

Business Information

SUBSCRIPTIONS: The *Howard Law Journal*, ISSN 0018-6813, is published three times per year. One year's domestic subscription rate is \$34, with a per-issue price of \$12. Symposium issues are \$15. International subscriptions are \$44. These rates are competitive with those of other journals and reviews.

SUBMISSIONS: The Editorial Board of the *Howard Law Journal* invites the submission of articles of substantial legal merit. The *Howard Law Journal* does not publish submissions by current students of other institutions. Authors seeking publication in the *Howard Law Journal* should submit one copy of a double-spaced manuscript. All manuscripts should be submitted in Microsoft Word format. The *Journal* assumes no responsibility for the return of any material unless accompanied by a self-addressed stamped envelope.

Although the *Journal* generally gives great deference to an author's work, the *Journal* retains the right to determine the final published form of every article. As a rule, footnotes should follow the form mandated by *The Bluebook: A Uniform System of Citation* (20th Edition).

When submitting an article, please include pertinent biographical data, business and home addresses, email address, and business and home phone numbers. Please submit electronic submissions (including curriculum vitae) to: hljexecutivesolicitations@gmail.com. Electronic submissions can also be submitted via ExpressO, an online delivery service available at <http://law.bepress.com/expresso/>. Please submit hardcopy manuscripts to:

Howard Law Journal
Jacqueline Young, Director of Publications
2900 Van Ness Street, NW
Washington, DC 20008
Phone: (202) 806-8084

VOLUME 60

•

ISSUE 1

•

FALL 2016

HOWARD LAW JOURNAL

EDITORIAL BOARD 2016-2017

MONIQUE PETERKIN
Editor-in-Chief

SASHA DE CRUISE
Managing Editor

LEONIE MICHELLE STOUTE
*Executive Notes &
Comments Editor*

DANICA L. BROWN
*Executive Solicitations &
Submissions Editor*

R. BISI ADEYEMO
*Executive Publications
Editor*

VALECIA J. BATTLE
Senior Articles Editor

SHANEKA MCKELLAR
Senior Articles Editor

CRYSTAL OPARAEKE
Senior Articles Editor

MARY-JANE RABEONY
Senior Articles Editor

DESIRAE KRISLIE TONGCO
Senior Articles Editor

TWANE HARRIS
Senior Notes & Comments Editor

KANDYCE R. JACKSON
Senior Notes & Comments Editor

KENLEY JOSEPH
Senior Notes & Comments Editor

JOHNATHAN M. NIXON
Senior Notes & Comments Editor

LUIGI ORENGO JR.
*Senior Solicitations & Submissions
Editor*

FARAZ R. SIDDIQUI
*Senior Solicitations & Submissions
Editor*

DANIELLE HOLLEY-WALKER
Dean

ANDREW I. GAVIL
PATRICE L. SIMMS
SARAH VANWYE
Faculty Advisors

JACQUELINE C. YOUNG, M.S.
Director of Publications

VOLUME 60

•

ISSUE 1

•

FALL 2016

HOWARD LAW JOURNAL

MEMBERS 2016-2017

NNAEMEKA K. ANYANWU*

JONATHAN G. BATES

MATTHEW WELLINGTON BURNS

MONIQUE T. CURRY

TIERRA L. DOTSON

OLAMIDE FADAHUNSI***

TANYA FREEMAN

BRITNEY A. GARR**

MELODY D. GODBOLT

MARVA GRAHAM

DANIELLE HAYES

SHANICE DARA HINCKSON

MOSE HOGAN III***

SHELDON HUGHES

ELIJAH D. JENKINS**

KRISTOPHER L. JILES**

DANA McCANN***

RONISHA M. PARKER*

HEIDI THOMAS

AYANA WILLIAMS

ALLANAH WYNN**

VACHERIA CHERIE TUTSON*

Member, National Conference of Law Reviews

* Senior Staff Editors

** Associate Publications Editor

*** Associate Solicitations Editor

ADMINISTRATIVE OFFICERS 2016-2017

Danielle Holley-Walker, *Dean, J.D., Harvard University*
Lisa A. Crooms-Robinson, *Associate Dean of Academic Affairs, J.D., University of Michigan*
Reginald McGahee, *Associate Dean of Admissions and Student Affairs, J.D., Howard University*
Ann-Marie Waterman, *Assistant Dean for Administration & Operations, M.A., Howard University*
Neil Dennis, *Assistant Dean of Career Services, J.D., Fordham University*

FULL-TIME FACULTY

Rhea Ballard-Thrower, *Associate Professor of Law and Director of the Law Library, J.D., University of Kentucky, MILS, University of Michigan*
Jasbir Bawa, *Assistant Professor of Lawyering Skills, J.D., Howard University*
Matthew A. Bruckner, *Assistant Professor of Law, J.D., New York University*
Sha-Shana N.L. Crichton, *Assistant Professor of Lawyering Skills, J.D., Howard University*
e. christi cunningham, *Professor of Law, J.D., Yale Law School*
Okianer Christian Dark, *Professor of Law, J.D., Rutgers University*
Marsha A. Echols, *Professor of Law and Director of Graduate Program, J.D., Georgetown University, LL.M., Free University of Brussels, S.J.D., Columbia University*
Olivia M. Farrar, *Assistant Professor of Lawyering Skills, J.D., Georgetown University*
Andrew I. Gavil, *Professor of Law, J.D., Northwestern University*
Lenese C. Herbert, *Professor of Law, J.D., University of California, Los Angeles*
Steven D. Jamar, *Professor of Law, J.D., Hamline University, LL.M., Georgetown University*
Darin Johnson, *Visiting Assistant Professor of Law, J.D., Harvard University*
Adam H. Kurland, *Professor of Law, J.D., University of California, Los Angeles*
Homer C. LaRue, *Professor of Law, J.D., Cornell University*
Harold A. McDougall, *Professor of Law, J.D., Yale Law School*
Karla M. McKanders, *Visiting Professor of Law, J.D., Duke University*
Ziyad Motala, *Professor of Law, LL.B., University of Natal, S.J.D., LL.M., Northwestern University*
Lateef Mtima, *Professor of Law, J.D., Harvard University*
Kelli I. Neptune, *Visiting Assistant Professor of Law, J.D., Emory University*
Cheryl C. Nichols, *Associate Professor, J.D., Georgia State University*
Mariela Olivares, *Associate Professor of Law, J.D., University of Michigan Law School, LL.M., Georgetown University Law Center*
Reginald L. Robinson, *Professor of Law, J.D., University of Pennsylvania*
W. Sherman Rogers, *Professor of Law, J.D., Howard University, LL.M., George Washington University*
Josephine Ross, *Professor of Law, J.D., Boston University*
Anibal Rosario-Lebrón, *Assistant Professor of Lawyering Skills, J.D., University of Puerto Rico, San Juan*
Valerie Schneider, *Associate Professor of Law, J.D., George Washington University*
Patrice L. Simms, *Associate Professor of Law, J.D., Howard University*
Mark R. Strickland, *Assistant Professor of Lawyering Skills, J.D., Rutgers University*
Keeva L. Terry, *Associate Professor of Law, J.D., Columbia University*
Alice M. Thomas, *Associate Professor of Law, J.D., Howard University, M.B.A., Howard University*
Sarah VanWye, *Assistant Professor of Lawyering Skills, J.D., University of South Carolina*
Patricia M. Worthy, *Professor of Law, J.D., Howard University*

EMERITI FACULTY

Loretta Argrett, *Professor of Law, J.D., Howard University*
Spencer H. Boyer, *Professor of Law, LL.B., George Washington University, LL.M., Harvard University*
Alice Gresham Bullock, *Professor of Law and Dean Emerita, J.D., Howard University*
Warner Lawson, Jr., *Professor of Law, J.D., Howard University*
Isiah Leggett, *Professor of Law, J.D., Howard University, LL.M., George Washington University*
Oliver Morse, *Professor of Law, LL.B., Brooklyn College, S.J.D.*
Michael D. Newsom, *Professor of Law, LL.B., Harvard University*
Laurence C. Nolan, *Professor of Law, J.D., University of Michigan*
Jeanus B. Parks, Jr., *Professor of Law, LL.B., Howard University, LL.M., Columbia University*
J. Clay Smith, *Professor of Law, J.D., Howard University*
Richard P. Thornell, *Professor of Law, J.D., Yale Law School*



HOWARD
UNIVERSITY
School of Law

HOWARD LAW JOURNAL

TABLE OF CONTENTS

LETTER FROM THE EDITOR-IN-CHIEF	<i>Monique Peterkin</i>	vii
---	-------------------------	-----

ARTICLES & ESSAYS

MORE JUSTICE AND LESS HARM: REINVENTING ACCESS TO CRIMINAL HISTORY RECORDS	<i>Alessandro Corda</i>	1
--	-------------------------	---

RENDERED INVISIBLE: AFRICAN AMERICAN LOW-WAGE WORKERS AND THE WORKPLACE EXPLOITATION PARADIGM	<i>Llezie Green Coleman</i>	61
---	-----------------------------	----

AFFIRMATIVE ACTION FOR AFFORDABLE HOUSING	<i>Courtney Lauren Anderson</i>	105
--	---------------------------------	-----

MISSING IN ACTION: THE ABSENCE OF POTENTIAL AFRICAN AMERICAN FEMALE SUPREME COURT JUSTICE NOMINEES—WHY THIS IS AND WHAT CAN BE DONE ABOUT IT	<i>April G. Dawson</i>	177
--	------------------------	-----

RACIAL ORIGINS OF DOCTRINES LIMITING PRISONER PROTEST SPEECH	<i>Andrea C. Armstrong</i>	221
---	----------------------------	-----

RESTORATIVE JUSTICE FROM THE MARGINS TO THE CENTER: THE EMERGENCE OF A NEW NORM IN SCHOOL DISCIPLINE	<i>Thalia González</i>	267
--	------------------------	-----

SEXTING PROSECUTIONS: TEENAGERS AND CHILD PORNOGRAPHY LAWS	<i>Angela D. Minor, Esq.</i>	309
---	------------------------------	-----

NOTES & COMMENTS

THE AFTERMATH OF <i>ZUBIK v. BURWELL</i> : THE WAR ON CONTRACEPTION	<i>Vacheria Cherie Tutson</i>	325
--	-------------------------------	-----

LETTER FROM THE EDITOR-IN-CHIEF

As we approach the end of 2016, the uncontroverted truth is that this has been a year full of pain, hurt, contention, and many calls for reform. Indeed, 2016 has been a mixed bag of issues across all three branches of government, broadcast media, social media, and the like. To reflect these cumbersome times, Volume 60, Issue 1 of the *Howard Law Journal* will shed light on a variety of issues that have plagued our country this year. Our hope is that this Issue will serve as a reflective device, and most importantly, that with each article, the reader will lend his or her voice to those issues and movements that inspire him or her.

“A person’s criminal history is considered to be one of the most important elements of her public identity.” Professor Alessandro Corda opens his Article, entitled, “More Justice and Less Harm: Reinventing Access to Criminal History Records” with this striking revelation. He then expounds on the notion of the “offender” characterization and how it affects a person once he or she exits the prison system.

Next, in “Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm,” Professor Llezlie Green Coleman highlights the fact that, as narratives of low-wage worker exploitation have been increasingly narrowed to reflect the experiences of undocumented immigrant workers, African American low-wage workers have become nearly invisible. Indeed, one of Professor Coleman’s most jarring comments is that “the more common narrative of the African American work experience has become one of unemployment, rather than low-wage employment.” As a result, African American workers are relatively absent from our national dialogue on low-wage workers’ rights. From Professor Coleman’s Article, one learns about the notion of low-wage versus poverty, how the law has addressed both, and how black binary critique and critical race theory factors into both.

In her in-depth Article, “Affirmative Action for Affordable Housing,” Professor Courtney Anderson highlights the correlation between race and government housing, the *Texas* case that directly addresses the issue, and the data that can be utilized to provide race-neutral solutions to this problem.

Professor April G. Dawson then discusses the total absence of African American women on the short list of potential Supreme Court Justice nominees and questions the role that African American women play in the federal judiciary. In her Article, entitled, “Missing in Action: The Absence of Potential African American Female Supreme Court Justice Nominees—Why This Is and What Can Be Done About It,” Professor Dawson further

argues that the use of today's "elite" criteria undermines the legitimacy of the Supreme Court by preventing full representation, not just in terms of race and gender, but also in terms of law school, legal and work experience, childhood socioeconomic class background, and so on.

On the other end of the judicial spectrum, Professor Andrea C. Armstrong hones in on the topic of prisoner protest in her Article, "Racial Origins of Doctrines Limiting Prisoner Protest Speech." In examining two Supreme Court cases that provide the backdrop for prisoner protest regulation, Professor Armstrong concurrently argues that such regulation cannot be discussed without also including the racial undertones inherent in the desire to silence those minorities who are overly policed and imprisoned.

In recent years, conversation around the school-to-prison pipeline has taken center stage. In her Article, "Restorative Justice From the Margins to the Center: The Emergence of a New Norm in School Discipline," Professor Thalia González advocates for abandoning the long accepted practice of zero tolerance and its associated values, identities, and processes of punishment and exclusion. Professor Gonzalez explains that the purpose of her Article is to "explore the emergence and cascade of restorative justice through the norm life cycle as understood through the lens of theories of normative change."

In the essay, "Sexting Prosecutions: Teenagers and Child Pornography Laws," Professor Angela D. Minor analyzes the legislation governing teenage sexting, the prosecution of sexting, and whether teenage sexting calls for an action of reform of narrowly tailored laws specific to the prevention of sexually charged photos and protecting minors. Minor posits that minors who have engaged in sexting should be offered alternative means to correct this behavior before child pornography violations are held against them.

The final work was authored by a member of the Volume 60 *Howard Law Journal*. Student author, Vacheria Cherie Tutson, speaks about the landmark decisions, *Griswold v. Connecticut* and *Roe v. Wade*, and how they have established that women have a fundamental right to contraceptives and to make their own reproductive choices without state interference. Ms. Tutson aims to draw attention to the missing interest *Zubik v. Burwell* failed to address by overlooking women's constitutional rights and the social meaning behind contraceptives.

On behalf of the *Howard Law Journal*, I thank you for your support and readership. It is our hope that this Issue will inform your judgment on the current social and political climate and inspire you to continue the academic discussion.

