008 WL 596136, at *6 (N.D. Okla. Mar. 4, 2008) (finding liability was precluded because the defendant's actions were not hostile towards women specifically and were inflicted on both men and women present); *Unrein v. Payless Shoesource, Inc.*, 51 F. Supp. 2d 1195, 1205 (D. Kan. 1999) ("[T]he record shows that Robinson had personality conflicts with persons of both genders and . . . [t]he court finds no evidence that any of Robinson's conduct was motivated by plaintiff's gender. Most of the incidents are entirely gender neutral."); *Plakio v. Congregational Home, Inc.*, 902 F. Supp. 1383, 1391 (D. Kan. 1995) (holding that plaintiff's claims lacked any evidence that "the objectionable work requirements were enforced or imposed disparately on the basis of sex The court has nothing from which to infer that the men . . . were held to different standards when it came to performing perineal care and meeting the specific needs of mentally alert residents.");

What emerges from the decisions of the Tenth Circuit is close attention to the equality or disparity of treatment between men and women as part of the Title VII test, without need for, or reference to, a “defense” of equal opportunity harassment.¹⁵⁶ This is an effective way to properly keep discrimination based on sex as the plaintiff’s burden and to avoid rhetoric surrounding the equal opportunity harasser concept.

The Second Circuit accepts the existence of the doctrine, but in its four published opinions on point, it has not yet applied the doctrine to bar liability.¹⁵⁷ In each case involving the doctrine, it has distinguished the conduct as different toward one sex or decided the case on other grounds.¹⁵⁸

The Second Circuit has addressed the issue most directly in *Petrosino v. Bell Atlantic*, where it stated that though “a work ‘environment which is equally harsh for both men and women’ cannot support a claim for sex discrimination,” it found that the sexual environment in general toward women was universally demeaning and exploitive only.¹⁵⁹ This approach was followed by *Kaytor v. Electric Boat Corp.*, which rejected a defendant’s attempt to claim that threats to choke the plaintiff were not based on sex because the supervisor had once made a similar threat to a male co-worker.¹⁶⁰

Though it has not had occasion to apply the doctrine to reject liability, the Second Circuit does acknowledge the doctrine and the requirement of differential treatment.¹⁶¹ A single district court opin-

Young v. Finish Line, Inc., No. 94-4117-DES, 1995 WL 472783, at *5 (D. Kan. July 12, 1995) (holding that insults such as “dumb” or “ass” and conduct such as “birthday spanking” are gender-neutral, if unprofessional, inappropriate, and unfunny displays, that do not support a claim of harassment).

156. Indeed, the terms “equal opportunity harassment,” “indiscriminate harassment,” “bisexual harassment,” or similar terms referring directly to the alleged harasser appear in no opinions within the Tenth Circuit except *Chiapuzio v. BLT Operating Corp.* See cases cited *supra* notes 148, 150–58.

157. See cases cited *infra* notes 159–61.

158. In two of these four cases, the Second Circuit avoided deciding on equal opportunity harassment grounds. See *Brown v. Henderson*, 257 F.3d 246, 256 (2d Cir. 2001) (holding the plaintiff’s discrimination was because of office politics rather than sex); *Brennan v. Metro. Opera Ass’n, Inc.*, 192 F.3d 310, 319 (2d Cir. 1999) (holding the plaintiff’s discrimination was not sufficiently severe).

159. *Petrosino v. Bell Atl.*, 385 F.3d 210, 221–22 (2d Cir. 2004) (quoting in part *Brennan*, 192 F.3d at 318).

160. *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 551–52 (2d Cir. 2010) (holding that the overall course of sex-based harassment precluded summary judgment).

161. See *Farren v. Shaw Env’tl., Inc.*, 852 F. Supp. 2d 352, 359 (W.D.N.Y. 2012), *aff’d*, 510 F. App’x 44 (2d Cir. 2013) (“Further, there is no comparative evidence detailing Puma’s interactions with women, and thus no evidence that would support an inference that Puma was either

ion within the circuit has applied the doctrine to dismiss a claim, and it seems to be applying the law of the circuit in doing so.¹⁶²

The Eleventh Circuit also seems to accept the principle of equal opportunity harassment, though both it and its district courts tend to find unequal harassment in most cases, or decide such cases on other grounds.¹⁶³ In 1982, relatively early in the Title VII sexual harassment jurisprudence, the Eleventh Circuit seemed to accept the proposition that equal harassment fell outside the reach of Title VII:

However, there may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, the sexual harassment would not be based upon sex because men and women are accorded like treatment. Although the plaintiff might have a remedy under state law in such a situation, the plaintiff would have no remedy under Title VII.¹⁶⁴

The court relied upon, and seemed to agree with, the analysis of *Barnes v. Costle*.¹⁶⁵ It also found persuasive the reasoning of two law review articles.¹⁶⁶ The Eleventh Circuit next addressed the issue in *Baldwin v. Blue Cross/Blue Shield of Ala.* Relying on the Supreme Court's decision in *Oncale*, the Eleventh Circuit affirmed the equal

generally hostile toward men or treated men and women differently.”); *Wentworth v. Hedson*, 493 F. Supp. 2d 559, 568 (E.D.N.Y. 2007) (“Equally meritless is the Hedsons’ argument, tacitly made, that they were equal opportunity harassers There is a genuine dispute of fact on this issue Moreover, what matters is whether the harassment that is visited upon members of different races or genders is truly equal in terms of, inter alia, prevalence, severity and impact.”) (internal citations omitted); *Anderson v. England*, 359 F. Supp. 2d 213, 217 (D. Conn. 2005) (“Though equal opportunity harassment is not actionable under Title VII, the Court believes that Officer Kujawski and Sergeant Wells have presented sufficient evidence at this stage that their gender was at least part of the reason for Lieutenant Coleman’s harassment of them.”); *Dobrich v. Gen. Dynamics Corp., Elec. Boat Div.*, 106 F. Supp. 2d 386, 391 (D. Conn. 2000) (citing *Holman*, 211 F.3d at 399) (“It is true that there are ‘equal opportunity harassers’ whose behavior is offensive to both sexes.”).

162. *Krasner v. HSH Nordbank AG*, 680 F. Supp. 2d 502, 519 (S.D.N.Y. 2010) (holding that plaintiff was a “male victim of equal opportunity harassment, and not, as required for Title VII liability, someone who experienced workplace harassment because of [his] sex”) (quoting *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir. 2001) (internal quotation marks omitted)).

163. See cases cited *infra* notes 167–75.

164. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

165. *Id.* (citing *Barnes*, 561 F.2d at 990 n.55).

166. *Id.* (citing Note, Sexual Harassment and Title VII, 76 U. MICH. L. REV. 1007, 1019–20 & n.99 (1978) and Comment, Sexual Harassment and Title VII, 51 N.Y.U. L. Rev. 148, 151–52 (1976)). A district court within the Eleventh Circuit also made a similar ruling in a Title VII racial discrimination case within its own jurisdiction. See also *Bradford v. Sloan Paper Co.*, 383 F. Supp. 1157, 1161 (N.D. Ala. 1974) (“The court finds that, while plaintiffs did suffer mistreatment, it was not directed against them because of their race. Other employees, including James ‘Rick’ Sweeney and Bobby J. Woodall, both white, felt that they were overworked and harassed. Sweeney and Woodall both quit as a result of these abuses, largely from Horace Ramey.”).

opportunity harassment principle: “An equal opportunity curser does not violate a statute whose concern is, as the Supreme Court has phrased it, ‘whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.’”¹⁶⁷ However, the court held that the plaintiff was sexually propositioned and subjected to gender-specific epithets sufficient to show harassment because of sex.¹⁶⁸

Finally, in *Reeves v. C.H. Robinson Worldwide, Inc.*, the Eleventh Circuit addressed a defendant’s claim that its workplace was a rough and vulgar one, but that any such offensive material was indiscriminate.¹⁶⁹ The court accepted that truly indiscriminate conduct, conduct directed toward both males and females and that caused no disadvantageous conditions to either group, would not violate Title VII.¹⁷⁰ As in the prior Eleventh Circuit cases, however, the court found that sufficient gender-specific harassment occurred to demonstrate harassment based on sex.¹⁷¹

Two district court decisions within the circuit applied the equal opportunity harasser rationale to dismiss Title VII claims.¹⁷² In several other cases, district courts within the Eleventh Circuit reaffirmed the

167. *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1302 (11th Cir. 2007) (quoting in part *Oncale, Inc.*, 523 U.S. at 80).

168. *Id.*

169. *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010).

170. *Id.* at 809 (“In particular, sexual language and discussions that truly are indiscriminate do not themselves establish sexual harassment under Title VII.”).

171. *Id.* at 811–12 (“If the environment portrayed by Reeves at C.H. Robinson had just involved a generally vulgar workplace whose indiscriminate insults and sexually-laden conversation did not focus on the gender of the victim, we would face a very different case. However, a substantial portion of the words and conduct alleged in this case may reasonably be read as gender-specific, derogatory, and humiliating. . . . The social context at C.H. Robinson detailed by Reeves allows for the inference to be drawn that the abuse did not amount to simple teasing, offhand comments, or isolated incidents, but rather constituted repeated and intentional discrimination directed at women as a group.”) (internal citation omitted).

172. *See Livingston v. Marion Bank & Trust Co.*, 2:11-CV-1369-LSC, 2014 WL 3347910 (N.D. Ala. July 8, 2014) (conceding that there may be cases where equal opportunity harassment exists but indiscriminately egregious conduct, particularly if especially offensive to women may not qualify); *Dehaan v. Urology Ctr. of Columbus LLC*, No. 4:12-CV-6 (CDL), 2013 WL 3227678, at *2 (M.D. Ga. June 25, 2013) (holding that where the defendant creates a hostile environment for both men and women, it fails to establish a hostile work environment “because of” an individual plaintiff’s sex); *Fitzpatrick v. Winn-Dixie Montgomery, Inc.*, 153 F. Supp. 2d 1303, 1305–06 (M.D. Ala. 2001) (“Fitzpatrick and Wright cannot establish that the harassment was based on the sex of the employee. As the Eleventh Circuit has noted, where a supervisor makes sexual overtures to employees of both genders, or where the conduct is equally offensive to male and female workers, the conduct may be actionable under state law, but it is not actionable as harassment under Title VII because men and women are accorded like treatment.”).

doctrine but found the conduct factually distinguishable in some way.¹⁷³

Two circuits, the Eighth and D.C., seem to accept the principle that indiscriminate or equal harassment fails to meet the Title VII requirement that the harassment be “because of sex,” but they do so in ways that cast some doubt on the certainty of the law of the circuit.

While the D.C. Circuit was the first to recognize the equal opportunity loophole in Title VII, application of the doctrine since then has been minimal.¹⁷⁴ After the early cases posing the possibility of an equal opportunity harasser, the only other comment by the D.C. Circuit comes from Judges Bork, Scalia, and Starr, writing in dissent from a denial of rehearing *en banc*.¹⁷⁵ In the final footnote of that dissent, the trio of judges acknowledges the D.C. Circuit’s position on the issue:

But this court has twice stated that Title VII does *not* prohibit sexual harassment by a “bisexual superior [because] the insistence upon sexual favors would . . . apply to male and female employees alike.” Thus, this court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible.¹⁷⁶

173. See *Murphy v. City of Aventura*, 616 F. Supp. 2d 1267, 1274 (S.D. Fla. 2009), *aff'd*, 383 F. App’x 915 (11th Cir. 2010) (excluding some incidents from consideration because the harassment was dealt equally and simultaneously to both men and women, but holding that other sex-specific slurs satisfied the because of sex requirement); *Smith v. Pefanis*, 652 F. Supp. 2d 1308, 1326 (N.D. Ga. 2009) (“Here, while Pefanis may have harassed both male and female employees, plaintiff’s evidence shows that the conduct directed at him was based on his sex since Pefanis allegedly repeatedly propositioned him for sex and inappropriately touched him on several occasions. Thus, plaintiff has made a showing that the alleged harassment he endured was based on his sex sufficient to survive summary judgment.”); *Forsberg v. Pefanis*, No. 1:07-CV-3116-JOF-RGV, 2009 WL 901015, at *7 (N.D. Ga. Jan. 26, 2009), *report and recommendation accepted in part and rejected in part on other grounds*, No. 1:07-CV-3116-JOF, 2009 WL 901012 (N.D. Ga. Mar. 27, 2009) (“Courts have found that harassing conduct that is equally offensive to male and female employees or that is inflicted on both sexes is not harassment based on sex. . . . While there is evidence that Pefanis regularly groped both male and female employees, his alleged harassment of plaintiff was of a different character in that it was gender specific and derogatory.”); *Petcou v. C.H. Robinson Worldwide, Inc.*, No. 1:06-CV-2157-HTW-GGB, 2008 WL 8910651, at *9 (N.D. Ga. Feb. 5, 2008) (holding that unwelcome exposure to pornography, exclusively pornography objectifying women, presents an issue of fact regarding harassment because of sex).

174. See *supra* Part II, *Bundy*, 641 F.2d at 942 n.7 (noting that a supervisor who harasses men and women alike would evade the reach of the statute); *Barnes*, 561 F.2d at 990 n.55 (noting that where the harasser propositioned members of both sexes, it “would not constitute gender discrimination because it would apply to male and female employees alike”).

175. *Vinson*, 760 F.2d at 1330.

176. *Id.* at 1333 n.7.

According to these judges, this loophole suggests Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender.¹⁷⁷ It seems as though the D.C. Circuit, perhaps the originator of the concept of equal opportunity harassment, accepts the doctrine albeit uneasily.

In contrast, the Eighth Circuit seems to apply the doctrine, but it does so without using the term “equal opportunity harasser” or any other synonymous terminology. For example, the principle seemingly accepted in *Kopp v. Samaritan Health System, Inc.*, which examined the relative treatment of men and women and found a legally relevant difference in quantity and quality.¹⁷⁸ *Kopp* properly enunciates the requirement that one sex be treated worse than the other to constitute discrimination under Title VII and finds that in that case worse treatment for one sex was present.¹⁷⁹ The court noted that the incidents involving men involved only a raised voice or verbal insult while those involving women involved physical contact and harm and rejected the application of the claim of indiscriminate harassment on factual grounds.¹⁸⁰

Twice the Eighth Circuit has ruled that the incidents were not based on the plaintiff’s sex, implicitly involving the equal opportunity harasser concept.¹⁸¹ Similarly, the principle embodied in the equal opportunity harassment doctrine seems present in *Schoffstall v. Henderson*, in which the court upholds a grant of summary judgment because the female plaintiff “cannot show that similarly situated male employees were treated differently.”¹⁸² But *Schoffstall* is a case of sex discrimination by adverse employment action, not a sexual harassment case.¹⁸³ Each case barring liability applies the doctrine without using the nomenclature or discussing the underlying legal basis leaving the

177. *Id.*

178. *Kopp*, 13 F.3d at 269–70.

179. *Id.*

180. *Id.*

181. See *Hesse v. Avis Rent A Car Sys., Inc.*, 394 F.3d 624, 630 (8th Cir. 2005) (“The record shows, however, that Johnson’s loud behavior was directed at both male and female employees. Hesse has acknowledged that everyone in the office was subjected to Johnson’s deliberate shoe squeaking and that he clapped his hands loudly to get the attention of male garage technicians. Hesse relies on the incident in which Johnson banged on a window to get Sheila Sexauer’s attention, but that incident does not establish that Johnson’s conduct was based on sex since he engaged in similar behavior to get the attention of male employees.”); *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 965 (8th Cir. 1999) (holding plaintiff’s admission that “she believed that [the harasser] would have reacted the same way had a male co-worker [provoked him]” demonstrated a lack of sex-based harassment).

182. *Schoffstall v. Henderson*, 223 F.3d 818, 826 (8th Cir. 2000).

183. *Id.*

exact status of the equal opportunity harasser doctrine in some doubt in the Eighth Circuit.

A recent case, the only published case in the Eighth Circuit to directly use the term “equal opportunity harasser,” avoids ruling on the issue despite it being the grounds for dismissal in the district court below.¹⁸⁴ In *Algana v. Smithville R-II School District*, the school district adduced evidence to demonstrate that the allegedly harassing behavior was directed toward both male and female employees.¹⁸⁵ The district court ruled this was sufficient to provide the defendant with a defense, but the circuit court resolved the case by addressing the absence of a different element: “We express no opinion on whether the evidence suggesting that the allegedly harassing behavior was also directed toward male employees is sufficient to establish an ‘equal opportunity’ harasser defense.”¹⁸⁶ This is neither an acceptance nor repudiation of the doctrine itself, though the court cites to *Holman v. Indiana*.¹⁸⁷ The doctrine seems alive in the Eighth Circuit, though often discussed simply as a lack of different treatment between the sexes, but the question remains somewhat open after the general language in the earlier circuit cases and the decision on other grounds in *Algana*.

With relatively few cases or a lack of clear use of the terminology, it is difficult to say whether these two circuits have accepted the doctrine as applicable. This leaves some uncertainty about the law of the circuit on this issue, which in turn keeps both employers and employees in the dark about their relative rights and responsibilities. This militates in favor of clarification of Title VII perhaps even more strongly than the cases plainly acknowledging the loophole.

Far from being a dead or dying concept, the equal opportunity harasser loophole is actively applied by most circuit courts. This is true whether they use the nomenclature or not and whether the conduct is bisexual, equally targeted, or indiscriminate. This represents a significant doctrinal hole in an important federal protection.

B. The Single Circuit Rejecting the Equal Opportunity Defense

Only the Ninth Circuit plainly rejects the premise that an equal opportunity harasser falls outside the scope of Title VII. In *Steiner v.*

184. *Algana v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 980 (8th Cir. 2003).

185. *Id.* at 979–80.

186. *Id.*

187. *Id.* at 980.

Showboat Operating Co., the Ninth Circuit rejected a claim of equal opportunity harassment by holding the conduct toward the female plaintiff and her female co-workers involved sex-specific pejoratives whereas the conduct toward men, while crass, was sex-neutral.¹⁸⁸ The court could easily have accepted the principle of equal opportunity harassment while finding the harassment in this case was unequal. It chose, however, to reject the principle and offered this dicta: “[E]ven if Trenkle used sexual epithets equal in intensity and in an equally degrading manner against male employees . . . we do not rule out the possibility that *both* men and women working at Showboat have viable claims against Trenkle for sexual harassment.”¹⁸⁹ Much like the opposing dicta acknowledging the equal opportunity harasser problem in *Barnes* and *Bundy*, there is no analysis or support for this casual comment.¹⁹⁰ At most, *Steiner* points to circuit authority, *Ellison v. Brady*,¹⁹¹ for the point that the standard is that of a “reasonable woman” and that “conduct that many men consider unobjectionable may offend many women.”¹⁹² But nothing about that point compels or even supports a rejection of the equal opportunity harasser exception.¹⁹³ Nevertheless, *Steiner* became known for its rejection of the premise of equal opportunity harassment, and its dicta has influenced the Ninth Circuit jurisprudence much as *Barnes* and *Bundy* have influenced the rest of the circuits. For example, in a racial discrimination case under Title VII, the Ninth Circuit plainly rejected defendant’s claim of equal opportunity harassment: “Potomac’s status as a purported ‘equal opportunity harasser’ provides no escape hatch for liability.”¹⁹⁴ Likewise, another racial discrimination case elevates this dicta to be the law of the circuit—“our case law is clear that the fact that an individual ‘consistently abused men and women alike’ provides no defense to an accusation of sexual harassment,”—and goes on to hold that though the supervisor used racially charged language

188. *Steiner*, 25 F.3d at 1463–64.

189. *Id.* at 1464.

190. *Id.*; *Bundy*, 641 F.2d at 942 n.7; *Barnes*, 561 F.2d at 990 n.55.

191. *Ellison v. Brady*, 924 F.2d 872, 878–79 (9th Cir. 1991).

192. *Steiner*, 25 F.3d at 1464.

193. Moreover, the “reasonable woman” standard was implicitly rejected in favor of a “reasonable person” standard. See *Harris*, 510 U.S. at 21 (applying a “reasonable person” standard); *Oncale*, 523 U.S. at 81 (applying a “reasonable person” standard); see also *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir. 1996) (“[T]he Supreme Court has employed the ‘reasonable person’ standard in a hostile work environment case. . . . Courts of appeals addressing the issue after *Harris* have used a ‘reasonable person’ standard.”).

194. *Swinton v. Potomac Corp.*, 270 F.3d 794, 807 (9th Cir. 2001).

to goad both black and white employees, the conduct remained “because of race.”¹⁹⁵

Similarly, in *E.E.O.C. v. National Education Association, Alaska*, the court, as in *Steiner*, holds that the conduct toward men and women was not equal, but rejects even the concept of an equal opportunity harasser in dicta.¹⁹⁶ In order to find differences in conduct and avoid directly ruling on a true equal opportunity harasser, the court expanded the manner in which the conduct can be different to include not only the harassing behavior, but also how that behavior is subjectively received by the victims.¹⁹⁷ That is, the reaction of individuals can now determine whether the conduct was “because of sex” in the Ninth Circuit.¹⁹⁸ Such an expansive reading of “because of sex” would seem to preclude equal opportunity harassment (or equal harassment between any two individuals) as a factual matter, regardless of the circuit’s rejection or acceptance of the doctrine itself.¹⁹⁹ For example, in *Davis v. California Department of Corrections & Rehabilitation*, the court quickly disposed of any suggestion of equal harassment by noting that not only was the conduct toward plaintiff different, but, even to the extent it was the same, she had a different subjective response than her male colleagues.²⁰⁰ These cases demonstrate that the Ninth Circuit rejects the equal opportunity harasser concept and will go to great lengths to distinguish conduct to avoid it.²⁰¹

The district courts within the circuit have likewise looked askance at the equal opportunity harasser doctrine. For example, in *Kane v. Beaudry Motor Co.*, the Arizona District Court flatly rejects the de-

195. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004).

196. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845 (9th Cir. 2005) (“We have previously held that it is error to conclude that harassing conduct is not because of sex merely because the abuser ‘consistently abused men and women alike.’”).

197. *Id.* at 845–46. Professor Calleros recognized that the equal opportunity harasser doctrine could be evaded in such a way, by “taking compartmentalization to the extreme.” See Calleros, *supra* note 15, at 77.

198. *Nat'l Educ. Ass'n, Alaska*, 422 F.3d at 845–46.

199. There certainly appears to be some dispute within the circuit about the scope of the “because of sex” requirement more generally. See *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1070 (9th Cir. 2002) (en banc) (arguing, particularly in the dissent, about the requirement of both “discrimination” and “because of sex” in all Title VII harassment cases); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 865 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003) (arguing, particularly in the dissent, regarding the proper standard in mixed motive cases for determining whether the employment action was because of sex).

200. *Davis*, 484 F. App'x at 128.

201. See *Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 844–45 (9th Cir. 2005); *Davis*, 484 F. App'x 124, 128 (9th Cir. 2012).

fendants' equal opportunity harasser defense without further analysis, relying on *Steiner* and *Swinton* as the law of the circuit:

Defendants argue that Kacic was an "equal opportunity harasser." While this description of Kacic may be true, the United States Court of Appeals for the Ninth Circuit has clearly held that an "equal opportunity harasser" is not a complete defense to a discrimination claim.²⁰²

The courts within the Ninth Circuit refuse to acknowledge the equal opportunity harasser defense to be the law of the circuit.²⁰³ Not only is this position an outlier, it is difficult to defend. Moreover, no attempt has been made to defend it. Without explanation, the *dicta* in *Steiner* has been elevated to the law of the circuit. The Ninth Circuit stands alone in its refusal to acknowledge the doctrine of equal opportunity harassment.

IV. THE LINGERING JURISPRUDENTIAL PROBLEM AND NEW CHALLENGES ON THE HORIZON

The existence of the equal opportunity harasser loophole became apparent the moment sexual harassment was first accepted as sexual discrimination under Title VII.²⁰⁴ It has moved from the realm of hypothetical doctrinal problem to a practical limitation on the scope of Title VII.²⁰⁵ It continues to be an unsettling doctrine to apply, relieving harassers of liability for having committed more or more indiscriminate harassment than the statute proscribes.²⁰⁶ Courts fear this

202. Kane v. Beaudry Motor Co., No. 01-249-TUC-WDB, 2002 WL 32866532, at *6 (D. Ariz. Sept. 3, 2002) (citing *Steiner*, 25 F.3d at 1463–64 and *Swinton*, 270 F.3d at 807); see also Garcia v. Los Banos Unified Sch. Dist., 418 F. Supp. 2d 1194, 1222–23 (E.D. Cal. 2006) (holding the conduct toward women was more intense than that directed at men).

203. The single counterpoint to this is *Cutrona v. Sun Health Corp.*, an unpublished opinion in which the Arizona District Court granted summary judgment based on the indiscriminate and non-sex based epithets by one supervisor. In *Cutrona*, the district court accepts the standard mantra of *Steiner* and *McGinest*—"it is well settled 'that the fact that an individual 'consistently abused men and women alike' provides no defense to an accusation of sexual harassment"—but ultimately rejects plaintiffs' claims by finding that the conduct was not because of sex but merely sex-neutral, if objectionable, conduct. *Cutrona v. Sun Health Corp.*, No. CV062184PHXMHM, 2008 WL 4446710 at *9–*12 (D. Ariz. Sept. 30, 2008).

204. *Bundy*, 641 F.2d at 942 n.7; *Barnes*, 561 F.2d at 990 n.55.

205. See Walsh, *supra* note 11, at 493 tbl. 6. (showing the percentage of "because of sex" challenges decided on equal opportunity harassment grounds more than doubled in 1998–2005 over the 1993–1998 period). Compare *Barnes*, 561 F.2d at 990 n.55 (acknowledging the problem in *dicta*) with *Holman*, 211 F.3d at 399, 401 (granting summary judgment to employer based on equal opportunity harassment by supervisor).

206. *Holman*, 24 F. Supp. 2d at 916, *aff'd sub nom.* 211 F.3d 399 ("Often the court is placed in the position of being the mediator between the reality of legal doctrine and the dictates of common sense. The court cannot deny that this is such a case. Certainly, the court is cognizant

loophole will provide a means of unjust escape from liability.²⁰⁷ Courts rejecting plaintiffs' claims on equal opportunity harassment grounds leave plaintiffs to their state law remedies, if any.²⁰⁸ State discrimination statutes are often patterned on and interpreted consistent with the federal Title VII law, and so carry the same limitation.²⁰⁹ State tort actions, such as negligence or intentional infliction of emotional distress, are often inadequate because they reach only "outrageous" conduct.²¹⁰ Likewise, workplace regulatory provisions fail to offer adequate protection.²¹¹ Leaving a doctrinal infirmity at the heart of Title VII sexual harassment jurisprudence is both theoretically and practically problematic.

Potential responses include judicial reinterpretation of Title VII, amending Title VII itself, or adding federal anti-harassment legislation. Judicial reinterpretation is unlikely because changes that resolve the problem also fundamentally contradict existing doctrine.²¹² For

that to decide as it does creates an anomalous result in sexual harassment jurisprudence which leads to the questionable result that a supervisor who harasses either a man or a woman can be liable but a supervisor who harasses both cannot be."); *Ryczek*, 877 F. Supp. at 761–62 nn.6, 7 (stating that the equal opportunity harasser exclusion "would lead to bizarre results and some rather provocative trial testimony" and worried that "[o]ne can only speculate as to what would be legally sufficient to submit the issue of a supervisor's bisexuality to the jury. Would the supervisor's sworn statement of his or her bisexuality be adequate? Would the supervisor need to introduce affirmative evidence of his liaisons with members of both sexes? Surely Congress did not anticipate that the language of Title VII would eventually produce such concerns").

207. *McDonnell*, 84 F.3d at 260 (referring to "the specter of the perfectly bisexual harasser" and finding the idea of a purposeful equal opportunity harasser "exceedingly perverse").

208. Corena Norris-McCluney, *Defending the Boor and the Misanthrope*, FOR DEF. Mar. 2010, at 34, 38–39 ("Although federal law might not create a cause of action for bad workplace behavior or behavior that treats everyone badly, plaintiffs have and will continue to assert claims against their employers based on state common law theories.").

209. Robin Applebaum, Note, *The "Undifferentiating Libido": A Need for Federal Legislation to Prohibit Sexual Harassment by a Bisexual Sexual Harasser*, 14 HOFSTRA LAB. L.J. 601, 620 (1997) ("Unfortunately, these discrimination statutes were modeled after Title VII. Consequently, the language is either identical to Title VII or varies slightly. As such, the legislation would not encompass protection from the bisexual sexual harasser because of the applicability of the 'but for' standard.").

210. Chamallas, *supra* note 16, at 2125–39 (concluding that the most jurisdictions hold hostile work environments are not sufficiently "outrageous" to qualify as intentional infliction of emotional distress); See RESTATEMENT (SECOND) OF TORTS § 46 (1965) (noting that to establish a cause of action for intentional infliction of emotional distress, one must by extreme and outrageous conduct intentionally or recklessly cause severe emotional distress to another).

211. David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 521–22 (2000) [hereinafter Yamada, *Phenomenon*] (concluding that the regulatory framework established by the Occupational Safety and Health Act of 1970 to avoid "serious physical harm" to workers is too focused on physical workplace hazards to address harassment).

212. See e.g., Macready, note 16 at 675–76 (calling, nevertheless, for a broad interpretation of "discriminate," "because of," and "sex" in Title VII to effectuate its anti-discrimination purpose).

example, one could reconceptualize Title VII liability to turn not on mistreatment because of one's physical sex but because the conduct is sexual in nature.²¹³ Or the courts could reject the causation requirement entirely, looking instead at a dominance analysis, examining whether the conduct perpetuates gender stereotypes in the workplace.²¹⁴ Each of these would require a significant course change by the Supreme Court given its recent reassertion and explanation of the "because of sex" requirement:

We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."²¹⁵

The Court is unlikely to abandon the causation requirement it so recently and strongly reaffirmed.

Alternatively, the courts could continue down the logical path embraced by the Ninth Circuit, which avoids the equal opportunity harasser problem by defining it out of existence. Current Ninth Circuit case law seems to achieve this by holding that even when conduct is equal in every detail, it is not truly equal between men and women because it is subjectively felt differently by men and women.²¹⁶ While this may be "compartmentalization in the extreme," it does provide a

213. David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1787 (2002) (proposing a "sex *per se* rule" as either a conclusive or rebuttable presumption that sexual conduct is "because of sex" and satisfies the causation requirement in Title VII harassment claims); Ronald Turner, *Title VII and the Inequality-Enhancing Effects of the Bisexual and Equal Opportunity Harasser Defenses*, 7 U. PA. J. LAB. & EMP. L. 341, 360-61 (2005) (defining "sexed" broadly as one who is harassed: "Being unlawfully sexed is the problem to be remedied in all harassment scenarios, for common to all claims is the placement of individuals on one side of the line between the harassed and the non-harassed. A person finding herself or himself on the harassed side of the line should be entitled to challenge and seek relief from that misconduct; that they were put there by a unisexual, unequal opportunity, bisexual, or equal opportunity harasser should not matter. Any person sexed by sexually harassing behavior should have an independent and not just a comparative right to statutory protection and a legal remedy.").

214. Sandra Levitsky, Note, *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1044 (1996) ("An equal opportunity harasser, like all people who harass, reinforces the sexual hierarchy by taking advantage of the sex object stereotype.").

215. *Oncale, Inc.*, 523 U.S. at 80 (citing *Harris*, 510 U.S. at 25).

216. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845-46 (9th Cir. 2005) (holding that "differences in subjective effects . . . [of harassment] is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific."); *Steiner*, 25 F.3d at 1464 ("[E]ven if Trenkle used sexual epithets equal in intensity and in an equally degrading manner against male employee . . . we do not rule out the

mechanism for shrinking the universe of true equal opportunity harassment from a small percentage of harassment cases to perhaps none.²¹⁷ Such a theory finds some support in the literature suggesting men and women perceive unwelcome sexual advances or ambient harassment differently.²¹⁸ Under this version of the law, all harassment is *sui generis* because it is evaluated not just by the conduct of the harasser, or even the conduct of the harasser as perceived by a reasonable person, but by the conduct of the harasser as perceived by the individual plaintiff.²¹⁹ While this approach eliminates the equal opportunity harasser, it does so by reinforcing sexual distinctions, and dividing the relevant legal standard into separate reasonable man and reasonable woman standards.²²⁰

Perhaps it is time to amend Title VII to be broader, to fully achieve its goal of workplace equality. Following the enactment of Title VII, states passed their own anti-discrimination laws. Many states now prohibit discrimination based on sexual orientation, gender identity, or both.²²¹ These states, and increasingly the federal courts, are coming to realize that “sex” encompasses a broad range of characteristics beyond a binary biological classification.²²² As one scholar notes:

The term “sex” embodies many interrelated factors, including chromosomes, genitalia, secondary sex characteristics, gender traits, and sexuality. Traditionally, each of these concepts was thought to embody duality: All people were thought to be either male or female

possibility that *both* men and women working at Showboat have viable claims against Trenkle for sexual harassment.”).

217. Calleros, *supra* note 15, at 77 (characterizing such finely detailed distinction between conduct as “taking compartmentalization to the extreme”).

218. Kyle F. Mothershead, Note, *How the “Equal Opportunity” Sexual Harasser Discriminates on the Basis of Gender Under Title VII*, 55 VAND. L. REV. 1205, 1237–38 (2002) (citing Craig R. Waldo, Jennifer L. Berdahl & Louise F. Fitzgerald, *Are Men Sexually Harassed? If So, by Whom?*, 22 LAW & HUM. BEHAV., 59–79 (1998)); Parker, *supra* note 37 (citing Note, *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 HARV. L. REV. 1075, 1076 (1993)).

219. This kind of “individualized analysis” was also proposed in a student note, which exposed the fact that this essentially reads “discrimination” out of the statute or, at best, redefines it to mean “treats poorly.” See Mark J. McCullough, Note, *One Is a Claim, Two Is a Defense: Bringing an End to the Equal Opportunity Harasser Defense*, 67 U. PITT. L. REV. 469, 485 (2005).

220. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting a reasonable woman standard).

221. Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & an Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 186 (2009) (citing Nat’l Gay and Lesbian Task Force, *State Nondiscrimination Laws in the U.S.* (July 1, 2009), http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_09_color.pdf) (noting twenty-one states and the District of Columbia outlaw job discrimination based on sexual orientation)).

222. *Id.*

(duality in chromosomes, genitalia, and secondary sex characteristics), masculine or feminine (duality in gender traits), and sexually attracted to only males or only females (duality in sexuality) When all five factors converge in one person, the courts need not consider all the ideas embodied in the term “sex.” But it is now abundantly clear that there is a spectrum of sexes and gender roles that and [sic] a person’s sexual identity is not always based on his or her biological organs.²²³

Bisexuality, asexuality, pansexuality, and a variety of other identity issues go into describing individuals, and each provides a basis for discrimination in the workplace.²²⁴ As presently written, “sex” in the statute cannot be fairly read to include these broader meanings.²²⁵ An amendment to Title VII could incorporate a broad prohibition on employment discrimination and undo or adjust the causation requirement in a manner that case law development cannot.

Finally, separate federal harassment legislation could address the issue. Legislation, such as the Employment Non-Discrimination Act (ENDA) proposed in 2011 and again in 2013, would provide a broad-based employment discrimination prohibition, including discrimination based on sexual orientation, gender identity, and transgender status.²²⁶ Such legislation would not necessarily fix the doctrinal loophole in Title VII, though perhaps it could be drafted to do so.²²⁷ At a minimum, it would provide another layer of federal protection for employees. State laws on the issue have been proposed, but not yet passed.²²⁸

223. Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL’Y 535, 547–48 (2007).

224. However, only seventeen states and the District of Columbia expressly, by statute, prohibit employment discrimination against transgender people. Shannon Minter, 1 Sexual Orientation and the Law § 10:10 (2013). No such protection exists for other gender identities. *Id.*

225. See 110 CONG. REC. 2547, 2577–84 (1964); Calleros, *supra* note 15 (“Smith and the few other Representatives who spoke to the amendment understood the word ‘sex’ in the amended bill to refer to the characteristic of being male or female.”); see also McCullough, *supra* note 219, at 485–86 (proposing merely expanding the judicial interpretation of “sex” in Title VII).

226. For example, the Employment Non-Discrimination Act (ENDA) offered just such a workplace-focused, broad non-discrimination statute. Employment Non-Discrimination Act, S. 811, 112th Cong. § 1 et seq. (2011) and S. 815 113rd Congress. § 1 et seq.

227. See Levitsky, *supra* note 214, at 1037 (acknowledging that federal legislation would not resolve the doctrinal problem of equal opportunity harassment but would provide an alternative means for relief); Deborah N. McFarland, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 FORDHAM L. REV. 493, 537 (1996) (proposing federal anti-harassment legislation focused on the sexual behavior at issue and the effect on the victim’s workplace environment).

228. Norris-McCluney, *supra* note 208, at 38–39 (“In addition to the common law claims that plaintiffs can bring based on hostile or inappropriate conduct in the workplace, a move is afoot to institute the civility code that our federal courts have refused to enforce under Title VII. Proposed bills designed to prevent and punish workplace bullying or abusive work environments have been introduced in approximately fifteen states. The states that have considered this type of

CONCLUSION

Regardless of the mechanism, the equal opportunity loophole should be addressed. It is an old wound in an important piece of federal legislation. The federal courts do their best to accept it, apply it, or avoid it, but it lingers as both a doctrinal anomaly and a practical, liability-limiting concept. For a legal loophole so “bizarre” and “perverse,” it has lingered far too long.

legislation include California, Connecticut, Hawaii, Illinois, Kansas, Massachusetts, Missouri, Montana, New Jersey, New York, Oklahoma, Oregon, Utah, Vermont, and Washington. However, although each of these states has considered such legislation, no state has passed a bill. Whereas Title VII prohibits harassing or discriminating conduct based on certain protected categories, the proposed state legislation would generally prevent ‘abusive conduct,’ defined as ‘conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests.’”).

The Incomplete Revolution: Women Journalists — 50 Years After Title VII of the Civil Rights Act of 1964, We’ve Come a Long Way Baby, But Are We There Yet?

SHA-SHANA N.L. CRICHTON*

“Equality is never given, it is taken”¹

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1. LYNN POVICH, *THE GOOD GIRLS REVOLT: HOW THE WOMEN OF NEWSWEEK SUED THEIR BOSSES AND CHANGED THE WORKPLACE* 215 (2012) (quoting Jane Bryant Quinn).

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INTRODUCTION

In 2011, Jill Abramson became the first woman to be appointed as executive editor of the *New York Times*. This historic event certainly had to mean that female journalists were on their way to smashing the glass ceiling. Like the Virginia Slims cigarette commercial, I thought “Wow! ‘You’ve come a long way baby.’” Then came my most sobering thoughts: it is true that women have come a long way since the 1960s, when Phillip Morris² introduced the popular commercial “You’ve come a long way baby,”³ but had women journalists truly arrived at gender equality in the workplace?

I mulled this question over for a few weeks. Then, while reading the book review section of the *New York Times*, I came across Anne Eisenberg’s review of Lynn Povich’s *The Good Girls Revolt: How the Women of Newsweek Sued Their Bosses and Changed the Workplace*. I was intrigued by Ms. Eisenberg’s review and specifically her comment that “[F]eminism is an incomplete revolution that has yet to reach its goals. But this sparkling, informative book may help move these goals a tiny bit closer.”⁴ I noted carefully, “has yet to reach its goals.”⁵ Half a century after Title VII of the Civil Rights Act of 1964 made sex-based employment discrimination illegal and more than forty-five years since a group of women at *Newsweek*⁶ joined forces to sue *Newsweek* for the right to work in an environment free from sex

2. *About Phillip Morris USA*, PHILLIPMORRISUSA AN ALTRIA COMPANY, http://www.phillipmorrisusa.com/en/cms/Company/Corporate_Structure/default.aspx?src=top_nav (last visited Sept. 17, 2014).

3. Hal Weinstein, *How an Agency Builds A Brand – The Virginia Slims Story* (Papers from the 1969 A.A.A.A Regional Conventions <http://legacy.library.ucsf.edu/tid/efc64e00/pdf>). In 1968, the Virginia Slims advertisements “You have come a long way baby” targeted young women and appealed to their desire to embrace feminism, women’s liberation, women’s independence, and gender equality. See Aaron Brown, *Selling Cigarettes as a Symbol of Women’s Liberation*, ABC NEWS (March 27, 2014), <http://abcnews.go.com/WNT/story?id=131153> (explaining that Virginia Slims cigarettes sold by Phillip Morris, now Atria Group, were introduced in the late 1960s and were targeted towards young women); Ruth Rosen, *You’ve Come a Long Way, Baby (Or Have You?)* HUFFINGTON POST (February 21, 2013) http://www.huffingtonpost.com/ruth-rosen/womens-movement_b_2733469.html.

4. Anne Eisenberg, *‘Good Girls’ Fight to be Journalists*, N.Y. TIMES, Sept. 1, 2012, http://www.nytimes.com/2012/09/02/business/good-girls-tells-of-womens-fight-for-rights-at-newsweek.html?pagewanted=all&_r=0 (commenting that “the *Good Girls Revolt* has many timely lessons for working women who are concerned about discrimination today, and for the companies that employ them.”).

5. *Id.*

6. *Newsweek* is currently owned by IAC. In 2010, the *Washington Post* sold *Newsweek* to Sidney Harman and it merged with *The Daily Beast* in 2012. IAC has been the controlling owner since the summer of 2012. Daniel Gross, *Newsweek Magazine Sold to IBT Media*, THE DAILY BEAST, Aug. 3, 2013, <http://www.thedailybeast.com/articles/2013/08/03/newsweek-magazine-sold-to-ibt-media.html>.

discrimination, this review suggested that women journalists had yet to reach the goal of gender equality in the workplace.

I bought and read *The Good Girls Revolt*. Ms. Povich told a gripping story of a group of women journalists at *Newsweek* who sued *Newsweek* in the 1970s on the grounds that *Newsweek* discriminated against them because of their gender.⁷ The women at *Newsweek* felt that despite being educated at the best schools, and despite their ability to do any job at *Newsweek*, they would never have the opportunity to work in any job other than that of a secretary or a researcher nor would they ever have the opportunity to sit in the “corner office,” solely because of their gender.⁸ Ironically, they filed the lawsuit against *Newsweek* the same day that *Newsweek* ran its cover story about feminism.⁹ This lawsuit inspired women in other media companies to file similar lawsuits.¹⁰

On a more disturbing note, however, over four decades later there was clear evidence that similar inequitable and discriminatory practices that were ongoing at the time of the *Newsweek* lawsuit in the 1970s were still alive at *Newsweek*. Jessica Bennett, a former *Newsweek* employee, related her experiences with gender discrimination at *Newsweek*.¹¹ In January 2006, Ms. Bennett was offered an internship at *Newsweek*.¹² She was about to be hired when three males got summer internships.¹³ At the end of the summer the men were offered permanent jobs, but Ms. Bennett was not offered a job.¹⁴ Instead, *Newsweek* kept extending her internship.¹⁵ *Newsweek* finally hired Ms. Bennett in January 2007.¹⁶ She had to fight to get her articles published¹⁷ while her male co-workers with the same or less experience got “better assignments and faster promotions.”¹⁸ Jesse Ellison, also a former *Newsweek* employee, had a similar experience. She be-

7. POVICH, *supra* note 1, at xix.

8. *See id.* at xvii–xix.

9. *Id.* at 1.

10. *Id.* at 9 (noting that the *Newsweek* lawsuit encouraged other women in media companies to file discrimination lawsuits.).

11. POVICH, *supra* note 1, at ix–x; *See* Lynn Povich, *40 Years Later, Newsweek Sex Discrimination Persists*, WE.NEWS, Sept. 9, 2012, http://womensenews.org/story/books/120907/40-years-later-newsweek-sex-discrimination-persists/#.U_uUw_lU7I.

12. POVICH, *supra* note 1, at ix–x.

13. *Id.* at x.

14. *Id.* at x. (Ms. Bennett was not offered a permanent job even though she was asked to rewrite a story written by one of the males who received a permanent position.).

15. *Id.*

16. *Id.* at x.

17. *Id.*

18. *Id.*

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came annoyed and frustrated when she discovered that *Newsweek* had paid a much higher salary to the male reporter who had replaced her.¹⁹ Both women noted that they blamed themselves for these occurrences;²⁰ they felt confused because what they were experiencing felt like discrimination, but in their mind gender discrimination was supposed to be a thing of the past,²¹ an evil that should have been remedied by legislation.

It was ironic that Ms. Bennett and her female colleagues noted that they felt discriminated against and marginalized in the workplace when there was ample evidence that women were advancing in media companies.²² Women appeared to be making progress in terms of getting jobs in top positions. Women made up nearly 40 percent of the masthead at *Newsweek* and were employed as writers, senior editors, and at least two women were in top management.²³ This progress had to be a sign that women journalist “are there,” that they had finally succeeded in achieving equality in the workplace. I revisited the question of gender equality for women journalists when less than two months before the fiftieth anniversary of Title VII of the Civil Rights Act 1964, Jill Abramson was fired from the *New York Times* and replaced by a male.²⁴ It is alleged that Ms. Abramson discovered that her pay and benefits package was “considerably less” than that of her male predecessor.²⁵ She challenged the pay and benefits disparity, was declared pushy, and was subsequently fired.²⁶ Her pay and benefits disparity raises the issue of sex-based employment discrimination

19. *Id.*

20. *Id.* at xii - xiii. Compare *id.* with Katie Johnston, *Authors Work to Reveal Hidden Gender Bias*, BOSTON GLOBE, Mar. 30, 2014, <http://www.bostonglobe.com/business/2014/03/29/authors-work-reveal-hidden-gender-discrimination/7vMZ61rk6eydmdszKbO5YP/story.html> (commenting on CARYL RIVERS & ROSALIND C. BARNETT, *THE NEW SOFT WAR ON WOMEN: HOW THE MYTH OF FEMALE ASCENDANCE IS HURTING WOMEN, MEN – AND OUR ECONOMY* (2013) and noting that the authors argue that “when women don’t realize that the playing field remains uneven, they tend to blame themselves for losing out on a job or promotion.”).

21. POVICH, *supra* note 1, at ix, xii-xiii.

22. Jessica Bennett & Jesse Ellison, *Young Women, Newsweek, and Sexism*, NEWSWEEK (filed March 18, 2010 and updated Mar. 21, 2014; at 3:03 pm), <http://www.newsweek.com/young-women-newsweek-and-sexism-69339> (quoting author Susan Douglas, “If we judge why what we see in the media, it looks like women have it made.” The assumption that women have made it negates allegations of sexism in the workplace.).

23. *Id.* (explaining that the number of women on the masthead increased from 25 percent in 1970 to 39 percent in 2010.). See also Jessica Bennett, Jesse Ellison & Sarah Ball, *Are We There Yet*, NEWSWEEK, March 18, 2010.

24. Ken Auletta, *Why Jill Abramson Was Fired*, THE NEW YORKER, May 14, 2014, <http://www.newyorker.com/business/currency/why-jill-abramson-was-fired>.

25. *Id.*

26. *Id.*

that was declared illegal fifty years ago by Title VII of the Civil Rights Act of 1964 and other anti-discrimination legislation.²⁷

This Article will focus on women journalists and their quest to bridge the gender gap and to achieve equality in the workplace fifty years after Congress passed Title VII of the Civil Rights Act of 1964. This Article does not address how women are portrayed by the media. I chose to explore the gender gap in the media industry for two reasons: first, after reading about the women of *Newsweek's* courageous fight in the 1970s for equal pay and equal job opportunities in *The Good Girls Revolt* and Jessica Bennett's article detailing similar discriminatory practices four decades later, I wondered why the goal of gender equality, a basic human right, seems so unattainable; and second, Title VII of the Civil Rights Act of 1964 has explicitly prohibited sex-based employment discrimination for now over fifty years, therefore it is time to end gender discrimination and the perpetual glass ceiling in every industry, especially in the media industry. The media industry is an important focal point because media companies play a significant role in shaping social norms and as such, they are in the best position to influence gender equality.²⁸ It is the media companies that set our national agenda²⁹ and shape our self-perception by deciding "what is important enough to report," who gets to talk or to write,³⁰ and how the information is presented.³¹ Given the media companies' vital social role in shaping our nation's understanding of equity, the limitations on employment opportunities for women journalists and the dearth of women in decision-making positions are concerning.³² The decision-makers in media companies have the power to influence gender equality by ensuring that gender equality is foremost

27. Equal Pay Act of 1963 29 U.S.C § 206(d) 2012, Civil Rights Act of 1964, 42 U.S.C § 2000e-2(a) (2012).

28. Robin H. Pugh Yi & Craig T. Dearfield, *The Status of Women in the US Media 2012*, WOMEN'S MEDIA CENTER 1, http://wmc.3cdn.net/a6b2dc282c824e903a_arm6b0hk8.pdf ("Media influence is one of the most powerful economic and cultural forces today."). See Carolyn M. Byerly, *The US: Social Contradictions Also Seen in Newsrooms*, in *THE PALGRAVE INTERNATIONAL HANDBOOK OF WOMEN AND JOURNALISM* 191 (Carolyn M. Byerly ed., 2013) (noting that journalism is essential to achieving equality.).

29. Erika Falk & Erin Grizard, *The Glass Ceiling Persists: The 3rd Annual APPC Report on Women Leaders in Communication Companies* 7 (Dec. 2003), available at http://www.nywift.org/documents/2003_04_the-glass-ceiling-persists-corrected_rpt.pdf.

30. Yi & Dearfield, *supra* note 28 at 1. See also DEBORAH CHAMBERS ET AL., *WOMEN AND JOURNALISM* 2 (2004) ("[The news is] shaped by gender and how the organization of the news and of the newsroom, as well as assumptions about gender and women, have affected women's performance and potential as journalists.").

31. Falk & Grizard, *supra* note 29.

32. *Id.*

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on the agenda as they determine what kinds of news, information, and entertainment will be produced and disseminated.³³ Gender equality may continue to be a dream for yet another fifty or more years if discrimination in the workplace continues to keep women journalists out of media companies and decision-making positions.³⁴

Part I of this Article gives a historical overview of women in the workplace, and particularly women journalists post women's suffrage and before the equal protection laws of the 1960s. Part II looks at the women journalists in the 1960s to 1970s and examines how the gender equality laws, and especially Title VII, affected the status of women journalists. This section also examines the seminal lawsuits filed by the women at *Newsweek* in an attempt to show the journey of women journalists, and in particular those in print journalism at *Newsweek*. This section underscores the importance of the *Newsweek* women's group who through galvanizing and advocating for their right to equality, made significant advancement in the fight for equality and created a domino effect as women in other media companies recognized their efforts and organized themselves into groups to advocate for gender equality. This section also looks at other lawsuits filed in the 1970s against media companies and shows that women journalists made meteoric advancements in the workplace because of the legislations and laws of the 1960s and 1970s, coupled with the willingness of women in that period to file sex discrimination lawsuits, advocate, and otherwise fight for equality.

Part III looks at women journalists from the 1980s to 1990s and argues that while the lawsuits of the 1970s and the resulting affirmative action plans motivated the male-dominated newsrooms to change their old policies and institute new policies that favor gender equality, the change was only temporary. The culture of the newsrooms had not changed to adequately influence permanent changes favoring equitable treatment of women in the workplace. This resulted in continued discriminatory practices that were now cloaked in more subtle and difficult to detect forms, such as the invisible glass ceiling that frustrates a woman's career advancement. Part IV looks at the status

33. *Id.*; see Byerly, *supra* note 28, at 203–04; Yi & Dearfield, *supra* note 28, at 1 (noting that how women are portrayed in the media directly affects gender equality and the decision-makers determine how women are portrayed.)

34. See DAVID H. HOSLEY & GAYLE K. YAMADA, *HARD NEWS: WOMEN IN BROADCAST JOURNALISM* 23, 158 (1987); SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 159 (2013) (noting that true equality will only be achieved “when more women rise to the top of every government and every industry.”).

of women journalists from 2000, the new millennium, to the fiftieth anniversary of Title VII of the Civil Rights Act of 1964 and argues that although women journalists have made some strides, they have yet to achieve gender equality in the workplace. Statistics show that women may in fact be regressing: a majority of the women journalists hired by media companies are in lower paying positions while the male journalists are more likely to be in higher paying positions, are more highly compensated, are more frequently promoted, and are more likely to be hired for top-level positions. Part V concludes by noting that Title VII and current anti-discrimination laws are sufficient to end gender discrimination in the workplace. We do not need more laws. Instead, we need better enforcement of the current anti-discrimination laws, easier access to filing discrimination claims in federal courts, a renewed focus on activism to highlight the social and legal effects and consequences of employment discrimination and a cultural shift that causes men to accept women as equals.

I. WOMEN JOURNALISTS IN THE WORKPLACE POST SUFFRAGE AND BEFORE THE EQUAL PROTECTION LAWS OF THE 1960S

A. Historical Overview of Women Journalists in the Workplace Post Women's Suffrage to World War II.

August 1920 marked a very important milestone in the lives of women in America. Women were finally given the right to vote.³⁵ But they lacked many other rights, including the inalienable right to gender equality in the workplace. Protective state labor laws and the prevailing traditional norm that women belonged at home taking care of the house and family made it difficult for women to enter the workforce.³⁶ The protective state labor laws limited the types of jobs

35. U.S. CONST. amend. XIX. The Nineteenth Amendment, passed by Congress on June 4, 1919 and ratified on August 18, 1920, guarantees all American males and females the equal right to vote. *19th Amendment to the U.S. Constitution: Women's Right to Vote*, NATIONAL ARCHIVES, available at <http://www.archives.gov/historical-docs/document.html?doc=13&title.raw=19th+Amendment%20the+U.S.+Constitution:+Women's+Right+to+Vote> (last visited September 28, 2014, 1:28 AM).

36. See CHAMBERS ET AL., *supra* note 30, at 33; POVICH, *supra* note 1, at 10, Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581, 588 (1997), Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment 1971-2002*, 10 CARDOZO WOMEN'S L.J. 501, 504 (2004), *Rosenfeld v. So. Pacific Co.*, 444 F.2d 1219, 1226 (9th Cir. 1971) (discussing protective state labor laws), *Weeks v. So. Bell Tel. & Tel. Co.*, 408 F.2d 228, 230 (5th Cir. 1969); see also William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment:*

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that women were allowed to do and consequently limited their employment opportunities and earning potential.³⁷

The shortage of male labor during World War I created opportunities for women to enter the workforce and assume “male” jobs.³⁸ This meant that protective state labor laws had to be temporarily relaxed and societal views of a woman’s role had to be temporarily suspended to allow women to be trained for, and take over such jobs. When the men returned from World War I, they were reinstated in their old jobs.³⁹ The women had to give up those jobs and return to homemaking and child-rearing.⁴⁰

Women found it extremely difficult to find jobs as journalists because journalism was deemed a “male” job and therefore a man’s domain.⁴¹ Newsrooms were generally all male, hierarchical, and most male editors believed that it was futile to hire women because “women lacked reporting skills and could never acquire them.”⁴² Although women made up twenty-one (21 percent) of all gainfully

Codes of Color, Codes of Gender, 12.2 J. ECON. PERSPS. 63, 65, (Spring 1998) (noting that unlike other states, New York had a state law prohibiting discrimination and a State Commission Against Discrimination).

37. Michele Hoyman & Lamont Stallworth, *Suit Filing By Women: An Empirical Analysis*, 62 NOTRE DAME L. REV. 61, 67 (1986) (noting that “[A]lthough these early protective labor laws had been initially intended to protect women in the workplace, in many instances they served to imprison and discriminate against women in regard to employment opportunities.”) The protective state labor laws limited how many hours a woman could work and the weight they were allowed to lift at work, prohibited nighttime work, and mandate rest time. *Id.* See Lens, *supra* note 36 at 504, (noting that the protective state labor laws served to protect women from exploitation in the workplace and to prevent women working so hard that they neglect their home and maternal duties); e.g. *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (the United States Supreme Court ruled that an Oregon statute that purported to protect women by limiting their workday to no more than 10 hours was constitutional. Adopting a patriarchal view of a woman’s status in society, the Court reasoned that a woman’s physical structure and her role as a mother prevented her from working long hours without causing injury to herself and compromising the well-being of her present and future offspring. The Court noted that as with minors, the courts needed to ensure that women’s rights were protected, especially since a woman’s physical well-being was “an object of public interest and care in order to preserve the strength and vigor of the race.” Mr. Louis D. Brandeis (later Justice Brandeis) represented the defendant and submitted a separate brief supporting the constitutionality of the statute.) The following states restricted the number of hours a women could be required to work. Massachusetts, Rhode Island, Louisiana, Connecticut, Maine, New Hampshire, Maryland, Virginia, Pennsylvania, New York, Nebraska, Washington, Colorado, New Jersey, Oklahoma, North Dakota, South Dakota, Wisconsin, South Carolina. *Muller v. Oregon*, 208 U.S. 412 (1908), fn1.

38. CHAMBERS ET AL., *supra* note 30, at 27.

39. *Id.* at 35.

40. *Id.*

41. *Id.*

42. *Id.* at 15, 16 (noting that it was widely believed that news gather was too “rude and exacting” for women); see NAN ROBERTSON, *THE GIRLS IN THE BALCONY: WOMEN, MEN AND THE NEW YORK TIMES* 39 (1992).

employed persons in the United States,⁴³ only 16.8 percent of reporters and editors were women.⁴⁴ Most of the women who were employed as journalists, worked at newspapers owned by friends or family members.⁴⁵

Female journalism students faced an equally difficult time in journalism school.⁴⁶ Even though some schools accepted female journalism students, these students were viewed as incompetent and incapable.⁴⁷ In 1939, a male professor at Northwestern University School of Journalism, “assured newspaper managers that journalism programs were intent on weeding out incompetents, misfits, and women”⁴⁸ The attitude that women were unfit for certain jobs, including journalism, created an impenetrable barrier and deterred media executives from hiring even professionally trained women journalists.⁴⁹

A boost for women journalists seeking jobs in the media came about because of an economic necessity. Newspapers were undergoing a severe financial crisis and needed an infusion of capital to survive.⁵⁰ Advertisements were the most lucrative source to boost revenue, and especially advertisements aimed at women, given their increased readership.⁵¹ Newspapers were forced to hire female journalists to “attract female audiences.”⁵² There was never true meritocracy, equity, or parity for women journalists as they were never considered to be “true” journalists.⁵³ They were segregated in the type of news they were allowed to cover and were paid less than male

43. CHAMBERS ET AL., *supra* note 30 at 33, (noting that in 1920 only nine percent of married women were gainfully employed). See also *Women’s Bureau, An Overview 1920 – 2012*, UNITED STATES DEPARTMENT OF LABOR, available at http://www.dol.gov/wb/info_about_wb/interwb.htm.

44. CHAMBERS ET AL., *supra* note 30, at 15.

45. *Id.* at 14-16, 43-46 (noting that women journalists assumed leadership roles largely through family connections).

46. PATRICIA BRADLEY, *WOMEN AND THE PRESS: THE STRUGGLE FOR EQUALITY* 210-11 (2005).

47. *Id.*

48. *Id.*

49. *Id.* at 211 (noting Ms. Bradley’s comment that women journalism students were further limited in their employment opportunities because they were not allowed to participate in on-campus interviews for certain jobs and because the few female journalism professors were restricted to areas concerning “women’s news” and therefore could not recommend the female journalism students for the same jobs as their male peers.). *Id.* at 206.

50. CHAMBERS ET AL., *supra* note 30, at 38; See also BRADLEY, *supra* note 46, at xix.

51. CHAMBERS ET AL., *supra* note 30, at 38.

52. *Id.* at 15, 17, 38.

53. *Id.* at 15-16 (noting that women journalist “occupied a sub-ordinated ‘ghetto status’” in that they were often marginalized and limited to covering soft news).

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journalists with similar qualifications.⁵⁴ Women journalists were hired to address soft news, focusing only on light topics geared to female audiences such as fashion, domestic issues, and society gossip.⁵⁵ The more serious topics, such as politics, current events, war, and economics attracted better pay and were covered by male journalists.⁵⁶

Women journalists in radio also faced discrimination in the workplace because of their sex. Radio became popular in the United States in the 1920s.⁵⁷ The number of radio stations increased by approximately 2000 percent from 1921 to 1923. In 1921 there were approximately 30 radio stations and by 1923, the number had soared to 600.⁵⁸ By 1930, radio had become the nation's primary source of news and entertainment; approximately 40 percent of US households had radio sets.⁵⁹ The reliance on radio for news and entertainment created many job opportunities, but like in print media, the job opportunities were gendered and favored men over women. Women journalists were prevented from participating in the higher paid areas of "serious news broadcasting"⁶⁰ under the excuse that women were unsuitable to speak "in public about serious political and economic matters."⁶¹ Radio executives also claimed that customer preference dictated that they did not employ women as broadcasters because the listeners did not like to have a female voice deliver the news since the microphones were "designed for the male vocal range" and made the women's voices "sound high-pitched and robbed them of authority."⁶² Women journalists were therefore limited to programs "aimed at housewives with an emphasis on fashion and beauty"⁶³ and programs

54. Bridge, *supra* note 36, at 588. (noting that historians justified the lower wages women received by claiming that a woman's primary job is that of an uncompensated mother and homemaker and therefore any job a woman takes outside of the home is temporary or "not serious" as she is supported by her husband or father and therefore does not need to be compensated on the same scale as a man who has to support himself and his family.)

55. CHAMBERS ET AL., *supra* note 30, at 15-16.

56. *Id.* at 16; see also *Male Journalists v. Female Journalists: Discrimination Debate*, RECOMPARISON CONTRIBUTOR, <http://recomparision.com/comparisons/101561/male-journalists-vs-female-journalists-discrimination-debate/> (last visited Sept. 17, 2014).

57. See HOSLEY & YAMADA, *supra* note 34, at 1; Emeritus Rick Musser, *History of American Journalism: The 1920s*, <http://history.journalism.ku.edu/1920/1920.shtml> (last visited Sept. 17, 2014).

58. CHAMBERS ET AL., *supra* note 30, at 28.

59. *Id.*; See Emeritus Rick Musser, *History of American Journalism: The 1930s*, <http://history.journalism.ku.edu/1930/1930.shtml> (last visited Sept. 17, 2014).

60. CHAMBERS ET AL., *supra* note 30, at 34 (noting that serious new broadcasting covered topics such as politics, economic and foreign affairs.)

61. *Id.* at 33.

62. *Id.* at 33, 52; see also HOSLEY & YAMADA, *supra* note 34, at 21-22.

63. CHAMBERS ET AL., *supra* note 30, at 8.

geared towards children.⁶⁴ Like in print media, women journalists in broadcasting were paid less than the men, even where the women did equal work.⁶⁵

The prevailing social norm that women belonged in the home as caretakers and not in the workplace competing with men⁶⁶ and protective state labor laws that enforced these social norms, continued to keep the newsrooms and broadcast stations male-dominated by permitting discriminatory hiring practices and fostering exclusionary policies that kept the playing field unlevelled for women journalists. In addition to the alleged customer preference for a male voice to deliver news, media companies used several other excuses not to hire women journalists. Some media companies refused to hire women, using the excuse that the women would leave to start families.⁶⁷ Pregnant women were fired or forced to resign.⁶⁸ Women were denied, or not considered for, jobs as professional journalists because they lacked access to critical news sources and were often excluded from important news beats.⁶⁹ For example, the all-male National Press Club (“NPC”) refused to grant membership to women journalists or allow them to use the facilities.⁷⁰ This exclusion had serious professional ramifications because “[t]he National Press Club in Washington was the place where almost every prominent newsmaker who visited the nation’s capital came to speak”⁷¹ Issues addressed during those speeches

64. *Id.* at 8, 33.

65. Women were paid less than the men as it was generally assumed that women did not have to support a family. HOSLEY & YAMADA, *supra* note 34, at 2. See also Bridge, *supra* note 36, at 588.

66. See Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After The Passage of the Civil Rights Act: Revolution in the Workforce and The Unfulfilled Promises that Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 636 (2005).

67. CHAMBERS ET AL., *supra* note 30, at 35.

68. ROSALIND ROSENBERG, CHANGING THE SUBJECT: HOW THE WOMEN OF COLUMBIA SHAPED THE WAY WE THINK 263 (2004) (explaining that Elizabeth Wade Boylan was fired from her job at the *New York Herald Tribune* in 1953 because she was pregnant); KAY MILLS, A PLACE IN THE NEWS 41 (1990) (noting that some pregnant women voluntarily left the newsroom, but most were fired.); see also Lens, *supra* note 36, at 506 (noting that pregnancy was considered a valid reason to dismiss a woman from her job).

69. See CHAMBERS ET AL., *supra* note 30, at 130; see also National Press Club, *History NPC*, <http://press.org/about/history> (last visited Sept. 17, 2014).

70. Maurine H. Beasley, *The Women’s National Press Club: Case Study in the Professionalization of Women Journalists* 4 (Aug. 1986), <http://files.eric.ed.gov/fulltext/ED271760.pdf>. See *History of the WPCF*, WASHINGTON PRESS CLUB FOUNDATION, <http://wpcf.org/history-of-the-wpcf> (last visited Sept. 15, 2014) (hereinafter “WPCF”). The National Press Club was formed by a group of men in 1908 and excluded women until 1971. *History NPC*, NATIONAL PRESS CLUB, <http://press.org/about/history> (last visited Sept. 17, 2014).

71. GAIL COLLINS, WHEN EVERYTHING CHANGED, THE AMAZING JOURNEY OF AMERICAN WOMEN FROM 1960 TO THE PRESENT 267 (2009).

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at the NPC became major news features and were “carried that night on radio and television and the next morning on the front pages of the newspapers across the country.”⁷² By not having access to the speakers, women journalists were at a competitive disadvantage that negatively impacted their careers because they could not report on the issues covered during the speeches. The women journalists had formed a parallel organization, the Women’s National Press Club, (“WNPC”) in an effort to increase their visibility as journalists.⁷³ The WPNC bolstered its members’ “identity as professional journalists”⁷⁴ and was important for their professional development, but women journalists were still at a professional disadvantage because they did not have access to the same important news sources as the all-male members of the NPC.⁷⁵

Journalist and champion of women’s rights, First Lady Eleanor Roosevelt, sought to remedy the women journalists’ lack of access to important news sources by holding weekly press conferences that were open only to women journalists.⁷⁶ Newspapers wanting to carry news from the press conferences were forced to hire women journalists.⁷⁷ These women journalists were not limited to covering soft news, but covered serious issues addressed by First Lady Roosevelt such as foreign affairs, economics, and commerce.⁷⁸ First Lady Roosevelt’s press conferences provided the access that helped to raise the profile of women journalists to professional journalists.⁷⁹

72. ROBERTSON, *supra* note 42, at 100 (noting that the women of the WNPC did not want to be members of the NPC, they only wanted equal access to the news.).

73. WPCF, *supra* note 70 (The WPCF’s mission is, “[T]o enhance the role of women journalists, who faced discrimination in the newsroom and were banned from membership or participation in the prestigious all-male National Press Club and Gridiron Club.”); MILLS, *supra* note 68, at 94 (the women journalists formed the Women’s National Press Club in 1919.).

74. Beasley, *supra* note 70, at 23.

75. ROBERTSON, *supra* note 42, at 100; MILLS, *supra* note 68, at 95; COLLINS, *supra* note 71, at 267. *See generally* Beasley, *supra* note 70, at 4.

76. WPCF, *supra* note 70 (noting that Mrs. Roosevelt joined the Women’s National Press Club and made it her mandate to promote women in journalism.); MILLS, *supra* note 68, at 36-37; CHAMBERS ET AL., *supra* note 30, at 43 (noting that during her time in the White House, Mrs. Roosevelt held more than 400 women only press conferences.); *See* CATHERINE GOURLEY, *WAR WOMEN AND THE NEWS: HOW FEMALE JOURNALISTS WON THE BATTLE TO COVER WORLD WAR II* 30-32 (2007).

77. *First Lady Biography: Eleanor Roosevelt*, NATIONAL FIRST LADIES’ LIBRARY, available at <http://www.firstladies.org/biographies/firstladies.aspx?biography=33>. (last visited Sept. 18, 2014).

78. *Id.*

79. *Id.* (noting that the press conferences raised women into the ranks of professional journalism.).

Necessity created another opportunity for women to gain employment in areas, such as journalism, that were “gendered,” and therefore had been closed to women.⁸⁰ In the 1940’s, the social and economic conditions created by World War II made it necessary for a large number of women, including journalists, to enter the workforce.⁸¹ This meant that protective state labor laws again had to be relaxed so that women could be hired⁸² and the restrictions on access to news sources and what women journalists were allowed to cover had to be removed.

Women journalists were hired as professional journalists to fill the positions in print and broadcast journalism that were vacated by the men who went to fight in World War II.⁸³ For example, United Press only had one female journalist on its staff prior to the war.⁸⁴ This number increased to approximately sixty-five women during the war.⁸⁵

World War II created several opportunities for women journalists to advance into more prominent news positions.⁸⁶ In radio, for example, women were trained and hired as presenters and correspondents

80. Hoyman & Stallworth, *supra* note 37 at 67; ROBERTSON, *supra* note 42, at 63.

81. Claudia Goldin, *The Role of World War II in the Rise of Women’s Work* 1-2 (Nat’l Bureau of Econ. Research, Working Paper No. 3203, 1989) available at <http://www.nber.org/papers/w3203.pdf> (noting that the economic and social changes during World War II caused more married women to enter the workforce); Daron Acemoglu, David H. Autor & David Lyle, *Women, War and Wages: The Effect of Female Labor Supply on the Wage Structure at Mid-Century* 1-2 (Nat’l Bureau of Econ. Research, Working Paper No. 9013, 2002) available at <http://www.nber.org/papers/w9013> (noting that the largest number of women to enter the workforce during the 20th century, entered in the 1940s. In 1940, only approximately 28 percent of the women over 15 in the United States were in the workforce. This number grew to over 34 percent by 1945); Bridge, *supra* note 36, at 590 (1997) (noting that approximately 20.6 million women entered the workforce during the World War II period). See generally Department of Labor, Women’s Bureau, *Women Workers in Ten War Production Areas and Their Postwar Employment Plans*, Bulletin of the Women’s Bureau 209 (Washington: U.S. Government Printing Office, 1946) available at http://www.njdigitalhighway.org/enj/lessons/ww_ii_industrial_production/pdf/women_workers_in_ten_war_production_areas.pdf.

82. Hoyman & Stallworth, *supra* note 37 at 67.

83. See CHAMBERS ET AL., *supra* note 30, at 35; ROBERTSON, *supra* note 42, at 63-64 (noting that although women journalists were hired en masse at a number of newsrooms, except *The New York Times*, they were always made to remember that their jobs would be temporary as they were hired only because of the war.).

84. GOURLEY, *supra* note 76 at 90.

85. *Id.* ROBERTSON, *supra* note 42, at 110-111 (noting United Press hired a number of women out of desperation because the men were away fighting in the war. When the war was over, and the male journalists returned for their jobs, the United Press fired all but three of the women journalists in the Washington bureau.).

86. CHAMBERS ET AL., *supra* note 30, at 31. See also Beasley, *supra* note 70, at 18 (“World War II brought increased dependence on radio news and with it greater recognition of women broadcasters.”).

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to replace the men who went to fight in the war.⁸⁷ For the first time in the history of radio broadcasting, one in every twelve radio announcers was female.⁸⁸ Television had started to become popular in the United States in 1941.⁸⁹ Approximately 80% of households had televisions.⁹⁰ Television allowed for a new visual presentation of news, but women journalists were trained and hired for on-air news positions only if there was a shortage of male journalists to fill those positions.⁹¹ Women were hired primarily as ‘weathergirls.’⁹² The weathergirls “were hired for looks and had little to no training in meteorology.”⁹³

B. The Status of Women Journalists Post World War II

As with World War I, when World War II ended the men returned and were reinstated in their old jobs.⁹⁴ The women were either demoted or fired so that the men could be rehired, or they were replaced by “newly recruited men.”⁹⁵ The vicious cycle continued. The women who were fired or demoted had no legal recourse because the state laws restricted the types of jobs women were allowed to do. They were not entitled to relief if they were fired from a ‘male’ job because although they had the physical or mental capacity to do the work, they lacked the legal right to perform ‘male’ jobs.⁹⁶ Given that journalism was considered a ‘male’ job, women journalists had no legal recourse if they were fired or demoted to create a work opportu-

87. See CHAMBERS ET AL., *supra* note 30, at 32.

88. HOSLEY & YAMADA, *supra* note 34, at 61 (noting that station managers directly attributed the rise in female announcers to the war).

89. July 1, 1941 is considered the first official day in the history of TV broadcasting. *Brief History of TV Shows*, BRIEFHISTORY.NET, <http://www.briefhistory.net/?q=node/49#sthash.2ScuBmyp.dpuf> (last visited Sept. 18, 2014).

90. CHAMBERS ET AL., *supra* note 30, at 28-29.

91. *Id.* at 57; HOSLEY & YAMADA, *supra* note 34, at 100 (noting that it was rare to see newswomen on air because professional positions “still belonged largely to men.”).

92. CHAMBERS ET AL., *supra* note 30, at 57.

93. *Id.*

94. *Id.* at 35; HOSLEY & YAMADA, *supra* note 34, at 61; ROBERTSON, *supra* note 42, at 70; Bridge, *supra* note 36, at 590–91. See also Hoyman & Stallworth, *supra* 37, at 67.

95. CHAMBERS ET AL., *supra* note 30, at 35; Bridge, *supra* note 36, at 590–91 (noting that the federal government gave veterans the right to displace wartime workers and stopped child-care funding, which forced some women to stop working and stay home to take care of the children). See also HOSLEY & YAMADA, *supra* note 34, at 61; ROBERTSON, *supra* note 42, at 70 (noting that some women journalists were happy to return to homemaking while others refused to leave their jobs.).

96. See Bridge, *supra* note 36, at 590–91; Hoyman & Stallworth, *supra* note 37, at 68.

nity for a male journalist.⁹⁷ The women who were not fired, were again limited to writing on women's issues, fashion, and society gossip.⁹⁸ These same limitations applied to women in radio, especially women on-air news presenters.⁹⁹ Like in print media, some of the women who were allowed to continue working in radio refocused and concentrated on women's issues.¹⁰⁰ Pauline Frederick, a respected journalist, had worked in radio but was forced out of her position when the war ended and the men returned to reclaim their jobs.¹⁰¹ Although Ms. Frederick had been a war correspondent and a broadcaster, CBS and NBC used the excuse that "women's voices lacked authority" so as not to hire her for a permanent on-air position.¹⁰² Ms. Frederick could only find work doing "freelance radio features on 'women's issues for ABC, her first story discussing how to find a husband.'" ¹⁰³ Ms. Frederick later became the first woman hired to work full-time in network television news.¹⁰⁴

Women journalists continued to be discriminated against in the profession even in the 1950s. They were, however, more vocal about their objections to the inequalities that existed. When the National Press Club continued to refused membership and admission to women journalist, the Women's National Press Club ("WNPC") adopted a resolution urging the National Press Club ("NPC") to allow women journalists to cover its events.¹⁰⁵ In 1955, the NPC granted limited access to women journalists.¹⁰⁶ Women journalists were allowed to attend some luncheon events, but were restricted to the balcony

97. Hoyman & Stallworth, *supra* note 37, at 68; CHAMBERS ET AL., *supra* note 30, at 35; COLLINS, *supra* note 71, at 98.

98. CHAMBERS ET AL., *supra* note 30, at 34.

99. *Id.* at 51.

100. *Id.* See also HOSLEY & YAMADA, *supra* note 34, at 101 (noting that broadcasting was male-dominated, professional positions in broadcasting were given to the men, and women were given only the assignments that the men rejected).

101. See CHAMBERS ET AL., *supra* note 30, at 57.

102. *Id.*

103. *Id.*

104. CHAMBERS ET AL., *supra* note 30, at 57. Ms. Frederick reported on the political conventions in 1948 when they were first aired on television. She covered the United Nations until she retired. See generally HOSLEY & YAMADA, *supra* note 34, 62-66 (discussing Pauline Frederick's career).

105. CHAMBERS ET AL., *supra* note 30, at 129. ("In 1954 the WNPC unanimously adopted a resolution urging the male-only National Press Club to let accredited newspaperwomen cover its events. . . .The following year the NPC decided to let women into the balcony to cover luncheon speeches. Still, this left women unable to ask questions (or even to hear well."). *Id.*; MILLS, *supra* note 68, at 95; ROBERTSON, *supra* note 42, at 100.

106. ROBERTSON, *supra* note 42, at 100;

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where it was difficult to hear or to see.¹⁰⁷ They were also prohibited from asking questions and from eating or drinking at the luncheon.¹⁰⁸

II. 1960S–1970S: LEGAL REFORM AND THE IMPACT ON WOMEN JOURNALISTS

A. Social Reform

The 1960s and the 1970s were perhaps the most dynamic periods in the professional advancement of women journalists. Women journalists benefited from a cultural shift sparked by a booming economy and the civil rights and feminist movements¹⁰⁹ that influenced groundbreaking anti-discrimination laws. During the 1960s, women entered the workforce in record numbers,¹¹⁰ some because of an economic necessity resulting from the rising cost of living and the economic boom,¹¹¹ others because the feminist movement motivated them to seek employment outside of the home.¹¹² It was without question that women were a vital and permanent part of the workforce,¹¹³ but as more women entered the workforce, they became more disenchanted with the social norms that perpetuated a general disregard for issues affecting women and promoted gender inequality, especially with re-

107. ROBERTSON, *supra* note 42, at 100-101; MILLS, *supra* note 68, at 95; *See* Beasley, *supra* note 70, at 19–20.

108. ROBERTSON, *supra* note 42, at 100; Beasley, *supra* note 70, at 20 *citing to* Eileen Summers, *Women Say 'NoThanksNo Thanks' to Bid for Admission to Male Press Club*, WASH. POST, Feb. 23, 1955, 1955.

109. *The 1960s-70s American Feminist Movement: Breaking Down Barriers for Women*, TAVAANA, https://tavaana.org/en/content/1960s-70s-american-feminist-movement-breaking-down-barriers-women#_ednref10 (last visited Sept. 15, 2014). The “second wave” of the feminist movement focused on promoting gender equality, including equality in the workplace. *Id.* The “first wave” of the feminist movement focused on fighting for women’s suffrage and ended with “the passage of the 19th Amendment that gave women the right to vote in 1920.” *Id.*; *see generally* BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1997).

110. MILLS, *supra* note 68, at 50; *See* Bridge, *supra* note 36, at 591 (noting that a “record number” of women entered the workforce because the United States underwent sweeping economic, social, demographic, and technological changes that altered the role of women in society and in the economy post World War II).

111. Bridge, *supra* note 36, at 591 (noting that because of the rising cost of living dual income families were now the norm rather than the exception, it was now “clear that women were a permanent and integral part of the labor force.”). *See* Hoyman & Stallworth, *supra* note 37, at 69-70. *See also* Kenneth T. Walsh, *The 1960s: A Decade of Change for Women*, U.S. NEWS (March 12, 2010; 8:30 am), <http://www.usnews.com/news/articles/2010/03/12/the-1960s-a-decade-of-change-for-women>.