MONIQUE PETERKIN
EDITOR-IN-CHIEF
VOLUME 60

More Justice and Less Harm: Reinventing Access to Criminal History Records

ALESSANDRO CORDA*

ABSTRACT	2
INTRODUCTION	3
I. MODERN CRIMINAL HISTORY REPOSITORIES..	8
A. Continental Roots	8
B. American Developments.....	11
II. CONSEQUENCES OF MASS DISSEMINATION OF CRIMINAL HISTORY RECORDS	15
III. PARTIAL REMEDIAL MEASURES	19
A. “Ban the Box” Initiatives	19
B. Sealing and Expungement Schemes.....	21
C. Certificates of Rehabilitation	23
D. Critique	24
IV. FROM REHABILITATION TO PUBLIC STIGMATIZATION	26
A. Pre-mid-1970s.....	27
1. Prioritizing Reintegration	27
2. “Juvenilization” of Conviction Records	29
3. Practical Obscurity of Criminal History Information	30
B. Mid-1970s to Date	33
1. A Distinctive Facet of American Penal Excess .	33

* Post-Doctoral Research Fellow in Comparative and Cross-National Justice System Studies, University of Minnesota Law School; LL.M., New York University School of Law, 2013; Ph.D., University of Pavia, 2011. Unless otherwise credited, all translations from foreign languages are mine. For helpful comments, criticisms, and conversations, I am extremely grateful to Michael Tonry, Jim Jacobs, Julian Roberts, Hadar Aviram, Dirk van Zyl Smit, Pippa Holloway, William McGeeveran, and Kevin Davis. Earlier drafts of this Article benefited from presentations at the Academic Careers Program Scholarship Clinic at New York University School of Law, and the 2016 Law and Society Association Annual Meeting.

2. Post-Watergate Open Records Movement	34
3. Game Changers: Information Technology and the Internet	37
C. An Unintended Development	40
V. HOW TO DO BETTER?	42
A. Public Conviction Records and Proportionality	42
1. Retributive Proportionality	43
2. Ends-benefits Proportionality	44
B. Publication of Criminal Convictions as an Ancillary Penalty	46
C. Ancillary Criminal Penalties and U.S. Criminal Law	49
VI. POLICY IMPLICATIONS	53
A. Reentry as Public Policy Objective	54
B. Taking Educated Risks	57
CONCLUSION	59

ABSTRACT

This Article challenges the conventional wisdom that public access and dissemination of criminal history information raise no special problems once a conviction occurs. The label “offender” burdens convicted individuals long after their debt to society has been paid. Numerous damaging effects labeled as mere “informal” collateral consequences of conviction go largely unquestioned. Contemporary debate revolves around partial remedial measures (“Ban the Box,” sealing and expungement schemes, issuance of certificates of relief/rehabilitation). These narrow although important proposals largely miss the point. For different reasons, they fail to effectively curb the devastating stigma produced by the current system that creates huge obstacles to people’s efforts to live law-abiding lives, and fosters unjust discrimination. How, when, and why criminal records should be generally accessible needs to be reconceived.

Until the mid-1970s, conviction records were largely inaccessible except to public officials. There was near consensus that widespread dissemination is undesirable and inimical to reintegration of ex-offenders. Yet the ill-fated combination of uncoordinated factors has led over time to unplanned results. The Article contends that the current state of affairs is an unintended consequence of post-Watergate open records movement and emphasis on public safety in criminal justice policy, compounded by the development of information technology

and the Internet, and emergence of a private industry that trawls, sells, and often sensationalizes criminal records. Such industry has made access to criminal history information easy, cheap, ubiquitous, and unlimited in time. The Article argues for a reimagining of the way the criminal justice system and the legal system as a whole classify and use records of criminal convictions. In particular, it contends that the stigma that public access and dissemination entail must be reinvented as an ancillary criminal sanction that is ordered at sentencing, if at all, for a limited time as a deserved supplement to criminal sanctions imposed.

INTRODUCTION

Background checks for prior convictions are part of today's society. A person's criminal history is considered to be one of the most important elements of her public identity. It is routinely scrutinized by potential employers, landlords, and universities, and often by neighbors, acquaintances, and partners.¹ But it has not always been so. The relevance and effects of criminal history information have dramatically changed over time.

Until relatively recently, there was widespread agreement that indiscriminate dissemination of criminal history information is inimical to society's and ex-offenders' interests in their successful reintegration. Many fewer individuals were convicted and criminal records were not readily accessible.² Beginning in the 1970s, things started to change. The decline in support for rehabilitation as a primary purpose of sentencing coincided with increased support for harsher law enforcement, sentencing, and corrections policies.³ Reentry policies and community corrections practices were also affected, with the focus

1. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD*, at xiii (2015). No single and universal record containing all the details of a person's interactions with the criminal justice system—including arrests, charges, and dispositions—really exists. In reality, people may have multiple records reporting different parts of their criminal past. As we shall see, these records are maintained in particular by law enforcement agencies, court systems, and private vendors. The same information regarding criminal convictions—the focus of this Article—may thus be collected, stored, and disclosed by different players and in different formats.

2. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *How. L.J.* 753, 755 (2011) [hereinafter Love, *Paying Their Debt*].

3. See, e.g., FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); Loïc Wacquant, *The Great Penal Leap Backward: Incarceration in America from Nixon to Clinton*, in *THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES* 3, 15–22 (David Brown et al. eds., 2005) (offering explanations of the dramatic shift towards more punitive policies, practices and attitudes experienced as of the mid-1970s).

shifting from social reintegration of ex-offenders to risk prevention.⁴ Criminal convictions became a mass phenomenon.⁵ Today, nearly 20 million Americans—1 in 12 adults—have a felony conviction.⁶ The figures for misdemeanors are much higher.⁷ Over the same time period, advances in information technology made collection and indexing of criminal history information more efficient than ever before. The ubiquity of the Internet has allowed unprecedented dissemination.

Legal scholarship has long criticized public access to records of arrests that did not result in convictions.⁸ After conviction, however, there has been little controversy about availability and dissemination of criminal conviction records (CCRs) outside the criminal justice sys-

4. See Kelly Hannah-Moffat, *Punishment and Risk*, in THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 129, 133 (Jonathan Simon & Richard Sparks eds., 2012) (noting that during the 1970s risk assessment technologies, “rose to prominence because . . . easily aligned with the dominant political and administrative priorities of the time”); see also Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 1 ANN. REV. L. SOC. SCI. 397, 399–400 (2005) (noting that over the past several decades, “[i]ncreasingly, risk assessment is being brought into the criminal justice process to select people for extended incapacitation through a variety of means. . .”).

5. See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1804 (2012) (“There are approximately 1.1 million new state felony convictions in a typical year, and some multiple of that in misdemeanor convictions.”); see also BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006: STATISTICAL TABLES 1 (2009) (reporting that felony convictions increased by thirty-seven percent between 1990 and 2006, from 829,340 to 1,132,290). The disproportionate representation of people of color is apparent; see, e.g., MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 11 (2011) (“By 2004 a third of adult black men had a felony conviction and half had been convicted of a felony or a misdemeanor.”).

6. Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948–2010*, 11–12 (April 2011) (unpublished paper, Princeton University), <http://paa2011.princeton.edu/papers/111687>.

7. Comprehensive studies on misdemeanors are not available; however they are far more common than felony convictions. See, e.g., Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101, 102–03, 108 (2012) (citing data estimating in approximately 10.5 million non-traffic misdemeanor prosecutions occurring nationally every year); Jenny M. Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090–91 (2013) (quoting studies showing that misdemeanors make up more than 75 percent of state criminal caseloads).

8. See, e.g., Andrew L. Gates, III, *Arrest Records—Protecting the Innocent*, 48 TUL. L. REV. 629, 629–33 (1974); William J. Leedom, *Removing the Stigma of Arrest: The Courts, The Legislatures and Unconvicted Arrestees*, 47 WASH. U. L. REV. 659, 666–67 (1972); see Allen Rosstron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business*, 90 WASH. U. L. REV. 1321, 1322 (2013); see also Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> (reporting an FBI estimate for which over the past twenty years over a quarter of a billion arrests have been made by law enforcement authorities). As used here, arrest records include so-called mugshots (photographic portraits typically taken after a person is arrested).

tem.⁹ Open government principles, judicial transparency, and concerns for public safety are seen as justifications for a nearly limitless right to know about prior adjudicated offenses in every person's past. The nearly unrestrained circulation of CCRs and the adverse consequences they trigger are largely unquestioned from a normative perspective.

Scholars and advocates are mostly concerned with trying to reduce and limit the negative repercussions of CCRs. Influential proposals would “ban the box,” enact legislation on sealing or expunging records of conviction, and provide for issuance of certificates of rehabilitation after a crime-free period.¹⁰

In this Article, I challenge the conventional wisdom. The stigma and hardships that arise from publicly accessible CCRs are not merely “informal” collateral consequences of a criminal conviction,¹¹ conceptually distinguishable from the vast array of “formal” collateral ramifications.¹² The onerous repercussions of pervasive dissemination of CCRs outside the criminal justice system must be reconsidered and reimagined. The stigma, stereotyping, and blocked opportunities that result from public CCRs cause great harm. The effects are punitive even if not recognized as “punishment.” That needs to change.

The Article contributes to the debate on collateral consequences, but instead of focusing on *de jure* ramifications of conviction it examines and calls attention to a topic—the hidden and not statutorily mandated burdens that attach to criminal convictions—that is routinely neglected in scholarship on criminal law and punishment. I focus on the stigma and discrimination that arise from routine availability of criminal history information. I document the complex trajectory of developments that led to the current widespread availa-

9. Conviction records have been neglected as a subject of study, with the major exception of criminal history sentence enhancements for repeat offenders. See, e.g., Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303 (1997); see also Richard S. Frase, *Prior-Conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals*, in PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 117 (Julian V. Roberts & Andrew von Hirsch eds., 2010); Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 MARQ. L. REV. 523, 532–34 (2014).

10. See *infra* Part I.B.

11. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. U. L. REV. 1103, 1105–09 (2013) [hereinafter Logan, *Informal Collateral*].

12. See, e.g., MARGARET COLGATE LOVE, JENNY M. ROBERTS & CECILIA M. KLINGELE, *Collateral Consequences of a Criminal Conviction: Law, Policy and Practice* (2 ed., 2016) [hereinafter LOVE ET AL., *COLLATERAL CONSEQUENCES*]; see *infra* Part II.

bility of CCRs. I offer what I believe to be the first concrete proposals for reconceptualizing public CCRs as one of many components of criminal sanction that must be justifiable according to general principles of legality and proportionality.

The current wide dissemination of CCRs for non-criminal justice purposes is not the product of deliberate decisions about punishment principles, sentencing policy or crime prevention. It resulted from an unplanned interplay of uncoordinated factors. The first is the shift from emphasis on rehabilitation as a primary purpose of sentencing and punishment to emphasis on overly punitive policies. Ex-offenders ceased being thought of as individuals who would benefit from rehabilitative programs that would improve their lives and make them less likely to reoffend, and became “risks who must be managed.”¹³ The second is the post-Watergate “open records” movement. The third is the rapid development of information technology, and with it the Internet, which enabled the crucial transition from difficultly accessible paper record files to readily accessible computerized criminal history databases.

The spread of the Internet boosted access to criminal records and led to the rise of a brand new industry: private vendors which collect criminal history information in bulk from state repositories and judicial system databases and sell it online.

The visibility and availability of CCRs and their adverse effects fundamentally affect the scale of severity of penalties imposed at sentencing. “Digital punishment” has become a distinctive facet of the excessiveness and disproportionality of punishment in the American criminal justice system.¹⁴ Criminal history information leaves marks on ex-offenders that pervade and affect crucial aspects of their lives long after the imposed sentence has been served. Re-conceptualization and reinvention of the role of public CCRs is therefore much needed.

I move beyond the narrow debate on partial remedial measures that target symptoms of the problem but not the problem itself and propose a more fundamental, just, and rational solution to the unintended adverse effects of current classification and uses of records of

13. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 175 (2001) [hereinafter GARLAND, *CULTURE OF CONTROL*].

14. Sara E. Lageson, *Digital Punishment: The Production and Consequences of Online Crime Reporting* (July 2015) (unpublished Ph.D. dissertation, University of Minnesota), <http://hdl.handle.net/11299/175223>.

criminal convictions. My proposals contain two main elements. First, public availability and dissemination of CCRs outside the criminal justice system should be tightly limited following conviction and imposition of a sentence. Second, the stigma, shaming, and other adverse consequences for ex-offenders that public access to CCRs entail should be acknowledged as an ancillary criminal sanction that is ordered at sentencing, if at all, for a limited time as a deserved supplement, justified in those terms, to criminal sanctions the court otherwise imposes.

This Article proceeds in six Parts. Part I traces the origins of modern criminal history databases in continental Europe and America, and describes the development of the American criminal record infrastructure.

In Part II, I discuss current understanding of the stigma and various forms of discrimination that result from wide dissemination of CCRs, especially the conventional views that the effects are simply natural and “informal” collateral consequences of conviction.

Part III describes and criticizes the preponderant law reform focus on partial remedial measures (“Ban the Box,” sealing and expungement, and certificates of rehabilitation) as the only viable ways to reduce the adverse effects on ex-offenders of publicly available CCRs.

Part IV shows that contemporary widespread access to CCRs was neither intended nor the product of conscious policy decisions. It simply happened. Until the mid-1970s the uses of criminal history information in the U.S. were little different from the experiences of other countries. There was a high degree of convergence between the U.S. and Europe. On both sides of the Atlantic rehabilitation was viewed as the ultimate goal of punishment. Accordingly, criminal history information was to be kept confidential in order not to negatively affect the reentry processes and prospects of ex-offenders. This was meant to increase the likelihood that they would live law-abiding future lives, which would of course be good for them, but it would also serve the social goods of reducing reoffending and preventing victimization. Criminal records were not then available in digital format. They were only available in paper records, which were generally not accessible (except to criminal justice officials) and if so, required time and expertise to locate and search. Beginning in the 1970s, a stark divergence between the U.S. and the old continent emerged and gradually became apparent. Harsher penal policies and practices in combination

with “open records” statutes and technological developments led to indiscriminate dissemination of records of criminal convictions.

Part V shows that public availability and dissemination of CCRs contradicts and undermines the fundamental principle of justice that criminal punishments should be proportionate to the seriousness of crimes and the blameworthiness of offenders as well as to their expected benefits. Adverse effects arising from making conviction records public must be taken into account in determining the deserved punishment for an offense. Conviction records should be made publicly available only when the sentencing judge decides that doing so, as a supplement to other punishments imposed, is justifiable in light of the seriousness of the offense or other specific circumstances, and in any case is for a limited period of time.

Part VI sets out concrete policy proposals for use of conviction records outside the criminal justice system. Private entities should not be involved in collection and dissemination of criminal history information and prospective employers should generally not be allowed to run routine background checks. Reintegration of offenders should be acknowledged as a fundamental objective whose implementation cannot be delegated to policy-making at the individual level.

I. MODERN CRIMINAL HISTORY REPOSITORIES

Efforts to understand contemporary American problems with criminal conviction records need to begin in nineteenth century Europe. There were no meaningful records of criminal convictions until the development of modern statistical systems and the professionalization of criminal justice system institutions. Both were necessary conditions. This Part outlines the origins of modern criminal history repositories in continental Europe and then explores the creation and evolution of the U.S. criminal record infrastructure.

A. Continental Roots

The origins and maintenance of criminal conviction record systems are closely connected to the development of modern theories of recidivism. In nineteenth century Europe recidivism was a relatively new policy problem. Before the enactment of law reforms informed by values of moderation and proportionality in the late eighteenth century, first-time offenders who committed trivial crimes were fre-

quently punishable by death. Then existing repeat offenders laws were rarely applied.¹⁵

Following the abolition of branding,¹⁶ as the gradual ending of local regulation of mobility and the development of public transportation allowed miscreants to extend their ranges of operation,¹⁷ a need was recognized to develop methods to link offenders to their previous convictions.¹⁸ Habitual criminals seemed ungovernable and a consensus emerged around the need to identify recidivists in order to subject them to harsher penalties. Penal reformers and law enforcement agencies sought ways to identify previously convicted offenders.

Record keeping became critical to implementation of recidivist sentencing statutes.¹⁹ French magistrate and penal reformer Arnould Bonneville de Marsangy is usually credited as the inventor of modern criminal record systems and criminal record repositories.²⁰ He was also the first developer of a comprehensive theory of recidivism.

15. See NORVAL MORRIS, *THE HABITUAL CRIMINAL* 18 (1951); see also Daniel Katkin, *Habitual Offender Laws: A Reconsideration*, 21 *BUFF. L. REV.* 99, 99 (1971) (noting that while habitual offenders unquestionably existed, “there were few whose careers were not ended by a first conviction”).

16. See Pieter Spierenburg, *The Body and the State: Early Modern Europe*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 44, 48 (Norval Morris and David J. Rothman eds., 1995) (“To a degree, branding was a preindustrial method for identifying recidivists. Judges, who took marks as sure signs of a previous conviction, often ordered the executioner to inspect the suspect’s body. Of course, this method worked only if the suspect had committed a crime serious enough to warrant branding.”).

17. See Tim Cresswell, *Towards a Politics of Mobility*, 28 *ENV’T. PLAN. D: SOC’Y & SPACE* 17, 27 (2010) (“By the 19th century in Europe the definition and control of legitimate movement had passed to the nation-state . . .”); see also Terry Thomas & Bill Heberton, *Dilemmas and Consequences of Prior Criminal Record: A Criminological Perspective from England and Wales*, 26 *CRIM. JUST. STUD.* 228, 229 (2013). See generally William J. Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12 *SOC. PROBS.* 67 (1964) for more information regarding modern vagrancy laws as an indirect attempt to restrict spatial mobility.

18. Until recently, there was basically no way of knowing or tracking criminals. See Mathieu Deflem & Stephen Chicoine, *History of Technology in Policing*, in *ENCYCLOPEDIA OF CRIMINOLOGY & CRIM. JUST.* 2269, 2272 (Gerben Bruinsma & David Weisburd eds., 2014) (reporting that at the beginning of the nineteenth century, “efforts in criminal identification were limited to descriptions entered in prison registers which did not contain a uniform language and were not necessarily specific enough to distinguish an inmate. Further, such records did not differentiate between individuals with the same name and had no ability to prevent the use of aliases”).

19. JOHN PRATT, *GOVERNING THE DANGEROUS: DANGEROUSNESS, LAW AND SOCIAL CHANGE* 33–34 (1997).

20. In the U.K. the creation of penal registers stemmed from the policing-oriented concept of “crime prevention.” The *Habitual Criminals Act* of 1869 provided for the maintenance of a single police-held register of criminals and the photographing of all convicted persons. The *Prevention of Crimes Act* of 1871 specified that the register must include data of all persons convicted of a crime sent to prison for a month or more. See LEON RADZINOWICZ & ROGER HOOD, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, Vol. 5, *THE EMERGENCE OF PENAL POLICY* 261–62 (1986).

The term “recidivist” (*recidiviste*)²¹ was coined in his 1844 treatise titled *De la récidive*,²² “probably the earliest European text to focus on the repeat offender.”²³ To Bonneville, recidivist statutes and criminal records were closely linked. The latter were necessary to apply the former. In 1848, Bonneville proposed creation of a comprehensive criminal record-keeping system.²⁴ There were three main expected consequences: more effective prevention of felonies and misdemeanors; protecting the “purity of the lists of voters and jurors;” and “social moralization.”²⁵

Bonneville believed that habitual criminals ought to be punished differently from first-timers. Criminal history repositories could be used to “hold repeat offenders to proper account, and first-time offenders could benefit from leniency.”²⁶ His proposals were enthusiastically received and almost completely enacted. France established the first criminal history repositories (also known as penal registers) in 1850 through regulations issued by the Ministry of Justice.²⁷ They revolutionized criminal justice record-keeping.²⁸ This system was soon adopted throughout Europe.

The new systems proved quite effective.²⁹ However, although accurate documentation of prior convictions was Bonneville’s primary

21. The French noun *recidiviste* comes from the verb *récidiver*, meaning “to fall back, relapse.” The etymology roots back to Medieval Latin *recidivare*, “to relapse into sin,” from Latin *recidivus*, “fallen back,” from *recidere*, *re-* “back, again,” and *cadere*, “to fall.”

22. ARNOULD BONNEVILLE DE MARSANGY, *DE LA RÉCIDIVE, OU DES MOYENS LES PLUS EFFICACES POUR CONSTATER, RECHERCHER ET RÉPRIMER LES RECHUTES DANS TOUTE INFRACTION À LA LOI PÉNALE* (1844).

23. SIMON A. COLE, *SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION* 15 (2001); *see also* BERNARD H. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 189 (2007) (noting that today “[a] prior criminal record communicates, more than anything, a higher likelihood of future offending”).

24. ARNOULD BONNEVILLE DE MARSANGY, *EXPOSÉ COMPLET DU SYSTÈME DES CASIERS JUDICIAIRES* (1848).

25. *Id.* at 648.

26. WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* 5 (2009) [hereinafter LOGAN, *KNOWLEDGE AS POWER*].

27. Andre Normandeau, *Pioneers in Criminology: Arnould Bonneville De Marsangy (1802-1894)*, 60 J. CRIM. L. & CRIMINOLOGY 28, 30–31 (1969).

28. *See id.* for a description of the operation of the system of criminal record-keeping. Normandeau notes that Bonneville wanted to develop a reliable and complete record of all previous convictions of each and every offender by assembling “all the reports of sentences imposed on a given individual by having such reports sent to the clerk of court in the district of his birthplace.” If the offender’s birthplace was unknown or the offender was a foreigner, the copy of the judgment of conviction and related sentence was to be sent to a central repository at the Ministry of Justice in Paris.

29. Recidivism became a more visible phenomenon. This led to enactment of harsher recidivist statutes as newly available evidence on the scale of repeat offending began to alarm public opinion. *See* Patricia O’Brien, *The Prison on the Continent: Europe, 1865–1965*, in *THE OXFORD*

goal, he did not envision criminal history repositories merely as bureaucratic tools. Rather, he recognized the potential they had of additionally stigmatizing convicted persons.

Bonneville intended that penal registries be permanently accessible to the general public.³⁰ They were not meant simply to be an effective technical support for implementation of habitual offender laws. Two further goals were intended: encouraging mutual surveillance within communities and heightening the stigma of conviction in a way that would amplify the imposed punishment and make future offending less likely.³¹

B. American Developments

The building of the American criminal record infrastructure began later than in Europe. Until the late nineteenth century no state authorities systematically compiled criminal history information. Private police agencies took the lead.³² By the 1870s, the Chicago-based Pinkerton's National Detective Agency assembled the first comprehensive American database of mug shots of criminals for identification purposes.³³

Others soon showed interest. U.S. prison commissioner E.C. Wines expressed enthusiasm for the French system in his report on the International Penitentiary Congress held in London in 1872. Wines describes French repositories and their rules of operation in detail on

HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 178, 191 (Norval Morris & David J. Rothman eds., 1995) (observing that “[r]ecidivism was a culturally constructed category made possible by more accurate statistical knowledge and a new technology of identification, including anthropometric procedures and fingerprinting”).

30. See BONNEVILLE DE MARSANGY, *supra* note 24, at 665.

31. *Id.* (observing that every conviction “rather than remaining hidden in the darkness of the archives of the government, will burn in shaming characters at the registry of [the offender’s] birth district, and will disrupt the self-seeking rest of those who did not fear to renounce the exercise of their most holy duties of supervision and surveillance.” The French magistrate believed that “directly hurting the interests and honor of [the offenders’] families would make them exercise the effective influence they can, and should, exercise regarding the prevention of crimes.” He also stressed that “criminals themselves will feel restrained by the fear of this local publicity of their misdeeds.”).

32. Greg Marquis, *Private Security and Surveillance: From the “Dossier Society” to Database Networks*, in SURVEILLANCE AS SOCIAL SORTING: PRIVACY, RISK, AND DIGITAL DISCRIMINATION 226, 231 (David Lyon ed., 2003) (noting that private sector police “virtually invented mass surveillance in North America”).

33. See David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1212–14 (1999); see also FRANK MORN, “THE EYE THAT NEVER SLEEPS”: A HISTORY OF THE PINKERTON NATIONAL DETECTIVE AGENCY (1982).

the basis of first-hand observation.³⁴ He noted that “unfortunately no well-devised plan for attaining this object with certainty exists, so far as I know”³⁵ in the U.S.

The first public criminal history systems were adopted in northeastern cities around 1880.³⁶ However, well into the twentieth century handling of criminal records was an uncoordinated hodge-podge of local and state practices that ranged from photographs of “wanted” posters to fingerprint files of convicted criminals.³⁷

In 1918 California created the first centralized state criminal record repository—the California Bureau of Criminal Identification and Investigation.³⁸ It was soon followed by other states. Nevada established its central criminal history repository only in 1987.³⁹ At the federal level, the first significant attempt to introduce a standardized and integrated criminal record system occurred in 1924 when Con-

34. E.C. WINES, REPORT ON THE INTERNATIONAL PENITENTIARY CONGRESS OF LONDON HELD JULY 3-13, 1872, at 288–89 (1873):

I found the *casier* to be an immense case, resembling a cupboard or closet, covering the whole side of a large apartment in the building, called the registry. The case contained rows of deep pigeon-holes, of which the numbers was equal to that of the letters of the alphabet. These compartments were filled with boxes or movable registers (*casiers mobile*) arranged in alphabetical order, each containing individual bulletins, or certificates of conviction, pronounced in any part of France against all persons born in that district (*arrondissement*). As soon as a sentence is pronounced by any tribunal (even though it be military or naval) the clerk of the district in which the prisoner has been convicted is obliged, on pain of a fine, to immediately address, signed by the attorney for the government, the certificate of his sentence to the registry of the district of which he is a native. . . . Now there is such a registry in every *arrondissement* or jurisdiction of France. There is, therefore, no longer any uncertainty possible in regard to the antecedents of any person charged with crime. A telegram, addressed to the register of his place of birth, immediately brings the statement that there is no record in his case, or a recapitulation of all the convictions previously had against him, no matter where, no matter when.

35. *Id.* at 288.

36. Gary Potter, *The History of Policing in the United States, Part I*, E. KY. U., <http://plsonline.eku.edu/insidelook/history-policing-united-states-part-1> (last visited Oct. 23, 2016).

37. See KENNETH C. LAUDON, DOSSIER SOCIETY: VALUE CHOICES IN THE DESIGN OF NATIONAL INFORMATION SYSTEMS 32 (1986); see also Greg Marquis, *supra* note 32, at 230 (“The police station blotter was an intimate record of quarrels and conflicts of the urban neighborhood. In addition to petty offenders, the police maintained informal records on the local “underworld” and, as a result of statutory provisions, formal records on pawnbrokers, peddlers and cab drivers . . .”).

38. See P. O. Ray, *Metropolitan and State Police*, 11 J. CRIM. L. & CRIMINOLOGY 453, 463 (1921) (reporting that “[d]uring the first six months of its existence prior to June 30, 1918, the California bureau received and filed duplicate finger-print records from twenty-three cities and penitentiaries outside the state of California, identified 227 criminals as previous offenders. . . . The report of the bureau for the biennial period ending June 30, 1920, shows that the bureau has identified 2,550 law-violators with previous criminal records, received and filed 33,686 finger-print records . . .”).

39. In 1985, the Department of Public Safety’s General Services Division Records Bureau was designated by the Nevada Legislature to be the central repository for records of criminal history, but only in 1987 were courts required to include dispositions in the reports that they send to the repository. See NEV. REV. STAT. § 179A.075 (1987).

gress authorized creation of what today is the Identification Division of the FBI.