112. COLLINS, *supra* note 71, at 215.

113. Bridge, *supra* note 36, at 591–92; COLLINS, *supra* note 71, at 98 (noting that the robust post World War II economy created more jobs than the men could fill. President Johnson urged employers to hire women.).

spect to pay and career advancement.¹¹⁴ They also grew increasingly disenchanted by the lack of legislation that addressed these inequalities.¹¹⁵

Despite these cultural shifts transforming the American workforce, journalism continued to be male-dominated. Women continued to be denied jobs in the media industry because of their sex and if hired, they were paid less for equal work or subjected to occupational segregation.¹¹⁶ Occupational segregation was a common practice. Women journalists were limited to covering soft news or working in areas that were deemed “feminine”¹¹⁷ jobs despite the facts that many of them had similar, or even better, credentials than the male journalists.¹¹⁸ Women journalists in newsmagazines, for example, worked as ‘researchers’ and ‘checkers’¹¹⁹ while the men worked as reporters and wrote the by-lines.¹²⁰ There were only a few women broadcasters in radio and on television, and “the number of on-air female reporters could be counted on a single hand.”¹²¹ Radio and television station managers used customer preference as a reason not to hire women broadcasters or not to promote those already hired. Radio station managers continued to claim that women broadcasters had to be limited to covering soft news because their voice did not have the authority required to present hard news.¹²² Similarly, women journalists were denied jobs as broadcasters because television

114. Kenneth T. Walsh, *The 1960s: A Decade of Change for Women*, U.S. News (March 12, 2010, 8:30 am), <http://www.usnews.com/news/articles/2010/03/12/the-1960s-a-decade-of-change-for-women>.

115. COLLINS, *supra* note 71, at 67-68 (noting that after years of trying to get the Constitution to be amended to prohibit sex-based discrimination, women complained that President Kennedy was ignoring women’s issues.).

116. See HOSLEY & YAMADA, *supra* note 34, at 152 (citing a 1960 industry study where 84% of the women broadcasters were paid less than \$96 per week, while only 17% of the male broadcasters made a similar salary); BRADLEY, *supra* note 46, at 231; Hoyman & Stallworth, *supra* note 37, at 62; RICHARD ANKER, GENDER AND JOBS: SEX SEGREGATION OF OCCUPATIONS IN THE WORLD 7 (1998) (noting that occupational segregation “is a major determinant of male-female wage differentials.”) *Id.*

117. See BRADLEY, *supra* note 46, at xiv (Gail Collins noted that ‘researchers’ were not categorized as journalists. Their primary responsibility was to work in the office library checking facts).

118. POVICH, *supra* note 1, at xviii, 2-3.

119. See BRADLEY, *supra* note 46, at xiv; POVICH, *supra* note 1, at 17, 18 (noting that *Newsweek*’s practice of hiring women for jobs as researchers and “virtually all men” for jobs as writers “stems from a newsmagazine tradition going back almost fifty years.”) *Id.* at 15.

120. See BRADLEY, *supra* note 46, at xiv (Gail Collins noting that when she did her first internship, women were barred from the copy desk because they were considered to be bad luck).

121. *Id.*

122. HOSLEY & YAMADA, *supra* note 34, at 22-23.

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stations claimed that viewers “didn’t want to watch women on television.”¹²³ An NBC News president noted that, “audiences are less prepared to accept news from a woman’s voice than from a man’s.”¹²⁴

By the 1960s, the lack of access to news sources became an even bigger hindrance to the professional advancement of women journalists. The National Press Club continued to refuse to accept women journalists as members or allow them full access to speeches and other events at the Club¹²⁵ and women sports reporters were banned from the athletes’ locker rooms thus depriving them of access to important interviews.¹²⁶ The lack of access to news sources put the women journalists at a competitive disadvantage because without access to the necessary information, they were not able to report on the news. Newspapers and other media companies used the lack of access to news sources as a reason not to hire women journalists,¹²⁷ or to exclude them from news projects.¹²⁸

Women noted their contribution to the economy and demanded equal access to employment opportunities, and equal pay.¹²⁹ In response, President John Kennedy established the President’s Commission on the Status of Women (“Commission on the Status of Women”).¹³⁰ The Commission on the Status of Women was charged with “the responsibility for developing recommendations for overcoming discriminations in government and private employment on the basis of sex and for developing recommendations for services which

123. *Id.* at 23.

124. *Id.*

125. CHAMBERS ET AL., *supra* note 30, at 129; MILLS, *supra* note 68, at 95 (noting that the lack of access prevented women journalists from doing their jobs); Beasley, *supra* note 70, at 21. Approximately one decade after the women journalists were first given limited access to the NPC, President Johnson directed the State Department to inform the NPC that dignitaries would not speak there unless women journalists were allowed access to the speeches and presentations at the NPC on an “equitable basis.” CHAMBERS ET AL., *supra* note 30, at 129; MILLS, *supra* note 68, at 102.

126. CHAMBERS ET AL., *supra* note 30, at 130.

127. *Id.* (explaining that media companies used the fact that women reporters were barred from locker rooms as a reason not to hire them); Tracy Everbach & Laura Matysiak, *Sports Reporting and Gender: Women Journalists Who Broke The Locker Room Barrier*, J. RES. ON WOMEN & GENDER, 5 (March 1, 2010).

128. CHAMBERS ET AL., *supra* note 30, at 129 (noting that a female reporter was removed from a civil rights project because she was not allowed to enter the National Press Club to cover the civil rights press conference that was held there.); MILLS, *supra* note 68, at 102; *see* Beasley, *supra* note 70, at 21.

129. Everbach & Matysiak, *supra* note 127, at 2 (“Liberal feminist theories at the time called for women to defy patriarchy and demand equal treatment in the workplace and in society.”).

130. *Role of John F. Kennedy*, JFK.ORG, <http://www.jfk.org/go/exhibits/call-to-action/jfk-role> (last visited Sept. 18, 2014).

would enable women to continue their role as wives and mothers while making a maximum contribution to the world around them.”¹³¹ President Kennedy appointed Eleanor Roosevelt to chair the Commission.¹³² In 1963, the Commission issued a report, the Peterson Report,¹³³ noting substantial discrimination against women in the workplace.¹³⁴ The Peterson Report contained specific recommendations for improvement such as providing affordable child care, fair hiring practices, equal opportunity for women, and paid maternity leave.¹³⁵ The President’s Commission on the Status of Women was dissolved in October 1963 after submitting the Peterson Report.¹³⁶

B. Legal Reform: Important Legislation, the EEOC, and Case Law Impacting Gender Discrimination in the Workplace

The recommendations of the Commission on the Status of Women, documented in the Peterson Report, led to ground-breaking legislation that mandated the end of the culturally entrenched gender discriminatory policies and practices in the workplace.

131. Exec. Order No. 10,980, 26 Fed. Reg. 12059 (Dec. 14, 1961). See also William Leuchtenberg, *President’s Commission on the Status of Women*, http://www.lexisnexis.com/documents/academic/upa_cis/10849_prescommstatwomen.pdf (last visited Sept. 18, 2014); Elizabeth Singer More, *Report of the President’s Commission on the Status of Women: Background, Content, Significance*, https://www.radcliffe.harvard.edu/sites/radcliffe.harvard.edu/files/documents/report_of_the_presidents_commission_on_the_status_of_women_background_content_significance.pdf; *Role of John F. Kennedy*, *supra* note 125.

132. More, *supra* note 131; *Role of John F. Kennedy*, *supra* note 130.

133. The Peterson Report was named after Ester Peterson who was the head of the Department of Labor’s Women Bureau and the executive vice chairperson of the Commission on the Status of Women. Commission on the Status of Women *Excerpt from “American Women: The Report of the President’s Commission on the Status of Women,” which was presented to President John F. Kennedy on October 11, 1963 available at* <http://www.encyclopedia.com/article-1G2-3441300077/commission-status-women.html> (last visited September 27, 2014, 9:48 PM). See also *Women’s Bureau, An Overview 1920 – 2012*, UNITED STATES DEPARTMENT OF LABOR, available at http://www.dol.gov/wb/info_about_wb/interwb.htm; Anne-Marie Imbornoni, *Women’s Rights Movement in the U.S., Timeline of Key Events in the American Women’s Rights Movement 1980–Present*, INFOPLEASE.COM, <http://www.infoplease.com/spot/womenstimeline3.html#ixzz34nqe62HA> (last visited June 16, 2014, 12:15 PM).

134. *American Women*, *supra* note 133 (The Report noted substantial discrimination against women and made recommendation for changes including implementing fair hiring practices, granting paid maternity leave and affordable child care.); see also More, *supra* note 131.

135. *American Women*, *supra* note 133; see also More, *supra* note 131.

136. *American Women*, *supra* note 133; see also *Role of John F. Kennedy*, *supra* note 130.

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1. The Equal Pay Act of 1963

On June 10, 1963, President John F. Kennedy signed the Equal Pay Act of 1963¹³⁷ (EPA) into law. This was a milestone achievement for women in their struggle for equality.¹³⁸ The EPA was the first legislation passed by Congress to address employment discrimination based on sex.¹³⁹ The EPA protects male and female workers by making it illegal for employers to engage in wage discrimination between employees solely on the basis of sex where male and female employees perform similar jobs for the employer under “similar working conditions,”¹⁴⁰ except where there is a seniority system, merit system, payment system based on quantity or quality of output, or systems based on “any other factor than sex.”¹⁴¹ Congress also closed the possibility of employers lowering the wages of male employees so as not to pay females a fair wage by explicitly prohibiting employers from reducing “the wage rate of any employee [by] paying a wage rate differential” based on sex.¹⁴²

2. Title VII of the Civil Rights Act of 1964

On July 2, 1964, approximately one year after Congress passed the Equal Protection Act of 1963, President Lyndon B. Johnson

137. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (2014)) (amending the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2014)). Section 4 of the Equal Pay Act provided that the Act would take effect upon the expiration of one year from June 10, 1963, the date of its enactment. *Id.* at § 4.

138. President Kennedy called the EPA a “significant step forward.” President John F. Kennedy, *Remarks Upon Signing the Equal Pay Act* (June 10, 1963), available at <http://www.presidency.ucsb.edu/ws/?pid=9267> (“[The EPA would] prohibit arbitrary discrimination against women in the payment of wages.”). See also *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (noting that the intent in enacting the Equal Pay Act was “to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry.”); *Equal Pay for Women: Hearing Before the S. Comm. On Health, Educ., Labor & Pensions*, 110th Cong. (2007) (statement of Jocelyn Samuels, Vice President, Educ. & Emp’t, Nat’l Women’s Law Ctr.).

139. Barnard & Rapp, *supra* note 66, at 637; Hoyman & Stallworth, *supra* note 37, at 61. See also *County of Washington v. Gunther*, 452 U.S. 161, 171–72 (1981) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)).

140. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2014).

141. *Id.*; Paula England, *The Pay Gap Between Male and Female Jobs: Organizational and Legal Realities*, 25 L. & SOC. INQUIRY 913, 918 (2000).

142. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (stating “an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.”). This section prevents employers from avoiding penalties by lowering the salary of male employees to avoid paying similarly situated female employees a fair rate.

signed into law the Civil Rights Act of 1964.¹⁴³ Title VII of the Civil Rights Act of 1964 extended the reach of the EPA by prohibiting not only wage discrimination, but discrimination in all aspects of employment based on race, color, religion, sex or national origin.¹⁴⁴ Title VII is regarded as one of the most powerful legislations prohibiting sex discrimination despite the ironic fact that sex was added in by the bill's opponents in an effort to defeat the bill.¹⁴⁵

Title VII made it unlawful for an employer:

(1) 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employers are exempt from liability under Title VII if their decision is based on "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."¹⁴⁶

143. *EEOC History: 35th Anniversary: 1965-2000*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/milestones/1964.html> (last visited Sept. 18, 2014).

144. Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000).

145. 110 CONG. REC. 2577 (1964) (statement of Rep. Howard Smith); See Price Waterhouse v. Hopkins, 490 U.S. 228, 244 n.9 (1989); Robert J. Aalberts & Lorne H. Seidman, *Should Prudential Standing Requirements Be Applied in Transferred Impact Sexual Harassment Cases? An Analysis of Childress v. City of Richmond*, 26 PEPP. L. REV. 261, 287 (1999); Susan Silberman Blasi, *The Adjudication of Same-Sex Sexual Harassment Claims Under Title VII*, 12 LAB. LAW. 291, 295 (1996); Timothy G. Healy, *Sexual Pattern: Why A Pattern or Practice Theory of Liability Is Not an Appropriate Framework for Claims of Sexual Harassment*, 10 ROGER WILLIAMS U. L. REV. 537, 546-47 (2005); Anthony E. Varona & Jeffrey M. Monks, *Engendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 70-71 (2000).

146. Title VII of The Civil Rights Act of 1964 § 2000e-2(e).

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion
Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

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Congress foresaw the potential conflicts between the Equal Pay Act and Title VII because of their similar scope.¹⁴⁷ As a result, Congress passed the Bennett Amendment to resolve any such conflict.¹⁴⁸ The Bennett Amendment “bars sex-based wage discrimination claims under Title VII where pay differential is authorized by the Equal Pay Act.”¹⁴⁹

3. The Equal Employment Opportunity Commission

On July 2, 1965, the first anniversary of the Title VII of the Civil Rights Act of 1964, Congress established The Equal Employment Opportunity Commission, (EEOC) to administer Title VII.¹⁵⁰ Employees seeking to sue for employment discrimination under Title VII had to first file a charge with the EEOC.¹⁵¹ The EEOC, however, had no enforcement power.¹⁵² Its function was purely administrative and was limited to investigating and conciliating allegations of Title VII proscribed employment discrimination in the workplace.¹⁵³ If the EEOC was unable to facilitate an acceptable agreement between the employer and the employee, the employee could sue privately.¹⁵⁴ The

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion. *Id.* See also Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

147. England, *supra* note 141, at 919; see also Note, *Sex-Based Wage Discrimination And The Bennett Amendment Issue In International Union of Electrical Workers v. Westinghouse Electric Corp.: The Case For Comparable Worth*, 30 AM. U. L. REV. 547, 547–48 (noting that Congress recognized the interrelationship and potential conflict between Title VII of the Civil Rights Act of 1964 and the Equal Pay Act and therefore passed the Bennett Amendment).

148. Title VII of The Civil Rights Act of 1964 § 2000e-2(h). The amendment was introduced by Senator Bennett on June 12, 1964. 110 Cong. Rec. 13,647 (1964). See also *Oregon v. Gunther*, 452 U.S. 161, 170 (1981) (“The Bennett Amendment was offered as a ‘technical amendment’ designed to resolve any potential conflicts between Title VII and the Equal Pay Act.”); *County of Washington v. Gunther*, 452 U.S. 172 (1981).

149. Title VII of the Civil Rights Act of 1964 § 2000e-2(h).

150. The EEOC enforces Title VII of the Civil Rights Act of 1964, the Equal Pay Act (since 1976), The Pregnancy Discrimination Act, The Age Discrimination in Employment Act, and the Genetic Information Non-discrimination Act. Press Release, EEOC, EEOC Celebrates Its 45th Anniversary (July 2, 2010) available at <http://www.eeoc.gov/eeoc/newsroom/release/7-2-10.cfm>.

151. *Id.*

152. Because of EEOC’s lack of enforcement powers, most civil rights groups viewed it as a “toothless tiger.” The EEOC was granted enforcement power in 1972. *1965 - 1971: A “Toothless Tiger” Helps Shape the Law and Educate the Public*, EEOC 35TH ANNIVERSARY, <http://www.eeoc.gov/eeoc/history/35th/1965-71/index.html> (last visited Sept. 19, 2014).

153. *Id.*

154. *Id.*

EEOC could also refer employment matters to the Department of Justice for litigation if the EEOC perceived there were “patterns or practices” of discrimination.¹⁵⁵

The EEOC is charged with the important functions of: issuing guidelines interpreting Title VII and monitoring employment data. The EEOC Guidelines inform compliance with Title VII and shape employment discrimination litigation and judicial opinions by defining discrimination in the workplace.¹⁵⁶ This is very important given that “discrimination” was never explicitly defined in the text of Title VII¹⁵⁷ and the sparse legislative history concerning sex does not clearly define “[w]hat constitutes unlawful sex discrimination under Title VII.”¹⁵⁸ The EEOC Guidelines do not carry the force of law, but courts have relied on, and have given deference to, the EEOC Guidelines.¹⁵⁹

The EEOC also evaluates and monitors employment data submitted via EEO-1 reports. EEO-1 reports are mandatory and require employers with 100 or more employees¹⁶⁰ to submit an annual EEO-1 form listing employees by job category, ethnicity, race, and gender.¹⁶¹ The data is used by employers to evaluate their employment policies and practices, and by the EEOC to assess employment patterns and practices and to target ones that are discriminatory.¹⁶² This is very useful in tracking patterns of sex discrimination in the workplace and gives the EEOC an opportunity to intervene early and the employers an opportunity to correct any discriminatory practices.¹⁶³

155. *Id.*

156. Barnard & Rapp, *supra* note 66, at 632–33.

157. Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 910 (2014); Barnard & Rapp, *supra* note 66 at 633.

158. Kramer, *supra* note 157, at 910.

159. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) (explaining that the Court gives deference to the EEOC’s Guidelines adopting the EEOC Commission’s position on the disparate impact theory of discrimination). *Cf.* EEOC v. SunDance Rehab Corp., 466 F.3d 490, 500 (6th Cir. 2006) (noting that the EEOC Enforcement Guidelines do not carry the force of law and are “entitled to respect only to the extent of its persuasive power.”).

160. Questions and Answers: Revisions to the EEO-1 Report, U.S. EEOC, <http://www.eeoc.gov/employers/eo1/qanda.cfm> (last visited Sept. 19, 2014).

161. The EEO-1 form is required by law: “under section 709(c) of Title VII, the Equal Employment Opportunity Commission may compel an employer to file this form by obtaining an order from the United States District Court.” *Id.* The EEO-1 survey is conducted annually under the authority of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et. seq., as amended. *Id.*

162. The EEOC uses the data to support the enforcement of Title VII and to “analyze employment patterns, such as representation of female and minority workers within companies, [and] industries.” *Id.*

163. Barnard & Rapp, *supra* note 66, at 632–33.

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4. Executive Order 11375

In 1967, President Lyndon Johnson issued Executive Order 11375¹⁶⁴ to address gender-based discrimination by federal contractors and agencies. The Order required federal contractors and agencies to “actively take measures to ensure that women as well as minorities enjoy the same educational and employment opportunities as white males.”¹⁶⁵

5. FCC Licenses

The Federal Communications Commission (FCC) also took important steps to end employment discrimination. In 1968, the FCC announced that it would not grant nor renew operating licenses to stations that engaged in employment discrimination.¹⁶⁶ In 1969, the FCC adopted rules prohibiting broadcast licensees from engaging in employment discrimination based on “race, color, religion or national origin.”¹⁶⁷ Sex was added to the list of protected categories in 1970.¹⁶⁸

Over the next two years, the FCC required its licensees to implement policies and procedures to increase the number of women and minorities employed in radio and television.¹⁶⁹ The broadcast stations had to “establish, maintain, and carry out, a positive continuing pro-

164. Exec. Order No. 11,375, 32 Fed. Reg. 14303 (Oct. 13, 1967) (including gender as a protected class). See 41 C.F.R §§ 60-1.1, 2.1, 20.1 et seq. (amending Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965)). 42 U.S.C § 2000e prohibits employment discrimination based on race, color, religion or national origin. Executive Order 11375 was further amended on July 21, 2014 to substitute “sex, sexual orientation, gender identity, or national origin” for “sex, or national origin.” Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 23, 2014).

165. Ann-Marie Imbornoni, *Women’s Rights Movement in the U.S. Timeline of Key Events in the American Women’s Rights Movement 1921–1979*, INFOPLEASE.COM <http://www.infoplease.com/spot/womenstimeline3.html#ixzz34nqe62HA> (last visited June 16, 2014, 12:15 PM); *EEOC Celebrates Its 45th Anniversary*, EEOC, <http://www.eeoc.gov/eeoc/newsroom/release/7-2-10.cfm> (last visited Sept. 19, 2014).

166. *In re* Petition for Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766, 772 (1968); see Leigh Hermance, *Constitutionality of Affirmative Action Regulations Imposed Under the Cable Communications Policy Act of 1984*, 35 CATH. U. L. REV. 807, 807 (1986). See generally, FCC, FCC 78-322, STATEMENT OF POLICY ON MINORITY OWNERSHIP OF BROADCASTING FACILITIES (1978), http://transition.fcc.gov/Bureaus/Mass_Media/Databases/documents_collection/78-322.pdf (explaining that in 1969 the FCC required that equal opportunity employment be extended to all licensees or permittees).

167. *In re* Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Employment Practices, 18 F.C.C.2d 240, 240 (1969).

168. *In re* Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 23 F.C.C.2d 430, 431 (1970).

169. *In re* Equal Opportunity Program, 32 F.C.C.2d 831, 831 (1971); Hermance, *supra* note 166 (noting that the FCC indicated that “compliance with the then recently enacted Title VII was not sufficient to accomplish” the FCC’s goal of developing a radio communication service that operates to serve the public interest and that could not be achieved in an atmosphere of

gram of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice.”¹⁷⁰ In order to assess licensees’ compliance, the FCC required broadcast stations with 5 or more employees “to submit an annual report categorizing its employees and to submit their EEO programs indicating the specific practices they follow in ensuring equal employment opportunities for minorities.”¹⁷¹

6. EEOC Regulations and NOW

The EEOC was forced to pay close attention to sex discrimination in the workplace because of the large volume of sex-based discrimination charges. In the EEOC’s first year of operation, approximately 33.5% of all charges filed alleged sex-based discrimination.¹⁷² The charges focused on three main issues: unequal fringe benefits; unequal job opportunities; and “post marriage-or post-birth terminations.”¹⁷³ Unequal fringe benefits accounted for one third of the sex discrimination charges.¹⁷⁴ The women alleged that the men received better life insurance, health, and pension benefits.¹⁷⁵ The charges also showed that women were barred from jobs because of existing seniority rules; that companies preferred to hire men over women after layoffs; and that women who got married or had children were fired.¹⁷⁶

The number of sex discrimination charges filed increased steadily each year.¹⁷⁷ This steady increase had been linked to the formation of

employment discriminate where equal employment opportunities were denied to women and minorities).

170. Equal Opportunity Program, 32 F.C.C.2d at 831; Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d at 245.

171. In re Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 23 F.C.C.2d at 430; see Nat’l Black Media Coal. v. FCC, 775 F.2d 342, 345 (DC. Cir. 1985); see also Hermance, *supra* note 166, at 812 n.37.

172. The total charges filed alleging sex based discrimination was 2,053 which represented 33.5% of the total charges filed. *Shaping Employment Discrimination Law*, EEOC 35TH ANNIVERSARY, <http://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html> (last visited Sept. 19, 2014). The number of charges filed alleging discrimination based on race was 3,254 which is 53.1 percent of the total charges. *Id.*; see also HOSLEY & YAMADA, *supra* note 34, at 90; Lens, *supra* note 36, at 508 (2004) (stating many of the complaints alleged unequal access to opportunities).

173. Barnard & Rapp, *supra* note 66, at 636; see also Lens, *supra* note 36, at 508.

174. Lens, *supra* note 36, at 508.

175. *Id.*

176. *Id.*

177. Total EEOC charges (not broken down by category). In 1966 there were 8,854 EEOC charges; in 1967, there were 12,927 charges; in 1968, there were 15,058 charges; in 1969, there were 17,272 charges; and in 1970, there were 20,310 charges. *Early Enforcement Efforts*, EEOC,

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The National Organization for Women, (NOW).¹⁷⁸ NOW, referred to as the NAACP for women,¹⁷⁹ educated and provided litigation support to women bringing sex discrimination charges.¹⁸⁰ NOW also lobbied for laws to protect women's rights; for the enforcement of anti-discrimination legislation;¹⁸¹ and lobbied the EEOC to consider employment practices that denied women equal rights as discriminatory and not as the "inevitable consequences of women's role in society."¹⁸²

7. Seminal Cases in the 1960s and 70s Influencing Gender Equality

In 1966, NOW petitioned the EEOC to amend its regulations to make it illegal for newspapers to print sex-segregated "Help Wanted" advertisements.¹⁸³ Newspapers had always classified jobs by sex. "Female" or "Female Interest" jobs were lower paying jobs such as domestic workers, waitresses, proofreaders, and teachers.¹⁸⁴ NOW noted that approximately 75 percent of all women in the workforce

http://www.eeoc.gov/eeoc/history/35th/1965-71/early_enforcement.html (last visited October 4, 2014); In 1972, Congress passed the Equal Employment Opportunity Act of 1972, amending Title VII, to give the EEOC enforcement and litigation authority to better manage the increasing number of charges and to enforce employment discrimination laws. The EEOC Act of 1972, Pub. L. No. 92-261, 86 Stat. 106 (1972) (amending the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4)). See Barnard & Rapp, *supra*, note 66, at 632-3.

178. Founding members included Betty Friedan and Pauli Murray. COLLINS, *supra* note 71, at 84-85. See *The National Organization for Women's 1966 Statement of Purpose*, NOW, <http://now.org/about/history/statement-of-purpose> (last visited Sept. 19, 2014) (NOW's mission was "to take action to bring women into full participation in the mainstream of American society now, assuming all the privileges and responsibilities therefore in truly equal partnership with men.") *Id.*, BARBARA BURRELL, WOMEN AND POLITICAL PARTICIPATION: A REFERENCE HANDBOOK (POLITICAL PARTICIPATION IN AMERICA) 62, (2004).; see also JOHN DAVID SKRENTNY, THE MINORITY RIGHTS REVOLUTION 118 (2012). (noting that NOW became "the voice of women's rights" lobbying the EEOC to reconsider its lack of seriousness regarding sex discrimination and lobbying to have sex added to Executive Order 11246; *Feminism Reborn*, DIGITAL HISTORY, http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3341 (last visited Sept. 19, 2014).

179. COLLINS, *supra* note 71, at 83-85.

180. *Id.* at 85; see also *Highlights*, NOW, <http://now.org/about/history/highlights/> (last visited Sept. 19, 2014).

181. COLLINS, *supra* note 71, 85; see also NOW, *supra* note 178. In 1967 NOW protested the EEOC's decision not to find that sex-segregated are illegal. *Id.*

182. Lens, *supra* note 36, at 507; see also NOW, *supra* note 178. In 1968 NOW boycotted Colgate Palmolive products and demonstrated at the company's headquarters in NYC for 5 days. *Id.* They were protesting the company's policy prohibiting women from lifting more than 35 pounds. *Id.*

183. PATRICIA BRADLEY, MASS MEDIA AND THE SHAPING OF AMERICAN FEMINISM, 1963-1975 40 (2003) (noting that in May 1967, the EEOC held hearings on the help wanted ads but failed to rule that they were discriminatory, so NOW members picketed the EEOC's office and filed suit); NOW, *supra* note 178; see COLLINS, *supra* note 71, at 82.

184. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 392 (1973).

had “female interest” jobs such as “clerical, sales, or factory jobs, or they are household workers, cleaning women, [or] hospital attendants.”¹⁸⁵ Listing “Help Wanted” advertisements by sex encouraged occupational segregation and was therefore discriminatory.¹⁸⁶ In August 1968, the EEOC amended its Guidelines to prohibit newspapers from listing “Help Wanted” advertisements separated by sex.¹⁸⁷ By December, the *New York Times* and other newspapers stopped listing sex-segregated advertisements.¹⁸⁸ The Supreme Court endorsed the EEOC’s Guidelines in its decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.¹⁸⁹ The Court’s decision opened the doors for women to apply for higher-paying jobs that were previously reserved only for men.¹⁹⁰

Courts adopted the EEOC Guidelines on Sex Discrimination and have held that protective state labor laws that allowed women ‘benefits’ such as exemption from lifting more than 35 pounds on the job, extra work breaks, shorter work hours, and early retirement are discriminatory and therefore pre-empt federal anti-discrimination legislation because they eliminate women from being considered for certain jobs.¹⁹¹ In *Bowe v. Colgate-Palmolive Company*, the Seventh Circuit held that Colgate’s imposition of a 35-pound weight-lifting restriction on jobs that were open to females was discriminatory because it prevented women from competing for jobs that required lifting more than 35 pounds.¹⁹²

185. NOW, *supra* note 178 (stating that approximately 46.4% of all American women between the ages of 18 and 65 worked outside of the home).

186. BRADLEY, *supra* note 183 at 40; Hoyman & Stallworth, *supra* note 37, at 62. *See generally*, Barnard & Rapp, *supra*, note 66 at 627.

187. 29 C.F.R. § 1604.5 (2014) (“It is a violation of Title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed “Male” or “Female,” will be considered an expression of a preference, limitation, specification, or discrimination based on sex.”). BRADLEY, *supra* note 183 at 40 (noting that the National Association of Newspaper Publishers countersued the EEOC).

188. BRADLEY, *supra* note 183 at 40.

189. *Pittsburgh Press Co.*, 413 U.S. at 392.

190. *See* Bridge, *supra* note 36, at 616.

191. *Shaping Discrimination Law*, EEOC 35TH ANNIVERSARY, <http://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html> (last visited Sept. 19, 2014); *see, e.g.*, *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 714 (1969); *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1223–26 (9th Cir. 1971); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235–36 (5th Cir. 1969); *Garneau v. Raytheon Co.*, 323 F. Supp. 391 (D. Mass 1971).

192. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 714 (1969). The court reversed the lower court’s decision that Title VII permitted employers to restrict female employees from jobs that required them to lift or carry 35 or more pounds. *Bowe v. Colgate-Palmolive Co.*, 272 F.Supp. 332 (S.D. Indiana 1967).

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Equality for women permeated judicial opinions in the 1970s. In 1971, the Supreme Court took bold steps towards gender equality by declaring in *Reed v. Reed* that the United States Constitution prohibits the unequal treatment of women.¹⁹³ Prior to the decision in *Reed v. Reed*, the Supreme Court removed major barriers to bringing a claim for sex-based employment discrimination by allowing plaintiffs without proof of intentional discrimination to establish a prima facie claim using disparate-impact analysis.¹⁹⁴ The Supreme Court also prohibited sex-based discrimination in hiring by ruling that companies that use different hiring practice for men and women with pre-school aged children violate Title VII except where the policy serves as “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”¹⁹⁵

Two years later, in 1973, the Supreme Court made it possible for women who were unable to show direct evidence of intentional discrimination to bring employment discrimination claims, ruling that plaintiffs can use circumstantial evidence to prove employment discrimination in disparate-treatment cases.¹⁹⁶ A female plaintiff using circumstantial evidence to prove discriminatory intent¹⁹⁷ (1) had to prove by preponderance of the evidence a prima facie case of discrimination;¹⁹⁸ (2) if she was successful in proving a prima facie case, the burden then shifted to the employer to show that she was denied the job for a legitimate non-discriminatory reason;¹⁹⁹ and (3) if the employer was successful in showing a legitimate non-discriminatory reason for selecting another person, the burden then shifted back to the plaintiff to prove by preponderance of the evidence that the em-

193. *Reed v. Reed*, 404 U.S. 71, 75–77 (1971) (unanimous decision) (holding that state law providing a mandatory preference to men was illegal).

194. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (the Supreme Court made it possible for plaintiffs who could not prove intentional discrimination “disparate-treatment” to establish a prima facie claim for employment discrimination by showing that the challenged employment practices had a discriminatory effect “disparate-impact.”).

195. *Phillips v. Marietta Corp.*, 400 U.S. 542, 543–44 (1971) (holding that a school’s practice of allowing males with pre-school age children to apply for jobs but refusing to allow women with pre-school-age children to apply for the same jobs is discriminatory and therefore violates Title VII). *See generally*, COLLINS, *supra* note 71, at 101 (explaining that there was a culturally entrenched prejudice against working wives).

196. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804-05 (1973).

197. *Id.* at 802.

198. To establish a prima facie case for sex discrimination, the plaintiff had to prove that she was qualified for the available position; she applied for that position but was denied the job “under circumstances which give rise to an inference of unlawful discrimination.” *Texas Dep’t of Cmty Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981).

199. *Id.*

ployer's legitimate non-discriminatory reasons were not the true reasons, but "were a pretext for discrimination."²⁰⁰

The Supreme Court also ruled that it is illegal to treat males and females differently for the purposes of determining spousal benefits.²⁰¹ The Court acknowledged the influence of culture in perpetuating sex discrimination through protective state statutes imbued with sex-role stereotypes²⁰² and noted that "the statute books gradually became laden with gross, stereotyped distinction between the sexes" because of the Nation's "long and unfortunate history of sex discrimination."²⁰³

In 1974, the Supreme Court addressed the issue of wage-based employment discrimination.²⁰⁴ The Court ruled in *Corning Glass Works v. Brennan* that the Equal Pay Act makes it unlawful for employers to pay women lower wages where they did equal work²⁰⁵ requiring equal skills under similar working conditions.²⁰⁶ The Court also made it illegal to pay women at a lower rate than similarly situated men within the company even if the women would accept the lower rate as the current 'market rate' and male employees had to be paid a higher rate because they refused to accept the lower rates paid to women.²⁰⁷

Sexual harassment was first acknowledged as a form of sex discrimination prohibited under Title VII in 1976. The court in *Williams v. Saxbe* ruled that sexual harassment is a form of sex discrimination because proven sexual advances by a male supervisor toward a female employee create an artificial barrier to employment on one gender and not another.²⁰⁸ One year later, the court in *Barnes v. Costle* ruled

200. *Id.*

201. *Frontiero v. Richardson*, 411 U.S. 677, 687-90 (1973).

202. *Id.* at 684-85.

203. *Id.*

204. *Corning Glass Works v. Brennan*, 417 U.S. 188, 190 (1974).

205. The Third Circuit ruled in *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265-66 (3d Cir. 1970) that jobs held by men and women needed to be "substantially equal" but not identical in order to fall under the protection of the Equal Pay Act. For example, an employer could not change the job titles of women workers in order to pay them less than the men.

206. *Corning Glass Works*, 417 U.S. at 202-03 (explaining that the jobs performed by the day inspectors were substantially equal to the jobs performed by the night inspectors).

207. *Id.* at 195 (noting that Congress intended the Equal Pay Act to remedy the "serious and endemic problem of employment discrimination" resulting from men's archaic belief that they are entitled to higher wages because their role in society warranted that they be paid more than a woman even when their duties were the same).

208. *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976).

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that retaliation against an employee for rejecting her manager's sexual advances is an impermissible form of sex discrimination.²⁰⁹

The unequal administration of employment benefits based on sex was also recognized as an impermissible form of sex discrimination. In *City of Los Angeles Department of Water and Power v. Manhart*, the Supreme Court ruled that classifications based on sex is illegal under Title VII, therefore a company could not require females to pay more than males when administering the company's pension plans.²¹⁰

C. Discrimination Lawsuits by Women in the Media

1. Newsweek

Women journalists were empowered and encouraged by the new anti-sex discrimination laws and began filing sex-based discrimination lawsuits.²¹¹ One of the first documented lawsuits under Title VII by women journalist was filed by female employees at *Newsweek*.²¹² On March 16, 1970, forty-six female *Newsweek* employees filed a complaint with the EEOC on the grounds that they were "systematically discriminated against in both hiring and promotion and forced to assume a subsidiary role" because of their gender.²¹³ The women requested that *Newsweek* immediately integrate the research staff and open correspondence, writing, and editing jobs to women.²¹⁴

Newsweek had an established practice of not hiring women writers.²¹⁵ Women journalists seeking jobs at *Newsweek* were told that if they "want to be [] writer[s], go somewhere else – women don't write at *Newsweek*."²¹⁶ The women journalists at *Newsweek* were hired only as checkers, clippers, and researchers, and were not promoted beyond researcher even though they were graduates of prestigious colleges, and some had advanced degrees.²¹⁷

209. *Barnes v. Costle*, 561 F.2d 983, 990, 993–95 (D.C. Cir. 1977).

210. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716–717 (1978).

211. COLLINS, *supra* note 71, at 268.

212. POVICH, *supra* note 1, at 1, 85 (noting that this was the first reported lawsuit sex-based discrimination lawsuit by women in the media and the first class action lawsuit involving white women).

213. *Id.* at 1.

214. *Id.* at 3.

215. *Id.* at 3, 28; 88.

216. *Id.* at 28.

217. *Id.* at 3, 18–19 (explaining that at *Newsweek*, the researcher's primary function was to fact-check the stories).

In 1968, *Newsweek* hired Ms. Gingold as a researcher.²¹⁸ Ms. Gingold was an Oxford University graduate and a Marshall scholar.²¹⁹ When *Newsweek* interviewed her for the job, they told her that if she wanted to write, she should go “someplace else.”²²⁰ In the fall of 1969, Ms. Gingold and her friend were talking about their jobs.²²¹ Ms. Gingold explained that jobs at *Newsweek* were gendered; the women journalists were clippers or researchers and were rarely promoted despite their qualifications.²²² Her friend, a lawyer, suggested that she contact the EEOC because *Newsweek*’s practices were discriminatory and therefore illegal under Title VII.²²³

Ms. Gingold contacted the EEOC and was advised to organize a group of her female colleagues at *Newsweek* who felt that they were discriminated against because of their sex and to then file a complaint.²²⁴ Ms. Gingold contacted three *Newsweek* researchers and Lynn Povich to form the “lawsuit” recruitment team.²²⁵ Lynn Povich had been recently promoted to junior writer, but she was only allowed to cover soft news: fashion, the women’s liberation movement, and gay rights.²²⁶ It was clear to Ms. Povich that she was not considered an equal to her fellow male writers.²²⁷ For example, the editor asked her peer, a male writer, to rewrite her story on the women’s liberation.²²⁸ The story was delayed several times and was never published.²²⁹ This did not happen to the male writers.²³⁰

Newsweek became known in the 1960s because of its “progressive views and pro-civil rights coverage”²³¹ yet its discriminatory treatment of women journalists was in stark contrast to its proudly declared commitment to, and support for, civil rights. *Newsweek* decided to do

218. *Id.* at 55.

219. *Id.* at 54.

220. *Id.* at 55 (explaining that she took the job at *Newsweek* because she was unable to find suitable employment elsewhere).

221. *Id.* at 55.

222. *Id.* *News-Week* (changed to *Newsweek* in 1937) adopted *Time*’s model of segregating its editorial functions into male and female categories. Female journalists, “girls,” did research and fact-checking while the male journalists were editors and reporters. *Id.* at 16–17.

223. *Id.* at 55–56.

224. *Id.* at 56, 97.

225. *Id.* at 71.

226. *Id.* at 4, 69.

227. *Id.* at 69.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 5 (“progressive views and pro-civil rights coverage that put *Newsweek* on the map in the 1960s”).

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a cover story on the women's liberation, *Women in Revolt*.²³² *Newsweek's* all male editorial team decided that a male writer was not the best choice to write the story,²³³ so they hired a female journalist outside of *Newsweek's* staff to write the story.²³⁴ This signaled to the women at *Newsweek* that they were not considered good enough to be writers and would never be given equal access to assignments or equal opportunities for promotion unless they availed themselves of the anti-discrimination laws.

Empowered by the new anti-discrimination laws prohibiting sex-based employment discrimination and the push for gender equality by the women's liberation movement, the women at *Newsweek* united to demand an end to the systematic and persistent discriminatory practices at *Newsweek*.²³⁵ The women journalists at *Newsweek* decided to sue *Newsweek* for sex-based employment discrimination.²³⁶ They were represented by prominent civil rights attorney, Eleanor Holmes Norton.²³⁷ Ms. Holmes Norton believed that the *Newsweek* women journalists had a clear Title VII sex discrimination case because the women were similarly, if not better, educated than the men yet the women were not given equal job opportunities.²³⁸ The women at *Newsweek* filed their complaint with the EEOC and got their right to sue notice.²³⁹

On March 16, 1970, the women at *Newsweek* announced that they had filed a sex discrimination suit against *Newsweek*.²⁴⁰ *Newsweek's* management team decided to meet with the women at *Newsweek* now that they had filed suit.²⁴¹ The women had already discussed among themselves the changes that they wanted to see at *Newsweek* and had selected a negotiation team to advance their goals.²⁴² Their goals had not changed: they wanted equal access to job opportunities and equal

232. *Id.* at 4.

233. *Id.*

234. *Id.* at 4-5.

235. *Id.* at 1, 85.

236. *Id.* at 79.

237. *Id.* at 85.

238. *Id.* at 86.

239. *Id.* at 1. At the time of the lawsuit, *Newsweek* was owned by the Washington Post Company whose publisher and president was a woman, Katharine Graham. Eleanor Holmes noted that "the *Newsweek* women believed that as a woman, Ms. Graham has a particular responsibility to end discrimination against women at her magazine." *Id.* at 3.

240. *Id.* at 1.

241. *Id.* at 102. Management was represented by Oz, Kermit, Grant Tompkins (*Newsweek's* head of personnel), and Rod Gander (the chief of correspondents). *Id.*

242. *Id.* at 102, 105.

pay.²⁴³ The women unanimously requested that Olga Barbi, “the long-serving head of research, be promoted to chief of correspondents.”²⁴⁴ The chief of correspondents was also a senior editor.²⁴⁵ At the time, only men were editors.²⁴⁶ The all-male management team rejected the request because they had no intention of promoting a woman to the post of senior editor.²⁴⁷

The management team’s refusal to grant this request evinced a lack of commitment to equal access to job opportunities, but the negotiation team would not be deterred.²⁴⁸ The management team agreed to create a plan to eliminate the company’s discriminatory practices and promote equality.²⁴⁹ The plan included taking steps to “affirmatively seek out women,” including current employees, for reporting and writing tryout and positions; to integrate the research category with men; and to identify qualified women employees for senior editor positions.²⁵⁰ The management team also agreed to invite women to join editorial lunches, panels, campus speaker programs, and other public functions.²⁵¹ The negotiation and management teams agreed to meet every two months “to monitor the magazine’s progress.”²⁵² Satisfied that the management team would fulfill its promises, the women of *Newsweek* signed a memorandum of understanding on August 26, 1970, “the fiftieth anniversary of the passage of the Nineteenth Amendment.”²⁵³ The Nineteenth Amendment granted women the inalienable right to vote; now the women of *Newsweek* were struggling to secure the inalienable right to equality in the workplace.

In March 1971, one year after the initial lawsuit had been filed, the women at *Newsweek* engaged counsel to enforce the agreement with *Newsweek*’s management team²⁵⁴ because the management team had reneged on the terms of the agreement.²⁵⁵ They had made cos-

243. *Id.* at 90.

244. *Id.* at 105.

245. *Id.*

246. *Id.* (the management team claimed that the promotion would “elevate research and [] Olga didn’t do senior-editor kind of work.”) *Id.*

247. *Id.* at 105.

248. *Id.*

249. *Id.* at 106.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 107.

254. *Id.* at 119 (stating that “they contacted Mel Wulf at the ACLU who requested a meeting with the editors to discuss the delay in implementing the terms of the agreement.”).

255. *Id.* at 111.

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metic changes such as inviting women to panels, speaker programs, and public functions,²⁵⁶ but they had failed to address the fundamental issues of promoting and instituting a transparent policy to promote women to writers,²⁵⁷ hiring women as writers and reporters, and posting vacant job opportunities, as they had agreed to do and as required by law.²⁵⁸ Instead, they continued their old practice of hiring through the “old boy network.”²⁵⁹ At the time, only 23 percent of *Newsweek*’s newly hired writers were females, while only 39 percent of the newly hired researchers were males.²⁶⁰

The women at *Newsweek* did not want to file another lawsuit but they were frustrated by management’s broken promises to foster equality in the workplace. Their new attorney, Harriet Schaffer Rabb,²⁶¹ met with *Newsweek*’s management team.²⁶² The management team asked the *Newsweek* women and Ms. Rabb for advice on how to create policies that would promote gender equality in the company.²⁶³ In January 1972, Ms. Rabb sent a “detailed document suggesting a program for training women writers and specifying goals and timetables for the complete integration of women into the magazine.”²⁶⁴ The editors refused to change their practices or implement any of the suggested changes.²⁶⁵ It was now clearer to the women at *Newsweek* that *Newsweek*’s management team would not take action toward gender equality unless forced to do so. On May 16, 1972, the women at *Newsweek* filed a second charge with the EEOC again alleging sex-based employment discrimination and a claim with the New York State Division of Human Rights alleging breach of contract.²⁶⁶

The second lawsuit spurred *Newsweek* into action. *Newsweek*’s management team immediately began to implement policies to ensure that they complied with the terms of the memorandum of understand-

256. *Id.* at 111-112.

257. *Id.* at 130-31 (explaining how *Newsweek*’s management failed three of the four *Newsweek* women journalists who tried out for writing positions on the grounds that they did not have sufficient writing experience to prepare them for the tryouts).

258. *Id.* at 120.

259. *Id.* (*Newsweek* breached their promise by failing to show the efforts they made to find a woman when a man had been hired.)

260. *Id.* at 130.

261. *Id.* at 124.

262. *Id.* at 130.

263. *Id.* at 132.

264. *Id.* at 131.

265. *Id.* at 131-32.

266. *Id.* at 144 (noting that they filed a second lawsuit because the systematic sex-based employment discrimination persisted.)

ing.²⁶⁷ They hired more women, including *Newsweek's* first female columnist;²⁶⁸ promoted Olga Barbi to senior editor;²⁶⁹ and appointed the first female ad sales representative.²⁷⁰ Ms. Rabb proposed that by December 1973, one-third of *Newsweek's* writers and foreign and domestic reporters should be women;²⁷¹ female staff members should be given priority for writing positions;²⁷² at least one woman writer should be placed in each of the six editorial departments, including the hard-news Nation, Foreign, and Business sections;²⁷³ and that the percentage of male and female researchers on staff should be approximately equal.²⁷⁴ Ms. Rabb also proposed a procedure for recruiting new hires and for in-house tryouts to add transparency to the hiring process,²⁷⁵ and she insisted that a woman be selected to fill one of the three open positions for senior editor.²⁷⁶ The all-male management team vehemently opposed this request since senior editors were a part of management.²⁷⁷ The *Newsweek* women indicated that they “wouldn’t sign an agreement that didn’t include a woman in the meetings where the decisions were being made.”²⁷⁸

On June 28, 1973 the women of *Newsweek* signed a new memorandum of understanding with the management team that included specific benchmarks *Newsweek* had to meet by specific dates.²⁷⁹ For example, by December 31, 1974, approximately one-third of *Newsweek's* writers and domestic reporters would be female, by the end of 1975 one of every three people hired or transferred as foreign correspondents staff would be a woman, and by December 31, 1975 *Newsweek* should appoint a female senior editor in charge of one of the magazine’s six editorial sections.²⁸⁰

267. *Id.* at 145.

268. *Id.*

269. *Id.* (stating that Olga Barbi was the chief of research and a prior unanimous request for her to be promoted to senior editor was rejected by the management team).

270. *Id.* A *Newsweek* employee noted that *Newsweek* was “desperately trying to hire women because of the lawsuit.” *Id.* at 146.

271. *Id.* at 149.

272. *Id.*

273. *Id.*

274. *Id.* at 150.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 152.

280. *Id.* at 153.

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Five years after the women at *Newsweek* began their fight for gender equality, they finally began to see the fruits of their efforts.²⁸¹ Lynn Povich was promoted to senior editor in 1975.²⁸² She was *Newsweek's*] first senior female editor in its forty-two-year history.²⁸³ *Newsweek* also began to hire more women.²⁸⁴ Between 1975 and 1985, women were hired in every position except in top management.²⁸⁵ Although the women at *Newsweek* were starting to see changes in terms of equal access to employment opportunities, they were still paid less than male journalists in similar positions. For example, as senior editor, Ms. Povich earned eight thousand dollars less than one of the male writers recently promoted to senior editor.²⁸⁶

2. Other Employment Discrimination Lawsuits by Women Journalists in Print Media

The women at *Newsweek* were trailblazers in their fight for equality in the media industry. The lawsuits against *Newsweek* had a profound impact on women journalists and women in other professions because they caused a heightened awareness of gender discrimination²⁸⁷ and created a blueprint for subsequent gender discrimination lawsuits.²⁸⁸ For example, two months after the women at *Newsweek* announced that they had filed suit, ninety-six women at Time Inc. filed a sex discrimination complaint against *Time*, *Life*, *Fortune* and *Sports Illustrated*.²⁸⁹ Several other women journalists filed Title VII gender discrimination suits against the Associated Press,²⁹⁰ the *Washington Post*, *Newsday*, the *Detroit News*, the *New York Times*, the *Baltimore Sun*, *Reader's Digest*, and the *New Haven Journal Courier*.²⁹¹

281. *Id.* at 179.

282. *Id.* at 178, 219.

283. *Id.* at 178.

284. *Id.* at 182, 187 (noting that in the 1980s *Newsweek* hired more women than most other media companies).

285. *Id.* at 181.

286. *Id.* at 177 (A male writer at *Newsweek* who was promoted to senior editors was paid \$40,000 while Ms. Povich earned only \$32,000).

287. *Id.* at 9 (Eleanor Holmes Norton noted that because the lawsuits “encouraged other women to come forward, it had an effect on journalism, and it had a wide-ranging effect on women.”).

288. *Id.* at 158.

289. *Id.* at 9, 166-67.

290. MILLS, *supra* note 68, at 149 (noting that because of their prominence in the media industry, the lawsuits against the Associated Press and *The New York Times* forced the industry to take notice of sex-based employment discrimination); POVICH, *supra* note 1 at 9.

291. POVICH, *supra* note 1 at 9; CHAMBERS, *supra* note 30, at 132.

The Washington Post

In May 1972, the women journalists at the *Washington Post*, parent company of *Newsweek*, filed a Title VII sex discrimination charge with the EEOC alleging that the *Washington Post* “intentionally and unintentionally discriminated against women in [its] hiring and promotion practices,”²⁹² in its allocation of assignments, and in determining compensation.²⁹³ The women claimed that the *Washington Post* had not instituted policies to ensure that women were equally hired and promoted,²⁹⁴ there were no female news desk editors, sports reporters, or editors in the financial section, and there were no women in management positions.²⁹⁵ The number of women employed by the *Washington Post* had declined by 2 percent to 13 percent from 1970 to 1972.²⁹⁶ Married women were passed over for assignments and the women journalists were paid less than their male colleagues.²⁹⁷ The *Washington Post* settled the case in 1980 and under the settlement agreement, the *Washington Post* agreed to increase the number of women hired and promoted within five years, and to ensure women comprised one-third of its workforce.²⁹⁸

The Associated Press

The women journalists at the Associated Press (AP) filed a charge with the EEOC in 1973 alleging sex-based employment discrimination.²⁹⁹ They claimed that the AP discriminated against women by using different policies for hiring and promoting men and women, filling jobs through “word-of-mouth” thus restricting women’s employment opportunities, encouraging pay disparity based on gender, and restricting women to jobs with “less prestige.”³⁰⁰ The women at the AP were paid less and received a lower benefits package than the men; the men earned an average of \$20,359.56 while the women earned \$16,580.20.³⁰¹ At the time the charge was filed, none of the AP’s forty-one domestic news bureaus was headed by a woman.³⁰² In 1978, the EEOC ruled that it had “reasonable cause to believe”

292. MILLS, *supra* note 68, at 170.

293. *Id.* at 169-170.

294. *Id.*

295. *Id.* at 169.

296. *Id.*

297. *Id.* at 171.

298. *Id.*

299. *Id.* at 150-151.

300. *Id.* at 151.

301. *Id.*

302. *Id.* (by 1978, the AP had one female bureau chief).

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that the AP's employment practices violated Title VII of the Civil Rights Act of 1964.³⁰³ The AP settled the case in 1983 and agreed to an affirmative action plan to increase the hiring and promotion of women and minorities.³⁰⁴

The New York Times

In November 1974, seven women from the *New York Times* (*Times*) filed a class action lawsuit against the *Times* alleging sex-based employment discrimination.³⁰⁵ The women, led by Elizabeth Wade Boylan, had previously formed the Women's Caucus³⁰⁶ to assess and address their concerns about the prevalent instances of gender disparity at the *Times*.³⁰⁷ The Women's Caucus had sent a letter to the *Times'* publisher documenting their concerns about gender discrimination at the newspaper.³⁰⁸ The letter pointed out that there was a dearth of women in management and senior positions, women were directed to work in traditionally "female" areas, women made up only approximately 10 percent of the staff of 6,000,³⁰⁹ and women were paid less than their male colleagues.³¹⁰ The *Times* male reporters earned an average of \$59 more per week than the female reporters.³¹¹ Approximately 23 percent of the women earned the minimum pay for their jobs while the same was true for only 6.8 percent of the men.³¹² The *Times* had no female executives on the masthead, no female vice presidents, nor women positioned to become vice presidents, and "two of the top three ranking women editors worked in the family/style department, positions traditionally held by women."³¹³ When the *Times* refused to correct the gender disparity, the women journalists filed sex-based employment discrimination charges with the EEOC and the New York Commission on Human Rights.³¹⁴ The *Times* settled in 1978 for \$350,000 and agreed to an affirmative-action

303. *Id.*

304. *Id.*; CHAMBERS ET AL., *supra* note 30, at 132.

305. MILLS, *supra* note 68, at 159; Elizabeth Randolph, *Betsy Wade Relentlessly Gets Facts, Values Right*, WOMENSENEWS.ORG (Nov. 4, 2001) <http://womensenews.org/story/journalist-the-month/011104/betsy-wade-relentlessly-gets-facts-values-right#.U9AeMf1OWUk>.

306. Randolph, *supra* note 305; ROBERTSON, *supra* note 42 at 5, 135.

307. ROBERTSON, *supra* note 42 at 135.

308. *Id.* at 144-145.

309. *Id.* at 144.

310. Randolph, *supra* note 305.

311. ROBERTSON, *supra* note 42, at 144; Randolph, *supra* note 305.

312. Randolph, *supra* note 305.

313. Nan Robertson, *The Girl in the Balcony*, in KEY READINGS IN JOURNALISM 165 (Elliot King & Jane Chapman ed., 2012).

314. ROSENBERG, *supra* note 68, at 265.

plan that included policies and procedures to promote gender equality.³¹⁵ The *Times* also agreed to include women in upper management positions,³¹⁶ and created a timetable that by the end of 1982 women would be placed in one of the four top positions in the news and editorial departments.³¹⁷

The Detroit News

In 1976, Mary Lou Butcher sued *The Detroit News* for sex discrimination.³¹⁸ Ms. Butcher alleged that the *Detroit News* discriminated against women journalists in “hiring, promotions, and the handling of reporting assignments.”³¹⁹ After nine years of working with the *Detroit News*, Ms. Butcher felt like she and other women journalists at the newspaper did not have the same opportunities for promotion as their male colleagues, neither were they given the same or equal schedules or assignments.³²⁰ Ms. Butcher was assigned to the weekend shift, which was generally assigned to new reporters.³²¹ Male journalist with less experience than Ms. Butcher had the weekends off.³²² When Ms. Butcher complained about the inequality, she was demoted to the suburban bureau where she was limited to working on soft news, the lifestyle section, or reader services.³²³ Ms. Butcher moved to a job in public relations months after filing her complaint with the EEOC because she knew she would never advance at the *Detroit News*.³²⁴ The *Detroit News* settled the case in 1983 and paid \$330,000 to 90 female employees.³²⁵

Sports Illustrated

Women journalists also filed sex discrimination lawsuits to gain equal access to news sources so that they could effectively do their jobs. Although media companies had started to hire women as sports

315. ROBERTSON, *supra* note 42, at 207-208; MILLS, *supra* note 68, at 164 (Betsy Wade noted that the women decided to settle rather than pursue the case in court because “they [*The New York Times*] were like scorpions in a bottle. “You’ve got them and they’ve got you, and everybody has a lot to lose.”).

316. ROSENBERG, *supra* note 68, at 265.

317. ROBERTSON, *supra* note 42, at 207-208.

318. MILLS, *supra* note 68, at 167 (three other female employees at the newspaper joined in the lawsuit).

319. *Mary Lou Butcher: Reporter and Crusader for Women’s Rights*, MICHIGAN JOURNALISM HALL OF FAME, <http://j-school.jrn.msu.edu/halloffame/butcher/> (last visited Sept. 29, 2014).

320. MILLS, *supra* note 68, at 167.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

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journalists, some coaches were banning female journalists from their locker rooms which prevented them from interviewing the athletes. *Sport Illustrated* journalist, Melissa Ludtke was denied equal access to the New York Yankees' locker room and was therefore unable to "gather the same interview information her male counterparts reported."³²⁶ In 1978, Ms. Ludtke and her editors filed a sex discrimination suit against Major League Basketball Commissioner Bowie Kuhn requesting that Ms. Ludtke be allowed equal access to interview players in the locker rooms.³²⁷

The New York Yankees had banned all female reporters from their locker rooms,³²⁸ but male reporters had full access to the locker rooms and to the players.³²⁹ Commissioner Kuhn claimed that the ban on female reporters was necessary to protect the privacy of the players, to guard the "image of baseball as a family sport," and to preserve the "traditional notions of decency and propriety."³³⁰ The court recognized that "fresh-off-the-field interviews" were critical to the work of sports reporters and therefore female journalists were placed at a substantial competitive disadvantage in comparison to their male peers because they were denied equal access to "get a story or gather news."³³¹ The court ruled that the New York Yankees engaged in impermissible sex discrimination by denying Ms. Ludtke access to the locker room because of her sex.³³² The court reasoned that there were no sound bases for the blanket ban on female reporters because the defendants could have used "less sweeping alternatives"³³³ instead of choosing to continue to adhere to discriminatory customary practices.³³⁴ The court's decision "opened doors for female reporters, [b]ut did not stop the sex discrimination."³³⁵

3. Lawsuits by Women in Television

Women journalists in television news also filed a series of sex discrimination lawsuits to end discriminatory hiring and promotion practices, and to close the pay gap between men and women journalists.

326. Everbach & Matysiak, *supra* note 127, at 1.
327. Ludtke v. Khun, 461 F. Supp. 86 (S.D.N.Y. 1978).
328. *Id.* at 91.
329. *Id.*
330. *Id.* at 97.
331. *Id.*
332. *Id.* at 92.
333. *Id.* at 98.
334. *Id.*
335. Everbach & Matysiak, *supra* note 127, at 1.

The suits continued into the 1980s where affirmative-action plans and hiring goals were not honored.³³⁶

ACLU v. ABC News

In 1970, the American Civil Liberties Union (“ACLU”) filed a sex discrimination suit against ABC News on the behalf of Sharon Niederman, a secretary at ABC News, and other women employees.³³⁷ Ms. Niederman had applied for a position as a writer or news producer, but was hired as a secretary to the news division’s director of public relations.³³⁸ Ms. Niederman noted that she was laughed at or ignored when she asked to be promoted to writer or to another news position.³³⁹ The ACLU supported the discrimination claim and noted that only 50 of ABC News’ 250 employees were women and a majority, 33, were “at the bottom of the hierarchy as secretaries or researchers.”³⁴⁰

NOW v. WRC

Months later, in March 1971, NOW filed sex discrimination charges with the EEOC and the FCC against NBC’s Washington, D.C. stations WRC-AM-FM-TV.³⁴¹ NOW alleged that only one woman was employed in the stations’ twenty-four top job categories.³⁴² The EEOC found that WRC reserved the managerial jobs for the men; failed to disclose management job opportunities to the women; the stations had never hired a woman for several of its higher paying positions, including announcer; and they refused to allow women to use accumulated sick leave for maternity purposes whereas the men could use accumulated sick leave for any purpose.³⁴³ The EEOC also found that the women were paid substantially less than the men: the sole female manager earned less than 23 of the 24 male managers, and only 5 percent of the women earned an annual salary of over \$15,000, compared to 43 percent of the men.³⁴⁴ The EEOC upheld the class-action charges but ruled against the women on their individual claims.³⁴⁵

336. BRADLEY, *supra* note 46 at 242.

337. *Broadcasting the Businessweekly of Television and Radio*, (Aug. 27, 1970) <http://americanradiohistory.com/Archive-BC/BC-1970/1970-08-24-BC.pdf>; see also HOSLEY & YAMADA, *supra* note 34, at 105.

338. HOSLEY & YAMADA, *supra* note 34, at 105.

339. *Id.* (Ms. Niederman noting that “her case was symbolic of the plight of the American working woman.”)

340. *Id.*

341. *Id.* at 106.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

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NOW v. FCC (WABC and WRC)

In 1972, NOW filed a petition with the FCC to deny the license renewal applications for WABC-TV and WRC-TV claiming that the stations discriminated against women in their employment practices and in their programming.³⁴⁶ NOW alleged that the disparity between the percentage of women hired by ABC and the percentage of women in the area's workforce was sufficient to establish a prima facie showing of sex discrimination given that similar statistics had led the EECO to find "reasonable cause to believe that WRC-TV had engaged in discriminatory employment practices."³⁴⁷ Women comprised approximately 40.3 percent of the area's workforce,³⁴⁸ but ABC's employment reporting form for 1971, Form 395, showed that only 23.3 percent of ABC's employees were women.³⁴⁹ Notably, only 5.7 percent of ABC's female employees were managers, professionals, and technicians while 72 percent of the female employees worked in clerical positions.³⁵⁰ NOW also alleged that ABC's EEO programs were inadequate, that ABC engaged in discriminatory hiring and promotion practices,³⁵¹ and that ABC violated the EEOC Guidelines by not providing paid maternity leave.³⁵² The FCC decided that none of NOW's allegations presented sufficient basis for an evidentiary hearing.³⁵³ The FCC noted that ABC had implemented an adequate EEO plan and had made great progress in meeting its self-imposed goals of increasing the number of women employed.³⁵⁴

NOW also argued that WRC-TV's license should not have been renewed because the EEOC had found reasonable cause to believe that WRC-TV engaged in discriminatory employment practices based on a complaint filed against WRC-TV in 1973 by 27 female employ-

346. Nat'l Org. For Women, *New York City Chapter v. F.C.C.*, 555 F.2d 1002, 1004 (1977) (NOW claimed that the stations did not consider the interests and problems of women; that ABC's past programming failed to consider the interests of women and the stations did not properly reflect the role of women in the society; and that the stations failed to comply with the FCC's equal opportunity policy).

347. *Id.* at 1015.

348. *Id.* at 1015 n.89.

349. *Id.* at 1015 n.89 (only approximately 44 of ABC's 189 employees were women.)

350. *Id.* (ABC employed only eight women as managers, professionals, and technicians (5.7% of such jobs) while the other 36 women worked in clerical positions (72% of such jobs)).

351. *Id.* at 1005; HOSLEY & YAMADA, *supra* note 34, at 107.

352. *F.C.C.*, 555 F.2d at 1015.

353. *Id.* at 1016.

354. *Id.* ABC had promised to increase the number managers from four to nine and the number of professionals from twelve to twenty-one. *Id.* at n.90. Data from the 1973 Form 395 showed that ABC had seven managers and seventeen professionals. *Id.*

ees.³⁵⁵ The EEOC noted that WRC-TV violated Title VII by engaging in discriminatory employment practices such as “maintaining segregated job classifications and/or limiting employment of females in other categories” and “discriminating against females in its recruitment policies.”³⁵⁶ The FCC determined that the EEOC’s findings alone did not provide a sufficient basis for a hearing because the EEOC and the FCC had different functions; the EEOC enforced Title VII in an effort “to make the aggrieved person whole” while the FCC regulated licensees to ensure that their practices on a whole complied with the EEO rules and served “the public interest.”³⁵⁷ The FCC noted that it takes a prospective approach, and therefore while it is concerned with past employment discrimination practices, it is more concerned with getting licensees with a history of inadequate affirmative action programs to adopt new policies that will ensure “genuine equal employment opportunity in the future.”³⁵⁸ After examining WRC-TV’s new employment data, the FCC determined that WRC-TV had taken “significant steps” to remedy its past discriminatory practices and was therefore on target to meet the FCC’s goal of providing women with equal employment opportunities.³⁵⁹ WRC-TV had hired and promoted more women and minorities and had corrected the salary disparities.³⁶⁰ The United States Court of Appeals District of Columbia Circuit agreed with the FCC that the stations had taken steps to end employment discrimination and that the post-term records were sufficient to show compliance with the EEO requirements.³⁶¹ The court affirmed the FCC’s decision to deny NOW’s petitions.³⁶²

EEOC v. NBC

NBC was sued again for sex discrimination in February 1973. Fifty of NBC’s female employees filed a complaint with the New York City Commission on Human Rights, the EEOC, and the U.S. Department of Labor alleging discriminatory hiring and promotion practices and unequal pay.³⁶³ NBC pointed out that it had taken steps to im-

355. *Id.* at 1016.

356. *Id.*

357. *Id.* at 1016–17.

358. *Id.* at 1017.

359. *Id.*

360. *Id.*

361. *Id.* at 1020.

362. *Id.*

363. HOSLEY & YAMADA, *supra* note 34 at 115.

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prove its hiring and promotion practices since 1971 and had almost doubled the “number of women in executive and managerial positions.”³⁶⁴ NBC further pointed out that the New York City Commission did not make a finding of intentional or individual cases of discrimination.³⁶⁵ The New York City Commission, however, found that the pay disparity between men and women evinced a discriminatory practice.³⁶⁶ A majority of the men earned an annual salary of over \$18,000 while the pay range for half of the women was \$5,896 to \$11,271.³⁶⁷ The EEOC filed a class action suit on behalf of the women against NBC in 1975.³⁶⁸ NBC settled the case without admitting to the charges and agreed to pay their female employees back wages, narrow the pay gap between the male and female managers, increase the number of women employed in technical jobs, and employ women to fill one-third of the news writing jobs by 1981.³⁶⁹

D. The Effect of the Social and Legal Changes of the 1960s to 1970s on the Employment Status of Women Journalists

The lawsuits brought nationwide attention to the systematic discrimination women journalists faced in the workplace and sparked a national agenda for change. Many media companies were forced to hire women journalists and grant them equal opportunities for promotion and professional development, some as a part of an affirmative action plan negotiated during the settlement of a lawsuit, others because they were in violation of the anti-discrimination laws and feared a lawsuit. In 1971, women journalists were finally allowed membership to the previously all-male National Press Club³⁷⁰ and in 1973 Katharine Graham became the first woman elected to the American Newspaper Publishers Association’s board.³⁷¹ Together, these

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Women’s Committee for Equal Employment Opportunity v. NBC*, 71.F.R.D. 666, 668 (S.D.N.Y. 1976) (the class included all NBC female employees employed on or after February 8, 1972, and the EEOC was allowed to intervene as a plaintiff.)

369. HOSLEY & YAMADA, *supra* note 34 at 115; *See E.E.O.C. v. National Broadcasting Co., Inc.*, 753 F.Supp. 452 (S.D.N.Y. 1990).

370. MILLS, *supra* note 68, at 94 (acceptance in the National Press Club and other victories women journalists had in the 1970s were a result “not only because women mobilized for the effort but also because a majority of the men affected also agreed with them at that time.”) *Id.*; ROBERTSON, *supra* note 42, at 99 (1992).

371. KATHARINE GRAHAM, *PERSONAL HISTORY* 593 (1997).

changes seemed to signal that times had changed or at least were changing for women journalists.

Newspapers, television, and radio hired more women as professional journalists than in previous times. For example, “[I]n 1973, 47 percent of the *Times* new hires for reporters and editors were women, compared to 7 percent in the year before.”³⁷² Television newsrooms also reported progress.³⁷³ In 1970, approximately 45 percent of American television newsrooms had women reporters and “94 percent of the news directors who participated in a national survey said that they would hire a woman reporter.”³⁷⁴ By 1973, the three commercial networks: NBC, ABC, and CBS had formed committees to improve the employment situation for women.³⁷⁵ The benefits soon became apparent. By 1976, approximately 86 percent of all television stations had women on their news staff, a 36 percent increase from 1972.³⁷⁶ Radio stations also substantially increased the number of women newscasters. In 1972, only 15 percent of radio stations had women newscasters, compared to 49 percent in 1976.³⁷⁷

Similarly, a record number of women were promoted to senior positions in media companies³⁷⁸ and more women were being hired as television anchors.³⁷⁹ The FCC license requirement that broadcast stations institute equal opportunity hiring policies paved the way for Oprah Winfrey and other female journalists to be hired as TV anchors.³⁸⁰ Network television was slower to embrace change, with ABC making the “first attempt to break the network men-only club” by hiring a female to co-anchor a network evening news program.³⁸¹ In 1976, ABC hired Barbara Walters to “co-anchor the ABC evening

372. COLLINS, *supra* note 69, at 269.

373. HOSLEY & YAMADA, *supra* note 34, at 77 (noting that a large number of women were hired in broadcast news in the 1960s and 1970s).

374. *Id.* at 101–02 (noting that “the push to hire women on the air might not have happened in the mid 1960s had it not been for the civil rights movement”).

375. *Id.* at 101, 114.

376. *Id.* at 118 (stating that 35% of the stations had no female anchors, 48% had only one and only 3% had three or more female anchors).

377. *Id.*

378. See BRADLEY, *supra* note 46 at 260; see also POVICH, *supra* note 1, at 219 (*Newsweek* promoted Lynn Povich to senior editor in September 1975 pursuant to the terms of the settlement agreement negotiated in the employment discrimination lawsuit against *Newsweek*. Ms. Povich noted that “If it hadn’t been for the lawsuit, I never would have become senior editor at *Newsweek*”); POVICH, *supra* note 1, at 221.

379. COLLINS, *supra* note 71, at 317.

380. BRADLEY, *supra* note 46, at 241. Ms. Winfrey was hired as a news anchor by Nashville’s WLAC-TV in 1973. *Id.*

381. COLLINS, *supra* note 71, at 316.

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news with Harry Reasoner.”³⁸² A female in the role of TV anchor was a significant step towards gender equality because “[T]he person reading the evening news had always been a figure of authority in American culture.”³⁸³ By 1976, women comprised 20 percent of all anchors and reporters.³⁸⁴

Despite the decision to hire and promote women, media companies continued to pay women less than men in similar positions doing similar work. Media companies often used lack of experience to justify their decision to pay the women a lower salary, even where this justification was purely a pretext.³⁸⁵ For example, *Newsweek* promoted Ms. Povich to senior editor but she was paid 20 percent less than a male writer at *Newsweek* who was newly promoted to senior editor.³⁸⁶

III. THE STATUS OF WOMEN JOURNALISTS 1980S–1990S

The lawsuits of the 1970s motivated the male-run newsrooms and broadcast stations to institute some changes, but the changes were temporary. The widespread hiring and promotion of women journalists of the 1970s came to a noticeable halt in the 1980s.³⁸⁷ The women journalists had seen some progress and had ceased initiating lawsuits. Without the threats of lawsuits, the male-dominated media companies reverted to their old gender-biased employment practices of denying qualified women equal access to certain jobs, equal opportunities for promotion, and equal pay. With more women journalists in the newsrooms and broadcast stations, the patterns of discrimination became subtler and therefore harder to detect yet they had an equally pernicious discriminatory effect.³⁸⁸ Women journalists were faced with older concerns of lower wages and unfair hiring practices, and newer concerns of an impenetrable glass ceiling, customer preference, sexual

382. *Id.*; HOSLEY & YAMADA, *supra* note 34, at 129 (noting that Mr. Reasoner threatened to quit if ABC hired a woman co-anchor.).

383. COLLINS, *supra* note 71, at 316.

384. HOSLEY & YAMADA, *supra* note 34, at 118 (noting that 35% of the stations had no female anchors, 48% had only one and only 3% had three or more female anchors).

385. *Id.* at 154.

386. POVICH, *supra* note 1, at 177 (stating that a male writer at *Newsweek* was paid \$40,000 while she earned only \$32,000).

387. MILLS, *supra* note 68, at 165.

388. Jennie Ruby, *Women in the Media*, *Off Our Backs*, Vol. 37, No. 1 14–16 (2007); POVICH, *supra* note 1, at xx.

stereotyping, and sexual harassment.³⁸⁹ New laws continued to proscribe discriminatory practices in the workplace. The United States Supreme Court declared sexual harassment and sexual stereotyping illegal and Congress enacted The Civil Rights Act of 1991³⁹⁰ to make it easier for aggrieved employees bring employment discrimination lawsuits where their civil rights are compromised in the workplace.

A. The Glass Ceiling

Women journalists became acutely aware of, and frustrated by, the invisible barriers to their upward professional mobility referred to as the glass ceiling.³⁹¹ Some women journalists made it to mid-management positions, but they became stuck there and were not allowed to ascend to the male dominated managerial and decision-making positions.³⁹² Women journalists were hired as, or promoted to, senior writers, editors and producers, but very few become managers, or editorial directors.³⁹³ For example, Dominique Browning became the first assistant managing editor of *Newsweek* in 1986.³⁹⁴ After she left in 1992, many women became assistant managing editors but none made it to managing editor or editor-in-chief.³⁹⁵ Ed Joyce, former head of CBS, observed that although women held 47 percent of the mid-management positions, the top jobs went to the men.³⁹⁶ The lack of professional mobility issues women journalists were now facing were similar to the issues the women journalists at *Newsweek* com-

389. See generally, COLLINS, *supra* note 71, at 340 (women have always been sexually harassed in the workplace.); JOAN KENNEDY TAYLOR, SEXUAL HARASSMENT: A NON-ADVERSARIAL APPROACH 32 (2001) (noting that the term sexual harassment was first coined in 1975); Barnard & Rapp, *supra* note 66, at 643-45.

390. Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071.

391. The glass ceiling is an invisible and “unbreachable barrier that keeps minorities and women from rising to the upper rungs of the corporate ladder, regardless of their qualifications or achievements,” and an “egregious denial of social justice. . .” MESSAGE FROM THE CHAIR, RECOMMENDATIONS OF THE FEDERAL GLASS CEILING COMMISSION 4 (1995). The ‘glass ceiling’ was first used in 1986 by Carol Hymowitz and Timothy D. Schellhardt. Carol Hymowitz and Timothy D. Schellhardt, *The Glass Ceiling: Why Women Can’t Seem to Break the Invisible Barrier that Blocks Them from the Top Job*, WALL ST.J., March 24, 1986, at 1, 4; See Bridge, *supra* note 36, at 581-582.

392. Byerly, *supra* note 28, at 194.

393. POVICH, *supra* note 1, at 193; see generally Theodora Ziamou, *Women Make the News: A Crack in the Glass Ceiling*, UNESOC 27 (2001), <http://unesdoc.unesco.org/images/0012/001230/123003eo.pdf> (noting that women are less likely to advance to the top positions in the workplace).

394. POVICH, *supra* note 1, at 187-88.

395. *Id.* at 188-89 (Ann McDaniel was appointed managing director of *Newsweek* in 2008); see also MILLS, *supra* note 68, at 274 (stating that in 1987 Janet Chusmir became the executive editor of the *Miami Herald*, the highest ranked woman at a major newspaper).

396. HOSLEY & YAMADA, *supra* note 34, at 158.

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plained about in the 1960s and 1970s. The difference then was that their glass ceiling was at clippers and researchers, during this period the glass ceiling may have moved a bit higher to reporter, editor, and assistant managing editor, but there was still a glass ceiling.

B. Customer Preference as a Reason Not to Hire Women Broadcasters

Broadcast stations, especially television stations, began to openly use viewer surveys to influence their decision to hire or demote reporters and television anchors.³⁹⁷ This practice justified eliminating a number of qualified women journalists, some because of age and others because they were deemed unattractive.³⁹⁸ Television stations use viewer surveys to measure viewers' reactions to individual newscasters³⁹⁹ and then incorporate the viewers' preferences into employment decisions.⁴⁰⁰ This can be problematic and can lead to impermissible stereotyping under Title VII because of the different social roles and traits assigned to males and females by society.⁴⁰¹ The surveys often contain inherent biases, which generally presume that the public "prefers women with certain traits – for example, youth, beauty, and nonaggressive behavior,"⁴⁰² and because cultural biases often cause the public to "evaluate[] female newscasters by different criteria from those used to judge their male counterparts."⁴⁰³

Courts, however, have been reluctant to rule that the use of viewer surveys in the television industry leads to discriminatory employment decisions. In 1982, Christine Craft sued her employer KMBC-TV for sex discrimination after she was demoted from television anchor to reporter because she allegedly did poorly in a viewer focus group survey.⁴⁰⁴ KMBC-TV told Ms. Craft that they had to demote her from her position as anchor because the viewers thought she was "too old, too unattractive, and not deferential enough to men."⁴⁰⁵

397. Leslie S. Gielow, *Sex Discriminating in Newscasting*, 84 MICH. L. REV. 443, 443-44 (1985); see also Patti Buchman, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearances*, 85 COLUM. L. REV. 190, 201 (1985).

398. Gielow, *supra* note 397, at 443-44; see also Buchman, *supra* note 397, at 201.

399. Gielow, *supra* note 397, at 443-44.

400. *Id.*

401. *Id.* at 447.

402. *Id.* at 444 (noting that the television broadcasters tend to perceive that the public has a preference for women with certain traits) (footnotes omitted).

403. *Id.*

404. Craft v. Metromedia, Inc., 572 F.Supp. 868, 874 (1983).

405. *Id.* KMBC-TV denied making this statement to Ms. Craft and the court believed KMBC-TV. Craft v. Metromedia, Inc., 766 F.2d 1205, 1209 (1985).

KMBC-TV required Ms. Craft to improve her appearance and learn new makeup styles.⁴⁰⁶ KMBC-TV also gave Ms. Craft new clothing to wear when she was on air.⁴⁰⁷ The court denied Ms. Craft's claim for sex-based employment discrimination, holding that KMBC-TV's actions concerning Ms. Craft's appearance were not "ipso facto discriminatory" because they did not result from "any general animus toward women" or any specific animus towards Ms. Craft as a woman.⁴⁰⁸ The court noted that KMBC-TV consistently evaluated "the appearance of all on-air personnel without regard to sex but with regard to the peculiar characteristics of each employee" and they had addressed the appearance problems of other male and female employees.⁴⁰⁹

The court of appeals affirmed the district court's decision that KMBC-TV's actions did not constitute sex-based employment discrimination.⁴¹⁰ The court of appeals noted that KMBC-TV did not demote Ms. Craft to reporter or ask her to pay attention to her appearance because of her sex, but because "KMBC required both male and female on-air personnel to maintain professional, businesslike appearances 'consistent with community standards' and that the station enforced that requirement in an evenhanded, nondiscriminatory manner."⁴¹¹

C. Sexual Harassment and Sexual Stereotyping

Sexual harassment and sexual stereotyping had been used to subtly discriminate against women, but were now receiving more attention as a discriminatory employment practice prohibited under Title VII. In 1980, the EEOC revised its Guidelines to include sexual harassment as a prohibited form of sex discrimination.⁴¹² The Supreme

406. *Craft*, 572 F.Supp. at 872.

407. *Id.*

408. *Id.* at 878.

409. *Id.*

410. *Craft*, 766 F.2d at 1209-10.