Creation of criminal history repositories was initially slowed by opposition from labor and civil liberties organizations and liberal commentators. They feared that centralized and coordinated criminal history repositories could become “a step towards European-style national registration systems which would discourage the exercise of First Amendment rights.”⁴⁰

Until the late 1960s, the United States did not have a comprehensive national criminal record system. Rather, “each state collected and stored records on crimes and criminals within its borders. In most states, these records were not effectively centralized. Thus, even in the same state, one police agency’s information was often not available to another agency.”⁴¹ The establishment in 1968 of the Law Enforcement Assistance Administration (LEAA), a federal program within the Department of Justice with the aim of funding state and local initiatives to improve law enforcement,⁴² was instrumental to development of the U.S. criminal record infrastructure that exists today.⁴³

Today, the FBI’s Interstate Identification Index system (known informally as “Triple I”) is designed to provide automated interstate and federal/state exchange of criminal history record information (CHRI).⁴⁴ It compiles federal and state criminal history records, including arrest information and corresponding dispositions, for misdemeanors and felonies. State criminal history repositories are the primary source of information. This database is the only comprehensive collection of criminal history information for all fifty states.⁴⁵

The FBI shares information with criminal justice agencies for purposes of law enforcement, sentencing, and sentence implementation.⁴⁶ CHRI is also available to other recipients for noncriminal justice purposes (employment and licensing in particular) authorized

40. LAUDON, *supra* note 37, at 35.

41. James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, the European Union and Interpol Compared*, 30 LOY. L.A. INT’L & COMP. L. REV. 125, 129 (2008).

42. In June 1968, Congress passed the Omnibus Crime Control and Safe Streets Act (P.L. 90-351). Title I of the Act established the new agency.

43. *See infra* Part III.B.C.

44. *See* JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 40. Each criminal history record indexed in the “Triple I” is created through the submission of fingerprint images to the Integrated Automated Fingerprint Identification System (IAFIS).

45. States voluntarily submit information to this federal database in order to gain ready access to comprehensive nationwide criminal biographies.

46. 28 C.F.R. § 20.33 (2016).

by statutes, executive orders, or regulations.⁴⁷ Individuals may obtain a copy of their own records from the FBI for the purpose of review and to request changes or corrections.⁴⁸ To enhance dissemination, since 1999 CHRI has also been provided to selected private contractors (so-called pre-approved “channelers”) which process CHRI inquiries for noncriminal justice purposes.⁴⁹ Noncriminal justice-related requests vastly exceed requests submitted for criminal justice purposes.⁵⁰

Each state maintains its own central criminal record repository for criminal history information submitted by law enforcement and other criminal justice agencies including state courts. Wide variations exist between states concerning access to information in the repositories. A general distinction is made between “open-records” and “closed-records” states.⁵¹

Florida is a paradigmatic “open records” state. Private individuals who are neither employers nor authorized agencies can obtain an individual’s criminal history records upon payment of a fee. No third

47. See 42 U.S.C. §§ 14611–14616 (National Crime Prevention and Privacy Compact Act of 1998, signed into law by President Clinton with the primary goal of facilitating electronic information sharing among the federal government and the states and permitting the exchange of criminal history records for noncriminal justice purposes when authorized by federal or state law).

48. 28 C.F.R. § 20.34 (2016).

49. As defined by the FBI, *Channeler Frequently Asked Questions*, <https://www.fbi.gov/services/cjis/compact-council/channeler-faqs> (last visited February 11, 2016) (“An FBI-approved Channeler is a contractor that serves as the conduit for submitting fingerprints to the FBI and receiving the FBI criminal history record information (CHRI), on behalf of an Authorized Recipient (AR), for authorized noncriminal justice purposes.”); see, e.g., NAT’L BACKGROUND CHECK INC., <http://www.nationalbackgroundcheck.com/fbi-channeling.htm> (last visited Sept. 20, 2016).

50. See *Privacy Impact Assessment for the Fingerprint Identification Records System (FIRS) Integrated Automated Fingerprint Identification System (IAFIS) Outsourcing for Noncriminal Justice Purposes—Channeling*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/records-management/foipa/privacy-impact-assessments/firs-iafis>; see also INSTITUTE FOR DEFENSE ANALYSIS U.S., TASK FORCE REPORT: SCI. & TECH. 74–75 (1967) (emphasizing that non-judicial records maintained by criminal justice agencies containing criminal history information are certainly “valuable in making prosecution, sentencing and correctional decisions,” but noting that they have potential to “create serious policy problems” through possible misuses (e.g., being used to “intimidate or embarrass,” being retained long after they have lost their usefulness, and serving only “to harass ex-offenders’ belief in the possibility of redemption”). Accordingly, the task force report recommended creation of an integrated national criminal record repository system, accessible only to criminal justice agencies).

51. See Shawn D. Bushway et al., *Private Providers of Criminal History Records: Do You Get What You Pay For?*, in *BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA* 174, 178 (Shawn D. Bushway et al. eds., 2007) (identifying an “intermediate” type of repository beside open-records and closed-records-states. In this case, “states allow access to their repositories on the condition that the subject of the search signs a release form.” For the purposes of this Article, so-called intermediate states are similar to close-records states as they do not allow an uncontrolled dissemination of CCRs.”).

party consent—in particular that of the subject of the search—is required.⁵²

California exemplifies a “closed-records” state. Criminal history information maintained by the California Department of Justice is not available to the general public in any format. Access is restricted to law enforcement and other authorized agencies, and requests from third parties are not permitted.⁵³ However, as we shall see, this distinction between “open records” and “closed records” states has been undermined and frustrated by the principle of the openness of court records in the Digital Age.⁵⁴

II. CONSEQUENCES OF MASS DISSEMINATION OF CRIMINAL HISTORY RECORDS

Criminologist Neil Shover, in a classic 1980s study of ex-offenders who had earlier committed ordinary crimes, coined the expression “stigma erosion.”⁵⁵ He describes the increasing certainty of ex-offenders over time that no one would discover their criminal history. Most interviewees reported that third-party disclosure of their criminal history record was rare and mostly confined to contacts with bureaucracies and other branches of government with “inflexible or other special policies for dealing with ex-convicts.”⁵⁶

This is no longer true. Millions of Americans are today routinely confronted by heavy burdens arising from past wrongdoing; the negative label “offender” has become increasingly sticky and visible. Previously ex-offenders were potentially *discreditable* from records that were largely hidden from public scrutiny. Today they are *discredited*

52. FLA. STAT. § 119.01 (1995) (stating that “(1) It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.”); *see also* FLA. DEP’T OF LAW ENF’T CRIMINAL HISTORY INFO., <https://web.fdle.state.fl.us/search/app/default> (last visited Sept. 11, 2016).

53. *See* CAL. PENAL CODE §§ 11142, 11143 (providing that applicant agencies are required to destroy criminal history record information once the organization’s business need has been fulfilled (e.g., pre-employment screenings for certain positions). They must not share or disseminate criminal history information unless expressly permitted to do so. Individuals have the right to request a copy of their own criminal history, but they may not disclose or provide copies of it to unauthorized third parties).

54. *See infra* Part IV.B.4.

55. NEAL SHOVER, *AGING CRIMINALS* 62 (1985).

56. *Id.* at 72 (including examples of interacting with the police, applying for governmental benefits, enlisting in the army).

by criminal history information that is widely known and publicly accessible.⁵⁷

Readily accessible CCRs do unnecessary harm in two major ways. First, they damage a person's public persona and reputation⁵⁸ by imposing an enduring stigma⁵⁹ that frequently leads to a spiral of deviant behaviors resulting in part from lack of legitimate alternatives.⁶⁰ Second, widespread dissemination of CCRs results in the loss of opportunities in contexts ranging from education⁶¹ to employment,⁶² even in the absence of laws or regulations that make ineligibility and differential treatment of ex-offenders mandatory or discretionary. Public availability and dissemination of CCRs thus "amplify punishment beyond the sanctions imposed by the criminal justice system."⁶³

Adverse punitive repercussions arising from a conviction are usually attributable to a myriad of "collateral consequences" that degrade

57. See ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 4 (1963); see also Christopher Uggen & Lindsay Blahnik, *The Increasing Stickiness of Public Labels*, in GLOBAL PERSPECTIVES ON DESISTANCE 222, 222 (Joanna Shapland et al. eds., 2016) (noting that "new and disruptive technologies now make these labels more accessible and consequential People now know more about their fellow citizens than ever before, such that labels are increasingly difficult to 'peel off,' dissolve, and remove").

58. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 94 (2010) ("Once a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal"); see also Jamila Jefferson-Jones, *A Good Name: Applying Regulatory Takings Analysis to Reputational Damage Caused by Criminal History*, 116 W. VA. L. REV. 497, 505-07 (2013).

59. The word "stigma" is usually used to refer to the "pejorative label" attached to a person. See LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 101 (1975). A "stigma" is defined as "[a] mark or token of infamy, disgrace, or reproach." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1702 (4th ed. 2000).

60. HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 31 (1963), was the first scholar to argue that having a criminal record can become a status that affects and nullifies views others have of a person. "[O]ne of the most crucial steps in the process of building a stable pattern of deviant behavior is likely to be the experience of being caught and publicly labeled as a deviant." *Id.*

61. THE CTR. FOR CMTY. ALTS. (CCA), THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED: A GUIDE FOR ATTORNEYS REPRESENTING COLLEGE APPLICANTS AND STUDENTS DURING AND AFTER CRIMINAL PROCEEDINGS 2 (2013), <http://www.communityalternatives.org/pdf/publications/Criminal-History-Screening-in-College-Admissions-AttorneyGuide-CCA-1-2013.pdf> (reporting that 66% of responding institutions collect criminal history information about applicants).

62. See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 109-14 (2006); David J. Harding, *Jean Valjean's Dilemma: The Management of Ex-Convict Identity in the Search for Employment*, 24 DEVIANT BEHAV. 571 (2003); Christopher Uggen, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUB. POL'Y 367 (2008). See generally DEVAH PAGER, MARKED, RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (detailing the difficulties faced by ex-offenders, both white and black, in trying to find jobs after release).

63. Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 484 (2006).

ex-offenders to second-class citizenship, but operate in ways completely separate from the “practice or jurisprudence of sentencing.”⁶⁴ Collateral consequences of convictions are “not included in the formal terms of [the] sentence” and are “implemented by non-criminal justice institutions.”⁶⁵

The term “collateral consequences” generally refers only to *formal* ramifications of a criminal conviction.⁶⁶ These are restrictions, disqualifications, losses of rights, special requirements, and changes in legal status provided for in a civil statute and imposed “automatically upon conviction even if . . . not included in the court’s judgment, or by action of a civil court or administrative agency on grounds related to the conviction.”⁶⁷

Unlike formal collateral consequences, enhanced stigma and related forms of discrimination stemming from accessibility and dissemination of CCRs arise “independently of specific legal authority” and trigger adverse repercussions even in the absence of “formal disquali-

64. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

65. Alec Ewald & Christopher Uggen, *The Collateral Effects of Imprisonment on Prisoners, Their Families, and Communities*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 83, 83–84 (Joan Petersilia and Kevin R. Reitz eds., 2012).

66. Formal collateral consequences, provided for by federal, state, and local laws, include denial or restricted access to public housing and welfare, bans on receipt of food stamps, ineligibility for professional and occupational licensing and, with particular regard to felons, disenfranchisement, lifetime exclusion from jury service, and loss of right to possess firearms. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 470 (2010) (“Felon disenfranchisement, the most longstanding of these consequences, originated during the colonial era in the United States and continues, in various forms, in the vast majority of states today. [. . .] Other collateral consequences—such as restrictions on welfare and housing benefits—dramatically increased in the 1980s and 1990s in number and severity”) [hereinafter Pinard, *Confronting Issues of Race*].

67. *User Guide Frequently Asked Questions*, ABA NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, http://www.abacollateralconsequences.org/user_guide/#q02 (last visited May, 30, 2016); for a comprehensive list, see also The American Bar Association’s (ABA) Searchable Database, NAT’L INVENTORY of Collateral Consequences of Conviction, <http://www.abacollateralconsequences.org/> (listing over 45,000 collateral consequences on the books restricting people with criminal records, ranging from about 300 in Vermont to over 1,800 in California); cf. LOVE ET AL., *COLLATERAL CONSEQUENCES*, *supra* note 12; Alec C. Ewald, *Collateral Consequences in the American States*, 93 SOC. SCI. Q. 211, 211 (2012); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006).

fications.”⁶⁸ Wayne Logan has called them “*informal* collateral consequences.”⁶⁹

The distinction between formal and informal collateral consequences is especially apparent concerning hiring practices:

Even when discrimination is not mandated, ex-offenders face daunting odds when looking for employment. Huge numbers of employers conduct criminal background checks, and many have expressed an unwillingness to hire employees with any sort of criminal record. This is typically a record of convictions.⁷⁰

Under current constitutional doctrine, neither formal nor informal collateral consequences are considered to be forms of punishment. Courts show substantial deference to legislative determinations concerning whether a statutory scheme is civil or criminal in nature; it “is first of all a question of statutory construction.”⁷¹ As a result, challenges to laws authorizing felon disenfranchisement, civil commitment, and sex offender registration are routinely rejected on the basis that they are civil regulatory measures rather than genuine punitive sanctions,⁷² and are therefore not cognizable under fundamental prin-

68. Logan, *Informal Collateral*, *supra* note 11, at 1104; *see also* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 272 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (observing that criminal justice institutions “after purging the convicts by means of their sentence, continues to follow them by a whole series of ‘brandings’” that once were imposed *de jure* and today stem from the conviction *de facto*).

69. Logan, *Informal Collateral*, *supra* note 11, at 1103–04. Mirjan R. Damaška, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 347 (1968) distinguishes between “legal” and “social” consequences of convictions. Social consequences are “those that do not attach by virtue of a legal norm, but rather on account of societal disapprobation (ostracism, refusal to employ, etc.).”

70. Tammy R. Pettinato, *Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory*, 98 MARQ. L. REV. 831, 837 (2014); *see also* Dallan F. Flake, *When Any Sentence is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45, 56–58 (2016) (citing various studies documenting employer biases against ex-offenders); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 968 (2016) (noting that “[t]o be faced with job application after job application inquiring into one’s criminal history, and to be denied job after job after giving one, is to experience the social world as someone branded an outsider.”).

71. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (upholding Kansas’s civil commitment statute for sex offenders because the law did not violate the double jeopardy or the ex post facto clause since it was *civil* in nature and therefore did not constitute criminal punishment).

72. *See* Gabriel J. Chin, *Collateral Consequences of Criminal Conviction*, in *THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA* 205, 208–09 (John T. Parry & L. Song Richardson eds., 2013) [hereinafter Chin, *Collateral Consequences*]. In *Trop v. Dulles*, the Supreme Court noted that disenfranchisement aims to “designate a reasonable ground of eligibility for voting,” and “is not a punishment but rather a non-penal exercise of the power to regulate the franchise.” *Trop v. Dulles*, 356 U.S. 86, 96–97 (1958). In *Smith v. Doe*, the Court upheld the constitutionality of the Alaska Sex Offender Registration Act’s retroactive requirements by saying that the act was non punitive and therefore could not violate the Ex Post Facto clause of the Constitution. *Smith v. Doe*, 538 U.S. 84, 89–91, 105 (2003).

ciples of the Constitution pertaining to formal punitive schemes.⁷³ The form prevails over the substance.⁷⁴

With regard to informal collateral consequences, lacking any statutory basis, they are nearly invisible to the legal system. They cannot be challenged in court on ex post facto, due process, and cruel and unusual punishment grounds. They are non-codified overflows of conviction that new technologies have turned into social practices embedded in the social body. Large strata of the public perpetuate such practices by “subscrib[ing] to a morality that demands continued status degradation.”⁷⁵

III. PARTIAL REMEDIAL MEASURES

Scholars and advocacy groups have been pushing for policy changes to reduce adverse effects of the widespread availability of CCRs. The most prominent are “Ban the Box” legislation, sealing and expungement schemes, and certificates of relief or rehabilitation.

A. “Ban the Box” Initiatives

Ninety percent of employers conduct criminal background checks on potential employees (compared with 51 percent in 1996).⁷⁶ Reform

73. See Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1296 (1973) (“By attaching [the civil label], the state has successfully denied defendants almost every important safeguard required in criminal trials. Invocation of this talismanic word has erased a veritable bill of rights.”). The punitive effects of collateral consequences have led scholars almost unanimously to criticize the formalistic distinction between punishment and “regulatory” consequences of conviction. See, e.g., Jenny M. Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”*, 93 MINN. L. REV. 670, 740 (2008) (“The current collateral-consequences rule rests on doctrinally flawed ground, is outdated, and is simply bad theory and policy.”). *Contra* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 302–06 (2015) (proposing recognition of collateral consequences as nonpunitive “predictive risk regulation” and urging heightened procedural scrutiny requiring the state to demonstrate that collateral consequences are a “reasonable means” to achieve their public safety/harm prevention goals).

74. Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, in LAW AS PUNISHMENT/ LAW AS REGULATION 77 (Austin Sarat et al. eds., 2011) [hereinafter Ewald, *Perils of Categorical Ambiguity*]. The practical implications of the civil/criminal divide have been highlighted by *Padilla v. Kentucky*, in which the Supreme Court made deportation an exception to the collateral consequences rule, and for the first time held that failure to advise a criminal defendant of the deportation consequences of a guilty plea constituted ineffective assistance of counsel. *Padilla v. Kentucky*, 559 U.S. 356, 373–74 (2010).

75. John P. Reed & Dale Nance, *Society Perpetuates the Stigma of a Conviction*, 36 FED. PROB. 27, 28 (1972).

76. See Society for Human Resources Management, *Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, SOC’Y FOR HUM. RES. MGMT. (July 19, 2012), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminalbackgroundcheck.aspx> (reporting that sixty-nine percent of responding organizations conduct crimi-

advocates call for enactment of “Ban the Box” laws and ordinances that forbid public employers from asking potential employees about previous convictions during the initial screening stage of the hiring process before they have had a chance to consider the applicant based solely on his or her job qualifications.⁷⁷ More recently, initiatives to ban the box have extended to the private sector. The Ban the Box campaigns aim to remove check boxes from application forms that ask whether the applicant has been criminally convicted.⁷⁸

The National Employment Law Project reports that over a hundred cities and counties and twenty-four states have adopted laws or regulations forbidding public employers to ask about an applicant’s criminal history before the applicant has been selected for an interview or received a conditional offer of employment.⁷⁹ Nine states—Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont—have forbidden conviction history questions in application forms of private employers.⁸⁰

Law enforcement agencies and criminal justice system employers are generally exempt from “Ban the Box” laws and ordinances. Employers and organizations seeking unpaid interns and volunteers as well as employers that are required by law to consider criminal history

nal background checks on all of their job candidates while eighteen percent conduct criminal background checks on selected job candidates); *see also* Sarah E. Lageson et al., *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 LAW & SOC. INQUIRY 175, 180 (2015) (reporting that approximately eighty percent of employers outsource criminal background checks to private companies).

77. Jessica S. Henry & James B. Jacobs, *Ban the Box To Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUB. POL’Y 755, 758 (2007) (“In voluntarily ignoring past criminal convictions for most public-sector jobs in the first instances, local governments can lead the way toward reducing job discrimination against ex-offenders.”).

78. *See* Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers’ Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 211–15 (2014) (tracing the history and general background of the Ban the Box movement and proposed policies); *see also* Suzy Khimm, *States Push to Provide Some Ex-felons a Second Chance*, MSNBC (Sept. 17, 2014, 10:48 AM), <http://www.msnbc.com/all/states-push-provide-some-ex-felons-second-chance> (quoting Dorsey Nunn, director of Legal Services for Prisoners with Children, saying “[w]e’re not even saying don’t ask us the question—we’re saying don’t ask the question as the first thing that you do . . .”).

79. Michelle Natividad Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT’L EMP. L. PROJECT (Sept. 1, 2016), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

80. *Id.* (noting that the initiative was substantially boosted by President Obama’s endorsement when he announced his direction to the federal Office of Personnel Management to delay inquiries into job applicant’s criminal history until later in the hiring process).

(for example, concerning positions as schoolteachers and caregivers for children or the elderly) are likewise exempt.⁸¹

B. Sealing and Expungement Schemes

In most states, statutes allow some ex-offenders to request that certain convictions be sealed or expunged from their criminal history.⁸² The applicant must meet various requirements—usually a waiting period depending on the offense, and no subsequent arrest or conviction—and petition the sentencing court or an appellate court.⁸³ In some states, sealing or expungement is granted upon request by a correctional official such as the commissioner of probation.⁸⁴

A sealed or expunged record of conviction will not be displayed in a background check by third parties. Accordingly, an affected person is legally authorized to deny having been convicted of that offense.⁸⁵

Sealing and expungement schemes have the same goals but operate through different mechanisms. The key difference is that a sealed record continues to “exist” in legal, physical, and electronic senses.

81. Christina O’Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 *FORDHAM L. REV.* 2801, 2807 (2015).

82. See Amy Shlosberg et al., *Expungement and Post-Exoneration Offending*, 104 *J. CRIM. L. & CRIMINOLOGY* 353, 355–62 (2014) (noting wide differences in nomenclature between jurisdictions: “[T]he process of limiting disclosure of criminal records to the public may be referred to as “expungement,” “expunction,” “sealing,” “setting aside,” “destruction,” “purging,” or “erasure”). Expungement of convictions from adult offenders’ records was promoted in the late 1950s by commentators and professional groups advocating rehabilitation as the ultimate goal of punishment and corrections. The 1956 National Conference on Parole is generally credited with originating the concept of adult expungement, which had been applied in the context of juvenile justice for some time. See Michael Pinard, *Criminal Records, Race and Redemption*, 16 *N.Y.U. J. LEGIS. & PUB. POL’Y*, 963, 990 (2013) (“At their core [expungement] laws recognize that a person should not be forever judged and burdened by his or her criminal record. Thus, the laws benefit those who have demonstrated a commitment to living a law-abiding life”) [hereinafter Pinard, *Criminal Records*].

83. Pinard, *Criminal Records*, *supra* note 82, at 989–90.

84. For a state-by-state survey, see Margaret Colgate Love, *50-State Comparison: Judicial Expungement, Sealing, and Set-aside*, *COLLATERAL CONSEQUENCES RESOURCE CENTER*, chart 4 (Jun. 2016), <http://ccresourcecenter.org/wp-content/uploads/2016/03/Chart-4-Judicial-Expungement-Sealing-Set-aside.pdf> [hereinafter Love, *50-State Comparison*].

85. See Alfred Blumstein & Kiminori Nakamura, *Processes of Redemption Should be Built into the Use of Criminal-History Records for Background Checking*, in *CONTEMPORARY ISSUES IN CRIMINAL JUSTICE POLICY* 37, 44 (Natasha Frost, Joshua Freilich, & Todd Clear eds., 2009) (summarizing in the following the main criticisms toward sealing and expungement schemes: the “compromis[ing] of governmental transparency” and the “possible adverse effect on non-offenders due to statistical discrimination”).

Expungement triggers physical and electronic deletion of the conviction record.⁸⁶ When a conviction is expunged, the slate is wiped clean.

Eligibility requirements vary enormously between states. Passage of a significant number of years of good behavior (ranging from 1 to 20 depending on the offense) after completion of the imposed sentence is a common requirement, and it is generally considered to be evidence of successful re-entry and desistance from crime.⁸⁷

Policy-makers in many jurisdictions view “judicial editing” of criminal histories with suspicion. This may be why Congress has not enacted comprehensive federal legislation⁸⁸ and why the vast majority of states “do not permit expungements for serious offense convictions, no matter how many crime-free years have passed since termination of the sentence.”⁸⁹ Recent state reforms are still largely “cutting the edges”: newly enacted or expanded provisions are usually limited to first time offenders convicted of nonviolent crimes, and only in case of misdemeanors.⁹⁰

86. Sealed and expunged records of conviction do not always become invisible to criminal justice actors. In many states, neither sealing nor expungement removes a prior conviction from consideration concerning sentence enhancements or granting of diversion or probation. *See* *People v. Jacob*, 174 Cal. App. 3d 1166, 1174–75 (Cal. Ct. App. 1985) (holding that the trial court properly imposed a five-year enhancement for a prior robbery conviction, even though the prior conviction had been expunged). In other states, sentencing authorities do not have access to or cannot consider expunged convictions. *See* *State v. Leitner*, 646 N.W.2d 341, 352 (Wis. 2002) (“An expunged record of a conviction cannot be considered at a subsequent sentencing.”). In the federal system, “expunged convictions are not counted, but may be considered as a basis for departure under § 4A1.3.” *See* UNITED STATES SENTENCING GUIDELINES MANUAL, § 4A1.2(j) (2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012_Guidelines_Manual_Full.pdf.

87. *See* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 349 (2009) [hereinafter Blumstein & Nakamura, *Redemption in the Presence*].

88. A high threshold is set for federal expungement. A judge must find it in “the interests of justice,” particularly when the conviction is based on a law later found to be unconstitutional or when it is ascertained that the conviction was the result of government misconduct. *See* *United States v. Schnitzer*, 567 F.2d 536, 539–40 (2d Cir. 1977). Expungement is available only for offenses involving possession of small amounts of certain controlled substances, when the offender was under age 21 at the time of the offense and has no prior drug offenses on record. 18 U.S.C. § 3607(c); *see, e.g.*, Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 46 n.144 (2008); *see also* James W. Dihem, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN’S L. REV. 72, 83–85 (1992).

89. JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 117; *see also* Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 323–26 (2015).

90. *See* Ram Subramanian et al., *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction*, VERA INST. OF JUST. 2009-2014, at 13 (2014) <http://archive.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v4.pdf>.

C. Certificates of Rehabilitation

Ex-offenders may not be eligible for sealing or expungement of a prior conviction either because the state where the conviction was pronounced does not provide for such schemes or they do not meet the numerous statutory requirements. An alternative to sealing and expungement is constituted by the issuance of a certificate of rehabilitation, also variously called a “certificate of relief from disabilities,” “certificate of recovery,” “certificate of good conduct,” or “certificate of employability.”

These certificates do not erase or conceal the record of a prior conviction. Rather, they “reward good behavior of ex-offenders by explicitly acknowledging them as being rehabilitated,”⁹¹ and “are meant to help third parties, such as employers and landlords, make better-informed decisions about individuals with criminal records.”⁹²

Certificates of rehabilitation are issued by courts or designated corrections agencies following completion of sentence or a statutory waiting period and relieve ex-offenders, typically first-timers and misdemeanants, from certain disabilities, bars to employment, or ineligibility for occupational licenses. They are usually available for a wider range of offenses than sealing and expungement and in some jurisdictions represent the first step in the pardon process.⁹³ They are generally not governed by any standard process and seldom offer predictable relief.⁹⁴

The different rationales underlying “editing” a criminal history record and acknowledging rehabilitation were vividly expressed by Judge John Gleeson in issuing a “federal certificate of rehabilitation” to a woman he had sentenced thirteen years earlier: “There are two general approaches to limiting the collateral consequences of convictions: (1) the ‘forgetting’ model, in which a criminal record is deleted or expunged so that society may forget that the conviction ever hap-

91. Blumstein & Nakamura, *Redemption in the Presence*, *supra* note 87, at 349.

92. Subramanian et al., *supra* note 90, at 11; see also Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 726 (2012) (noting that in NY State such certificates “create a presumption of rehabilitation that an employer or licensing agency must consider in evaluating the impact of an applicant’s criminal conviction.”).

93. At least ten jurisdictions provide for issuance of certificates of rehabilitation. Proposals are under discussion nationwide. See Love, *50-State Comparison*, *supra* note 84; see also Heather J. Garretson, *Legislating Forgiveness: A Study of Post-Conviction Certificates as Policy to Address the Employment Consequences of a Conviction*, 25 B.U. PUB. INT. L.J. 1, 15–23 (2016).

94. See, e.g., Alec Ewald, *Rights Restoration and the Entanglement of US Criminal and Civil Law: A Study of New York’s “Certificates of Relief,”* 41 LAW & SOC. INQUIRY 5, 6–7, 17–23 (2016).

pened; and (2) the ‘forgiveness’ model, which acknowledges the conviction but uses a certificate of rehabilitation or a pardon to symbolize society’s forgiveness of the underlying offense conduct.”⁹⁵

Scholars who believe concealment of CCRs is an undesirable and counterproductive shortcut in the reentry process favor certificates of rehabilitation.⁹⁶ This is because such certificates do not remove information from a person’s criminal history but aim instead “to confront history squarely with evidence of change.”⁹⁷

D. Critique

These various remedial measures cannot substantially limit mass dissemination of CCRs and the stigma and discrimination they cause and enable. “Ban the Box” laws prohibit inquiries about an applicant’s criminal history prior to an initial interview (or, in fewer cases, a conditional job offer), but do not protect applicants from invidious use of their record. After the initial screening, employers may conduct background checks and take the applicant’s criminal history into account in making a decision.