411. *Id.* at 1209-10. Ms. Craft filed a writ of certiorari with the Supreme Court but the Court declined to hear her case. *HOSLEY & YAMADA*, *supra* note 34, at 149.

412. 29 C.F.R. § 1604.11(a) (2014).

Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.

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Court later adopted these Guidelines and concluded in *Meritor Savings Bank, FSB v. Vinson* that sexual harassment is a violation of Title VII.⁴¹³

In 1989, the Supreme Court acknowledged sex stereotyping as a violation of Title VII,⁴¹⁴ but made it difficult for women alleging sex-based employment discrimination to secure a favorable judgment in mixed motive cases even where the women-plaintiffs had established that gender influenced the adverse employment decision.⁴¹⁵ In *Price Waterhouse v. Hopkins*, the plaintiff claimed that she was not promoted to partner because of her sex.⁴¹⁶ A social psychologist testified at trial that the defendant's partnership selection process "was likely influenced by sex stereotyping."⁴¹⁷ The trial court held that defendant unlawfully discriminated against the plaintiff because of her sex when the defendant denied her request for promotion based on the sexually stereotyped comments about her personality.⁴¹⁸ The defendant had failed to prove by clear and convincing evidence that it would have denied the plaintiff's promotion absent the comments.⁴¹⁹ The court of appeals affirmed the trial court's decision on liability noting that the defendant "could not demonstrate by clear and convincing error that impermissible bias was not the determining factor" in its decision to deny the plaintiff's promotion.⁴²⁰ The Supreme Court reversed the court of appeal's decision on liability noting that in mixed motive cases, even where plaintiff may establish that gender played a motivating factor in an adverse employment decision, the defendant only needs to prove by preponderance of the evidence that the resulting decision would have been the same if the plaintiff's gender was not considered.⁴²¹ The Court's decision made it easier for employers to avoid liability for employment discrimination where gender is not the only determining factor.

413. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

414. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

415. *See id.* at 258.

416. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231-232 (1989). Some partners reacted negatively to plaintiff's personality "because she was a woman." *Id.* at 235.

417. *Id.* at 235.

418. *Hopkins v. Price Waterhouse*, 618 F.Supp. 1109, 1122 (D.D.C. 1985).

419. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989).

420. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 472 (D.Cir. 1987) (noting that this is a mixed motive case because the defendant considered several factors in determining whether to grant or deny the plaintiff's request to be promoted to partner).

421. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231-232 (1989).

That same year, 1989, the Supreme Court appeared to have abandoned the Court's trend of pro-equality decisions and diverted from Title VII's purpose to eliminate employment discrimination when the Court issued decisions that made it difficult for women to successfully bring a claim for gender discrimination in the workplace.⁴²² For example, the Court made it difficult to use statistical evidence to prove disparate impact in sex discrimination cases,⁴²³ and to challenge an established seniority system.⁴²⁴ Congress passed the Civil Rights Act of 1991 to remove these barriers created by the Supreme Court to bringing employment discrimination claims⁴²⁵ and to restore and "strengthen and improve" Title VII civil rights laws.⁴²⁶

D. Civil Rights Act of 1991 and The Glass Ceiling Act of 1991

The Civil Rights Act of 1991 amends the Civil Rights Act of 1964.⁴²⁷ The Civil Rights Act of 1991, which became effective on November 21, 1991, made it possible for plaintiffs to request a jury trial in employment discrimination cases,⁴²⁸ to request attorney's fees for expert witnesses,⁴²⁹ and for successful plaintiffs to receive compensatory damages and punitive damages where the alleged discriminatory practice was intentional.⁴³⁰ The Civil Rights Act of 1991 prohibited employment decisions based on sex even where sex was not the sole

422. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 912–13 (1989); *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 659 (1989).

423. See *Wards Cove Packing Co.*, 490 U.S. at 650.

424. See *Lorance*, 490 U.S. at 905.

425. Civil Rights Act of 1991 § 3, Pub. L. No. 102-166, § 1, 105 Stat. 1071, 1071; Donald Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 53 (1993); Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 304 (1992).

426. Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071; See H.R. Res. 162, 102d Cong. (1991)(enacted) available at http://library.clerk.house.gov/reference-files/House_Calendar_102nd_Congress.pdf (providing support for the Civil Rights Act of 1991 noting that its purpose is to "amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment . . .")

427. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Daniel Gyebi, *The Civil Rights Act of 1991: Favoring Women and Minorities in Disparate Impact Discrimination Cases Involving High-Level Jobs*, 36 HOW. L.J. 97, 97 (1993).

428. Civil Rights Act of 1991 § 1977A(c); *The Law*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/thelaw/index.html> (last visited Sept. 16, 2014).

429. Civil Rights Act of 1991 § 113(b).

430. *Id.* § 1977A(b); see generally Timothy G. Healy, *Note and Comment: Sexual Pattern: Why A Pattern or Practice Theory of Liability Is Not an Appropriate Framework for Claims of Sexual Harassment*, 10 ROGER WILLIAMS U. L. REV. 537, 570 (2005) (noting that the intent of the Civil Rights Act of 1991 was to strengthen Title VII law by allowing greater damage awards and jury trials, but an unintended consequence was the likelihood of diminished successful class certification).

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factor influencing the employment decisions,⁴³¹ and made it possible for an employee to challenge an established seniority system when the seniority system is adopted, and when the employee becomes subjected to or is impacted by the seniority system.⁴³² The Civil Rights Act of 1991 also undid the effects of *Wards Cove Packing Co. v. Atonio* and shifted the burden of persuasion in disparate impact cases to the employer to show that that the challenged employment practice is a necessary business practice.⁴³³

The Civil Rights Act of 1991 has five parts.⁴³⁴ Part II of the Civil Rights, the Glass Ceiling Act of 1991,⁴³⁵ established the Glass Ceiling Commission.⁴³⁶ The Glass Ceiling Commission was tasked with conducting a study and preparing recommendations to eliminate the “artificial barriers” that prevent women and minorities from advancing to management and decision-making positions in the workplace.⁴³⁷ The study revealed that there is indeed a barrier to professional mobility for women and minorities and even if they are promoted to top ranks, their compensation is lower.⁴³⁸

431. Civil Rights Act of 1991 § 107(a) (overruling *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

432. Civil Rights Act of 1991 § 122 (overruling *Lorance v. AT&T Technologies, Inc.* 490 U.S. 900 (1989)).

433. Civil Rights Act of 1991, §§ 2, 105. In *Wards Cove Packing Co. v. Antonio*, the United States Supreme Court held that statistical evidence showing a high percentage of a racially majority group in high paying jobs and a low percentage of that group in a low paying jobs did not establish a prima facie case of disparate impact in violation of Title VII. *Wards Cove Packing Co.*, 490 U.S. at 650. The Court noted that the employer has the initial burden of producing evidence to justify an employment practice as a necessary business decision, but the burden then shifts to the employee to prove that other employment practices would have a less racially adverse impact and be equally effective and serve the same employment goals without placing an additional burden on the employer. *Id.* at 659–60. The Civil Rights Act of 1991 shifts the burden of persuasion back to the employer to show that where there is evidence of disparate impact, the employer has the ultimate burden of convincing the court that the employment practice is a necessary business decision. Civil Rights Act of 1991 § 105.

434. Loudon, *supra* note 425, at 309.

435. Glass Ceiling Act of 1991, Pub. L. 102-166 § 202(a)(1)&(2), 105 Stat. 1081(1991). Women and minorities remain underrepresented in management and decision-making positions in business despite the growing number of women in the workplace; and artificial barriers exist to the advancement of women and minorities in the workplace.

436. Glass Ceiling Act of 1991, Pub. L. 102-166 § 203(a)(1)&(2), 105 Stat. 1081(1991); Loudon, *supra* note 425, at 309.

437. Glass Ceiling Act of 1991, Pub. L. 102-166 § 203(a)(1)&(2), 105 Stat. 1081(1991); Loudon, *supra* note 425, at 309; *Good For Business: Making Full Use of the Nation's Human Capital*, DEP'T OF LABOR (March 1995), <http://www.dol.gov/oasam/programs/history/reich/reports/ceiling.htm>.

438. Falk & Grizard, *supra* note 29, at 6; see also Larry Lovoy, *Student Article: A Historical Survey of the Glass Ceiling and the Double Bind Faced by Women in the Workplace: Options For Avoidance*, 25 LAW & PSYCHOL. REV. 179, 180–81 (2001).

IV. THE STATUS OF WOMEN JOURNALISTS FROM 2000,
THE NEW MILLENNIUM, TO FIFTIETH
ANNIVERSARY OF THE CIVIL RIGHTS
ACT OF 1964

Women journalists have continued to make progress in the new millennium but they are still far from achieving gender equality. Statistics underscore the inequalities in the journalism profession. More women than men graduate with journalism degrees in the United States and yet more men find full time employment in radio, television, and newspapers.⁴³⁹ Approximately 75 percent of graduates with a degree in journalism in the United States are women,⁴⁴⁰ but women are employed in less than half of the key media positions.⁴⁴¹ In 2009, 34.8 percent of newsroom supervisors and 37 percent of newsroom employees were women.⁴⁴² Male journalists make up approximately 60 percent of newspaper employees yet they wrote 80 percent of the newspaper op-eds⁴⁴³ and 69 percent of the by-lines in the *New York Times*.⁴⁴⁴ Only 47.1 percent of the nation's radio stations have women workers,⁴⁴⁵ and approximately 97.2 of all television stations hire women, but women make up only 40.3 percent of the total workforce.⁴⁴⁶

A. Persistent Problems Facing Women Journalists

Media companies may have reduced the restrictions on the number of women hired as professional journalists, but women journalists continue to be discriminated against in the types of job that they have access to. There is a resurgence of “gendered news categories,” albeit cloaked in the label of ‘new’ journalism. In ‘new’ journalism, the em-

439. Diana Mitsu Klos, *The Status of Women in the US Media 2013*, WOMEN'S MEDIA CTR. 35–36, http://wmc.3cdn.net/51113ed5df3e0d0b79_zzzm6go0b.pdf (stating that women tend to work in public relations and advertising).

440. Yi & Dearfield, *supra* note 28, at 6 Table 8, (citing to statistics from the Annual Survey of Journalism and Mass Communications Graduates (Becker et al., 2010)); *cf.* COMPARISON CONTRIBUTOR, *Male Journalists vs. Female Journalists: Discrimination Debate?*, <http://recomparison.com/comparisons/101561/male-journalists-vs-female-journalists-discrimination-debate/> (noting that in 1970 women comprised approximately one third of the people graduating with a degree in journalism).

441. Yi & Dearfield, *supra* note 28, at 7–9.

442. Kay Mills, *Measuring Progress: Women as Journalists*, NEIMAN REPORTS (2010), <http://www.nieman.harvard.edu/reports/article/102534/Measuring-Progress-Women-as-Journalists.aspx> (citing to the American Society of News Editors (ASNE) 2009 employment survey).

443. Bennett et. al, *supra* note 22; Susan Antilla, *Why do women still lag in journalism?*, CNN (Sept. 18, 2012), <http://www.cnn.com/2012/09/18/opinion/antilla-women-journalists/>.

444. *The Status of Women in the US Media 2014*, WOMEN'S MEDIA CENTER 9 (2014).

445. *US Media 2014*, *supra* note 444, at 25.

446. *Id.* at 26.

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phasis is on style.⁴⁴⁷ There is ‘masculine’ styled news that covers “traditional, serious journalism” or ‘feminine’ styled news that covers “human-interest, emotional investment and sensationalism.”⁴⁴⁸ Male or female journalists can produce either masculine or feminine style news, but women journalists continue to be steered towards more ‘feminine’ style news that pays less and offers fewer opportunities for professional advancement.⁴⁴⁹ This is a reversion to the status quo where women journalists were forced into “pink collar” positions covering the lower paying and less prestigious soft news.⁴⁵⁰

While media companies may hire more women, there is still evidence of the “The Good Ole Boys”⁴⁵¹ club where male editors and editorial directors tend to fill open positions by hiring people like themselves, other males of the same “ethnicity and class background” instead of “doing public searches.”⁴⁵² This is very problematic because it limits diversity and it denies qualified women journalists equal access to employment opportunities.

Women in sports journalism account for the lowest number of women journalists in any group.⁴⁵³ Male journalists comprise approximately 90 percent of sports editors, 83 percent of assistant sports editors, and 88 percent of sports reporters.⁴⁵⁴ Sports is generally viewed as a man’s territory and women are “viewed as outsiders.”⁴⁵⁵ About 98 percent of women in sports journalism have acknowledged that they have been discriminated against in the workplace, they have been subjected to unequal opportunities for promotion, unequal pay,⁴⁵⁶ sexual harassment, unfair criticism of their work, or unequal alloca-

447. CHAMBERS ET. AL, *supra* note 30, at 233.

448. *Id.*

449. Jennifer L. Pozner, *Media Discrimination Begets Biased Content*, WELLESLEY CTRS. FOR WOMEN (June 26, 2014 11:02 AM), <https://www.wcwoonline.org/WRB-Issues/289.Id>.

450. *Id.*

451. GRAHAM, *supra* note 371, at 593 (noting that the view of ‘The Good Ole Boys’ will not die except generationally).

452. Pozner, *supra* note 449; ROBERTSON, *supra* note 42, at 232 (stating that the practice of hiring men of the same color and ethnic background is an old practice). After the women at the *New York Times* sued the organization for sex discrimination, the owner, Arthur Sulzberger, Jr. cautioned the male staff to reject “the comfort factor” of promoting only white men. *Id.*

453. *US Media* 2014, *supra* note 444, at 33.

454. *Id.*; Everbach & Matysiak, *supra* note 127, at 5.

455. Everbach & Matysiak, *supra* note 127, at 4; Marie Hardin & Stacie Shain, *Female Sports Journalists: Are We There Yet? ‘No’*, 26 *NEWSPAPER RES.J.* 22, 24 (2005), available at <http://www.newspaperresearchjournal.org/pdf/Hardin.pdf> (noting that sport-related workplaces are generally hostile to women); Everbach & Matysiak, *supra* note 127, at 4.

456. Amy McMahon, *Equality in the Last Male Frontier*, *WOMEN IN SPORTS AND JOURNALISM* 5 (Apr. 21, 2011), <https://sites.google.com/brvgs.k12.va.us/amymcmahon/research-paper> (citation omitted).

tion of assignments.”⁴⁵⁷ There are no women in the top 10 or the top 50 of the most important radio sports talk hosts in the U.S.⁴⁵⁸ and of the 183 sports talk radio host in the country, only 2 are women.⁴⁵⁹

The two of most pressing problems women journalists face at this time are the impenetrable glass ceiling and the pay inequity. Very few women journalists are promoted to top positions in media companies. Women journalists need women in positions of power who are willing to hire and promote women and influence changes in the companies that will positively impact gender equality. In 2010, Tina Brown became the first female editor-in-chief at *Newsweek*, forty years after the women journalists first sued *Newsweek* for gender discrimination.⁴⁶⁰ In 2011, when Jill Abramson assumed the position of Executive Editor of the *New York Times*, she hired and promoted a number of women.⁴⁶¹ For the first time, the *New York Times*' masthead reflected true gender equality; the masthead had 50% females.⁴⁶² Ms. Abramson was fired in 2014.⁴⁶³ In 2013, Nancy Gibbs became the first female managing editor of *Time* magazine.⁴⁶⁴ She focused on ensuring pay parity by reviewing the salaries of the female employees to ensure that they were comparable with the salaries of equally situated male employees.⁴⁶⁵

A survey of women in leadership positions in media companies showed 21.6 percent in television news, 19.2 percent in newspapers, 7.5 percent in radio news, and 55 percent in social media.⁴⁶⁶ There are only four female editors-in-chief, and one female publisher, at the top 25 largest newspapers in the country.⁴⁶⁷ Approximately 15.3 percent of the boards of the directors of the top 10 national news organizations are females but no female owned any of the 20 most visited on-line news sites.⁴⁶⁸

457. Ruby, *supra* note 388, at 14–16; Everbach and Matysiak, *supra* note 127, at 5.

458. *US Media* 2014, *supra* note 444, at 31.

459. *Id.* (citing the “Heavy Hundred” list from *Talkers* magazine).

460. *Id.* at 192–93.

461. *US Media* 2014, *supra* note 444, at 7, 23.

462. *Id.* at 7.

463. Autella, *supra* note 24.

464. Charlotte Alter, *Nancy Gibbs to Lead TIME*, *TIME*, Sept. 17, 2013, available at <http://business.time.com/2013/09/17/nancy-gibbs-to-lead-time/>.

465. Joe Pompeo, *Her “Time,” CAPITAL*, Dec. 5, 2013 available at <http://www.capitalnewyork.com/article/media/2013/12/8536964/her-time> (Mika Brzezinski calls Nancy Gibbs “the kind of leader necessary to complete the quest for equality in the workplace).

466. *Id.* at 70.

467. *Id.*

468. *Id.*

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Pay inequity continues to be another major challenge for women journalists.⁴⁶⁹ Women journalists continue to be paid less for equal work and receive fewer fringe benefits than similarly situated male journalists.⁴⁷⁰ Female editors and reporters earn approximately 90 percent of what male editors and reporters earn.⁴⁷¹ This is 3 percent more than they earned in 1972.⁴⁷² Women in the persistently male dominated news jobs such as sports reporters and sports editors fare even worse: they earn between 60 to 75 percent of what their male peers earn.⁴⁷³ Journalist Susan Reed suspected that she was being paid less than her male colleagues with the same level of experience.⁴⁷⁴ She found out that she was being paid 40 percent less and asked management to increase her salary.⁴⁷⁵ After the salary increase, she was still paid 18 percent less than her peers.⁴⁷⁶ Ms. Reed was fortunate that her male peers disclosed their salary because many would not, thus making it difficult to challenge the discriminatory wage gap.

B. The Lilly Ledbetter Fair Pay Act of 2009: Closing the Wage Gap

Before January 29, 2009, when President Barack Obama signed the Lilly Ledbetter Fair Pay Act of 2009 into law,⁴⁷⁷ women who were affected by the wage gap were barred from bringing a Title VII employment discrimination suit if they failed to discover the discriminatory pay decision within the statutory filing period.⁴⁷⁸ Given that salary information was rarely disclosed, it was very difficult for female

469. The wage gap continues to be a challenge for women. According to the 2013 US Census report, women earn 78 cents on every dollar that a man earns. U.S. CENSUS BUREAU, P60-249, INCOME AND POVERTY IN THE UNITED STATES IN 2013 (2013) available at <https://www.census.gov/library/publications/2014/demo/p60-249.html>.

470. MILLS, *supra* note 68, at 279 (noting that women are paid less than men with similar length of service and experience in almost every news job notwithstanding the category.)

471. Susan E. Reed, *The Value of Women Journalist*, NEIMAN REPORTS (Mar. 15, 2002), <http://www.nieman.harvard.edu/reports/article/101510/The-Value-of-Women-Journalists.aspx>.

Nationwide, women earn 77 cents for every dollar a man earns. *Women's Earnings as a Percentage of Men's, 1951-2011*, U.S. WOMEN'S BUREAU AND THE NAT'L COMM. ON PAY EQUITY, <http://www.infoplease.com/ipa/A0193820.html#ixzz3C56v9B5M> (last visited Sept. 15, 2014) (showing an increase from 60.7 cents in 1960, and 59.1 cents in 1964).

472. Reed, *supra* note 471.

473. MILLS, *supra* note 68, at 279-280.

474. Reed, *supra* note 471.

475. *Id.*

476. *Id.*

477. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (Jan. 29, 2009).

478. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

employees to discover that they were being paid less than similarly situated male employees in time to bring suit within the statutory filing period. The Lilly Ledbetter Fair Pay Act amends Title VII of the Civil Rights Act of 1964 to make it clear that a proscribed “discriminatory compensation decision or other practice occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice,” thus resetting the 180-day statute of limitations for wage discrimination lawsuit each time the employee is paid.⁴⁷⁹

Lilly Ledbetter sued Goodyear for sex discrimination alleging that she was paid less than her male co-workers because of poor performance evaluations influenced by her sex.⁴⁸⁰ The evaluations occurred more than 180 days before Ms. Ledbetter filed a sex discrimination charge with the EEOC and therefore Ms. Ledbetter argued that her lawsuit should not be time-barred because each paycheck marked a separate discriminatory act that should reset the statute of limitations.⁴⁸¹ Goodyear claimed Ms. Ledbetter’s sex did not influence its decision in setting her salary and that she should be denied relief unless she could prove that the alleged discriminatory decision to pay her less than her male peers was made within the 180-day statute of limitations period.⁴⁸² The Supreme Court held that the 180-day statute of limitations period for filing a wage discrimination lawsuit begins when the decision to set the pay is made, not when the paychecks are issued.⁴⁸³ Congress responded to the Supreme Court’s decision by enacting the Lilly Ledbetter Fair Pay Act of 2009.⁴⁸⁴ Congress noted that the Supreme Court’s decision ignored the reality of the wage gap and “significantly impairs the statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades.”⁴⁸⁵ Senator Harry Reid of Nevada lauded the Lilly Ledbetter Act as the

479. Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5(e)(3)(A) (2014).

“(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”

480. *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1171 (11th Cir. 2005).

481. *Ledbetter*, 550 U.S. at 622-623.

482. *Ledbetter*, 421 F.3d 1169, 1182-1183; *Ledbetter*, 550 U.S. at 622-623.

483. *Ledbetter*, 550 U.S. at 637.

484. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (Jan. 29, 2009).

485. S.181, 111th Cong. § 2 (2009-2010).

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“single greatest legislative step to ensure women have every chance to be full, equal participants in the workforce since the Equal Pay Act of 1963.”⁴⁸⁶

C. Women Journalists in the Internet Age

The new millennium has brought a number of changes to the field of journalism, especially as media companies are now migrating towards a more Internet-based presence. A number of newspaper and new magazine companies have closed or have downsized and some have “shifted from print to the web.”⁴⁸⁷ In October 2012, *Newsweek* announced its plans to go digital and issued its final print copy in December of that year.⁴⁸⁸ Television and radio stations are also active on the Internet, most maintaining at least a secondary presence there. It is highly unlikely that the shift from print journalism to online journalism will favorably influence gender equality for women journalists, given that history has shown that gender bias in journalism is cultural and dependent on the employees and not on the medium used to convey the news.⁴⁸⁹

V. COMPLETING THE REVOLUTION

Although Title VII was enacted half a century ago to eradicate the persistent social problem of employment discrimination based on sex, women journalists continue to experience sex-based discrimination in the workplace. Women journalists today are facing problems in the workplace similar to those that the women journalists at *News-*

486. ROLL CALL, INC., SEN. HARRY REID, D-NEV., FLOOR REMARKS ON PAY EQUALITY, (Jan. 29, 2013) (verbatim transcript released by Senator Harry Reid’s office) available at 2013 WL 327043.

487. John B. Judis, *This Law of Economics Shows Why Print Journalism is Doomed*, THE NEW REPUBLIC (Dec. 3, 2013), <http://www.newrepublic.com/article/115798/new-york-magazines-biweekly-move-explained-baumols-law>. This has led to a reduction of newsroom staffing; 54,000 workers in 1997 to 38,000 in 2013. *US Media 2014*, *supra* note 444, at 21. Women continue to represent approximately 36 percent of all newsroom staffers. *Id.* at 19.

488. Robert Daniel & Keach Hagey, *Turning a Page: Newsweek Ends Print Run*, WALL ST. J. (Dec. 26, 2012), available at <http://online.wsj.com/news/articles/SB10001424127887324660404578201432812202750>.

489. CHAMBERS ET. AL, *supra* note 30, at 234-235 (questioning whether on-line journalism will evolve into a “male” job because of the reliance on technology or whether it will attract more women with “childcare responsibilities” because of the flexibility but noting that the ultimate status will depend on the newsroom culture). *Id.* at 235. See WOMEN IN MASS COMMUNICATION 42-43 (Pamela J. Creedon & Judith Cramer eds., 3d ed. 2006) (noting that while online journalism in the 1990s appeared to provide possible growth and employment opportunities for women journalists, once “online became more established in newspapers,” it became male-dominated and hierarchical.) *Id.*

week and at other media companies fought to eradicate in the 1970, namely unequal job opportunities and unequal pay, and new problems including sexual harassment, sex stereotyping and an impenetrable glass ceiling. These problems continue to rob women journalists of their legal right to equality in the journalism profession and economic parity. As history has shown in the past fifty years, laws alone will not end male dominance in newsrooms, level the playing field for women journalists and guarantee them equal employment opportunities and equal pay.⁴⁹⁰ There also needs to be a cultural shift from the patriarchal influenced belief that males have a “superior claim to available work”⁴⁹¹ and higher wages,⁴⁹² to a belief that is more reflective of the current social reality; that women are a vital and permanent part of today’s workforce and they are legally entitled to equal job opportunities and equal compensation.

Title VII is clear in its proscriptions and current gender discrimination laws are sufficiently comprehensive to bring about the desired effect of gender equality and pay equity in the workplace, but given the long history of male dominance in the field of journalism, law without continued activism will not foster permanent changes towards equality in the workplace. Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991 and the companion cases interpreting those laws, clearly makes it illegal for an employer to discriminate against an employee in any aspect of employment where the alleged discriminatory act is based on sex and does not fall into any of the exceptions to the rules. The EPA and Title VII explicitly prohibit sex-based wage discrimination and the Lilly Ledbetter Fair Pay Act of 2009 has provided additional protection by lengthening the period a plaintiff has to file a discrimination suit. Courts have done a good job interpreting the anti-discrimination legislation and where they have failed to capture Congress’ intent to end discrimination in the work-

490. Carolyn M. Byerly, *Factors Affecting the Status of Women Journalists: A Structural Analysis*, in *THE PALGRAVE INTERNATIONAL HANDBOOK OF WOMEN AND JOURNALISM* 17 (Carolyn M. Byerly ed., 2013) (“Male dominance continues to endure in our media institutions in spite of national laws and policies that seek to replace it with mandates for equality”).

491. Barnard & Rapp, *supra* note 66, at 636; *see* Byerly, *supra* note 490, at 17–18 (noting that male journalists continue to exert their superiority in the newsroom even in cases where women have decision-making roles).

492. *Corning Glass Works v. Brennan*, 417 U.S. 188, 190 (1974) (noting a man’s expectation that he be paid more than a woman even for equal work). The Court also referred to Equal Pay Act’s legislative history noting that sex-based wage differentials “depresses wages and living standards for employees necessary for their health and efficiency.” *Id.* at 206 (citing Equal Pay Act of 1963, Pub. L. No. 88-38, § 2(a)(1), 77 Stat. 56 (1963)).

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place, Congress has stepped in to enact another statute to make its anti-discrimination intent clear.⁴⁹³

Enacting more statutes alone may not help to end sex-based employment discrimination. Women are less inclined to file lawsuits⁴⁹⁴ and generally do not avail themselves of the remedies provided by the law. Scholars have noted that, “despite the legal remedies available to women, they may be inclined not to file complaints.”⁴⁹⁵ Culture and economics are the two major deterrents to women filing sex discrimination suits. Women may be less inclined to file sex discrimination lawsuits because many have been socialized to believe that it is not socially acceptable for a woman to file lawsuits.⁴⁹⁶ Furthermore, the option of filing a sex-based employment discrimination claim with the courts only became available to women in the 1960s. Before the 1960s the laws allowed employers to implement different, albeit unequal, policies for men and women.⁴⁹⁷ The laws were never to benefit working women and women generally “have not fared well in the law.”⁴⁹⁸ The fear of reprisal, including losing their jobs or being ostracized in the workplace, is another reason some women may not file employment discrimination lawsuits.⁴⁹⁹ Women fearing reprisal may choose to internalize or ignore the discriminatory actions, which unfortu-

493. See, e.g., Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

494. Deborah Zalense, *Sexual Harassment Law in the United States and South Africa: Facilitation the Transition from Legal Standards to Social Norms*, 25 Harv. Women's L.J. 143, 196-97 (2002) (noting that women in the United States are less inclined to file lawsuits than men).

495. Hoyman & Stallworth, *supra* note 37, at 62.

496. *Id.*; see ROBERTSON, *supra* note 42, at 146.

497. Hoyman & Stallworth, *supra* note 37, at 64; ASHLYN K. KUERSTEN, *WOMEN AND THE LAW: LEADERS, CASES AND DOCUMENTS* 14 (2003) (noting that the courts in the United States through various rulings, encouraged patriarchy which led to the institutionalization of “male dominance over women and children” in the society and permitted the separate and unequal policies for men and women.).

498. Hoyman & Stallworth, *supra* note 37, at 63 (noting that women may be hesitant to file lawsuits because of the “legal and historical status of women” and because “women have not fared well in the law”); see generally POVICH, *supra* note 1, at 1-13 (noting the hesitancy of the *Newsweek* women to file suit). It is instructive to note that culture played a very important role in their hesitation to file suit. The women at *Newsweek* noted that in order to move forward with the lawsuit, they had to “overcome deeply held values and traditional strictures.” POVICH, *supra* note 1, at 13.

499. Linda Stamato, *Dispute Resolution and the Glass Ceiling: Ending Sexual Discrimination at the Top*, 55-FEB DISP. RESOL. J. 25, 28 (2000); See generally Tristin Wayte et al., *Perspectives in Law and Psychology*, in 14 *TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY*, 325, 340 (2002) (noting that women do not file complaints about perceived sexual harassment because they fear retaliation, humiliation and career setbacks.); See POVICH, *supra* note 1, at xix, 13 (noting their fear of being fired for filing the lawsuit).

nately do not make them disappear.⁵⁰⁰ Lawsuits are costly, time consuming,⁵⁰¹ and the length of time one has to wait for a judgment in a sex discrimination lawsuit most likely serves as another deterrent to filing suit. Often, women see no immediate benefits to filing suit because even if they win in court, the court-ordered remedies generally provide short-term relief for the individual filing suit, but fail to fix the larger problem of institutionalized sex discrimination.⁵⁰²

While the EEOC appears to be doing a good job of enforcing Title VII, federal courts are not adequately addressing the legal injuries arising from sex-based employment discrimination. Employment discrimination cases filed in federal courts have declined by 40% from 1999 to 2007,⁵⁰³ while the number of sex discrimination charges filed with the EEOC has declined only slightly from 30.7 percent in 1997 to 29.5 percent in 2013.⁵⁰⁴ According to Nathan Koppel in the article *Job Discrimination Cases Tend to Fare Poorly in Federal Court*, “employees who sue over discrimination lose at a higher rate in federal court than other types of plaintiffs.”⁵⁰⁵ Employment discrimination plaintiffs also “get less time in court, with judges quicker to throw out their cases.”⁵⁰⁶ Courts are also more likely to dismiss an employment discrimination case before it gets to trial.⁵⁰⁷ In 2008, federal judges dismissed 12.5 percent of employment discrimination cases through summary judgment.⁵⁰⁸ Employees are also finding it more difficult to bring a claim for sex-based employment discrimination because of the heightened pleading adopted by the courts after the Supreme Court’s

500. Tristin Wayte et al., *Perspectives in Law and Psychology*, in 14 *TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY*, 325, 340 (2002) (noting that instead of filing a sex-discrimination lawsuit based on sexual harassment the women may “resort to internal coping methods” such as ignoring the problem.). See POVICH, *supra* note 1, at xii (relating Jessica Bennett’s reaction sexism at *Newsweek* “Maybe it’s a female tendency to turn inward and blame yourself, but I never thought about sexism.”) *Id.*

501. Hoyman & Stallworth, *supra* note 37, at 62.

502. CHAMBERS ET. AL, *supra* note 30, at 11.

503. Nathan Koppel, *Job Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL ST. J. (Feb. 19, 2009), available at <http://online.wsj.com/articles/SB123500883048618747>.

504. *EEOC Charge Statistics FY1999 through FY 2013*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (showing a percentage of the total number of employment related suits filed with the EEOC). The number of sex-based charges increased to 31.5% in 2000 and 31.1% in 2001. *Id.* There was a sharp decrease in 2011 to 28.5%. *Id.*

505. Koppel, *supra* note 503.

506. *Id.*

507. *See id.* (noting that federal courts exhibit a pattern of dismissing more employment discrimination cases through summary judgment of motion to dismiss).

508. *Id.* (noting that in 90% of the cases, the employers had requested summary judgment, while in contracts cases, only 3% of contracts cases and 1.7% of personal injury cases were dismissed on a motion for summary judgment).

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ruling in *Bell Atlantic Corp. v. Twombly*.⁵⁰⁹ As per *Twombly*, federal courts may dismiss a sex-based discrimination case if the plaintiff has not plead sufficient facts in the initial complaint to state a plausible claim.⁵¹⁰

The issues that employment discrimination litigants face in federal courts need to be corrected. Federal courts should make it easier, not harder, for women to bring sex-based discrimination lawsuits because the courts have not only the power, but the duty to “eliminate the discriminatory effects of the past as well as bar like discrimination in the future.”⁵¹¹ Sex-based discrimination lawsuits will help to influence a cultural shift towards gender equality, especially those that receive media attention.⁵¹² The media will alert employees and potential employees of their legal rights and will inform employers and potential employers of the penalties for violating such rights.⁵¹³

Women journalist are not there yet because many have given up the organized fight for equality.⁵¹⁴ Unfortunately, some women journalists have been lulled into a place of complacency and acceptance and many may never see a need to fight for gender equality because they subscribe to the popular public sentiment that the problem of sex-based employment discrimination has been solved.⁵¹⁵ This sentiment is fueled by the number of women in the workforce and the fact that the media highlights stories of the few women journalists who ascend to high positions thus, creating the false “perception that women are doing better than they are”⁵¹⁶

509. Koppel, *supra* note 503.

510. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

511. *Louisiana v. United States*, 380 U.S. 145, 154 (1965) (referring to racial discrimination but the same principles apply to sex discrimination).

512. Bryce Covert, *Can Suing For Equality Really Close the Gender Wage Gap?*, THE NATION, May 23, 2012 available at <http://www.thenation.com/blog/168030/can-suing-equal-pay-really-close-gender-wage-gap>.

513. *Id.*

514. Johnson, *supra* note 20; *Cf.* Reed, *supra* note 471 (“Why do we hear no protest today about the wage gap? In part, it is because there are now significantly more women journalists on the payroll.”).

515. Reed, *supra* note 471; Johnston, *supra* note 20 (noting that authors Rosalind Barnett and Caryl Rivers argue that the stories of women’s “occasional successes” are widely publicized and “create the perception that women are doing better than they are, leading many to stop pushing for equality”)

516. Johnston, *supra* note 20; *see also* Amanda Palmeira, *Suing Their Way Into the Newsroom: How Women at the Detroit News Changed Journalism 57–58* (Fall 2012) (unpublished manuscript), available at http://etd.fcla.edu/CF/CFH0004306/Palmeira_Amanda_N_201212_BA.pdf (“*TIME* magazine found in 2009 that sixty percent of men polled say there are no longer any barriers to women’s advancement in the workplace, while only 50 percent of women agreed.”).

The employment landscape for women journalists changed significantly in the 1970s.⁵¹⁷ Newspapers and newsrooms hired and promoted women in record numbers. This change resulted from a combination of the anti-discrimination laws of the 1960s and 1970s and the continued legal activism and the threats of lawsuits. When the threats of lawsuits disappeared, however, the men reverted to their gender discriminatory practices. This is a clear indication that laws and the threats of lawsuits alone are insufficient to eradicate sex-based employment discrimination. Continued activism, the continued threat of lawsuits, and obtaining the buy-in from men in the workplace who can influence workplace policies to encourage gender equality seem to be the missing key.

Activism may involve lending one's voice to gender equality in the workplace and "Leaning In"⁵¹⁸ to make that voice heard; getting women in leadership positions to mentor and be willing to help other women advance in the workplace; getting women to hire other qualified women; urging journalists to get the necessary qualification; and urging media companies to incorporate policies aimed at retaining women journalists. Also, given the strong male cultural influence and the fact that newsrooms are still male dominated, women journalist should seek or at least encourage buy-in from the males in management positions and their male co-workers. This is critical to the successful adoption and implementation of gender-equality policies in the workplace because even the best researched and well intended gender-equality policies may not work unless there is a cultural shift in the workplace that causes men to accept women as equals and gender equality as a woman's inalienable right.

Change takes time, and is a process, but 50 years is a long time to wait. It is important that women journalists complete the revolution and continue to fight for equality in the newsrooms. The media shapes our culture and our society. According to the 2014 US Media study, if there is gender equality in the media, we can expect a social change towards gender equality in all other private and government sectors.⁵¹⁹

517. Cynthia L. Cooper, *1970s Laws Are Today's Ammo for Women's Rights*, WE.NEWS (Mar.16, 2012), http://womensnews.org/story/our-history/120315/1970s-laws-are-todays-ammo-womens-rights#.VAAuF1Eg_Mw. Justice Ruth Bader Ginsburg noted that women were able to break down employment barriers in the 1970s because "the culture was ripe for legal reforms" and that "[t]here was a spirit that things were not right and they needed to be changed." *Id.*

518. SANDBERG, *supra* note 34, at 10.

519. *US Media* 2014, *supra* note 444, at 5.

Love and Civil Rights

EDIBERTO ROMAN*

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“This oft misunderstood and misinterpreted concept so readily dismissed by the Nietzsches of the world as a weak and cowardly force, has now become an absolute necessity for the survival of man. When I speak of love I am not speaking of some sentimental and weak response which is little more than emotional bosh. I am speaking of that force which all of the great religions have seen as the supreme unifying principle of life.”

Rev. Dr. Martin Luther King¹

INTRODUCTION

Despite western legal scholars' almost universal rejection of the use of emotions in legal analysis, the unquestionable greatest social activist and grassroots legal reformer of our times, and perhaps one of the greatest in the annals of time, Rev. Dr. Martin Luther King, understood a basic yet profound fact concerning societal change—the transformative power of love. During the era where he achieved the

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1. Martin Luther King, Jr., *The Quest for Peace and Justice* (Dec. 11, 1964), available at http://nobelprize.org/nobel_prizes/peace/laureates/1964/king-lecture.html.

greatest influence, Dr. King knew that societal-wide change could not occur without transforming the American psyche on the basic fairness of the civil rights struggle. This civil rights struggle, which is now so closely associated with King's proper place in history, occurred through victories in both our federal courts and through federal legislation. Arguably, the most important and influential victories of the era's struggle is the nationwide legislative victory of the 1964 Civil Rights Act, and Title VII of that act, both of which were aimed to end discrimination.

The year 2014 marks the fiftieth anniversary of this most important victory, the landmark legislation that outlawed various forms of discrimination in voting, public facilities, public education, housing, credit, and employment (under Title VII).² Title VII, which is the focus of this symposium issue, declared it an "unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."³ Congress' intent was to promote equal employment opportunities by prohibiting policies and practices that are prejudicial to historically mistreated groups, especially African-Americans.⁴ Indeed, as Professor Kerri Stone eloquently observed, "federal antidiscrimination law was passed in this country against the backdrop of a compelling need for certain historically discriminated-against groups to be afforded access, entrée, and inclusion into public life, including employment."⁵

Although Title VII prohibited only racial, ethnic, and religious discrimination in its original proposed form, a late-hour amendment included the insertion of the word "sex" into the bill.⁶ Thus, Title VII,

2. 42 U.S.C. §§ 2000e to -17 (2000).

3. 42 U.S.C. §§ 2000e to -2(a)(1) (1994). Specifically, the statute defines it as an "unlawful employment practice" for an employer:

(1) 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

4. Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 *FORDHAM L. REV.* 2613 (1998).

5. See Kerri Lynn Stone, *Taking In Strays: A Critique Of The Stray Comment Doctrine In Employment Discrimination Law*, 77 *MO. L. REV.* 149 (2012).

6. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985); Suzanne Sangree, *Title VII Prohibitions*

in its current form, expressly forbids employers from discriminating on the basis of race, color, religion, sex, or national origin. Moreover, Title VII features ancillary prohibitions aimed at combating discrimination in the workplace.⁷ These rights include a prohibition on retaliating against an employee for charging an employer with discriminatory conduct,⁸ a prohibition against publishing advertisements that indicate a prohibited preference,⁹ and these protections apply to agents of an employer as well as the employer.¹⁰ The drafters of Title VII highlighted the purpose of the new law by declaring “the right of persons to be free from [improper] discrimination.”¹¹ When Congress enacted Title VII in 1964, it sought to “assure equality of employment opportunities” and undo the “stratified job environments” that arise from discrimination against minorities.¹² The Equal Employment Opportunity Commission (EEOC) is the arm of government with the power to investigate discrimination charges, to seek voluntary compliance through conciliation, and to institute civil actions to enforce Title VII’s provisions. Title VII also provides for what attorneys describe as the availability of private attorney generals—the power of individuals to seek redress for violations of their substantive rights.¹³ In other words, Title VII allows for private rights of action. For an individual to bring suit, however, he or she must first exhaust the Act’s administrative requirements. Moreover, Title VII has burden of proof requirements based upon alternative theories of “disparate impact” and “disparate treatment.” Under the disparate impact

Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight, 47 RUTGERS L. REV. 461, 481 (1995).

7. See Stone, *supra*, note 5 at 150.

8. 42 U.S.C. § 2000e-3(a); see also *Sias v. City Demonstration Agency*, 588 F.2d 692, 694-96 (9th Cir. 1978) (holding that the Title VII provision prohibiting retaliation against persons filing discrimination complaints protects employees who file a discrimination complaint against their employer, even if there is a reasonable mistake in the allegation); Robert Keith Shikiar, *Title VII Retaliation Claims*, 57 GEO. WASH. L. REV. 1168 (1989) (discussing remedies available under Title VII for persons retaliated against for reporting employment discrimination); see generally Douglas E. Ray, *Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405 (1997) (reviewing the retaliation provision, including scope, methods of proof, and remedies).

9. 42 U.S.C. § 2000e-3(b); see also *Hailes v. United Air Lines*, 464 F.2d 1006, 1007-08 (5th Cir. 1972) (finding that a “Help Wanted—Female” advertisement violated Title VII because Title VII expressly prohibits publication of advertisements indicating a preference based on sex); Sangree, *supra* note 70, at 522 (explaining that an advertisement for “men only” violates Title VII).

10. See *Slack v. Havens*, 1973 WL 339, 341 (S.D. Cal. 1973), *aff’d as modified*, 522 F.2d 1091, 1093 (9th Cir. 1975).

11. See H.R. Rep. No. 88-914, at 26 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2401.

12. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

13. *Id.*

theory it is not necessary to show intent. The disparate treatment theory, on the other hand, requires proof of discriminatory intent. Courts, however, imply such intent from circumstantial evidence.¹⁴

There seems to be a broad consensus that Title VII was a “remarkable success.”¹⁵ Indeed, one scholar recently observed that Title VII’s “striking success” best exemplifies this country’s commitment to individualistic race-neutrality.¹⁶ Yet more and more scholars have been far more critical, questioning the impact of the legislation. For instance, one scholar recently observed that the passage of Title VII “represented a major victory for employee rights in the United States. Yet, what did employees really win? A legal duty upon employers to merely desist from discriminating is far less compelling than would be a requirement on them to actively accommodate. To what degree, if at all, could this . . . protection receive application in real life?”¹⁷

Indeed, a majority of legal scholars continue to question the efficacy of the 1964 Civil Rights Act in general, and Title VII in particular, with, among other arguments, some observing that Title VII represented merely a political compromise that fell short of achieving true equality,¹⁸ and others noting the various judicial pronouncements that either interpreted the legislation so narrowly, thereby effectively defeating the goals of the act,¹⁹ and other writers have noted that these judicial opinions have had the effect of whittling away the goal of the legislation.²⁰ Yet even these scholars admit that the legislation has nevertheless had an important impact, and has made the workplace, while not without bias, certainly less biased than prior to the Act’s enactment.²¹

14. *Id.*

15. Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014)

16. Michelle Adams, *Integration Reclaimed: A Review of Gary Peller’s Critical Race Consciousness*, 46 CONN. L. REV. 725 (2013).

17. Robert J. Friedman, *Religious Discrimination in the Workplace: The Persistent Polarized Struggle*, 11 TRANSACTIONS 143 (2010).

18. Linda Greene, *Twenty Years of Civil Rights: How Firm a Foundation?*, 37 RUTGERS L. REV. 707, 708 (1985).

19. *Id.*

20. Dean C. Berry, *The Changing Face of Disparate Impact Analysis*, 125 MIL. L. REV. 1 (1989); see also Jerome M. Culp, *A New Employment Police for the 1980’s: Learning from the Victories and Defeats of Twenty Years of Title VII*, 37 RUTGERS L. REV. 895, 899-908 (1985); Jack M. Beermann, *The Unhappy History of Civil Rights Legislation Fifty Years Later*, 34 CONN. L. REV. 981 (2002).

21. A host of legal sources acknowledge the effect that Title VII has had in reducing discrimination. Notably, one law review article contends that “Title VII has significantly reduced workplace discrimination; perhaps if the law can be made even stricter, it can eliminate even more of it.” See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of*

I. WHAT'S LOVE GOT TO DO WITH IT?

This essay, while fully recognizing these critiques and criticisms of the effectiveness of Title VII, seeks to use a slightly different lens when examining this legislation.²² The goal here is to situate this landmark legislation within the large scope of discourse concerning social movements. Specifically, the goal here is to highlight this legislative effort as a prime example of the true power of social movements that seek institutional and widespread social and psychological change. At its core, this piece proposes what is perhaps a fairly new means to examine the end results of social movements—the passage of legislation or the outcomes of class-action lawsuits—as evidence of the transformative power of love in legal, political, social, and historical movements.²³

Examined in this light, the essay seeks to at least challenge dominant western legal discourse, which not only rejects the role of emotions in legal analysis, it actually goes much further and utterly dismisses the role of emotions in reasoned thinking. This dominant discourse misses and perhaps even confuses a critical point—the dominant discourse on legal analysis puts rationality on a pedestal, and perhaps even on a throne, and essentially equates emotions with irrational human interaction. Perhaps as a classic example of such thinking is evidence by dominant discourse scholars' examination of love, to the extent such scholars even specifically address love; proponents of the exclusivity or centrality of rationality to legal thought simply look at emotions such as love, in the romantic individualized sense of the word. As some more forward thinking theorists have explored, and which will be addressed below, the emotion of love is largely mis-

Motivation in Reducing Workplace Discrimination, 95 VA. L. REV. 1893, 1899 (2009); see also Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN'S L.J. 1 (2004) (addressing the impact that it has had for women's participation in the workforce: "The Title VII era has reduced discrimination and increased female labor force participation").

22. See Greene, *supra* note 18, at 708 (finding that Title VII did not result as a "clear victory, drafted by the victors and signed by the vanquished" and instead, it represented "the result of a battle of words and votes in the Congress and the White House" along with "[a] very fierce fight, accompanied by unprecedented filibuster efforts and rare cloture votes," that "occurred before the legislation . . . became law").

23. See TIMOTHY P. JACKSON, *THE PRIORITY OF LOVE: CHRISTIAN CHARITY AND SOCIAL JUSTICE* (Princeton University Press, 2009) (While this essay is not specifically based on Christian constructs of Agape, it does recognize and agree that Agape is consistent with the social justice mission championed by the great Martin Luther King Jr., and is also consistent with the goals of the efforts herein).

placed or simply foolishly disregarded by the majority of contemporary western legal thinkers. They essentially equate love with passion-filled carnal versions of this emotion. That is not the form of love advocated here. Rather, the emotion addressed by Dr. King above, is a more global and central concept to human interaction—the ability to understand and empathize with fellow humans despite one not actually facing the same challenges of those individuals. Thus, central to this vision of love is the ability to empathize with a fellow brother and sister in the human condition even if one does not fully understand the challenges and struggles of that person or group. In other words, the goal here is to write something that many would consider more than slightly revolutionary in legal circles—to challenge traditional legal critiques of the value of emotions in the legal realm, where the dominant norm is the exclusive consideration of purported rationale thought. For too long legal discourse and its cousin legal scholarship, tends to ask all students of law to give exclusive consideration to success measured solely by fairly immediate legal outcomes. Unlike that approach, what is advocated here is to have these same students to examine the long-term impact of powerful emotions such as love, and how it can ultimately change our values and eventually our public policy. Success, in other words, should not exclusively be measured by a decision or decisions, or legislative enactments for that matter; successes stemming the use of social movements, which are often driven by both hope and despair, can at times be only seen over years if not decades—yet in the end, they are successes.

Unlike many critiques, from both the political left and right, the goal here will not be to question the success of Title VII in eradicating inequality, and the success of other similar social movements, but rather to situate the discourse of social movements, in general, and this legislative effort, in particular, within a hopefully new discourse of love efforts, for lack of a better term. By using the term love, a legal taboo of sorts, the goal here is to propose that social movements and their resulting legal reforms that arise, if such movements are in fact successful, are merely a step in the larger goal of creating mass psychological change within a society. Thus, unlike the dominant view on the role of reason and the rejection of emotions, this essay proposes that legal reform is not the final step in social movements, but merely a significant step, and perhaps not even a penultimate step, in changing societal perceptions of a group or a cause.

While law school curricula and law review articles alike are filled with references to terms like murder, theft, robbery, battery, and even fraud, it is rare the professor that dares mention love in the classroom, and it is even more unusual for articles or political efforts to be openly based on the power of love. Despite this tendency, this essay aims to do just that—to proclaim that the civil rights movement of the 1960s succeeded, and is more accurately a significant step, in the goal of achieving societal equality because of the transformative power of love. While perhaps the overall goal of equality, and Title VII’s goal in particular of attaining equality in employment opportunity, is still elusive fifty years later, perhaps the focus could be shifted slightly to recognize the impact the legislation did achieve, and perhaps more importantly, to appreciate that the goal of employment equality could hardly be achieved through one legislative act no matter how broad its goal or its sweeping language. In other words, the goal of any form of equality is an ongoing one, and should appropriately be viewed as such.

As Professor William Eskridge noted, rarely did significant changes in law in the twentieth century stem from change in text or some judge’s new discovery concerning the Constitution.²⁴ Indeed, changes in significant rights occurred as a result of outsider groups calling for change to a system that treated them less than equal. Eskridge observes:

Race, sex, and sexual orientation were markers of social inferiority and legal exclusion throughout the twentieth century. People of color, women, and gay people all came to resist their social and legal disabilities in the civil rights movement seeking to end apartheid; various feminist movements seeking women’s control over their own bodies and equal rights with men; and the gay rights movement, seeking equal rights for lesbian and transgendered people. All these social movements sought to change positive law and social norms.²⁵

While Professor Eskridge astutely and persuasively argues that “identity-based social movements” effectively used courts to create constitutional doctrine, the position of this essay is to examine related, but also different, issues, specifically, the passage of significant federal legislation seeking to achieve social change, namely the eradication of racial and other forms of discrimination. The focus here is not based

24. William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

25. *Id.* at 2065.

upon court-driven decisions that are the result of social movements, but legislative, and to a lesser extent, judicial action that stem from such movements. In other words, the goal here is to question how it is that outsider groups, which are often the subject of wide spread hate and scorn, can ultimately win the hearts and minds of judges and legislatures alike. How do these legal victories occur when these advocates are often among the most disliked groups in the United States? Indeed, they are often representative of the least among us, and as a result are not only often the most obvious prey of the bigots, but also cause few in society to even think about their plight. Yet, they seem to succeed, at least partially, and in a wide variety of legal settings, albeit at times it may take decades or even centuries to fully achieve, or even have most appreciate such victories.

Merely examine the antipathy against the LGBT community in the 1980s during the AIDS epidemic's genesis, for instance. This group was far from a popular one in the public statements by politicians and religious leaders alike. Indeed, it was not unusual to hear leaders proclaim that the dreaded disease of AIDS was some sort of moral punishment. Now, move forward and compare that to the LGBT community's success in the courts, and in the hearts of many Americans, concerning marriage equality today. Could it be that popular culture leaders like Ellen DeGeneres, with her now iconic outing of herself in her sitcom, caused such a dramatic shift? The simple answer is yes, at least in part. When members of an outsider group, such as a woman in the 1800s with respect to the suffrage movement, and gay actor in the 1990s, or a DREAMer today, is given a chance to let others view them as they are, society grows to eventually, and perhaps incredibly slowly, appreciate them as fellow brothers and sisters in that society. In other words, when outsiders demonstrate they are basically no different than the rest of us at their and our core, we begin to empathize with them and grow to appreciate that yes indeed, they are our fellow neighbors, and in fact brothers and sisters in our society.

How else can one explain these repeated victories against apparently insurmountable odds? It can hardly be argued that the above-mentioned outsider groups, just to name a few, have not succeeded in some real tangible ways within our legal structure. And perhaps a more vivid, and arguably a more current example, is how the American psyche is changing its view of immigrants as this very moment. And while no significant legislative reform has yet occurred for this

group, such as comprehensive immigration reform, it is not hard to compare the historic vitriol used against undocumented immigrants for well over a century, and compare it today with the image of young college-aged advocates, also known as DREAMers, affecting public perceptions of immigrants. Indeed, these young advocates have transformed a public debate against one of the most hated groups in society—the so-called “illegals,” a term that is not only offensive, it is also linguistically and grammatically untenable.²⁶

II. IS LOVE THE ANSWER?

Social scientists have had as much trouble defining love as philosophers and poets. We have books on love, theories on love, and research on love. Yet no one has a single, simple definition that is widely accepted by other social scientists.²⁷

As the quote above suggests, while love is a word even a preschooler purports to understand, few of those that study the concept, can adequately describe, let alone define it. What does seem to be clear is that a vast majority of modern western legal thinkers reject the role of any emotion in legal analysis, and appear to have a special disdain for the emotion of love.²⁸

What is wrong with their analysis is that they, perhaps unwittingly, seem to be focused on romantic love when they examine this emotion. And perhaps because most can appreciate the irrationality of that sort of love, i.e., the recollections all seem to have of foolish behavior associated with that form of love,²⁹ these thinkers quickly dismiss emotions in general, and love in particular, when exploring the role of reason in legal thought. Consider the how easily noted jurist and professor Richard Posner readily distinguishes emotions and reason. Posner notes four emotions as particularly interfering with the problem solving process: “anger, disgust, indignation, and love.”³⁰

26. Ediberto Roman and Bobby Joe Bracy, *Words Do Matter in the Immigration Debate*, LA PRENSA SAN DIEGO, (Apr. 26, 2013), <http://laprensa-sandiego.org/editorial-and-commentary/commentary/words-do-matter-in-the-immigration-debate>.

27. Beverley Fehr and James A. Russell, *The Concept of Love Viewed From a Prototype Perspective*, 60 J. PERSONALITY & SOC. PSYCHOL. 425, 426–27 (1991) (quoting S. S. Brehm, *Intimate Relationships* 90 (Random House 1985)).

28. See Barbara L. Atwell, *The Jurisprudence of Love*, 85 U. OF DET. MERCY L. REV. 495 (2008) (observing that love—energetic and spiritual versions of it, and not romantic versions, are central to achieving justice).

29. Example would be too ample for this author to list even if looking to his own follies in this context.

30. Richard A. Posner, *Emotion Versus Emotionalism in Law*, in *THE PASSIONS OF LAW* 309, 309 (Susan A. Bandes ed., 1999).

With little equivocation, Posner observes: “the law itself is conventionally regarded as a bastion of ‘reason’ conceived of as the antithesis of emotion.”³¹ Similarly, Robert Solomon argues that “law is by definition dispassionate.”³² In essence, there is little debate in leading legal academic circles that legal analysis should be devoid of emotions. More recently, even my friend Andrew McClurg similarly dismisses love as playing a role in the legal arena. In the context of pleas to emotion, McClurg observes:

Appeals to emotion are fallacious because emotions are irrelevant as a basis for deciding an issue. While emotions have psychological relevance in that they have a persuasive impact on the human mind, they have no logical relevance because they are incapable of establishing the truth of conclusions. Proving truth requires the mustering of convincing evidence and not simply the exploitation of emotional sensitivities. Emotions may move us to act, but reason should control the course of that action.³³

While the above quotes do not provide a wholesale devaluation of love, they do illustrate the ease with which legal scholars attempt to dissociate their analytical undertaking with emotions. The task here is an attempt to remind these scholars that not only is the effort by humans to remove emotions from decision-making by definition futile, the effort of those that claim emotions have no place in the legal arena too narrowly define or interpret the emotion of love. And to the extent they at all consider the emotion of love, they only consider that definition that more closely resembles romantic love, with all its irrational qualities.

Similarly, one emotion advocate recently criticized contemporary legal thinkers, observing:

Incorporating experiential understanding of persons or groups into an ideological system based on a reductionist concept of reason, system that at times seems to have a fetish for predictability and control under the Rule of Law, raises terrifying specters of destabilization, chaos, and anarchy. Accordingly, the emotional, physical, and experiential aspects of being human have by and large been banished from the better legal neighborhoods and from explicit recognition in

31. *Id.*

32. Robert Solomon, *Justice v. Vengeance*, in *THE PASSIONS OF LAW* 123, 128 (Susan A. Bandes ed., 1999).

33. See Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 *AM. U. L. REV.* 53, 66 (1992).

legal discourse (although they sometimes get smuggled in as “facts” in briefs and opinions).³⁴

A related argument is as follows:

A scholar or a judge may react to the pain and anguish caused actual human beings by a given law or doctrine, but she will seldom point to the painful or existential consequences of that law as reason to change it. This is because the *ideological structures of legal discourse and cognition block affective and phenomenological argument: The “normal” discourse of law disallows the language of emotion and experience. The avoidance of emotion, affect, and experiential understanding reflects an impoverished view of reason and understanding - one that focuses on cognition in its most reductionist sense. This impoverished view stems from a belief that reason and emotion are separate, that reason can and must restrain emotion, that law-as-reason can and must order, rationalize and control.*³⁵

As a result of the dominant discourse in legal analysis an important mode of understanding is simply undervalued and even dismissed. As Professor Henderson correctly observed over a decade ago, though unfortunately, her astute observations have gone largely unnoticed to the majority of legal scholars:

That mode of understanding is best captured by the word “empathy,” a word that at first seems counterintuitive in a world defined as legal. Yet empathy is a form of understanding, a phenomenon that encompasses affect as well as cognition in determining meanings; it is a rich source of knowledge and approaches to legal problems - which are, ultimately, human problems. Properly understood, empathy is not a “weird” or “mystical” phenomenon, nor is it “intuition.” Rather, it is a way of knowing that can explode received knowledge of legal problems and structures, that reveals moral problems previously sublimated by pretensions to reductionist rationality, and that provides a bridge to normatively better legal outcomes.³⁶

What is therefore missing in contemporary legal discourse is the analytical tool and force of empathy, which is an emotion that assists us in understanding our surroundings. As noted author R. Wasserstrom previously observed, “empathy enables the decision maker to have an appreciation of the human meanings of a given legal situation.

34. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

35. *Id.* at 1575 (emphasis added).

36. *Id.*

Empathy aids both process of discovery- the procedure by which a judge or other legal decision maker reaches a conclusion- and process of justification- the procedure used by a judge or other decision maker to justify the conclusion- in a way that disembodied reason simply cannot.³⁷

What is instead proposed in this essay is not a narrow reductionist means of analysis, but a more classic interpretation of analysis; one that specifically and openly embraces the analytical value of all means of human understanding, including the power of empathy, which stems from a broader, and arguably more comprehensive understanding of the term love, or to use the philosopher Hegel's term, *liebe*. The word empathy in turn should be understood to encompass several related and complementary parts. In essence, there are three basic phenomena captured by the word: (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another.³⁸

With such an interpretation one can appreciate that within the spectrum of the term love, and its consequences of provoking, or at least engendering empathy, comes the ability to care for the needs of others even if one cannot fully understand or even have considered those needs held by others. In other words, the great power of love is the ability to have others that are totally unfamiliar with your claims for change to be able to empathize with your plight even if they do not fully understand or can appreciate the extent of your pain, or call for change and justice. This ability is exactly what contemporary legal thinkers simply fail to do too often.

It is exactly because of empathy that hated, or at least disregarded groups, like African-Americans in the 1960s, members of the LGBT community in the 1990s and early part of this century, and even today undocumented youth, can cause other members in society to listen to their claims and eventually agree with their cause. Note that in each of these three examples, the groups calling for change and initiating a social movement were the subjects of deep resentment and even hate. They had no army, nor were they popular in numbers, yet

37. R. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 27 (1961).

38. See Henderson, *supra* note 34, at 1579.

they were able to achieve some tangible gains within the legal and political arena.

In the legislative arena, the passage of the 1964 Civil Rights Act and its Title VII are prime examples of such successes for the African-American and other racial minority communities. For the LGBT community, the U.S. Supreme Court's decision in *United States v. Windsor*,³⁹ which held that the Constitution's Due Process and Equal Protection Clauses forbid federal laws like the Defense of Marriage Act (DOMA), was a real and significant victory for that community. In the context of young immigrant advocates, the passage of laws by several states to allow for in-state college tuition for these undocumented immigrants likewise speaks to the power of empathy even for groups that were once the most disliked sub-culture in society.⁴⁰ Currently, for instance, at least 18 states have provisions allowing for in-state tuition rates for undocumented students. Sixteen states—California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah and Washington—extend in-state tuition rates to undocumented students through state legislation.⁴¹ Two states—Oklahoma and Rhode Island—allow in-state tuition rates to undocumented students through Board of Regents decisions.⁴² These victories occurred not from dispassionate analysis by the lawyers or politicians, they occurred because society eventually was able to empathize with the claims of these groups, and either judges and juries agreed with the justice of the causes, or perhaps even more telling, legislative representatives appreciated the will of their constituents, even in the face of vocal and powerful opposition.

III. HISTORY OF LOVE!

Eighteenth century philosopher, Georg Wilhelm Friedrich Hegel recognized this exact form of non-romantic transformative and extremely powerful form of Love. At the end of the eighteenth and the beginning of the nineteenth century, Hegel developed a concept of “recognition,” where he also reflected back on a whole series of philo-

39. 133 S. Ct. 2675 (2013).

40. I am so proud to have played a role in fighting for such access issues in my home state of Florida, and I remain inspired by the strength and perseverance of many of my DREAMer friends.

41. Nat'l Conference of State Legislatures, *Undocumented Student Tuition: Overview*, (Feb. 10, 2015), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>.

42. *Id.*

sophical projects in which related concepts and notions had taken on leading roles in contemporary philosophical discourse.⁴³ For Hegel, central classic reference in recognition-theory, is in reading his treatment of the theme of love or *Liebe*.⁴⁴ According to Hegel, self-consciousness of human beings is dependent upon the experience of social recognition. Hegel's model of a "struggle for recognition" includes the idea that ethical progress unfolds in a series of three levels of increasingly more demanding patterns of recognition, and an "intersubjective struggle" mediates between each of these levels, a struggle that subjects conduct in order to have their identity claims confirmed.⁴⁵

Hegel's model, which is key to the thesis here is that it adds to legal (rights-based) recognition, which in turn includes two more forms of reciprocal recognition, to which particular levels of the individual relation-to-self have to correspond: in *love*, which Hegel in his early work understands in the very emphatic sense of a philosophy of unity.⁴⁶ According to this philosophy, subjects recognize each other in the unique nature of their needs, so that they can attain emotional security in the articulation of the claims raised by their drives, and finally, in the state's sphere of ethical life in turn the state thereby obtains a form of recognition that allows subjects to esteem one another in those attributes that contribute to the reproduction of the societal order.⁴⁷

While at an initial reading, Hegel's theory of recognition may give some the impression of being a tad bit dense, and arguably cumbersome to comprehend, in actuality it is fairly straight-forward. As one writer recently observed,

one attitude that is essential in how exactly the constellation of issues that Hegel calls *Liebe* instantiates the structure of 'finding oneself in one's other', an attitude that thereby forms the core of all relationships and all attitude-complexes that deserve the name *Liebe* in Hegel. This is the attitude of unconditional concern for the good, well-being or happiness of

43. John Farrell & Axel Honneth, *Recognition and Moral Obligation*, 64 SOC. RES. 16, 16 (1997).

44. Heikki Ikaheimo, *Globalising Love: On the Nature and Scope of Love as a Form of Recognition*, 18 RES PUBLICA 11 (Feb. 7, 2012).

45. See Farrell & Honneth, *supra* note 43, at 25.

46. *Id.*

47. *Id.*

the other—the very same attitude that is on Aristotle’s view the focal meaning of *philia*.⁴⁸

Therefore, Hegel’s model, to perhaps put it too simply, recognizes that individuals in a society develop forms of recognition, to use his term, which develops a form of progress that allows members of that society to recognize each other’s needs. In other words, empathy or love for fellow members of society eventually develops as the notion of recognition of those within a society evolves. And according to Hegel, love, which Hegel recognizes as essentially a form of empathy, or a form of philosophical of unity, allows individuals within a society to recognize each other and the needs each other may possess. This in turn allows members of a society to attain understanding and emotional security in the articulation of the claims raised by others. Ultimately, according to Hegel’s theory, in a state’s sphere of ethical life, there is a form of recognition that allows subjects to respect, and have esteem for one another, which in turn promotes the social order of that society.

Now moving forward to the era that is the focus of this symposium issue — 1964 and the passage of the civil rights act by that name as well as Title VII, the leading civil rights figure of that era understood the need for social, legal, political, and cultural change. And he also knew of the need to use empathy and love to foster understanding of the injustices faced by racial minorities. In other words, Dr. King knew of both the importance and the power of Hegel’s notion of love. Throughout the series of speeches quoted below, it becomes fairly obvious that Dr. King was not only calling for change, he was purposefully using love as a means to reject hate and fear, and as a vehicle to promote understanding or empathy. The passages below highlight this influential effort.

King’s August 16, 1967, speech in Atlanta, Georgia, entitled “Where Do We Go From Here?” delivered at the 11th Southern Christian Leadership Conference Convention discussed how love and power are often “contrasted as polar opposites” when, in fact, they are concepts that are intertwined with each other.⁴⁹ He observed “Negro Americans” and white Americans both had it wrong in the racial struggle in America.⁵⁰ Whereas the former sought their goals “through love . . . devoid of power,” the latter pursued their goals

48. See Ikaheimo, *supra* note 44, at 26.

49. Rev. Dr. Martin Luther King, Jr., *Where Do We Go From Here?* (Aug. 16, 1967).

50. *Id.*

“through power devoid of love and conscience.”⁵¹ He concluded that he has decided to “stick with love” because love is ultimately the only answer to mankind’s problems.”⁵² The relevant passage from his speech is as follows:

And one of the great problems of history is that the concepts of love and power have usually been contrasted as opposites, polar opposites, so that love is identified with a resignation of power, and power with a denial of love. . . . Now, we got to get this thing right. What is needed is a realization that power without love is reckless and abusive, and that love without power is sentimental and anemic. (*Yes*) Power at its best [*applause*], power at its best is love (*Yes*) implementing the demands of justice, and justice at its best is love correcting everything that stands against love. (*Speak*) And this is what we must see as we move on. Now what has happened is that we’ve had it wrong and mixed up in our country, and this has led Negro Americans in the past to seek their goals through love and moral suasion devoid of power, and white Americans to seek their goals through power devoid of love and conscience. It is leading a few extremists today to advocate for Negroes the same destructive and conscienceless power that they have justly abhorred in whites. It is precisely this collision of immoral power with powerless morality which constitutes the major crisis of our times. (*Yes*) . . . And the other thing is, I’m concerned about a better world. I’m concerned about justice; I’m concerned about brotherhood; I’m concerned about truth. (*That’s right*) And when one is concerned about that, he can never advocate violence. For through violence you may murder a murderer, but you can’t murder murder. (*Yes*) Through violence you may murder a liar, but you can’t establish truth. (*That’s right*) Through violence you may murder a hater, but you can’t murder hate through violence. (*All right, That’s right*) Darkness cannot put out darkness; only light can do that. [*applause*] . . . And I say to you, I have also decided to stick with love, for I know that love is ultimately the only answer to mankind’s problems. (*Yes*) And I’m going to talk about it everywhere I go. I know it isn’t popular to talk about it in some circles today. (*No*) And I’m not talking about emotional bosh when I talk about love; I’m talking about a strong, demanding love. (*Yes*) For I have seen too much hate. (*Yes*) I’ve seen too much hate on the faces of sheriffs in the South. (*Yeah*) I’ve seen

51. *Id.*

52. *Id.*

hate on the faces of too many Klansmen and too many White Citizens Councilors in the South to want to hate, myself, because every time I see it, I know that it does something to their faces and their personalities, and I say to myself that hate is too great a burden to bear. (*Yes, That's right*) I have decided to love. [*applause*]⁵³

Similarly, Dr. King's address at the conclusion of the Selma to Montgomery March on March 25, 1965, posited that racial segregation was not the "natural result of hatred between the races."⁵⁴ Instead, it was a "political stratagem:"

Our whole campaign in Alabama has been centered around the right to vote. In focusing the attention of the nation and the world today on the flagrant denial of the right to vote, we are exposing the very origin, the root cause, of racial segregation in the Southland. Racial segregation as a way of life did not come about as a natural result of hatred between the races immediately after the Civil War. There were no laws segregating the races then. And as the noted historian, C. Vann Woodward, in his book, *The Strange Career of Jim Crow*, clearly points out, the segregation of the races was really a political stratagem employed by the emerging Bourbon interests in the South to keep the southern masses divided and southern labor the cheapest in the land. You see, it was a simple thing to keep the poor white masses working for near-starvation wages in the years that followed the Civil War. Why, if the poor white plantation or mill worker became dissatisfied with his low wages, the plantation or mill owner would merely threaten to fire him and hire former Negro slaves and pay him even less. Thus, the southern wage level was kept almost unbearably low.⁵⁵

Later in the movement, Dr. King's "The American Dream" speech delivered at Ebenezer Baptist Church in Atlanta, Georgia, on July 4, 1965, addressed how the civil rights movement involves meeting the hatred of the other side with love, despite what they may do because "hate is too great a burden to bear."⁵⁶ There is perhaps no greater a passage than the following in demonstrating Dr. King's and the social movement's call for greater understanding and empathy. Or to use Hegel's terminology—recognition, than these powerful and

53. *Id.*

54. Rev. Dr. Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965).

55. *Id.*

56. Rev. Dr. Martin Luther King, Jr., *The American Dream* (July 4, 1965).

love-filled words. Indeed, much like Hegel proclaimed as necessary for societal evolution, King specifically in this passage observes that the effort undertaken is not only based on love and will benefit the subjects of hate, but King specifically recognizes that the effort is undertaken for his fellow members of society, whether victim or oppressor—recognition indeed:

We need not hate; we need not use violence. We can stand up before our most violent opponent and say: We will match your capacity to inflict suffering by our capacity to endure suffering. We will meet your physical force with soul force. (*Make it plain*) Do to us what you will and we will still love you. We cannot in all good conscience obey your unjust laws, because noncooperation with evil is as much a moral obligation as is cooperation with good, and so throw us in jail. (*Make it plain*) We will go in those jails and transform them from dungeons of shame to havens of freedom and human dignity. Send your hooded perpetrators of violence into our communities after midnight hours and drag us out on some wayside road and beat us and leave us half-dead, and as difficult as it is, we will still love you. (*Amen*) Somehow go around the country and use your propaganda agents to make it appear that we are not fit culturally, morally, or otherwise for integration, and we will still love you. (*Yes*) Threaten our children and bomb our homes, and as difficult as it is, we will still love you. (*Yeah*) . . . One day we will win our freedom, but we will not only win freedom for ourselves, we will so appeal to your heart and your conscience that we will win you in the process.” And our victory will be a double victory. Oh yes, love is the way. (*Yes*) Love is the only absolute. More and more I see this. I’ve seen too much hate to want to hate myself; hate is too great a burden to bear. (*You bet, Yes*) I’ve seen it on the faces of too many sheriffs of the South—I’ve seen hate. In the faces and even the walk of too many Klansmen of the South, I’ve seen hate. Hate distorts the personality. Hate does something to the soul that causes one to lose his objectivity. The man who hates can’t think straight; (*Amen*) the man who hates can’t reason right; the man who hates can’t see right; the man who hates can’t walk right. (*Yeah*)⁵⁷

King’s acceptance speech at the Nobel Peace Prize Ceremony on December 10, 1964, discussed how the foundation of the civil rights movement in the United States is love, and is a movement that “re-

57. *Id.*

jects revenge, aggression, and retaliation.”⁵⁸ The relevant portion of the speech is as follows:

Civilization and violence are antithetical concepts. Negroes of the United States, following the people of India, have demonstrated that nonviolence is not sterile passivity, but a powerful moral force which makes for social transformation. Sooner or later, all the peoples of the world will have to discover a way to live together in peace, and thereby transform this pending cosmic elegy into a creative psalm of brotherhood. If this is to be achieved, man must evolve for all human conflict a method which rejects revenge, aggression, and retaliation. The foundation of such a method is love. The torturous road which has led from Montgomery, Alabama, to Oslo bears witness to this truth, and this is a road over which millions of Negroes are traveling to find a new sense of dignity. This same road has opened for all Americans a new era of progress and hope. It has led to a new civil rights bill, and it will, I am convinced, be widened and lengthened into a superhighway of justice as Negro and white men in increasing numbers create alliances to overcome their common problems.⁵⁹

King’s “Levels of Love” sermon delivered at Ebenezer Baptist Church in Atlanta, Georgia, on September 16, 1962, describes the different types of love and how racism deals with utilitarian love, which involves loving another for his usefulness to the person.⁶⁰ Dr. King ends with noting that “love is the greatest power in all the world”:

First, there is what I would refer to as utilitarian love. This is love at the lowest level. Here one loves another for his usefulness to him. . . . Whenever we treat people not as thous, whenever we treat a man not as a him, a woman not as a her but as an it, we make them a thing, and this is the tragedy of this level of love. This is the tragedy of racial segregation. In the final analysis, segregation is wrong not merely because it makes for physical inconveniences, not merely because it leaves the individuals who are segregated with inferior facilities, but segregation is wrong, in the final analysis, because it substitutes an I-It relationship for the I-Thou relationship and relegates persons to the status of things. . . . I talked with a white man in Albany, Georgia, the other day, and when we got down in the conversation he said . . . “I used to love the Negro, but I don’t have the kind

58. Rev. Dr. Martin Luther King, Jr., Acceptance Speech at the Nobel Peace Prize Ceremony (Dec. 10, 1964).

59. *Id.*

60. Rev. Dr. Martin Luther King, Jr., Levels of Love (Sept. 16, 1962).

of love for them that I used to have. You know, I used to give money to Negro churches. And even the man who worked for me, I would give him something every year extra; I'd give him a suit. But I just don't feel that way now. I don't love Negroes like I used to." And I said to myself, "You never did love Negroes (That's right) because your love was a conditional love. It was conditioned upon the Negro staying in his place, and the minute he stood up as a man and as somebody, you didn't love him anymore because your love was a utilitarian love that grew up from the dark days of slavery and then almost a hundred years of segregation." This is what the system has done, you see. (Yes) It makes for the crudest level of love. . . . *Agape* is higher than all of the things I have talked about. Why is it higher? Because it is unmotivated; it is spontaneous; it is overflowing; it seeks nothing in return. It is not motivated by some quality in the object. . . . The greatness of it is that you love every man, not for your sake but for his sake. . . . And it comes to the point that you even love the enemy. (*Amen*) Christian love does something that no other love can do. It says that you love every man. You hate the deed that he does if he's your enemy and he's evil, but you love the person who does the evil deed. . . . And therefore, I'm convinced this morning that love is the greatest power in all the world. Over the centuries men have asked about the highest good; they've wanted to know. All of the great philosophers have raised the question, "What is the *summum bonum* of life? What is the highest good?" Epicureans and the Stoics sought to answer it. Plato and Aristotle sought to answer it. What is that good that is productive and that produces every other good? And I am convinced this morning that it is love.⁶¹

Finally, Dr. King's most iconic and prophetic effort, the "Letter from a Birmingham Jail," he brilliantly identifies the power and ultimate need for love in our society and in our decision-making. In this masterpiece, which should be required reading for all in the United States and elsewhere, King addresses how the movement responded to hate and oppression:

I began thinking about the fact that I stand in the middle of two opposing forces in the Negro community. One is a force of complacency, made up in part of Negroes who, as a result of long years of oppression, are so drained of self-respect and a sense of "somebodiness" that they have adjusted to segregation; and in part of a few mid-

61. *Id.*

dle class Negroes who, because of a degree of academic and economic security and because in some ways they profit by segregation, have become insensitive to the problems of the masses. The other force is one of bitterness and hatred, and it comes perilously close to advocating violence. It is expressed in the various black nationalist groups that are springing up across the nation, the largest and best-known being Elijah Muhammad's Muslim movement. Nourished by the Negro's frustration over the continued existence of racial discrimination, this movement is made up of people who have lost faith in America, who have absolutely repudiated Christianity, and who have concluded that the white man is an incorrigible "devil." . . . But though I was initially disappointed at being categorized as an extremist, as I continued to think about the matter I gradually gained a measure of satisfaction from the label. Was not Jesus an extremist for love: "Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you." . . . And Abraham Lincoln: "This nation cannot survive half slave and half free." And Thomas Jefferson: "We hold these truths to be self-evident, that all men are created equal . . ." So the question is not whether we will be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for the preservation of injustice or for the extension of justice? In that dramatic scene on Calvary's hill three men were crucified. We must never forget that all three were crucified for the same crime—the crime of extremism. Two were extremists for immorality, and thus fell below their environment. The other, Jesus Christ, was an extremist for love, truth and goodness, and thereby rose above his environment. Perhaps the South, the nation and the world are in dire need of creative extremists.⁶²

62. Rev. Dr. Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963). See also Rev. Dr. Martin Luther King, Jr.'s speech at the Great March on Detroit held on June 23, 1963, where he calls for a nonviolent approach to the civil rights movement and to engage in love, which he describes as a "sort of understanding, creative, redemptive goodwill for all men":

For nonviolence not only calls upon its adherents to avoid external physical violence, but it calls upon them to avoid internal violence of spirit. It calls on them to engage in that something called love. And I know it is difficult sometimes. When I say "love" at this point, I'm not talking about an affectionate emotion. (*All right*) It's nonsense to urge people, oppressed people, to love their oppressors in an affectionate sense. I'm talking about something much deeper. I'm talking about a sort of understanding, creative, redemptive goodwill for all men. [*Applause*] We are coming to see now, the psychiatrists are saying to us, that many of the strange things that happen in the subconscious, many of the inner conflicts, are rooted in hate. And so they are saying, "Love or perish." But Jesus told us this a long time ago. And I can still hear that voice crying through the vista of time, saying, "Love your enemies, bless them that curse you, pray for them that despitefully use you." And there is still a voice saying to every

Other civil rights leaders of the day accordingly followed the love-based approach in their calls for social change. For instance, In October of 1957, Roy Wilkins, the Executive Secretary of the NAACP in a speech entitled “The Clock Will Not Be Turned Back,” noted that the Brown decision of the Supreme Court pushed the country into a grave situation in light of the Cold War, but that “the clock will not be turned back,” in spite of the hostility toward “Negro Americans.”⁶³ In this sense, he discusses how the movement would press on despite racial hatred and hostility:

It is no exaggeration, I think, to state that the situation presented by the resistance to the 1954 decision of the United States Supreme Court in the public school segregation cases is fully as grave as any which have come under the scrutiny and study of the Commonwealth Club. . . . The Negro citizens of our common country, a country they have sweated to build and died to defend, are determined that the verdict at Appomattox will not be renounced, that the clock will not be turned back, that they shall enjoy what is justly theirs. Their little children, begotten of parents of faith and courage, have shown by their fearlessness and their dignity that a people will not be denied their heritage. Complex as the problem is and hostile as the climate of opinion may be in certain areas, Negro Americans are determined to press for not only a beginning, but a middle and a final solution, in good faith and with American democratic speed.

The Negro position is clear. Three years of intimidation on the meanest and most brutal of levels have not broken their ranks or shaken their conviction. What of the rest of our nation? It must make a decision for morality and legality and move in support of it, not merely for the good of the Negroes, but for the destiny of the nation itself. Already I have indicated that this is a new and dangerous world.

potential Peter, “Put up your sword.” History is replete with the bleached bones of nations, history is cluttered with the wreckage of communities that failed to follow this command. And isn’t it marvelous to have a method of struggle where it is possible to stand up against an unjust system, fight it with all of your might, never accept it, and yet not stoop to violence and hatred in the process? This is what we have. [Applause] And then we also need your support in order to get the civil rights bill that the President is offering passed. And there’s a reality, let’s not fool ourselves: this bill isn’t going to get through if we don’t put some work in it and some determined pressure. And this is why I’ve said that in order to get this bill through, we’ve got to arouse the conscience of the nation, and we ought to march to Washington more than 100,000 in order to say, [Applause] in order to say that we are determined, and in order to engage in a nonviolent protest to keep this issue before the conscience of the nation.

Martin Luther King, Jr., Speech at the Great March on Detroit (June 23, 1963).

63. Roy Wilkins, Exec. Sec’y, Nat’l Ass’n for the Advancement of Colored People, *The Clock Will Not Be Turned Back* (Oct. 1957).

This cold war is a test of survival for the West. The Soviet sputnik, now silent and barely visible, casts a shadow not lightly to be brushed aside. Can we meet the challenge Moscow in the sciences and in war with a country divided upon race and color? Can we afford to deny to any boy girl the maximum of education, that education which mean the difference between democratic life and totalitarian death? We may falter and stumble, but we cannot fail.⁶⁴

Social justice advocates and civil rights leaders like Martin Luther King, Jr., unquestionably were obviously instrumental in the passage of the 1964 Civil Rights Act and Title VII. Indeed, scholars have long recognized the role King played in its passage. As Professor Bruce Ackerman notes, “Without the rise of the popular movement led by Martin Luther King, Jr., without the decisive victory of Lyndon Johnson over Barry Goldwater in 1964, without the consolidations under Richard Nixon, Brown’s promise might have been overwhelmed by a segregationist backlash at the polls and racial rioting in the streets. While the Supreme Court remained important throughout the 1960s, constitutional leadership turned to other branches, which broadened and consolidated Brown’s promise in landmark statutes like the Civil Rights Act of 1964 and the Voting Rights Act of 1965.”⁶⁵

Yet another scholar noted the importance of Dr. King’s social struggle based on love in the passage of the Civil Rights Act:

A year before [its] passage. . . King, was arrested in Birmingham, Alabama, facing various charges for protesting segregation in a state that, along with Mississippi, had come to represent the hate of southern racism and violence of the segregating South. While in jail, he wrote a letter to a group of southern clergymen who had suggested that his protests against segregation were “unwise and untimely.” His letter is a masterpiece in the history of social protest and thoughtful opposition to discrimination. It was a catalyst—one of many—that led to passage of the Civil Rights Act the next year. The letter eloquently expressed the pain and humiliation of segregation. In this letter, Dr. King described the nature of segregation and articulated why blacks could no longer wait for equality. The 1964 Civil Rights Act, which is celebrated and reconsidered in this symposium, was the most dramatic

64. *Id.*

65. Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 Nw. U. L. REV. 63, 65 (2009).

and powerful possible answer to this letter. When Lyndon Johnson signed the law, Dr. King was standing behind him.⁶⁶

IV. THE POWER OF LOVE?

The power of social movements, like the ones of Dr. King's era, are unquestionably of great significance in efforts that eventually lead to structural legislative legal change. Social scientists have long examined the power associated with having individuals to frame goals in terms of an ecosystem (in which people focus on their connection to others) rather than in terms of an egosystem (in which people focus on their own desires or needs) which can reduce identity threat and lead to engagement as well as more positive emotions toward others, such as feelings of love, compassion, and empathy.⁶⁷ Indeed, social movements may offer the rights claimant two other forms of emotional inducement or sustenance. First, it offers her an opportunity to ameliorate or satisfy some of her responsive emotions through the vehicle of protest itself. Different strategies of protest may draw participants by appealing to their own affective tendencies or emotion cultures, or creating new emotion cultures that support particular forms of response. Strategies of civil disobedience may appeal to the dignity and self-respect of prospective participants, or to the steadfast commitment with which they approach a challenge.⁶⁸

Social scientists have noted that another way that social movements respond to the emotions of their prospective participants is to facilitate connections with others who have experienced similar affronts or losses. Suffering an injury or a wrong, as noted above, may give rise to feelings of isolation, disaffection, and vulnerability.⁶⁹ En-

66. Paul Finkelman, *The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 Had to Change*, 74 LA. L. REV. 1039, 1093 (2014).

67. See, e.g., Martin N. Davidson & Erika Hayes James, *The Engines of Positive Relationships Across Difference: Conflict and Learning*, in EXPLORING POSITIVE RELATIONSHIPS AT WORK: BUILDING A THEORETICAL AND RESEARCH FOUNDATION 137, 145 (Jane E. Dutton & Belle Rose Ragins eds., 2007); Sophie Trawalter, Jennifer A. Richeson & J. Nicole Shelton, *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 PERSONALITY & SOC. PSYCHOL. REV. 243, 252 (2009); see also Jennifer Crocker & Julia A. Garcia, *Downward and Upward Spirals in Intergroup Interactions: The Role of Egosystem and Ecosystem Goals*, in HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 229, 234 (describing behavior in response to racial emotion as "fight-or-flight" response). There is surprisingly little research in the field of social psychology that focuses on antagonistic behavior in response to negative racial emotion, compared to research on avoidance.

68. Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 HARV. C.R.-C.L. L. REV. 551 (2011).

69. *Id.*

countering others who have experienced similar violations may provide a salve to such feelings. It mitigates the sense that one is alone and brings the resources of others to bear on the shared losses. Affection for, or trust in, others can affect the decision to raise a collective claim. These affective connections not only make it easier to see common patterns of injury or causation; they also can fuel the courage and resolve necessary to confront those who may be responsible or to persist during difficult times. During Argentina's Dirty War, mothers of the "disappeared" began holding vigils in the Plaza de Mayo in Buenos Aires, voicing the simple demand that the government tell them what had happened to their children. The bonds of shared experience, trust, and ultimately love that emerged among these women led them to turn what was initially a spontaneous gathering into an ongoing practice that became the center of a nationwide protest movement. Respect for, or trust in, a leader may fuel rights claiming within a social movement, as mobilizations led by Martin Luther King Jr., Cesar Chavez, and other strong movement leaders demonstrate.⁷⁰

But the emotional work performed by social movements is not limited to their members. Social movements accomplish much of their moral and political work through recourse to the emotions of their target audiences. Many movement strategies compel the attention of their public or institutional audiences not simply through their cognitive claims but through their expression, or performance, of particular emotions; and they produce change by eliciting particular emotions in those outside the group. Change in the emotion norms of stigmatized groups or the broader society can be a direct goal of social movements: replacing sexual shame with pride for gays and lesbians was one such goal; legitimating feelings of anger and frustration on the part of women during the second-wave feminist movement was another. More often, however, emotions are deployed as an instrument to achieve a substantive goal that is not primarily effective.

It appears such thinking is beginning to have impact on at least some legal scholars. Though still in the minority, such thinkers have grown to appreciate the power of love and its ability to engender empathy. As one recently observed:

Essentially, we develop a desire - as opposed to a capacity - to act justly, i.e., from the standpoint of justice, because we've been treated kindly in the past. We love our parents because they love us, and treat

70. *Id.*

us accordingly. We come to like, if not love, our colleagues because they like us, and treat us accordingly. And so it is with the sense of justice, properly speaking: “We develop a desire to apply and to act upon the principles of justice [i.e., a sense of justice] once we realize how social arrangements answering to them have promoted our good and that of those with whom we are affiliated,” i.e., our family and our “associates.”⁷¹

In his work on Justice, Markus Dubber also appreciated the importance of Hegel’s writings concerning love and empathy. Dubber observes:

Hegel too can be seen as clarifying the moral significance of that point of identification which gives rise to the sense of justice as a mediated form of empathy. He also pointed out that we speak of a sense, rather than a sensation, of justice or of self-False Now, Hegel saw that a person evaluating an offender’s moral desert or contemplating fundamental questions about the institutions of justice and their effect on herself and others cannot see herself in another’s particular characteristics without first recognizing that she already shares at least one basic characteristic with that person. It is the acknowledgment of this identity, however formal, that permits the onlooker to engage in the sort of empathic thought experiment that is required for a full assessment of desert or a considered judgment on issues of institutional justice. That basic characteristic, that point of identification, was their shared personhood. This most abstract equality remains as the background condition governing all interactions between individuals in modern society. No matter what other identities they acquire, as members of families or of other substantive communities, they will always remain identical in their personhood.

False

The theory of justice thus does no more than work out the place for this moral point of view, from which all persons are considered as such, in a complex society of multiple communities. And the commitment to justice is nothing more than the commitment to always also - not always only - regard everyone as a person, no matter what else she might be or try to be. . . . And here too we find the legitimacy of the process, in this case of defining rather than applying norms, derive itself from both direct participation and indirect, vicarious, self-judg-

71. Markus Dirk Dubber, *Making Sense of the Sense of Justice*, 53 *BUFF. L. REV.* 815, 836-37 (2005).

ment. The representatives re-present their constituents, they decide as if they were their constituents, through empathy from the standpoint of justice; the representatives decide as the represented would decide if they were to exercise their capacity for a sense of justice, rather than to pursue their personal advantage.⁷²

V. ALL YOU NEED IS LOVE?⁷³

In essence, to answer a question posed above, yes, love is the answer—both to the question concerning whether legal analysis should include discourse and reasoning associated with legal reasoning, and love is the answer to those well-intended critics of whether Title VII achieved its intended goals. Dr. Martin Luther King, Jr., and other social activists, then and now, surely understand, or should understand the power of engendering empathy in their causes. When legal thinkers recognize the power, effectiveness, and ongoing nature of such efforts, perhaps law and legal analysis were become a more fluid and less static arena.⁷⁴ Title VII is perhaps one of our great testaments to such powers, and is one of our ongoing steps to become a just and equality-centered land. We should all be thankful that love was and still is the answer.⁷⁵

72. *Id.* at 827–29.

73. It has indeed been fun to separate the sections of this essay with popular songs with titles concerning love, which were quite appropriate for each section. Any readers that name the performers and era for each song will surely impress this author.

74. The motivations to write this law review essay, my first in nearly a decade (in part because my writing efforts have recently focused on books and op-eds), was because of my respect for the monumental attempt to eradicate discrimination through the 1964 Civil Rights Act, my appreciation, as well as the honor I hold for Howard University and its mission, and finally, the rare opportunity for me to pay my respects to my hero and inspiration, Dr. Rev. Martin Luther King. Perhaps yet another motivation here is my effort to give support to the too often devalued aspects of the cultures of many people of color in this land. It is my view that unlike many of our Anglo brothers and sisters, we tend not to scorn or express disdain for the use of emotions. Indeed, we are often accused of showing them too often. I have often found such critiques more than a bit bewildering, for it is my emotions and passions I embrace in not only my journey in faith and my related studies in martial arts, but more importantly, I often dig deep to find my passion when I write on social justice issues in my effort to engage in a realm that too often devalues both my intellect and my considerable scholarly contributions. Such consequences do not deter me, for my intellect, pride in my culture, and my reverence for the emotions that inspire my efforts keep me strong, and dare I say, incredibly productive. So I say, up with love, and its never-ending and transformative power!

75. As I often tell my children and all those that will listen, love is the world's greatest power.

Antebellum Islam

KHALED A. BEYDOUN*

ABSTRACT

Muslim-American identity today is deeply conflated with Arab-American identity. This conflation perpetuates stereotypes within legal scholarship, government agencies, and civil rights interventions seeking to combat the marginalization of Muslim Americans – victims of post-9/11 profiling and new, local policing surveillance programs (e.g., NYPD “Suspicious Activity” policing of Muslim-American identity, activity and religious institutions). This article examines the legal seeds of this conflation, and the consequent erasure of Black Muslim identity that still prevails today.

America’s first Muslims were slaves. Social scientists estimate that 15 to 30 percent of the Africans enslaved in the Antebellum South practiced Islam. Research indicates that the Muslim slave population could have been as high as 1.2 million. Despite their considerable presence in the Antebellum South, the history of Muslim slaves has been largely neglected within legal scholarship.

This Article argues that the omission of Muslim slaves from legal scholarship is a consequence of the legal segregation of Black and Muslim identity during the Antebellum Era. Two factors brought about this segregation. First, the law remade Africans into Black slaves, and state slave codes criminalized their religious activity and stripped slaves of their religious identities. Second, the state adopted a political conception of Muslim identity that converted it from a religious into a racial identity in the narrow profile of “Arabs” and “Turks” – a non-white class that racially restrictive naturalization laws barred from accessing

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citizenship. Muslim slaves lived at the intersection of these two irreconcilable racial configurations.

An intersectional approach enables investigation of the omitted history of Muslim slaves. In addition, intersectional examination facilitates analysis of modern narratives marginalized by the continued application of the antebellum binary that segregated Black and Muslim identity. Although Black Americans comprise the biggest plurality of Muslims in the US today, the modern re-deployment of this antebellum binary continues to separate Black and Muslim identity. As a result, limiting recognition of Black and Muslim identity as compatible, and following the September 11th terrorist attacks, undermining the focus on Black American Muslims as a specific community victimized by compounded racial and religious profiling, vilification and violence.

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INTRODUCTION

“[T]his was the culture
 From which I sprang.
 This is the terror
 From which I fled.”

—RICHARD WRIGHT, BLACK BOY¹

“[B]efore I came to the country of the Christians, my faith was the
 faith of Mohammed, the prophet of God.

—Omar Ibn Said – Fayetteville, North Carolina (1836)²

The sun’s familiar rays crept through the crack of the door. The *lord’s* voice, synchronized with the sun, summoned Omar Ibn Said from his slumber. With a water-pot near his bedside, Omar performed the customary ablutions in Fayetteville, North Carolina as he did in Futa Tooro, West Africa.³ He meticulously cleansed his dark brown skin in line with the divine custom, beginning with his feet and finishing with his face.⁴ Omar then set foot for the first of the five daily prayers.⁵

1. RICHARD WRIGHT, BLACK BOY: A RECORD OF CHILDHOOD AND YOUTH 257 (1944).
 2. Omar Ibn Said, *The Life of Omar Ibn Said*, in 12 THE GENERAL BAPTIST REPOSITORY AND MISSIONARY OBSERVER 556, 557 (1850).
 3. *Said*, *supra* note 2. Futa Tooro is the region in West Africa that is surrounded by the Senegal River. The region today is encompassed by northern Senegal and southern Mauritania. See also Michael A. Gomez, *Muslims in Early America*, 60 J. S. LEGAL HIST. 671, 677 (1994) (“[F]uta Toro . . . was ethnically Fulbe, or ‘Tukolor.’ The latter term is used to distinguish the Muslim, sedentary, and – in some instances – ethnically mixed portion of the Fulbe from the pastoral, non-Muslim segment.”).
 4. *Said*, *supra* note 2.
 5. The *Qur’an* requires Muslims to cleanse their bodies, in a defined order and fashion, before making the five daily required prayers. The practice is referred to as *Wudu* in Arabic, and derives its source from 5:6 of the *Qur’an*.
 “O believers, when you stand up for the service of prayer wash your faces and hands up to elbows, and also wipe your heads, and wash your feet up to the ankles. If you are in a

The erasure of Muslim slaves from legal scholarship is rooted in the antebellum segregation of Black and Muslim identity. Since the law and slaveholders did not see Muslim slaves as Muslims, this brought about sparse documentation about their history. As a consequence, there was no historical record for legal scholars to draw on, creating the appearance that there were no Muslims among the slaves in the Antebellum South. However, starting with the period of American slavery until today, Black Muslims have always comprised the largest segment of the Muslim community in the U.S.⁶ These statistical and corporeal bodies of evidence testify to the fact that Black and Muslim identities are not only reconcilable, but since the inception of the U.S. as a nation, have always represented the most visible and sizeable representation of Muslims in America.

An African slave and a devout Muslim, Omar's story exemplifies the first, yet largely forgotten, community of Muslims in the U.S.⁷ Research affirms that Muslims were not a negligible element, but a sizeable segment of the African slave population in the Antebellum South.⁸ Social scientists estimate that 15 to 30 percent,⁹ or, "[a]s many as 600,000 to 1.2 million slaves" were Muslims.¹⁰ Forty-six percent of the slaves in the Antebellum South were kidnapped from Africa's western regions, which boasted "significant numbers of Muslims."¹¹

state of seminal pollution, then bathe and purify yourself well. But in case you are ill or are travelling, or your have satisfied the call of nature, or have slept with a woman, and you cannot find water, then take wholesome dust and pass it over your face and your hands, for God does not wish to impose any hardship on you. He wishes to purify you, and grace you with His favours in full so that you may be grateful."

AHMED ALI, *AL-QUR'AN: A CONTEMPORARY TRANSLATION* 98 (2001).

6. Today, Africans Americans still maintain the largest plurality (24%) of the Muslim population in the US, followed by Arab (23%) and South Asian Americans (21%). See PEW RESEARCH CTR., *MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM* 16 (2011). See also F. Nu'man, *The Muslim Population of the United States: A Brief Statement* 11–13 (1992) (a study finding that 42% of the Muslim American population was African American).

7. Hishaam D. Aidi & Manning Marable, *Introduction: The Early Muslim Presence and its Significance*, in *BLACK ROUTES TO ISLAM* 1, 1 (Manning Marable & Hishaam D. Aidi, eds., 2009). See generally OMAR IBN SAID, *A MUSLIM AMERICAN SLAVE: THE LIFE OF OMAR IBN SAID* (2011) (the autobiography written by the Muslim slave).

8. DIOUF, *infra* note 9, at 48.

9. See Aminah Beverly McCloud, *Blackness in the Nation of Islam, in RELIGION AND THE CREATION OF RACE AND ETHNICITY: AN INTRODUCTION* 101, 102 (Craig R. Prentiss ed., 2003). See generally SYLVIANE A. DIOUF, *SERVANTS OF ALLAH: AFRICAN MUSLIMS ENSLAVED IN THE AMERICAS* (1998) (explaining hypothetical estimates of the Muslim African slave population in the Antebellum South based on slave trade origins).

10. PRECIOUS RASHEEDA MUHAMMAD, *MUSLIMS AND THE MAKING OF AMERICA: 1600S TO PRESENT* 23 (2013).

11. DIOUF, *supra* note 9, at 47.

Legal scholars make no mention of Islam while examining “African”¹² or “slave” religions.¹³ As this Article explains, Black and Muslim identities were imagined and constructed by law in terms that undermined seeing them as coexistent. Thus, simultaneous recognition of Black and Muslim identity was precluded by legal baselines constructed during the Antebellum Era.¹⁴ Muslim slaves were practically invisible as a consequence of these clashing legal constructions. This practical invisibility brought forth the erasure of Muslim slaves from legal scholarship. As a result, this absence from legal history seeds the still prevailing misconception that the Africans enslaved in the Antebellum South did not include Muslims.¹⁵

Recent social science research conveys the “intersectional” status “Muslim slaves” occupied in the Antebellum South.¹⁶ While classified as Black, and reduced to property, many Muslim slaves strove to meet Islam’s requirements.¹⁷ Much like Omar Ibn Said, the vast majority of these observant Muslim slaves observed religious traditions and holidays, and led devout lifestyles while under the dominion of slave owners.¹⁸ Their continued commitment to Islam defied the “slave codes”

12. Danielle Boaz, *Introducing Religious Reparations: Repairing the Perceptions of African Religions Through Expansions in Education*, 26 J.L. & RELIGION 213, 216 (2010-2011) (“States should make to counteract the negative images of African religions that each State actively promoted during slavery and early emancipation periods.”). Boaz only makes a passing mention of “Muslim holidays” recognized in Trinidad and Tobago (“[U]ntil recently Orisha worshippers were denied a public holiday in Trinidad and Tobago even though the government recognized Christian, Muslim and Hindu holidays as public holidays.”). *Id.* at 225.

13. See generally Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 AM. J. LEGAL HIST. 237 (2007).

14. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s 55 (1994). “Racial Construction” or “Racialization” is defined as “an unstable and de-centered complex of social meanings constantly being transformed by political struggle.” *Id.*

15. *Id.*

16. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) for an overview and description of “intersectionality.” The title “Muslim slaves” is used in this article to refer to the heterogeneous population of African Muslims enslaved in the Antebellum South. “Intersectionality,” for purposes of this article, relates to the clashing constructions of black and Muslim identity that brought about the practical invisibility of Muslim slaves. Muslim slaves occupied the intersection of these two clashing legal identities, and thus, were marginalized from being recognized as Muslim slaves.

17. Five central responsibilities are required of each Muslim. These “five pillars” include: five daily prayers, abstaining from food or drink during the Holy Month of Ramadan, pilgrimage to the Holy sites in Mecca, almsgiving to the poor, and the declaration that there is “only one God, and the Prophet Mohammed is his messenger.” Pillars of Islam, Oxford Islamic Studies Online, available at http://www.oxfordislamicstudies.com/article/opr/t125/e1859?_hi=32&_pos=3 (last viewed on Sept. 10, 2014).

18. DIOUF, *supra* note 9, at 49–70.

enacted by every state in the Antebellum South, which criminalized religious activity and expression.¹⁹

Islam not only remained central in the lives of Muslim slaves, but also emerged into a *liberation theology* that perpetually reaffirmed the dignity, humanity,²⁰ and “Muslim citizenship” in the face of slave codes.²¹ Islam mandated regular observance, which moved Muslim slaves to defy slave codes and question the legality of slavery at large. Slave codes that restricted the right to worship disparately impacted Muslim slaves simply on account of the frequency of prayer mandated by Islam.²² However, many Muslim slaves continued their religious observance and worshipped in brazen opposition to slave codes.²³ Furthermore, because race-based, American slavery was irreconcilable with Islamic Law, the conflict of laws sparked resistance and rebellion on the part of Muslim slaves in the Antebellum South.²⁴

The absence of Muslim slaves from legal scholarship is a consequence of the legal segregation of Black and Muslim identity during the Antebellum Era. The following brought about this segregation:

- 1) The law remade Africans into Black slaves, and slave codes criminalized religious activity and the public assertion of religious identity;
- 2) The state adopted a political conception of Muslim identity that converted it from a religious into a racial identity in the

19. “Slave codes” are the state statutes that proscribed the legal rights of slaves, and reaffirmed the ownership rights whites had over them. These slave codes supplemented federal law regulating slavery, and oftentimes, enhanced them by enshrining specific rights to slave owners. The states in the South looked upon Virginia’s Slave Codes as a model body of law, which they used as a template for constructing their own slave codes.

20. See Beverly Thomas McCloud, *African-American Muslim Women*, in *THE MUSLIMS OF AMERICA* 178, 184 (Yvonne Yazbeck Haddad ed., 1991) (“Islam satisfied the inner hunger of black people to be acknowledged as human.”).

21. Muslim citizenship denotes belonging to the broader, global Muslim community or nation (*Ummah*, Arabic). The *Ummah* is comprised of the aggregate population of Muslim communities, forming a spiritual community defined by religious affinity not geographic boundaries. While enslaved, Muslims in America remained active participants, or citizens, of this spiritual community.

22. Some states, like South Carolina, were in the minority, enshrining “the right of slaves to worship as long as their worship did not weaken the control of their masters over them.” James Lowell Underwood, *Church and State, Morality and Free Expression*, in 3 *THE CONSTITUTION OF SOUTH CAROLINA* 202 (1992). However, statutes like South Carolina’s were paradoxical because worship, in South Carolina and the South at large, was viewed as a springboard for resistance or insurrection. The religious assembly of slaves was viewed with great suspicion by slave codes in South Carolina, and additional statutes outlawing the assemblage of slaves, if read in conjunction with this statute, would limit the rights of slaves to worship. See *id.*

23. DIOUF, *supra* note 9, at 49–70.

24. DIOUF, *supra* note 9, at 145–178.

narrow profile of “Arabs” and “Turks” – a non-white class that racially restrictive naturalization law barred from accessing citizenship; as a result,

- 3) Muslim slaves lived at the intersection of these two irreconcilable racial configurations, which made their religious identity invisible to the state and slaveholders, and as a result, inconspicuous to legal scholars examining American slavery.

Criminalizing religion was vital to the project of stripping Africans of their humanity and reducing them into “beasts of burden.”²⁵ While the law remade them into a racial monolith, Africans submerged into the American slave market hailed from a diverse range of tribal, ethnic, and religious backgrounds.²⁶ This diversity, however, had no relevance to their legal conversion into property. Legal recognition of the religious identities of Africans would amount to a concession of their humanity, and in turn, undermine the project of converting them into godless slaves. Therefore, eliminating the religious identities of slaves marked the first prong of the process that segregated Black from Muslim identity during the Antebellum Era.

Muslim identity was converted from a religious into a racial classification during the Antebellum Era. The political struggles with the Barbary States and the Ottoman Empire led the state to construct Muslim identity in the exclusive image of Arab and Turkish identity. The Naturalization Act of 1790 limited naturalization to “Whites,” which restricted citizenship to immigrants who fit within the racial parameters of Muslim identity.²⁷ Islam was oriented as the rival of

25. See May, *supra* note 13, at 239 (“After all, legal recognition of a slave’s right to worship implicitly granted a fundamental right: freedom of conscience.”); see also FREDERICK DOUGLASS, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: FROM 1817 TO 1882* 122 (1882) (explaining Frederick Douglass’ observations on “elevating” a slave through better treatment and the humanizing effect of religion). “[B]eat and cuff the slave, keep him hungry and spiritless, and he will follow the lead of his master like a dog; but feed and clothe him well, work him moderately, surround him with physical comfort, and dreams of freedom will intrude.” *Id.*

26. See Gomez, *supra* note 3, at 673–85. See generally EDWARD W. BLYDEN, *CHRISTIANITY, ISLAM AND THE NEGRO RACE* (1888) (providing a sociological overview of the Muslim communities in West African states).

27. Naturalization Act of 1790, Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795). Arab and Turkish identity were viewed as synonymous with Muslim identity, and vice versa, during the Antebellum Era. The Naturalization Law of 1790, until 1944 with the *In re Mohriez*, 54 F. Supp. 941 (D. Mass. 1944), decision, denied Muslims’ naturalization on grounds that their Muslim identity was inassimilable with American values and society. *In re Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944) (granting citizenship to Arab born Mohamed Mohriez). Therefore, Muslims did not fit within the statutory definition of whiteness. It is highly likely that anti-Muslim attitudes in the U.S., particularly after the Barbary Wars, deterred Muslims from migrating.

Christianity, a hallmark of whiteness during the Antebellum Era. Thus, the Naturalization Act barred Muslim immigrants being naturalized as citizens. As a result, first Congress and then the courts converted Muslim identity from a religious status into a narrowly defined ethno-racial identity.²⁸ This racial profile excluded Sub-Saharan Africans, and forms the second component of the process that dis-identified believing slaves as Muslims.

The legal meanings attached to Black and Muslim identity drew a sharp line between the two racial classifications, which preempted seeing both as coexistent identities. Slave codes enshrined the belief that slaves were a godless people incapable of practicing religion,²⁹ while immigration law restricted the naturalization of (Arab and Turkish) immigrants perceived to be Muslims.³⁰ Muslim slaves lived at the intersection of these two irreconcilable racial configurations.

Section I provides a profile of Muslim slaves in America. Although the experience of Muslim slaves in the Antebellum South was by no means monolithic, this section imports a profile of Muslim slaves from social science literature that is currently absent from legal scholarship.

Section II examines the legal formation of Blackness, and the conversion of Africans into Black slaves. Congress, and later the courts, converted Muslim identity, a colorblind religious classification, into a narrow racial classification constructed in the image of inassimilable Arabs and Turks. This religious to racial conversion, the focus of Section III, excluded African slaves from being recognized as Muslims.

Section IV analyzes the structural distinctions that undermined legal recognition of Black and Muslim as coexistent identities during the Antebellum Era. Using an intersectional approach, Section V reconstructs the distinct legal history of Muslim slaves that arose from their marginal status. Although no longer identities segregated by law.

28. TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* 27 (1993). See generally *Between Muslim and White*, *infra* note 156.

29. See WINTHROP JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812* 24 (1968).

30. Naturalization Act of 1790, Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795).

I. STILL RESISTING INVISIBILITY: A PROFILE OF MUSLIM SLAVES

The lives of Muslim slaves “[a]re for the most part unknown.”³¹ The legal and practical consequences of wholesale enslavement, combined with ignorance about Islam during the Antebellum Era, contributed to the lack of scholarly examination into their lives. Enslavement and its concomitant dehumanization prevented the transmission of Islam to future generations, making primary sources scarce to scholars interested in examining the experience of Muslim slaves.³²

Recent social science research has furnished expanded insight into the history of Muslim slaves in the Antebellum South. The research of Sylviane Diouf, Michael Gomez, and Allan D. Austin collectively form a Muslim slave history that was previously non-existent.³³ This research provides an invaluable historical record that has enabled legal analysis of the experience of Muslim slaves.³⁴

This section provides a generalized history as a foundational step for the broader aims of this article. Subsection A contends that, although slaves and not citizens, Muslim slaves established the first Muslim-American communities. Subsection B introduces the antebellum segregation of Black and Muslim identity within legal scholarship, which erased the Muslim slave narrative from legal history.

31. KAMBIZ GHANEABASSIRI, *A HISTORY OF ISLAM IN AMERICA: FROM THE NEW WORLD TO THE NEW WORLD ORDER* 57 (2010). “[A]frican Muslims enslaved in colonial and antebellum America stood at the intersection of the encounters and rivalries between Europe, Africa, and America which shaped the Atlantic World. Their lives [were], for the most, part unknown.” *Id.* See also Gomez, *supra* note 3, at 672 (“Th[is] scarcity of primary data is a function of two factors. First, colonial and antebellum observers, who were ignorant of the Islamic faith, did not accurately record the variegated cultural expressions of African slaves. The cumulative evidence suggests that such observers could distinguish the Muslims from other slaves but had neither the skill nor the interest to record detailed information about them. The other factor contributing to the scarcity of data is the reluctance of the descendants of these early Muslims to be forthright in answering questions about their ancestors.”).

32. See TIMOTHY MARR, *THE CULTURAL ROOTS OF AMERICAN ISLAMICISM* 17–18 (2005); see also DIOUF, *supra* note 9, at 179 (“[T]he orthodox Islam brought by the enslaved West Africans has not survived.”).

33. The works of these authors are cited extensively throughout this article.

34. In addition, the lives of these notable Muslim slaves prompted study of the lands and contexts from which they came from before their sale into the American slave market. Examining the tribes, communities, and traditions from which Muslim slaves hail highlights both the salient distinctions and commonalities shared by Muslim slaves. In addition, this research curbs the otherwise natural consequences of constructing a narrative that illustrated Muslim slaves as a monolithic group.

A. The First Muslim-American Community

The first Muslims came to North America as chattel.³⁵ They were violently uprooted from their families, tribes, and religious communities.³⁶ Unlike the waves of Muslim immigrants that came to the U.S. in the 19th and 20th centuries,³⁷ Muslim slaves did not choose to emigrate from their homelands. African Muslims were captives aboard the *Amistad* and many of the slave ships that set course for the New World before there was a *United States of America*.³⁸ Departing from the classical grand immigrant narrative, Africans were neither pushed to the U.S. by volatile circumstances at home, nor pulled to it by opportunity and freedom. Rather, African Muslims were violently poached and then parceled out to the highest bidder at the auction block.

Muslim slaves hailed from a broad spectrum of African tribes and nations.³⁹ These tribes had distinct customs and traditions.⁴⁰ A number of these tribes and nations embraced Islam as early as the 9th Century.⁴¹ Therefore, Islam was deeply rooted in West Africa as a local religion, and entwined within a number of the indigenous cul-

35. Aidi & Marable, *supra* note 7, at 1 (“A little known fact that continues to inspire incredulity is that America’s first Muslims arrived chained in the hulls of slave ships.”); *see also* GHANEA-BASSIRI, *supra* note 31, at 60; MARR, *supra* note 32, at 135 (“[T]he only Muslims inside the United States were subjugated African slaves.”).

36. African slaves generally originated from the following tribes, indigenous to West Africa: Akan, BaKongo, Chamba, Gbe, Igbo, Mande, Makua, Mbundu, Wolof, and Yoruba. *See generally* GWENDOLYN MIDLO HALL, *SLAVERY AND AFRICAN ETHNICITIES IN THE AMERICAS: RESTORING THE LINKS* (2005).

37. *See* ALIXA NAFF, *BECOMING AMERICAN: THE EARLY ARAB IMMIGRANT EXPERIENCE* 76–117 (1993).

38. *U.S. v. The Amistad*, 40 U.S. 518, 533 (1841) [hereinafter *Amistad*].

39. Gomez, *supra* note 3, at 673–685; *see Id.* at 67 (illustrating the six slavery “supply zones” Muslim slaves originated from: (1) Senegambia; (2) Sierra Leone (present-day Guinea-Bissau, Guinea, Sierra Leone, and “a small portion of Liberia”); (3) the “Windward Coast” (near the present-day Ivory Coast and Ghana border); (4) Gold Coast; (5) Bight of Benin; and (6) Bight of Biafra); ALLAN D. AUSTIN, *AFRICAN MUSLIMS IN ANTEBELLUM AMERICA: TRANSATLANTIC STORIES AND SPIRITUAL STRUGGLES* 3 (1997) (illustrating the tribal and geographic origins of Muslim slaves in a map).

40. DIOUF, *supra* note 9, at 4–6.

41. *See* Gomez, *supra* note 3, at 674 (“[I]slam had penetrated the savanna south of the Sahara Desert by the beginning of the ninth century as a consequence of Berber and Arab commercial activity.”); DIOUF, *supra* note 9, at 4 (“[T]he spread of Islam in sub-Saharan Africa followed a mostly peaceful and unobtrusive path These carriers of the faith were natives and therefore identified culturally and socially as well as ethnically with the potential converts. Some fundamental features or traditions religions and customs, such as the ritual immolation animals, circumcision, polygamy, communal prayers, divination, and amulet making, also were present in Islam. Such affinities facilitated conversion as well as accommodation and tolerance of others’ ritual and beliefs. Africans themselves considered Islam an African religion.”).

tures and traditions on the continent.⁴² In light of its long history in Africa and its acceptance among a considerable portion of the population on the continent, “[A]fricans themselves considered Islam an African religion.”⁴³

Muslim slaves observed a religion that distinguished them from their non-Muslim peers. The *Ash’arite and Maliki* schools of orthodox Sunni Islam were the prominent traditions practiced by African Muslims.⁴⁴ However, with rare exception, the slaveholders did not distinguish Muslim slaves from non-Muslim slaves.⁴⁵ Like the non-Muslims among them, the law and their own overseers generally saw Muslim slaves as property and nothing more. This pushed their Muslim identity into the private sphere, where it continued to function as a spiritual framework, way of life, and in many instances, a source of resistance against enslavement.⁴⁶

The state assigned a distinctly American racial designation, “Black,” to every West African slave.⁴⁷ This racial construction swallowed all ancestral and religious modes of identification, stamping slaves with a new legal identity.⁴⁸ While the *Qur’an* makes no racial distinctions between Muslims, Africans legally remade into Blacks were, “[p]ainfully aware of the oppressive linkage slavery reinforced between one’s color and humanity” after arriving in the U.S.⁴⁹ In their native lands, religion and tribe functioned as the principal metrics of identification and association; in Antebellum America, race ranked as the primary social criteria for *de jure* and *de facto* stratification. Enslaved Africans, both Muslim and non-Muslim alike, recognized that Blackness remade them into a monolithic block that legally washed away their diversity.

42. DIOUF, *supra* note 9, at 4.

43. *See Id.*

44. *See* SHERMAN A. JACKSON, *ISLAM AND THE BLACKAMERICAN: LOOKING TOWARD THE THIRD RESURRECTION* 33, 39 (2005); *see also* BLYDEN, *supra* note 26, at 199–216; DIOUF, *supra* note 9, at 5 (“[S]tarting in the fifteenth century, Islam in West Africa gradually became more associated with the Sufi orders. The Sufis stress the personal dimension of the relationship between Allah and man, as embodied in *Surah* 2:115: ‘Wherever you turn, there is Allah’s Face.’”).

45. *See* Gomez, *supra* note 3, at 672.

46. DIOUF, *supra* note 9, at 145–178.

47. Cheryl Harris, *infra* note 96, at 1720 (citing THOMAS R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES* §§ 68–69, at 66–67 (1858)).

48. *See* IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 10–11 (1996).

49. GHANEABASSIRI, *supra* note 31, at 21.

Historians have relied heavily on the narratives of Muslim slaves who left historical records of their lives.⁵⁰ Many of the Muslim slaves who documented their own lives or attracted the interest of writers hailed from respected backgrounds and high-ranking social positions.⁵¹ These Muslim slaves were *imams*,⁵² world travelers,⁵³ scholars,⁵⁴ historians and *huffaz*.⁵⁵ The Muslim slave population even counted a prince among its ranks.⁵⁶ The well-documented lives of Estevanico de Dorantes,⁵⁷ Bilali Muhammad,⁵⁸ Salih Bilali,⁵⁹ Ibrabima abd el Rahman,⁶⁰ Lamine Kebe,⁶¹ Job Ben Soloman,⁶² and Omar Ibn Said,⁶³ furnish rare records of the lives of these notable Muslim slaves.⁶⁴ Their stories have served as key foundations, and frequent starting points, for intellectual projects seeking to uncover the experience of Muslim slaves in the Antebellum South.

While valuable, focusing heavily on the lives of a few notable figures runs the risk of skewing a reconstructed general history of Muslim slaves.⁶⁵ Additionally, in line with the remarkable stories that

50. See generally AUSTIN, *supra* note 41.

51. GHANEABASSIRI, *supra* note 31, at 18–24.

52. See Muhammad, *supra* note 10 at 6.

53. See, e.g., AUSTIN, *supra* note 41, at 173.

54. *Ulema* (Arabic). Said's autobiography stands as the only one of its kind written by a slave. See Marie A. Failingler, *Islam in the Minds of American Court: 1800 to 1960*, 32 B.C. J.L. & SOC. JUST. 6 (2012) (explaining that Omar Ibn Said is widely regarded as the "earliest known Arabic scribe in America."); see also JAMES H. JOHNSTON, FROM SLAVE SHIP TO HARVARD: YARROW MAMOUT AND THE HISTORY OF AN AFRICAN AMERICAN FAMILY (Fordham University Press, 2012).

55. (Arabic) The esteemed status given to the few who have completely memorized Islam's Holy Book, the *Qur'an*, and can recite it from memory.

56. TERRY ALFORD, PRINCE AMONG SLAVES 3 (1977); see also Gomez, *supra* note 3, at 689.

57. GHANEABASSIRI, *supra* note 31, at 10 ("Estevanico is recognized as possibly the first African and the first person of Muslim heritage to travel in the Southwest United States and the first non-native to enter the Zuni Pueblos in New Mexico and Arizona.").

58. Gomez, *supra* note 3, at 689; see also AUSTIN, *supra* note 41, at 85–114.

59. Muhammad, *supra* note 10, at 25–28; see also AUSTIN, *supra* note 41, at 85–114.

60. See also AUSTIN, *supra* note 41, at 65–84.

61. *Id.* at 115–128.

62. GHANEABASSIRI, *supra* note 31, at 27 ("[T]he 1734 Bluett publication about Job Ben Soloman's life remains the earliest known recorded account of an African Muslim enslaved in America and has been referred to as 'the first text in African American literature.'"); see also AUSTIN, *supra* note 41, at 51–61.

63. See *supra* Introduction; see also AUSTIN, *supra* note 41, at 129–158.

64. See *infra* Section IV (B).

65. Cf. MARR, *supra* note 32, at 17 ("The reconstructive illumination of the experiences of enslaved African American Muslims is one area of recent scholarship that acknowledges the sociologies presence of Islam in early American history.") The lives of these notable Muslim slaves also highlight just how uniformly the law perceived West Africans. Figures prominent in their own lands, with extensive education, wealth, and political status, were indiscriminately dehumanized and enslaved. See also DIOUF, *supra* note 9, at 2 ("Few Africans have left personal

arose from their distinguished statuses, a history that is excessively based on the lives of these notable slaves overlooks the distinct experiences of the anonymous masses.⁶⁶ The vast majority of Muslim slaves, despite their faith, did not garner the attention their more notable counterparts attracted. In fact, the vast majority of Muslim slaves whose lives were documented through scholarly work or news publications were re-identified as “Arabian” or “Moor.”⁶⁷ The exotic elements of their stories (as princes and scholars), not their Muslim identity, are what piqued the interest of Antebellum Era scholars and writers.⁶⁸

Muslim slaves were a deeply heterogeneous community.⁶⁹ They hailed from broad origins on the African continent and represented a diverse array of tribes, ethnicities and religions.⁷⁰ The work of Edward W. Blyden, a 19th Century Americo-Liberian scholar of religion, provides a rare and intimate illustration of the origins of African Muslims before they were submerged into the American slave market.⁷¹ Blyden illustrates that Muslim slaves were by no means a monolithic group, and his work provides a thorough examination of the distinct and diverse regions, tribes, religions, and political contexts Muslim slaves hailed from. As discussed more closely in Section V, Islam functioned as a common faith, lifestyle, and source of resistance that, within and sometimes across different plantations, fostered a sense of community among ethnically and culturally heterogeneous Muslim slaves.

The common practice of Islam moved Muslim slaves in close proximity of one another to reconstruct spiritual communities while enslaved.⁷² These reconstructed Muslim communities were built across tribal and ethnic lines, and even brought in converts from among the enslaved and emancipated Africans of different faiths.⁷³

accounts of their life under slavery, but among those who did are a disproportionate number of Muslims.”).

66. See GHANEA-BASSIRI, *supra* note 31, at 18–24, for a brief overview of the experience of prominent enslaved Muslims.

67. See Aidi & Marable, *supra* note 7, at 6.

68. AUSTIN, *supra* note 41, at 130.

69. Gomez, *supra* note 3, at 690–92.

70. *Id.* at 673–85.

71. See generally EDWARD W. BLYDEN, *CHRISTIANITY, ISLAM AND THE NEGRO RACE* (1888).

72. Islam bred literacy, and Arabic functioned as the spiritual *lingua de franca* that united Muslims across linguistic, tribal and ethnic barriers. Hence, Arabic provided Muslim slaves from distinct backgrounds to communicate across language differences.

73. See Gomez, *supra* note 3, at 672.

Collectively, these practices and activities, networks and distinctly Muslim slave experiences, formed the first “Muslim American communities.”⁷⁴ These pioneer Muslim communities, as illustrated in Section V, were in large part galvanized by the constant assault on their faith by slave codes, and the slave owners that enforced them.

Under the most trying of conditions, Muslim slaves established the first Muslim-American communities. The Muslim slaves, by law, were not citizens and thus by legal definition not Americans. However, they continued to worship and lead Muslim lifestyles amid the most restrictive circumstances of slavery.⁷⁵ Prayer, observing Ramadan, making charitable donations, and striving to meet Islam’s Five Pillars remained a core pursuit for many Muslim slaves.⁷⁶ This shared but diverse experience spawned frequent communication within and without the boundaries of individual plantations, fostering new Muslim communities among the disjointed slave populations in a given region of the Antebellum South. Despite these slaves’ continued observation of Muslim traditions and Muslim lifestyles, scholars examining Muslim-American history have fallen short of recognizing Muslim slaves as the first “Muslim American community.”⁷⁷

B. Erasure From Legal Scholarship

The Muslim slave narrative ranks among the most overlooked topics within the area of legal scholarship concerning American slav-

74. See JACKSON, *supra* note 47, at 119 (illustrating these “indigenous” Muslims as comprising the first Muslim-American community).

75. See CESAR E. FARAH, *ISLAM: BELIEFS AND OBSERVANCES* 307 (2003) (“What Muslim faith they [the African slaves] brought with them was quickly absorbed into their new Christian milieu and disappeared.”); see also DIOUF, *supra* note 9, at 179. (“The orthodox Islam brought by the enslaved West Africans has not survived. It has left traces; it has contributed to the culture and history of the continents; but its conscious practice is no more. For Islam to endure, it had to grow both vertically, through transmission to the children, and horizontally, through conversion of the unbelievers. Both propositions met a number of obstacles.”).

76. DIOUF, *supra* note 9, at 49–70; see also Khaled A. Beydoun, *Ramadan: A Centuries Old American Tradition*, AL-JAZEERA, June 28, 2014, available at <http://www.aljazeera.com/indepth/opinion/2014/06/ramadan-american-tradition-201462714534443176.html> (last viewed on Sept. 11, 2014).

77. Historians have fallen short of crediting Muslim slaves for establishing the first “Muslim-American communities.” Still today, studies focusing on Muslim America seldom begin with the history of Muslim slaves in America. While a number of works have acknowledged their presence on American soil, few have recognized their distinct experience and struggle to merit classifying them as a community. However, Muslim slaves were the first people to practice Islam and observe its traditions in North America. This marginalization has the effect of delegitimizing the Muslim slave population as a viable community. Or, is a consequence of the Arab and South Asian-centric focus that dominates both scholarly and lay discussions about Muslim America and its history. See JACKSON, *supra* note 46, at 99–130.

ery.⁷⁸ The social science discussed above inspired this Article, and motivated closer examination of the Antebellum laws and institutions that: first, remade African Muslims into Black slaves; and second, helped intensify “ignorance of the Islamic faith” during the Antebellum Era.⁷⁹ This Article scrutinizes how criminal codes in the Antebellum South and immigration laws were the most instrumental legal actors in bringing about the practical invisibility of Muslim slaves in the Antebellum South. Slave codes and immigration law jointly brought about the legal segregation of Black and Muslim identity, which resulted in the practical and scholarly invisibility of Muslim slaves.

Legal commentators have failed to recognize Islam as either an “African religion” or a “slave religion.”⁸⁰ Law review articles, both old and new, examining American slaves have altogether overlooked the presence of Muslims among the African slave Diaspora in the Antebellum South. For example, in her call for “religious reparations” for the persecution of “African religions” during the Antebellum Era, Danielle Boaz makes no mention of Muslim slaves.⁸¹ Although Muslim slaves comprised up to thirty percent of the slave population, Boaz fails to identify how slaves codes in the Antebellum South impacted Muslim slaves, and as discussed in Section V, had a disproportionate impact on specific modes of Islamic worship.

Similarly, Nicholas May excludes Muslims from his definition of “slave religion.”⁸² In his article, “Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia,” May overlooks how restrictive religious assembly laws enacted by southern states effected Muslim slaves. This very theme, examined in Section V, demonstrates how Slave Codes disparately impacted religious rituals and traditions unique to Muslim slaves.

78. Until recently, the legal history of American slaves was presumed to be an entirely excavated intellectual realm. This presumption limited the degree of new inquiry into the history of American slaves within legal scholarship. However, rising intellectual interest related to Muslim slaves, particularly within the disciplines of sociology and history, unearthed facts and themes of undeniably legal concern tied to the slave experience. While the intellectual discourse about the lives and experiences of Muslim slaves is rising within social science circles, this theme is still largely untreated within legal scholarship. See Gomez, *supra* note 3, at 671–72.

79. See *id.*

80. DIOUF, *supra* note 9, at 4. In conflict, “Africans themselves considered Islam an African religion.” *Id.*

81. See BOAZ, *supra* note 12, at 216.

82. May, *supra* note 13, at 238. May defines “slave religions” monolithically as “African religious traditions.” *Id.* at 238.

A. Leon Higginbotham's, Jr. and Greer C. Bosworth's important article about "free Blacks" in Colonial and Antebellum Virginia also marginalizes the experience of Muslim slaves.⁸³ A considerable number of African Muslims from Senegambia resided in Virginia.⁸⁴ As discussed in Section IV(B), a number of Muslim slaves achieved freedom by virtue of their Muslim identity. However, despite the critical mass of emancipated and enslaved African Muslims in Virginia, the authors make no mention of them in their study of free Blacks.⁸⁵ As an authoritative piece on the experience of free Blacks in the legal and cultural hub of the Antebellum South, Higginbotham and Bosworth's exclusion of Muslims has been particularly influential in fostering the misconception that Muslims, free or slave, were not part of the African Diaspora in Antebellum America.

These three articles illustrate a broader theme of Muslim slave invisibility within legal scholarship. At worst, Muslim slaves have been entirely omitted from the literature. At best, coverage of Muslim slaves in law review articles examining "African"⁸⁶ and "slave religions" comprises a footnote or two.⁸⁷

II. BLACKNESS AS PROPERTY

*"[N]egroes were a people of beastly living, without a God, law, religion, or commonwealth."*⁸⁸

Blackness is an American racial construction born out of slavery. It was devised as a separate legal category for African slaves, and following the abolition of slavery, Americans with "one-drop" or more of African ancestry.⁸⁹ Again, African slaves originated from a diverse

83. See generally A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than the Free": *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV 17 (1991) [hereinafter "Rather Than the Free"] (discussing the evolution of slavery jurisprudence and race relations law in Virginia only as it affected blacks). When discussing the family unit and education of free blacks in Virginia, the authors make no discussion of the Muslims among them. See *id.* at 55-62; AUSTIN, *supra* note 41, at 14. Virginia "Maroons" have claimed Muslim heritage through African believers, evidencing that the presence of Muslims in Virginia, free and enslaved, was strong.

84. See AUSTIN, *supra* note 41, at 14.

85. See generally Higginbotham, *supra* note 85.

86. See *supra* note 93.

87. See *supra* note 94.

88. JORDAN, *supra* note 29, at 24.

89. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896). "It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white

range of ethnic and tribal groups from the western coast of the continent.⁹⁰ However, the new racial designation – Black – reduced Africans into an indistinguishable monolith in Antebellum America, and indiscriminately bonded them to the status of slave before the eyes of the law.⁹¹ Blackness was interchangeable with slave status, and inscribed into the bodies of Africans.

This Section examines the legal construction of Blackness. While this construction began to take form during the colonial period, the Antebellum Era witnessed the full-fledged conversion of Blackness into a legal identity synonymous with slavery. The following subsections will examine the roots of race-based slavery in the U.S., the formation of Blackness as a designator of slave status, and finally, how slave status legally restricted slaves from practicing their religions.

A. The Roots of Race Based Slavery in the U.S.

The legal congruence of race and slave status was influenced by the European slave trade. In the 16th Century, “Europeans reserved slavery for the Africans, and the enslavement of whites totally disappeared from the countries they controlled. Slavery and color were linked for the first time.”⁹² The English exclusively enslaved Africans, thereby conflating African ancestry with slave status. This created a familiar precedent for slaveholders in the American colonies, and marked the first step in the formation of legal Blackness.⁹³

person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race; others that it depends upon the preponderance of blood; and still others, that the predominance of white blood must only be in the proportion of three-fourths.” *Id.* See generally Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997) (analyzing of the one-drop rule and its impact on black American identification today). The one drop rule, or “Hypodescent,” means that a person with any visible trace of black ancestry is deemed black for legal purposes. See *id.* at 1163; Adrienne D. Davis, *Identity Notes, Part One: Playing in the Light*, 43 Am. U. L. Rev. 695 (1996). (saw no comparable quote)

90. Gomez, *supra* note 3, at 673–85.

91. Africa, the world’s second largest continent, boasts a spectrum of populations that are distinct along cultural, tribal, phenotypic and spiritual lines. For instance, Africa is home to Wolof and Mandingos, Arabs and Berbers, Muslims and animists. The law, however, limited its construction of blackness to a monolithic phenotypic image of West African slaves. Gomez, *supra* note 3, at 673–685.

92. DIOUF, *supra* note 9, at 16; see also KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* 68–70 (1994).

93. In addition, there are other factors idiosyncratic to the U.S. These factors include, among others not mentioned herein, the formation of a national identity based on white Anglo-Saxon Protestant identity. See EDWARD J. BLUM & PAUL HARVEY, *THE COLOR OF CHRIST: THE SON OF GOD AND THE SAGA OF RACE IN AMERICA* (2012). Second, the concomitant formation of naturalization laws that restricted citizenship to this limited (but fluidly changing)

Domestic market dynamics at play before the Antebellum Era heightened the demand for African slaves. The decline of White indentured servitude and the escalating demand for cheap labor in the 18th Century opened the door for the full-fledged shift toward chattel slavery. Ultimately, the diminished supply of indentured white labor brought about “a greater reliance on African labor and a rapid increase in the number of Africans imported into the colonies.”⁹⁴ As a result, the labor force almost abruptly transitioned from a white, indentured servant market toward an entirely African slave market.

Slavery presented a more preferable labor alternative, both economically and racially, for agrarian industries in the South. First, the free labor provided by slaves netted a considerable economic windfall for businesses in the South. Indentured servants, by definition, were only bound to serve until their debts were satisfied. Once satisfied, indentured servants were released from their duties.⁹⁵ However, African slaves, were terminally bound to their owners.⁹⁶ As property, their term of enslavement ended at death.⁹⁷ This eliminated labor expenses for businesses in the South, and yielded them skyrocketing profits.⁹⁸ Thus, immense economic interests drove the maintenance, expansion, and defense of slavery in the Antebellum South.

Second, African slaves were neither Christian nor European. This freed Whites from the burden of subjugating their European brethren as indentured servants, or turning to Native Americans as a source for cheap labor. It was a far easier option to dehumanize an alien-looking people as an expedient toward “[making] the slavery

conception of whiteness. See HANEY LOPEZ, *supra* note 50, 166–67. Third, conflation of slavery with black identity, the decimation of the indigenous Native population, and marginalization of populations deemed non-white by law.

94. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1717 (1993); see DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 19–42 (1999) (discussing how indentured servitude took on new forms after the enslavement of Africans, and while a diminishing market as a primary labor source, remained prominent).

95. In addition, the vast majority of indentured servants were European and Christian, which undermined the possibility of their enslavement. ROEDIGER, *supra* note 96, at 31–32.

96. Many state slave laws put this into law, including Rhode Island, “[t]he common course practised among English men to buy negars, to that end that they made have them for service or slaves forever.” Bush, *supra* note 107, at 420. The only financial investment associated the purchase of slaves was the initial transaction, and the logical expenses related to housing and feeding them. In addition, African slaves were bonded to labor for life, unlike indentured servants. Therefore, slavery offered a far more economically sound option to meet nation’s growing demand for labor.

97. Alternatively, the term of a slave’s ended whenever his or her legal owner decided.

98. Bush, *supra* note 107, at 420.

system function at maximum efficiency.”⁹⁹ Thus, depriving African slaves of a “clear conception of rights” emerged into a racial imperative that aligned with the economic objective of maximizing profits.¹⁰⁰

Therefore, the economic and non-economic benefits of slavery far surpassed those of indentured servitude. These collective benefits expedited the legal convergence of Black and slave status. With European slavery as a model, the American legal system perfected an entirely new racial status – Black – that legally branded and bonded Africans as slaves.

B. From African Freemen to Black Slaves

Blackness was a racial classification foreign to enslaved Africans. Before arriving in America, these Africans identified primarily along lines of religion, and secondly, tribal affiliation.¹⁰¹ They were Mande, Fulani, Serer, Tukalor and Hausa, among an array of other African tribes.¹⁰² Enslaved Africans practiced Islam and African animist religions.¹⁰³ Therefore, Africans identified in configurations that paired tribe with faith: for instance, Hausa Muslims, Tukalor Muslims, or Ibo animists, in addition to a range of other identities that combined a distinct ethnic or tribal affiliation with a range of African religions.¹⁰⁴ Again, African slaves were a richly heterogeneous population that was legally reduced into one monolithic bloc.¹⁰⁵

The demand for slave labor triggered the wholesale conversion of Africans into “Blacks.”¹⁰⁶ Blackness came to be viewed as “insepara-

99. Higginbotham, *supra* note 85, at 21; *see also* Angela Onwuachi-Willig, *Multiracialism and the Social Construction of Race: The Story of *Hudgins v. Wrights**, in RACE LAW STORIES 147, 149 (Moran & Carbado eds., 2008). “[A]s a social and financial matter, white Virginians viewed slavery as economically rational and necessary. To their minds, white indentured servants were too costly because of social customs that required payment for their work with wages and future land grants.” *Id.* at 149.

100. *Id.* at 22.

101. BLYDEN, *supra* note 26, at 199–216.

102. Gomez, *supra* note 3, at 673–685

103. JACKSON, *supra* note 46, at 39. The West African Muslims enslaved in America derived from the Wolof, Mandingo, Tukolor, Fulani, and Serer tribes; DIOUF, *supra* note 9, at 19. *See also* BLYDEN, *supra* note 26, at 199–216. Hereinafter, I will refer to the union along Islamic lines as “Muslim citizenship.”

104. BLYDEN, *supra* note 26, at 199–216.

105. *Id.*

106. HANEY LOPEZ, *supra* note 50, at 28–29; *see also* Richard T. Ford, *Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis*, 9 HARV. BLACKLETTER L.J. 117, 134 (1992) (“[I]n order for the concept of a white race to exist, there must be a Black race which is everything the white race is not (read of course: does not want to be associated with. Thus, the most debased stereotypical attributes of the ‘Black savage’ are none other than the guilty projections of white society.”). *Id.* at 134.

ble” from Negro, or slave status.¹⁰⁷ As noted by Cheryl I. Harris in *Whiteness as Property*, the “[B]lack color of the race [raised] the presumption of slavery.”¹⁰⁸ Therefore, Blackness was carefully crafted into a full-blown racial category that was made synonymous with property, which inscribed the status of slave on the bodies of Africans.¹⁰⁹ Blackness, in and of itself, raised the presumption of slavery that could only be overcome by producing documents that “prove[d] a right to freedom.”¹¹⁰

Blackness was shaped in direct opposition to Whiteness.¹¹¹ The legal conflation of Blackness and slavery “propertized” the human life of Africans in direct contrast with how Whiteness defined citizenship.¹¹² Blackness was “coded to servitude, and whiteness “code to liberty rights.”¹¹³ Ian Haney Lopez observed, “[W]hiteness exists not only as the opposite of non-Whiteness, but as its superior opposite. Witness the close connection between the negative characteristics imputed to Blacks and the reverse, positive traits attributed to Whites.”¹¹⁴

In short, the construction of Blackness relied centrally on Whiteness as its domestic racial antithesis. Blacks were remade into a race of “bestly and godless people,”¹¹⁵ and characteristics emblematic to Blackness were shaped in direct contrast to civilization, modernity,

107. MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 177 (1998).

108. Harris, *supra* note 96, at 1720, citing THOMAS R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES* §§ 68–69, at 66–67 (1858).

109. See Harris, *supra* note 96, at 1716–1718 (“[M]embership in the new social category of ‘Negro’ became itself sufficient justification for enslavability.”), citing CHRISTOPHER LASCH, *THE WORLD OF NATIONS: REFLECTIONS ON AMERICAN HISTORY, POLITICS, AND CULTURE* 17 (1974).

110. *Hudgins v. Wrights*, 11 Va. (134, 137 (Va. 1806)) ([F]rom the first settlement of the colony of Virginia to the year 1778, all negroes . . . brought into this country by sea, or by land, were slaves. And by the uniform declarations of our laws, the descendants of the females remain slaves, to this day, unless they can prove a right to freedom, by actual emancipation, or by descent in the maternal line from an emancipated female.”). For more commentary on the burdens black claimants had to meet to gain emancipation during the 18th and 19th Centuries, see Davis, *supra* note 91 (discussing race as a social construct and explaining why race matter in civil rights organizing).

111. See HANEY LOPEZ, *supra* note 52, at 28; see also Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 51, 64–65 (2005). “[W]hiteness has come to represent a positive property right in America’s political and economic wealth. The opposite could be said about ‘blackness,’ a negative property right in America’s legacy: beginning with a history of blacks as whites’ enslaved property.” *Id.*

112. Harris, *supra* note 106, at 1720.

113. Davis, *supra* note 101, at 708.

114. HANEY LOPEZ, *supra* note 50, at 28.

115. JORDAN, *supra* note 29, at 24.

Christianity, and other hallmarks of Whiteness. Justice Taney affirmed this racial binary in *Dred Scott v. Sandford*, stating:

[Blacks are] being of an inferior order, and altogether unfit to associate with the white race either in social or political relations. . . . At the time of the Declaration of Independence and when the Constitution of the United States was adopted. . . . blacks were so inferior that they had no rights which the white man was bound to respect.¹¹⁶

Taney branded blacks as inferior to whites 29 times in his majority opinion,¹¹⁷ and solidified that the essence of Blackness clashed with that of civilization and humanity, both of which were conflated with whiteness.

The *Dred Scott* decision symbolized the prevailing societal attitude toward Blacks during the Antebellum Era. Ariela Gross cites Taney's opinion in *Dred Scott* as an example of "trial as narrative and performance."¹¹⁸ Gross classifies Taney's observations in *Dred Scott* as, "[l]egal doctrine [that reflected] white Southern ideology," and thus, a narration of the prevailing southern worldview that Blacks were property and to remained enslaved.¹¹⁹ Gross further characterizes *Dred Scott* as a "performance of white supremacy over enslaved Africans," whereby the Supreme Court endorsed "[S]outhern law as an instrument of slaveholders' power."¹²⁰

The Southern States enacted the Slave Codes that enshrined that Black slaves were the property of Whites.¹²¹ Under the law, Blackness was defined in terms that reaffirmed its alignment with property, and its misalignment with humanity. Conversely, the Slave Codes preserved the ownership rights of Whites, and created enforcement mechanisms that punished slaves and non-slaves that encroached upon them. Section VI of this article analyzes how Slave Codes adopted by southern states distinctly impacted Muslim slaves.

116. *Dred Scott v. Sandford*, 60 U.S. 407, 411 (1857).

117. Higginbotham, *supra* note 85, at 19 n.9.

118. Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 645 (2001).

119. *See id.* at 642.

120. *Id.* at 642–43.

121. *See* JUNE PURCELL GUILD, BLACKS LAW OF VIRGINIA: A SUMMARY OF THE LEGISLATIVE ACTS OF VIRGINIA CONCERNING NEGROES FROM EARLIEST TIMES TO THE PRESENT (1936).

C. Godlessness: A Property of Black Slaves

African slaves did not possess the First Amendment right to freely exercise their faith.¹²² In fact, African slaves held no constitutional rights at all. As property, Muslim and non-Muslim slaves alike were viewed as, “[a] docile, devoted, contented” monolith unfit for, and unworthy of, spiritual lives.¹²³ Disassociating faith from the lives of slaves was central to the maintenance of the institution of slavery:

If Puritans were to preach the good news of Christ crucified and resurrected to West Africans, the colonists might undermine their fiscal investments. And black bodies were too badly needed in the New World to cook, clean, and cultivate the land.¹²⁴

Slave codes restricting slaves from religious worship were enacted by every state in the South.¹²⁵ Southern states implemented a range of statutes that outlawed slaves from worshipping and assembling, for either religious or non-religious purposes. A Virginia statute even held that, “baptism of slaves did not exempt them from bondage.”¹²⁶ Although missionaries sought to save the souls of slaves through baptism, religious conversion would not save their bodies from enslavement. Local police, slave owners, and private citizens enforced these slave codes, creating insufferable conditions for slaves seeking to practice their faith.¹²⁷

African slaves held no constitutional protection to freely practice religion, while Slave Codes in the South criminalized their religious activity. Therefore, federal and state law worked in tandem: first, to

122. U.S. CONST. amend. I. Black slaves were property not citizens in Antebellum America, and thus were not protected by the First Amendment. In Virginia, Muslim slaves were not protected by the Virginia Act of 1786, which furnished the State Governor with the power to ship out suspicious aliens. The Act, authored by Thomas Jefferson, also extended religious freedom to legal residents and aliens alike. According to Jefferson, “the Jew and the Gentile, the Christian and the Mahometan, the Hindoo, and infidel of every denomination.” ROBERT J. ALLISON, *THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD 1776-1815* 6–7 (1995). The right to freely exercise religion, however, was denied to Muslim slaves.

123. C. ERIC LINCOLN, *THE BLACK MUSLIMS IN AMERICA* 39 (3d. ed. 1961) (“Historians have contributed to the confusion by stereotyping black slaves as docile, devoted, contented servant, or else by ignoring him altogether. Active protests by African Americans against the condition of slavery imposed upon them by a comparatively infinite power do not commonly appear in America’s textbooks. Knowledge of the numerous slave revolts and insurrections . . . [is] available only to the scholar who has the facilities for laborious research.”).

124. BLUM & HARVEY, *supra* note 95, at 49.

125. *See id.*

126. *Id.* at 50.

127. These codes are closely examined within the specific experience of Muslim slaves in Section V.

maintain the narrative that African slaves were a godless people;¹²⁸ and second, to separate slaves from a spiritual existence that could foment resistance to slavery and (potentially) destabilize the entire institution. The result was remaking African slaves into chattel, and thus, one-dimensional beings divorced entirely from a religious or spiritual identity.

III. CONVERTING RELIGIOUS INTO RACIAL IDENTITY: MUSLIMS AS ARABS AND TURKS

Islam is a spiritual network defined by religion, never race or ethnicity. Muslims – the followers of Islam – hail from a wide range of different racial and ethnic origins.¹²⁹ Islam encompasses a range of legal schools of thought, which have spawned a number of distinct Islamic sects and traditions.¹³⁰ Therefore, the Muslim community today is, and has long been, a multiracial, multicultural, and spiritually diverse population.¹³¹ The *Qur'an* explicitly disavows any distinctions made among Muslims across racial or ethnic lines.¹³² Despite this, Islam and Muslims have been defined along racial and ethnic terms throughout American history.

Accordingly, this Section examines the racial construction of Muslim identity during the Antebellum Era. Political propaganda emanating from the state in the late 18th Century engendered a narrow racial understanding of Muslim identity as exclusively Arab and Turkish. Racially restrictive immigration law preempted the influx of immigrant Muslims into the U.S., and the courts reaffirmed the denial of naturalization claims of immigrants from the Middle East commencing in the late 19th Century. Subsection A illustrates the political construction of Muslim identity within American government, with specific emphasis on the propaganda and rhetoric arising from the

128. Proponents of slavery argued that slavery “saved” Africans them from a more debased existence. This view also contended that slavery offered African slaves with a preferred life to the ones from which they came.

129. See generally PEW RESEARCH CENTER, THE WORLD’S MUSLIMS: UNITY AND DIVERSITY, (Aug. 9, 2012), available at <http://www.pewforum.org/files/2012/08/the-worlds-muslims-full-report.pdf> (last visited Sept. 10, 2014) [hereinafter “The World’s Muslims”].

130. WAEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 31–37 (2009).

131. See generally The World’s Muslims, *supra* note 133.

132. BERNARD LEWIS, RACE AND SLAVERY IN THE MIDDLE EAST: AN HISTORICAL ENQUIRY 6 (1999) (“Since all human beings were naturally free, slavery could only arise from two circumstances: (1) being born to slave parents or (2) being captured in war.”). Therefore, these two limitations to who could be enslaved limited the capture and sale of slaves along ethnic, tribal or racial lines. Muslim slavery, unlike the American practice, was colorblind and distinctly political in form and function.

Barbary Wars. The following subsection will closely examine how Muslim identity was converted from a religion into a racial identity, which immigration law explicitly deemed inassimilable with American citizenship.

A. The Political Construction of Muslim Identity

European scholarly and political discourse informed early American knowledge about Islam and Muslims.¹³³ More specifically, “Orientalist” research and scholarship shaped formative American attitudes and images of Islam as a religion, and Muslims as a people.¹³⁴ These distorted attitudes and images drew the parameters of what Americans believed to be the “Muslim World” – a socially constructed sphere demarcated along political and racial lines.¹³⁵ The Muslim World, as imagined by American statesman, converted a population united by religion, defined by its colorblind and transnational character, into a narrowly constructed geographic and ethnic entity. Muslims, as imagined by the state and law, were those people that hailed from the politically constructed Muslim World.¹³⁶

The imagined boundaries of the Muslim World shifted according to the historical moment’s primary political menace. During the European Colonial Era, the Muslim World was reformed to encompass regions in the Levant, Gulf, and North Africa. As the Ottoman Empire claimed regional and geopolitical hegemony, climaxing in the 16th and 17th Centuries,¹³⁷ the Muslim World as imagined assumed a distinctly Ottoman and Arab form.

Oftentimes, Arabs and Turks were conflated into one group, Muslims or “Mohammedans,” by virtue of a shared faith and political history.¹³⁸ The U.S. adopted the European view of Islam and Muslims

133. THOMAS KIDD, *AMERICAN CHRISTIANS AND ISLAM: EVANGELICAL CULTURE AND MUSLIMS FROM THE COLONIAL PERIOD TO THE AGE OF TERRORISM* 1–2 (2009).

134. EDWARD SAID, *ORIENTALISM* (1979).

135. *See generally id.*

136. *Id.*

137. *See generally* STANFORD J. SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY 169–277* (1976) (explaining that the Ottoman Empire decelerized and began to come apart in the 18th century).

138. In addition, Arabs and Ottomans (or Turks) were also believed to be the same people because of Ottoman rule over much of the Arab World from the 13th to the early 20th Century. Although the relationship between Ottoman governance and Arab people was many times hostile, the courts routinely conflated natives of the Arab lands governed by the Ottoman Empire as “Turks.” Samir Khalaf, *The Background and Causes of Lebanese/Syrian Immigration to the United States Before World War I*, in *CROSSING THE WATERS: ARABIC-SPEAKING IMMIGRANTS TO THE UNITED STATES BEFORE 1940* 18 (Eric J. Hooglund ed., 1987).

to serve as its reference for its independent formation of Islamic and Muslim identity. However, an “American Orientalist” view of Muslim identity,¹³⁹ which relied heavily on European Orientalist baselines supplemented with distinct American stereotypes, resulted from the state’s independent engagement with Muslim actors.¹⁴⁰

In 1785, the U.S. government found itself on the brink of war with the “Barbary States.”¹⁴¹ The Barbary States encompassed present-day Morocco, Algeria, and Tunisia, in North Africa, which were populated by overwhelmingly by Muslims.¹⁴² The War was incited by the Barbary States’ interception of an American ship off the coast of Algiers, and the subsequent enslavement of the 124 American citizens on board.¹⁴³ Only years separated from independence, an “Arab Muslim” entity emerged into the principal geopolitical menace of an embryonic American nation.¹⁴⁴ As a result, the conflict sparked political rhetoric and propaganda that vilified the Barbary States, and positioned them as the principal enemy of the state on the world stage, only years after the U.S. won its independence.

American political propaganda vilifying the Barbary States focused largely on their Muslim identity.¹⁴⁵ Despite the geographic proximity of the Barbary States to the West African regions that sourced American slaves, Congress classified the people from the Bar-

139. Here, I use “American Orientalism” to refer to the state’s view of Islam and the “Muslim World” that began to take form in the 18th Century. This is not to be mistaken by how the term has been deployed more recently by other scholars, most notably Douglas Little, who uses “American Orientalism” as governmental view of the Middle East that began to take shape after 1945. See generally DOUGLASS LITTLE, *AMERICAN ORIENTALISM: THE UNITED STATES AND THE MIDDLE EAST SINCE 1945* (2008) (exploring the relationship between the United States and the Middle East from World War I to the war in Iraq).

140. See MARR, *supra* note 32. See generally ALLISON, *supra* note 125. Both authors argue how the prevailing conceptions of Muslim World were formulated according to contemporary political threat.

141. ALLISON, *supra* note 125, at 127. See also Kidd, *supra* note 137, at 19–36.

142. “Barbary” references the indigenous Amazigh, or Berber, populations in North Africa. Berbers include a range of tribes in North, Western, and Sub-Saharan Africa that predate the coming of the Arab peoples. However, Berbers were conflated with Arabs during the Antebellum Period. See BRUCE MADDY-WEITZMAN, *THE BERBER IDENTITY MOVEMENT AND THE CHALLENGE TO NORTH AFRICAN STATES* 14 (2011).

143. At the very same time in 1793 when the U.S. declared war on Algeria for enslaving its white citizens, it was funneling scores of West Africans to work as slaves in the Antebellum South.

144. See generally ALLISON, *supra* note 125, at 10 (discussing how America’s farmers and planters suffered when America refused to pay bribes to the Bey of Algiers in order to gain access to the Mediterranean).

145. *Id.* (referring to Algiers as a “piratical state”).

bary States as “Muslims” because they were thought to be Arab.¹⁴⁶ Arab identity, in the late 18th Century, was synonymous with Muslim identity. Again, Muslim identity was imagined and defined along racial terms, and this extinguished seeing the people of the Barbary States for who they really were, Arabs and Berbers.¹⁴⁷ Since the people of the Barbary States were collectively classified as Arabs, and thus Muslims, political propaganda – and subsequently, the courts – dis-identified them as “Africans.” This designation of North Africans as Muslims, compounded with the conflation of African identity with Blackness, furthered the idea that the indigenous natives of North Africa were not “African.” In turn, the state viewed Africans as a people wholly distinct from Muslims.

B. Inassimilable Muslims and the Naturalization Act of 1790

Propaganda arising from the Barbary Wars, combined with Orientalist baselines, cemented the idea that Arab and Muslim identity were one in the same.¹⁴⁸ In other words, Islam – as a religious identity – was converted into a narrow ethno-racial identity that excluded any group that was not believed to be Arabs or Turks. This “disorientation of Muslim identity,” shaped how American halls of power and society viewed Muslim identity beginning in the late 18th Century and onward.¹⁴⁹

Many judges adopted the disoriented view of Muslims identity before the first immigrant-petitioner from the Arab World came

146. The Barbary States’ enslavement of white Americans bolstered the belief that Islam drove slavery. State rhetoric framed the Wars as a religious struggle between American Christendom and Islam, instead of a dispute between two states. This framing: first, further entrenched the Racial Antebellum belief that Islam was exclusively Arab, this time embodied by the Barbary States; second, deployed Christianity as synonymous with American citizenship, BLUM & HARVEY, *supra* note 95, at 8, and; third, indicated that “Muslim slavery” was arbitrary, capricious, and prone to subjugate any race of people that stood in its way – including whites, Africans, or any other group of people.

147. See MADDY-WEITZMAN, *supra* note 148, at 14 (introducing the idea of how the French determined the origins of the Berbers in a way that “best served” their colonization project).

148. The term “Barbary” stems from “Barbarian,” and was defined as “those who refuse to cooperate with the dominant faith or commercial systems.” See KIDD, *supra* note 137, at 2 (explaining how “printed treatises allowed colonists to believe they had legitimate ‘knowledge’ of Islam”).

149. See Khaled A. Beydoun, *Between Muslim and White: The Legal Disorientation of Arab-American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 4 (forthcoming, 2013) [hereinafter “*Between Muslim and White*”]. “[T]he conflation of Arabs and Muslims as one in the same, and the legal re-positioning of this group as inassimilable antagonists of the U.S., characterized the disoriented view of Arab identity that guided the rulings of judges presiding over the naturalization proceedings of immigrants from the Arab World.” *Id.*

before an American judge seeking citizenship.¹⁵⁰ A number of early 18th Century judges subscribed to the prevailing misrepresentations of Arabs-Muslims that followed the Barbary Wars, and also turned to Orientalist secondary sources that bolstered their disoriented understanding of Muslim identity.¹⁵¹ Muslims were not only narrowly Arabs, but from the vantage point of the state, enemy combatants that practiced a faith hostile to Christianity, and cultural norms that threatened American ideals and national security. Consequently, Muslims were conceived as an Arab monolith to be fenced off at the border, and the Naturalization Act provided the legal means to accomplish this end.

“Arab” was viewed as invariably the same as “Muslim” during the Antebellum Era, and the Naturalization Act held this identity to be inassimilable with American citizenship. The Act expressly made Whiteness a prerequisite for American citizenship.¹⁵² Further, the vitriolic propaganda against Muslims, vis-à-vis the Barbary States and accepted Orientalist baselines, positioned Arab-Muslims as societal antitheses and enemy combatants. Thus, Arab-Muslim identity was the polar opposite of Whiteness on a global scale, which made the pursuit of American citizenship under the Naturalization Act impossible.

U.S. courts not only institutionalized an image and understanding of Muslims as irreducibly foreign and inassimilable, but disoriented Muslim identity as being narrowly Arab and non-Black. The Naturalization Act explicitly restricted non-whites as prospective American

150. See SARAH M. A. GUALTIERI, *BETWEEN ARAB AND WHITE: RACE AND ETHNICITY IN THE EARLY SYRIAN AMERICAN DIASPORA* 3 (2009).

151. George Sale’s problematic translation of the Qur’an served as one of the courts’ most referenced texts through the Naturalization Era. See *Clay v. United States*, 403 U.S. 698, 708 (1971). Sale’s problematic translation engendered shallow, “[f]amiliarity with Islamic law or the Muslim faith,” and its presentation perpetuated a range of harmful representations of Islam, and Muslims. The reliance on these Orientalist texts, such as Sale’s translation of the Qur’an, not only deepened the disorientation of Arab identity within the courts, but also stamped these representations with judicial approval. George Sale’s translation of the *Qur’an*, Islam’s Holy Book, served as a commonly cited source for judges presiding over hearings involving Arabs or Muslims. See Suzan Jameel Fakahani, *Islamic Influences on Emerson’s Thought: The Fascination of a Nineteenth Century American Writer*, 18 J. MUSLIM MINORITY AFF. 291, 300 (1998).

152. Naturalization Act of 1790, Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795) (“[A]ny alien being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof on application to any common law Court of record in any one of the States wherein he shall have resided for the term of one year at least . . . shall be considered as a citizen of the United States.”). The Act did not compel or mandate immigrants to naturalize. This Article will refer to the time period when the Naturalization Act governed the naturalization of immigrants as the “Naturalization Era.”

citizens, and the political imagination of Muslims as exclusively Arabs entrenched the idea that Blacks could not be Muslim; and second, that the law imagined Arabs-Muslims, as historical rivals of Christianity and contemporary enemy combatants, as inassimilable and irreducibly foreign.

C. The Legal Construction of Muslim Identity

The political construction of Muslim identity informed how the courts assessed the citizenship petitions of immigrants from the Middle East. Following the Barbary Wars and the rising regional hegemony of the Ottoman Empire in the 19th Century, Muslim identity was inextricably defined and classified in line with Arab and Turkish identity.