Sealing and expungement after the passage of a crime-free period are backward-looking certifications of something that has already happened—successful reentry and redemption. They do not actively help ex-offenders in reentry by tackling stigma and discrimination immediately after release or discharge. As James Jacobs observes, “if expungement and sealing are meant to facilitate (rather than recognize) rehabilitation, they should occur much sooner” for “[e]x-offenders need the most assistance immediately after release from prison or termination of sentence.”⁹⁸

95. *Jane Doe v. United States*, No. 15-MC-1174, 2016 U.S. Dist. LEXIS 29162, at *53 (E.D.N.Y., Mar. 7, 2016) (holding that even absent specific statutory provisions, federal courts have authority to mitigate the adverse effects of a criminal record short of sealing or expungement schemes).

96. See, e.g., Bernard Kogon & Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 378, 381 (1970).

97. Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1711–13 (2003) [hereinafter Love, *Starting Over*] (noting that this was the approach of section 306.6 of the 1962 draft of the American Law Institute’s Model Penal Code, “Order Removing Disqualifications or Disabilities; Vacation of Conviction; Effect of Order of removal or vacation”, part of Article 306 on “Loss and Restoration of Rights incident to Conviction and Imprisonment.” Section 306.6(1) provided for a court-issued order removing disqualifications or disabilities upon completion of the sentence imposed; section 306.6(2) provided for an order of removal or vacation of the judgment of conviction issued by the court in case of discharge from probation or parole before the expiration of the maximum term, or following a crime-free period of at least five years).

98. JACOBS, *THE ETERNAL CRIMINAL RECORD*, *supra* note 1, at 131.

Furthermore, proponents of sealing and expungement seemingly ignore the durability of CCRs in the age of Big Data. Information about criminal records cannot be effectively “undone” after it has been widely available for several years. Expungements and non-disclosure orders issued in the interim are often not reflected in the released record, so that sealed and expunged convictions continue to re-emerge long into the future.⁹⁹ Sealing and expungement thus primarily represent a “symbolic gesture” since pervasive background checking has greatly diminished their effectiveness as relief mechanisms based on concealment.¹⁰⁰

Private vendors (known as “consumer reporting agencies,” or CRAs) which obtain conviction information for commercial dissemination¹⁰¹ have a duty to utilize reasonable procedures to obtain maximum possible accuracy, but neither the Federal Trade Commission nor courts considering lawsuits for willful and negligent noncompliance with the Fair Credit Reporting Act (FCRA)¹⁰² have historically been willing to relentlessly control or sanction disclosure of inaccurate conviction data.¹⁰³ The result is an inadequate regulatory regime that “fails to regulate the release of harmful, false information and then

99. See Adam Liptak, *Criminal Records Erased by Courts Live to Tell Tales*, N.Y. TIMES (Oct. 17, 2006), http://www.nytimes.com/2006/10/17/us/17expunge.html?_r=0 (“[R]eal expungement is becoming significantly harder to accomplish in the electronic age. Records once held only in paper form by law enforcement agencies, courts and corrections departments are now routinely digitized and sold in bulk to the private sector. Some commercial databases now contain more than 100 million criminal records. They are updated only fitfully, and expunged records now often turn up in criminal background checks ordered by employers and landlords.”).

100. Love, *Paying Their Debt* *supra* note 2, at 777–78.

101. See BERNARD E. HARCOURT, EXPOSED: DESIRE AND DISOBEDIENCE IN THE DIGITAL AGE 205 (2015) [hereinafter HARCOURT, EXPOSED] (“Following in the footsteps of the “credit scores” that were developed during the 1950s, we are seeing today the proliferation and extension of this scoring logic to all facets of life.”). Interestingly, CRAs can report negative information for seven to ten years depending on the nature of the negative item. Yet information about criminal convictions may be reported without any time limitation.

102. Fair Credit Reporting Act, 15 USC § 1681 et seq.; Title X of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act) of 2010 transferred some regulatory and enforcement powers to the Consumer Financial Protection Bureau (CFPB).

103. See Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 268, 270 (2013) (noting that “the FCRA does not impose any affirmative duties on data brokers to update their records, and its enforcement provisions still put the onus of ensuring compliance on individual persons”; “courts have interpreted the responsibilities of data brokers under the FCRA’s accuracy provisions to be so minimal that plaintiffs rarely prevail in such suits”); see also JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 152–55 (discussing, however, recent signs of a possible new trend in public and private enforcement).

fails to provide an adequate remedy for those who are directly harmed when the information is released.”¹⁰⁴

Finally, unlike orders to seal or expunge a record of conviction, certificates of relief or rehabilitation granted after the completion of the sentence do not rewrite history. They are merely complementary. They are issued to the concerned person and are not recorded in the official criminal history record to which third parties have access. This substantially limits their effectiveness in reducing stigma and related discriminations.¹⁰⁵

None of these initiatives meant to help ex-offenders overcome burdens associated with records of convictions is sufficiently broad in scope or practical effect. Advocates seem to understand the punitive nature of informal collateral sanctions but seem to be reluctant to address the problems head-on.¹⁰⁶ This is tantamount to acknowledging the ailment but offering only palliative cures, rather than directly tackling the causes.

IV. FROM REHABILITATION TO PUBLIC STIGMATIZATION

Consideration and use of CCRs have changed substantially in recent decades. Until the mid-1970s both the dominant ideal of rehabilitation in sentencing and corrections and practical hurdles to obtaining access to criminal history information prevented wide availability and dissemination outside the criminal justice system. Things have dramatically changed. Penal policies became harsher, fueling substantial growth in the number of Americans with criminal convictions. The interplay with other factors unsealed a Pandora's Box.

Ready access to and massive dissemination of CCRs have become distinctive facets of American punitiveness. They are unparal-

104. Wayne, *supra* note 103, at 270; see also Noam Weiss, *Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act*, 78 BROOK. L. REV. 271, 274–75 (2012) [hereinafter Weiss, *Combating Inaccuracies*] (noting that the FCRA is not construed as a strict liability statute, “provid[ing] for liability only in cases of negligent or willful noncompliance.” This is true in general under § 1681e(b), and also when CRAs are furnishing criminal background reports for employment purposes created using public records that “are likely to have an adverse effect upon a consumer’s ability to obtain employment” (§ 1681k)).

105. JACOBS, *THE ETERNAL CRIMINAL RECORD*, *supra* note 1, at 128 (noting that to serve this purpose, certificates of rehabilitation should “be recorded on the offender’s rap sheet or at least be made easily available to criminal background checkers”).

106. See, e.g., Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 162 (1999) [hereinafter Demleitner, *Preventing Internal Exile*]; see also Pinard, *Confronting Issues of Race*, *supra* note 66, at 648.

leled in other Western countries. This is not inconsistent with other signs of remarkable American severity like mass incarceration and the proliferation of three-strikes, mandatory minimum sentence, and truth-in-sentencing laws, all of which resulted from deliberate policy decisions. However, proliferation of CCRs did not happen by design but resulted from other uncoordinated developments. These include legal and policy implications of the reinvigorated “open records” movement in the post-Watergate era, rapid development of information technology that facilitated the shift from paper to electronic databases, and the emergence and near exponential spread of the Internet.

A. Pre-mid-1970s

1. Prioritizing Reintegration

Until the mid-1970s, there was nothing exceptional about the American approach to CCRs. On the contrary, there were clear parallels on both sides of the Atlantic. Rehabilitation was regarded as the main goal of punishment, and there was widespread agreement that limiting access to conviction records outside the criminal justice system made sense both for the convicted person and for society at large.¹⁰⁷ Were ex-offenders able to re-enter society as productive members, society would benefit from lower rates of recidivism and reduced spending for law enforcement and corrections. Criminal history records were thus best kept confidential in order not to negatively affect ex-offenders’ efforts at successful reentry.

When maintenance of criminal conviction records first became possible,¹⁰⁸ policy-makers and law reformers immediately recognized the risks of stigmatization they posed, and also recognized that stigmatization would undermine and frustrate offenders’ efforts to live law-abiding future lives. As a result, both in individual countries and in multi-national fora, initiatives were organized that sought to establish rational and effective policies. American policy-makers and law re-

107. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 193 (2003) (noting that “the differences in punishment practice between the United States and Europe seemed to be vanishing for a long time. Until about 1975, there was something of an international orthodoxy, founded in an international triumph of modernist programs of rehabilitation. For a good century, punishment professionals everywhere in the West believed that individualized punishment, founded in social scientific and psychotherapeutic techniques, had permanently displaced older ideas of retribution”) [hereinafter WHITMAN, *HARSH JUSTICE*].

108. See *supra* Part I.

formers were often involved and reached much the same conclusions as their European colleagues.

The transatlantic convergence is documented in the reports of the session on Penal Registers and Social Rehabilitation at the Twelfth International Penal and Penitentiary Congress held in The Hague in 1950. The creation of national criminal record repositories was unanimously supported, but concerns were widely expressed about impediments to successful reentry that might result from public access to former offenders' conviction records.

The European position was summarized by the Dutch magistrate and law professor M.P. Vrij. He stressed that accurate penal registers would not only serve essential functions in the administration of criminal justice but also improve criminological research and judicial statistics by providing "information of an impersonal nature."¹⁰⁹ However, he insisted that making penal registers accessible to the general public would be highly problematic: "Experience has demonstrated that moralization induced by the beginner's salutary fear of having a 'register' cannot balance the demoralization of the convicted offender caused by the disastrous aversion which people have for all those who 'have one.'"¹¹⁰

William Shands Meacham, chairman of the Virginia Parole Board, first director of the parole section of the National Probation and Parole Association, and the country reporter for the U.S., echoed concerns about public availability and dissemination:

The keeping of the complete record of the offender is an essential of scientific procedures in the administration of justice and in penal administration. But the record should be so securely kept by the court and by the penal administration that it will be sealed against a curious public and press. Then it will never arise to haunt an offender whose civil rights are precious where they exist, a God-given gift of government today.¹¹¹

American criminal justice scholars, reformers, and practitioners wanted to minimize the stigmatizing effects of a criminal record. It was common to find passionate writings in law journals advocating for

109. M.P. Vrij, *General Report, Session on Penal Register and Social Rehabilitation*, in 5 PROCEEDINGS OF THE TWELFTH INT'L. PENAL AND PENITENTIARY CONG., THE HAGUE, 4-19 AUGUST 1950, V, GEN. AND NAT'L. REPORTS OF SECTION III 360, 364 (1951).

110. *Id.*

111. William Shands Meacham, *National Report*, in 5 PROCEEDINGS OF THE TWELFTH INT'L PENAL AND PENITENTIARY CONG., THE HAGUE, 4-19 AUGUST 1950, V, GEN. AND NAT'L. REPORTS OF SECTION III 429, 434 (1951).

reforms in how criminal history information was maintained and disclosed. Scholars argued that once a sentence had been served, the offender's debt to society should be considered paid in full. Branding her with a permanent mark of deviance would be unjust and inimical to a successful reentry.¹¹²

Professor and federal Parole Board chairman Paul Tappan pointed out that rehabilitation would be achievable only if society understood that "the convicted offender can become a first-class citizen only when he is treated as one."¹¹³ Others stressed that although the law formally honors the principle of double jeopardy, it fosters "multiple social jeopardy" by allowing public access to criminal records and thereby placing ex-offenders permanently among the "condemned of our society" who are held to "repetitious and humiliating accountings" because of their criminal past.¹¹⁴ In this climate, much attention was devoted to mechanisms for eliminating (or at least mitigating) "status-generated penalties" that follow a criminal conviction.¹¹⁵

2. "Juvenilization" of Conviction Records

The goal of giving convicted individuals a "clean slate" immediately after release or discharge became a priority for reform advocates and scholars. The most radical approach was taken by proponents of "youth offender procedures" in which offenders were sentenced without being "convicted" as in adult criminal proceedings.¹¹⁶ The final discharge from parole or probation or release from prison would not only restore all of the ex-offender's civil rights but automatically expunge any record of the conviction that might otherwise be released to third parties for non-criminal justice purposes.

Aidan Gough called for a "juvenilization" of adjudication records of adult offenders by means of keeping conviction information confi-

112. See, e.g., Nelson M. Oneglia, *Criminal Records—Valuable Investigative Tool or Public Branding Iron?*, 1 MD. L. F. 20, 21 (1971) ("[O]nce an individual has served his sentence, his debt to society is paid in full. Therefore, there is nothing to be gained by branding a person forever as an outcast"); see also Arnold T. Lieberman & Dawn B. Girard, *Punishment: The Reward for Guilt*, 5 BUFF. L. REV. 304, 308 (1956) ("[P]unishment must not have an effect of disgracing the individual in the eyes of his peers.").

113. Paul W. Tappan, *Loss and Restoration of Civil Rights of Offenders*, in CRIME PREVENTION THROUGH TREATMENT 86, 104 (Matthew Matlin ed., 1952).

114. Pasco L. Schiavo, *Condemned by the Record*, 55 A.B.A. J. 540, 540 (1969).

115. See Love, *Paying Their Debt*, *supra* note 2, at 759.

116. See NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, CORR., Commentary to Standard 16.17, Collateral Consequences of a Criminal Conviction 593 (1973).

dential outside the criminal justice system.¹¹⁷ The main goal was to remedy “the failure of the criminal law to clarify the status of the reformed offender imped[ing] the objective of reintegrating him with the society from which he has become estranged.”¹¹⁸

The aim was thus clear: “restricting or preventing public access to criminal records of individuals who have satisfied the penalties imposed upon them by the law.”¹¹⁹ The proposed new rules, it was argued, would lead to “the abolition of the additional penalty so frequently imposed by public opinion”¹²⁰ in both supplementary stigmatization and social discrimination. Under leading proposals, ex-offenders would have been entitled to deny that they had ever been criminally convicted. Expungement was not to be seen as “hamper[ing] effective law enforcement,” but as an “adjuvant to the goal of the correctional law,” providing “a potent incentive to reformation,” and making the response to crime “less febrile and more effectual.”¹²¹

In balancing competing interests between successful reintegration of convicted people and the public’s “right to know,” the effective rehabilitation of ex-offenders was seen as justifying non-disclosure of criminal history information.

3. Practical Obscurity of Criminal History Information

Until the mid-1970s, criminal history information was largely inaccessible. Criminal record repositories were often not open to the general public. They were started primarily to address the need

117. Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 148 (1966). On the rationale of nondisclosure of juvenile records, see James B. Jacobs, *Juvenile Criminal Record Confidentiality*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 149, 151 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (explaining that by the late 1920s, “[t]he majority of states passed laws limiting disclosure of information about adjudication and arrests” outside the criminal justice system and selected government agencies. Some states also “required that the case file automatically be sealed when the respondent turned 21 so that the delinquent youth could embark upon adulthood without a criminal stigma”).