The first wave of immigrants from the Middle East traveled to the U.S. seeking citizenship in the late 19th Century. At this juncture, an understanding of Muslim identity as narrowly Arab and Turkish was already ingrained with the U.S. courts. Muslim identity, in line with the propaganda and rhetoric emanating from the legislative and executive branches, posed a political and civilizational threat to the U.S. This caricaturing of Muslim identity became a barrier to citizenship for immigrants from the Middle East, who regardless of religion or ethnicity, were initially viewed by the courts as Muslims.¹⁵³ The courts viewed Arab and Turkish identity interchangeably with Muslim identity, which narrowed the understanding of Muslim identity and the “Muslim World” within the limited geographic bounds of the Middle East and North Africa; and second, overlooked the religious and ethnic diversity within these regions.¹⁵⁴

Beginning in the 19th Century, the first waves of immigrants from Mount Lebanon and the surrounding Levant region of the Arab

153. *Between Muslim and White*, *supra* note 156, at 20.

154. The political understanding of Muslim identity complicated the citizenship petitions of both Muslims and non-Muslims from the Muslim World. Matching the prevailing political imagination of Muslims as Ottoman and Arab, the courts assumed that anybody that hailed from the Muslim World – whether they be Christians, Jews, Zoroastrian, or Druze – were *racially Muslim*. The Muslim World, for one judge, could include or exclude the Gulf, North Africa, Central Asia, South Asia, Anatolia, North Africa and even the South Asian sub-continent. However, judges never included Sub-Saharan Africa, or the West African nations where Islam thrived, in an understanding of the Muslim World. For instance, although Mount Lebanon was home to a lower percentage of Muslims than Northern Nigeria in the 19th Century, the latter was not included as part of the imagined Muslim World while the former deemed one of its hubs by the courts. Therefore, the courts limited its conception of Muslims to anyone and everyone who came from within the bounds of the Middle East and North Africa, and in turn, legally adopted the distorted political understanding of Muslim identity.

World traveled to the U.S. The vast majority of these immigrants were Christian.¹⁵⁵ The courts were initially split as to whether these Christian petitioners from the Levant were White, fearing that they were “[e]ither undercover Muslims or Christians irredeemably tainted by Muslim blood.”¹⁵⁶ The racial profile of Muslim identity as Arab,¹⁵⁷ and Turkish,¹⁵⁸ generally trumped the religious affiliation of the petitioners. Since these early Christian immigrants originated from a region populated by Arabs and governed by Ottomans,¹⁵⁹ the courts struggled with the question of whether these petitioners were legitimately Christian or “Muslims in hiding.”¹⁶⁰ This debate continued until a 1915 decision established that Levantine Christians were White by law.¹⁶¹

Despite the ruling establishing courts categorically denied citizenship to Muslims.¹⁶² Unlike Christians, Muslims from the Middle East were members of a faith deemed antagonistic to American culture and inassimilable with the statutory definition of whiteness mandated by the Naturalization Act. The courts confirmed that Islam was antithetical to American interests and inassimilable with American cul-

155. JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* 69 (2009); see also GUALTIERI, *supra* note 157, at 46.

156. *Between Muslim and White*, *supra* note 156, at 20.

157. *Ex parte Shahid*, 205 F. 812, 816 (D.S.C. 1913) (“What is the race or color of the modern inhabitant of Syria it is impossible to say. No geographical area of the world has been more mixed since history began. Originally, possibly of Hittite or non-Semitic races, for a time at least under Egyptian domination, then apparently taken possession of largely, and almost exclusively, by the Semitic peoples, then overlaid with immigration from European races, then again followed by another Semitic conquest in the shape of the Arabian Mahometan eruption.”); see also *In re Ahmed Hassan*, 48 F. Supp. 843, 845 (E.D. Mich. 1942) (“Apart from the dark skin of the Arabs, it is well known that they are a part of the Mohammedan world and that a wide gulf separates their cultures from that of the predominantly Christian peoples of Europe.”).

158. See *In re Halladjian*, 174 F. 834, 839 (C.C.D. Mass. 1909); see also *Karamian v. Curran*, 16 F.2d 958 (2d. Cir. 1927); *United States v. Cartozian*, 6 F.2d 919, 920 (D. Or. 1925) (“Although the Armenian province is within the confines of the Turkish Empire, being in Asia Minor, the people thereof have always held themselves aloof from the Turks, the Kurds, and allied peoples, principally, it might be said, on account of their religion, though color may have had something to do with it. The Armenians, tradition has it, very early, about the fourth century, espoused the Christian religion, and have ever since consistently adhered to their belief, and practiced it.”).

159. GUALTIERI, *supra* note 157, at 24.

160. *Between Muslim and White*, *supra* note 156, at 4.

161. See *Dow v. United States*, 226 F. 145, 148 (4th Cir. 1915). *Dow v. United States* was the first major judicial decision that classified Syrians as white; see also *Between Muslim and White*, *supra* note 156, at 26.

162. Naturalization cases involving Muslim petitioners often turned into judicial “performances” whereby judges articulated how white supremacy applied to immigrants from the Middle East and the “Muslim World;” and second, juridical “narrations” of the prevailing political worldview of Muslim inferiority, backwardness, and avarice. Gross, *supra* note 133, at 644–654 (describing “trials as narrative and performance” when distinctions were made between blacks and whites).

ture, and there, preempted the immigration of Muslims into the U.S.¹⁶³ As Christianity formed to be an integral component of Whiteness, the courts interpreted the naturalization statute in relation to Christian petitioners from the Middle East as mechanism for providing safe haven. As Christianity formed to be an integral component of Whiteness, the courts interpreted the naturalization statute in relation to Christian petitioners from the Middle East as mechanism for providing safe haven. Therefore, Whiteness was initially granted to Christian petitioners from the region, in part, as a consequence to the courts' depiction of Arabs and Turks, as the sole representatives of Muslims, as persecutors of Christians.¹⁶⁴ Muslim immigrants, part of that persecuting majority, were denied citizenship time and again.

The courts during the Naturalization Era reconfirmed that Arabs (and Ottoman identity) represented Muslims.¹⁶⁵ Muslims, considered a political and ideological menace, were to remain outside of the U.S. at all costs. Using the enslavement of American Christians in the Barbary States as a cautionary tale, the courts sometimes naturalized Christians from the Middle East as preventative or responsive measure to Muslim persecution.¹⁶⁶ The Naturalization Era cases involving immigrants from the Middle East not only adopted the political conflation of Muslim with Arab and Turkish identity, but also legally stamped the conversion of Islam as religion into Islam as race. Islam, as a race remade by politics and endorsed by law, as illustrated by the "Arab Naturalization Cases,"¹⁶⁷ did not include the

163. Compare RANDA A. KAYYALI, *THE ARAB AMERICANS (THE NEW AMERICANS)* 49 (2006), and Sarah Gualtieri, *Syrian Immigrants and Debates on Racial Belonging in the Los Angeles, 1875-1945*, SYRIAN STUDIES ASS'N BULLETIN, <https://ojcs.siue.edu/ojs/index.php/ssa/article/view/773/355> (last visited Aug. 31, 2014) (providing an example of a Syrian immigrant who was able to naturalize). See Khaled A. Beydoun, *The Business of Remaking Arab-American Identity*, ALJAZEERA (June 15, 2012), <http://www.aljazeera.com/indepth/opinion/2012/06/2012610114257813921.html> (discussing whether Arab-Americans should remain categorized as white).

164. See *In re Halladjian*, 174 F. 834, 839, 841 (C.C.D. Mass. 1909) ("The Turks and the Saracens did not exterminate the people they conquered. Conversion to Mohammedanism and tribute were usually offered as alternatives to the sword."); see also *Karamian v. Curran*, 16 F.2d 958 (2d. Cir. 1927) ("He [Yerwand Karamian] and other boys of his race were most cruelly treated by the Turks, and he himself 'burned from the hip to the knee with a hot steel rod, because they wanted [him] to be a 'Mohammedan'."). See *Reid v. Covert*, 354 U.S. 1, 58 (1957); see also *Ex parte Shahid*, 205 F. 816 (E.D.S.C. 1913).

165. See generally *Between Muslim and White*, *supra* note 156.

166. *Id.* at 16–26.

167. *Between Muslim and White*, *supra* note 170, at 7. The rationales and rulings delivered by the judges in the ten Arab Naturalization Cases illustrate that the disorientation of Arab identity was deeply entrenched during the Naturalization Era. In addition, the rulings from these cases highlight the presumption held by Naturalization Era judges that any immigrant from the Arab World was a Muslim unless proven otherwise. This presumption moved the first eight

peoples of Sub-Saharan Africa that were made into slaves in the U.S.¹⁶⁸

IV. SEGREGATING BLACK FROM MUSLIM IDENTITY

“[W]ide galleries ran all around the four sides, whose Moorish arches, slender pillars, and arabesque ornaments, carried the mind back, as in a dream, to the reign of oriental romance in Spain.”

—HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN*¹⁶⁹

African Muslims were absent from the vision of the “reign of oriental [Muslim Empire],” constructed in the minds of Americans during the Antebellum Era.¹⁷⁰ Although Islam was brought to Africa in the 9th Century, Muslims were seldom if ever associated with African identity – and vice-versa.¹⁷¹ This, together with the conversion of Africans into Black slaves, undermined the prospect of seeing Black and Muslim as a coexistent identity. Therefore, although enslaved Muslims worshipped on plantations that resembled Stowe’s “Moorish and Oriental” inspired estate,¹⁷² their Blackness branded them with a legal status that negated their Muslim identity. In addition, Muslims were shaped into an inassimilable foreign Arab and Turkish foil, which further deepened the rift between Black and Muslim identity.

This Section highlights the structural barriers between Black and Muslim as constructed in the Antebellum Era. Subsection A closely examines how the core characteristics of Black and Muslim identity, as constructed during the Antebellum Era, were incompatible by definition. As a result, recognition of a Muslim slave’s Muslim identity, as discussed in subsection B, necessitated racial re-designation (as Arab), since Black (slave) and Muslim were legally incompatible.

Christian petitioners to ‘perform,’ and in Shishim’s case over-perform, their Christianity in order to gain citizenship.” *Id.*

168. KIDD, *supra* note 151, at 1 (“Although there were perhaps thousands of Muslim African slaves working on colonial American plantations, most free white observers failed to realize their devotion, and their presence had little impact on the way elite Anglo-American colonists imagined Islam[,] . . . the Prophet Muhammad,” and Muslims.”).

169. HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN* 168–69 (Jean Fagan Yellin ed., Oxford Univ. Press 1998) (1852).

170. *Id.* at 253.

171. Gomez, *supra* note 3, at 674.

172. *Id.*

A. Black and Muslim: Incompatible Racial Classifications

At first glance, the racial formation of Black and Muslim identities during the Antebellum Era seemed independent and disconnected processes. The formation of Blackness centered solely on African slaves in the U.S. On the other hand, Arabs and Turks were considered and classified as an inassimilable foreign menace, who came to be perceived as a growing societal threat when immigration from the Middle East proliferated in the mid-19th Century. However, the critical mass of Muslim slaves, and their distinct experience at the intersection of both Black and Muslim identity, confirmed that these racial constructions converged – and did so quite frequently.

Despite their overlap on the ground, the law prevented the legal convergence of Black and Muslim identity during the Antebellum Era. Black and Muslim identity were constructed in a fashion that made them legally irreconcilable. Blacks were slaves that held no right to exercise religion, while immigration law restricted the naturalization of Muslims (as non-white Arabs and Turks). Their definitional distinctions made the integration of Black and Muslim identity impossible. Therefore, slave codes and immigration laws converged to form a sharp line between Black and Muslim identity. As a result, Black and Muslim were incompatible identities as a matter of law, which further entrenched the practical invisibility of Muslim slaves.

Therefore, identifying an individual as “Black” cancelled the possibility that he or she could also be Muslim. The legal incompatibility of Black and Muslim identity is best highlighted in four core areas: (1) demographic divergence; (2) distinct legal statuses; (3) “religious” distinctions; and (4) their perceived oppositional roles with relation to the slave trade (Muslim merchant, Black slave).

1. Demographical Divergence

Blackness was formed in the image of enslaved Africans, and “coded to servitude.”¹⁷³ Although African slaves overwhelmingly came from the western parts of the continent, the state and slaveholders generally perceived Sub-Saharan Africa as a cultural, ethnic, and religious monolith. As a result, Africans were entirely (whether enslaved on American soil or on the continent) assigned Black identity and presumed to be slaves.¹⁷⁴ African populations originating from

173. Davis, *supra* note 125, at 708.

174. *Hudgins v. Wrights*, 1. Hen. & M. 134, 134 (Va. 1806).

northern parts of the continent were distinguished, and the Sahara Desert functioned as a racial boundary that divided Arabs from Blacks. “North Africans,” although broadly heterogeneous, were classified as Arabs,¹⁷⁵ and thus “Muslims,” that were to be restricted from naturalization.

Congress and the courts during the Antebellum Era converted “Muslim” from a religious identity into a racial one.¹⁷⁶ This racial construction was limited to Arabs and Turks during the Antebellum Era, and beyond it.¹⁷⁷ Further, this construction excluded a range of ethnic groups that identified, religiously, as Muslims. Among the excluded groups were African Muslims, particularly Africans from the western regions of the continent, where Islam was practiced since the 9th Century.¹⁷⁸

As a result, the intersectional identity of Muslim slaves was marginalized by the legal construction of “African” and “Muslim” identities. Africans were Black, and vice-versa, and entirely stripped of a religious identity. On the other hand, Muslims that originated from Sub-Saharan Africa did not fit within the racial profile of Muslim identity, which was limited to people that hailed from the Middle East and North Africa

2. Distinct Legal Statuses

Blackness signified property while Whiteness signified ownership, and Blackness represented inhumanity while Whiteness marked citizenship.¹⁷⁹ As the property interests of Whites, Blackness formed the domestic legal antithesis of Whiteness.¹⁸⁰ Slave codes and the courts reaffirmed that Whites held “full dominion over slaves,” and the law repeatedly held that slaveholders could practice that dominion in any way they deemed fit. The courts seldom limited slaveholders’ rights over their slaves, and regularly enforced their unfettered freedom to buy, sell, trade, and recover runaway slaves. One decision even affirmed a slaveholders’ right to kill their slaves, which vividly highlights

175. Northern Africa is populated by a heterogeneous population, which includes Arabs, but also encompasses Coptic Egyptians, Nubians, and a diverse array of Berber tribes (*kabil*).

176. Nagwa Ibrahim, Comment, *The Origins of Muslim Racialization in U.S. Law*, 7 *UCLA J. ISLAMIC & NEAR E. L.* 121, 125 (2008).

177. Muslim identity is still generally conflated with Arab identity in the U.S.

178. See Gomez, *supra* note 3, at 674 (“Islam had penetrated the savanna south of the Sahara Desert by the beginning of the ninth century as a consequence of Berber and Arab commercial activity.”).

179. See *supra* note 174 and accompanying text.

180. *State v. Mann*, 13 N.C. (2 Dev.) 263, 265 (1829).

just how tightly Black identity was tied to property (and alienated from humanity), as a commodity to be disposed of at the whim of a slaveholder.¹⁸¹

Muslims were perceived as an inassimilable foreign menace that courts excluded from the statutory definition of whiteness. Personified by Arabs and Turks, the “Mohammedan eruption” posed an ideological threat that endangered American democracy and liberal ideals.¹⁸² Therefore, Islam and Muslims were to be kept outside of America’s borders. The Naturalization Act guaranteed their inadmissibility as citizens, and judges subsequently interpreted the law to carry forward this aim until 1944.¹⁸³ While slave codes marked Blacks as slaves, immigration law and subsequent rulings oriented Muslims as the undesirable and menacing aliens that were to be restricted American citizenship.

3. “Religious” Distinctions

Slaves held no constitutional right to freely exercise their faith. Part of the process of remaking African slaves into Black property was depicting them as a people unworthy and unfit for religion and a spiritual life.¹⁸⁴ As non-citizens, slaves held no right to freely exercise their religions, and slave codes in the Antebellum South led to the aggressive policing and profiling of slaves that continued to worship. The portrayal of African slaves as a godless people was, for the state and slaveholders, a vital prerequisite for justifying their wholesale enslavement. Per this logic, proponents of slavery feared that extending the right to worship would humanize slaves before the eyes of the law and the polity. In other words, legally acknowledging that slaves were capable of religious worship, an exercise reserved for full-fledged beings, would amount to an admission of their humanity. Thus, the epis-

181. Mann, 13 N.C. (2) Dev.) at 268.

182. See *Ex Parte Shahid*, 205 F. 816 (E.D.S.C. 1913).

183. See, e.g., *Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944) (“As every schoolboy knows, the Arabs have at various times inhabited part of Europe, lived along the Mediterranean, been contiguous to European nations and been assimilated culturally and otherwise, by them. . . . The names of Avicenna and Averroes, the sciences of algebra and medicine, the population and the architecture of Spain and of Sicily, the very words of the English language, remind us as they would have reminded the Founding Fathers of the action and interaction of Arabic and non-Arabic elements of our culture. . . . [T]he Arab people stand as one of the chief channels by which the traditions of white Europe, especially the ancient Greek traditions, have been carried into the present.”).

184. Onwuachi-Willig, *supra* note 102, at 149 (“As a moral matter, many . . . viewed enslavement as an acceptable practice to inflict on blacks, whom they believed to be inferior heathens.”).

temological denial of the spiritual capacity of slaves, and enshrining this belief through slave codes, stripped Muslim slaves of their religious identity.

As discussed in Section III, the religion of Islam itself was converted from a religion into a narrowly defined racial identity. The construction of Muslim identity also shaped the religion of Islam into a tyrannical, totalitarian faith shaped in the mirror image of Arabs and Turks.¹⁸⁵ Islam, again, was imagined and then classified by the courts as a racial identity, and second, an Arab and Turkish faith.¹⁸⁶

On account of their Blackness, Muslim slaves were perceived as a godless people. While Muslim slaves strove to meet the religion's dictates on American soil, the state and slaveholders were generally unable to recognize Muslims and conspicuous Islamic practices and symbols because they did not align with the state's racial caricature of Muslim identity.¹⁸⁷ In instances when believing slaves were identified as Muslim, as discussed more closely in the following subsection, they were racially re-identified as "Arab" or "Moor."¹⁸⁸

4. Muslim Merchant, Black Slave

Slavery was synonymous with Blackness and therefore, slave was a status assigned to Sub-Saharan Africans at large.¹⁸⁹ Sub-Saharan Africans were perceived as Blacks regardless of their physical location.¹⁹⁰ African identity, with the exception of North Africans, marked one as Black, and Blackness coded one as a slave whether located in the Antebellum South or in Africa.¹⁹¹

185. See *Ross v. McIntyre*, 140 U.S. 453, 463 (1891) ("The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse.").

186. See *id.*

187. See, e.g., Gomez, *supra* note 3, at 672.

188. See *supra* Section IV(B).

189. Africans, except North Africans, were classified as black in Antebellum America. The designation of North Africans as non-black during the Antebellum Era roots the present-day legal classification of North Africans and Middle Easterners as white. The Office of Management and Business's (OMB) "Directive 15," the Equal Employment Opportunity Commission (EEOC), and the US Census Bureau codified the designation that Arab-Americans are white. U.S. Census Bureau, *Overview of Race & Hispanic Origin 2010* 3 (March 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> (last viewed on July 15, 2013) ("'White' refers to a person having origins in any of the original peoples of Europe, the Middle East, or North Africa.").

190. Africans within the Antebellum South were black, while Africans still on their indigeneous lands were essentially viewed by the law as a part of the global slave supply. Any African would have been deemed black by any court of law in the U.S. before 1865.

191. As discussed in Section III, North Africans were entirely viewed as Arabs, and thus Muslims, which removed them from African, and in turn, black identity.

The construction of Muslim identity included within it the stereotype that “Muslims were slave merchants.”¹⁹² This image was built upon the idea that Islam’s “religious and political oppression,”¹⁹³ and the Prophet Mohammed’s “ambition” promoted an “uncontrollable” mission to enslave non-Muslims.¹⁹⁴ Islam, as a “systematic symbol of slavery,”¹⁹⁵ was believed to endanger any and every non-Muslim it encountered.¹⁹⁶ Sub-Saharan Africans, Muslims and non-Muslims alike, were believed to be part of this endangered group of “non-Muslims” that were vulnerable to Muslim enslavement.

In line with the antebellum construction of Muslim identity, the activities of Arab and Turkish slave merchants were attributed to Islam and Islamic Law.¹⁹⁷ Consequently, the state indicted Islam as a religion that promoted race-based slavery on account of the slave-driving activity of Turkish and Arab merchants.¹⁹⁸ Muslims did in fact participate in the African slave trade,¹⁹⁹ and Islamic Law itself does not explicitly prohibit slavery.²⁰⁰ However, Islamic Law denounces race-based slavery, and therefore, condemns the enslavement and selling of slaves on account of their ethnic or racial identity.²⁰¹

The conversion of Islam into racial identity facilitated the view that Islamic slavery was, like its American counterpart, a race-based system. This spawned a simplistic binary that distorted the fact that

192. Aidi & Marable, *supra* note 7, at 6.

193. ALLISON, *supra* note 138, at 37.

194. *Id.* “[T]he Prophet Mahomet is a slave to his own ambitions and passions, and enslaves others to them as well. He cannot restrain the passions of his followers because his own are out of control.” *Id.*

195. MARR, *supra* note 32, at 135 (“Islam, as it was orientally figured, served as a deep systematic symbol of slavery itself, supplanting or at least supplementing the biblical genealogy of Egyptian bondage.”).

196. *Id.*

197. *See* LEWIS, *supra* note 136, at 81 (“Because of . . . anti-Islamic act[s] . . . the Turks had become apostates and heathens. It was lawful to kill them without incurring criminal penalties.”).

198. MARR, *supra* note 32, at 135.

199. DIOUF, *supra* note 9, at 12.

200. Islam’s monotheistic predecessors, Judaism and Christianity, also “recognize and accept the institution of slavery.” LEWIS, *supra* note 136, at 4.

201. Race-based slavery is illegal under Islamic Law. Islamic Law scholar Amina Wadud echoes that, “[R]acially based slavery is incongruent with Islam’s egalitarian teachings with regard to race and ethnicity.” Amina Wadud, *Sylvania A. Diouf’s Servants of Allah: African Muslims Enslaved in the Americas*, 15 J.L. & RELIGION 542 (2000-2001). Prominent West African Islamic Scholar, Ahmed Baba, issued a series of scholarly edicts in the 16th Century which disavowed the legality of, “[A]ny possible relation between the black color of African and slavery, because the only cause for slavery in Islam is infidelity.” Bernard Barbour & Michelle Jacobs, *Miraj: A Legal Treatise on Slavery By Ahmed Baba*, in *SLAVES AND SLAVERY IN MUSLIM AFRICA* 125–129 (John R. Willis ed., 1985).

Sub-Saharan Africans also participated in the slave trade.²⁰² Arab and African Muslims, alike, were involved with the selling of Muslim and non-Muslim Africans into slavery.²⁰³ Many of the slaves were Muslim, while others were, “Non-Muslim peoples such as the Bambaras, Ashanti, Dahomeans, Yorubans, and Ibos . . . [that] captured and sold thousands of Africans who were sent to the New World.”²⁰⁴ Many Muslim slaves themselves were familiar with slavery before they arrived in the Antebellum South. Some, “[h]ad already been slaves while others had been slaveholders.”²⁰⁵ The antebellum orientation of Muslims (Arabs and Turks) as slave merchants and Blacks (Sub-Saharan) as slaves distorted a complex historical phenomenon.

B. “De-Negroification” of Muslim Slaves

The slave status that came with Blackness was so enveloping that it diminished every other element of a Muslim slave’s being. Branding an individual with the status of slave limited the ability of one to see the slave beyond this status. However, there were rare occurrences when the Muslim performance of believing slaves led to their “dis-identification” as Black.²⁰⁶ This process, however, rarely led to their recognition as Muslim slaves. Rather, it brought about a Muslim slave’s racial reclassification as “Arab” or “Moor,” which in turn, declassified them as Black.²⁰⁷

Recognizing a practicing slave’s Muslim identity shifted him or her into the racial column of Muslims.²⁰⁸ Kambiz GhaneaBassiri refers to this racial reclassification as, “[t]he de-negroification of enslaved African Muslims.”²⁰⁹ De-negroified slaves were no longer seen

202. See DIOUF, *supra* note 9, at 12; see also GHANEABASSIRI, *supra* note 31, at 17.

203. DIOUF, *supra* note 9, at 12 (“Although Islam prohibited the selling of free believers, the practice did not always follow the principle. African Muslims did sell their coreligionists, especially in times of war. The civil wars and the jihad of nineteenth-century central Sudan, for instance, sent many Muslims sold by other Muslims to the Americas.”); see also GHANEABASSIRI, *supra* note 31, at 17.

204. AUSTIN, *supra* note 41, at 20.

205. DIOUF, *supra* note 9, at 9.

206. Performance of Muslim identity included: prayer, reciting of the Qur’an, writing and reading Arabic, distinctive Islamic dress, and more.

207. Aidi & Marable, *supra* note 7, at 6 (“The literacy and education of the Muslim slaves was rarely seen as a result of their exposure to Islam or Arabic education in West Africa but was attributed to their Arab, Berber, or Moorish origin.”). The term “Moor” denoted Muslims of Arab and Berber background in Northwest Africa (modern day Morocco, Tunisia, Algeria, and Mauritania).

208. See Section III.

209. GHANEABASSIRI, *supra* note 31, at 18.

as Black, but rather Arab or Moor. Acknowledging a slave's literacy, knowledge, and faith conflicted directly with the prevailing belief that Blacks were a godless people. Thus, this racial reclassification was compulsory in that recognizing a slave's Muslim identity, and maintaining his or her Blackness, conflicted with that belief. Austin articulated why Black and Muslim identity could not be viewed as a coexistent identity during the Antebellum Era:

True religious sensibilities in a Muslim, literacy or 'civilization' in an African were not easily admitted: the black man who could believe in god, who prayed, who knew biblical figures, and who could read and write had to be called an Arabian to be allowed in most antebellum and postbellum Southern publications.²¹⁰

Acknowledging a slave that performed activities linked to religion, literacy, and civility, as Black and Muslim could undermine the mainstreamed idea that Black slaves were "inferior heathens" incapable of religion.²¹¹ Maintaining the one-dimensional definition of Blacks as property was vital to the maintenance of slavery, and remained the most salient rebuttal to mounting opposition to the institution that called for its abolition on religious and ethical grounds.

Research indicates that a number of notable Muslim slaves were declassified as Black by virtue of their performance of Muslim identity. Muslim slaves, including Bilali Mohammed,²¹² Ibrahima abd al Rahman,²¹³ and Yarrow Mamout were recognized by their slaveholders as "Mahometan" and thus dis-identified as Black. Muslim slaves, like abd al Rahman, were believed to possess Arab or Moorish "blood" following a slaveholder's acknowledgement of their Muslim identity.²¹⁴ Per the discussion in Section III, Islam was not viewed as a religion that could be practiced across ethnic or racial boundaries, but a standalone racial identity:

Prince [Ibrahima abd al Rahman] is a Moor. Of this, however, his present appearance suggests a doubt. The objection is, "he is too dark for a Moor and his hair is short and curly." It is true such is his

210. AUSTIN, *supra* note 41, at 130.

211. See, e.g., Onwuachi-Willig, *supra* note 102, at 149.

212. See GHANEABASSIRI, *supra* note 31, at 25 "Further benefits could have been accrued by labeling an African slave a 'Moor.' This term originally denoted Muslims of Arab and Berber background in Northwest Africa (modern day Morocco, Tunisia, Algeria, and Mauritania)." MADDY-WEITZMAN, *supra* note 119, at 14.

213. DIOUF, *supra* note 9, at 98 ("Ibrahima abd al Rahman, for example, because of his regal behavior, honesty, dignity, and intellectual skills (he could speak five languages and write in Arabic), was said to be a Moor.").

214. See Cyrus Griffin, *Prince the Moor*, Southern Galaxy, June 5, 1828.

present appearance; but it was materially different on his arrival in this country. His hair was at that time soft and very long, to a degree that precludes the possibility of his being a negro. His complexion, too, has undergone a change. Although modern physiology does not allow color to be a necessary effect of climate, still one fact is certain that a constant exposure to a vertical sun for many years, together with the privations incident to the lower order of community, and an intention to cleanliness, will produce a very material change in the complexion.²¹⁵

Muslim slaves generally considered themselves distinct from non-Muslim slaves, and frequently embraced their re-identification as Moor or Arab.²¹⁶ For Muslim slaves, these racial markers acknowledged, and in extreme cases, exoticized their religious identities. In any regard, re-identification as Moor or Arab created legal space for Muslim slaves to practice Islam without, or with less, risk. Again, American racial categories were foreign to Muslim slaves, which led to the acceptance of any racial identity that acknowledged their status as Muslims.²¹⁷ For Muslim slaves, religion was the primary mode of identification, community building, and lifestyle. Therefore, Muslim slaves generally welcomed any racial tags that restored public acknowledgement of their Muslim identity.²¹⁸

De-negroification exposed how the very same slave bodies, in an instant, could be seen and described in radically different terms upon acknowledgement of a slave's Muslim identity. According to the antebellum journalist Cyrus Griffin, it was the physical rigors linked to enslavement that transformed Abd al Rahman's physical attributes

215. *See Id.* (emphasis added).

216. BLYDEN, *supra* note 26, at 201. Many Muslim slaves were aloof of non-Muslims, both slave and slave masters. African Muslims held this very perspective in Africa before being kidnapped and sold into slavery. They sometimes considered themselves superior to them, largely because of the education and elevated socioeconomic status gained by being Muslim. In addition, they oftentimes saw themselves to be superior to white Christians – a perspective that likely enhanced their willingness to resist and rebel. “These enslaved Muslims then, emerged from elites of West African societies, and thus it is not surprising that they elevated themselves over other black Africans. There is also evidence that as Muslims they held themselves above black pagans and perhaps even white Christians.” GHANEA-BASSIRI, *supra* note 31, at 23. *See* Aidi & Marable, *supra* note 7, at 7, for discussion on how the religious distinctions made by Muslim slaves impacted non-Muslim slaves: “This air of superiority would fuel the resentment of other slaves, with those of Muslim, Moorish, and Arab identity being suspected of being proslavery and antiblack, while also luring other slaves to claim Moorish or Muslim identity.”

217. *See* Aidi & Marable, *supra* note 7, at 7. Muslim slaves did not distinguish themselves from other slaves and whites according to racial or ethnic status, but almost always by religion.

218. Moreover, since blackness was a foreign identity directly linked to slavery, Muslim slaves were happy to shed it in place for Arab or Moorish identity.

from Moor to Black.²¹⁹ Before his enslavement, Al Rahman's hair, skin complexion, and general physical appearance aligned with the archetypal image of a Moor. However, perpetual exposure to a "vertical sun," hard labor, and commingling with Black slaves mutated him physically from Moor to Black.²²⁰

Although an uncommon occurrence, slave masters that recognized the religious identity of Muslim slaves generally distinguished them from their other slaves. Salih Bilali was among the Muslim slaves dis-identified as Black. Bilali was originally purchased to work on the Hopeton plantation in Georgia. After working in the fields, Bilali was promoted to the role of "slave driver" after his master discovered his "superior" Muslim origins.²²¹ Bilali supervised "500 to 1,000 slaves – without white overseership."²²² As a slave driver, Salih Bilali met another Muslim slave, who went by the same name.²²³ Bilali was also promoted to that very same role on account of his Muslim faith.²²⁴ John Cooper, owner of the Hopeton Plantation on the Georgia Sea Islands where Salih Bilali and Bilali were enslaved, believed that their "Muslim qualities" made them more "intelligent, reasonable, and dignified."²²⁵ Salih Bilali and Bilali were not Black Muslims, but rather, racially reclassified as Muslims and both formally and functionally distinguished from the general population of Black slaves.

As illustrated by the experiences of Abd Al Rahman, Salih Bilali and Bilali, the majority of slaves re-identified as Arab or Moor received elevated statuses on the plantation. Their disassociation from Black identity led their owners to separate them from the general slave population, provide them with better accommodations, and reassign them to higher posts.²²⁶ Witnessing how Muslim identity led to an elevated status created an incentive for non-Muslim slaves to convert. Most likely, it also incentivized over-performance of Muslim identity among secular Muslim slaves seeking an improved lot. It

219. *Id.*

220. *Id.*

221. See DIOUF, *supra* note 9, at 102 ("[S]alih Bilali, for example, were slave drivers. As such, their tasks were to carry out the overseer's instructions to the slaves, organize the work gangs, and act as intermediaries between whites and blacks. The position was the highest a slave could reach.").

222. AUSTIN, *supra* note 41, at 6.

223. AUSTIN, *supra* note 41, at 29.

224. *Id.*

225. *Id.*

226. See Gomez, *supra* note 3, at 701. The promotion of Muslim slaves to higher posts on plantations provides an additional explanation to the presumption that slaveholders exclusively awarded "lighter-skinned" slaves with coveted slave posts. *See id.* at 708.

likely also encouraged conversion to Islam among non-Muslim slaves, and spawned stratification and discord among the aggregate slave population on individual plantations.

A number of slaves were emancipated as a consequence of their identification as Muslims.²²⁷ Upon his re-identification as a Muslim, Yarrow Mamout was sent to Maryland where, “he [was] able to retain his Muslim African name and to have others respect his faith and his right to express it publicly.”²²⁸ His literacy, knowledge of history, and faith, cultivated through Islam, disassociated him from the qualities linked to Blackness.²²⁹ Mamout was emancipated because, “[A]s an almost-white, as an Arab, he was supposed to feel contemptuous of the blacks and be loyal to the whites.”²³⁰ However, the vast majority of de-negroified Muslim slaves were not liberated, but at best, promoted to higher posts on the plantation.

The de-negroification of Muslim slaves was a rare occurrence during the Antebellum Era. It was generally experienced by a select group of men, whose education, reputation, or status distinguished them from the majority of Muslim slaves. Their ability to perform in the perceived role of Muslim, demonstrated through Arabic fluency, prayer, recitation of the *Qur’an*, literacy, and their superior education were all causes for calling their Blackness into question. As a result, Muslim identity shifted de-negroified slaves beyond the sharp divide that segregated Black and Muslim identity. However, their racial reclassification did not cause the state or slaveholders to call that dividing line into question, or consider the notion that Black and Muslim could be integrated to form one identity. The fact that a slave was either Muslim or Black, and never both, highlighted how the law spawned conflicting conceptions of Muslim and Black identity that could not be reconciled during the Antebellum Era.

227. See DIOUF, *supra* note 9, at 104. “But other renowned Muslims gained their freedom, such as Job ben Solomon, Yarrow Mahmout, Ibrahima abd al Rahman, Abu Bakr al Siddiq, Lamine Kebe, John Mohamed Bath, Samba Makumba, Mohamed Ali ben Said, Mohamed-Abdullah, and Mahomma Gardo Baquaqua.” *Id.*

228. DIOUF, *supra* note 9, at 60.

229. *Id.*

230. *Id.* at 99. American Christian missions, writers, and businesses looked upon these de-negroified Muslims with special interest. Converting them to Christianity would make them attractive ambassadors to spread the Gospel, and promote special business interests, in their native African lands. As “Moors” or “Arabs,” these de-negroified Muslims were perceived as ideal middlemen by Americans white because of their perceived “off white” status. GHANEABASSIRI, *supra* note 31, 42–43. “[T]he non-Christian world was perceived as fertile field hungering for the ‘civilizing’ rays of Christianity, and enslaved African Muslims provided an opening for the realization of this goal.” *Id.* at 43.

V. BETWEEN SLAVE AND DIVINE CODE

The construction of Blackness marginalized the Muslim identity of devout slaves, while the formation of Muslim identity excluded Africans. Every state in the Antebellum South enacted slave codes that aggressively policed and prosecuted Muslim slaves that worshiped in public. Political rhetoric and immigration restrictions fortified a racial profile of Muslim identity in the exclusive image of Arabs and Turks. In sum, an intersectional analysis of the salient dimensions of the Muslim slave experience reveals a narrative marginalized, and made invisible, by the antebellum segregation of Black and Muslim identity.

Intersectional examination of the lives of Muslim slaves highlights that religion remained a central part of their identity. Islam offered solace, escapism, and a semblance of a life known to the slave before enslavement.²³¹ However, familiarity with the traditions linked to Muslim worship, life, and law also reveals how Islam inspired devout Muslim slaves to resist and rebel against an enslavement they deemed unjust. Thus, Islam remained core to the spiritual identity and routines of many Muslim slaves. In addition, Islam's collision with American race-based slavery ignited the spirit of resistance and rebellion that mobilized Muslim slaves to question, and confront, mechanisms that enforced their subjugation.

"Mapping the margins" of the Muslim slave narrative highlights that their dual status as Black and Muslim bred a distinct experience and brand of insubordination unrevealed in legal scholarship.²³² Subsection A analyzes how Islam, as a way of life, clashed with the mandates of slave codes, creating a legal tension that incited many Muslim slaves to resist. Muslim resistance to slavery oftentimes developed into full-fledged rebellion, as discussed in subsection B.

A. Islamic Life as Resistance to Slavery

Muslim slaves belonged to a transnational community of believers united by a common religious belief. This Muslim community, or *Ummah*,²³³ formed a distinct brand of religious nationalism, or "Mus-

231. See DIOUF, *supra* note 9, at 59 ("The African Muslims clearly remained attached to their faith, and their enslavement was itself a good reason to be even more devout. Faith meant hope, moral comfort, and mental escape. It was also a link to the past, to a time when they were free, respected, and for many, engaged in intellectual pursuits, not menial labor.").

232. Crenshaw, *supra* note 16, at 1242.

233. (Arabic).

lim citizenship.”²³⁴ Although shackled to plantations and subjugated by law, Muslim slaves strove to remain committed to this transnational religious community, “[T]he West African Muslims . . . to a much larger sphere - an Islamic world with pockets of followers from Spain to China.”²³⁵ Continued worship, and persevering to piece together a semblance of Muslim life while enslaved, maintained a connection to the Muslims shackled inside, and the broader network of Muslims outside, of the Antebellum South. These spiritual and community connections sparked resistance on the part of many Muslim slaves, who practiced Islam in the face of strictly enforced slave codes that restricted religious observance.

1. Muslim Citizenship Clashing with “Slave” Status

Muslim citizenship instilled Muslim slaves with a religiously derived humanity that conflicted with their legal subjugation as slaves. While the law classified them as property, and slave codes explicitly elaborated how this status limited almost every sphere of life, Muslim citizenship countered this subjugation by dignifying and humanizing Muslim slaves with a competing source of enfranchisement.²³⁶ Muslim slaves remained connected to family and friends in their native lands and maintained ties through kindred religious practices, observation of holidays, and most directly, letter writing.²³⁷ In addition, Muslim slaves forged spiritual networks within Southern plantations, with prayer offering the introductory springboard toward establishing new Muslim communities in the Antebellum South.

Fighting to maintain one’s original name stood at the frontline of a Muslim slave’s resistance.²³⁸ For many Muslim slaves, accepting a slave name symbolized permanent capitulation to enslavement. During the latter stages of the Antebellum Era, Christian missionaries

234. “Muslim Citizenship” is the term used in this article to designate membership in the Muslim *Ummah*, the transnational community of Muslims united by religion, custom, and Islamic Law. Muslim citizenship was expressed through daily prayer, observing Ramadan and Muslim holidays, collecting for Friday prayer, and striving to meet Islam’s Five Pillars.

235. *Id.*

236. See DIOUF, *supra* note 9, at 3. “Islam in America was the catalyst of revolt and insubordination.” *Id.*

237. Dwight, *supra* note 2, at 88–89.

238. Many Muslim slaves resisted their slave status while under the dominion of their slave masters. Slave codes furnished their owners with unfettered dominion over them. However, Muslim citizenship clashed with the dehumanization springing from slavery. In this regard, Islam was more than simply religion for Muslim slaves, but an oppositional ideology that inspired resistance: “After years of study in Koranic schools and centers of higher learning, they refused to let enslavement turn them into mere beasts of burden.” DIOUF, *supra* note 9, at 3.

typically launched conversion attempts by seeking to assign Christian names to Muslim slaves.²³⁹ The records of runaway slaves indicate that many of them were Muslims, creating a strong presumption that Muslim slaves resisted and even ran away from attempts at conversion.²⁴⁰ Others had no choice but to accept a “slave name,” and in extreme instances, disavow Islam as a means of survival.²⁴¹ Some Muslims kept “their real names within their community while using the name imposed by their owner when dealing with the outside world.”²⁴²

Running off the plantation was common among Muslim slaves. “[T]he preponderance of runaway notices” containing Muslim slave names may be read as illustrating Islam’s influence of resistance.²⁴³ Muslim slaves literally ran from a status that did not fit with their religious convictions, and in doing so, risked being “killed or destroyed by gun.”²⁴⁴ Iron collars were placed around the necks of Muslim slaves that were apprehended and not killed.²⁴⁵ Other Muslim slaves resisted by aiding the emancipation of fellow slaves, which qualified as an act criminalized by slave codes.²⁴⁶

239. McCloud, *supra* note 9, at 102 (“These first Muslim slaves rarely converted to Christianity even as subterfuge and retentions remained in the black slave community for sometime.”).

240. Cf. RICHARD BRENT TURNER, *ISLAM IN THE AFRICAN-AMERICAN EXPERIENCE* 4–5 (1997).

241. Whether Muslim slaves maintained or disavowed their Muslim faith hinged on a range of variables. Geographic proximity in the Antebellum South, subjective strength of faith, the presence of a Muslim community or lack thereof, and degree of slaveholder enforcement of slave codes, among other factors, were influential.

242. DIOUF, *supra* note 9, at 82.

243. Gomez, *supra* note 3, at 695. “Names such as “Bullaly” (Bilali), “Mustapha,” Sambo,” “Bocarrey” (Bubacar, from Abu Bakr), and “Mamado” (Mamadu) are regularly observed in the advertisements for runaway slaves.” *Id.* at 685.

244. JUNE PURCELL GUILD, *BLACK LAWS OF VIRGINIA: A SUMMARY OF THE LEGISLATIVE ACTS OF VIRGINIA CONCERNING NEGROS FROM EARLIEST TIMES TO THE PRESENT* 47 (1996) (citing 1691 Va. Acts ch. 16).

[A]n act for suppressing outlying slaves covering divers subjects, states whereas many times Negroes, mulattoes and other slaves lie hid and lurk in obscure places killing hogs and committing other injuries, it is enacted, that the sheriff may raise so many forces from time to time as he shall think convenient for the effectual apprehending of such Negroes. If they resist or runaway they may be killed or destroyed by gun or otherwise whatsoever, provided that the owner of any slave killed shall be paid four thousand pounds of tobacco by the public.

Id.

245. GUILD, at [pincite] (citing 1726 Va. Acts ch. 4).

246. Islam and its routines shaped strong communal relationships among Muslims on the plantation. Therefore, slaveholders oftentimes assumed that a runaway’s companions aided and abetted the act, and in many instances, held them strictly liable. This created a collateral dynamic where subordinate Muslim slaves were sometimes punished by association.

2. Restrictions on the Right to Worship and Assembly

The majority of states in the South enacted slave codes that strictly restricted slaves' right to worship.²⁴⁷ Muslims are required to pray five times per day.²⁴⁸ Therefore, slave codes disparately impacted Muslim slaves simply because of the frequency of prayer mandated by Islam.²⁴⁹ As a result, Islam moved Muslim slaves to violate the slave codes at least five times every single day. This made Muslim slaves perpetually vulnerable to punishment. Prayer, however, among the most important of Islam's five pillars, created a legal dilemma Muslim slaves' faced on five different occasions every day. This created an ultimatum for Muslim slaves – defy divine code or slave code.

The communitarian nature of Friday prayers violated slave codes that restricted slave assembly. Slaves converted their quarters into “makeshift mosques,”²⁵⁰ where Muslim slaves on a single plantation, or from a number of proximate plantations, would come together to pray on Islam's holy day, Friday.²⁵¹ Every state in the South enacted statutes that explicitly restricted these “frequent meetings.”²⁵² Some

247. See, e.g., ALA. SLAVE CODE §§10, 36, 37 (1833).

248. See generally QUR'AN, *supra* note 5. The obligatory daily prayers were in part escapism from the reality of slavery, but also, a religious reminder of their humanity and Muslim citizenship. The content of the prayers, particularly the *Fatihah* (opening verse of the Qur'an), reaffirmed, during each prayer that, “[Y]ou alone do we worship, and You alone do we ask for help.” QUR'AN, *supra* note 5, at 1:1.

249. Some states, like South Carolina, were in the minority, enshrining “the right of slaves to worship as long as their worship did not weaken the control of their masters over them.” JAMES LOWELL UNDERWOOD, THE CONSTITUTION OF SOUTH CAROLINA, VOL. 3: CHURCH AND STATE, MORALITY AND FREE EXPRESSION 202 (1992). However, South Carolina's “freedom to worship” statute, when read within the broader context of other statutes restricting assembly and mixing, were seldom extended to slaves. The religious assembly of slaves was viewed with great suspicion by slave codes in South Carolina, and additional statutes outlawing the assemblage of slaves, if read in conjunction with this statute, would limit the rights of slaves to worship. See *id.*

250. AKEL ISMAEL KAHERA, DECONSTRUCTING THE AMERICAN MOSQUE: SPACE, GENDER, AND AESTHETICS 147 (2002). “In keeping with the *hadith* that states, ‘the [whole] earth is a *masjid* [synonym for mosque],’ an antebellum mosque may have been a rudimentary building, quite temporary and unrefined; and in some instances, a simple demarcated space on the ground – under the dome of the sky – facing Makkah would have sufficed without an enclosed structure.” *Id.* (alteration in original) (alteration to original). The *hadith* (Arabic) is the example of behavior of the Prophet Mohammed and his companions.

251. Unlike other “African Religious” practices (see Boaz, *supra* note 18, at 219), Islamic prayer did not require a formal priest or central spiritual figure. This made community prayers far more decentralized, easy to organize, and facilitated the creation of makeshift mosques and prayer spaces. Therefore, plantations' prohibitions on prayers, which supplemented slave codes, overlooked this distinctive quality about Muslim prayers. DONALD C. SWIFT, RELIGION AND THE AMERICAN EXPERIENCE: A SOCIAL AND CULTURAL HISTORY, 1765–1997 35 (1998). Boaz, in her analysis of plantation prohibitions, replicated the same ignorance of Muslim prayer traditions displayed by slaveholders in the Antebellum Era. *Id.*

252. See, e.g., GUILD, *supra* note 306, at 45 (citing 1680 Va. Acts ch. 10); ALA. SLAVE CODE §§10, 37 (1833).

statutes, such as one enacted in Virginia, considered the assembly of five slaves as an “unlawful and tumultuous meeting” convened to plot rebellion attempts.²⁵³ Considering the communal nature of Friday prayer, which likely convened far more than five Muslim slaves, such a statute criminalized one of Islam’s central traditions.

Muslim slaves also abstained from food and drink during Ramadan,²⁵⁴ and assembled to collectively break the fast in brazen violation of anti-slave assembly laws. This Islamic pillar, which requires a complete fast from sunrise to sundown during the Holy Month, drained Muslim slaves of the requisite energy needed to undertake the day’s rigorous work. Although the *Qur’an* “[a]llows a believer to abstain from fasting if he or she is far from home or involved in strenuous work, which was the Africans’ case,” many Muslim slaves still continued to observe Ramadan.²⁵⁵ Ramadan *iftars* (daily breaking of the fast) and Holy Month prayers were held in private quarters,²⁵⁶ which brought together Muslim slaves repeatedly during the month.²⁵⁷ These dinners violated the slave codes restricting assembly, and although meetings of a religious nature, were classified by slave codes as gatherings where slaves conspired to organize rebellions.²⁵⁸

In addition, the festive and conspicuous nature of the Muslim holidays following Ramadan likely incited reprimand as illegal “ceremonies, rituals, and festivals.”²⁵⁹ It is probable that the Virginia religious assembly code that restricted “feasts and burials” were, in part, promulgated to curb the *iftar* and holiday traditions observed by Muslim slaves.²⁶⁰ Communal gatherings were central to Muslim worship

253. See Guild, *supra* note 306, at [pincite] (citing 1748 Va. Acts ch. 38). Insurrections, and the conspiracy to stage one, were crimes punishable by death in Virginia. Va. Slave Laws, Ch. IV (1726).

254. See DIOUF, *supra* note 9, at 64. However, the *Qur’an* makes allowances for Muslims experiencing extreme trials to abstain from the fast. *Id.* at 67. The enslavement Muslim slaves endured qualified as one of these exceptions. *Id.* However, Diouf contends that Muslim slaves, in the U.S. and outside of it, observed Ramadan by fasting. *Id.* at 64–66.

255. DIOUF, *supra* note 9, at 67.

256. *Taraweeh* (Arabic) are special Ramadan prayers held each and every evening during the Holy Month.

257. (Arabic) The traditional Ramadan meal where observing Muslims conclude their day’s fast (from water and food consumption). *Iftar* dinners are typically communal festivities.

258. See GUILD, *supra* note 306, at [pincite] (citing 1723 Va. Acts ch. 4 and 1726 Va. Acts ch. 4).

259. See May, *supra* note 13, at 238 (“African religion was ‘communal, not solely individual.’”).

260. See GUILD, *supra* note 306, at 45 (citing 1680 Va. Acts. Ch. 10).

Whereas the frequent meetings of considerable numbers of Negro slaves under pretense of feasts and burials is judged of dangerous consequence, it is enacted that no Negro or slave may carry arms, such as any club, staff, gun, sword, or other weapon,

and life, and most common during Ramadan. Therefore, considering the routine and frequent ceremonies, gatherings, and festivals that took place during Ramadan, Muslim slaves were likely punished at a far higher rate during the Holy Month.²⁶¹

“Anti-mixing” statutes also made it difficult for Muslim slaves to come together.²⁶² Laws disallowing slave fraternization made Ramadan gatherings illegal, and specific restrictions against “night time” assembly sharply impacted specific functions including the *iftar*, special Ramadan prayers, and the late-night feast.²⁶³ In addition, these statutes frustrated the traditional Friday prayers, a key catalyst in building the cross-tribal communities in the Antebellum South.²⁶⁴ Friday prayers were central to integrating Muslim slaves across tribal lines.²⁶⁵ Through Friday prayer, Wolof and Mandingo, Fulani and Tukolor

nor go from his owner’s plantation without a certificate and then only on necessary occasions; the punishment twenty lashes on the bare back, well laid on. And, further, if any Negro lift up his hand again any Christian he shall receive thirty lashes, and if he absent himself or lie out from his master’s service and resist lawful apprehension, he may be killed and this law shall be published every six months.

Id.; see also; A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 36–38 (1978) (Higginbotham does not make specific reference to Muslim “feast” traditions). Virginia amended its law to include “[n]ighttime religious meetings,” which continued to disparately impact Muslims who prayed, broke fast, and collected for special prayers in the evening. JOURNAL OF THE SENATE OF VIRGINIA 11–13 (1800). The slaves code enacted by Virginia was viewed as the model for the remainder of the southern states during the Antebellum Era. Virginia served as a benchmark that the states looked to with regard to slavery. See Bush, *supra* note 107, at 433 (“[T]he Virginia Slave Code of 1705, which formed the basis of all subsequent Virginia slave law and is widely considered the legislative consolidation of slavery in Virginia.”).

261. May observed, without specifying, that, “African religion was ‘communal, not solely individual.’” May, *supra* note 13, at 238.

262. See GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 151 (1856). “All meetings of slaves, free negroes and mulattoes mixing with such slaves at any *meeting-house*, or any other place, in the night, under any pretext whatsoever, are declared to be *unlawful assemblies*; and the civil power may disperse the same, and inflict corporal punishment on the offenders.” *Id.*

263. *Sahoor* (Arabic).

264. Ramadan strengthened Muslim slaves communities within and beyond tribal lines. In Florida and Georgia, Muslim slave families continued the tradition of exchanging *sadhaka* during Ramadan, which illustrates that new Muslim communities were formed and others strengthened during the Holy Month. See generally DIOUF, *supra* note 9, at 65 (stating that other Muslim communities in other part of America were faithful to the commandment and carried on the tradition of exchanging *sadhaka*). It is also likely that the stronger union created by Ramadan created practical spaces for political organizing, which evolved into resistance and Muslim participation in the Seminole Slave Rebellions of 1835–1838. *Id.* at 147.

265. See BLYDEN, *supra* note 26, at 6–7. “[H]ausas, Foulahs, Mandingos, Soosoos, Akus, can all read the same books and mingle in worship together, and there is to all one common authority and one ultimate umpirage. They are united by a common religious sentiment. . . . Not only the sentiments, but the language, the words of the sacred book are held in the greatest reverence and esteem.” *Id.*

looked beyond tribal differences to forge new ties along religious lines.²⁶⁶

3. Education and Literacy Slave Codes

A number of states in the Antebellum South specifically barred slaves from “reading and writing.”²⁶⁷ For Muslims, such activities are essential for prayer, recital of the Qur’an, and intellectual engagement in spiritual activities. Since Arabic was the primary language of Islam, many Muslim slaves were bilingual – proficient in Arabic and their native, tribal tongue.²⁶⁸ Therefore, literacy codes criminalized routine activity that was at the core of Muslim worship and life. In addition, Muslim slaves used prayer and the reading of the Qur’an to educate the illiterate among them. Such activity violated slave codes restricting, “teach[ing] and caus[ing] any slave or slaves to be taught to write.”²⁶⁹ Therefore, given their comparatively higher rates of literacy,²⁷⁰ Muslim slaves were disproportionate violators of slave codes that barred reading and writing, and the related codes that restricted the education of other slaves.²⁷¹

Slave-masters equated Muslim prayer with literacy, which slave codes criminalized.²⁷² Islamic prayer not only qualified as a mode of religious expression restricted by slave code, but was also considered especially menacing because of its connection to promoting literacy.²⁷³

266. See Gomez, *supra* note 3, at 694–95. “[T]hose who were Muslims would have sought out each other’s company and would have searched for corporate ways to express their common faith.” *Id.*

267. See, e.g., *Slaves Are Prohibited to Read and Write By Law*, in LET NOBODY TURN US AROUND: VOICES OF RESISTANCE, REFORM, AND RENEWAL 41–42 (Manning Marable & Leigh Mullings eds., 2000) (citing a North Carolina Statute barring all persons from teaching slaves to read or write).

268. DIOUF, *supra* note 9, at 107–144, illustrating the advantages – and dangers – attached to literacy for enslaved Muslims. Therefore, the foreign nature of these languages made them more inconspicuous or undecipherable, which in some instances, made the reading and writing of Arabic less detectable and thus punishable.

269. See, e.g., Negro Act of 1740 § 41 (S.C. 1740); see also WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS AND ILLUSTRATIVE FACTS 319 (1853); ALA. SLAVE CODE §31 (1833) (“Any person who shall attempt to teach any free person of color, or slave, to spell, read or write, shall upon conviction thereof by indictment, be fined in a sum not less than two hundred fifty dollars, nor more than five hundred dollars.”).

270. See DIOUF, *supra* note 9, at 7.

271. See May, *supra* note 13, at 254 n.114. “South Carolina’s 1834 Act very much resembled Georgia’s 1829 restriction on slave literacy.” *Id.*

272. DIOUF, *supra* note 9, at 160–61.

273. Literacy is central to the practice of Islam. It is vital for the reading of the Qur’an, recital of the daily prayers, community and civil involvement, and intellectual engagement with

Since, “[l]iteracy. . . and Islam went hand in hand,”²⁷⁴ practicing Muslims were comparatively more literate, by default, than non-Muslim slaves.²⁷⁵ Slaveholders regarded literacy as a threat to their dominion over slaves.²⁷⁶ Disproportionate literacy rates made Muslim slaves habitual slave code violators, and thus, more vulnerable to punishment and persecution than their non-Muslim counterparts.²⁷⁷

Certain components of Muslim worship were themselves educational in both function and appearance, clearly violating slave codes restricting such activities. A *khutba* (or lecture delivered by learned Muslims) for example, typically follows the communal Friday prayer. Slave-masters likely viewed these *khutbas* as educational meetings or even makeshift schools, given that they resembled a typical, classroom structure whereby a lecturer stood at the front of an audience. Therefore, the patently educational nature and appearance of these *khutbas* would have been easy targets for slaveholders, which would have made holding and attending them a considerable risk for Muslim slaves.

B. Islam Sparking Slave Rebellion

Southern states enacted statutes punishing any activity linked to rebellion or (perceived) conspiracy to rebel. Virginia enacted the model statute in 1638 for example.²⁷⁸ These codes likely preempted rebellion attempts, and supplementary status branded insubordinate

Islam. Through its expansion of literacy, Islam empowers newly converted Muslims with the intellectual tools to exercise and engage their faith.

In the eyes of slaveholders, the Muslims’ literacy was dangerous because it represented a threat to the whites’ intellectual domination and a refutation of the widely held belief that Africans were inherently inferior and incapable of intellectual pursuits. The Africans’ skills constituted a proof of humanity and civilization that did not owe anything to the Christians’ supposed civilizing influence.

Id. at 161.

274. *Id.* at 23.

275. Koranic schools spread the literacy of both Muslims and non-Muslims, and served as educational hubs in Senegambia, Chad, Guinea, Mali, and other regions of West Africa that sourced the American slave trade. *See id.* at 24.

276. DIOUF, *supra* note 9, at 108. “[I]n the eyes of the slaveholders, the Muslims’ literacy was dangerous because it represented a threat to the whites’ intellectual dominion and a refutation of the widely held belief that Africans were inherently inferior and incapable of intellectual pursuits.” *Id.*

277. Consequently, Muslim slaves that prayed publicly were oftentimes beaten and persecuted. This led to a majority of slaves worshipping in private quarters, and in some instances, deserting prayer and/or Islam entirely.

278. *See, e.g.*, GUILD, *supra* note 306, at [pincite] (citing 1638 Va. Acts ch. 10, which states that “All persons except Negroes are to be provided with arms and ammunition or be fined at the pleasure of the governor and council”).

Muslim slaves believed to be at the center of the plotting.²⁷⁹ Ultimately, while Islam fomented rebelliousness amongst the ranks of the enslaved, slave codes and repressive plantation policies combined to systematically thwart the coordination and execution of slave rebellions.

Slave codes left little room for Muslims to worship and lead a life that met the religion's requirements. As a result, Muslim slaves were forced to choose between two options: adhere to slave codes or to Islam's divine edicts. Capitulating to the slave codes meant disavowing the practice of Islam, while persevering to remain a devout Muslim necessitated the blatant violation of a number of slave codes. In fact, many slaves disavowed Islam in order to play it safe. Others, however, continued to practice in the face of considerable risk. The conflict of slave with divine law also pushed the most devout and courageous slaves to rebel against their slave masters.

Islamic law ordains Muslims to rebel against actors that oppress one's ability to freely exercise their faith. Such obstructionist forces are referred to as *fitnah* within Islamic Law.²⁸⁰ Sherman Jackson defines *fitnah* within the context of American slavery as:

[E]mphatic opposition to white supremacy, as a system of domination, whose daily assaults on black consciousness bludgeon the human spirit and simultaneously undermine and abuse the fact of black humanity. This process of short-circuiting blacks' efforts to realize their humanity, as a matter of divine fiat as opposed to some honorary recognition granted on the satisfaction of self-serving criteria imposed by the dominant culture, I identify with the Qur'anic term "fitnah" which the Qur'an characterizes as being worse than murder.²⁸¹

Slavery, and its assault on the bodies and minds of slaves, presented an extreme form of *fitnah* that ordained Muslim slaves to take action against their oppressors.²⁸² The duty to rebel grew stronger later dur-

279.

280. S. A. Jackson, *Islam and Affirmative Action*, 14 J.L. & RELIGION 405, 410–11 (1999–2000).

281. *Id.*

282. For Muslim slaves, rebellion against their subjugation ranked as the highest form of religious expression. Insurrections against slavery were considered by many as a *jihad*, or a holy war ordained by Islamic Law. Slavery, for Muslims in Antebellum America, generally offered two choices: first, capitulation to a condition deemed illegal by Islam; two, or heeding the call for rebellion against subjugation deemed unjust Islamic Law. Muslim slaves were enfranchised as citizens of a spiritual and transnational Pan-Islamic community, but reduced to property in Antebellum America.

ing the Antebellum Era, as attempts to convert Muslim slaves to Christianity became more prevalent.²⁸³

The obstruction of Islamic worship sparked rebellion on the part of Muslim slaves.²⁸⁴ Legal commentators have discussed the Bible's role in inspiring slave revolts, which drove the latter Antebellum Era debates about whether to Christianize slaves.²⁸⁵ However, Islam's role in spurring rebellion has largely gone untreated by these legal commentators, although social science has vividly illustrated how it functioned as a, “[P]retense for insurgent activity and . . . a source of moral justification for the uprising itself.”²⁸⁶

Muslim-led rebellions were common in the New World. Wolof and Fulani Muslims spearheaded the, “[f]irst slave revolt in the history of the Americas” in Hispaniola in 1522, with subsequent insurrections in Puerto Rico, Panama, and Columbia from 1533 to 1580.²⁸⁷ These insurrections illustrated the distinct brand of insubordination that emanated from Islamic belief. Since many of the slave codes in the Antebellum South were specifically concerned with preempting insurrections, the incidence of rebellions in the U.S. was comparatively less than in Latin America. However, Muslim slaves did play key roles in the insurrections that took place in the Antebellum South, including Florida's “Seminole Slave Rebellions” in 1835-1838.²⁸⁸ Considering Islamic Law's opposition to enslavement, Muslim slaves were comparatively more insubordinate and rebellious than their counterparts.²⁸⁹ In addition, Islamic Law incentivized the manumission of Muslim and non-Muslim slaves, which activated Muslim slaves

283. See generally Gomez, *supra* note 3, at 706 (stating that African-born Muslims resisted with success the pressure to convert to Christianity).

284. DIOUF, *supra* note 9, at 3 (“[I]slam in America was the catalyst of revolt and insubordination. It played a major part in the most elaborate slave uprisings and was the motivating force that sent freed men and women back to Africa.”).

285. May, *supra* note 13, at 243, 252–54. “As slave rebellions became more common, they drew upon the Bible for inspiration and organization. Indeed, most antebellum slave revolts made use of religion both as a pretense for insurgent activity and as a source of moral justification for the uprising itself.” *Id.* at 243.

286. *Id.* at 243. May generalizes about the role of “slave religion” without making mention of Islam's role in spurring resistance and rebellion. However, his observations accurately describe Islam's practical influence on rebellion efforts: “[I]t afforded an opportunity for slaves to organize the conspiracy; 2) it provided an ostensible dogma to support the uprising.” *Id.* at 224.

287. DIOUF, *supra* note 9, at 147.

288. DIOUF, *supra* note 9, at 147; see also RODGER LYLE BROWN, J. VERNON CROMARTIE AND PETER H. WOOD, *THE INVISIBLE WAR: AFRICAN AMERICAN ANTI-SLAVERY RESISTANCE FROM THE STONO REBELLION THROUGH THE SEMINOLE WARS* (2006).

289. See Jackson, *supra* note 355 at 410–11 (emphasizing Islamic law's support of affirmative action and opposition to white supremacy and the differential treatment of “discreet and insular” classes on the basis of any permanent membership in a particular social group).

to assist in the freedom of their fellow slaves.²⁹⁰ Therefore, through both religious mandate and incentive, Islam sourced divine dictates that not only clashed with slave codes, but sparked rebellion against them.

CONCLUSION

This Article illustrates how slave codes and immigration law spawned irreconcilable constructions of Black and Muslim identity during the Antebellum Era. Slave codes and immigration law converged to draw a sharp line between Black and Muslim identity. The segregation of these two identities brought about the on-the-ground invisibility of Muslim slaves, which brought about their absence from legal scholarship examining American slavery. The legal segregation of Black and Muslim identity during the Antebellum Era roots the contemporary social and political dissonance still applied to the two classifications today, both on a domestic and even on a global scale.²⁹¹

Slavery decimated the orthodox Islam practiced, and introduced to the U.S., by Muslim slaves.²⁹² Slave codes confined African Islam from being transmitted to successive generations, but its spirit of resistance and rebellion inspired Latter-Day “Black Muslim Move-

290. The Qur’an repeatedly ordains the manumission of slaves as redress for sinful activity. One verse, related to marriage, ordains the freeing of a slave to rectify mistreatment of one’s wife. Another lists the emancipation of a “believing slave” as legal redress for the mistaken killing of a believing individual. See, e.g., QUR’AN, *supra* note 5, at 58:3 (“Those who call their wives their mothers then revoke what they had said, should free a slave before having physical contact (with them). This is to warn you, as God is aware of what you do.”). Therefore, for Muslim slaves, one method for accruing favor with God was seeking the manumission of his or her fellow Muslim, or non-Muslim, slaves. The encouragement of manumitting slaves is built into the Islamic pillar of *zakah*, or alms giving. See QUR’AN, *supra* note 5, at 9:60 (“Charities are meant for the indigent and needy, and those who collect and distribute them, and those whom you wish to win over, and for redeeming slaves (and captives).”).

291. See generally DeJuan Bouvean, *A Case Study of Sudan and the Organization of African Unity*, 41 How. L.J. 413, 413–16 (1998) (discussing the violent and brutal struggle between Arab Muslims and the black African Christian in Sudan). South Sudan’s struggle for independence offers a vivid illustration of how the antebellum binary separating black from Muslim identity is applied to a foreign context (South Sudan became an independent state on July 9, 2011). Scholars, and political actors, applied a distinctly American racial binary to frame the civil strife in Sudan. “Northern Muslims” were pit against the “Black” non-Muslims in (now independent) South Sudan. The political application of the antebellum binary pitting Muslims against blacks to this complex international story rendered a simplistic and problem-ridden narrative of the struggle between the people of the Republic of the Sudan and the separatists in, the newly independent, South Sudan. See *id.*

292. MARR, *supra* note 32, at 17–18; see also DIOUF, *supra* note 9, at 179 (“The orthodox Islam brought by the enslaved West Africans has not survived.”).

ments.”²⁹³ These Movements, which harmonized an adapted form of Muslim identity with a revolutionary reconfiguration of Blackness,²⁹⁴ confronted a reformed but still formidable brand of white supremacy.²⁹⁵ In doing so, they challenged marginalization by perfecting the union of Black and Muslim identity in a fashion their slave ancestors could not.²⁹⁶

The Islam practiced by Latter-Day Movements was a vehicle for forward progress and existential *return*. For the vast majority of its followers, the Nation of Islam offered a spiritual portal back to the orthodox Islam practiced by their slave ancestors.²⁹⁷ Today, Black Americans comprise the largest segment of the Muslim-American population, outnumbering both Arab and South Asian American Muslims.²⁹⁸ Therefore, while slavery abolished African Islam, Black Americans readopted the orthodox faith practiced by Omar Ibn Said, and the scores of Muslim slaves erased – but *rewritten* – into legal history.

293. Hereinafter “Latter Day Movements.” This title refers to the African American Islamic traditions established during the 20th Century, which include the Moorish Science Temple, the Nation of Islam, and other movements.

294. See generally ISLAM AND THE BLACKAMERICAN, *supra* note 46, at 3 (focusing partly on the struggle of black Americans to settle upon self-definition that is both “functionally enabling” and authentic).

295. Sherman Jackson refers to these movements as the “proto-typical black-nationalist spinoff movements.” ISLAM AND THE BLACKAMERICAN, *supra* note 46, at 3; MARTHA F. LEE, THE NATION OF ISLAM: AN AMERICAN MILLENARIAN MOVEMENT 20 (Syracuse Press, 1996); GHANEABASSIRI, *supra* note 31, at 218–223 (discussing Noble Drew Ali’s synthesis of Islamic and popular spirituality practices which lead to a prophetic nationalist movement that appealed to African Americans). For followers of the Moorish Science Temple, founded in 1913 by Noble Drew Ali, followers became “Moors.” See GHANEABASSIRI, *supra* note 31, at 216.

296. See MARR, *supra* note 32, at 17–18 (“Although the horrors of slavery largely prevented the transmission of Muslim practices across generational lines, Islam has been readopted by many twentieth-century African Americans as a powerful resource that expresses not only religious faith but also symbolizes an African cultural heritage with a tradition of resistance to the indignities of racism.”).

297. See ISLAM AND THE BLACKAMERICAN, *supra* note 46, at 4 (stating that the movements conferred upon Blackamericans a sense of ownership in Islam); see also EDWARD CURTIS IV, ISLAM IN BLACK AMERICA 84 (State University of New York Press, 2002) (“It was his Islam rather than the Islam of his critics.”).

298. See Pew Muslim Americans Study, *supra* note 6, at 16.

COMMENT

Leaving No Law Student Left Behind: Learning to Learn in the Age of No Child Left Behind

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INTRODUCTION

Thousands of students matriculate in law schools throughout the United States (U.S.), seeking a career in the legal profession.¹ However, decreasing bar exam² passage rates³ and an increasing concern regarding the inability of recent law school graduates to effectively perform in the workplace⁴ have caused many legal scholars to challenge the effectiveness of legal education in America.⁵

This Comment argues that bar passage rates may improve and law students may effectively develop the legal skills necessary to become proficient legal practitioners if law professors and administrators account for the different learning styles and experiences of their students who matriculated during the era of the No Child Left Behind

1. During the 2012-2013 academic year, over 150,000 students were enrolled in law schools throughout the United States. See A.B.A., ENROLLMENT AND DEGREES AWARDED: 1963-2013.

2. *Bar Admissions Basic Overview*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html (last visited Aug. 27, 2014) (defining the bar exam as typically a two-day test necessary to obtain a license to practice law in a given jurisdiction or state after graduating from law school).

3. See Christian C. Day, *Law Schools Can Solve the “Bar Pass Problem”-“Do the Work!”*, 40 CAL. W. L. REV. 321, 324-25 (2004) (“In 1994, the bar examination pass rate for first-time takers was at an all-time high of more than 82.5%. It has declined to below 75% in 2000 and will likely continue to erode.”). *But see* NAT’L CONF. B. EXAMINERS, 2012 STATISTICS (2013) (showing that bar passage rates for first-time takers increased to eighty-two percent in 2008, but has steadily declined to seventy-seven percent in 2012).

4. James Eagar, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 GONZ. L. REV. 389, 392 (1997) (“Critics have accused law schools of failing to teach students many of the practical lawyering skills they will need in practice.”).

5. See, e.g., David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 268 (noting that legal education does not provide the skills and knowledge necessary for students to become effective lawyers); Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 221 (2007) (reasoning that legal education is no longer efficient or adequate for preparing modern lawyers); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 57 (1992) (arguing that legal practice is disjoined from legal pedagogy).

Act of 2001 (NCLB).⁶ NCLB has been criticized for “teaching to the test,” where primary and secondary teachers focus their instruction on test taking strategies designed to maximize standardized test scores.⁷ Opponents of NCLB argue that teaching to the test does not develop students’ broad reading, writing, or analytical skills.⁸ Instead, opponents emphasize that NCLB stifles inquiry by encouraging rote memorization through the application of test taking strategies.⁹ Scholars argue that the development of skills that require minimal analytical inquiry or the regurgitation of memorized information is perpetuated at the undergraduate level.¹⁰ However, effective and successful legal education requires the development of broad analytical skills as well as the application of effective problem solving abilities.¹¹

If law students were not taught these skills on a basic level during their primary, secondary, or undergraduate matriculation,¹² many will find it difficult to matriculate through law school, pass the bar exam, and become proficient legal practitioners.¹³ The purpose of legal edu-

6. See No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2012); Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 244 (2004) (“Title I of [the No Child Left Behind Act] provides the largest single source of federal education funding targeted to help the states meet the needs of socioeconomically disadvantaged students.”).

7. See Benjamin Michael Superfine, *The Promises and Pitfalls of Teacher Evaluation and Accountability Reform*, 17 RICH. J.L. & PUB. INT. 591, 598 (2014) (recognizing the pressure placed on teachers to emphasize test-taking skills instead of alternative learning experiences).

8. See, e.g., Thomas F. Risberg, *National Standards and Tests: The Worst Solution to America's Educational Problems . . . Except for All the Others*, 79 GEO. WASH. L. REV. 890, 899 (2011); Andrew Spitzer, Comment, *School Reconstitution Under No Child Left Behind: Why School Officials Should Think Twice*, 54 UCLA L. REV. 1339, 1369–70 (2007).

9. See, e.g., Samantha A. Moppett, *Lawyering Outside the Box: Confronting the Creativity Crisis*, 37 S. ILL. U. L.J. 253, 291–93 (2013) (arguing that the lack of creativity during primary and secondary education impacts students throughout their lives, including in law school and in the legal profession).

10. See Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 987 (2005); 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, 673 (1994).

11. See David M. Becker, *Some Concerns About the Future of Legal Education*, 51 J. LEGAL EDUC. 469, 474 (2001) (reasoning that repetitious legal exercises help encourage and develop the problem solving and analytical skills necessary for effective legal practice).

12. See Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 99 (2003) (recognizing that many students that do not develop adequate reading or writing skills in middle school, high school, or during their undergraduate studies, carry these flaws with them into law school).

13. While scholars may argue that law schools should admit fewer students or increase their admission requirements to account for industry concerns regarding bar passage rates and workplace proficiency, students enter law school for a host of different reasons and should retain the opportunity to obtain a proficient legal education. See Jack Graves, *An Essay on Rebuilding and Renewal in American Legal Education*, 29 TOURO L. REV. 375, 379–82 (2013); see also Grutter v.

cation does not include teaching law students fundamental, yet basic, analytical and problem solving skills for the first time.¹⁴ Law students are expected to enter law school with basic analytical and problem solving skills for law professors to build upon.¹⁵ However, if law professors and administrators do not account for circumstances where students have not been taught these basic skills, the concerns regarding bar passage rates and the workplace proficiency of recent law school graduates will likely continue. This Comment seeks to resolve these concerns by urging law professors and administrators to develop an understanding of, and at least consider how law students have been taught to learn when designing and implementing their own instructional methods and course offerings. This Comment will address these concerns through four sections: Section I will review the impact of NCLB on how students have been taught to learn in the 21st Century. Section II will review the history of traditional legal instructional methods and will analyze the impact of modern legal instructional methods on 21st Century law students. Section III will analyze the concerns of the legal community regarding bar passage rates and the development of legal skills. Finally, Section IV will propose mechanisms for improving law school instructional methods and course offerings by comparing current, primary, and secondary education reform to law school instructional reform.

I. THE IMPACT OF NO CHILD LEFT BEHIND

Law school instructional methods and course offerings should account for the impact of NCLB on students who matriculated through primary and secondary school during the past decade of the Act's enactment¹⁶ by developing a better understanding of the varying instruc-

Bollinger, 539 U.S. 306, 332–33 (2003) (“Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals . . . so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”).

14. Thomas R. Newby, *Law School Writing Programs Shouldn't Teach Writing and Shouldn't Be Programs*, 7 NO. 1 PERSP. TEACHING LEGAL RES. & WRITING 1, 2 (1998) (arguing that the primary purpose of first-year legal writing courses is not to teach students how to write generally, but how to write in a legal manner).

15. See Cynthia V. Ward, *A Response to Professor Vernellia R. Randall's the Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 111, 114–15 (1996) (noting that unjustified assumptions pertaining to entering law students writing and analytical skills may adversely impact students post-graduation).

16. See Shavar D. Jeffries, *Mandated Mediocrity: Modernizing Education Law by Reducing Mandates and Increasing Professional Discretion*, 23 CORNELL J.L. & PUB. POL'Y 45, 61 (2013) (“Congress doubled down on standards and accountability with the 2002 enactment of the No

tional backgrounds of their incoming students.¹⁷ Law students come from a variety of different primary and secondary schools, colleges, and universities.¹⁸ Each law student brings with them a history of how they have been taught to learn and apply information.¹⁹ By incorporating and understanding the previous instructional experiences of their students, law professors and administrators may be able to develop effective instructional methods and course offerings that would increase bar passage rates²⁰ and enhance the ability of recent law school graduates to effectively perform in the workplace.²¹ Law professors and administrators should develop an understanding of the impact and implementation of NCLB and consider how the instructional principles of the Act are changing to address the concerns regarding primary and secondary student academic performance.²²

A. The History of the No Child Left Behind Act of 2001

The No Child Left Behind Act of 2001 (NCLB) was a bipartisan initiative between former President George W. Bush and the U.S. Congress.²³ The Act became effective in 2002,²⁴ and was first implemented during the 2002-2003 academic year.²⁵ The Act was developed

Child Left Behind Act ('NCLB'), which requires states to ensure that all children, including racial minorities, students with disabilities, and English Language Learners, meet state-determined proficiency benchmarks.”)

17. “Law students come to law school with great variations in their previous education and from different backgrounds.” Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 291 (1998).

18. *Id.*

19. See Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 185 (1994) (noting how students from different doctrinal backgrounds may be familiar with different skill sets and may apply these skills to solve legal issues).

20. “[P]assage rates affect law schools’ rankings, accreditation, and recruitment. Students who fail bar exams experience anxiety, stress, loss of employment opportunities, financial insecurity, a deep sense of professional failure, and damage to their sense of self-worth. Low passage rates decrease the number of practicing attorneys, may raise the cost of legal services, and limit the diversity of the profession.” Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 271 (2007).

21. “The law student who merely takes a variety of pure theory courses . . . will be woefully unprepared for legal practice. That student will lack the basic doctrinal skills: the capacity to analyze, interpret and apply cases, statutes, and other legal texts. More generally, the student will not understand how to practice *as a professional*.” Edwards, *supra* note 5, at 38.

22. See Regina Ramsey James, *How to Mend A Broken Act: Recapturing Those Left Behind by No Child Left Behind*, 45 GONZ. L. REV. 683, 691 (2010) (calling for the abolishment of the arbitrary notions, assessments, labels, and threats surrounding the sufficiency requirements of NCLB).

23. See Kristina P. Doan, *No Child Left Behind Waivers: A Lesson in Federal Flexibility or Regulatory Failure?*, 60 ADMIN. L. REV. 211, 211–12 (2008).

24. See Jeffries, *supra* note 16.

25. See Rosemary C. Salomone, *Educating English Learners: Reconciling Bilingualism and Accountability*, 6 HARV. L. & POL’Y REV. 115, 127–28 (2012).

out of the reauthorization of the Elementary and Secondary Education Act of 1965,²⁶ particularly regarding Title I, a program created by the U.S. Department of Education to distribute funding to schools and school districts with a high percentage of students from low-income families.²⁷ NCLB sought to promote “standards-based education reform”²⁸ in order to establish measurable goals to “improve individual outcomes in education.”²⁹ The primary purpose of the Act sought to increase “school accountability for the academic performance”³⁰ of students from low-income families and minorities, in order to decrease the purported educational disparities in America and worldwide.³¹

Congress recognized that many students on the primary and secondary level were experiencing learning deficiencies and states were not making “significant educational progress.”³² This inability of many students to grasp material at the primary and secondary level sparked a government desire to particularly meet “the educational needs of low-achieving children in our Nation’s highest-poverty schools”³³ and reduce the broad disparities between “minority and nonminority students, and between disadvantaged children and their more advantaged peers.”³⁴ The notion that America could not fall behind

26. See Paul Weckstein & Stephen J. Wermiel, *The Need for Equal Opportunity and a Right to Quality Education*, 35 HUM. RTS. 21, 22 (2008) (“NCLB . . . is the latest revision of President Lyndon Johnson’s original Elementary and Secondary Education Act of 1965.”).

27. See *id.* (“Title I of [the Elementary and Secondary Education Act of 1965] is the largest federal education program, providing about \$14 billion annually for improvement of academic programs, with the money directed to schools with higher poverty levels.”); see also Coulter M. Bump, *Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending That Leaves Children Behind*, 76 U. COLO. L. REV. 521, 523 (2005).

28. Diana Pullin, *Ensuring an Adequate Education: Opportunity to Learn, Law, and Social Science*, 27 B.C. THIRD WORLD L.J. 83, 89 (2007) (requiring states to define performance standards for districts and hold them accountable for compliance with those standards).

29. Kimberly Harrison et al., *John B. Anderson: The Exemplary Dark Horse*, 34 NOVA L. REV. 347, 390 n.283 (2010) (measuring outcomes through the use of assessments that test the basic skills of primary and secondary school children).

30. 20 U.S.C. § 6301 (2012) (“The purpose of this subchapter is ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”); see also Nora Brunelle, *Political Education: An Analysis of the Policy and Politics Behind Utah’s Opposition to No Child Left Behind*, 2006 UTAH L. REV. 419, 424–25 (describing school accountability as NCLB’s defining purpose).

31. See Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 13 (2010) (noting that NCLB was borne out of a congressional understanding that previous legislation and state constitutions were insufficient to address differences in student achievement).

32. Brunelle, *supra* note 30, at 423.

33. See § 6301(2).

34. See § 6301(3).

other nations in an “increasingly competitive global economy” was also a supporting factor for the implementation of the Act.³⁵ Similar to the current concerns facing the legal profession,³⁶ Congress found it necessary to impart a fundamental change upon primary and secondary education in order to improve standardized test scores³⁷ and to enable citizens to compete in the global economy both academically and professionally after graduating from high school.³⁸

NCLB requires each state to account for adequate yearly progress (AYP) scores measured by standardized achievement tests in math, reading, language arts, and science with the goal of making every student “proficient” by 2014.³⁹ AYP is based on state testing standards “that describe at least three levels of student achievement,” including basic, proficient, and advanced performance.⁴⁰ These standardized tests “must be administered at least once annually to students in grades three through eight, and once in high school.”⁴¹ States are required to determine how they will measure AYP and formulate their own statewide standards based on the varying levels of achievement.⁴² While states are given discretion in determining what constitutes AYP, NCLB “requires that the annual increase must include separate objectives for all subgroups of students.”⁴³ Subgroups include “economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.”⁴⁴ States are also required to use empirical re-

35. Joanna Franks Sackel, *Conflicting Policies: Special Education and High Stakes Testing in the United States and England*, 5 WASH. U. GLOBAL STUD. L. REV. 611, 637 (2006).

36. See 2012 STATISTICS, *supra* note 3 (showing that bar passage rates for first time takers have steadily decreased to seventy-seven percent since 2008); Eagar, *supra* note 4 (discussing the criticism of law schools being unable to provide law students with the skills they will need in professional practice).

37. See Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL’Y 1, 4 (2008) (noting that standardized tests are used as a proxy to measure improvement in education).

38. Sackel, *supra* note 35.

39. Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637, 640 (2006) (allowing States to determine their own calculation of proficiency).

40. 20 U.S.C. § 6311(b)(1)(D)(ii)(II)-(III) (2006); Benjamin Michael Superfine, *New Directions in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L.J. 653, 675 (2010).

41. Superfine, *supra* note 40; see also § 6311(b)(3)(C)(vii).

42. § 6311(b)(2)(C)(v); see also Superfine, *supra* note 40 (noting that States are given wide latitude to determine their own standards and mechanisms for assessment).

43. Superfine, *supra* note 40; see also § 6311(b)(2)(C)(v).

44. Superfine, *supra* note 40; see also § 6311(b)(2)(C)(v).

search⁴⁵ to develop programs, training seminars, and teaching methods to achieve AYP.⁴⁶ States have broad discretion in deciding which research-based programs to utilize in order to accomplish these requirements, as long as they have been “scientifically proven to work.”⁴⁷

States receive federal funding⁴⁸ to assist in the development of teachers and principals in achieving AYP.⁴⁹ Schools are required to improve their standardized test scores annually until the level of proficiency is met based on state-set standards.⁵⁰ Teacher discretion regarding how and what to teach is often limited to what will be tested on the standardized tests.⁵¹ Teachers emphasize repetition and uniformity by using problem-sets and other test preparation methodologies to ensure that their students are able to perform well on standardized tests.⁵² While a test-centered teaching methodology allows for some students to perform well, many students are unable to fully grasp the

45. “The term ‘scientifically based reading research’ means research that—(A) applies rigorous, systematic, and objective procedures to obtain valid knowledge relevant to reading development, reading instruction, and reading difficulties; and (B) includes research that—(i) employs systematic, empirical methods that draw on observation or experiment; (ii) involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn; (iii) relies on measurements or observational methods that provide valid data across evaluators and observers and across multiple measurements and observations; and (iv) has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.” 20 U.S.C. § 6368(6)(A)-(B) (2002).

46. See Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 618 (2013); Pinder, *supra* note 31, at 15.

47. See Kamina Aliya Pinder, *Using Federal Law to Prescribe Pedagogy: Lessons Learned from the Scientifically-Based Research Requirements of No Child Left Behind*, 6 GEO. J.L. & PUB. POL’Y 47, 61 (2008) (quoting another source) (emphasizing the lack of guidelines provided by the federal government that states may use to determine and assess which programs work).

48. See 20 U.S.C. § 6302 (2002) (detailing the grants and appropriations provided by the federal government for the purpose of carrying out Title I, including NCLB).

49. See Superfine, *supra* note 40, at 676 (requiring high qualified teachers, systems of intensive and sustained support, and school support teams for schools in order to increase schools capabilities to improve student achievement).

50. § 6311(b)(2)(F) (2006); see also Superfine, *supra* note 40 (detailing that all students must be proficient by 2014).

51. “[F]rom the teacher’s perspective, standards reduce discretion. . . . Accordingly, the potential is to reduce a teacher into a mere technician, mechanically regurgitating that which is required by the state.” R. Ryan Younger, *The Rationales of Striking Rights: Influences of the No Child Left Behind Act*, 60 ARK. L. REV. 735, 760–61 (2007).

52. See Superfine, *supra* note 7, at 598 (describing the practice of showing students how to fill in answer sheets); Allison S. Owen, *Leaving Behind a Good Idea: How No Child Left Behind Fails to Incorporate the Individualized Spirit of the IDEA*, 78 GEO. WASH. L. REV. 405, 423 (2010) (noting teacher focus on test subjects and test-taking strategies); Matthew D. Knepper, *Shooting for the Moon: The Innocence of the No Child Left Behind Act’s One Hundred Percent Proficiency Goal and Its Consequences*, 53 ST. LOUIS U. L.J. 899, 917 n.110 (2009) (recognizing how teachers focus instruction on test content and teaching test items).

material based on a one-size-fits-all instructional method⁵³ and other students simply are not proficient standardized test takers.⁵⁴ These concerns have led many scholars to question whether NCLB is solving the academic and professional deficiencies the Act set out to resolve.⁵⁵

B. The Impact of No Child Left Behind on Primary and Secondary Education

Scholars debate whether NCLB has been successful.⁵⁶ One of the major concerns relates to the harshness of the penalties for not meeting the standards set by the states in compliance with the Act,⁵⁷ especially as the penalties disproportionately and negatively impact impoverished communities and communities of color.⁵⁸ Schools that do not meet the level of proficiency required are deemed “in need of improvement,” and must undergo a series of government interven-

53. See Mark Burgreen, *Being Neighborly in Title 20: Using the IDEA to Lend a Helping Hand to NCLB*, 43 COLUM. J.L. & SOC. PROBS. 51, 61 (2009) (noting NCLB’s attempt to apply one academic approach to states with diverse educational challenges and students with varying abilities).

54. See Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 423 (2002) (recognizing that even many law school graduates simply are not good multiple-choice or timed test-takers).

55. “NCLB and other federal measures such as Race to The Top have proven ineffective at spurring meaningful governance reforms at schools and school districts.” Robert A. Garda, Jr. & David S. Doty, *The Legal Impact of Emerging Governance Models on Public Education and Its Office Holders*, 45 URB. LAW. 21, 23–24 (2013). But see Jonathan C. Pentzien, Note, *Congress, Are You Listening?—The “No Child Left Behind” Act and Its Failure to Account for Tragic Domestic Situations of Urban Youth*, 4 RUTGERS J.L. & PUB. POL’Y 576, 596–97 (2007) (acknowledging that NCLB has increased accountability and has worked in some respects).

56. See James, *supra* note 22, at 683–84 (arguing that the Act has failed to close the achievement gap between minorities and non-minorities as well as between impoverished students and their more affluent counterparts). But see Joseph Strong, *“The Grass Is Always Greener”: A Look at Educational Reform in the United States and Japan*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 277, 296–97 (2012) (recognizing that standardized accountability can be a positive measure when based on a solid curriculum and noting that math and science scores have improved in many areas in the United States).

57. See 20 U.S.C. § 6316(8)(A)–(B) (2002). “For schools classified as in need of improvement, after two years of not making satisfactory progress, the school must allow parents the right to transfer their children to another public school. In the third year, students are eligible for tutoring and other supplemental instructional assistance. In the fourth year, the district must take certain measures which may include replacing the school staff, instituting a new curriculum, and appointing an outside expert to advise the school on its progress toward making AYP. Finally, in the fifth year, penalties include reopening the school as a public charter school, replacing all or most of the school staff, and/or entering into a contract with a private management company to take over the public school’s operation.” Rentschler, *supra* note 39, at 642.

58. See Zanita E. Fenton, *Disabling Racial Repetition*, 31 LAW & INEQ. 77, 101 (2012) (recognizing that NCLB’s accountability structure requires the largest gains from lowest performing schools, which tend to be found in impoverished and minority communities); see also James, *supra* note 22, at 694–97 (arguing that NCLB has led to increased dropout rates and unemployment in many of the communities the Act set out to assist and improve by not accounting for the socio-economic factors impacting those areas).

tions to assist in the improvement of test scores⁵⁹ or risk having their staff replaced or losing their federal funding.⁶⁰

Supporters of NCLB argue that the Act has increased the accountability of teachers and schools in the education of children.⁶¹ Standardized tests provide for a statistical account of how students in a given school, grade-level, and classroom are performing academically.⁶² The required score of “proficient” in a given subject makes academic performance functionally determinable.⁶³ The measurement allows schools, teachers, and parents to recognize which students need extra assistance—often in the form of tutoring—⁶⁴ and, more importantly, provides a measurement of which teachers are most effective at instructing students on a given subject.⁶⁵

Conversely, teachers and principals receive the blame when a school does not meet their AYP requirements.⁶⁶ This broad declaration of proficiency or inefficiency based on a single, annual test does not factor in a host of intangibles that the Act itself sought to address,

59. See § 6316(8)(A)–(B).

60. See § 6311(g)(2) (“If a State fails to meet any of the requirements of this section . . . then the Secretary may withhold funds for State administration . . . until the Secretary determines that the State has fulfilled those requirements.”); see also Owen, *supra* note 52, at 426 (recognizing that a state may lose funding even if one subgroup of students fails to meet proficiency).

61. See Bret D. Asbury & Kevin Woodson, *On the Need for Public Boarding Schools*, 47 GA. L. REV. 113, 127 (2012) (noting that the impetus of NCLB was based on the assumption that raising accountability would incentivize teachers and administrators to better educate their students).

62. See § 6311(b)(2)(C)(v). “States must publicly report the results of student performance on these tests for every school.” Superfine, *supra* note 40, at 675.

63. See § 6311(b)(1)(D)(ii)(II)–(III) (requiring states to describe at least three levels of student achievement); see also Superfine, *supra* note 40, at 675 (noting that states must publicly report the results of standardized tests).

64. See § 6316(e) (requiring schools to provide tutoring after three years of failing to meet AYP); see also Nina S. Rees, *Does Education Need a Devolution Revolution?*, 6 GEO. J.L. & PUB. POL’Y 85, 87–88 (2008) (noting that report cards are provided detailing how the school and individual student performed on the standardized tests).

65. See Derek W. Black, *Education’s Elusive Future, Storied Past, and the Fundamental Inequities Between*, 46 GA. L. REV. 557, 595–96 (2012) (noting how schools may agree to adopt measures of teacher performance based on test scores in exchange for waivers for noncompliance with the provisions of NCLB); see also Audrey R. Lynn, *Teacher Evaluations Based on Student Testing: Missing an Opportunity for True Education Reform*, 18 TEX. J. C.L. & C.R. 203, 205 (2013) (noting that some proponents of NCLB argue that test scores provide an effective measure of how well students are learning, and in effect, how well teachers are teaching).

66. “[P]oor student performance on state-administered standardized tests may trigger an examination of teacher quality and a purge of those teachers whose students scored badly.” Spitzer, *supra* note 8, at 1373 (noting that this process presupposes that student performance on standardized tests accurately measures teacher quality and teacher relevancy to the school and students).

including socio-economic status and race-based disparities.⁶⁷ Schools and students in impoverished areas are likely further behind academically than students attending schools that are located in wealthier school districts.⁶⁸ However, the abrupt implementation of NCLB provided nearly all schools the same amount of time and resources to alleviate drastically different educational issues originating from different starting points.⁶⁹ The penalties for failing to meet AYP often do not provide students with the most need—those in impoverished and minority school districts—sufficient time or resources to improve academically.⁷⁰ Consequently, a number of states design simpler tests and reduce the AYP scores necessary for each school to meet the requisite level of proficiency.⁷¹ Many students are deceived into believing that they are academically proficient, while other students learn to understand and accept mediocrity,⁷² which keeps them academically far behind their peers.

However, schools are able to provide increased transparency of test scores and circumstances that allow families to measure how their children are performing in schools.⁷³ Through reports and online noti-

67. “[R]ecent studies find that schools with high numbers of poor and minority students still receive significantly less state and local money than schools attended by a high number of wealthy and white students.” *Id.* at 1374–75 (explaining how teacher salaries are significantly lower in minority and impoverished school districts reducing their ability to hire more teachers with more credentials and experience).

68. *See Bump, supra* note 27, at 558 (recognizing that NCLB treats all schools the same, regardless of whether the school already has generous resources or is impoverished, which inherently disadvantages those schools starting further academically behind).

69. “[F]ailing schools will be sanctioned for continued noncompliance, a direct result of the inadequate federal financial support and unrealistic demands given the composition of their student bodies.” *Id.*; *see also* Liz Hollingworth, *Unintended Educational and Social Consequences of the No Child Left Behind Act*, 12 J. GENDER RACE & JUST. 311, 319–20 (2009) (arguing that NCLB’s colorblind approach perpetuates inequality by ignoring color differences and the American history of privilege and discrimination).

70. “The NCLB sanctions take away the very funding that could provide adequate resources for disabled students to remain in public school systems. This elimination of the critical funds needed to improve failing subgroups’ performance merely compounds the problem.” Owen, *supra* note 52, at 426–27.

71. *See* Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 326 (2013) (noting that without any federally mandated minimum standard, many states adopted weak standards requisite for their students to meet the level of proficiency to ensure that students merely passed the tests); *see also id.* at 327 (states determine standards for measuring “highly qualified” teachers).

72. *See* Evan Stephenson, *Evading the No Child Left Behind Act: State Strategies and Federal Complicity*, 2006 B.Y.U. EDUC. & L.J. 157, 184 (arguing that grade inflation and lower standards discourage higher-level learning because many students alter their level of effort based on the expectations and requirements of the school system).

73. 20 U.S.C. § 6301 (2012) (“The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic

fications of statistical academic information, families are able to compare the scores of their children with those of other schools in the district, state, or country.⁷⁴ Proficient and advanced students are able to develop confidence in their abilities when they recognize that they are performing well academically.⁷⁵ Students also become more involved in the learning process and take a larger role in their academic success due to positive reinforcement.⁷⁶ Those who have not met this level of proficiency may witness the benefits of performing well academically and may then strive to perform better themselves.⁷⁷ These students are able to request assistance in specific areas where their test scores demonstrate learning difficulties.⁷⁸ Schools are also required to provide tutoring services to those students who need additional academic assistance after multiple years of failing to meet AYP standards.⁷⁹

assessments.”); *see also* Lynn, *supra* note 65, at 205 (noting that some proponents of NCLB argue that test scores provide an effective measure of how well students are learning, and in effect, how well teachers are teaching); Black, *supra* note 65, at 595–96 (noting how schools may agree to adopt measures of teacher performance based on test scores in exchange for waivers for noncompliance with the provisions of NCLB); Brunelle, *supra* note 30, at 424–25 (describing school accountability as NCLB’s defining purpose).

74. *See* Rees, *supra* note 64, at 87 (noting that report cards are provided detailing how the school and individual student performed on the standardized test); *see also* Briana Sprick Schuster, Note, *Highly Qualified Teachers: Moving Forward from Renee v. Duncan*, 49 HARV. J. ON LEGIS. 151, 154 (2012) (emphasizing that schools are required to notify parents if their children are being taught by a teacher that is not highly qualified). *But see* Robinson, *supra* note 71, at 327–28 (recognizing that states may determine that a teacher is highly qualified based on a standardized exam that the state creates, which allows for lower teacher standards similar to the lowering of the state-set standards used to evaluate student performance).

75. *See* Cynthia Schmidt & Ann L. Iijima, *A Compass for Success: A New Direction for Academic Support Programs*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 651, 680 (2006) (noting that law students who were confident in their test taking abilities earned higher first-term grades, because self-perception influences performance).

76. *See* David D. Garner, *Socratic Misogyny?—Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, Note, 2000 B.Y.U. L. REV. 1597, 1641–42 (2000); Michael J. Higdon, 15 NO. 3 PERSP. TEACHING LEGAL RES. & WRITING 169 (2007) (arguing that positive reinforcement in the law school classroom lessens student anxiety).

77. *See* Eboni S. Nelson, *The Availability and Viability of Socioeconomic Integration Post-Parents Involved*, 59 S.C. L. REV. 841, 847 (2008) (arguing for socioeconomic integration in schools because positive peer influences positively correlate with academic success).

78. *See* Rees, *supra* note 64 (noting that report cards are provided detailing how the school and individual student performed on the standardized tests, which allows for teachers, parents, and students to pinpoint where they may need additional assistance); *see also* § 6316(b) (requiring schools, after the third year of failing to make AYP, to provide students with tutoring and other supplemental instructional assistance).

79. *See* § 6316(b) (requiring schools, after the second consecutive year of failing to make AYP, to provide students with tutoring and other supplemental instructional assistance).

However, students may become academically discouraged following continuous underperformance,⁸⁰ especially those in impoverished or high minority-populated areas. Many school districts are unable to afford high quality teachers⁸¹ or secure tutors capable of effectively assisting underperforming students.⁸² Students remain unable to reach the requisite level of proficiency in time for subsequent, annual standardized tests.⁸³ Parents may be incentivized to transfer their children to a better performing school,⁸⁴ but many schools attempt to limit the number of transfer students that they will admit annually.⁸⁵ Schools that have already met their AYP are less likely to admit a student who has not met the standardized level of proficiency at his or her previous school, in fear of bringing the school's AYP scores down.⁸⁶ The potential for student improvement is further minimized, because quality teachers and principals also transfer to proficient schools, leaving a reduced and ineffective faculty and staff at the underperforming schools.⁸⁷ Similar to racial and socio-economic flight,

80. See Schmidt & Iijima, *supra* note 75 (noting that law schools that believe certain groups of students are less capable of academic success may create a self-fulfilling prophecy in students because many of those students enter school with less confidence and perform according to their perceptions of themselves).

81. See Maurice R. Dyson, *Are We Really Racing to the Top or Leaving Behind the Bottom? Challenging Conventional Wisdom and Dismantling Institutional Repression*, 40 WASH. U. J.L. & POL'Y 181, 211 (2012) (detailing that it costs significantly more to recruit and retain high-quality instructors in high-minority school districts).

82. See Jane Gross, *Free Tutoring Reaches Only Fraction of Students*, N.Y. TIMES, Aug. 29, 2003, <http://www.nytimes.com/2003/08/29/nyregion/free-tutoring-reaches-only-fraction-of-students.html?pagewanted=print> (providing examples in New York where few students requested tutoring and most who did were tutored by the same school that had already failed them).

83. See Jennifer C. Bracer, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1183 (2002) (recognizing that some students fail standardized tests repeatedly, year after year).

84. See § 6316(b)(1)(E) (giving parents the right to transfer their children to a better performing school).

85. See Jonathan Barron, *Amending No Child Left Behind to Prevent School Rezoning and Resegregation: A Response to the Tuscaloosa City Schools*, 42 COLUM. J.L. & SOC. PROBS. 373, 400 (2009) (recognizing that large amounts of transfer students may lead to overcrowding in high-performing schools, reducing their effectiveness and capacity to accept all transfer applicants). *But see* 34 C.F.R. § 200.44(d) (2008) (establishing that capacity is not a viable excuse for refusing to accept transfer students).

86. "Students who perform poorly on state tests obviously hurt schools looking to make AYP . . . This is why schools . . . will work to avoid enrolling those students who are at risk of failing the exams. The same pressure could lead schools to push low-performing students out . . ." Nina Rabin, Mary Carol Combs & Norma Gonzalez, *Understanding Plyler's Legacy: Voices from Border Schools*, 37 J.L. & EDUC. 15, 54 (2008).

87. See Janet M. Hostetler, *Testing Human Rights: The Impact of High-Stakes Tests on English Language Learners' Right to Education in New York City*, 30 N.Y.U. REV. L. & SOC. CHANGE 483, 513-14 (2006) (describing how teachers and administrators are drawn to high-performing schools, leaving lower-resources schools with shortages of experienced and qualified teachers); *see also* Spitzer, *supra* note 8, at 1370 (noting that teachers and administrators may

underperforming students are often limited in options and forced to remain at a “basic,” non-proficient school.⁸⁸

While there are national reports of improved test scores and academic performance overall due to NCLB, many of these statistics are undercut by racial, ethnic, and socio-economic variables.⁸⁹ The move toward primarily measuring school, teacher, and student success through standardized tests has caused many teachers to focus primarily on building test taking skills in contrast to holistic learning of the material.⁹⁰ However, “teaching to the test” does not necessarily encourage innovation, creativity, or critical-thinking.⁹¹ While test taking skills are valuable, exclusively teaching to the test reduces the importance of learning the material for the long-term and creates an atmosphere where students believe that academic success primarily involves performing well on an exam.⁹²

Strict standardization stifles students’ and teachers’ ability to develop analytical learning opportunities and problem solving methodologies⁹³ because student learning is varied. The systematic use of a one-size-fits-all instructional method to garner 100% proficiency in

also choose to not teach at all, because academic underperformance often coincides with other issues).

88. See Damon T. Hewitt, *Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act to Fulfill Brown’s Promise*, 30 YALE L. & POL’Y REV. 169, 191–92 (2011) (recognizing that transfer students often remain in schools located within their district where the achievement levels among all schools are consistently low); see also Jay P. Greene, Jonathan Butcher, Laura Israel Jensen & Catherine Shock, *You Can’t Choose If You Don’t Know: The Failure to Properly Inform Parents About NCLB School Choice*, 6 GEO. J.L. & PUB. POL’Y 7, 12 (2008) (recognizing that many parents are unaware of the transfer options available to their children, while others find out too late in the academic year).

89. See *Study Finds Test Scores Up Since NCLB, but Cause Remains Unclear*, NAT’L EDUC. ASS’N, <http://www.nea.org/home/16231.htm> (last visited Aug. 24, 2014).

90. See Gershon M. (Gary) Ratner, *Why the No Child Left Behind Act Needs to Be Restructured to Accomplish Its Goals and How to Do It*, 9 U. D.C. L. REV. 1, 33 (2007) (recognizing that schools concentrate on narrow curriculum and test-taking strategies rather than teaching and learning); Serin Ngai, *Painting over the Arts: How the No Child Left Behind Act Fails to Provide Children with a High-Quality Education*, 4 SEATTLE J. FOR SOC. JUST. 657, 674 (2006) (noting that opponents of standardized tests argue that the methodology does not ensure that students are substantively learning).

91. See Spitzer, *supra* note 8, at 1369–70 (“[E]ven if test scores rise, it may be simply that children get better at test-taking strategies, without any actual gain in their substantive knowledge, critical thinking, or analytical skills.”).

92. See Moppett, *supra* note 9, at 298 (arguing that the competitive culture of law school stifles creativity and undermines intrinsic motivation, because law students are often primarily motivated to perform well on exams in order to obtain a good class rank, honors, or employment opportunities).

93. See Moppett, *supra* note 9 (arguing that standardization stifles creativity by discouraging purposeful, individual, and diverse creative development).

student performance is unrealistic.⁹⁴ Even if students improve academically across the nation, the achievement gap between majority, minority, and students living in impoverished areas remains relatively unchanged.⁹⁵ Underperforming students are unable to reach their full potential without sufficient academic instruction.⁹⁶ Students who manage to achieve academic proficiency on standardized tests often have minimal incentive or opportunity to proceed beyond proficient and reach their full academic potential.⁹⁷ In both instances, students are not taught the adequate reading, writing, analytical, and problem-solving skills that are necessary to carry them beyond college, through law school, and into the modern legal profession.⁹⁸ NCLB was developed to establish measurable goals to improve secondary and primary education.⁹⁹ However, while many students were previously falling behind academically before the Act's implementation,¹⁰⁰ NCLB has not remedied the purported educational disparities in America and

94. See Matthew D. Bernstein, *Whose Choice Are We Talking About? The Exclusion of Students with Disabilities from For-Profit Online Charter Schools*, 16 RICH. J.L. & PUB. INT. 487, 494–95 (2013) (reasoning that NCLB is an unrealistic system of accountability).

95. See Timothy P. Glynn & Sarah E. Waldeck, *Penalizing Diversity: How School Rankings Mislead the Market*, 42 J.L. & EDUC. 417, 427 (2013) (“[T]he achievement gaps between students with high and low family incomes remain when researchers control for race.”). *But see* Mike Johnston, *From Regulation to Results: Shifting American Education from Inputs to Outcomes*, 30 YALE L. & POL’Y REV. 195, 208 (2011) (recognizing that we now have data detailing how wide the achievement gap remains and data on school systems that are delivering positive academic results, which may allow for a viable path to academic proficiency).

96. See Raquel Aldana, *When the Free-Market Visits Public Schools: Answering the Roll Call for Disadvantaged Students*, 15 NAT’L BLACK L.J. 26, 27–28 (1998) (displaying that even before the implementation of NCLB, students were forced to deal with poor academic instruction that hindered their ability to achieve educational equality and opportunities).

97. “[S]tudents who have the greatest potential to achieve and be tomorrow’s leaders and innovators are forced into a lockstep educational system in which they often underachieve.” Elizabeth A. Siemer, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 555–56 (2009) (recognizing that proficient students require more challenging instruction and educational activities to achieve their full potential); *see also* Dawn M. Viggiano, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 486 (2005) (recognizing that schools desire to retain gifted students who perform well on standardized tests; however, they offer few programs that would further develop their students’ talents).

98. See Alice M. 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, 128 (2000) (hypothesizing that the most successful law students acquired, through years of learning, the ability to engage in meaningful learning, including the ability to transfer knowledge to new problems and contexts).

99. See Harrison et al., *supra* note 29 (measuring outcomes through the use of assessments that test the basic skills of primary and secondary school children).

100. See Pinder, *supra* note 31 (noting that NCLB was borne out of a congressional understanding that previous legislation and state constitutions were insufficient to address differences in student achievement).

the impact of these disparities after students graduate from high school.

C. The Impact of No Child Left Behind on Undergraduate Education

Students' developed or underdeveloped skills in primary or secondary school may not necessarily impact their academic success at the undergraduate level.¹⁰¹ Most undergraduate colleges and universities teach using the standard "lecture format of instruction."¹⁰² The standard lecture occurs when an instructor stands before a large body of students and orally discusses a given subject.¹⁰³ This method may not require active student engagement in the classroom¹⁰⁴ and often only requires students to memorize and regurgitate information.¹⁰⁵ The instructional and assessment methodology allows for many students to perform well on an exam without having to critically analyze or learn the material for the long term.¹⁰⁶

Law students bring their learning experiences for acquiring new information with them into the law school.¹⁰⁷ Understanding how students have been taught to learn and succeed academically is critical for law professors and administrators to effectively evaluate and develop their own instructional methods and course offerings.¹⁰⁸ Stu-

101. See, e.g., Vitiello, *supra* note 10 (noting that memorization and regurgitation at the undergraduate level may be sufficient to achieve academic success).

102. Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 *LOY. U. CHI. L.J.* 449, 475 (1996).

103. See Shreya Atrey, *O 'The Damn Good Deal Lawyer' Where Art Thou?*, 13 *T.M. COOLEY J. PRAC. & CLINICAL L.* 331, 346 (2011) ("The lecture method is structured around classrooms where students uninterruptedly listen to professors and read textbooks to acquaint themselves with the relevant legal doctrine").

104. See Atrey, *supra* note 103, at 346–47 (noting that listening and remembering occupy the majority of class time under the lecture format).

105. See Stropus, *supra* note 102 (noting that undergraduate students are often able to memorize facts, repeat them in an organized manner on an exam, and perform well academically).

106. *Id.* (recognizing that the reinforcement of the ability to memorize and regurgitate material, while performing well academically has caused many undergraduate students to become "passive" learners).

107. See Saunders & Levine, *supra* note 19 (noting how students from different doctrinal backgrounds may be familiar with different skill sets and may apply those skills to solve legal issues); see also B. Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 *GONZ. L. REV.* 89, 108 (2003) ("[M]any law students could have achieved high grades based on minimal effort and may be unaccustomed to rigorous study schedules.").

108. "Scholars, practitioners, and judges alike have identified the need for educational institutions that train future legal professionals to pay more attention to what law students need to learn, how law students learn best, what teaching methods are most effective, and what duties the law school has to the profession and the society it serves." Beryl Blaustone, *Improving Clinical Judgment in Lawyering with Multidisciplinary Knowledge About Brain Function and*

dents who have previously found academic success without continuous and long standing active classroom engagement will likely find it difficult to become active and engaged learners upon acceptance into law school.¹⁰⁹ Passive and unengaged learning is generally ineffective in law school,¹¹⁰ because the vast amount of information students are required to learn, interpret, and analyze in a semester or year does not allow for students to prepare assignments or study for exams at the last minute and remain successful.¹¹¹ Law students unable to quickly adapt to the instructional and teaching methods found in law school, such as the Socratic method or the more modern open-discussion lecture, will likely find the first year of law school especially challenging.¹¹²

The concerns regarding declining bar passage rates and the decrease in workplace preparedness of law graduates primarily pertain to law students who are unable to adapt to the instructional methods that law professors use to teach and the courses that law schools provide.¹¹³ However, with recognition comes the obligation of preparation.¹¹⁴ Law professors and administrators have the ability and the

Human Behavior: What Should Law Students Learn About Human Behavior for Effective Lawyering?, 40 U. BALT. L. REV. 607, 612 (2011).

109. “[C]ontemporary law students must learn how to learn before they can benefit from any of the principal methods of instruction law professors employ today. Most law students simply do not have the skills necessary to profit from methods of instruction other than lectures.” Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943, 954–955 (1996).

110. See *id.* at 955 (recognizing that law school requires more than mere rote memorization; instead, law school requires active thought and the ability to problem solve).

111. See, e.g., Paul Bateman, *Toward Diversity in Teaching Methods in Law Schools: Five Suggestions from the Back Row*, 17 QLR 397, 415 (1997) (arguing that last minute preparation in law school is unlikely to be effective because of the continuous introduction to new and challenging material throughout the semester).

112. See Nancy J. Soonpaa, *Stress in Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Students*, 36 CONN. L. REV. 353, 367 (2004) (identifying the following factors as causes of stress in the first year of law school: (1) students’ high expectations, (2) law school teaching methods, (3) the limited amount of feedback, (4) the unfamiliar subject matter, (5) lack of familiarity with effective methods for studying law, (6) the importance of first semester grades, and (7) the way that “law school shatters the illusion that a student is in control by challenging how she thinks, writes, and interacts with [the] world.”).

113. “Students who rank in the upper half of their law school graduating class pass bar examinations no matter which law school courses they take.” Douglas K. Rush & Hisako Matsuo, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Related to Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. LEGAL EDUC. 224, 228 (2007); see also Ron M. Aizen, Note, *Four Ways to Better 1L Assessments*, 54 DUKE L.J. 765, 774 (2004) (noting that first-year grades often impact internship opportunities, membership on law reviews and moot court, and provide students with skill-building opportunities).

114. See Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 406 (1999) (“Many students come to law school after undergraduate experiences

duty to consider how many law students have “learned to learn,” and account for those circumstances when developing their own instructional methods.¹¹⁵ Law professors and administrators should recognize how current and incoming law students were taught to achieve academically, specifically during the first decade following NCLB.¹¹⁶

D. The Impact of No Child Left Behind on Legal Education

Reading and language arts curricula make up a significant portion of the material covered on primary and secondary standardized tests administered through NCLB.¹¹⁷ However, many modern students were “taught to learn” these skills in a narrow and standardized manner.¹¹⁸ The inefficient instructional methods used to develop reading and writing skills at the primary and secondary level often lead to the continued underdevelopment of adequate study habits, and analytical and problem solving skills, which are necessary to succeed in law school.¹¹⁹ Most law school courses require an extensive amount of reading to be completed every week in preparation for class.¹²⁰ Substantive law school courses require students to effectively read, analyze, and interpret detailed fact patterns in order to write essay-style final exams.¹²¹ Legal briefs, memoranda, and research papers make

in which the norm was passive learning during class and recall of content on exams and reason that professors should subsequently teach their students how to be active learners.”)

115. See Richmond, *supra* note 109, at 959 (reasoning that law professors must teach students how to learn and not assume that other educators have fulfilled their promise of promoting active learning in the classroom).

116. See Jeffries, *supra* note 16 (“Congress doubled down on standards and accountability with the 2002 enactment of the No Child Left Behind Act (‘NCLB’), which requires states to ensure that all children, including racial minorities, students with disabilities, and English Language Learners, meet state-determined proficiency benchmarks.”).

117. “NCLB is primarily concerned with increasing proficiency in the subject areas of math and reading.” Pentzien, *supra* note 55, at 580.

118. See Ratner, *supra* note 90 (recognizing that standardization requires that schools concentrate on narrow curriculum and test-taking strategies rather than teaching and learning).

119. See James Etienne Viator, *Legal Education’s Perfect Storm: Law Students’ Poor Writing and Legal Analysis Skills Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 CATH. U. L. REV. 735, 753–54 (2012) (arguing that most first-year law students do not enter law school with the requisite critical reading, writing, or reasoning skills, because high school and college students no longer receive sufficient academic development in those areas).

120. Jennifer Jolly-Ryan, *Promoting Mental Health in Law School: What Law Schools Can Do for Law Students to Help Them Become Happy, Mentally Healthy Lawyers*, 48 U. LOUISVILLE L. REV. 95, 103–104 (2009) (emphasizing that first-year law students are exposed to a heavy workload and are required to read an extensive amount of material).

121. “[I]n the critical first year, the only assessment most students experience is a three or four hour end-of-the-semester final exam.” Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 79 (2010).

up the majority of non-exam student evaluation in law schools.¹²² However, if law students were not taught basic, yet fundamental, reading, writing, and analytical and problem solving skills prior to entering law school, both the traditional and the modern instructional methods of law professors are unlikely to effectively prepare many law students to pass the bar exam or become proficient practitioners.

II. THE IMPACT OF TRADITIONAL AND MODERN LEGAL INSTRUCTIONAL METHODS

Two of the predominant eras of instructional methods that have been used in law schools to prepare students to matriculate, pass the bar exam, and become effective legal practitioners include the traditional Socratic method¹²³ and the modern multifaceted method of incorporating lectures and open-class discussions into a derivative form of the Socratic method.¹²⁴ However, due to the instructional and pedagogical impact of NCLB, many law students are not academically prepared to independently perform to the level expected by their law professors.¹²⁵ When assessing, developing, and implementing their instructional methods and providing course offerings, law professors and administrators should account for how their students were taught

122. See Kenneth D. Chestek, *Reality Programming Meets LRW: The Moot Case Approach to Teaching in the First Year*, 38 GONZ. L. REV. 57, 80 (2003) (recognizing that traditional legal writing courses primarily include writing legal briefs and memoranda).

123. “[A] law professor practicing the classical version of the law school Socratic method should: hide the methodology from the students; expect all students to be prepared and on call; call on students without advance notice; give very little direct feedback on the quality of the students’ responses; treat all arguments as equally valid for purposes of advancing the dialogue; refuse to let poorly prepared or unprepared students off the hook; discourage the use of canned briefs or commercial outlines; radiate comfort with ambiguity in law and facts; ensure that the students confront ambiguity in law and facts; expect other students to listen actively to the exchange; convey neutrality as to legal policies; conceal personal ideology; ruthlessly play devil’s advocate; make the students’ assumptions and biases apparent; highlight differences of kind and degree; point out logical consistencies and inconsistencies; and finally, remember that a Socratic dialogue is not a discussion where assertions of students’ personal views are welcomed.” Amy R. Mashburn, *Can Xenophon Save the Socratic Method?*, 30 T. JEFFERSON L. REV. 597, 619–620 (2008).

124. See Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 125, 128–30 (1999) (providing examples of professors who teach using the Socratic method, open lectures, in-class practice problems, client counseling and legal document drafting assignments, as well as panel discussions in order to focus instruction on the needs of the students).

125. See Debra R. Cohen, *Competent Legal Writing—A Lawyer’s Professional Responsibility*, 67 U. CIN. L. REV. 491, 515 (1999) (noting that elementary writing skills are learned early on and that many law students, even practicing attorneys, have not developed these basic skills); Matthew J. Arnold, Comment, *The Lack of Basic Writing Skills and Its Impact on the Legal Profession*, 24 CAP. U. L. REV. 227, 254 (1995) (reasoning that there should be a rebuttable presumption that incoming law students do not possess basic writing skills that reasonably should have been taught in primary and secondary school).

to learn in order to provide those students with the optimum opportunity for success.

A. The History of the Traditional Socratic Method

The use of the Socratic method in law schools began in 1870, when Christopher Columbus Langdell became dean of Harvard Law School.¹²⁶ Dean Langdell utilized the Socratic method to establish the case method of legal study.¹²⁷ Through the case method version of the Socratic method, students were required to read judicial opinions and cases in order to prepare for class, where the professor engaged students in a back and forth sequence of questions and answers pertaining to the assigned opinions.¹²⁸ Unlike Socrates' classical version of the Socratic method, "[t]he questioning used in the [legal] Socratic method [was] not dialectic because one of the participants (the professor) [knew]the answer."¹²⁹ Thus, "[t]he purpose of the [legal] Socratic method [was] for the professor to guide the student in discovering that answer for himself or herself."¹³⁰

The first year of legal study is generally considered the most difficult and important for law students, because academic success during the first year of legal study often directly impacts the professional opportunities available to students during the rest of their matriculation and after graduation.¹³¹ The Socratic method purportedly encourages law students to evaluate and interpret the nuances and specific rules of law applied within a given judicial opinion.¹³² Through the Socratic method, students are taught the core subjects and skills that prepare them to think critically, analyze, and find solutions for legal issues.¹³³ However, studies have shown that the exclusive use of the Socratic

126. Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 269–70 (2007).

127. *Id.* at 270.

128. "Under the Socratic Method, law students read cases and the faculty engages them in a question and answer exchange regarding those cases." Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools Draft: May 25, 2000*, 16 T.M. COOLEY L. REV. 201, 206 (1999).

129. Jackson, *supra* note 126, at 272.

130. *Id.*

131. *See* Aizen, *supra* note 113.

132. "The Socratic method, in general, has the goals of teaching students how to read cases and extract principles of law from them, use legal reasoning and analysis to apply law to fact patterns different from those of an assigned case, make persuasive legal arguments, and understand the nature of legal decision making. Ideally, the student internalizes the Socratic dialectic and is ultimately able to do these things for herself without someone else prompting the next step in the analysis." Mashburn, *supra* note 123, at 620–21.

133. *Id.*

method during the first year is not the most effective instructional tool for teaching law students.¹³⁴

Law students are generally given a single exam at the end of the semester or year,¹³⁵ typically in fact-pattern essay format,¹³⁶ which constitutes the majority of their grade in the course.¹³⁷ Each law school class, especially during the first year of law school, typically contains approximately 70 to 90 students.¹³⁸ However, only a few law students are called on by the professor within a given class period to engage in the Socratic method.¹³⁹ Law students listen and take notes pertaining to the class discussion between the professor and their classmates.¹⁴⁰ A few scholars argue that the Socratic method encourages active learning, because law students are required to “read the material and think critically about the material before class so that they can respond if called upon” as well as “actively follow the dialogue between the professor and the answering student.”¹⁴¹ These scholars argue that the Socratic method encourages students to speak and develop their oratory skills in a “safe” classroom environment.¹⁴² While the Socratic method has long served as a primary methodology for teaching the law, opponents of the method argue that these “on call”¹⁴³ discussions are often the only opportunities for feedback an individual student may have with their professor.¹⁴⁴ Opponents argue

134. See Jackson, *supra* note 126, at 307 (recognizing that while the Socratic method is useful for teaching legal analysis, the methodology is most effective when used in conjunction with other techniques that are better suited to teach other legal concepts).

135. See Randall, *supra* note 128, at 207 (noting that law professors generally give one exam per semester and grade based on how students in the class compare against each other).

136. See Roach, *supra* note 10, at 673.

137. See Harvey Gilmore, *Misadventures of a Law School Misfit*, 51 DUQ. L. REV. 191, 198 (2013).

138. See Randall, *supra* note 128.

139. *Id.* (recognizing that most students in law classrooms are passive learners, because the Socratic method typically only allows the professor to engage a few students at a time).

140. “Those who are not engaged [in the Socratic method] are expected to listen, silently answer the questions being asked of their peers, and determine whether their potential response was appropriate based on the professor’s response to the student of the day.” Linda S. Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 APPALACHIAN J.L. 127, 135 (2006).

141. Jackson, *supra* note 126, at 274–75.

142. *Id.* at 280 (noting that many law students matriculated through their undergraduate institution without having to speak in class).

143. See Eileen A. Scallen, *Evidence Law As Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 QLR 813, 865 (2003) (describing the phenomenon when students are called on by the professor and required to speak in class).

144. See Roach, *supra* note 10, at 673 (arguing that law students receive minimal feedback or assessment regarding how they are performing in the course and whether they are understanding the material); Anderson, *supra* note 140 (noting that the little feedback law students do receive

that “many students find that their self-esteem depends on their demonstrations of ability in class.”¹⁴⁵ Thus, many first-year law students who are on call are distressed and frightened by the experience,¹⁴⁶ in part because of the “perceived hostility and smugness of the professors in questioning,”¹⁴⁷ but also due to the pressures of law school and the need for “personal validation prior to the exam.”¹⁴⁸

Law students who are not on call may be less engaged than their peers in the learning process.¹⁴⁹ Many law students find the material taught through the use of the Socratic method confusing and difficult to process.¹⁵⁰ The methodology alone often fails to motivate law students to think critically about the information that they are assigned to read, because many law students spend the majority of their time merely getting through the material just to prepare for class.¹⁵¹ Proponents argue that the Socratic method develops cognitive skills and advances students’ legal reasoning, synthesizing, and application skills in regard to complex legal rules, cases, and exceptions.¹⁵² Becoming accustomed to the Socratic method is a difficult process, because “[m]ost of the teaching students have experienced prior to law school places a premium on knowledge of facts rather than process.”¹⁵³ Many law students simply do not learn the covered material during the academic

often comes after the semester is over and they have already received their final grade in the course).

145. Jackson, *supra* note 126, at 286.

146. See John O. Sonsteng, Donna Ward, Colleen Bruce & Michael Petersen, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 337 (2007) (arguing that questions posed by professors through the Socratic method are often arbitrary, obscure, and posed in an intimidating manner).

147. Jackson, *supra* note 126, at 285.

148. *Id.* at 286.

149. “Many [law students] sit quietly in class pouring their energy into taking verbatim notes of what the professor says, rarely participating voluntarily or engaging in active listening.” Mashburn, *supra* note 123, at 652 (conceding that a shift away from the Socratic method may cause less students to come to class prepared). *But see* Eagar, *supra* note 4, at 401 n.54 (arguing that the Socratic method may motivate students to continuously be prepared for class).

150. See Camille Lamar Campbell, *How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class*, 48 DUQ. L. REV. 273, 291 (2010) (noting that the Socratic method, minimal feedback, and final grades based on a single exam cause distress for many students and inhibit their ability to learn).

151. See David J. Herring & Collin Lynch, *Teaching Skills of Legal Analysis: Does the Emperor Have Any Clothes?*, 18 LEGAL WRITING: J. LEGAL WRITING INST. 85, 117 n.86 (2012) (recognizing that students do not obtain full comprehension of the material by merely reading to prepare for class discussion); Carol McCrehan Parker, *Reflecting on the Value of Expressive Writing in the Law School Curriculum*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 279, 281 (2009) (noting that first year law students often read in search of the right answer without critically analyzing or interpreting the information).

152. See Jackson, *supra* note 126, at 276.

153. *Id.* at 277.

year,¹⁵⁴ and instead are forced to attempt to memorize the information at the end of the semester in preparation for the final exam.¹⁵⁵ However, a shift away from the unitary methodology of the Socratic method developed in 1970 to address the evolving needs of law students.¹⁵⁶

B. The Shift Toward Modern Instructional Methods

In the 21st Century, the Socratic method is no longer the primary teaching method used to instruct law students.¹⁵⁷ The modern instructional methodology includes lecture and open-class discussions, and in certain instances completely eliminates the traditional use of the Socratic method, especially after the first year.¹⁵⁸ While some law professors still utilize the traditional Socratic method form of instruction,¹⁵⁹ most have opted to utilize a variety of teaching methodologies¹⁶⁰ and many professors have completely replaced the Socratic method with “toned-down Socratic questioning, student panels, group discussions, and lectures.”¹⁶¹ One explanation for this pedagogical shift recognizes that “yesterday’s students have become today’s professors, and have carried with them perspectives and attitudes toward legal education” from their own experiences as law students.¹⁶² Many modern law professors disapprove of the use of the strict Socratic method and favor more modern instructional methods that reduce the purported in-class anxiety and fear in law students.¹⁶³

154. See Randall, *supra* note 128 (noting that most law students are passive learners in the classroom setting).

155. See Douglas A. Henderson, *Uncivil Procedure: Ranking Law Students Among Their Peers*, 27 U. MICH. J.L. REFORM 399, 412 (1994) (arguing that students tend to attempt to memorize and cram material tested on their final exams during the last weeks of the semester).

156. See Kerr, *supra* note 124, at 130 (interviewing non-traditional professors who explained that the exclusive use of the Socratic method was not an effective tool for teaching; the method unnecessarily increased student stress and fear; and it was not an enjoyable experience for students).

157. See Jackson, *supra* note 126, at 270–71.

158. See Kerr, *supra* note 124, at 128–30 (providing examples of professors who teach using the Socratic method, open lectures, in-class practice problems, client counseling and legal document drafting assignments, as well as panel discussions in order to focus instruction on the needs of the students).

159. See *id.* at 122–23 (detailing the author’s interviews with professors who primarily use the Socratic method exclusively).

160. See *id.* at 114 (listing student panels, group discussions, and lectures as modern teaching methodologies).

161. *Id.*

162. *Id.* at 131.

163. See *id.* at 130 (interviewing non-traditional professors who explained that the exclusive use of the Socratic method was not an effective tool for teaching; the method unnecessarily increased student stress and fear; and it was not an enjoyable experience for students).

Law professors have recognized the effectiveness, or in many instances, ineffectiveness of the traditional instructional methods used in law schools.¹⁶⁴ However, these modern instructional methods do not and should not necessarily incorporate changed expectations regarding the information students are still required to learn.¹⁶⁵ Due to their own instructional experiences,¹⁶⁶ law professors should be more open to recognize the differing instructional experiences of their students, particularly those who grew up in the era of NCLB. By doing so, law professors may be able to craft teaching methodologies that account for their students' learning experiences and enable them to improve their potential for academic success during law school and after graduation.

Presently, law students who enter law school without fundamental reading, writing, problem solving, and analytical skills often find it difficult to succeed academically in law school,¹⁶⁷ because law professors historically offer minimal guidance or feedback in regard to exam taking and legal analysis or writing.¹⁶⁸ Without sufficient instruction, many students are further impacted when they are required to read and analyze fact patterns and write essays to solve legal issues on law school exams and the Bar exam.¹⁶⁹ Few first-year legal writing professors or courses devote a significant amount of time teaching basic grammar, analytical, and writing skills prior to teaching standard legal writing curricula.¹⁷⁰ While some of these skills may be further devel-

164. *See id.*

165. *See* M. H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. ASS'N LEGAL WRITING DIRECTORS 27, 27–28 (2004) (noting that regardless of the methodology used to teach law students, they must sufficiently learn and understand the material in order to pass the course).

166. *See* Kerr, *supra* note 124, at 129–30 (noting that some professors move away from the traditional Socratic method because they did not find the method effective or productive when they were law students).

167. *See* Thomas, *supra* note 98, at 128 (hypothesizing that the most successful law students acquired, through years of learning, the ability to engage in meaningful learning, including the ability to transfer knowledge to new problems and contexts); *see also* Cohen, *supra* note 125, at 515 (noting that elementary writing skills are learned early on and that many law students, even practicing attorneys, have not developed these basic skills); Arnold, *supra* note 125, at 254 (reasoning that there should be a rebuttable presumption that incoming law students do not possess basic writing skills).

168. *See* Lasso, *supra* note 121, at 79.

169. *See* Randall, *supra* note 128, at 207 (noting that law professors generally give one exam per semester and grade based on how a student compares to other students in the class); *see also* Society of American Law Teachers Statement on the Bar Exam July 2002, 52 J. LEGAL EDUC. 446, 446 (2002) (describing the bar exam as a test consisting of multiple-choice questions and a set of essay questions).

170. “Historically, law schools have not offered sufficient writing instruction. Few law schools have implemented the ABA suggestion for a writing requirement in each year. Although

oped in law school,¹⁷¹ legal writing professors should not be required to spend extensive amounts of time teaching the fundamental, yet basic, skills that law students are expected to have learned during their primary and secondary matriculation.¹⁷² The time spent teaching or reviewing these skills in law school could more effectively be spent building and teaching law students the skills they will need in order to pass the bar exam and practice law.¹⁷³ However, if a significant number of law students have not been taught these skills prior to entering law school, law professors and administrators should account for the instructional histories of law students when developing their instructional methods and course offerings. If they do not account for these realities while constructing their instructional methodologies and course offerings, many law students will continue to graduate unprepared to take the bar exam and become ineffective legal practitioners.

C. The Impact of Modern Instructional Methods

Law school grades typically fail to provide law students with the ability to assess whether or not they have effectively learned the material.¹⁷⁴ Law students usually receive very minimal feedback regarding how they performed on their final exams, aside from the grade itself, or why they received those grades.¹⁷⁵ Law school grades are also not necessarily indicative of how well students understand the material, especially if the school utilizes a grading curve that creates a false sense of actual student performance on the exam.¹⁷⁶ In conjunction, law schools are primarily the only professional academic institutions

more and more law schools are requiring an upper level writing requirement, most require only two semesters of legal writing.” Cohen *supra* note 125, at 515–16 (noting that elementary writing skills are learned early on and that many law students, even practicing attorneys, have not developed these basic skills).

171. *See id.* at 523–24 (calling for competent legal writing training through a law student’s matriculation in law school as well as after graduation).

172. *See* Arnold, *supra* note 125, at 254 (reasoning that there should be a rebuttable presumption that incoming law students do not possess basic writing skills that reasonably should have been taught in primary and secondary schools).

173. *Id.* at 256 (arguing that law schools should screen students in an attempt to discern whether they have basic writing skills before admitting them because of the detrimental impact of poor legal writing on the legal profession).

174. Sonsteng et al., *supra* note 146, at 337–38, 394 (recognizing that many incoming law students expect to perform well based on their past academic success; however, with minimal feedback regarding their law school performance, besides a single grade or score, students have little opportunity to assess and improve).

175. *See* Lasso, *supra* note 121, at 79.

176. Lynn Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J.C. & U.L. 505, 558 (2006) (providing that schools with mandatory curves measure how students perform in comparison to their classmates).

in the U.S. that allow students to graduate after receiving less than a “C” in multiple classes.¹⁷⁷ While law students who perform well academically are more likely to pass the bar and become effective legal practitioners,¹⁷⁸ students who did not perform well during their first-year often find it difficult to improve their academic circumstances.¹⁷⁹ Many are labeled based off their first-year performance¹⁸⁰ and are often unable to receive the academic assistance that they need to improve.¹⁸¹

Understanding the need for substantial academic feedback is necessary when assessing law school instructional methods, because most legal professionals agree that the first-year of law school is the most indicative of success post-graduation.¹⁸² However, many law students who were not able to perform well academically during law school, particularly during their first year of legal study, are unlikely to be able to adequately prepare to take the bar exam two months after graduating from law school,¹⁸³ nor will they develop the skills overnight to become effective legal practitioners.¹⁸⁴

177. “Law schools differ from other graduate institutions. The vast majority require only a 2.0 grade point average—or something in that range—to remain in good standing and graduate.” Joshua M. Silverstein, *A Case for Grade Inflation in Legal Education*, 47 U.S.F. L. REV. 487, 497–98 (2013) (noting that “C” grades are generally satisfactory in legal education and recognizing that a number of law schools continue to employ “D” grades).

178. See Henderson, *supra* note 155, at 417 (finding it unsurprising that law student performance on final exams remain much the same semester after semester, because the satisfaction of performing well typically decreases after the first year, leading to a perpetuation of the status quo for many students).

179. *Id.*

180. “[G]rading requirements that set the standard lower than pre-law school performance lead students to believe that only a small portion of each graduating class is successful—namely, the ten to twenty-five percent who actually receive high marks. . . . Students . . . resent such grading systems, which effectively create a sense of resignation and mediocrity across a large segment of the class.” Silverstein, *supra* note 177, at 536 (quoting another source).

181. “First-year grades control the distribution of goodies: honors, law review, job placement, and, because of the importance placed on these matters by the law school culture, even the student’s sense of personal worth. Since the system rewards only a few, punishes the rest, and is perceived as largely unresponsive to the degree of effort devoted to study, it is not surprising that clerking in a law office, combined with a passive and limited response to the upperclass curriculum, is a frequent choice.” Roger C. Cramton, *The Current State of the Law School Curriculum*, 32 J. LEGAL EDUC. 321, 329 (1982).

182. *E.g.*, Joshua M. Silverstein, *In Defense of Mandatory Curves*, 34 U. ARK. LITTLE ROCK L. REV. 253, 264–65 (2012).

183. See Richard A. Matasar, *Skills and Values Education: Debate About the Continuum Continues*, 22 N.Y.L. SCH. J. INT’L & COMP. L. 25, 34 (2003) (finding that many students who have difficulty understanding legal doctrine and applying legal analysis often do not pass the bar exam on the first attempt).

184. *Id.* (noting that many students who have difficulty understanding legal doctrine and applying legal analysis will likely require more training in lawyering skills).

III. THE CONCERNS OF THE LEGAL COMMUNITY

While the effectiveness of law professors' instructional methods and the availability of certain course offerings directly impact the academic and professional lives of law students,¹⁸⁵ these circumstances also directly affect the legal community.¹⁸⁶ Members of the legal profession, especially those involved in legal education, expect a significant number of law students to be able to pass the bar exam upon graduation.¹⁸⁷ They also expect recent law graduates to have amassed a sufficient amount of skills in law school that will enable them to become effective legal practitioners.¹⁸⁸ However, declining bar passage rates¹⁸⁹ and growing concerns regarding the preparedness of recent law school graduates to enter the legal field¹⁹⁰ have led many in the legal community to express concern regarding the sufficiency of law school instructional methods.¹⁹¹

A. Preparing for the Bar Exam

Few attorneys reason that law students need to take an extensive amount of bar courses in law school prior to sitting for the bar exam.¹⁹² Most practitioners agree that overall academic performance in law school and continued strong preparation post-graduation are the strongest indicators of success on the bar exam.¹⁹³ However, school-provided bar courses give students an opportunity to learn

185. See Kamina A. Pinder, *Street Law: Twenty-Five Years and Counting*, 27 J.L. & EDUC. 211, 226 (1998) (detailing the purpose of law school in preparing students to effectively practice law).

186. See Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J.L. & SOC. JUST. 247, 248–49 (2012) (arguing that law schools are no longer fulfilling their promise of preparing practice ready attorneys evinced by concerns of those already practicing in the legal industry).

187. See Joan Mahoney, *The Future of Legal Education*, 33 U. TOL. L. REV. 113, 115 (2001).

188. *Id.*

189. See 2012 STATISTICS, *supra* note 3 (showing that bar passage rates for first time takers have steadily decreased to seventy-seven percent since 2008).

190. “[T]he profession increasingly is demanding that [legal research and writing] be a central focus of the work of the law school and that students graduate with highly developed abilities to conduct effective research and write clearly, concisely, and persuasively.” Deaneel Reece Tacha, *No Law Student Left Behind*, 24 STAN. L. & POL’Y REV. 353, 362 (2013).

191. See Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 70 (2012) (finding that law schools are failing to assess whether law students are mastering the necessary skills that they will need to develop into effective legal practitioners).

192. “Students who rank in the upper half of their law school graduating class pass bar examinations no matter which law school courses they take.” Rush & Matsuo, *supra* note 113, at 228 (reasoning that there is no evidence supporting a relationship between the number of bar examination subject-matter courses and bar passage).

193. *Id.*

rules of law pertaining to subject matter generally tested on the bar in a given jurisdiction.¹⁹⁴ Bar courses in law school provide law students with an introduction to material that they will need to master by the time they sit for the bar exam.¹⁹⁵

Most law students also take a bar preparation course after graduating from law school, but prior to sitting for the bar exam.¹⁹⁶ Post-graduation preparatory courses are tailored toward the specific jurisdiction in which an individual plans to take the bar and provide graduates with an opportunity to learn the specific, settled law particular to that jurisdiction.¹⁹⁷ Most law schools teach nationally recognized rules of law and “how to think like lawyers.”¹⁹⁸ However, if a law graduate did not sufficiently learn how to generally analyze and interpret the law during his or her three years of law school, the individual will likely have a difficult time learning specific, related, but sometimes contradictory legal material in two months before sitting for the bar exam.¹⁹⁹

Since 2008, overall bar passage rates in the U.S. have declined,²⁰⁰ and the specific scores on the Multistate Bar Examination (MBE)²⁰¹ and the Multistate Professional Responsibility Examination (MPRE)

194. “The bar exam tests the subjects students should have learned in law school in preparation for the general practice of law.” Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 451 (2004) (recognizing that bar preparation courses do not teach students how to “analyze a question, write an essay, or think through a problem.”).

195. See Riebe, *supra* note 20, at 308 (“[I]t is logical that students will be better situated to pass bar exams if they do not have to spend their review period learning many courses from scratch.”).

196. See Anthony Peirson Xavier Bothwell, *The Law School Admission Test Scandal: Problems of Bias and Conflicts of Interest*, 27 T. MARSHALL L. REV. 1, 30 (2001).

197. See Riebe, *supra* note 20, at 317 (recognizing that bar exams are state specific and encouraging law students to research and identify which review courses are most effective for passing a particular state’s exam).

198. J.B. Ruhl, *Managing Systemic Risk in Legal Systems*, 89 IND. L.J. 559, 568 (2014).

199. See James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1704 (1991) (noting that law school attempts to teach students how to think like a lawyer; however, bar review courses teach the law of a particular state).

200. See 2012 STATISTICS, *supra* note 3 (showing that bar passage rates for first time takers have steadily decreased to seventy-seven percent since 2008).

201. *Id.* (showing that July MBE scores have steadily decreased since 2008); see also James R. Maxeiner, *Chapter 19 United States Federalism: Harmony Without Unity*, 28 IUS GENTIUM 491, 513 (2014) (“All but two states, Washington and Louisiana, use the Multistate Bar Exam, for 1 day of their 2-or-3 day state bar exams. The Multistate Bar Exam consists of 200 multiple choice questions on the topics of contracts, torts, constitutional law, criminal law, evidence, and real property. These questions are not jurisdiction-specific but test issues that should have the same solutions in all states.”).

portion of the bar have likewise decreased.²⁰² Only seventy-seven percent of law school graduates who sat for the bar exam in 2012 passed the test on the first time.²⁰³ Many legal scholars believe, in part, that recent increases in the minimum score necessary to pass the bar have made the bar exam more difficult to pass.²⁰⁴ Other legal professionals are more concerned that recent law school graduates are just generally not academically prepared to pass the exam.²⁰⁵ Ineffective legal instruction and training perpetuates the divide between law students who perform academically well and those who do not.²⁰⁶ Law schools around the country are graduating students who were unable to perform well on a large number of law school exams throughout their matriculation.²⁰⁷ While law students who perform well academically during law school tend to pass the bar,²⁰⁸ law students who did not effectively develop basic cognitive and reasoning skills prior to attending law school, as well as learn rudimentary substantive legal doctrine during their three years of law school, are far more likely to find it difficult to pass the bar exam.²⁰⁹ Many of those students will similarly find it difficult to become effective legal practitioners.

202. See 2012 STATISTICS, *supra* note 3 (showing that MPRE scores have generally declined since 2008, but increased in 2012); see also A. Michael Gianantonio, *The Practical Use of the Trial Advocacy Course in Today's Legal Education Curriculum*, 50 DUQ. L. REV. 485, 499–500 (2012) (“A law student’s knowledge of the rules of ethics is . . . tested by the Multistate Professional Responsibility Exam (‘MPRE’). The MPRE is designed to measure a student’s knowledge and understanding of established standards related to a lawyer’s professional conduct.”).

203. See 2012 STATISTICS, *supra* note 3 (showing that bar passage rates for first time takers have steadily decreased to seventy-seven percent since 2008).

204. E.g., Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 930 (2001) (recognizing the increase in the requisite score to pass the bar exam across the United States).

205. See, e.g., Riebe, *supra* note 20, at 270–71 (noting the increase in the requisite score necessary to pass the bar exam, but reasoning that the more pertinent issue concerns the argument that many students are not academically prepared to pass the bar regardless of the requisite score).

206. See Grant H. Morris, *Preparing Law Students for Disappointing Exam Results: Lessons from Casey at the Bat*, 45 SAN DIEGO L. REV. 441, 455–56 (2008) (recognizing how law schools and the legal profession divide students between those who “do well” and those who “do poorly,” in terms of job opportunities); see also Aizen, *supra* note 113 (noting that first-year grades often impact internship opportunities, membership on law reviews and moot court, the continuation of merit-based scholarships, and job opportunities upon graduation).

207. See Silverstein, *supra* note 177, at 499–507 (noting that grading scales differ between law schools and recognizing that law school is the only graduate or professional institution where students are not always academically dismissed for earning grades below a “C” or having less than a “B” average).

208. “Students who rank in the upper half of their law school graduating class pass bar examinations no matter which law school courses they take.” Rush & Matsuo, *supra* note 113, at 228.

209. See Linda Jellum & Emmeline Paulette Reeves, *Cool Data on a Hot Issue: Empirical Evidence That a Law School Bar Support Program Enhances Bar Performance*, 5 NEV. L.J. 646,

B. Preparing for the Legal Profession

While the decline in bar passage rates is troublesome,²¹⁰ the professional development of effective legal practitioners is also of concern.²¹¹ In 2012, only 62.3% of law school graduates obtained legal jobs that required them to pass the bar exam.²¹² While every law graduate does not seek to practice the law,²¹³ those who do will likely find that legal jobs are scarce and difficult to obtain.²¹⁴ Most law firms, government agencies, judges, and private practitioners primarily seek to hire only the best law students.²¹⁵ While many law firms and government agencies provide for general on-the-job training,²¹⁶ more employers are expecting law school graduates to be able to practice proficiently immediately upon hire.²¹⁷ There is a growing concern among those in the legal profession that many law school graduates, including those who excelled academically in law school and have passed the bar exam, are unable to practice proficiently.²¹⁸

Many legal scholars reason that recent law school graduates are not adequately prepared to work in the legal field because they have not proficiently developed the necessary skills in law school.²¹⁹ For example, the ABA only requires law schools to ensure “that each student receive substantial instruction in . . . professional skills generally

671–72 (2005) (providing research indicating that students in the bottom half of the class will have far greater difficulty with passing the bar exam).

210. See Sonia Bychkov Green, Maureen Straub Kordesh & Julie M. Spanbauer, *Sailing Against the Wind: How a Pre-Admission Program Can Prepare At-Risk Students for Success in the Journey Through Law School and Beyond*, 39 U. MEM. L. REV. 307, 309 (2009) (noting that many law schools have become increasingly concerned about declining bar passage rates).

211. See Eagar, *supra* note 4, at 392 (describing the criticism law schools have faced for purportedly failing to teach students many of the practical lawyering skills they will need in practice).

212. A.B.A., 2012 LAW GRADUATE EMPLOYMENT DATA.

213. See Barnhizer, *supra* note 5, at 309 (recognizing that many law students want to possess legal knowledge, but do not want to practice law in the traditional sense).

214. Cassandra L. Hill, *The Elephant in the Law School Assessment Room: The Role of Student Responsibility and Motivating Our Students to Learn*, 56 HOW. L.J. 447, 487 (2013) (critiquing the impact of the United States recession on the legal job market); Tacha, *supra* note 190, at 358; see also 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) (recognizing that rising tuition, scarce student loans, and fewer available jobs from law school graduates has put a premium on job candidates with practical skills).

215. E.g., Hill, *supra* note 214, at 488 (arguing that employers seek law students with high academic achievement, moot court experience, or law journal or review experience, and practical training).

216. See Tacha, *supra* note 190, at 362 (noting that large law firms and judicial internships and clerkships provide on the job training).

217. See *id.* at 362; Hill, *supra* note 214, at 487–88.

218. See Tacha, *supra* note 190, at 362.

219. *Id.* at 370–71.

regarded as necessary for effective and responsible participation in the legal profession²²⁰ and offer clinical experience as well as²²¹ co- and extra-curricular activities.²²² However, modern law students are expected to balance a full-time course load²²³ and participate in a number of extracurricular activities, clinics and internships, in order to develop the skills necessary to become proficient practitioners. Although the importance of taking skills courses may be understood by law students, many must balance the maximum credit hours with taking substantive courses,²²⁴ other elective courses that will specifically assist them within their chosen career field,²²⁵ or enrolling in courses that may enable them to maintain or improve their grades.²²⁶ Thus, law students often do not take a sufficient amount of skills courses in order to develop the skills necessary to become proficient practitioners upon graduation,²²⁷ exacerbating the concerns of those already in the legal field regarding the effectiveness of law school instructional methods.²²⁸

IV. REFORMING MODERN LEGAL INSTRUCTIONAL METHODS

In order to address the concerns regarding bar passage rates and the workplace proficiency of law graduates, law professors and administrators should account for the impact of NCLB when developing their instructional methods and course offerings. While NCLB fo-

220. 2013-2014 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS., Standard 302, Interpretation 302-3 (defining substantial as a minimum of one or two required courses) [hereinafter 2013-2014 ABA STANDARDS].

221. *Id.* at Standard 301.

222. *Id.*

223. See Paul F. Kirgis, *Race, Rankings, and the Part-Time Free Pass*, 54 J. LEGAL EDUC. 395, 399 (2004) (illustrating that a full-time course load generally consists of twelve to sixteen credit hours per semester).

224. See Anthony J. Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151, 163 (2007).

225. See Ann Marie Cavazos, *Next Phase Pedagogy Reform for the Twenty-First Century Legal Education: Delivering Competent Lawyers for a Consumer-Driven Market*, 45 CONN. L. REV. 1113, 1152 (2013) (recognizing that while electives are typically available, the number of courses that are required and “the limited number of courses offered in specialize[d] areas prevent students from graduating with [a] recognized law specialty”); Peter H. Huang & Rick Swedloff, *Authentic Happiness & Meaning at Law Firms*, 58 SYRACUSE L. REV. 335, 345 (2008) (arguing that law students can enroll in elective courses that cater to and develop their strengths).

226. See Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH. U. J.L. & POL’Y 11, 35 (2003).

227. See Eagar, *supra* note 4, at 392–93.

228. See Mahoney, *supra* note 187, at 115.

cused on test preparation,²²⁹ law schools offer law students minimal opportunities to develop and improve their exam taking skills in a legal manner.²³⁰ However, primary and secondary education has shifted toward incorporating substantive learning in conjunction with test preparation.²³¹ Although law professors and administrators have extensive freedom in determining their own instructional methods,²³² many law students may benefit from combining test preparation with substantive learning prior to taking the bar exam and beginning their careers as legal practitioners.

A. Reforming Primary and Secondary Education in the Wake of No Child Left Behind

Recognizing that many students were not developing the analytical, problem solving, or other skills that they need to succeed in the 21st Century labor market, President Obama, various congressmen, and a number of administrative agencies, have organized to improve primary and secondary instructional methods across America.²³³ The U.S. government has begun to encourage schools to move away from strict, standardized instructional methods, toward more fluid, individualized learning programs that assess and address the needs of particular schools and students.²³⁴ These modern initiatives actively promote incorporating test-taking strategies with substantive and engaging learning activities. By shifting the focus away from primarily

229. See Ratner, *supra* note 90 (recognizing that schools concentrate on narrow curriculum and test-taking strategies rather than teaching and learning); Ngai, *supra* note 90 (noting that opponents of standardized tests argue that the methodology does not ensure that students are substantively learning).

230. See Lasso, *supra* note 121, at 79.

231. See Jeffrey C. Sun & Philip T.K. Daniel, *Math and Science are Core to the IDEA: Breaking the Racial and Poverty Lines*, 41 *FORDHAM URB. L.J.* 557, 593 (2013) (“[A]ssessment does not consider whether the students reached the achievement standard, but rather, whether students made incremental progress from year to year and the amount in which districts and states contributed to these students’ gains.”).

232. See Newton, *supra* note 191, at 141 (recognizing the concept that professors have the freedom to teach and communicate academic material in any reasonable manner without repression).

233. “President Obama was the first president to have access to the data collected by NCLB which could be used to improve education. In response to the implementation difficulties and flawed outcomes of NCLB, President Obama overhauled the law to replace the 100 percent proficiency goal in reading and math by 2014, with a goal of preparedness for a college or trade for all high school students by 2020.” Jodi Wood Jewell, *Legislating Higher Education: Applying the Lessons of No Child Left Behind to Post-Secondary Education Reformation Proposals*, 50 *IDAHO L. REV.* 53, 63 (2013).

234. “[T]he federal government had begun to link continued funding to the adoption of national academic standards, even though the setting of standards has traditionally been within the purview of the states.” *Id.* at 65.

standardized memorization, schools are encouraged to also emphasize the learning and retention of fundamental math, science, reading, writing, and problem-solving skills.²³⁵

The U.S. government is also fronting a collective movement to return the power of primary and secondary school instruction to local school districts²³⁶ and has initiated or proposed a number of programs designed to address local concerns regarding the effectiveness of modern instructional methods.²³⁷ With the expansion of government oversight,²³⁸ these local school districts may become better equipped to ascertain and solve local instructional concerns to meet state and national standards. By reducing the immediacy of many of the penalties surrounding NCLB, primary and secondary schools may retain their funding even when they do not meet state testing standards.²³⁹ Research has shown that withholding funding from schools in need does not offer those schools an opportunity to effectively educate or assist failing students who require extra assistance.²⁴⁰ Allowing schools to retain their funding gives school districts the opportunity and time to

235. *See id.* at 64 (describing how the government has further encouraged education and reform and innovation by preventing tying student achievement to teacher evaluations and offering waivers of NCLB provisions when schools implement pre-approved plans which included greater academic rigor and better outcomes for all students).

236. *See id.*

237. *See id.* (“President Obama also created the Race to the Top (RTT), a \$4.35 billion dollar grant to the states which took the form of a competition based on more rigorous academic standards, updated data collection strategies, increased teacher effectiveness and improved low-performing schools. The dispersal of the funding was tied to the states’ elimination of barriers which prevent tying student achievement data to teacher evaluations.”); *see also* Lindsey H. Chopin, *Untangling Public School Governance: A Proposal to End Meaningless Federal Reform and Streamline Control in State Education Agencies*, 59 *LOY. L. REV.* 399, 419–20 (2013) (“[A]s the Obama administration continues to release reform after reform, Congress introduced five new bills for approval. These bills have many goals, including: elimination of duplicative federal programs created under NCLB; expansion of charter schools by providing financial incentives to states who replicate or expand successful charter schools; an increase in local flexibility in the spending of federal funding; continuation of state standards and linked assessments as well as accountability reports linked to those assessments; encouragement of effective teaching through grants for more professional development and performance-based pay; and promotion of innovation through use of local competitive grant programs.”).

238. *See Jewell, supra* note 233, at 65 (recognizing that the revisions of NCLB and the implementation of RTT has increased federal government oversight of education, which has been traditionally within the purview of the states).

239. *See id.* at 64 (“[T]he government began granting waivers to meeting some of NCLB’s requirements, eventually ending in waivers to struggling schools and districts being granted to 41 states and the District of Columbia by the end of 2013. These waivers were granted in exchange for commitments by the approved states to implement pre-approved plans which included greater academic rigor and better outcomes for all students.”).

240. *See Whitney Stohr, Coloring a Green Generation: The Law and Policy of Nationally-Mandated Environmental Education and Social Value Formation at the Primary and Secondary Academic Levels*, 42 *J.L. & EDUC.* 1, 91 (2013) (“From the perspective of school districts facing the threat of penalties for non-achievement, it is difficult to justify adopting a pedagogical ap-

better resolve academic concerns as well as provide more varied support and learning opportunities for students.²⁴¹ Incentivizing schools with alternative funding resources through federal programs and grants also allows schools to obtain additional funding based on individualized and local demonstrations of academic improvement.²⁴² These modern government initiatives recognize that students and schools across the U.S. are currently at very different stages of academic achievement.²⁴³ Thus, these programs seek to encourage individual school or district growth by recognizing and accounting for the reality that many school districts may take longer than others to reach academic proficiency.²⁴⁴ By shifting the focus of improvement from across-the-board standards toward achievable goals, individual school districts may calculate and resolve the needs of schools by taking into account the various academic, socio-economic, and political concerns of specific communities without penalty.²⁴⁵

Utilizing technology to diversify learning initiatives and improve student as well as teacher access to various academic tools, such as E-books, podcasts, tablet or computer software, and the Internet, has become a central part of President Obama's endeavor to improve education in America.²⁴⁶ Working with the Federal Communications Commission and the U.S. Department of Education, President Obama has prioritized providing ninety-nine percent of American schools and libraries with Internet access "within the next five years."²⁴⁷ Government programs, such as E-rate²⁴⁸ and ConnectEd,

proach that further adds to the time constraints and teaching requirements of educators while not directly contributing to benchmark achievement.").

241. Jennifer Rebol Rust, *Investing in Integration: A Case for "Promoting Diversity" in Federal Education Funding Priorities*, 59 LOY. L. REV. 623, 654 (2013). *But see* Chopin, *supra* note 237, at 419 (recognizing that increased usage of waivers and lax enforcement of NCLB may leave more students behind, because school districts may fail to address educational concerns when they have a reduced fear of funding penalties).

242. *See* Jewell, *supra* note 233, at 64.

243. *See* Barack Obama, President, United States of America, Remarks on ConnectED Initiative at Buck Lodge Middle School (Feb. 4, 2014) (transcript available at <http://www.whitehouse.gov/photos-and-video/video/2014/02/04/president-obama-speaks-connected#transcript>) [hereinafter Remarks by the President on ConnectEd].

244. *See id.*

245. *See* Jewell, *supra* note 233.

246. *See* Remarks by the President on ConnectEd, *supra* note 243.

247. *See id.* ("ConnectED — a new initiative to close the technology gap in our schools and connect 99 percent of America's students to high-speed broadband Internet within five year").

248. *Office of Non-Public Education (ONPE)*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/oi/nonpublic/erate.html> (last updated Aug. 21, 2013) ("The universal service Schools and Libraries Program, commonly known as 'E-rate,' provides discounts of up to 90 percent to help ['public and most non-profit K-12 schools as well as all public and many private libraries'] in the United States obtain affordable telecommunications and internet access.").

are seeking to encourage local schools to utilize digital technology that may provide students with access to digital tools that will help improve their math and science skills.²⁴⁹ The central theme involves helping students take responsibility for their own education and academic growth by engaging them academically with technological resources that will encourage them to enjoy learning.²⁵⁰ The understanding revolves around recognizing that students in the 21st Century learn very differently from students who grew up even one or two decades ago, because technology has changed so rapidly in the past decade.²⁵¹ Secondary and primary schools have to keep up with the changing technology so that students remain engaged in the classroom.²⁵² These technological tools also offer a host of new methods for teaching as well as accessing knowledge, both inside and outside of the classroom, in order to improve primary and secondary students' reading, writing, and math substantive and test-taking skills.²⁵³ However, while federal and state government entities have the authority to regulate primary and secondary public education,²⁵⁴ their authority is limited on the postsecondary level.

B. The Right of Academic Freedom

The First Amendment protects a law professor's preferred instructional method through the concept of "academic freedom."²⁵⁵ Academic freedom consists of the widely recognized and understood concept that professors have the freedom to teach and communicate academic material in any reasonable manner without repression.²⁵⁶

249. See Remarks by the President on ConnectEd, *supra* note 243; *FCC Comm'r Jessica Rosenworcel on the Connected Initiative*, 2013 WL 2456136 (F.C.C. June 6, 2013).

250. See Remarks by the President on ConnectEd, *supra* note 243.

251. See *id.*

252. See *id.* (These tools allow students to study and complete homework assignments anywhere with an Internet connection. They also allow for individual assessment based on the needs of the individual student).

253. See *id.*

254. See Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 313 & n.51 (2011) ("[T]he current interpretation of the commerce power does not provide Congress with the power to directly regulate public education, as public education is thought to reside beyond the definition of 'interstate commerce.' However, the commerce power's limitations do not prevent Congress from actually enacting a particular piece of legislation seeking to directly regulate public education . . .") (noting that Congress regulates through its conditional spending power).

255. See J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 253 (1989) (noting that law school administrators also have a form of academic freedom).