118. Gough, *supra* note 117.

119. Dale Hilmen & Peter D. Pettler, Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CAL. W. L. REV. 121, 132 (1967).

120. *Id.*

121. Gough, *supra* note 117, at 190; see also Linda S. Buethe, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma*, 58 NEB. L. REV. 1087, 1108 (1979) (noting that in balancing the individual’s need for a ‘fresh start’ and the public’s interest in the access of conviction records, legislatures and policy-makers should be “sympathetic to the hardships and disabilities attendant to [persons with] a criminal record”).

for good record keeping and information sharing within the criminal justice system¹²².

Until relatively recently, access to records of arrests and convictions was generally only available to law enforcement agencies, prosecutors, and judges. Where records were accessible to the public in “open records” states, repositories were neither systematically updated nor available in digital format.¹²³ Criminal history information languished in the “practical obscurity”¹²⁴ that until the 1970s characterized most public records: “Finding information about a person often involved a treasure hunt around the country to a series of local offices to dig up records.”¹²⁵

Unlike records maintained in state and police databases, confidentiality and other privacy concerns have historically been less acute with regard to court records.¹²⁶ The possibility for the public to verify what happens in courts during public hearings¹²⁷ and, retrospectively, what happened through the inspection of court records has traditionally been seen as contributing to the overall trustworthiness of the criminal justice system.¹²⁸ However, the public’s right to access court

122. See *supra* Part I.B.

123. See Diana R. Gordon, *The Electronic Panopticon: A Case Study of the Development of the National Criminal Records System*, 15 POL. SOC. 483, 483 (1987) (“Computerized criminal justice record keeping has grown to immense proportions in the United States since the early 1970s.”).

124. The concept has been first articulated in *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989) (noting that despite most criminal history information in FBI-held rap sheets being public, citizens long benefited from their practical inaccessibility).

125. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1139 (2002); see Nancy S. Marde, *From “Practical Obscurity” to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 441 (2009) (quoting Justice Stevens’ majority opinion in *Reporters Comm. for Freedom of the Press*, 489 U.S. at 764: “[T]here is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”); see also Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 21 (2013) (noting that the concept “typically focuses on off-line impediments to data retrieval” and is related to the “extremely high cost and low likelihood of the information being compiled by the public”).

126. See JACOBS, *THE ETERNAL CRIMINAL RECORD*, *supra* note 1, at 190–91. Records of criminal proceedings, including CCRs, have always been intended to be public and open to search to prevent abuses associated in history with secret criminal proceedings.

127. The underlying assumption is that not only must justice be done, it must also be seen to be done. See AKHIL R. AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 104 (1998) (“[T]he public has interests, independent of criminal defendant, in monitoring judges, police, and prosecutors.”).

128. See Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 982 (2008) (“The idea that criminal procedures, records, and outcomes should be public, and that the public and the media should have access to trial pro-

records was never intended to serve a stigmatizing function. When the principle was established, “unofficial” punitive effects related to the nearly effortless access and mass dissemination of criminal history information made possible by information technology and commercial data vendors were not in sight.¹²⁹ Information contained in otherwise public records benefited from the “forgetfulness of predigital days.”¹³⁰

Like state and police criminal records, court records of criminal proceedings were not available in computerized databases before the digital revolution. Hence, notwithstanding the fact that U.S. courts have a longstanding tradition of permitting open access to their records,¹³¹ significant effort and sometimes expertise were required to find out whether an individual had been convicted of a crime.

Access was anything but convenient for the general public. Records were kept in paper files (later, on magnetic tape) stored in courthouses throughout the country. Although technically accessible to anyone without the need to demonstrate a legitimate reason or interest, access to such records were neither easily nor frequently achieved in practice. Until the advent of digital databases and the Internet, they were far removed from the public eye and did not systematically burden ex-offenders.¹³² This way, public’s access to public records and reintegration into community largely managed to coexist.

ceedings . . . is part of a larger democratic commitment to public accountability and responsiveness.”).

129. See *infra* Part IV.B.3.

130. David Streitfeld, *European Court Lets Users Erase Records on Web*, N.Y. TIMES (May 13, 2014), <http://www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html> (quoting Professor Viktor Mayer-Schönberger); see also VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* (2009) (arguing that today’s digital memory has the capacity to trap us in the past, and stressing the important role that forgetting has played throughout human history also in regard to the possibility of second chances).

131. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (finding a common law right of access to judicial records); see also DANIEL J. SOLOVE, *THE DIGITAL PERSONA: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 133 (2004); see also Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 785–86 (2012) (“Judicial openness has two components: the right of access to trials themselves, and the right of access to judicial documents for inspection and copying”).

132. See *infra* Part III.B.3. In this respect, to those arguing that limiting access to court records would defeat the public nature of the court system, it has been replied that courts and legislatures in several instances have already “weighed the commitment to public access to records against considerations of safety, stigma, shame, unfair disadvantage, and reputational damage to concerned parties.” Conley et al., *supra* note 131, at 826.

B. Mid-1970s to Date

1. A Distinctive Facet of American Penal Excess

Despite a genuine reformatory effort, no comprehensive legislation was passed at federal or state levels to reduce negative repercussions on ex-offenders from disclosure and dissemination of conviction records. When support for rehabilitation as a goal of sentencing and corrections precipitately dropped after the mid-1970s,¹³³ attitudes towards public access to conviction records also changed.

In the new politics of crime and punishment, anything perceived potentially to reduce public safety and increase the risk of re-offending largely disappeared from the agenda. Publicity and dissemination of conviction records ceased being challenged as a roadblock to reentry. Concern for public safety nearly entirely smothered earlier concerns about indiscriminate accessibility to CCRs.¹³⁴ This shift in sensibilities surrounding reentry of ex-offenders eventually undermined policies that sought to insulate former offenders from stigma associated with a conviction.

Statutes providing for sealing or expungement of adult conviction records were not immune. They were criticized as a substantial limit on citizens' access to judicial records and, more broadly, to the exercise of First Amendment rights by the press and public at large.¹³⁵ As Colgate Love recounts, "criminals were to be labeled and segregated for the protection of society, not reclaimed and forgiven Permanent changes in a criminal offender's legal status served to emphasize his 'other-ness.'"¹³⁶

133. See, e.g., Michael Tonry, *Explanations of American Punishment Policies: A National History*, 11 PUNISHMENT & SOC'Y 377, 379 (2009) ("Between 1975 and 1995, policymakers enacted a wide range of laws meant to make punishments severer, and practitioners applied those laws"); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536 (2001) (noting that by the late 1970s, "felony prosecutions were then rising steeply . . . much faster than growth in crime rates (by the late 1970s, crime rate were holding steady). The natural explanation is that public demand for more law enforcement caught up with the prosecutors' offices.").

134. See, e.g., Demleitner, *Preventing Internal Exile*, *supra* note 106, at 160 (observing that in the U.S. "collateral" sentencing consequences "label the ex-offender an 'outcast,' and frequently make it impossible for her ever to regain full societal membership").

135. See, e.g., Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 750 (1981) (observing that expungement "introduces its own brand of implicit dishonesty. For even where convicts and officials are not authorized or required to lie, the very act of expunging is an attempt to conceal the past and to convey to inquirers the impression that something that has in fact occurred has not.").

136. Love, *Starting Over*, *supra* note 97, at 1716.

While before the 1970s reform advocates proposed laws and remedies granting offenders a sort of “civil rebirth” upon discharge, it has become almost impossible for people with criminal convictions to enjoy a real fresh start.¹³⁷ However, the shift in American penal policies starting in the mid-1970s was not the only factor making publicity and dissemination of conviction records a distinctive facet of American penal policy.

2. Post-Watergate Open Records Movement

Openness and transparency of government are values at the core of the American institutional framework. Access to information has historically been seen as essential to assure that people exercise political power in responsible ways.¹³⁸

The First Amendment was primarily built on distrust of government. Unlike in Europe, where nations achieved “bureaucratic rationalization” before they firmly established democratic institutions, in the United States “democracy came first.”¹³⁹ As a result, “state institutions developed in the context of democratic control, which led overall to more politicized, rather than nonpartisan, public administration.”¹⁴⁰ Distrust of government has been embedded in American society since its inception. The public’s access to records produced by the executive was seen as crucial. Accordingly, early on the public requested tools through which “monitor and check the actions of the executive branch.”¹⁴¹

Wisconsin in 1849 was the first state to pass open records legislation. Only nine states lacked similar laws prior to enactment of the

137. Given the impracticability of effectively hiding one’s criminal past, it has been suggested that ex-offenders who have committed comparatively less serious crimes might “favor more granular disclosure” in order to separate themselves from those who have committed more serious crimes. See Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy*, 126 HARV. L. REV. 2010, 2020 (2013).

138. See DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* 25 (2016).

139. *Id.*

140. *Id.* (noting that this is “a difference of fundamental importance for American criminal justice system”); see also GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* (1999).

141. Amanda Frost, *Restoring Faith in Government: Transparency Reform in the United States and the European Union*, 9 EUR. PUB. L. 87, 88 (2003); see also Frederick Schauer, *The Exceptional First Amendment*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29, 47 (Michael Ignatieff ed., 2005) (arguing that the First Amendment represents “the natural repository for a culture in which libertarianism, laissez-faire, and distrust of government remain the hallmarks of a distinctive American ideology”).

federal Freedom of Information Act (FOIA) in 1966.¹⁴² Open government and access to information were considered to be, as they are today, “the general rule from which exceptions should be made only where there are substantial rights, interests, and considerations requiring secrecy or confidentiality.”¹⁴³

The 1974 Watergate scandal that led to President Nixon’s resignation revamped the “open records” movement and had lasting effects on the already embedded Americans’ distrust in government.¹⁴⁴ The scandal encouraged more active scrutiny of government and established suspicions about any concealment of official records.¹⁴⁵ Non-accessibility of criminal history records made no exception and was soon questioned.

In 1975, federal regulation was promulgated regarding the collection, storage and dissemination of criminal history information with the aim of ensuring its accuracy and protecting the privacy of individuals.¹⁴⁶ The initial rules concerned both arrest and conviction records. Access to both non-conviction and conviction information was limited

142. See generally NAT’L ASSOC. OF CTY., OPEN RECORDS LAWS: A STATE BY STATE REPORT (2010), <http://www.naco.org/sites/default/files/documents/Open%20Records%20Laws%20A%20State%20by%20State%20Report.pdf>.

143. Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 4 (1957). Parks is usually credited as the first to use the term “open government” in print.

144. See Julian Zelizer, *Distrustful Americans Still Live in Age of Watergate* (July 7, 2014), <http://www.cnn.com/2014/07/07/opinion/zelizer-watergate-politics/> (noting that “[t]he worst effect of Watergate is that it created a climate where Americans fundamentally don’t trust their government”); see also Michael Schudson, *Notes on a Scandal and the Watergate Legacy*, 47 AM. BEHAV. SCI. 1231, 1236 (2004) (“Cynicism about politics has advanced to new heights in our own day, but how could this be otherwise? The challenge of sincerity in a disillusioned, post-Vietnam, post-Watergate media age is overwhelming, tried and tested on a daily basis”). From a criminal justice perspective, see Franklin E. Zimring & David T. Johnson, *Public Opinion and the Governance of Punishment in Democratic Political Systems*, 605 ANN. AM. ACAD. POL. SOC. SCI. 266, 276 (2006) (arguing that besides growth in salience of crime as a public concern, “[a] second major shift in rhetoric and opinion that was generated since the 1970s is a decline in trust in government. This occurred toward all levels of government but has had a number of criminal justice manifestations. The last thirty-five years of the twentieth century produced some epic provocations for distrust of government, including Vietnam and Watergate.”); see generally BILL D. MOYERS, *THE SECRET GOVERNMENT: THE CONSTITUTION IN CRISIS* (1988) (analyzing public scrutiny surrounding executive powers during Watergate and the Iran-Contra affair).

145. In the wake of Watergate, Congress amended the federal Freedom of Information Act (FOIA) of 1966, overriding President Ford’s veto. The original provisions had proven to be toothless and ineffective. See Thomas Blanton, *The World’s Right to Know*, 131 FOREIGN POL’Y. 50, 52 (2002) (“The U.S. FOIA would not be as far-reaching had it not been for Watergate.”).

146. See 28 C.F.R. § 20.1 (1975). The rules set out in Title 28, Code of Part 20 of the Federal Regulations apply to the Federal Government and to all states whose criminal history repository systems have been fully or partly funded with federal funds (almost every state had received funds through LEAA).

to law enforcement personnel, courts, and others with a specific and significant “need to know.”¹⁴⁷

That privacy-premised approach provoked vocal opposition that included private employers and the press. Following these protests, public hearings were held at which major criticisms were offered. Besides noting that the regulations were very different from public records laws in some states, witnesses stressed the need for access to conviction information during hiring in order to identify potential threats for other employees and the general public, and to control risks of lawsuits based on the doctrine of negligent hiring.¹⁴⁸ Amendments to the original regulations were soon promulgated.

New provisions made it explicit that limitations to dissemination “do not apply to conviction data.”¹⁴⁹ However, the Commentary noted that while “[n]o statute, ordinance, executive order, or court rule is necessary in order to authorize dissemination of conviction data . . . nothing in the regulations shall be construed to negate a state law limiting such dissemination.”¹⁵⁰

Another important factor influencing expanded availability of CCRs was the Supreme Court ruling in *Paul v. Davis* that official criminal justice records do not fall within the constitutional zone of privacy.¹⁵¹ The Court thus granted the states substantial autonomy.¹⁵²

147. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 10 (2003). The dissemination provision of the 1975 regulation granted access to criminal history information to authorized noncriminal justice agencies only if “a statute or executive order expressly referred to criminal conduct and contained requirements and/or exclusions based upon such conduct.” See Thomas J. Madden & Helen S. Lessin, *Privacy: A Case for Accurate and Complete Criminal History Records*, 22 VILL. L. REV. 1191, 1193 (1977) [hereinafter Madden & Lessin, *Privacy*]. But see 28 C.F.R. § 20.21 (1975).

148. Madden & Lessin, *Privacy*, *supra* note 147, at 1193–96. A tort claim for negligent hiring can be made against an employer when an employee causes injury to a customer or co-worker, and the employer failed to take reasonable action in hiring that could have prevented the injury. It is based on the theory that the employer knew or should have known about the employee’s background which, if known, indicates a dangerous or untrustworthy character. In many states “[l]iability often turns on the issue of foreseeability . . . Other states rely more heavily on the “totality of the circumstances” which would indicate a propensity to cause harm.” See Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 5 ST. LOUIS U. L.J. 1001, 1107–08 (2011).

149. 28 C.F.R. § 20.21(b) (41 FR 11715, Mar. 19, 1976, as amended at 42 FR 61595, Dec. 6, 1977).

150. 28 C.F.R. Part 20, Appendix to Part 20—Commentary on Selected Sections of the Regulations on Criminal History Record Information Systems, §20.21(b). “Closed records” states have chosen to restrict public access to government-held criminal history information

151. *Paul v. Davis*, 424 U.S. 693, 713 (1976) (finding that the constitutional right to privacy is limited to “matters relating to marriage, procreation, contraception, family relationships, child rearing and education”).

152. See Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276, 286 (2004) (“The net result [of the ruling

Following this shift, “dissemination policies for arrest and, of course, conviction record information, became almost entirely a matter of legislative choice.”¹⁵³ However, two real game changers were still to come.

3. Game Changers: Information Technology and the Internet

In 1972, LEAA established the Comprehensive Data Systems Program to provide funds to states for development of criminal history repositories. By 1976, twenty-six states had used LEAA funding to create computerized state repositories of criminal history information.¹⁵⁴ In the late 1970s, SEARCH—an LEAA-funded organization established in 1969 to serve as the clearinghouse for the development of systems and policies regarding information sharing of criminal records nationwide—and the FBI first envisioned the “Triple I” system.¹⁵⁵ Triple I was conceived as an integrated system that would indicate in which state particular criminal history information could be found. It replaced the Computerized Criminal History (CCH) program, established in 1971 as a national centralized repository, following recognition of the greater completeness and accuracy of state criminal history repositories.¹⁵⁶

The digitalization of criminal history record-keeping at the repository level was praised for the increased efficiency. Yet concerns posed by the computerization of such data were also highlighted, primarily related to risks of enhanced social control through digital agglomeration of information.¹⁵⁷ Enactment of data confidentiality

in *Paul v. Davis*] has been a great diversity of statutory schemes in the states, although the national trend is for a steadily increasing volume of authorized noncriminal justice use.”).

153. ROBERT R. BELAIR, PUBLIC ACCESS TO CRIMINAL HISTORY RECORD INFORMATION 13–14 (1988).

154. U.S. DEP’T OF JUST., USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE 26 (2001) [hereinafter CRIMINAL HISTORY RECORD Report]; see also Don L. Doernberg & Donald H. Zeigler, *Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems*, 55 N.Y.U. L. REV. 1110, 1112–13 (1980) (noting that during the 1970s, “computerized criminal history information systems have proliferated at the federal, state, and local levels” even though at this early stage “with virtually no coordination or effective regulation”).

155. See *supra* Part I.B.

156. CRIMINAL HISTORY RECORD Report, *supra* note 154, at 73–77.

157. David Weinstein, *Confidentiality of Criminal Records Privacy v. The Public Interest*, 22 VILL. L. REV. 1205, 1212 (1977) [hereinafter Weinstein, *Confidentiality of Criminal Records Privacy*] (“The general public sees little or no connection between collection and computerization of information about ‘criminals’ and its own ‘privacy’ and related interests. The immediate problem of controlling criminal behavior precludes serious consideration of remote and uncertain consequences. If the computer can be used to ‘fight crime,’ then the public is behind it”). In his concurring opinion in *Whalen v. Roe*, Justice Brennan wrote, “The central storage and easy ac-

policies was proposed to address “unintended” consequences of ready availability and widespread use of criminal history information.¹⁵⁸

However, today even in jurisdictions in which criminal history information in centralized repositories is classified as confidential,¹⁵⁹ two factors substantially frustrate restrictions on disclosure and dissemination: the competing principle of the openness of court records, now digitized,¹⁶⁰ and the advent and spread of the Internet. (Adults with an Internet connection in the U.S. grew from 14 percent in 1995 to 84 percent in 2015).¹⁶¹

As a result, there are stark contradictions between the principle of open access to court records, including criminal case information, and policies in some states that make criminal history information in government databases exempt from disclosure. Alaska is illustrative. At the state repository level, criminal history information is as a rule confidential and available to private requestors only with the cooperation of the record subject.¹⁶² However, the website of the Alaska Court System allows anyone to search online for criminal case information including closed charges by case number or name of the defendant.¹⁶³

In addition to online court system databases in either “closed” and “open” records states, a new private business sector has developed that collects criminal record data and sells it to employers, land-

cessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.” *Whalen v. Roe*, 429 U.S. 589, 607 (1977) (Brennan, J., concurring) (The case involved a New York State drug-control law requiring reporting and storage of information concerning prescriptions for a certain class of drugs).

158. Weinstein, *Confidentiality of Criminal Records Privacy*, *supra* note 157, at 1212.

159. Although all fifty states have passed some form of open records or FOIA legislation, many jurisdictions provide for multiple exceptions making some information not available for public inspection (often including criminal history information). When CCRs are not made exempt by the law, a written consent of the “record subject” is often requested.

160. Publicity of CCRs is not narrowly tied to a physical court record anymore, but to the accessibility of the channels through which such information can be obtained.

161. See *Americans Going Online . . . Explosive Growth, Uncertain Destinations*, PEW RES. CTR. (Oct. 16, 1995), <http://www.people-press.org/1995/10/16/americans-going-online-explosive-growth-uncertain-destinations/>; see also Andrew Perrin & Maeve Duggan, *Americans’ Internet Access: 2000-2015*, PEW RES. CTR. (June 26, 2015), <http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/>.

162. See ALASKA STAT. § 12.62.160 (2015) (“Release and use of criminal justice information; fees. (a) Criminal justice information and the identity of recipients of criminal justice information are confidential and exempt from disclosure The existence or nonexistence of criminal justice information may not be released to or confirmed to any person except as provided in this section and AS 12.62.180(d).”).

163. See ALASKA COURT SYSTEM, COURTVIEW PUBLIC ACCESS WEBSITE, <http://www.courtrecords.alaska.gov/eservices/home.page.2> (last visited Sep. 20, 2016).

lords, and concerned or curious citizens. Everyone has, at his or her fingertips, access to criminal history information about any other person concerning whom they possess biographical details as basic as a full name or city of residence. Readily accessible and inexpensive criminal history data were instrumental in stimulating demand, and exponentially increasing demand has stimulated supply.¹⁶⁴

As the history of the Pinkerton Agency demonstrates,¹⁶⁵ private collectors and providers of criminal record information have been part of the American criminal justice system since its inception. Private brokers of criminal records have historically played a distinctive role, largely because they have been the only organizations able to collect, compile, and provide records nationwide. The Internet has multiplied their capacities. The scale of their role in contemporary IT society is unprecedented.

Private vendors build and update their databases in various ways.¹⁶⁶ The majority of state criminal record repositories do not sell criminal history data to commercial organizations in bulk for purposes of re-dissemination.¹⁶⁷ The court systems are the goldmine for commercial vendors in every state, however, especially at the county level. Background check companies purchase criminal records in bulk from clerks of courts either in a static format (such as CDs or microfiches) or by directly downloading court records or databases.¹⁶⁸ Case history

164. See MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T L. PROJECT, 65 MILLION "NEED NOT APPLY" THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT, (Mar. 2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply1.pdf ("In recent years, the criminal background check industry has grown exponentially. . . . [T]he ready availability of inexpensive commercial background checks has made them a popular employee screening tool."); see also Weiss, *Combating Inaccuracies*, *supra* note 104, at 278 (criticizing the over-reliance on criminal background checks as a hurting practice to both ex-offenders and society as a whole). On the implications of the data brokerage business, cf. HARCOURT, EXPOSED, *supra* note 101, at 207 ("The data market—our new behemoth—is the agglomerated space of the public and private spheres, of government, economy, and society. There, corporations surveil and govern, governments do commerce, individuals go public.").

165. See *supra* Part I.B.

166. Sometimes using unconventional methods to collect information such as sending "runners" to courthouses when records cannot be searched or downloaded electronically. See JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 72.

167. See NAT'L CONSORTIUM FOR JUST. INFO. AND STATISTICS, SEARCH MEMBERSHIP SURVEY: BULK SALE OF PUBLIC CRIMINAL HISTORY INFORMATION, (2014), <http://www.search.org/files/pdf/BulkDataSurvey-Dec14.pdf>. In 2006, six states offered bulk data from their criminal history repositories to commercial third parties for re-dissemination. See BUREAU OF JUST. STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012, at 2012, at 19 (2014).

168. See Kevin Lapp, *Databasing Delinquency*, 67 HAST. L.J. 195, 220 (2015). With regard to the federal judiciary, private data brokers regularly harvest the Public Access to Court Electronic Records ("PACER"), a government service providing on-line access to U.S. Appellate,

information is now also frequently attainable via the above-mentioned online state or county court websites searchable by name.¹⁶⁹

Although it may be true that the process of searching online for a person's criminal records is conceptually more akin to "a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality,"¹⁷⁰ over the past two decades, however, an undeniable "tectonic shift has occurred in their accessibility."¹⁷¹ What in the past required a visit to the courthouse and a lengthy and laborious search "is now accomplished with a few keystrokes or a nominal fee to a private firm. As a result, everyday citizens, employers, and landlords now routinely consult criminal databases."¹⁷²

C. An Unintended Development

Sociologist Stanley Cohen showed how eventual outcomes of strategies of punishment and social control can differ from the original design. Good intentions sometimes lead to disastrous consequences.¹⁷³

District, and Bankruptcy court records and documents nationwide. PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, <https://www.pacer.gov/> (last visited Sep. 20, 2016). Only rarely have state legislatures shown concern for the aftermath once court records have been provided to bulk resellers. See JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 59. For a survey of state rules, see *Privacy/Public Access to Court Records: State Links*, NAT'L CTR. FOR STATE COURTS (NCSC), <http://www.ncsc.org/Topics/Access-and-Fairness/Privacy-Public-Access-to-Court-Records/State-Links.aspx?cat=Privacy%20Policies%20for%20Court%20Records> (last visited July 5, 2016). Sporadic state case law has stressed the dangers in bulk sales from court systems to private entities. See, e.g., *Westbrook v. Cty. of Los Angeles*, 27 Cal. App. 4th 157, 165 (1994) (denying a private seller of criminal history information copies of computer tapes of criminal history information. The court observes, "[T]here is a qualitative difference between obtaining information from a specific docket or on a specified individual, and from obtaining docket information on every person against whom criminal charges are pending in the municipal court. If the information were not compiled in [a database], [Westbrook] would have no pecuniary motive (and presumably no interest) in obtaining it. It is the aggregate nature of the information which makes it valuable to the respondent; it is that same quality which makes its dissemination constitutionally dangerous.").

169. See, e.g., *Criminal Court Case History*, JUD. BRANCH OF ARIZ., MARICOPA COUNTY, <https://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseSearch.asp> (last visited Sep. 20, 2016); *Criminal/Motor Vehicle Convictions Search by Defendant*, STATE OF CONNECTICUT JUDICIAL BRANCH CRIMINAL CONVICTION, <http://www.jud2.ct.gov/crdockets/SearchByDefDisp.aspx> (last visited Sep. 20, 2016).

170. *Smith v. Doe*, 538 U.S. 84, 99 (2003).

171. Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 628 (2014).

172. *Id.*

173. STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION 19–21, 88 (1985).

Criminal history information is mostly seen in contemporary America as a means to control “dangerous bodies”¹⁷⁴ through the assessment and management of risks posed by ex-offenders.¹⁷⁵ Readily accessible and widely disseminated CCRs in particular have become an essential tool in pursuit of a zero-risk society.¹⁷⁶

This conception and use of criminal history information is far from the original aims behind the creation of the U.S. criminal record infrastructure. The primary goals were to facilitate the identification of suspects and defendants, and to enhance the legitimacy and strengthen the professionalism of police forces.¹⁷⁷

The advent of the digital age brought “public visibility” and dissemination of criminal convictions to a level that was unimaginable even to its most ardent supporters. The digitalization of criminal records in general, and of CCRs in particular, alongside expanded access to information technology, changed the very essence of such records.

Information technology was viewed as a powerful tool to improve capacities to collect and share criminal history information. Its use in the criminal justice field was never envisioned by the people who proposed and created digital repositories and databases as a means to making the system more punitive. Things turned out otherwise. The spread of the Internet—and the emergence of the data brokers—have made criminal background checking a ubiquitous component of American life and culture.

174. See LOGAN, KNOWLEDGE AS POWER, *supra* note 26, at 83–84.

175. See Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 744 (2011) (stressing how in the last decades, “the criminal has been reimagined from one of us—a person for whom society bears some responsibility and who must therefore be reformed and rehabilitated—to one of them—a monster who must be separated from us and whose behavior must be monitored and controlled.”). On risk management of offenders, see generally Malcom Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992); JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990, at 17–18 (1993).

176. See JEFFREY ROSEN, THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE (2004); see also GARLAND, CULTURE OF CONTROL, *supra* note 13; Gordon, *supra* note 123, at 504 (comparing criminal history information systems to a panoptic scheme “which oppresses its subjects with the potential for surveillance as well as its actuality”).

177. SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM 40 (1977).

V. HOW TO DO BETTER?

This Part argues that publication and dissemination of CCRs clash with the basic principles of proportionality of punishment. Publication of CCRs should be reimagined as an ancillary penalty supplementing the main penalty imposed at sentencing, and taken into account in calculating the punishment deserved, and therefore justly inflicted, for the crime. European penal systems recognize concepts and categories of “ancillary penal sanctions” that are all but unknown to U.S. criminal law, and that American jurisdictions should emulate.

A. Public Conviction Records and Proportionality

Proportionality in sentencing is a widely recognized principle of justice.¹⁷⁸ The notion of proportionality of punishment has two facets.¹⁷⁹ Retributive proportionality maintains that punishment should be scaled to blameworthiness determined by the seriousness of the offense and the culpability of the perpetrator.¹⁸