256. See Newton, *supra* note 191, at 141.

The right of academic freedom in law schools is further protected by the American Bar Association (ABA) through the authority granted by the U.S. Department of Education.²⁵⁷ The ABA's ability to enforce accreditation standards for law programs that lead to the Juris Doctor degree extends from Title 34, Chapter VI, § 602 of the Code of Federal Regulations.²⁵⁸

Accreditation includes the process of evaluating the academic quality of a law school.²⁵⁹ Law schools seeking accreditation are required to implement a program with "sound legal principles" in accordance with ABA standards.²⁶⁰ ABA accredited law schools are also required to "maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession."²⁶¹ In order to fulfill these standards, each law school must have qualified faculty to meet the program requirements of the institution.²⁶² These law school accreditation standards are quite open-ended and only minimally infringe on the otherwise broad discretion of individual law schools and professors to instruct law students in any reasonable manner.²⁶³ While the ABA offers law schools broad discretion in meeting these minimum guidelines,²⁶⁴ this discretion has caused standardization in curriculum.²⁶⁵ There are minimal differences between various law school instructional methods and course offerings.²⁶⁶ However, students who were not taught funda-

257. Andrew S. Murphy, *Redeeming A Lost Generation: "The Year of Law School Litigation" and the Future of the Law School Transparency Movement*, 88 *IND. L.J.* 773, 790 (2013); David Yellen, *The Impact of Rankings and Rules on Legal Education Reform*, 45 *CONN. L. REV.* 1389, 1402 (2013).

258. See 34 CFR § 602 (1999); ABA, Section of Legal Education and Admissions to the Bar, *The Law School Accreditation Process*, at 3, available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_revised_accreditation_brochure_web.auth_checkdam.pdf.

259. See Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 *ALB. L. REV.* 85, 127 (1997).

260. 2013-2014 ABA STANDARDS, *supra* note 220., Standard 101.

261. *Id.* Standard 301.

262. *Id.* Standard 401.

263. *Id.* at 163 (Appendix 1).

264. *Id.* (Law schools may determine their own course offerings and law professors may utilize their own instructional methods).

265. See Rush & Matsuo, *supra* note 113, at 226-27 ("Although the ABA does not mandate specific courses to be taught in law schools, a recent ABA curriculum survey found a fairly uniform curriculum at all ABA accredited law schools. The vast majority have a required first-year curriculum with the second- and third-year curriculum being devoted to electives chosen by students to focus their study toward particular areas of concentration or specialization. The ABA survey found that the typical required curriculum had not changed since its similar survey in 1975.").

266. *Id.*

mental reading and writing skills in primary and secondary school are severely disadvantaged while matriculating through law school. Differences between law schools regarding bar passage rates and workplace preparedness become readily apparent after graduation.²⁶⁷ Law school administrators and professors should learn from the academic reforms of primary and secondary education in order to more effectively assess the needs of law students who matriculated through primary and secondary school during the era of NCLB.

C. Law School Reform in the Wake of No Child Left Behind

Recognizing that many law students who matriculated through primary and secondary school during the past decade learn differently from their predecessors is the first step in improving law school instructional methodologies and ensuring that law students are adequately prepared to pass the bar exam and become proficient legal practitioners. Many law students who matriculated through primary and secondary school during the era of NCLB have been taught to focus on preparing for standardized tests.²⁶⁸ To improve legal proficiency both during and after graduation, law professors should be encouraged to teach exam-writing²⁶⁹ and law school administrators should also develop a separate first-year exam-writing course or incorporate the development of the skill into the first-year legal writing courses.²⁷⁰ Law schools may also offer essay writing or multiple-choice skills building courses.²⁷¹ While law students are typically taught orally,²⁷² their legal competence is primarily measured by written exams.²⁷³ However, very few test-taking skills are currently taught dur-

267. See Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 25 (2006) (noting that Ivy league schools often have the highest first-year retention, graduation, and bar passage rates).

268. See Superfine, *supra* note 7 (describing the practice of showing students how to fill in answer sheets); Owen, *supra* note 52 (noting teacher focus on test subjects and test taking strategies); Knepper, *supra* note 52 (recognizing how teachers focus instruction on test content and teaching test items).

269. See Adam G. Todd, *Exam Writing As Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 TEMP. L. REV. 69, 82 (2003).

270. See *id.* at 71 (finding value in teaching exam writing).

271. See Derek Alphan, Tanya Washington & Vincent Eagan, PhD., *Yes We Can, Pass the Bar. University of the District of Columbia, David A. Clarke School of Law Bar Passage Initiatives and Bar Pass Rates—from the Titanic to the Queen Mary!*, 14 U. D.C. L. REV. 9, 26 (2011) (generally discussing bar exam writing courses).

272. See Kerr, *supra* note 124, at 125, 128–30 (providing examples of professors who teach using the Socratic method, open lectures, or in-class discussions).

273. See Sonsteng et al., *supra* note 146, at 394 (recognizing that most law school grades are determined by a single, typed or written exam).

ing the first-year of law school. Although practice exams are often encouraged in law school, few professors require them.²⁷⁴ For many students, their first time writing an exam answer is during the final.²⁷⁵ Professors should require practice exams for submission or, at least, make themselves available to review and provide feedback on practice exams attempted by their students. Offering students multiple assessments throughout the year may build student confidence and exam taking skills.²⁷⁶ Practice problem-solving and case briefing activities may be done in the classroom or taken home to allow students to assess their analytical and writing strengths or weaknesses on their own.²⁷⁷ Law professors may also utilize group conferences, assignments, or peer assessments to encourage students to develop and expand their understanding of the material by discussing the material with other students.²⁷⁸ Studies have shown that “learning is best when students are self-regulating, engaged, and motivated learners, and when the learning process is active, experiential, collaborative, and reflective.”²⁷⁹ Practical application of rules of law, especially during the first-year, are likely to be more engaging and effective than primarily sitting and listening to a lecture or another student conversing with the professor.²⁸⁰

Unfortunately, many modern law students who grew up in the NCLB era, dedicated to test preparation, are ill-prepared to perform well on law school exams without specific test-taking instruction, especially in courses where their professors do not hold midterms or offer

274. See Andrea A. Curcio, Gregory Todd Jones & Tanya M. Washington, *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271, 275 (2008).

275. See *id.*

276. See Stephen M. Johnson, *Teaching for Tomorrow: Utilizing Technology to Implement the Reforms of Maccrata, Carnegie, and Best Practices*, 92 NEB. L. REV. 46, 61–62 (2013) (noting other disciplines show that students learn better through multiple assessments and that assessments may give professors the ability to more accurately evaluate student mastery of the material). But see Andrea A. Curcio, *Moving in the Direction of Best Practices and the Carnegie Report: Reflections on Using Multiple Assessments in a Large-Section Doctrinal Course*, 19 WIDENER L.J. 159, 177 (2009) (noting that there is no evidence that multiple assessments actually improve exam scores).

277. See Johnson, *supra* note 276, at 62.

278. Andrea A. Curcio, Gregory Todd Jones & Tanya M. Washington, *Developing an Empirical Model to Test Whether Required Writing Exercises or Other Changes in Large-Section Law Class Teaching Methodologies Result in Improved Exam Performance*, 57 J. LEGAL EDUC. 195, 201 (2007) (“[Studies] suggest[] that exam performance tends to improve when students are given practice exams that are similar to the actual exam and that improvement requires practice, feedback, and explicit instruction on strategies for improving learning.”).

279. See Timothy W. Floyd et al., *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 OHIO N.U. L. REV. 257, 258 (2011).

280. See Curcio et al., *supra* note 274, at 313.

other means of assessment.²⁸¹ Professors should be able to communicate their expectations pertaining to their academic assessments to reduce student stress, increase student classroom engagement, and encourage students to retain an active role in their education.²⁸² Professors may also encourage students to take a more active role in their learning by offering extra credit for participating in the aforementioned activities or including the activities as a means of class participation. However, substantive learning of the law remains crucial to post-graduation success.²⁸³ As learned over the past decade since the implementation of NCLB, focusing instruction on developing test-taking skills may not be enough to ensure effective mastery of basic fundamental skills.²⁸⁴ In conjunction with test-taking skill development, law professors must also strive to keep students engaged throughout their three years of law school with stimulating in-class teaching methodologies, while also encouraging practical application of learned skills.²⁸⁵ Notably, the ABA currently only requires that law students take at least one skills course,²⁸⁶ and while many schools offer a number of different opportunities, law school administrators should encourage or require students to take more practical skill building courses prior to graduation.²⁸⁷ Law school administrators should also require students to take more upper level courses, particularly advanced legal writing and research courses, as opposed to retaining a completely open curriculum.²⁸⁸ They may also encourage third-year students to take a bar preparation course in order to more effectively

281. See Randall, *supra* note 128, at 207 (noting that law professors generally give one exam per semester)

282. See Emily Zimmerman, *An Interdisciplinary Framework for Understanding and Cultivating Law Student Enthusiasm*, 58 DEPAUL L. REV. 851, 904 (2009); Fines, *supra* note 106, at 90 (arguing that raising expectations garners higher student results).

283. See Carrie Menkel-Meadow, *Crisis in Legal Education or the Other Things Law Students Should Be Learning and Doing*, 45 MCGEORGE L. REV. 133, 155–56 (2013).

284. See Remarks by the President on ConnectEd, *supra* note 243.

285. See Kerr, *supra* note 124, at 114, 125, 128–30 (providing examples of professors who teach using the Socratic method, open lectures, in-class practice problems, group assessments, client counseling and legal document drafting assignments, as well as panel discussions in order to focus instruction on the needs of the students); see also Larry A. DiMatteo, *Contract Stories: Importance of the Contextual Approach to Law*, 88 WASH. L. REV. 1287, 1300 (2013) (thinking like a lawyer); Wendy L. Werner, *Law Schools Get Practical*, 39 NO. 5 LAW PRAC. 60, 61; Fines, *supra* note 106, at 90.

286. 2013-2014 ABA STANDARDS, *supra* note 220, Standard 302(a)(4), Interpretation 302-3.

287. See Karen Tokarz, Antoinette Sedillo Lopez, Peggy Maisel & Robert F. Seibel, *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J.L. & POL'Y 11, 56-57 (2013).

288. See Sarah O. Schrup & Susan E. Provenzano, *The Conscious Curriculum: From Novice Towards Mastery in Written Legal Analysis and Advocacy*, 108 NW. U.L. REV. COLLOQUY 80, 98-99 (2013).

prepare for the bar exam.²⁸⁹ Some scholars propose the elimination of the third-year of law school so that students are able to intern and work for a year prior to sitting for the bar.²⁹⁰ However, with the rising concern regarding post-graduation preparedness, students may need an additional fourth year to accumulate all of the substantive and practical knowledge required of them to pass the bar exam and become effective legal practitioners. Taken together, these methodologies may account for the impact of NCLB on law students' abilities and mechanisms for learning and allow for improved instructional methods and opportunities in law school.

CONCLUSION

With declining bar passage rates and increasing concerns regarding the inability of recent law school graduates to effectively practice in the workplace, law school administrators and professors must assess the effectiveness of legal education. As thousands of students matriculate through law schools throughout the U.S.,²⁹¹ legal educators in the position to directly impact the academic and professional success of their students must recognize their duty and obligation to understand how their students have been taught to learn. In the wake of NCLB, legal educators should account for law students' experiences with being taught specific test-taking strategies,²⁹² which were promoted as the indicator of academic success. Legal educators should also account for many of their students' underdeveloped analytical, reading, writing, and problem-solving skills due to NCLB's inadvertent promotion of rote memorization and other test-taking strategies.²⁹³ Legal educators may be able to more effectively hold their students accountable for their own learning by developing broader and more specialized methods of legal instruction for encouraging academic achievement

289. See Riebe, *supra* note 20, at 336 (explaining that the ABA does not allow law schools to require students to pass a bar preparation course).

290. See, e.g., Karen Tokarz et al., Robert F. Seibel, *Legal Education at A Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J.L. & POL'Y 11, 34 (2013).

291. During the 2012-2013 academic year, over 150,000 students were enrolled in law schools throughout the United States. ENROLLMENT AND DEGREES AWARDED: 1963-2013, *supra* note 1.

292. See Superfine, *supra* note 7 (describing the practice of showing students how to fill in answer sheets); Owen, *supra* note 52 (noting teacher focus on test subjects and test taking strategies); Knepper, *supra* note 52 (recognizing how teachers focus instruction on test content and teaching test items).

293. See Cohen, *supra* note 125, at 515-16 (noting that elementary writing skills are learned early and that many law students, even practicing attorneys, have not developed these basic skills); Arnold, *supra* note 125 (reasoning that there should be a rebuttable presumption that incoming law students do not possess basic writing skills).

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and engagement, as well as the enhanced development of the aforementioned skills. By accounting for the evolving standards of NCLB toward specialized instruction and incorporating both test-taking strategies and substantive and practical learning,²⁹⁴ legal educators may be able to more effectively prepare their students to pass the bar exam and become proficient legal practitioners. In doing so, law administrators and professors may enhance the preparedness of the legal practitioners of the future.

294. See Remarks by the President on ConnectEd, *supra* note 243.

COMMENT

When Justice Is Done: Expanding a Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of *Brady v. Maryland*

CADENE A. RUSSELL*

"It is difficult to get a man to understand something when his salary depends upon his not understanding it."

— Upton Sinclair¹

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* J.D. Candidate, Howard University School of Law, Class of 2015; Editor-in-Chief, *Howard Law Journal*, Vol. 58; B.A., Duke University, 2010. I give thanks to God for His continued grace, wisdom, and guidance in all things. I also sincerely thank my Faculty Advisor Professor Josephine Ross for her invaluable insight. I am thankful to Volume 57 Executive Notes & Comments Editor Joseph Garmon, Senior Notes & Comments Editor Samir Islam, and the Volume 58 Executive Board and Staff Editors. Their commitment to the *Journal* and tremendous attention to detail have added to the quality of my Comment, and to building the legacy of this long-standing publication. Thank you to Judge Emmet G. Sullivan, who has been a wealth of knowledge, Professor Patricia Worthy for her lessons on professional responsibility, Ms. Jacqueline Young, for her tireless commitment to this Journal's excellence, and Attorney Christopher Lomax, who continues to show me what it means to "do justice." Finally, to my tremendously supportive parents and brother—Barrington, Sr., Carrol, and Barrington, Jr.— and to my dear Mitchel Brooks, your continued support and your steadfast commitment to my success has shown me that there are no limits. I would have never come this far without you all by my side.

1. Upton Sinclair, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED 109 (Univ. of Cal. Press 1994) (1935).

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INTRODUCTION

In 1985, John Thompson was convicted of murder.² He spent the next eighteen years of his life at the Louisiana State Penitentiary, fourteen of which were on death row.³ While in prison, Mr. Thompson’s death warrant was signed eight times.⁴ However, less than a month before he was to be executed, a cancer-stricken member of the prosecution who convicted Mr. Thompson revealed to a defense investigator that the prosecution withheld crime lab results from the de-

2. See *Connick v. Thompson*, 131 S. Ct. 1350, 1355 (2011).

3. See *id.*; see also Radley Balko, *The Untouchables: America’s Misbehaving Prosecutors, and the System That Protects Them*, HUFFINGTON POST 2 (Aug. 1, 2013, 2:18 PM), http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html.

4. Balko, *supra* note 3, at 2.

fense, and removed a blood sample from the evidence room.⁵ Additionally, the prosecutors also failed to disclose to Mr. Thompson's defense that he was implicated in the murder by a person who received a reward from the victim's family, and that a separate eyewitness identification did not match Mr. Thompson's description.⁶ The combination of these non-disclosures would have proven Mr. Thompson's innocence.

With the disclosure of this new evidence, John Thompson was released from all charges and was free to walk out the doors of the prison.⁷ However, he was only free to leave after eighteen years of his life were wasted in a six by nine foot prison cell.⁸ The stories of Mr. Thompson and the thousands of defendants wrongfully convicted under similar circumstances are evidence that misconduct by prosecutors who have the duty to disclose exculpatory evidence under the *Brady* Rule continues to occur.⁹ These stories are evidence that the justice system must work to combat wrongful convictions of defendants.

The *Brady* Rule is a well-established legal concept defined by the Fifth¹⁰ and Fourteenth Amendments,¹¹ and the Supreme Court ruling

5. Pablo Lastra, *Clarence Thomas to Wrongfully Convicted Louisiana Death Row Inmate: "You Get Nothing"*, HARV. C.R.-C.L. L. REV. 1, <http://harvardcrcl.org/2011/04/02/clarence-thomas-to-wrongfully-convicted-louisiana-death-row-inmate-you-get-nothing/> (last visited Sept. 29, 2013); see also Andrew Cohen, *Prosecutors Shouldn't Be Hiding Evidence from Defendants*, ATLANTIC 3 (May 3, 2013, 1:10 PM), <http://www.theatlantic.com/national/archive/2013/05/prosecutors-shouldnt-be-hiding-evidence-from-defendants/275754/>.

6. See Lastra, *supra* note 5, at 1.

7. See Jacob Sullum, *The Disappearing Blood Stain*, REASON.COM 1 (Mar. 31, 2010), <http://reason.com/archives/2010/03/31/the-disappearing-blood-stain>.

8. *Id.*

9. See, e.g., *Cannon v. Alabama*, 558 F.2d 1211, 1213 (5th Cir. 1977) (invalidating a criminal defendant's conviction because a prosecutor concealed the existence of an eyewitness who identified someone other than defendant as the assailant); *Wilkinson v. Ellis*, 484 F. Supp. 1072, 1077 (E.D. Pa. 1980) (finding that a prosecutor destroyed a third party's tape-recorded confession that he, not the criminal defendant, had committed the offense); *In re Kapatos*, 208 F. Supp. 883, 888–89 (S.D.N.Y. 1962) (finding that a prosecutor had concealed evidence that around the time and near the place of a killing, an eyewitness had seen two persons run to a car, neither of whom were the defendant); see also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697–703, 731–33 (1987) (noting the “disturbingly large number of published opinions” involving “deliberately suppressed unquestionably exculpatory evidence” that nevertheless did not result in disciplinary action against prosecutors, classifying typical *Brady* violations, and arguing that further deterrents are necessary); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 836, 844–48, 869–71, 933–34 (1997) (arguing that the current *Brady* doctrine results in “the almost routine violation of the fundamental guarantee of a fair trial”).

10. See U.S. CONST. amend. V.

11. See U.S. CONST. amend. XIV.

in *Brady v. Maryland*.¹² Once the government brought charges against Mr. Thompson in *Connick v. Thompson*,¹³ the constitutional mandate of the Rule required that the prosecution disclose evidence that is “material either to guilt or to punishment” of the defendant.¹⁴ Though this doctrine has been in existence for fifty-one years, the government continues to violate nearly every aspect of its requirements.¹⁵ Furthermore, these violations exist on multiple fronts.

The aforementioned issues raise the question of whether a prosecutor’s affirmative duty to disclose *Brady* evidence, and the current remedies for defendants who have been wrongfully convicted due to these violations, are sufficient to ensure that justice is served. Where there have been noted *Brady* violations, courts enforce some remedies to provide relief to defendants, yet few sanctions have deterred persistent prosecutorial misconduct.¹⁶ Notwithstanding, the Supreme Court has never articulated the range of sanctions that should be imposed when there has been a *Brady* violation.¹⁷ Because misconduct under *Brady* has existed for such an extended period, the status quo is insufficient. As a result, the criminal justice system is left with two critical and unanswered questions: to what extent must prosecutors disclose evidence to the defense, and if disclosure violations do occur, what shall be the sanctions against prosecutors and police?

12. See *Brady v. Maryland*, 373 U.S. 83, 84 (1963).

13. See *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

14. See *Brady*, 373 U.S. at 87. Evidence is material under *Brady* if it creates “a reasonable probability of a different result.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (internal quotation marks omitted).

15. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56–60 (1987) (finding and discussing prosecutorial suppression of exculpatory evidence in 35 out of 350 wrongful convictions); Elizabeth Napier Dewar, *A Fair Trial Remedy for Brady Violations*, 115 YALE L.J. 1450, 1453–54 (2006) (citing BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000) (finding that prosecutorial misconduct caused wrongful convictions in forty-two percent of sixty-two cases examined)); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at A1 (summarizing the results of reporters’ nationwide study of prosecutorial misconduct in homicide cases).

16. See, e.g., David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. 203, 215 (2011) (“Perhaps the lack of a personal civil remedy against misbehaving prosecutors would be less consequential if other effective remedies were available.”).

17. Cynthia Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 443 (2010). As is noted elsewhere in this Comment, the usual practice when *Brady* violations are discovered after trial is to simply allow for a new trial where the previously hidden evidence may be introduced. *Id.* For violations discovered pretrial, a court would grant a continuance to allow the defense the opportunity to make use of the new information. *Id.* (citing WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE 1143 (5th ed. 2009)).

This Comment argues that unrestrained *Brady* violations are caused by a lack of effective deterrence of prosecutor, and law enforcement misconduct. This Comment also discusses the various perspectives of legal scholars on why *Brady* misconduct continues to exist. Ultimately, this Comment proposes that in order to safeguard against these constitutional violations, the court must implement a multi-fold approach in addressing *Brady* to ensure that the number of defendants who are wrongfully convicted declines and the role of the prosecutor will shift to align with her constitutional duty.

In order to address this issue, Part I of this Comment provides a historical overview of the *Brady* doctrine. Part II explores the impact of *Brady* violations and the extent to which wrongful convictions are caused by a failure to disclose exculpatory evidence. Part III provides an analysis of what causes *Brady* violations. Finally, Part IV explores the current remedies for *Brady* violations and proposes recommendations for reform as the Court seeks to curtail almost fifty-one years of prosecutorial abuse of the rights of defendants. This Comment does not seek to undermine the difficult, necessary, and noble work of prosecutors who serve for the safety and betterment of society. However, just as there are many good prosecutors, law enforcement officials and judges, it is the duty of those in our justice system to uphold their obligations under *Brady* and prevent these systematic violations even fifty-one years after its ruling.¹⁸ Unless the court provides consistent enforcement, sanctions, and remedies for the failure to abide by a prosecutor's constitutional duty to disclose *Brady* evidence, criminal defendants will systematically and perpetually be subjected to prison sentences and death penalty convictions that they do not deserve. Furthermore, “[w]hen a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public’s trust in our justice system, and chips away at the foundational premises of the rule of law.”¹⁹

I. THE *BRADY* DOCTRINE: A HISTORICAL PERSPECTIVE

In 1963, the Supreme Court, through its ruling in *Brady v. Maryland*, held that a prosecutor’s failure to turn over exculpatory evidence to defense counsel violates due process when the evidence is material

18. Radley Balko, *An Interview with Sam Dalton, Now in his Seventh Decade of Criminal Defense Law*, HUFFINGTON POST (Dec. 30, 2013), http://www.huffingtonpost.com/2013/12/30/an-interview-with-sam-dal_n_4520241.html.

19. *United States v. Olsen*, 704 F.3d 1172, 1177 (9th Cir. 2013) (Kozinski, J., dissenting).

to a defendant's innocence.²⁰ As a result, prosecutors now have an affirmative duty to "investigate, preserve, and disclose favorable information located in the prosecutor's files, as well as information in the possession of any member of the prosecution team."²¹ The purpose of this rule is to "ensure that the defendant receives a fair trial in which all relevant evidence . . . is presented to enable the fact-finder to reach a fair and just verdict."²² However, five decades after the implementation of this doctrine, *Brady* and its progeny still do not prevent a prosecutor's nearly unchecked discretion.²³ An overview of *Brady* and its progeny will provide evidence of the need for reform of the *Brady* doctrine.

A. *Brady* and its Supreme Court Progeny

A prosecutor withholding *Brady* evidence certainly has no place in our criminal justice system. However, widespread violations of *Brady* continue to result in an abuse of justice and a violation of the due process rights of defendants.²⁴ The *Brady* Rule originated from critical Supreme Court jurisprudence that recognized the need for a safeguard against the failure to disclose certain evidence that is favorable to a defendant.²⁵ In *Brady*, the Court imposed an affirmative duty to act on prosecutors.²⁶ The government's obligation to disclose evidence extends to favorable evidence that is "material."²⁷ Material *Brady* evidence includes, for example, statements of witnesses or physical evidence that conflicts with the prosecution's witnesses,²⁸ and evidence that could allow the defense to impeach the

20. See *Brady*, 373 U.S. at 87–88.

21. Jones, *supra* note 17, at 422–23 (citing *Kyles v. Whitley*, 514 U.S. 419, 436–38 (1995)).

22. *Id.* (citing *Brady*, 373 U.S. at 87–88).

23. See also *id.* at 432; Cohen, *supra* note 5, at 3–4.

24. See, e.g., *Powell v. Wiman*, 287 F.2d 275, 281–82 (5th Cir. 1961) (suppressing a prior inconsistent statement of an accomplice who testified for the prosecution); *State v. Cohane*, 479 A.2d 763, 777 (Conn. 1984) (suppressing an inconsistent prior statement of a key eyewitness); *Schwartzmiller v. Winters*, 576 P.2d 1052, 1054–55 (Idaho 1978) (suppressing a victim's prior statement admitting perjury at a preliminary hearing); *People v. Sumner*, 252 N.E.2d 534, 536–37 (Ill. 1969) (suppressing the inconsistent statements of two witnesses); see also *United States v. Cuffie*, 80 F.3d 514, 518–19 (D.C. Cir. 1996) (suppressing the inconsistent testimony at another hearing materially different from the witness's testimony at the defendant's trial); *State v. Oliver*, 682 So. 2d 301, 311 (La. Ct. App. 1996) (suppressing inconsistent statements to police by both of the state's witnesses); *People v. Ramos*, 614 N.Y.S.2d 977, 984 (N.Y. App. Div. 1994) (suppressing repeated statements made by an alleged victim to authorities that the defendant had not molested her).

25. *Brady*, 373 U.S. at 87.

26. See *id.* at 87–88.

27. See *id.* at 87.

28. See *People v. Johnson*, 113 Cal. Rptr. 303, 309 (Cal. Ct. App. 1974).

witness' credibility—such as evidence of false statements by the witness or evidence that a witness was paid to act as an informant.²⁹

The *Brady* Rule has its constitutional underpinnings rooted in the Fifth Amendment. Prior to the implementation of the *Brady* doctrine and the birth of the affirmative duty to disclose *Brady* evidence, the Supreme Court recognized that the “suppression . . . of evidence favorable”³⁰ to the accused, or the “nondisclosure [of evidence] by a prosecutor”³¹ violates the constitutional rights of defendants.³² Specifically, the Due Process Clause of the Fifth Amendment of the United States Constitution mandates that no person “be deprived of life, liberty, or property, without due process of law”;³³ a defendant is deprived of his liberty when he is wrongfully convicted when prosecutors fail to disclose evidence of his innocence.³⁴ However, under the Constitution, prosecutors are left without a clear standard to which they should abide.³⁵ Consequently, because some defendants received insufficient protection from wrongful convictions, a stricter standard emerged from *Brady*.³⁶

29. See *Banks v. Dretke*, 540 U.S. 668, 690–91 (2004).

30. *Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). “[The defendant alleges] that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody.” *Id.* at 215–216.

31. *Brady*, 373 U.S. at 86 (citing *Mooney*, 294 U.S. at 112).

It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Mooney, 294 U.S. at 112.

32. See *United States v. Agurs*, 427 U.S. 97, 104 n.10 (1976) (citing *Brady*, 373 U.S. at 87) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”) (internal quotation marks omitted).

33. U.S. CONST. amend. V. The Fourteenth Amendment expands this duty to the States and provides that no State shall “deprive any person of life, liberty, or property, without due process of law” U.S. CONST. amend. XIV. Due process under the Constitution requires notice and the opportunity to be heard. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

34. “We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87.

35. Jones, *supra* note 17, at 443.

36. See *Brady*, 373 U.S. at 87.

In 1976, the duty of prosecutors to disclose exculpatory evidence was further developed by the Court in *United States v. Agurs*.³⁷ The Court recognized that the government has an ongoing burden to provide material exculpatory evidence that would raise a reasonable doubt about a defendant's guilt whenever it discovers that it possesses this information.³⁸ This duty must be upheld even in the absence of a specific request from a defendant's attorney.³⁹ Under *Agurs*, a finding of materiality was dependent on the totality of the circumstances.⁴⁰

The standard of materiality established in *Agurs* was modified in *United States v. Bagley*, which narrowed the remedy for defendants provided under *Brady*.⁴¹ In order for a *Brady* violation to result in the reversal of a conviction, the suppressed evidence must be both exculpatory and material.⁴² In *Bagley*, Justice Blackburn stated that evidence is "material" "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."⁴³ A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome."⁴⁴ This however, is an extremely difficult standard for defendants to overcome.⁴⁵

Despite this standard, *Brady* does not create a requirement for prosecutors to turn over all exculpatory evidence to the defense

37. *Agurs*, 427 U.S. at 104–07.

38. See *United States v. Bagley*, 473 U.S. 667, 690 (1985); see also *Agurs*, 427 U.S. at 106–07 (recognizing that even in circumstances where defense attorneys do not explicitly request particular evidence on behalf of a client, the prosecution still maintains the duty to disclose information that may be deemed material exculpatory evidence).

39. *Agurs*, 427 U.S. at 106–07.

40. See *id.* at 112.

41. See generally *Bagley*, 473 U.S. at 667–715.

42. *Id.*

43. *Id.* at 681–82; see also *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (holding that there has not yet been a *Brady* violation "unless nondisclosure was so serious that a post-trial review leads judges to conclude that it undermined their confidence in the verdict").

44. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

45. To say that the undisclosed information was not material, a court must conclude that the other evidence was so overwhelming that, even if the withheld evidence had been presented to the jury, there would be no "reasonable probability" that it would have acquitted. This standard is not satisfied if "the State's argument offers a reason that the jury could have disbelieved [the undisclosed evidence], but gives us no confidence that it would have done so." *United States v. Olsen*, 704 F.3d 1172, 1177 (9th Cir. 2013) (citing *Smith*, 132 S. Ct. at 630).

before trial.⁴⁶ It is only a means for retroactive review of a case in order to determine if a defendant received a fair trial. Unfortunately, courts have limited the sanction of prosecutors who do not abide by the disclosure standards because a court's ability to sanction attorneys for prosecutorial misconduct has been curtailed.⁴⁷

B. Present Day Jurisprudence

Additionally, present day law imposes on the prosecution a "duty to learn of [and disclose to the defendant all information that is] favorable, material and known to those acting on the government's behalf, including the police."⁴⁸ *Brady* material should also be disclosed in order "to allow the defense to use the favorable material effectively."⁴⁹ Though the due process obligation under *Brady* serves the purpose of "allowing defense counsel an opportunity to investigate the facts of the case and . . . craft an appropriate defense,"⁵⁰ *Brady* has not lived up to its constitutional promise. Thus, courts recognize that when *Brady* material is discovered after a conviction, certain questions must be answered in order to address the merits of a *Brady* claim. In *Litigating Justice*, Bennett Gersham highlights three questions that must be answered: (1) whether the prosecutor suppressed evidence, (2) whether the evidence was favorable to the accused, and (3) whether the suppression was prejudicial to the accused.⁵¹

Almost 100 years ago in *Berger v. United States*, the court stated that "it is not that it shall win a case, but that justice shall be done. . . . [W]hile [the prosecutor] may strike hard blows . . . [i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."⁵² A prosecutor's unrestrained discretion must be controlled because these widespread, intentional constitutional viola-

46. See *Brady*, 373 U.S. at 87-88; FED. R. CRIM. P. 16. In fact, instead of requiring the disclosure of all evidence, "[i]t effectively announces that the prosecution need not produce exculpatory or impeaching evidence so long as it's possible the defendant would've been convicted anyway. This will send a clear signal to prosecutors that, when a case is close, it's best to hide evidence helpful to the defense, as there will be a fair chance reviewing courts will look the other way." *Olsen*, 704 F.3d at 1177.

47. *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

48. *Kyles*, 514 U.S. at 437.

49. See *Lindsey v. United States*, 911 A.2d 824, 838 (D.C. 2006).

50. See *Perez v. United States*, 968 A.2d 39, 66 (D.C. 2009).

51. See Bennett L. Gersham, *Litigating Brady v. Maryland*, 57 CASE W. RES. L. REV. 531, 537 (2007).

52. *Berger*, 295 U.S. 78, 88 (1935).

tions continue to result in an unprecedented number of incarcerated, yet innocent, men and women.⁵³ Even more, a significant majority of *Brady* violations go unnoticed and are carried to the graves of prosecutors.⁵⁴ For this reason, the Court must recognize the impact of withholding exculpatory evidence, evaluate the current application of *Brady*, and ensure that there are serious and widespread ramifications for its violation by prosecutors and law enforcement.

II. INTENTIONAL *BRADY* VIOLATIONS AND THE OUTCOMES OF PROSECUTORIAL MISCONDUCT

Though the *Brady* doctrine is noble, it is not effective in theory; thousands of defendants have been wrongfully convicted due to the withholding of material exculpatory evidence by the government.⁵⁵ It is impossible to know how many *Brady* violations have occurred over the decades. However, scholars have noted the widespread nature of these failures: simply put, “[a] prosecutor’s violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice.”⁵⁶

Studies have further documented the extensive consequences of prosecutorial misconduct. In a study of the first seventy-four DNA-based exonerations, the Innocence Project found that the initial wrongful conviction of defendants was caused, in part, by *Brady* violations: 37% of the cases involved the suppression of exculpatory evidence, 25% involved the knowing use of false testimony, and 11% involved the undisclosed use of coerced witness testimony.⁵⁷ In as early as the 1970s, 1980s, and 1990s, a study by the Center for Public Integrity found 129 rulings by trial and appellate judges “that ad-

53. See Dewar, *supra* note 15, at 1452.

54. See Keenan, *supra* note 16, at 209 (“[P]rosecutors who engage in willful misconduct presumably do not want to be discovered and therefore take steps to conceal their misdeeds.”). According to one scholar, “[f]or every one of these cases, we have every reason to suspect that there are many more in which the prosecutor’s refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney.” Dewar, *supra* note 15, at 1455 n.23 (citing Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors To Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 869 (1997)).

55. See, e.g., Smith v. Cain, 132 S. Ct. 627 (2012); United States v. Sedaghaty, 728 F.3d 885 (9th Cir. 2013); Aguilar v. Woodford, 725 F.3d 970 (9th Cir. 2013); United States v. Kohring, 637 F.3d 895 (9th Cir. 2010); Simmons v. Beard, 590 F.3d 223 (3d Cir. 2009); Douglas v. Workman, 560 F.3d 1156 (10th Cir. 2009); Harris v. Lafler, 553 F.3d 1028 (6th Cir. 2009); United States v. Zomber, 299 Fed. Appx. 130 (3d Cir. 2008).

56. Dewar, *supra* note 15, at 1454.

57. BARRY SCHECK ET AL., ACTUAL INNOCENCE (1st ed. 2001); *Understand the Causes*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/>.

dressed alleged prosecutorial error by the circuit attorney's office."⁵⁸ Prosecutorial conduct was challenged in numerous cases, and in twenty-four instances, prosecutorial error was found.⁵⁹ In seven of the cases, the misconduct was found prejudicial and remedial action was taken.⁶⁰ Additionally, numerous other prosecutors were cited for error and misconduct several times.⁶¹

A recent empirical study of 5,760 capital convictions in the United States found that *Brady* violations accounted for one in every six death penalty convictions between 1973 and 1995.⁶² Additionally, in 2003, thirty-six years after *Brady*, a study of 11,000 cases involving prosecutorial misconduct identified that in just over 2,000 instances, an appeals court found the misconduct material to the defendant's conviction and overturned it;⁶³ in this same study, nearly 400 state homicide cases were reversed at the post-conviction stage due to these *Brady* violations.⁶⁴ In these scenarios, "prosecutors hid evidence or allowed witnesses to lie."⁶⁵ Unnervingly, these statistics account for only a fraction of the serious misconduct, which *Brady* was meant to prevent.⁶⁶ This very conduct continues to remain widely undetected and undeterred.⁶⁷

As these statistics indicate, Mr. John Thompson⁶⁸ is far from being the only victim of violations of the *Brady* Rule.⁶⁹ Another victim,

58. Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 17 (2009) (citing Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, CTR. FOR PUB. INTEGRITY, <http://www.publicintegrity.org/2003/06/26/5517/breaking-rules>).

59. *Id.* at 18.

60. Unfortunately, in the remaining seventeen cases, "appellate judges affirmed the conviction or trial judges allowed the proceeding to continue, despite finding [that the prosecutor] committed prosecutorial error." *Id.*

61. *Id.*

62. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1846, 1850 (2000).

63. Balko, *supra* note 3, at 12.

64. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 11, 1999, available at <http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story>.

65. *See id.*

66. *Id.*

67. *Id.*

68. *See Connick v. Thompson*, 131 S. Ct. 1350, 1355 (2011).

69. *Indictment, United States v. Stevens*, 593 F. Supp. 2d 177, 179-84 (D.D.C. 2009) (No. 1), 2008 WL 284791; *see e.g., United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149 (2d Cir. 2008); *United States v. Aviles-Colon*, 536 F.3d 1 (1st Cir. 2008); *Horton v. Mayle*, 408 F.3d 570 (9th Cir. 2004); *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004); *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003); *United States v. Lyons*, 352 F. Supp. 2d 1231 (M.D. Fla. 2004); *Watkins v. Miller*, 92 F. Supp. 2d 824 (S.D. Ind. 2000); *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998).

former Senator Ted Stevens—who was charged with violating federal ethics laws by failing to disclose gifts and services from constituents—is a recent example of this.⁷⁰ In observation of these *Brady* violations, federal judge Emmet G. Sullivan of the United States District Court for the District of Columbia found that the government “used business records that the Government undeniably knew were false,” suppressed “critical grand jury transcript[s] containing exculpatory information,” “affirmatively redacted” exculpatory content from documents, and provided the defense with a series of intentionally inaccurate document summaries.⁷¹ Judge Sullivan set aside the conviction of former Senator Stevens, and announced: “In nearly 25 years on the bench, I’ve never seen anything approaching the mishandling and misconduct seen in this case.”⁷² In April 2009, after the case resumed and in an “unprecedented” and “highly unusual” act, Attorney General Eric H. Holder, Jr. moved to set aside former Senator Stevens’ guilty verdict and dismiss the indictment with prejudice in the case of *United States v. Stevens*.⁷³ In this instance, the *Brady* violations, which were revealed for the first time five months after Mr. Stevens’ verdict, did not go unnoticed.

This Court must seek to prevent *Brady* violations such as these and enforce effective sanctions for violations because the government’s obligation to make *Brady* disclosures is pertinent to the defendant’s preparation for trial as well as his determination of whether to accept a guilty plea in his criminal proceedings.⁷⁴ As a result of *Brady* violations, without being fully aware of favorable material evidence known to the government, the defendant is stripped of the fairness he is due under the Constitution.⁷⁵ As Justice William O. Douglas stated, “[s]ociety wins not only when the guilty are convicted but

70. See *Stevens*, 593 F. Supp. 2d at 177–84.

71. Jones, *supra* note 17, at 417–18 (citing Transcript of Motion Hearing, at 4–5, 45–46, *Stevens*, 593 F. Supp. 2d 177 (No. 374)).

72. *Sen. Ted Stevens’ Conviction Set Aside*, CNN 1 (Apr. 7, 2009) <http://www.cnn.com/2009/POLITICS/04/07/ted.stevens/index.html>.

73. Letter from the Hon. Emmet G. Sullivan, Judge, U.S. Dist. Court for D.C., to the Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure (Apr. 28, 2009), available at <http://www.mainjustice.com/files/2009/10/sullivanletter.pdf>.

74. Dewar, *supra* note 15, at 1464 (stating that a fair trial remedy, such as that required where there are *Brady* violations, is important in plea bargain scenarios especially where “nearly nine out of ten criminal cases result in plea bargains rather than trials”).

75. See *United States v. Avellino*, 136 F.3d 249, 261 (2d Cir. 1998); see also *State v. Huebler*, 275 P.3d 91, 93 (Nev. 2012) (extending *Brady* disclosure obligations to require prosecutors to disclose *Brady* evidence prior to a defendant’s acceptance of a guilty plea).

when criminal trials are fair; our system of the administration of justice suffers” when this is not done.⁷⁶

III. THE PERVASIVENESS OF *BRADY* VIOLATIONS AND THEIR ORIGINS

Numerous scholars have indicated that the extensive nature of *Brady* violations is a result of a widespread and overt disregard for the constitutional duty to disclose material evidence under the *Brady* Rule. First, there is no real incentive for attorneys to comply with *Brady* because the current remedy for failing to disclose *Brady* evidence is simply compliance itself.⁷⁷ Scholars note that when some prosecutors are faced with disclosing a piece of arguably favorable evidence, “few considerations weigh in favor of disclosure.”⁷⁸ Furthermore, where there is already compliance, there is little consistency. Courts are likewise reticent to aid in the disclosure of *Brady* evidence, as they are hesitant to “grant motions to compel disclosure of alleged *Brady* evidence, examine government files, or hold prosecutors in contempt.”⁷⁹ Additionally, prosecutors determine what constitutes *Brady* evidence, and defense attorneys may never become aware of any potential *Brady* issues.⁸⁰ Though the duty to affirmatively disclose *Brady* evidence has also extended to police agencies, many of these violations are never disclosed.

Unfortunately, defendants face an uphill battle in their attempts to unearth material evidence that has been hidden. Even when *Brady* violations are uncovered when prosecutors have withheld this information, courts rarely overturn convictions because of the tremendous burdens of appealing a ruling.⁸¹

Scholars have indicated that another example of the legal system’s tendency to favor the government at the expense of a defen-

76. *Brady*, 373 U.S. at 87 .

77. See Jones, *supra* note 17, at 443.

78. Dewar, *supra* note 15, at 1455.

79. *Id.* For example, Dewar and others have made note that a court may refuse to grant a motion to compel or oppose the review of evidence when a *Brady* violation has been found. *Id.* (citing United States v. Blackley, 986 F. Supp. 600 (D.D.C. 1997)); 5 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 24.3(b) (2d ed. 1999)).

80. Dewar, *supra* note 15, at 1454 (“The very nature of *Brady* violations—that evidence was suppressed—means that defendants learn of violations in their cases only fortuitously, when the evidence surfaces through an alternate channel.”).

81. *Id.* at 1455. The defense would be required to show that the “suppression raised a ‘reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Id.* at 1455–56.

dant's rights is evident where bar associations are not inclined to "discipline prosecutors for even the most egregious *Brady* violations."⁸² Furthermore, obtaining this *Brady* evidence is particularly difficult because "prosecutors who engage in willful misconduct presumably do not want to be discovered and therefore take steps to conceal their misdeeds."⁸³ In addition, there is rarely punishment of prosecutors who engage in willful misconduct under *Brady*.⁸⁴ The burden that defendants face is oftentimes insurmountable.⁸⁵ Nonetheless, it is the role of the Court to provide an adequate solution.

A. The Problem of Prosecutorial Discretion and the Inconsistent Standards of Materiality in *Brady* Evidence

Because the *Brady* doctrine provides a remedy for defendants who are able to show that the government hid exculpatory evidence or did not turn this evidence over in time for the defendant to make effective use of it at trial, the first issue in resolving violations of the *Brady* doctrine is defining the scope of what constitutes *Brady* evidence. Though the Court has defined *Brady* evidence as evidence that is material to a defendant's innocence, there is no Court imposed boundary or guide regarding what this embodies.

Scholars have recognized that identifying what constitutes *Brady* material is "not always simple . . . and often subject to debate."⁸⁶ Prosecutors may not recognize how applicable evidence in their possession may be to a defendant's innocence. Furthermore, due to the adversarial nature of the justice system, one scholar has indicated that prosecutors and defense attorneys are often trying different cases.⁸⁷ Law professor Stephen Bright noted: "Even the most conscientious prosecutor may not know how critical a document may be to establishing the defendant's innocence."⁸⁸

82. *Id.* at 1456.

83. Keenan, *supra* note 16, at 209 (citing Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 975 (1984)).

84. *See* Dewar, *supra* note 15, at 1452.

85. *See* Keenan, *supra* note 16, at 206 (showing that defendants and defense attorneys may never even become aware of the material evidence altogether).

86. Joaquin Sapien & Sergio Hernandez, *NYC Prosecutors Who Abuse Their Authority Almost Always Evade Punishment*, HUFFINGTON POST 3 (Apr. 3, 2013, 5:30 AM), http://www.huffingtonpost.com/2013/04/03/nyc-prosecutors-who-abuse-authority-evade-punishment_n_3008438.html?1368471071 (internal citations omitted).

87. *See generally* Cohen, *supra* note 5.

88. *Id.* at 5.

How then may the Court rectify the competing goals of the prosecution and the defense? The Supreme Court and prosecutors' offices across the country have begun to solve this issue by identifying what is included in certain types of impeaching evidence. Because the Court has held that "favorable" evidence includes both exculpatory evidence that negates guilt and impeaching evidence that undermines the government, the solution is first unfolded in what attorneys should recognize as cut-and-dry material *Brady* evidence. Though "[a]ssistant district attorneys [and assistant U.S. attorneys] do not emerge from law school with a genetic disposition to hiding Brady material," one attorney notes, "this is something which is learned and taught."⁸⁹

First, the prosecution must determine what constitutes material and impeaching *Brady* evidence. In reviewing the approaches to disclosing *Brady* material by various United States Attorneys Offices, both liberal and conservative disclosure policies have been identified, each of which impacts the ultimate disclosure of evidence and a defendant's opportunity for a fair trial.⁹⁰ The United States Attorney's Office for the Southern District of New York, for example, implemented a liberal *Brady* evidence disclosure policy in favor of defendants that seeks to safeguard the Office where appeals may occur, which is aided by New York State courts allowing the grant of *in camera* review of potential *Brady* material as a matter of "sound case management."⁹¹ The court is able to avoid the possibility of delay or post-conviction reversal because of late *Brady* disclosure or discovery. *Brady* evidence should automatically include statements of witnesses or physical evidence that conflicts with the prosecution's witnesses,⁹² and

89. David Taintor, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, TPM 6 (Apr. 3, 2013, 3:01 PM), <http://talkingpointsmemo.com/muckraker/who-polices-prosecutors-who-abuse-their-authority-usually-nobody?ref=fpb>.

90. The Department of Justice currently provides a general overview of a prosecutor's duty within their U.S. Attorneys' Manual. See U.S. ATTORNEY'S OFFICE, DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL 9-5.001; see also Letter from the Hon. Emmet G. Sullivan, U.S. Dist. Judge to the Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. (Apr. 28, 2009), available at <http://www.mainjustice.com/files/2009/10/sullivanletter.pdf>; Joe Palazzolo, *Justice Department Opposes Expanded Brady Rule*, MAIN JUSTICE 1 (Oct. 15, 2009, 12:43 AM), <http://www.mainjustice.com/2009/10/15/justice-department-opposes-expanded-brady-rule/print>.

91. See *United States v. Noghbou*, 07 Cr. 814 (JFK), 2007 WL 4165683, *at 3 (S.D.N.Y. Nov. 19, 2007) (internal quotations omitted).

92. See *People v. Johnson*, 38 Cal. App. 3d 228, 235-36 (Cal. Ct. App. 1974); see also Jane Anne Murray, *SDNY Judge Grants Pretrial In Camera Review of Potential Brady Material as a Matter of "Sound Case Management"*, N.Y. FED. CRIM. PRAC. (Nov. 29, 2007, 10:00 PM), <http://www.nyfederalcriminalpractice.com/2007/11/sdny-judge-grants-pretrial-in.html> (quoting *United States v. Stein*, 424 F. Supp. 2d 720 (S.D.N.Y. 2006) ("Acknowledging that the Second Circuit does not mandate immediate disclosure of exculpatory and impeachment material upon the

evidence that could allow the defense to impeach the witness's credibility. Evidence relevant to a witness's credibility includes evidence of false statements by the witness or evidence that a witness was paid to act as an informant. For example, a court would likely find that the following constitutes *Brady* evidence⁹³: a prosecutor who suppresses evidence which tends to suggest that someone other than the defendant committed the crime;⁹⁴ a prosecutor presenting false testimony about physical evidence;⁹⁵ and a prosecutor who suppressed prior inconsistent statements made by key government witnesses.⁹⁶

The non-disclosure of favorable or impeaching evidence is only critical to the outcome of a case under current standards if the withheld evidence is material or prejudicial to the defendant.⁹⁷ Its materiality is determined by whether the defendant can prove that the absence of a particular piece of evidence is relevant to undermine the

defendant's request, the court nonetheless pointed out that it could order early disclosure as a matter of "sound case management.")

93. See Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 845-48 (1997).

94. See *Nelson v. State*, 208 N.W.2d 410, 412-13, 415 (Wis. 1973) (finding that a prosecutor suppressed evidence of a witness's confession to a cellmate that the witness, not the criminal defendant, had shot the victim himself); see also *Miller v. Angliker*, 848 F.2d 1312, 1316-17, 1323 (2d Cir. 1988) (finding suppression, by the prosecutor, of extensive evidence tending to establish that a man other than the defendant committed the murders in question).

95. See, e.g., *United States v. Badalamente*, 507 F.2d 12, 17-18 (2d Cir. 1974) (finding the suppression of letters written by a key government witness claiming coercion by government); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815, 817, 819-20 (3d Cir. 1952) (finding the suppression of a bullet and ballistics report that showed that police, not the defendant, killed the victim); *People v. Walker*, 504 P.2d 1098, 1099-1100 (Colo. 1973) (finding that the prosecutor suppressed the deceased's gun and ballistics report that supported defendant's self-defense claim); *People v. Loftis*, 370 N.E.2d 1160, 1165-68 (Ill. App. Ct. 1977) (finding that a rape victim testified that the defendant ripped her clothes; the prosecutor concealed the unripped clothing); *People v. Wisniewski*, 290 N.E.2d 414, 416-17 (Ill. App. Ct. 1972) (finding that the defendant claimed he killed the victim after the victim struck him with a pipe; the prosecutor suppressed the pipe found at the scene); *Arline v. State*, 294 N.E.2d 840, 841, 843 (Ind. Ct. App. 1973) (finding that the prosecutor suppressed a knife that supported the defendant's self-defense claim); *Commonwealth v. Lam Hue To*, 461 N.E.2d 776, 779-81 (Mass. 1984) (finding that the prosecutor concealed the existence of one knife and misled a defense attorney about facts surrounding discovery of a second knife; the knives supported self-defense claim); *State v. Thompson*, 396 S.W.2d 697, 700-02 (Mo. 1965) (finding that a prosecutor suppressed shells found at the scene that supported the defendant's claim that he did not fire gun).

96. See, e.g., *Lindsey v. King*, 769 F.2d 1034, 1036-38, 1040 (5th Cir. 1985) (finding the suppression of prior statement by eyewitness, who positively identified defendant at trial, but could not identify perpetrator of murder); *Chavis v. North Carolina*, 637 F.2d 213, 219, 223 (4th Cir. 1980) (finding the suppression of a prior inconsistent statement of an important government witness); *United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978) (finding the suppression of a prior statement showing the witness's participation in a crime); *Davis v. Heyd*, 479 F.2d 446, 452-53 (5th Cir. 1973) (finding the suppression of prior inconsistent statements of a witness that supported defendant's accidental killing defense).

97. See *Berger v. United States*, 295 U.S. 78, 88 (1935).

verdict. Courts consider “(1) the importance of the withheld evidence; (2) the strength of the rest of the prosecution’s case; and (3) other sources of evidence available to and used by the defense.”⁹⁸ As prosecutors determine the viability of their case, the stronger the government’s case, the less likely it is that a particular item of evidence will be construed as material.⁹⁹

Second, prosecutors must know in what circumstances this *Brady* evidence must be disclosed. Though this standard has since changed, the Supreme Court established a standard in *United States v. Agurs*¹⁰⁰ which distinguished three different scenarios in which evidence under *Brady* must be disclosed: in the first scenario, material evidence is presented where the prosecution’s case included perjured testimony that the prosecution knew, or should have known, was perjured.¹⁰¹ A conviction must be set aside if there is a likelihood that the false testimony could have affected the judgment of the jury.¹⁰² A defendant is entitled to a new trial if there is a reasonable likelihood that the evidence could have affected the outcome of the trial.¹⁰³ Second, *Brady* applies where there was a pretrial request for specific evidence to which the prosecution did not comply.¹⁰⁴ Finally, *Brady* applies where the government failed to volunteer exculpatory evidence that the defense did not request, or only generally requested.¹⁰⁵ In these situations, the suppression of this evidence must have been sufficient to result in the denial of the defendant’s right to a fair trial.¹⁰⁶ Under *Agurs*, though it is clear in what scenarios *Brady* applies, it is not always clear when it is violated.

In *United States v. Bagley*, a ruling just under a decade after *Agurs*, the Court mostly abandoned the *Agurs* three-part materiality test and instead distinguished between various types of requests for

98. Daniel S. Medwed, *Brady’s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1541 (2010).

99. *Id.*

100. *Agurs*, 427 U.S. at 103.

101. *Id.* at 103–04; *see also* *United States v. Vozzella*, 124 F.3d 389, 393 (2d Cir. 1997) (“In the instant case, the government knew that some portion of the records was fictitious, that their author had stated that they were false in their entirety, and that no adequate further inquiry had been made into their veracity. It should have known that introduction of the records with Stirling’s unqualified testimony concerning their significance conveyed a message so misleading as to amount to falsity.”).

102. *Agurs*, 427 U.S. at 103.

103. *Id.* at 103–04.

104. *Id.* at 104–06.

105. *Id.* at 107–13.

106. *Id.* at 108.

evidence. Thus, the present test for materiality under *Brady* is: evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; a “reasonable probability” is a probability sufficient to undermine confidence in the outcome.¹⁰⁷

B. Insufficient Remedies Disincentivize Disclosure of Material *Brady* Evidence

Though there are an extensive number of *Brady* violations, there is little incentive to disclose *Brady* material, in part because the current remedy for a violation is compliance in handing over the evidence.¹⁰⁸ “In practice . . . [w]hen *Brady* violations are discovered pretrial, the court usually orders the government to disclose the suppressed evidence and, if necessary, grants a continuance in order to give the defense the opportunity to make effective use of the exculpatory information.”¹⁰⁹ This is insufficient to curb prosecutorial misconduct because prosecutors experience no burden as a result of their non-disclosure. According to Judge Kozinski of the United States Court of Appeals for the Ninth Circuit, “[t]his creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice.”¹¹⁰

Some scholars have also noted that there must be a new standard for disclosure because internal codes of protection and secrecy protect attorneys and hinder the possibility of fair trials, as judges and lawyers seek to protect one another from prosecution for their misdeeds; for example, “[i]n many states, . . . the entire disciplinary process occurs in secret, ostensibly to protect the reputation of the accused attor-

107. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

108. Jones, *supra* note 17, at 443; see *United States v. Olsen*, 704 F.3d 1172, 1177 (9th Cir. 2013) (Kozinski, J., dissenting) (recognizing that “[a] robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence”).

109. See Jones, *supra* note 17, at 443.

110. According to Judge Kozinski of the 9th Circuit Court of Appeals, “[a] robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence. Due to the nature of a *Brady* violation, it’s highly unlikely wrongdoing will ever come to light in the first place. This creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice.” *United States v. Olsen*, 704 F.3d 1172, 1177 (9th Cir. 2013) (Kozinski, J., dissenting). If nothing else, remedies that incentivize a prosecutor acting in accordance with their constitutional mandate will remove the “moral hazard” where a prosecutor may be encouraged not to disclose exculpatory evidence. See *id.* at 1177.

neys.”¹¹¹ In some states, prosecutors have the option of admitting wrongdoing and accepting a private reprimand.¹¹² This means that neither their actions nor the disciplinary board’s investigation will ever be made public.¹¹³ Similarly, “those in the best position to report misconduct—namely judges and prosecutors—are often disincentivized from doing so for both strategic and political reasons.”¹¹⁴ Prosecutors often seek the “gratitude of victims, favorable media coverage, career promotions, appointment to judgeships, and the allure of high political office.”¹¹⁵

What is more, scholars have noted that few prosecutors’ offices have mechanisms in place to reward disclosure practices that tend to favor defendants, especially in offices that measure individual performance by win-loss conviction rates.¹¹⁶ In fact, “[f]ew prosecutors who are convinced of a defendant[‘s] guilt are going to turn over evidence that may hurt their chances of obtaining a conviction. It is very easy to rationalize—from the prosecutor’s view of the case—that the evidence is not really exculpatory.”¹¹⁷ One scholar noted that most chief prosecutors in the country are elected, with forty-seven states electing their prosecutors, and the remaining three having their local chief prosecutor appointed by an elected attorney general.¹¹⁸ These

111. Balko, *supra* note 18, at 2 (“You have to remember that nearly all judges are former prosecutors. There’s an undercurrent of alliance between judges and prosecutors, so there’s a certain collegiality there. They run in the same social circles. They attend the same Christmas parties.”).

112. Balko, *supra* note 3, at 8.

113. “[The secrecy of the entire disciplinary process] hides the misconduct from the media, from defense attorneys and from the voters who elect these prosecutors.” *Id.*

114. Keenan, *supra* note 16, at 210; *see also* Brink, *supra* note 58, at 13–16. “The concern that election politics could affect the conduct of prosecutors in specific cases is not merely hypothetical. In the Duke lacrosse case, there was considerable evidence that District Attorney Michael Nifong engaged in misconduct in large part to ensure his reelection. Indeed, when the Chairman of the Disciplinary Panel that heard the Nifong case issued the panel’s decision, she stated: “At that time he was facing a primary and yes he was politically naïve. But we can draw no other conclusion that that [sic] those initial statements that he made were to forward his political ambitions.” *Id.* at 14 (citing F. Lane Williamson, Chairman, Disciplinary Hearing Comm’n, Comments on Disbarment of Michael Nifong (June 17, 2007)), available at <http://www.nytimes.com/2007/06/17/us/17duke-text.html?pagewanted=all>; *see also* CTR. FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 3 (2013); Balko, *supra* note 3, at 3.

115. *See* Brink, *supra* note 58, at 14–15 (citing F. Lane Williamson, Chairman, Disciplinary Hearing Comm’n, Comments on Disbarment of Michael Nifong (June 17, 2007)), available at <http://www.nytimes.com/2007/06/17/us/17duke-text.html?pagewanted=all>).

116. Ellen Yaroshfsky & Bruce A. Green, *Prosecutors’ Ethics in Context: Influences on Prosecutorial Disclosure*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 286 (Leslie C. Levin & Lynn Mather eds., 2012).

117. Cohen, *supra* note 5, at 5.

118. Brink, *supra* note 58, at 13 (citing Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589 (2009)).

candidates “frequently rely on their record of ‘wins,’ either generally or in high profile cases, to support their general tough-on-crime claims.”¹¹⁹ Appointed prosecutors may also be subject to political and performance-based pressures in their career.¹²⁰

C. Even When *Brady* Violations are Uncovered, Prosecutors are Seldom Sanctioned

Despite the justice system’s ability to uncover some prosecutorial misconduct, prosecutors are “rarely sanctioned by courts, and almost never by disciplinary bodies”¹²¹ for their misdeeds. In 2013, for the first time in five decades, a prosecutor would serve time in jail for wrongfully convicting an innocent man.¹²² Remarkably, fifty-one years of prosecutorial misconduct in violation of *Brady* has only seen this one instance where a prosecutor will be imprisoned for this wrongful conduct.¹²³ Twenty-five years ago, then prosecutor, Ken Anderson, possessed exculpatory evidence that would have prevented Mr. Michael Morton from being sent to prison for the murder of his wife.¹²⁴ Mr. Morton was innocent and Mr. Anderson never disclosed

119. *Id.* at 14 (citing Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 156 (2004) (“In running for election as a district attorney, candidates often convey tough-on-crime rhetoric sprinkled with references to their winning percentage and successes in high-profile cases.”) (citation omitted)).

120. *See id.* at 15. In the course of defending against [allegations of firing U.S. attorneys for failing to pursue investigations or bring indictments of certain political figures], Department of Justice officials asserted that they had performance-based reasons for firing the prosecutors and cited insufficient prosecution rates as the legitimate cause. *Id.* (citing Adam Zagorin, *Why Were These U.S. Attorneys Fired?*, TIME (Mar. 7, 2007), <http://www.time.com/time/printout/0,8816,1597085,00.html>).

121. Dewar, *supra* note 15, at 1454 (internal quotations omitted). Even with the Supreme Court’s rebuke of prosecutorial misconduct, courts have not been convinced that the “blatant and repeated violations” of *Brady* that have been “unmitigated by any prosecutorial obligation for the sake of truth” are enough to find a pattern of unconstitutional behavior required to provide an adequate remedy for a defendant. Accordingly, for many jurisdictions, the status quo is perfectly adequate: “Where prosecutors commit Brady violations, convictions may be overturned. That could be a sufficient deterrent, so that the imposition of additional sanctions . . . is unnecessary.” Balko, *supra* note 3, at 6 (internal quotations omitted).

122. *See* Mark Godsey, *For the First time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man*, HUFFINGTON POST 1 (Nov. 8, 2013, 4:12 PM), http://www.huffingtonpost.com/mark-godsey/for-the-first-time-ever-a_b_4221000.html. Despite the charges against Mr. Anderson, the State of Texas settled all civil and criminal misconduct charges against former prosecutor Anderson, in exchange for Anderson “forfeit[ing] his law license, [] serv[ing] up to 10 days in jail, pay[ing] a \$500 fine and perform[ing] 500 hours of community service.” Nathan Koppel, *Texas Ex-Prosecutor Gets Brief Jail Time for Misconduct*, WALL ST. J., Nov. 9–10, 2013, at A5, available at <http://online.wsj.com/news/articles/SB10001424052702304672404579186212406837816>.

123. *See* Godsey, *supra* note 122, at 1.

124. *Id.*

the information proving this innocence.¹²⁵ Mr. Anderson went on to establish a prominent career, ultimately becoming a judge.¹²⁶ However, while Anderson was flourishing in the State of Texas, Mr. Morton became a product of the prison industrial complex.¹²⁷

In addition to the almost nonexistent criminal prosecution of attorneys who withhold exculpatory *Brady* evidence, few prosecutors experience disciplinary sanctions or reprimand. A comprehensive study completed in 1987, less than twenty-five years after the *Brady* ruling, revealed only nine cases in which any state bar disciplinary committee even considered disciplining a prosecutor for *Brady*-related misconduct.¹²⁸ A study by the Chicago Tribune found that no prosecutors involved in the almost 400 vacated homicide convictions were disbarred or given “any kind of public sanction from a state lawyer disciplinary agency.”¹²⁹ Of those prosecutors, only one was fired, but after an appeal was reinstated with back pay.¹³⁰ The report concluded: “[i]t is impossible to say whether any of the prosecutors received any professional discipline at all, because most states allow agencies to discipline lawyers privately if the punishment is a low-grade sanction like an admonition or reprimand.”¹³¹ Still, more than two decades later, USA Today published a six-month investigation of 201 cases involving misconduct of federal prosecutors.¹³² Of those hundreds of prosecutors, only one “was barred even temporarily from practicing law for misconduct.”¹³³

State studies have also supported this proposition. In a study of New York state trial and appellate court findings of misconduct between 2004 and 2008, there were 151 instances of misconduct found, with only three cases where attorneys were publicly sanctioned.¹³⁴ In the 2004–2008 studies in Pennsylvania and Arizona, of forty-six and twenty instances of misconduct, respectively, neither state saw any

125. *Id.*

126. *Id.*

127. *Id.*

128. Rosen, *supra* note 9, at 720.

129. Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, CHI. TRIB. 4 (Jan. 11, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story>.

130. *Id.*

131. *Id.* at 5.

132. Balko, *supra* note 3, at 7.

133. *Id.* at 7.

134. Veritas Initiative, *Prosecutorial Oversight Forum: Court Findings of Prosecutorial Error and Misconduct in New York State*, 1, 2–3 (2012), <http://www.prosecutorialoversight.org/about-the-issue/court-findings-of-prosecutorial-error-and-misconduct-in-new-york-state-2004-2008>.

public sanctioning of those attorneys.¹³⁵ In Texas, the study revealed that trial and appellate courts found prosecutorial misconduct in ninety-one cases between 2004 and 2008, with only one case providing for public sanctioning of attorneys.¹³⁶

Other state studies show similar findings. In 2010, the Northern California Innocence Project also published a study where they found prosecutorial misconduct in 707 cases in California state courts between 1997 and 2009.¹³⁷ Of the 4,741 attorneys disciplined over that period, only ten were prosecutors; the study also found sixty-seven prosecutors whom appeals courts cited for multiple infractions.¹³⁸ Only six prosecutors faced any disciplinary action from the state bar.¹³⁹ Further, “judges often failed to report misconduct to the state bar despite having a legal obligation to do so. Sixty-seven prosecutors committed misconduct more than once and some as many as five times. The majority of those prosecutors were never publicly disciplined.”¹⁴⁰ Additionally, in an Innocence Project study of seventy-four DNA exonerees, none of the prosecutors of those exonerees faced any serious professional sanction.¹⁴¹

This widespread disregard for the liberty of defendants defeats the purpose of our justice system. It has become a system, which seeks to prosecute criminals for heinous crimes, but refuses to hold “prosecutors accountable who have abused public trust.”¹⁴² In many cases, defendants’ lives would not have been stripped from them had this problem of a systematic failure to uphold a duty under the law

135. Veritas Initiative, *Prosecutorial Oversight Forum: Court Findings of Prosecutorial Error and Misconduct in Pennsylvania*, 1, 6 (2012), <http://www.prosecutorialoversight.org/about-the-issue/court-findings-of-prosecutorial-error-and-misconduct-in-pennsylvania-2004-2008>; Veritas Initiative, *Prosecutorial Oversight Forum: Court Findings of Prosecutorial Error and Misconduct in Arizona*, 1, 8 (2012), <http://www.prosecutorialoversight.org/about-the-issue/court-findings-of-prosecutorial-error-and-misconduct-in-arizona-2004-2008>.

136. Veritas Initiative, *Prosecutorial Oversight Forum: Court Findings of Prosecutorial Error and Misconduct in Texas*, 1, 4 (2012), <http://www.prosecutorialoversight.org/about-the-issue/court-findings-of-prosecutorial-error-and-misconduct-in-texas-2004-2008>.

137. Balko, *supra* note 3, at 7.

138. *Id.*

139. *Id.*

140. Leigh Jones, *Prosecutorial Misconduct Is Rarely Punished, Says New Study*, NAT’L L.J. 1 (2010), <http://www.nationallawjournal.com/id=1202472897418/Prosecutorial-Misconduct-Is-Rarely-Punished-Says-New-Study>.

141. Balko, *supra* note 3, at 7.

142. Matt Clarke, *Prosecutors Who Commit Misconduct Are Rarely Disciplined*, PRISON LEGAL NEWS, Aug. 2011, at 12.

been solved.¹⁴³ Prosecutors do not fear sanctions and they are not deterred from engaging in misconduct.

IV. RECOMMENDATIONS FOR *BRADY* REFORM

Because *Brady* did not provide a universal remedy for violations caused by the suppression of evidence, the decades leading up to this 51st Anniversary of *Brady* have seen a hodge-podge of remedies.¹⁴⁴ Unfortunately, these proposed solutions have yet to change the dysfunctional nature of disclosures under *Brady*. Current propositions for curbing prosecutorial misconduct have included: (1) an “open file” system and (2) expanding the civil liability of prosecutors and police officers. The aforementioned solutions have fallen short of meeting the disclosure requirements that *Brady* compels and there is a lack of a universal remedy for convicted defendants. Therefore, this Comment proposes the following solutions.

First, the duty to disclose pretrial discovery in criminal cases should be expanded to include all evidence—not solely evidence that prosecutors cursorily consider *Brady* material. Second, the Court should require a third party neutral magistrate judge to review the evidence that the prosecution believes may be *Brady* material. This leaves far less discretion to prosecutors who may be uncertain of whether evidence is *Brady* material. Third, the Court should enforce already promulgated rules that sanction *Brady* violations. Specifically, these widespread and unconscionable violations should require mandatory and automatic consideration for sanctioning under the Model Rules of Professional Conduct. Likewise, the Court should expand liability of prosecutors under these rules to include holding them accountable for the conduct of law enforcement officers under their direction. Fourth, the Court should bind police officers to the same ethical standards to which prosecutors are bound. Finally, when *Brady* evidence that should have been divulged comes to light after a trial, the court should reverse a defendant’s conviction, irrespective of

143. In 2007, a California Court of Appeals found that a deputy district attorney, Phil Cline, improperly withheld an exculpatory audiotape of a witness interview years earlier in the murder trial of Mark Sodersten. Because the tape was so damning, the court wrote that “[t]his case raises the one issue that is the most feared aspect of our system — that an innocent man might be convicted.” Mr. Sodersten has already died in prison. Deputy District Attorney Phil Cline was never disciplined by the state bar. In fact, he was elected district attorney in 1992 and continued to win reelection, even with the court’s opinion chastising him. The other prosecutor in the case, Ronald Couillard, went on to become a judge. Balko, *supra* note 3, at 7; *see also* Jones, *supra* note 141, at 1.

144. *See generally* Dewar, *supra* note 15.

whether the outcome of the case would have been different if the *Brady* evidence had been included. Automatic reversal is one of the few remaining potential remedies that has yet to see widespread implementation.

As Justice Douglass explained fifty-one years ago, the overarching mission of the Department of Justice is to do “*justice*.”¹⁴⁵ On this, the 51st Anniversary of *Brady v. Maryland*, recommendations forthwith are proposed with the intent of being both remedial in nature in order to protect defendants that are wrongfully convicted, and also to serve as a deterrent to ensure that government actors are abiding by their affirmative constitutional duties. That was, after all, the purpose of *Brady* some five decades ago.

A. The Duty to Disclose All Evidence

Prosecutors should be required to disclose each piece of evidence attained in preparation for trial. The government’s obligation to provide exculpatory information stems from two sources: *Brady* and the Federal Rules of Criminal Procedure.¹⁴⁶ Rule 16 of the Federal Rules requires the government to “permit the defendant to inspect and copy . . . books, papers, documents [or] data . . . if the item is within the government’s possession, custody or control if (i) *the item is material to preparing the defense*; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.”¹⁴⁷

This duty to disclose usually only occurs post-conviction, when the bar for attaining a new trial is particularly high.¹⁴⁸ However, full disclosure from the beginning of the trial process would allow defense attorneys themselves to review evidence that may be exculpatory, instead of relying on the judgment of a “prudent prosecutor” about what is and is not exculpatory.¹⁴⁹ Though full disclosure of all evi-

145. *Brady*, 373 U.S. at 87 (emphasis added).

146. See Sheila Sawyer & William Athanas, *Is ‘It’s In There Somewhere’ Enough? Defining the Scope of the Government’s Brady Obligation*, 24 ANDREWS WHITE-COLLAR CRIME REP., Dec. 2009, at 3, 4. See generally *Brady*, 373 U.S. 83 (setting out the government’s obligation to turn over exculpatory evidence).

147. FED. R. CRIM. P. 16 (emphasis added).

148. See, e.g., *United States v. Blackley*, 986 F. Supp. 600, 607 (D.D.C. 1997).

149. In 2009, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia urged the Judicial Conference Advisory Committee on the Rules of Criminal Procedure to “once again” propose an amendment to the FED. R. CRIM. P. 16, seeking that the rule require the disclosure of all exculpatory information to the defense. Letter from the Hon. Emmet G. Sullivan, Judge, U.S. Dist. Court for the Dist. of Columbia, to the Hon. Richard C. Tallman,

dence may cause an unwanted burden on the government in building its case, the duty to disclose may take the form of creating a database, much like the current “open file”¹⁵⁰ system across numerous jurisdictions.¹⁵¹ This would allow extensive access with little effort by the government. This is a useful proposition, but it is incomplete without an analysis of why full disclosure is paramount to fairness.

According to one scholar, a critical rationale for mandating the disclosure of all evidence is due to the need to combat “cognitive bias,” which is defined as “a pattern of deviation in judgment, whereby inferences about other people and situations may be drawn in an illogical [and artificial] fashion.”¹⁵² From their cognitive biases, police officers and prosecutors create “subjective social reality” from their perception of this reality, even when their perception is incorrect.¹⁵³ As Alafair Burke notes, because of cognitive bias, the materiality test forces prosecutors to “engage in a bizarre kind of anticipatory hindsight review” dependent on an artificial comparison of the evidence and the as-of-yet unborn trial record.¹⁵⁴ Prosecutors who have charged a defendant with a crime now conduct a pretrial materiality assessment because of this cognitive bias.¹⁵⁵ They are forced to “engage in biased recall, retrieving from memory only those facts that tend to confirm the hypothesis of guilt.”¹⁵⁶ At best, prosecu-

Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure (Apr. 28, 2009) (on file with U.S. District Court for the District of Columbia). Judge Sullivan provided support for his proposal of an amendment, specifically:

An amendment to Rule 16 that requires the government to produce all exculpatory information to the defense serves the best interests of the court, the prosecution, the defense, and, ultimately, the public. Such a rule would eliminate the need for the court to enter discovery orders that simply restate the law in this area, reduce discovery disputes, and help ensure the integrity and fairness of criminal proceedings. Moreover such a rule would also provide clear guidance to the prosecutor and indeed protect prosecutors from inadvertent failures to disclose exculpatory information. Finally, a federal rule of criminal procedure mandating disclosure of such information . . . would ensure that the defense receives in a timely manner all exculpatory information in the government’s possession.

Id.

150. An “open file” policy requires the disclosure of evidence to defendants of essentially all information gathered by police, whether it is exculpatory or not. However, it is unlikely that these policies will be adopted if they inhibit a prosecutor’s ability to obtain a conviction of defendants.

151. *Strickler v. Greene*, 527 U.S. 263, 281, 284 (1999).

152. Haselton, M. G., Nettle, D., & Andrews, P. W., *The Evolution of Cognitive Bias*, in *THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY* 724–746 (D. M. Buss ed., 2005).

153. Alafair Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006); see also Medwed, *supra* note 99, at 1542.

154. Burke, *supra* note 153, at 1610; see also Medwed, *supra* note 98, at 1542.

155. Burke, *supra* note 153, at 1593–1601; see also Medwed, *supra* note 99, at 1542.

156. Medwed, *supra* note 98, at 1542 (citing Burke, *supra* note 152, at 1611); see also Alafair Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 495 (2009).

tors process information selectively, “undervaluing the potentially exculpatory evidence and overrating the strength of the rest of the prosecution case.”¹⁵⁷

In this way, a prosecutor’s cognitive dissonance affects his or her evaluation of the potential *Brady* evidence.¹⁵⁸ Inculpatory evidence “takes on tremendous significance” and exculpatory evidence becomes insignificant.¹⁵⁹ Having already concluded that the defendant is likely guilty, a prosecutor might discount the subsequent discovery of exculpatory information.¹⁶⁰ A prosecutor “shirk[s] the uncomfortable psychic reality that he may have charged an innocent person with a crime.”¹⁶¹

Requiring prosecutors to disclose *all* evidence through the use of an “open file” system, or otherwise, prevents cognitive bias that results from prosecutorial discretion. Yet, even if the court were to identify an early enough point when *Brady* disclosure might apply, the issue would still remain of *what Brady* material should be disclosed.

B. Review by a Third Party Neutral

When suppressed favorable evidence comes to light during or shortly before a trial, the trial court should also consider requiring a third party neutral magistrate judge to review evidence which prosecutors bring forth as potentially falling within *Brady*.¹⁶² This third party neutral requirement would function similarly to the review of evidence by a neutral and detached magistrate that is necessary for a warrant to be issued under the Fourth Amendment’s Search and Seizure Clause.¹⁶³ This requirement is especially important if prosecutors are not required to disclose all evidence.

157. Medwed, *supra* note 98, at 1542 (citing Burke, *supra* note 152, at 1611–12).

158. *Id.* at 1543 (citing Burke, *supra* note 152, at 495–96).

159. *Id.* at 1542–43.

160. *Id.* at 1543.

161. *Id.*

162. In Judge Kozinski’s dissent in *United States v. Olsen*, he stated: “There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.” *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013). A third party magistrate requirement, requiring a judge to review material that prosecutors identify as potential *Brady* material will ensure that the judiciary is actively assisting in combating prosecutorial misconduct. *Id.* In fact, Judge Kozinski notes:

The panel’s ruling “effectively announces that the prosecution need not produce exculpatory or impeaching evidence so long as it’s possible the defendant would’ve been convicted anyway. This will send a clear signal to prosecutors that, when a case is close, it’s best to hide evidence helpful to the defense, as there will be a fair chance reviewing courts will look the other way, as happened here.”

Id. at 630.

163. U.S. CONST. amend. IV.; *see also* *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979).

As required by the Fourth Amendment, the “neutral and detached” magistrate functions as a “safeguard against improper searches,” in order to prevent “the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.”¹⁶⁴ In these circumstances, the magistrate should be in a position to issue warrants only where they remain in a position of neutrality.¹⁶⁵ Instead of being a “rubber stamp for the police,”¹⁶⁶ the magistrate is to have no stake in the investigation for which the warrant is sought. Additionally, the Fourth Amendment requires a “detached” magistrate—the role usually being served by a member of the judiciary, as opposed to the executive branch. Thus, the Attorney General, prosecutors, and other members of law enforcement agencies cannot issue warrants.

Like the “neutral and detached” magistrate requirement under the Fourth Amendment, a similar requirement should attach to all investigations under *Brady* to curb violations of the *Brady* disclosure standard. The fulfillment of this requirement should occur prior to an actual decision by prosecutors not to disclose evidence made by the prosecution. The “neutral and detached” magistrate under *Brady* would serve as an adequate solution because the failure to disclose exculpatory evidence exists on two fronts. First, the current standard of educating Assistant District Attorneys and Assistant U.S. Attorneys fails to ensure consistency in recognizing what constitutes material *Brady* evidence.¹⁶⁷ Though there still may be an issue of a lack of uniformity that persists after the use of a third party neutral, this disparity would be minute; an impartial judicial officer who determines what constitutes *Brady* evidence can rectify this problem. Second, even where prosecutors received the same education and instruction about what constitutes *Brady* evidence, *Brady* evidence is still often

164. *Lo-Ji Sales, Inc.*, 442 U.S. at 326.

165. *Connally v. Georgia*, 429 U.S. 245, 251 (1977) (holding invalid warrants issued by a magistrate who was paid a fee for each warrant he issued, but who received no fee for warrant applications that he declined to approve).

166. *United States v. Leon*, 468 U.S. 897, 914 (1987).

167. *See* U.S. ATTORNEYS OFFICE, DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL 9–5.001. The United States Attorneys’ Manual recognizes “that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence.” *Id.* (citing *Kyles*, 514 U.S. at 439). While all United States Attorneys assigned to criminal matters and cases must receive training on *Brady*, training occurs through the Office of Legal Education or, alternatively, any United States Attorney’s Office or DOJ component. *See id.* The standard of disclosure across the United States varies, which results in various offices making different final decisions regarding disclosure.

hidden or never disclosed because law enforcement officers and prosecutors each have a role in being able to prevent the discovery of evidence.

C. Holding Prosecutors Accountable

In order to hold prosecutors accountable for their misdeeds, courts should (1) require mandatory and automatic consideration for sanctioning under the Model Rules of Professional Conduct; (2) expand liability of prosecutors under these rules to include holding prosecutors accountable for the conduct of law enforcement officers under their direction, and (3) bind police officers to the same ethical standards to which prosecutors are bound. According to John Thompson, his case “[wasn’t] about bad men, though they were most assuredly bad men [It was] about a system that is void of integrity. Mistakes can happen. But if you don’t do anything to stop them from happening again, you can’t keep calling them mistakes.”¹⁶⁸ If the justice system is to truly hold prosecutors accountable, it must exist through a multi-fold approach that begins to transform prosecutors, defense attorneys, and judicial expectations.

1. Prosecutors Should Be Held Accountable Under Already Promulgated Rules

Prosecutors should be held accountable through (1) the already promulgated constitutional guide of *Brady* and the Model Rules of Professional Conduct, and (2) enforcing transparency in sanctioning of prosecutors. According to the Model Rules, prosecutors have an obligation to disclose exculpatory and mitigating evidence, regardless of materiality. Specifically, Rule 3.8(d) requires that prosecutors:

Make timely disclosure to the defense of *all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . .* and disclose to the defense and to the tribunal *all unprivileged mitigating information* known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.¹⁶⁹

Just as the American Bar Association argues, “a prosecutor’s pre-trial ethical disclosure obligations are established by the attorney regulatory codes of the prosecutor’s state or jurisdiction, and are separate

168. Balko, *supra* note 3, at 1; *see also* Jones, *supra* note 140.

169. MODEL RULES OF PROF’L CONDUCT R. 3.8 (emphasis added).

from and broader than the constitutional standards that control a court's post-trial determination of *Brady* claims.”¹⁷⁰ Not only should there be increased pressure on prosecutors to abide by standards in *Brady* and the Model Rules of Professional Conduct,¹⁷¹ but professional bar associations should refrain from sanctioning prosecutors in private. The internal reprimands that often occur in favor of requiring mandatory reprimands before state bar associations are contrary to progress within this area of the law. This may create a culture of disclosure and transparency, which can in turn prevent *Brady* violations.

Justice Clarence Thomas, writing for the majority of the Court, noted that there are practices in place, which serve to sanction prosecutors who intentionally engage in *Brady* misconduct, such as “legal training and professional responsibility.”¹⁷² In *Connick*, Justice Thomas stated that District Attorneys should be able to rely on the already enforced professional responsibility measures as a remedy.¹⁷³ However, with all due deference to the Court, the decision in *Connick* was incorrect. Critics of Justice Thomas have noted “study after study proves conclusively that Justice Thomas is misguided—that prosecutors are rarely sanctioned by the bar when they cheat on their disclosure obligations.”¹⁷⁴ However, the fact that prosecutors are rarely sanctioned does not mean that the proper implementation of these sanctions cannot prove to be an actual and effective remedy. Where prosecutors were once without the implementation of the sanctions, the actual repercussions will now force prosecutors to curb their own conduct. The court and the bar must recognize that the importance of justice for the defendant and deterrence of misconduct will not occur unless actual sanctions are effectuated. Nevertheless, this remedy alone is not enough.

170. Brief of ABA as Amicus Curiae, at 6, n.11, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145) 2011 U.S. S. Ct. Briefs LEXIS 1144.

171. *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009); see also *Agurs*, 427 U.S. at 108 (“[S]ignificant practical difference[s] [exist] between the pretrial decision of the prosecutor and the post-trial decision of the judge.”).

172. *Connick v. Thompson*, 131 S. Ct. 1350, 1363 (2011).

173. *Id.*

174. Cohen, *supra* note 5, at 4; see also Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 722 (2006); Keenan, *supra* note 16, at 205; Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, 540–43 (2011).

2. Expanding Responsibility through Rule 3.8(f)

Because of the failure of the justice system to abide by *Brady* standards, the Court should again look to the ABA Model Rules of Professional Conduct to expand the duties of prosecutors. The current *Brady* rule requiring disclosure of exculpatory evidence encompasses evidence that is “known only to police investigators and not to the prosecutor.”¹⁷⁵ However, this Comment proposes that Rule 3.8(f)¹⁷⁶ of the Model Rules should be extended to make the misconduct of police officers attributable to prosecutors. Though a harsh requirement, this would curb misconduct on the part of both prosecutors and law enforcement. Rule 3.8(f) of the Model Rules of Professional Conduct states:

The prosecutor in a criminal case shall: . . . (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.¹⁷⁷

Currently, Rule 3.8(f) does not discuss training or the result of violations of the duty to disclose material evidence under the *Brady* Rule.¹⁷⁸ However, a rule provision that addresses *Brady* and contains an extended obligation to investigators is necessary. Because law enforcement officers work at the direction of prosecutors,¹⁷⁹ ethical rules should be expanded to include their conduct as well.¹⁸⁰ If, in fact, police do not abide by this duty, prosecutors should be sanctioned.

175. *Kyles*, 514 U.S. at 438. The 1995 ruling in *Kyles* stated that in order for prosecutors to comply with *Brady* “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in [a] case, including the police.” *Id.* at 437.

176. MODEL RULES OF PROF’L CONDUCT R. 3.8(f).

177. *Id.*

178. *Id.*

179. See Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 727 (2004).

180. Sunil Bhave, *The Innocent Have Rights Too: Expanding Brady v. Maryland to Provide the Criminally Innocent With a Cause of Action Against Police Officers Who Withhold Exculpatory Evidence*, 45 CREIGHTON L. REV. 1, 29 n.1 (2011) (“The United States Supreme Court, however, has yet to extend the *Brady* holding to claims that police officers, as opposed to prose-

An extension of this rule is critical for preventing *Brady* violations, and without it, some prosecutors may never become aware of the violations themselves until the court seeks to sanction them. Though it is not the purpose to collapse a career for something a prosecutor did not know, strict liability is sometimes necessary. Police officers and investigators may choose not to disclose evidence, but by holding prosecutors accountable, this will force prosecutors and law enforcement to create protocol and procedures which ensure that law enforcement is transparent and truthful in their disclosure or nondisclosure of material evidence which may be dispositive of a defendant's innocence.

3. Subject Prosecutors to Civil Sanctions for Willful *Brady* Violations

When the government pursues a criminal case, the prosecutor is cloaked with absolute immunity from civil liability. Prosecutors are also rarely criminally prosecuted as a result of their misconduct. This allows the prosecutor to make discretionary decisions fairly and fearlessly without the distraction of a flood of civil lawsuits [or criminal sanctioning] by disgruntled defendants.¹⁸¹ Justice Learned Hand rationalized this ruling by arguing that it is “in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.”¹⁸² For example, in *Imbler v. Pachtman*, the Court created a bright-line rule, which cloaked prosecutors with immunity for investigatory and trial violations.¹⁸³ Unfortunately, prosecutorial immunity is more of a hindrance to effective *Brady* policies than it is a benefit.

Under the current standard, in order to hold a prosecutor civilly liable, a court must find more than that an “offending prosecutor knowingly withheld exculpatory evidence, and that the offense wasn't

cutors, withheld material, exculpatory evidence from the defense.”); see also Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMP. POL. & CIV. RTS. L. REV. 1, 1–2 (2003). *But see* *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (noting lower federal courts permit convicted plaintiffs to bring civil rights *Brady* claim against police).

181. Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, Aug. 10, 2010, at 1, <http://digitalcommons.pace.edu/lawfaculty/635/> (citing *Imbler v. Pachtman*, 424 U.S. 409, 423–26 (1976)).

182. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

183. See *Imbler v. Pachtman*, 424 U.S. 409, 427–29 (1976).

due to mere negligence or oversight.”¹⁸⁴ According to the Supreme Court, “a single *Brady* violation—i.e., a one-time failure to disclose “material” evidence—is insufficient to establish liability on a failure-to-train theory.”¹⁸⁵ This standard prevents justice for defendants. Thus, civil liability should not be precluded. Further, the standard for liability is currently excessively strict.

Anything otherwise “not only fail[s] to protect the judicial process but skew[s] the balance of power in the criminal justice system more heavily toward prosecutors.”¹⁸⁶ Unfortunately, the Court is far removed from this outcome. Allowing prosecutors the luxury of prosecutorial immunity undermines the purpose of *Brady* and perpetuates the deliberate concealment, or reckless misconduct, of prosecutor’s failing to disclose exculpatory evidence.

D. Professionalizing the Police

In addition to holding prosecutors accountable for their violations of *Brady*, it is both an appropriate remedy to impose a duty on police officers to disclose material evidence and necessary to sanction these officers for failure to do so. This sanction will impact law enforcement’s conduct and ultimately the ability of prosecutors to have all information at their disposal.

Under current law, a prosecutor must disclose exculpatory evidence known to the police.¹⁸⁷ Since police officers, investigators and other law enforcement officers also engage in misconduct under *Brady*, these officers of the court should be held to the same ethical standards which prosecutors are held. In the Court’s attempt to professionalize the police, law enforcement officers should be disbarred or fined for their intentional incompetence in office. If the court were to subject police officers to being fined or disbarred for this conduct, law enforcement officers would be accountable.

184. Radley Balko, *Brady v. Maryland Turns 50, But Defense Attorneys Aren’t Celebrating*, HUFFINGTON POST, (May 13, 2013, 5:42 PM), http://www.huffingtonpost.com/2013/05/13/brady-v-maryland-50_n_3268000.html?utm_hp_ref=politics.

185. Keenan, *supra* note 16, at 204.

186. Gershman, *supra* note 181, at 3 (citing Brink, *supra* note 58, at 31; Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 145–46 (2005); Douglas J. McNamara, Buckley, Imbler and Stare Decisis: *The Present Predicament of Prosecutorial Immunity and an End to its Absolute Means*, 59 ALB. L. REV. 1135, 1159 (1996)).

187. *Kyles v. Whitley*, 514 U.S. 419, 437–438 (1995). Because of this duty, the prosecution should establish regular procedures by which the police must inform him of anything that tends to prove the innocence of the defendant. However, the prosecutor is not obligated to *personally* review police files in search of exculpatory information when the defendant asks for it.

E. Dismissing the Guilty Verdict

Finally, though drastic, no remedy short of dismissal of an entire conviction can prevent the Government's flagrant *Brady* violations."¹⁸⁸ The remedies for *Brady* violations after conviction are overly lenient and must reflect the current landscape of prosecutorial misconduct.¹⁸⁹ This is a radical remedy that should be exercised with great care.¹⁹⁰ However, dismissal is appropriate especially when viewed in the light of violations made by some prosecutors. Abiding by and upholding *Brady* in this way would likely influence prosecutors to actually fear the repercussions of a *Brady* violation. Otherwise, these same violations will still arise another fifty years from today.

The current standard for proving *Brady* violations is: if the prosecution does not disclose material exculpatory evidence under this rule, and prejudice has ensued, the evidence will be suppressed.¹⁹¹ The evidence will be suppressed regardless of whether the prosecutor knew the evidence was in his or her possession, or whether or not the prosecutor intentionally or inadvertently withheld the evidence from the defense.¹⁹² The defendant bears the burden of proving that the undisclosed evidence was material, and the defendant must show that there is a reasonable probability that there would be a difference in the outcome of the trial had the evidence been disclosed by the prosecutor.¹⁹³ Under this standard, courts have embraced a "harmless error" standard of review, which requires a defendant to prove (1) misconduct, and (2) that the misconduct substantially prejudiced the outcome of his trial.¹⁹⁴ The Third Circuit Court of Appeals explains that dismissal with prejudice for a *Brady* violation is appropriate only in cases of deliberate or willful misconduct, since this remedy is needed in such cases for deterrence.¹⁹⁵

188. See generally Bennett L. Gershman, PROSECUTORIAL MISCONDUCT § 5:22, 5:43–45 (2d ed. 2008) (stating that the court exceeds its authority in granting dismissal as a sanction for *Brady* violations where a less severe sanction could have cured the violation).

189. Jones, *supra* note 17, at 444–46.

190. *Id.* at 444.

191. William Harvey, *Telling the Truth*, POLICE MAG. (June 21, 2013), <http://www.police-mag.com/blog/careers/story/2013/06/telling-the-truth.aspx>.

192. *Id.*

193. *Id.*

194. Keenan, *supra* note 16, at 212 n.49 (citing Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 977 (1984) (“[M]any instances of harmless error occur when an appellate court finds trial misconduct by the prosecutor but does not reverse the conviction. In such cases the only apparent sanction for unethical conduct is that the conduct is described in the opinion, perhaps in opprobrious terms.”)).

195. *Virgin Islands v. Jareem Fahie*, 419 F.3d 249, 254–55 (3d Cir. 2005).

The current standard is insufficient to deter prosecutorial misconduct. Thus, though dismissal of a case is a drastic remedy to be exercised with great care, it is a fair remedy. The Court has previously held that, “a one-time failure to disclose ‘material’ evidence—is insufficient to establish liability on a failure-to-train theory.”¹⁹⁶ However, this current standard requires a showing of perpetual wrongdoing by prosecutors.¹⁹⁷ A one-time failure may be the result of an intentional act and may be far reaching in its consequences to a defendant.¹⁹⁸ It is unjust, therefore, to prevent liability in these instances. John Thompson, who served eighteen years in prison and was deprived of his freedom, is just one example of this. Mr. Thompson received no compensation for the nearly two decades that he served in prison.¹⁹⁹ Instead, the court overturned a \$14 million award to Mr. Thompson after the New Orleans prosecutors deliberately withheld crucial exculpatory blood evidence because Mr. Thompson’s prosecutor had not demonstrated a pattern of disregard for constitutional rights.²⁰⁰ Because the individual prosecutors had the privilege of “absolute immunity,” Mr. Thompson is left with nothing.²⁰¹

This standard does not take into account the underlying purpose of *Brady*. Not only was the *Brady* doctrine implemented to ensure that defendants are not deprived of their liberty without due process, but also the fundamental basis upon which the amendment rests—*fairness*—should be the guiding principle in implementing *Brady* violation remedies. Federal courts have already explicitly recognized that dismissal of charges with prejudice may be an appropriate remedy for a violation.²⁰² Yet, the flagrant nature of *Brady* violations should further allow for the widespread authorization for a court to grant a dismissal in all circumstances.

196. Keenan, *supra* note 16, at 204 (quoting *Connick v. Thompson*, 131 S. Ct. 1350, 1361 (2011)).

197. *Id.*

198. *Id.*

199. *Connick*, 131 S.Ct. at 1355.

200. *Id.*

201. *Id.*

202. *See* *United States v. Struckman*, 611 F.3d 560, 577 (9th Cir. 2010) (“Nonetheless, our circuit has recognized that dismissal with prejudice may be an appropriate remedy for a *Brady* or *Giglio* violation using a Court’s supervisory powers where prejudice to the defendant results and the prosecutorial misconduct is flagrant.”).

CONCLUSION

This Comment proposes that the Court consider a multi-fold approach to addressing *Brady* violations to ensure that the number of defendants who are wrongfully convicted will decline and the role of the prosecutor will shift to align with his constitutional duty. This includes (1) requiring a duty to disclose *Brady* evidence to expand to all evidence, namely through the use of an “open file” system or something similar; (2) the use of a third-party neutral magistrate to review evidence that the prosecution may deem as *Brady* material; (3) holding prosecutors and law enforcement officials to a higher standard of accountability; and (4) dismissing a defendant’s guilty verdict where *Brady* violations have occurred. The widespread problem of *Brady* violations will decrease only when the justice system recognizes the critical need to redefine the government’s compliance with its constitutional duty. Therefore, this Comment has proposed potential solutions to curb this problem.

Five decades ago, the Supreme Court recognized that one of the things most lacking in the justice system is an appreciation for what is at stake: “[t]o take someone’s freedom—that’s the ultimate deprivation a government can inflict on a citizen, short of taking his life.”²⁰³ Even Blackstone’s age-old formulation states that it is “better that ten guilty persons escape, than that one innocent party suffer.”²⁰⁴ Yet, the failure to prosecute justly and consistently under *Brady* inevitably forces both to occur.²⁰⁵ Though the actual number of wrongful convictions themselves is important, the criminal justice system—which was predicated on a presumption of justice—is also predicated on the presumption of innocence until *proven* guilty. For each defendant caught in the crossfire of *Brady* violations, no such justice exists.²⁰⁶ This restructuring of the justice system begins with a forceful instruction; the courts must send prosecutors a clear message: if you “[b]etray *Brady* . . . you will lose your ill gotten conviction.”²⁰⁷

203. Balko, *supra* note 18, at 3.

204. 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

205. See Balko, *supra* note 184, at 1.

206. *Id.*

207. *United States v. Olsen*, 737 F.3d 625, 633 (9th Cir. 2013) (Kozinski, J., dissenting) (emphasis added).

COMMENT

Rule 12(b)(6) and the Hurdle It Imposes for Gender Discrimination and Hostile Work Environment Sexual Harassment Claims

SHAKERA M. THOMPSON*

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INTRODUCTION

In *Nelson v. Knight*,¹ the Iowa Supreme Court upheld a district court’s grant of a dentist’s summary judgment motion in a gender discrimination claim where the dentist fired his assistant, Melissa Nelson, because she was too attractive.² Nelson’s claim would have had greater merit as a hostile work environment sexual harassment claim as opposed to a gender discrimination claim. However, the court did not reach the issue as to whether Nelson established a hostile work environment sexual harassment claim.³ In fact, the court emphasized that its holding was limited.⁴ Nonetheless, although Nelson would have been able to plead facts to allege a hostile work environment sexual harassment claim, the question arises as to whether her claim would have been able to withstand a Rule 12(b)(6) motion to dismiss.⁵ This question comes into play because of the pleading requirements set forth in *Bell Atlantic v. Twombly*, the governing law with respect to the facts that are necessary for a complaint to withstand a Rule 12(b)(6) motion to dismiss.⁶

1. *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 65 (Iowa 2013).

2. See Ryan Foley, *All-Male Iowa Supreme Court Rules Firing of Woman for Being Too Attractive Was Legal*, HUFFINGTON POST, (July 12, 2013, 12:09 PM), http://www.huffingtonpost.com/2013/07/12/iowa-supreme-court-attractive-woman-firing_n_3586861.html; Associated Press, *Iowa: Court Reaffirms Dentist’s Firing of Woman He Found Too Attractive*, N.Y. TIMES, July 13, 2013, at A11.

3. *Nelson*, 834 N.W.2d at 65.

4. *Id.* (“We emphasize the limits of our decision. The employee did not bring a sexual harassment or hostile work environment claim; we are not deciding how such a claim would have been resolved in this or any other case.”)

5. Federal Rule of Civil Procedure 12(b)(6) allows a party to assert a motion to dismiss for “failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6).

6. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Despite the court's assertion to the contrary,⁷ it is questionable if *Twombly* imposes a heightened pleading standard on plaintiffs seeking to withstand a Rule 12(b)(6) motion to dismiss, which would be especially problematic with Title VII claims. However, one study noted that the rate at which district courts granted motions to dismiss in Title VII claims began to rise when the courts relied on *Twombly*.⁸ Almost eighty-one percent of district court opinions citing *Twombly* between six and twelve months after the decision either granted or granted in part a motion to dismiss.⁹

This Comment explores the question of whether, despite the Court's assertion, *Twombly* imposes a heightened pleading standard, specifically with respect to gender discrimination and hostile work environment claims. Part I discusses the evolution of the pleading standard for facts necessary to withstand a Rule 12(b)(6) motion to dismiss from *Conley v. Gibson* to *Bell Atlantic v. Twombly*. Part II discusses *Nelson v. Knight*, and analyzes if the facts pleaded in *Nelson* would withstand a Rule 12(b)(6) motion to dismiss under the *Conley* and *Twombly* standards. Part III discusses hostile work environment sexual harassment claims, and the requirements to plead a hostile work environment sexual harassment claim that will withstand a Rule 12(b)(6) motion under the *Conley* standard as opposed to the *Twombly* standard. Part IV discusses criticisms of the assertion that *Twombly* imposes a heightened pleading standard. Part V discusses policy implications of the heightened pleading standard set forth in *Twombly*. Part VI discusses proposed solutions and alternatives to the heightened pleading standard imposed by *Twombly*.

I. FROM *CONLEY* TO *TWOMBLY*

A. *Conley v. Gibson*

In *Conley v. Gibson*, a group of black railroad employees sued their union under the Railway Labor Act.¹⁰ The employees alleged in their complaint that there was a contract between their union and the

7. See *id.* ("Here . . . we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

8. See Joseph A. Seiner, *The Trouble With Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1030 (2009).

9. See *id.* This study examined 532 federal district court decisions. 264 of the decisions involved Rule 12(b)(6) motions to dismiss in the year immediately before the *Twombly* decision, and 268 of the decisions involved Rule 12(b)(6) motions to dismiss in the year immediately after the *Twombly* decision. *Id.* at 1027–28.

10. See *Conley v. Gibson*, 355 U.S. 41, 43 (1957).

railroad to protect them from “discharge and loss of seniority.”¹¹ The employees further alleged that the railroad eliminated jobs that were held by black employees, and filled the positions with white employees.¹² The employees also alleged that the union acted “according to plan,” failed to protect them from the discriminatory discharges, and did not give the black railroad employees protection that was comparable to that given to white railroad employees.¹³ Finally, the employees alleged that the union failed to represent black railroad employees “equally and in good faith,” in violation of their right to fair representation under the Railway Labor Act.¹⁴

The union moved to dismiss the employees’ complaint.¹⁵ The District Court dismissed the complaint for lack of jurisdiction, and the Court of Appeals affirmed.¹⁶ The United States Supreme Court then granted certiorari, as the case “raised an important question concerning the protection of employee rights under the Railway Labor Act.”¹⁷

The Court found that the courts below erred in dismissing the complaint for lack of jurisdiction.¹⁸ The Court further found that although the District Court did not rule on the other reasons given for the dismissal of the complaint, it was necessary for the Court to consider them in this case.¹⁹ The Court held:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.²⁰

11. *Id.*

12. *Id.* (“In May 1954, the Railroad purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted. In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority.”).

13. *Id.*

14. *Id.* The employees requested relief in the form of a declaratory judgment, injunction, and damages. *Id.*

15. *Id.* The union moved to dismiss the employees’ complaint for lack of jurisdiction, failure to join an indispensable party defendant, and failure to state a claim upon which relief could be given. *Id.*

16. *Id.* at 43–44.

17. *Id.* at 44.

18. *Id.*

19. *Id.* at 45. The Court found that the employees did not fail to join an indispensable party. The Court then dedicated a substantial portion of the analysis to addressing the sufficiency of the employees’ complaint. *Id.*

20. *Id.* at 45–46 (emphasis added).

In applying this standard, the Court found that the employees' allegations that they were wrongfully discharged, that the union failed to protect their jobs as it did those of white employees, and that the union failed to address their grievances because they were black were sufficient to state a claim for relief.²¹ The Court further found that if the allegations were proven, there would be a "manifest breach" of the union's statutory duty to fairly represent all employees in the bargaining unit.²² The Court rejected the union's argument that the complaint did not include "specific facts to support its general allegations of discrimination" and thus should be dismissed.²³ The Court responded that the "Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim," but instead require a "'short and plain statement' of the claim" to give the defendant notice of the claim and the grounds for the claim.²⁴

B. *Bell Atlantic v. Twombly*

Bell Atlantic v. Twombly involved the 1984 dispossession of AT&T, resulting in regional service monopolies (called "Incumbent Local Exchange Carriers" or "ILECs"), and a separate market, from which the ILECs were excluded, for long-distance service.²⁵ Congress then enacted the Telecommunications Act of 1996, which authorized ILECs to compete in the long-distance market.²⁶ Under the 1996 Act, ILECs were also required to share their networks with "competitive local exchange carriers" or "CLECs."²⁷ William Twombly and Lawrence Marcus, whom the Court referred to as "plaintiffs," represented a putative class that consisted of all "subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present."²⁸ The plaintiffs filed a complaint against a group of ILECs alleging violations of § 1 of the Sherman Act, which prohibited

21. *Id.*

22. *Id.* at 46.

23. *Id.* at 47.

24. *Id.* The Court went on to say that "such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and other pretrial procedures . . . to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* at 47-48.

25. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 549 (2007).

26. *Id.*

27. *Id.* ("A CLEC could make use of an ILEC's network in any of three ways: by (1) 'purchas[ing] local telephone services at a wholesale rates for resale to end users,' (2) 'leas[ing] elements of the [ILEC's] network 'on an unbundled basis,' or (3) 'interconnect[ing] its own facilities with the [ILEC's] network.'").

28. *Id.* at 550.

contracts or agreements “in restraint of trade or commerce among the several States, or with foreign nations.”²⁹

The plaintiffs alleged in the complaint that the ILECs “conspired to restrain trade in two ways,” resulting in increased charges for local telephone and Internet services.³⁰ The plaintiffs first alleged that the ILECs were involved in “parallel conduct” to hinder the growth of CLECs.³¹ The plaintiffs further alleged that the ILECs’ “‘compelling motivatio[n]’ to thwart the CLECs’ competitive efforts naturally led them to form a conspiracy.”³² The plaintiffs’ second allegation was that the ILECs made agreements “to refrain from competing against one another.”³³ The plaintiffs alleged the agreements should be “inferred from the ILECs’ common failure ‘meaningfully [to] pursu[e]’ ‘attractive business opportunit[ies]’ in contiguous markets where they possessed ‘substantial competitive advantages.’”³⁴

The district court dismissed the complaint, finding that the complaint failed to state a claim upon which relief could be granted.³⁵ The Court of Appeals reversed, holding that “to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”³⁶ The Supreme Court then granted certiorari to address the proper pleading standard.³⁷

The Court began its analysis of “what a plaintiff must plead in order to state a claim” by noting that in order to withstand a Rule 12(b)(6) motion to dismiss, a complaint “does not need detailed factual allegations,” but a plaintiff is obligated to provide the “grounds of his ‘entitlement to relief.’”³⁸ The Court went on to state that this obligation “requires more than labels and conclusions, and a formulaic

29. *Id.*

30. *Id.*

31. The plaintiffs alleged that this conduct included ILECs making unfair agreements with CLECs wishing to use their networks, providing “inferior” network connections, and charging CLECs in a way to damage the relationships between CLECs and their customers. *Id.*

32. *Id.* at 550–51.

33. *Id.* at 551.

34. *Id.*

35. *Id.* at 552. The district court found that in simply alleging parallel conduct, the plaintiffs did not state a claim under the Sherman Act. *Id.*

36. *Id.* at 553 (emphasis added) (internal quotation marks omitted). Here, the court applied the *Conley* standard to the facts of the case. See *id.*

37. *Id.*

38. *Id.* at 554–55.

recitation of the elements of a cause of action will not do.”³⁹ Therefore, the Court held that in order for the plaintiffs to state a claim under the Sherman Act, their complaint must include “enough factual matter (taken as true) to suggest that an agreement was made.”⁴⁰ The Court further stated that requiring “plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage,” but instead “calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”⁴¹ The Court went on to say that requiring plausibility at the pleading stage reflects the requirement of Rule 8(a)(2) that the “‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”⁴²

The plaintiffs argued against a plausibility standard to the extent that it conflicted with the Court’s ruling in *Conley v. Gibson*.⁴³ In response, the Court overturned the *Conley* decision, stating that *Conley*’s “no set of facts” language had been “puzzling the profession for 50 years” and “earned its retirement.”⁴⁴ The Court further stated that the language was “best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent

39. *Id.* at 555; see also 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, 235–36 (3d ed. 2004) (“[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.”).

40. *Twombly*, 550 U.S. at 556.

41. *Id.* at 556–57 (“A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant’s commercial efforts stays in neutral territory.”).

42. *Id.* at 557; see FED. R. CIV. P. 8(a)(2) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing the pleader is entitled to relief.”).

43. See *Twombly*, 550 U.S. at 560–61.

44. *Id.* at 562–63. The Court cites several sources to show that “*Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough.” *Id.* at 562; see *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) (discussing tension between *Conley*’s “no set of facts” language, and its acknowledgment that a plaintiff must provide the “grounds” on which his claim rests); *McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 42–43 (6th Cir. 1988) (quoting *O’Brien v. DiGrazia*, 544 F.2d 543, 546, n.3 (1st Cir. 1976)); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (“*Conley* has never been interpreted literally” and, “[i]n practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.”) (internal quotation marks omitted); *O’Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976) (“[W]hen a plaintiff . . . supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional . . . action into a substantial one.”); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) (describing *Conley* as having “turned Rule 8 on its head”); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 463–465 (1986) (noting tension between *Conley* and subsequent understandings of Rule 8).

with the allegations in the complaint.”⁴⁵ In doing away with *Conley* and applying a plausibility standard, the Court found that the plaintiffs’ complaint was insufficient to state a claim under the Sherman Act.⁴⁶ The Court stated it was not requiring “*heightened fact pleading* of specifics, but only enough facts to state a claim to relief that is plausible on its face.”⁴⁷ The Court concluded by finding that because the plaintiffs did not “nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed.”⁴⁸

II. NELSON V. KNIGHT

Melissa Nelson, the plaintiff, worked as a dental assistant for Dr. James Knight, the defendant, for approximately ten and a half years.⁴⁹ During the last year and a half of Nelson’s employment, Dr. Knight complained to Nelson that her clothing was revealing and distracting.⁵⁰ On one occasion, Dr. Knight told Nelson “that if she saw his pants bulging, she would know her clothing was too revealing.”⁵¹ Nelson and Dr. Knight also began texting one another toward the end of her employment.⁵² The court record reflects that both have children, and some texts involved discussions about their children’s activities, and other seemingly innocent exchanges.⁵³

On one occasion, Dr. Knight texted Nelson that the shirt she wore was too tight and Nelson responded that he was not being fair.⁵⁴ Dr. Knight replied to her text stating that it was a good thing that she did not also wear tight pants because “then he would get it coming and going.”⁵⁵ The facts do not indicate that Nelson responded to this text.⁵⁶ Dr. Knight alleged that Nelson made a statement about the infrequency of her sex life and he replied, “[T]hat’s like having a

45. *Twombly*, 550 U.S. at 563.

46. *See id.* at 570.

47. *Id.* (emphasis added).

48. *Id.* The United States Supreme Court case of *Ashcroft v. Iqbal* is also relevant to this discussion, primarily because in *Iqbal*, the Court found that its decision in *Twombly* applied to all civil actions. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’ . . .”).

49. *See Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 65 (Iowa 2013).

50. *See id.*

51. *Id.* at 66.

52. *See id.* at 65.

53. *See id.* The facts of the case do not indicate that Nelson and Dr. Knight mutually engaged in inappropriate text exchanges. *Id.*

54. *See id.* at 66.

55. *See id.*

56. *See id.*

Lamborghini in the garage and never driving it.”⁵⁷ Dr. Knight’s wife, who also worked at the dental office, learned of Nelson and Dr. Knight’s texting and insisted that Dr. Knight fire Nelson because “she was a big threat to [their] marriage.”⁵⁸ Dr. Knight ultimately terminated Nelson.⁵⁹

Nelson filed a civil rights complaint and received a “right to sue” letter from the Iowa Civil Rights Commission.⁶⁰ Nelson brought an action against Dr. Knight in district court alleging that he terminated her because of her gender.⁶¹ The district court granted summary judgment in favor of Dr. Knight, and Nelson appealed to the Iowa Supreme Court.⁶² The Iowa Supreme Court affirmed the district court’s decision, finding that Dr. Knight did not engage in unlawful gender discrimination.⁶³

Nelson’s primary argument was that Dr. Knight would not have terminated her if she were a man.⁶⁴ The court approached the issue in this case narrowly, asking “whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss’s spouse views the relationship between the boss and the employee as a threat to her marriage?”⁶⁵ The court then stated that the case at hand was similar to the case of *Platner v. Cash*.⁶⁶ In *Platner*, an employer terminated a female employee who worked on the same crew as the employer’s son after the son’s wife became jealous of the

57. *Id.* Nelson also alleged that Dr. Knight sent her a text asking how often she experienced an orgasm, and she did not respond to his text. *Id.*

58. *See id.*

59. *See id.* Dr. Knight and his wife discussed the situation with the senior pastor of their church, and the pastor agreed with the decision to terminate Nelson. *Id.*

60. *Id.* at 67.

61. *See id.*

62. *See id.*

63. *See id.* The Iowa Supreme Court reheard the case after public outcry of its initial decision to affirm the district court’s holding. *See Nelson v. James H. Knight DDS, P.C.*, No. 11–1857, 2012 WL 6652747, at *8 (Iowa Dec. 21, 2012); Ryan Foley, *All-Male Iowa Supreme Court Rules Firing of Woman for Being Too Attractive Was Legal*, HUFFINGTON POST (July 12, 2013, 12:09 PM), http://www.huffingtonpost.com/2013/07/12/iowa-supreme-court-attractive-woman-firing_n_3586861.html.

64. *Nelson*, 834 N.W.2d at 67 (“Nelson argues that her gender was a motivating factor for her termination because she would not have lost her job if she had been a man.”).

65. *Id.* at 69.

66. *See id.*

female employee.⁶⁷ The Eleventh Circuit upheld the termination and stated that no “unlawful discrimination” occurred.⁶⁸

The court in *Knight* then noted that the purpose of civil rights laws was to “ensure that employees are treated the same regardless of their sex or other protected status,” and Dr. Knight’s termination of Nelson did not inhibit this goal.⁶⁹ The court reasoned that finding that Dr. Knight terminated Nelson because of her gender would permit an employee to allege that any termination resulting from a consensual relationship was discriminatory because “the relationship would not have existed but for his or her gender.”⁷⁰ The court then stated that such an argument contradicts federal precedent that holds that in the absence of sexual harassment, there is no actionable Title VII claim for an adverse employment action that results from a consensual workplace relationship.⁷¹

A. *Nelson v. Knight* under the *Conley* and *Twombly* Standards

The gender discrimination claim set forth in *Nelson v. Knight* likely would have also been unsuccessful in withstanding a Rule 12(b)(6) motion to dismiss under the *Conley* standard. Although arguably the Rule 12(b)(6) motion to dismiss has transformed into a summary judgment motion,⁷² the language of the Federal Rules of Civil Procedure would suggest that different standards should apply in ruling on these motions.⁷³ To sufficiently plead a complaint alleging a

67. *Id.* (citing *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 903–05 (11th Cir. 1990)).

68. *Id.* (citing *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 903–05 (11th Cir. 1990)). The court reasoned that the employer terminated Platner because of the employer’s favoritism for his son, not because of Platner’s gender. *Id.* (citing *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 903–05 (11th Cir. 1990)).

69. *Id.* at 70.

70. *Id.*

71. *Id.*

72. See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 41 (2010) (discussing how currently under both the motion to dismiss and summary judgment standards, “courts assess the plausibility of a claim, using inferences favoring the plaintiff and inferences favoring the defendant, and under both, courts use their own opinions of the evidence to decide the plausibility question.”).

73. Federal Rule of Civil Procedure 56 provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law,” and allows the party to “cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials.” Fed. R. Civ. P. 56(a), (c)(1)(A). Federal Rule of Civil Procedure 12(b)(6) allows a party to assert a motion to dismiss for “failure to state a claim upon which relief can be granted,” and in ruling on a Rule 12(b)(6) motion, courts assess the sufficiency of the complaint. See Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–56 (2007) (discussing the standards

gender discrimination claim, a plaintiff must show that she is a member of a protected group, she is qualified for her job, her employment was adversely affected by a decision, and similarly situated males received treatment that was more favorable.⁷⁴ In *Garza v. Univision*, the plaintiff alleged that a male coworker inappropriately touched her, kissed her, and inserted a CD in the plaintiff's work computer that included shirtless pictures of the male coworker.⁷⁵ The plaintiff further alleged that she reported the behavior to her immediate supervisor who advised the plaintiff that the male coworker would be suspended without pay, but the plaintiff later learned the male coworker was sent to another location for an assignment.⁷⁶ Because of these events, the plaintiff alleged she was treated "more adversely than similarly situated male employees;" however, the court did not find her argument persuasive and granted the defendant's motion to dismiss.⁷⁷ In applying *Garza v. Univision* to *Nelson v. Knight*, Nelson would be unsuccessful in withstanding a Rule 12(b)(6) motion under the *Conley* standard in a gender discrimination claim because although Nelson alleged that she suffered an adverse employment action, she did not allege that she was treated less favorably than similarly situated males.⁷⁸

However, Nelson likely would have been successful in withstanding a Rule 12(b)(6) motion for a hostile work environment sexual harassment claim under the *Conley* standard. In *EEOC v. Jamal & Kamal, Inc.*, the United States District Court for the Eastern District of Louisiana applied the *Conley* standard in ruling on the defendant's Rule 12(b)(6) motion to dismiss in a hostile work environment

used in evaluating a motion to dismiss); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (noting the standard for determining the sufficiency of a complaint). This Comment focuses on Rule 12(b)(6) motions to dismiss. However, *Nelson v. Knight* is relevant to this discussion because it shows how even the amount of information that a plaintiff provides for a court ruling on a motion for summary judgment may not be sufficient to withstand a Rule 12(b)(6) motion to dismiss under the *Twombly* standard.

74. See *Garza v. Univision*, No. Civ.A. 3:04CV1905-K, 2005 WL 1107374, at *3 (N.D. Tex. May 6, 2005).

75. See *id.* at *1.

76. See *id.*

77. See *id.* at *3 (granting the defendant's motion to dismiss because the plaintiff did not allege facts to show that she was treated less favorably than similarly situated males, or that she suffered an adverse employment action).

78. See *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 67 (Iowa 2013) (Nelson argued that Dr. Knight terminated her because of her gender and would not have terminated her if she were a male. While Nelson alleged an adverse employment action, she did not allege that she was treated less favorably than similarly situated males).

sexual harassment claim.⁷⁹ In *Jamal*, the United States Equal Employment Opportunity Commission (EEOC) alleged that a manager engaged in conduct amounting to hostile work environment sexual harassment, including “unwelcome and offensive sexual overtures, the initiation of graphic, sexually-oriented conversations, and touching and rubbing.”⁸⁰ The court denied the motion to dismiss, finding that the EEOC pleaded facts that if true, would support its claim that the employees were “subjected to a sexually hostile work environment.”⁸¹ In *Nelson v. Knight*, Nelson not only alleged “unwelcome and offensive overtures” and the “initiation of graphic, sexually-oriented conversations” as did the plaintiff in *Jamal*, but Nelson also detailed the behavior.⁸² Therefore, Nelson likely would be successful in withstanding a Rule 12(b)(6) motion under the *Conley* standard in a hostile work environment sexual harassment claim.

Nelson may have also been successful in withstanding a Rule 12(b)(6) motion under the *Twombly* standard in a hostile work environment sexual harassment claim. In *EEOC v. Tuscarora Yarns, Inc.*,⁸³ the United States District Court for the Middle District of North Carolina applied the *Twombly* standard in ruling on the defendant’s Rule 12(b)(6) motion to dismiss in a hostile work environment claim.⁸⁴ In *Tuscarora Yarns*, the EEOC alleged that a manager “propositioned [the plaintiff] for sex, made unwelcome sexual comments to her, inappropriately touched her and sexually assaulted her.”⁸⁵ The court granted the motion to dismiss, finding that the EEOC’s complaint was “virtually devoid of any facts underlying the alleged sexual harassment.”⁸⁶ The court further stated while the manager’s actions might show conduct to state a hostile work environment claim, the EEOC’s complaint lacked sufficient facts to allow the court to reach

79. See *EEOC v. Jamal & Kamal Inc.*, No. Civ.A. 05-2667, 2006 WL 285143 (E.D. La. Feb. 7, 2006).

80. *Id.* at *2.

81. *Id.* at *3.

82. See *Nelson*, 834 N.W.2d at 66. On one occasion, Nelson alleged that Dr. Knight told her that a shirt she wore was too tight, and said if her pants were also tight “he would get it coming and going.” Further, Dr. Knight admitted that he once told Nelson “that if she saw his pants bulging, she would know her clothing was too revealing.” In a comment about the infrequency of Nelson’s sex life, Dr. Knight stated, “that’s like having a Lamborghini in the garage and never driving it.” Dr. Knight also asked Nelson how often she experienced an orgasm. *Id.*

83. See *EEOC v. Tuscarora Yarns, Inc.*, No. 1:09-cv-217, 2010 WL 785376 (M.D.N.C. Mar. 3, 2010).

84. *Id.* at *1–*2.

85. *Id.* at *1.

86. *Id.* at *3.

such a conclusion.⁸⁷ In *Nelson v. Knight*, Nelson sets forth several facts “underlying the alleged sexual harassment,” as required by the court in *Tuscarora Yarns*.⁸⁸ Therefore, a court could find that Nelson’s complaint contained sufficient facts to allow the court to conclude that Dr. Knight’s actions might show conduct to state a hostile work environment sexual harassment claim, and thus could withstand a Rule 12(b)(6) motion to dismiss. However, it is very possible to plead substantial facts and still fail to withstand a Rule 12(b)(6) motion under the *Twombly* standard in a hostile work environment sexual harassment claim.

III. HOSTILE WORK ENVIRONMENT CLAIMS

A. Facts Necessary to Plead a Hostile Work Environment Sexual Harassment Claim

The Second Circuit Court of Appeals took a somewhat straightforward approach to pleading hostile work environment sexual harassment claims. The Second Circuit Court of Appeals held

To state a claim for a hostile work environment in violation of Title VII, a plaintiff must plead facts that would tend to show that the complained of conduct: (1) is objectively severe or pervasive—that is, creates an environment that a reasonable person would find hostile or abusive; (2) creates an environment that the plaintiff subjectively perceives as hostile or abusive; and (3) creates such an environment because of the plaintiff’s sex.⁸⁹

The court went on to say that in evaluating the sufficiency of a complaint stating a hostile work environment sexual harassment claim, the court should evaluate the “totality of circumstances.”⁹⁰ Factors to consider in evaluating the totality of circumstances may include the frequency and severity of the conduct, whether the conduct is threatening or humiliating or simply an offensive utterance, and

87. *Id.*

88. See *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 65–67 (Iowa 2013); see also *Tuscarora*, 2010 WL 785376, at *2–*3 (identifying the types of facts required for sufficient pleading). Nelson also alleged that she was ultimately terminated, which would further support a claim for a hostile work environment. See *Nelson*, 834 N.W.2d at 67.

89. *Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2000). The Second Circuit Court of Appeals plays a major role in shaping the progression of employment discrimination claims. See generally Lewis M. Steele & Miriam F. Clark, *The Second Circuit’s Employment Discrimination Cases: An Uncertain Welcome*, 65 ST. JOHN’S L. REV. 839 (1991) (discussing how the Second Circuit has handled fundamental issues in the area of employment discrimination and how the Second Circuit’s approach has affected plaintiffs’ civil rights, as well as the progression of civil rights law).

90. *Patane*, 508 F.3d at 113.

whether the conduct “unreasonably interferes with an employee’s work performance.”⁹¹ In *Patane v. Clark*, the plaintiff alleged that her supervisor engaged in “inappropriate sexually charged conduct” in the workplace.⁹² The court applied the *Twombly* standard and found that the plaintiff alleged sufficient facts such that she was “entitled to offer evidence to support her claim.”⁹³ The court went on to say that a plaintiff is only required to allege that she was subjected to a hostile work environment because of her gender, and can successfully do so even if the conduct was not explicitly directed at her.⁹⁴

While the facts of *Nelson v. Knight* do not rise to the level of those alleged in *Patane*, Nelson may have been able to plead a hostile work environment sexual harassment claim sufficient to withstand a Rule 12(b)(6) motion under the *Twombly* standard, as discussed in *Patane*. In considering *Patane* in evaluating *Knight*, a court could reasonably find that Nelson pleaded facts sufficient to allege that the complained of conduct was objectively severe or pervasive. This is most evident with Dr. Knight’s conduct in telling Nelson that if she saw his pants bulging she would know her clothing was too revealing, as well as telling her that it was a good thing that she did not wear tight pants in addition to her tight shirt because he would get it coming and going.⁹⁵ Additionally, Dr. Knight admittedly told Nelson that her husband infrequently having sex with her was like having a Lamborghini in the garage and never driving it.⁹⁶ A court could also find that Nelson subjectively perceived the conduct as hostile or abusive because when Dr. Knight told Nelson that her shirt was too tight she responded that he was not being fair, and she did not respond at all to his comment about getting it coming and going.⁹⁷ While the court in *Knight* found that Dr. Knight terminated Nelson because she was a threat to his marriage and not because of her gender,⁹⁸ a court would likely find that Dr. Knight’s conduct toward Nelson was be-

91. *Id.*

92. *Id.* at 114. The plaintiff alleged that her supervisor watched pornography such that the employees could see what he was watching, she was regularly required to handle pornographic videotapes, and she discovered pornographic material that her boss viewed on her computer. *Id.*

93. *Id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

94. *Id.* (discussing how the court previously “recognized that sexually charged conduct in the workplace may create a hostile environment for women notwithstanding the fact that it is also experienced by men”).

95. *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 66 (Iowa 2013).

96. *Id.*

97. *Id.*

98. *Id.* at 71.

cause of her gender. As the court noted in *Patane*, a plaintiff is only required to allege that she was subjected to a hostile work environment because of her gender.⁹⁹ This distinction is notable because as did the court in *Patane*, a court would consider the totality of the circumstances¹⁰⁰ and not simply the isolated event of the termination. This would admittedly be a more difficult argument because although a court might find that the conduct was frequent and severe, a court could also find that Dr. Knight's statements were simply "offensive utterances" as opposed to being threatening or humiliating.¹⁰¹ Furthermore, based on the facts provided, a court might not find that the conduct unreasonably interfered with Nelson's work performance.¹⁰² Therefore, it is difficult to say whether Nelson would have been successful in withstanding a Rule 12(b)(6) motion under the *Twombly* standard in a hostile work environment sexual harassment claim.

B. Proving Versus Pleading a Hostile Work Environment Sexual Harassment Claim

The facts necessary to establish a prima facie case in a hostile work environment sexual harassment claim differ from those necessary to survive a Rule 12(b)(6) motion.¹⁰³ The distinction between the facts necessary to survive a Rule 12(b)(6) motion and those necessary to establish a prima facie case in a hostile work environment sexual harassment claim is an important issue in determining precisely what facts a plaintiff must set forth to plead a sufficient complaint.

1. Establishing a Prima Facie Case in a Hostile Work Environment Sexual Harassment Claim

The Fourth Circuit Court of Appeals has held that a plaintiff has a Title VII sexual harassment cause of action when sex based discrimination has created a hostile work environment.¹⁰⁴ The plaintiff must first "make a prima facie showing that sexually harassing actions took place."¹⁰⁵ The employer may rebut this showing by proving that the

99. *Patane*, 508 F.3d at 113.

100. *Id.* The totality of circumstances may include the frequency and severity of the conduct, whether the conduct is threatening or humiliating or simply an offensive utterance, and whether the conduct "unreasonably interferes with an employee's work performance." *Id.*

101. *Id.*

102. *Id.*

103. *Compare* *Dwyer v. Smith*, 867 F.2d 184, 187 (4th Cir. 1989), *with* *Edwards v. Murphy-Brown*, L.L.C., 760 F. Supp. 2d 607, 614 (E.D. Va. 2011) (citing *Twombly*, 550 U.S. at 570).

104. *See Dwyer*, 867 F.2d at 187.

105. *Id.*

events did not occur, or “by showing that they were isolated or genuinely trivial.”¹⁰⁶ The plaintiff must then show that “the employer knew or should have known of the harassment, and took no effectual action to correct the situation.”¹⁰⁷ The employer may also rebut this showing “by pointing to prompt remedial action reasonably calculated to end the harassment.”¹⁰⁸

2. Pleading a Hostile Work Environment Sexual Harassment Claim

It is extremely important that plaintiffs meet the Rule 12(b)(6) standard when setting forth facts in hostile work environment sexual harassment claims in order to plead sufficient complaints and avoid the court dismissing their claim in the earliest stage of litigation. Consider the following scenario:

Veronica is pursuing a hostile work environment sexual harassment claim against the owner of her former place of employment. Below are the facts of her complaint.¹⁰⁹

1. Plaintiff alleges that the defendant’s conduct was unwelcome. Plaintiff alleges that almost daily during the last year of her employment, the defendant would stand less than one foot from the plaintiff during daily meetings and attempt to brush against the side of the plaintiff’s body with the front or side of the defendant’s body.

Plaintiff alleges that on one occasion, she was out of the office and when she returned the next day, the defendant stood extremely close to her during a meeting. Plaintiff further alleges that on this occasion, the defendant intentionally brushed against the side of her body with the front of his body and told her how much he missed her while she was out of the office. Plaintiff alleges that other employees witnessed the defendant’s behavior during the daily meetings on this and other occasions. Plaintiff alleges that in response to the defendant’s behavior on the aforementioned occasions, she began going to

106. *Id.* An employer may rebut this showing directly by proving that the events did not occur, or may rebut the showing indirectly by alleging that the events were trivial. *Id.*

107. *Id.*

108. *Id.*

109. The facts of this complaint are in accord with the pleading standards set forth by the Fourth Circuit Court of Appeals. The Fourth Circuit Court of Appeals has held that the plaintiff must plead facts to establish: (1) unwelcome conduct; (2) based on sex; (3) sufficiently severe or pervasive such that it altered the conditions of the plaintiff’s employment and created an abusive work environment; and (4) that such conduct is “imputable to the employer.” *Okoli v. City of Baltimore*, 648 F.3d 216, 220 (4th Cir. 2011) (quoting *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 334 (4th Cir. 2010)).

the meetings early so that she could position herself such that other employees were between herself and the owner. Plaintiff alleges that as a result, the owner would simply stare at her during the meetings.

Plaintiff further alleges that on another occasion, the defendant approached the plaintiff and told her that he was closing the office at 3:00 p.m. so that all of the employees could see a building that was under renovation to open a new location. Plaintiff further alleges that upon inquiring of her co-workers, the plaintiff realized she was the only employee who received this “invitation,” and chose not to go. Plaintiff alleges that although she never directly gave the defendant her cell phone number, the defendant called her cell phone several times and left two voicemails, stating that he was at the building alone and asking if she was coming. Plaintiff alleges that she returned the defendant’s call and stated that she was with her mother and they would both come and see the building. Plaintiff alleges that the defendant then responded that he was just leaving the building.

Plaintiff alleges that after this incident plaintiff’s immediate supervisor asked the plaintiff about the calls before the plaintiff had the opportunity to discuss the incident with her supervisor, and knew details such as the frequency and the reason for the calls. Plaintiff alleges that she recounted the events to her supervisor, and told her supervisor that what happened to the plaintiff was not appropriate and needed to be addressed.

Plaintiff further alleges that she advised the defendant that she would be leaving the firm to attend law school and the defendant asked the plaintiff several times on several different occasions where she planned to attend law school. Plaintiff alleges that she advised the defendant that she would rather not disclose the information. Plaintiff alleges that the defendant then asked several employees of the company, as well as a former employee, for information regarding where the plaintiff would attend law school.

Plaintiff further alleges that she won a trip through a company contest that she was not able to attend, but the company offered to send her on a different trip for herself and a guest at another time. Plaintiff alleges that the initial trip was to be a group trip to include herself and the defendant. Plaintiff alleges that after inquiring about the trip, the defendant came into her office, closed the door and said in a low, singsong voice with low eyes and a coy smile that he could not bring himself to send the plaintiff on a trip alone, but plaintiff could go on a trip with the defendant. Plaintiff alleges that in re-

sponse to this comment, her eyes widened and she looked disgusted as she backed away from the defendant. Plaintiff alleges that the defendant then said that he meant with “us” because the company did not have the money. Plaintiff alleges that she later told the Director of Operations about the encounter and that it made her very uncomfortable. Plaintiff alleges that the director of operations advised her that he would speak with the owner about the incident.

2. Plaintiff alleges that the defendant’s conduct was based on her sex. Plaintiff alleges that the defendant did not subject similarly situated males employed with the firm to behavior similar to the behavior directed toward the plaintiff. Plaintiff alleges, however, that the defendant subjected other female employees to similar behavior. Plaintiff alleges that another female employee told the plaintiff and other coworkers that the defendant invited the employee to a lunch meeting and they rode together in the defendant’s vehicle. Plaintiff alleges that said female employee stated that on the way back to the office, the defendant stopped at a park and began rubbing the employee’s shoulders, caressing her face, and playing in her hair.

Plaintiff further alleges that the defendant and male employees would talk about going to strip clubs such that the plaintiff and other female employees could overhear them. Plaintiff also alleges that the defendant attempted to get another former female employee to go on a trip with him, as he attempted to get the plaintiff to go on a trip with him (as discussed in section 1).

3. Plaintiff alleges that the defendant’s conduct in standing extremely close to the plaintiff and attempting to brush against her (as discussed in section 1) was sufficiently severe or pervasive such that it altered the conditions of her employment and created an abusive work environment. Plaintiff alleges that defendant’s behavior altered the conditions of her employment when the defendant’s behavior forced the plaintiff to attempt to get to morning meetings early and position herself between other employees so that the owner could not be near her.

Plaintiff further alleges that the defendant attempting to lure the plaintiff to an empty building by herself (as discussed in section 1) was sufficiently severe or pervasive such that it altered the conditions of the plaintiff’s employment and created an abusive work environment. Plaintiff alleges that after the incident, other employees confronted her with several humiliating questions about the incident for the majority of the day.

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Plaintiff further alleges that defendant terminated her employment for refusing the defendant's advances. Plaintiff alleges that the termination of her employment was sufficiently severe or pervasive such that it altered the conditions of her employment.

4. Plaintiff alleges that the defendant's conduct is imputable to the employer. Plaintiff alleges that the defendant is the owner of the firm, thus the conduct is imputable to the employer. Plaintiff further alleges that persons in supervisory roles, including the Director of Operations and plaintiff's immediate supervisor (as discussed in section 1), were aware of the defendant's conduct. Plaintiff alleges that because the Director of Operations and her immediate supervisor were aware of the defendant's conduct, such conduct is imputable to the employer.

a. Would This Complaint Withstand a Rule 12(b)(6) Motion Under *Conley*?

The facts Veronica has pleaded are likely sufficient to withstand a Rule 12(b)(6) motion under *Conley*. In *Gregory v. Daly*, the United States Court of Appeals for the Second Circuit applied *Conley* in reviewing a district court's decision to grant a motion to dismiss in a hostile work environment sexual harassment claim, and ultimately vacated the judgment granting the motion to dismiss and remanded the claim for further proceedings.¹¹⁰ In *Gregory*, the plaintiff claimed that the employer "made demeaning comments about women, . . . initiated unwelcome physical conduct of a sexual nature, . . . and intimidated her by 'standing uncomfortably close to [her].'"¹¹¹ The court held that the pleadings were sufficiently detailed to state a claim, and if proven established that "plaintiff was required to endure an environment that 'objectively' was *severely* and *pervasively* hostile."¹¹²

The facts of the complaint set forth in Part III.B.2 are very similar to the facts that the plaintiff pleaded in *Gregory*. As did the plaintiff in *Gregory*,¹¹³ Veronica pleaded facts alleging that her employer made demeaning comments about women when he spoke with other male employees about going to strip clubs such that Veronica and other

110. See *Gregory v. Daly*, 243 F. 3d 687, 692 (2d Cir. 2001).

111. *Id.* at 692–93.

112. *Id.* at 693 ("Looking at the totality of the circumstances rather than to individual events in isolation, we believe that plaintiff could reasonably have found her workplace to be both physically and sexually threatening.") (internal citation omitted).

113. *Id.*

female employees could hear him.¹¹⁴ Veronica also pleaded facts alleging that her employer “initiated unwelcome physical conduct of a sexual nature”¹¹⁵ when he attempted to brush against the side of her body with the front of his body.¹¹⁶ Veronica also pleaded facts alleging that her employer intimidated her by standing uncomfortably close to her during daily meetings.¹¹⁷ As such, a court reviewing this complaint pursuant to a Rule 12(b)(6) motion to dismiss is likely to follow the court in *Gregory* and find that the pleadings were sufficiently detailed to state a claim.¹¹⁸

In *Donnell v. Kohler Co.*, the United States District Court for the Western District of Tennessee also applied *Conley* in ruling on a Rule 12(b)(6) motion to dismiss in a hostile work environment sexual harassment claim.¹¹⁹ In *Donnell*, the plaintiff alleged that her supervisor would stare at her, stand close to her in meetings, and make sexually suggestive comments to her.¹²⁰ The court stated that in order to state a claim arising from sexual harassment, the plaintiff must plead facts to show that

[The plaintiff] is a member of a protected class; (2) that she was “subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;” (3) the sexual harassment was taken because of her sex; (4) either a tangible employment action was taken or the sexual harassment “unreasonably interfer[ed] with [her] work performance and creat[ed] an intimidating, hostile, or offensive work[] environment that affected seriously [her] psychological well-being . . .;” and (5) “the existence of *respondeat superior liability*.”¹²¹

The court found that the plaintiff’s Title VII claim survived a motion to dismiss and the facts pleaded, if true, might entitle the plaintiff to relief.¹²²

114. See *infra* Part III.B.2.

115. *Gregory*, 243 F. 3d at 693; see *infra* Part III.B.2.

116. See *infra* Part III.B.2.

117. *Gregory*, 243 F. 3d at 69; see *infra* Part III.B.2.

118. *Gregory*, 243 F. 3d at 693.

119. *Donnell v. Kohler Co.*, No. 1:05-1139-T-AN, 2005 WL 3071784, *at 2 (W.D. Tenn. Nov. 10, 2005) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (“If the complaint gives a defendant ‘fair notice of what the plaintiff’s claim is and the grounds upon which it rests,’ the motion should be denied.”).

120. *Id.* at *1.

121. *Id.* at *3.

122. *Id.* at *4 (“The ‘facts’ section of the complaint tells a story that, if true, might very well entitle Mrs. Donnell to relief . . .”).

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The facts of the complaint set forth in Part III.B.2 are very similar to the facts that the plaintiff pleaded in *Donnell*. Like the plaintiff in *Donnell*, Veronica alleged that her employer stared at her, stood close to her in meetings, and made sexually suggestive comments to her.¹²³ A court reviewing this complaint pursuant to a Rule 12(b)(6) motion to dismiss is likely to follow the court in *Donnell* and find that the pleadings were sufficiently detailed to state a claim.¹²⁴ Therefore, the complaint set forth in Part III.B.2 would likely withstand a Rule 12(b)(6) motion under *Conley*.

b. Would This Complaint Withstand a Rule 12(b)(6) Motion Under *Twombly*?

Veronica's factual allegations likely do not rise to the level of specificity required to withstand a Rule 12(b)(6) motion under *Twombly*. The Court in *Twombly* reasoned that a plaintiff must "nudge[] their claims across the line from conceivable to plausible" to avoid dismissal of their complaint.¹²⁵ Following this reasoning, the United States District Court for the Eastern District of Virginia held that a court should grant a motion to dismiss for failure to state a claim if the complaint does not allege "enough facts to state a claim to relief that is plausible on its face."¹²⁶ The court further stated, "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."¹²⁷

In *Edwards v. Murphy-Brown, L.L.C.*, the court ruled on a Rule 12(b)(6) motion to dismiss in a hostile work environment sexual harassment claim.¹²⁸ The plaintiff alleged that her co-workers, among other things, touched her shoulders, rubbed her legs and foot, and talked amongst themselves about what the plaintiff believed to be female body parts.¹²⁹ In evaluating the elements, the court found that whether the conduct was unwelcome must be determined from the

123. *Id.* at *1 ; *see infra* Part III.B.2.

124. *Donnell*, 2005 WL 3071784, at *2.

125. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

126. *Edwards v. Murphy-Brown, L.L.C.*, 760 F. Supp. 2d 607, 614 (E.D. Va. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007)). The court further cited the portion of the *Twombly* opinion where the Court found that "requiring a claim be plausible does not impose a probability requirement at the pleading stage." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007)).

127. *Id.* at 614–15 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

128. *See id.* at 613.

129. *Id.* at 611–12.

plaintiff's subjective perspective.¹³⁰ The court further stated that the "objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances."¹³¹ The court also stated that the Fourth Circuit has held that "all the circumstances includes the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."¹³² In evaluating all of these factors, the court found that the plaintiff's claim withstood a Rule 12(b)(6) motion.¹³³

In applying *Edwards* to this case, a court is likely to find that the claim is not plausible on its face. A court would likely find that the conduct was unwelcome from Veronica's subjective perspective, as evidenced by her complaining to her supervisors about the conduct.¹³⁴ In determining the objective severity of the conduct, a court would likely find that the owner brushing against Veronica in daily meetings¹³⁵ was frequent enough to allow the court to make a reasonable inference that the conduct was severe. However, in *Edwards*, conduct similar to the owner's conduct in the meetings alone was not sufficient to withstand the Rule 12(b)(6) motion, and a court is likely to look to the other alleged discriminatory conduct.¹³⁶ In determining whether all of the alleged conduct was physically threatening or humiliating, a court is likely to determine that it could make a reasonable inference that the conduct satisfies this requirement; however, the court must be able to make a reasonable inference that is plausible on its face.¹³⁷ For example, a court could make a reasonable inference that the owner attempting to lure Veronica to a building alone¹³⁸ was physi-

130. *Id.* at 626–27. The court found that "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Id.* (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21–22 (1993)).

131. *Id.* at 627 (quoting *EEOC v. Fairbrook Med. Clinic. P.A.*, 609 F.3d 320, 328 (4th Cir. 2010)).

132. *Id.*

133. *Id.* at 633.

134. See *infra* Part III.B.2.

135. See *infra* Part III.B.2.

136. *Edwards*, 760 F. Supp. 2d at 627 (quoting *EEOC v. Fairbrook Med. Clinic. P.A.*, 609 F.3d 320, 328 (4th Cir.2010)) ("There is no 'mathematically precise test' for determining if an environment is objectively hostile or abusive.").

137. *Id.* at 614–15 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

138. See *infra* Part III.B.2.

cally threatening because he likely had improper motives. However, the inference that the conduct was physically threatening is not plausible on its face when there is potentially another reasonable explanation for the conduct. The owner could allege that he intended to give Veronica her own office in the new building and wanted her to be the first to know. A court is therefore likely to find that because there are equally reasonable explanations, Veronica has not nudged her claim from conceivable to plausible.¹³⁹

The United States District Court for the Western District of Virginia approached Rule 12(b)(6) motions in a similar manner.¹⁴⁰ The court stated “in evaluating a Rule 12(b)(6) motion to dismiss, the court accepts as true all well-pleaded allegations and views the complaint in the light most favorable to the plaintiff.”¹⁴¹ The court went on to say that “[w]hile the court must accept the claimant’s factual allegations as true, this tenet is ‘inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.’”¹⁴² The court also stated, “A complaint achieves facial plausibility when it contains sufficient factual allegations to support a reasonable inference that the defendant is liable for the misconduct alleged.”¹⁴³

In *Auriemma v. Logan’s Roadhouse, Inc.*, the plaintiff alleged that a male coworker who had a propensity for aggressive sexual behavior sexually assaulted her, and her employer knew of this propensity.¹⁴⁴ The plaintiff also alleged that the workplace was “permeated” with other forms of sexually harassing behavior, including a supervisor who often made sexually suggestive and propositioning comments to female employees and often inappropriately touched or interacted with female employees.¹⁴⁵ The defendant moved to dismiss the plaintiff’s hostile work environment sexual harassment claim because the alleged conduct was not severe or pervasive enough.¹⁴⁶ The court

139. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

140. *Auriemma v. Logan’s Roadhouse, Inc.*, 7:12CV00284, 2012 WL 5844967, *2 (W.D. Va. Nov. 19, 2012).

141. *Id.* (citing *Phillips v. Pitt Cnty. Mem’l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009)).

142. *Id.* “Rather, plaintiffs must plead enough facts to ‘nudge their claims across the line from conceivable to plausible,’ and if the claim is not ‘plausible on its face,’ it must be dismissed.” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

143. *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

144. *Id.* at *1. The plaintiff alleged that management tolerated the male coworker’s conduct, although the male coworker sexually assaulted another female employee. *Id.*

145. *Id.*

146. *Id.* at *2.

found that the plaintiff sufficiently alleged that the employer's tolerance of the harasser's behavior "contributed to a sexually charged atmosphere," and the plaintiff alleged severe and pervasive harassment "sufficient to constitute a hostile work environment."¹⁴⁷

In applying *Auriemma* to these facts, a court could find that Veronica sufficiently alleged that the overall tolerance of the owner's behavior contributed to a sexually charged atmosphere. Veronica promptly complained on more than one occasion about the owner's harassing behavior toward her, and at least one supervisor at the firm was aware of the owner's harassing behavior toward other employees as evidenced by statements to Veronica.¹⁴⁸ However, a court could also find that the firm's awareness of the owner's conduct toward Veronica combined with one other isolated event was not sufficient to find that the alleged tolerance of the owner's behavior contributed to a sexually charged atmosphere. A court might also find that Veronica alleged severe and pervasive harassment sufficient to constitute a hostile work environment. As did the alleged harasser in *Auriemma*, the owner inappropriately touched Veronica by brushing against her in daily meetings.¹⁴⁹ However, a court could also find that while the owner's behavior was inappropriate, it did not rise to the level of severe and pervasive such that it would constitute a hostile work environment. Because of several differing yet potentially reasonable inferences, a court would likely find that Veronica's allegations are certainly conceivable, but not plausible as required to withstand a Rule 12(b)(6) motion under the *Twombly* standard.¹⁵⁰

IV. CRITICISMS OF THE ASSERTION THAT *TWOMBLY* IMPOSES A HEIGHTENED PLEADING STANDARD

Many scholars dispute the assertion that *Twombly* imposes a heightened pleading standard. Douglas Smith, a law firm partner and critic of the assertion that *Twombly* imposes a heightened pleading standard, argued that plausibility pleading does not deviate from traditional notice pleading but is instead a "necessary component of the notice requirement."¹⁵¹ However, this argument is unpersuasive

147. *Id.* at *3. The court noted that it considered the facts of the case in the light most favorable to the plaintiff. *Id.* at *2.

148. See *infra* Part III.B.2.

149. See *infra* Part III.B.2.

150. *Twombly*, 550 U.S. at 570.

151. Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1098 (2009).

as it is hard to imagine that a simple expansion of an already existing standard would have such sweeping effects as those discussed in the introduction. Smith then asserts that his conclusion does not “undermine the significance of the Court’s decision,” and states the Court “essentially ratified a trend in the lower federal courts to increase the scrutiny applied to the pleadings.”¹⁵² Based on Smith’s own assertion, *Twombly* undeniably applies a heightened pleading standard. In fact, Smith even cites to a source that refers to this “trend” as heightened pleading in the footnote to this assertion.¹⁵³ If the *Twombly* Court ratified the trend of heightened pleading, it follows that *Twombly* does in fact impose a heightened pleading standard.

In the immediate aftermath of *Twombly*, A. Benjamin Spencer, a law professor, posed the question, “Are Civil Rights Claims Subject to Greater Scrutiny?”¹⁵⁴ Spencer suggested that for the most part, in order to answer this question, a deciding court must indicate how it would have “decided the case under *Conley* versus what it is doing under *Twombly*.”¹⁵⁵ However, this question may also be answered by comparing cases with similar facts where courts have ruled on Rule 12(b)(6) motions to dismiss using either the *Conley* or *Twombly* standards. As demonstrated in comparing such cases and in applying the analysis and holdings of these cases to the complaint set forth in Part III.B.2, it seems apparent that *Twombly* does in fact impose a heightened pleading standard.

V. POLICY IMPLICATIONS

There is a very high likelihood of continued negative societal implications if courts continue dismissing Title VII claims in increasing numbers at the pleading stage because of the requirements imposed by *Twombly*. Attorneys, rightfully so, are likely to be very discerning in deciding whether or not to pursue these cases if there is no likelihood of the cases making it to trial. Attorneys are required to conduct an initial investigation before pursuing a case,¹⁵⁶ and are unlikely

152. *Id.*

153. “[F]ederal courts in every circuit impose . . . heightened pleading in direct contravention of notice pleading doctrine.” Smith, *supra* note 151, at 1098 n.228.

154. A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 *How. L.J.* 99, 158 (2008).

155. *Id.*

156. FED. R. CIV. P. 11(b). Rule 11(b) provides that by “presenting to the court a pleading, written motion or other paper” an attorney certifies that to the best of their knowledge, “after an inquiry reasonable under the circumstances,” the claims and defenses are warranted by law, and the factual contentions have evidentiary support. *Id.*

to put forth the time and incur the expense of doing so except in cases that are seemingly guaranteed to withstand a Rule 12(b)(6) motion. As one scholar noted, the plausibility pleading requirements established by *Twombly* “will chill a potential plaintiff’s or lawyer’s willingness to institute an action.”¹⁵⁷ A potential plaintiff who may have actually been a victim of unlawful discrimination under Title VII may believe that the conduct was in fact permissible simply because an attorney is not able to assist them. A possible, and unfortunate, result is that the potential plaintiff would simply give up on a claim that may have merit and forfeit the potential to vindicate the wrongdoing. However, even if the potential plaintiff is adamant and brings the claim on their own, there is a likelihood that this potentially meritorious case will be terminated under Rule 12(b)(6), which ultimately reduces the potential plaintiff’s “ability to employ the nation’s courts in a meaningful fashion.”¹⁵⁸

Another implication of dismissing Title VII cases very early in the litigation process is that it gives the offender the impression that they may continue to engage in the unlawful behavior. As one scholar noted, “Many of the cases on the federal court dockets involve purely private matters that do not affect anyone other than the actual parties. . . . But many of these cases have stare decisis value. Many also have important deterrent implications. . . .”¹⁵⁹ Employers may be more sophisticated than employees and often have attorneys at their disposal. As such, employers are likely aware that if an employee brings a claim for certain types of behavior, the claim is very likely to be dismissed on a Rule 12(b)(6) motion. This is especially problematic if employers engage in behavior with an expectation that there is no likelihood that they will be punished for the behavior. However, it appears that when the Court imposed the plausibility requirements of *Twombly*, the Court was primarily concerned with defendants. As one scholar noted, the Court seemed less concerned with “citizen access and the deterrent value of enforcing the substantive law effectively” and more concerned with matters such as “extortionate settlements.”¹⁶⁰

157. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 71 (2010).

158. *Id.*

159. *Id.* at 72 (“In this category of purely private litigation, *Twombly* ha[s] had a negative impact on . . . the deterrent value of enforcing the substantive law effectively.”).

160. *Id.* Miller further states that the Court had a “preoccupation with the supposed deleterious effects of litigation.” *Id.*

The ability of private individuals to enforce public policy is essential, especially in cases enforcing a statutory scheme designed to rectify activity proscribed by a federal statute.¹⁶¹ Title VII claims fall precisely within this definition as they attempt to rectify employment discrimination, an activity proscribed in Title VII.¹⁶² As Miller notes, provisions such as Title VII often result from Congress' determination that private actions are necessary for reasons such as deterrence and compensating injured citizens.¹⁶³ To this end, the statement of purpose of Title VII indicates that Congress intended plaintiffs to have the ability to litigate these claims.¹⁶⁴ As such, using the pleading requirements of *Twombly* to essentially prevent the litigation of many of these claims expressly frustrates the specified purpose of Title VII.

VI. PROPOSED SOLUTIONS AND ALTERNATIVES

As discussed, there are several policy implications that will continue to result from the ongoing application of *Twombly*'s plausibility pleading requirements. Therefore, diligent and thoughtful work is necessary to determine a solution to this problem. The most obvious solution is to have courts apply *Twombly*'s standards differently with respect to Title VII claims. However, this solution presents many difficulties. The most obvious difficulty is that this solution would require incorporating countless different perspectives.¹⁶⁵ Thus, this solution would likely be ineffective, as it would yield inconsistent results.¹⁶⁶

Another solution is to have the Advisory Committee amend the Federal Rules of Civil Procedure, although this would be a delicate task. As one scholar noted, this would require the Committee to "reconcile the continuing viability of the values of 1938 with the realities

161. Miller, *supra* note 157, at 73.

162. 29 C.F.R. § 1608.1 (1984).

163. Miller, *supra* note 157, at 74.

164. Congress adopted primary processes such as conference and persuasion to modify employment practices that were barriers to equal employment opportunity, "with enforcement action through the courts . . . as a supporting procedure where voluntary action did not take place . . ." 29 C.F.R. § 1608.1.

165. This solution would require "attempting to establish distinctions [that] will bring to the fore vast differences in philosophy, ideology, and self-interest that merge substantive predilections with procedure." Miller, *supra* note 158, at 124. This would involve "the drawing of lines that are difficult—perhaps impossible—to see." *Id.*

166. "Those who formulate court rules . . . must be mindful of the often competing interests of . . . the people." Miller, *supra* note 157, at 125. However, being mindful of the competing interests of the people combined with adherence to precedent is likely to yield inconsistent results.

of [the present], and find a way to uphold the . . . policy objectives underlying the original Rules.”¹⁶⁷ This would be an extremely difficult task because just as scholars differ as to whether or not *Twombly* imposes a heightened pleading standard, the Advisory Committee may strongly differ as to this issue. Further, even if the members of the Advisory Committee agree that *Twombly* imposes a heightened pleading standard, they may have very different opinions of how to reconstruct the Rules to address this issue. As such, this proposed solution presents the possibility of no solution at all if there is not sufficient agreement to make a meaningful change to the Rules. In accepting amendment of the Rules as a potential solution, a previous Advisory Committee Reporter admitted, “the devil resides” in the difficulty of working out the details.¹⁶⁸

Perhaps a more realistic solution and alternative to doing away with *Twombly* completely with respect to Title VII claims is to allow plaintiffs some form of discovery prior to filing a complaint. This alternative would allow plaintiffs to satisfy the plausibility requirements of *Twombly* because they would have access to information that would allow them to “nudge[] their claims across the line from conceivable to plausible.”¹⁶⁹ However, this solution intensifies many of the same problems that the Court considered in reaching its decision in *Twombly*, namely the costs associated with discovery.¹⁷⁰ One scholar suggested that this potential downfall could be eliminated by “requiring judicial authorization for presuit discovery on a demonstration of good faith and the applicant’s need, which would include a showing that relevant information was solely in the possession or control of a potentially adverse party or third person.”¹⁷¹ However, there is a great potential for this solution to result in a return to the original problem in that courts are likely to require a high level of specificity in granting such judicial authorization. This level of specificity will likely be akin to the level of specificity required for pleading imposed by *Twombly*.

167. *Id.* at 104.

168. *Id.*

169. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

170. *Id.* at 558 (quoting *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (“[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.)) The Court then found that it must not “forget that proceeding to antitrust discovery can be expensive.” *Id.*

171. *Miller*, *supra* note 157, at 106–07.

An even more realistic approach to the above alternative would be to expand the information that is automatically disclosed in the litigation process. This may be accomplished by expanding the categories of disclosure in Rule 26(a)(1),¹⁷² or by allowing district court judges to order disclosure of specified information on a case-by-case basis.¹⁷³ However, expanding the categories of disclosure in Rule 26(a)(1) again presents difficulty for the Advisory Committee in determining which categories of information should be added to the Rule.¹⁷⁴ Allowing district court judges to order specified discovery allows more flexibility but also imposes a greater burden on courts.¹⁷⁵ Alleviating the burden on the courts was an underlying reason for the Court's decision in *Twombly*.¹⁷⁶ Ultimately, this is not a viable solution because allowing district court judges to make the decision will likely lead to inconsistent results and frustrate the purpose of implementing this procedural change.

Perhaps the most effective solution is to revisit and expand the sanctions imposed by Rule 11.¹⁷⁷ Part of this expansion "might include a partial reinstatement of compensation and punishment as legitimate objectives of the sanction process to promote efficiency and compliance"¹⁷⁸ Although difficulties will arise in reaching a consensus as to the most effective sanctions to include, there will likely be less difficulty than the other proposed solutions. The Advisory Committee is likely to have less difficulty determining the sanctions to be imposed for filing an insufficient complaint than determining what constitutes an insufficient complaint. Expanding the sanctions imposed by Rule 11 would leave determining the sufficiency of a complaint to the discretion of courts without giving the unbridled discretion that *Twombly* gives to simply dismiss claims at an early

172. Federal Rule of Civil Procedure 26(a)(1) outlines required initial disclosures, which include, for example, the name, address, and telephone number of anyone likely to have discoverable information, and the subject of that information, as well as a copy or description of all information that a "disclosing party has in its possession . . . and may use to support its claims or defenses" FED. R. CIV. P. 26(a)(1).

173. Miller, *supra* note 157, at 113.

174. *Id.*

175. *Id.* at 113–14.

176. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) ([W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time . . . by . . . the court."').

177. Miller, *supra* note 157, at 126. Federal Rule of Civil Procedure 11 allows the court to impose sanctions including a nonmonetary penalty, paying a penalty to the court, or, upon the defendant's motion, paying the defendant's attorney's fees. FED. R. CIV. P. 11.

178. Miller, *supra* note 157, at 126.

stage in the litigation. This would be a useful alternative to simply opening the floodgates of litigation in that it would serve the purpose of Title VII by allowing plaintiffs to litigate these claims, while also curtailing “inappropriate pleading, motion and discovery conduct” to maximize the efficiency of the courts.¹⁷⁹ Although some might argue this approach will have the same effect of chilling potential claims as does *Twombly*,¹⁸⁰ any resulting chilling effect is likely to be less drastic and perhaps more beneficial than that imposed by *Twombly*. The chilling effect of this approach would discourage plaintiffs from filing meritless claims for fear of courts imposing sanctions. However, the benefit of this approach is that it is unlikely to deter plaintiffs from filing claims with merit because unlike *Twombly*, it will allow clients to substantiate claims at the discovery stage. This also does away with the potential burdens imposed by allowing additional discovery as discovery remains at the same stage in the litigation process. As with any solution, however, there will be opposition and “any changes in the sanction structure would have to be handled with considerable delicacy and applied evenhandedly. . . .”¹⁸¹

CONCLUSION

In reviewing *Conley* and *Twombly*, it is evident that the Court sets forth very different standards in each case. In comparing cases ruling on Rule 12(b)(6) motions to dismiss in hostile work environment sexual harassment claims under *Twombly* as compared to *Conley*, it becomes further evident that the pleading standard that the court set forth in *Twombly* is a heightened standard as compared to that set forth in *Conley*. This is extremely problematic where a plaintiff can plead a series of egregious actions that occurred in the workplace and still not manage to withstand a Rule 12(b)(6) motion. A fundamental component of our legal system is to allow access to the courts; however, this access is being impeded with strict, unwavering adherence to the *Twombly* pleading standard. It is extremely important to address the needs of both plaintiffs and defendants without foreclosing access to the courts. Although there are many potential approaches to addressing the issue, the most logical approach that is

179. *Id.*

180. *Id.* (“Opposition can be expected from various civil rights and public-interest groups who fear—with some justification—the disproportionate application of sanctions against them and the concomitant chilling effect.”).

181. *Id.* at 126–27.

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also the approach most likely to be effective is to revisit and expand the sanctions imposed by Rule 11.

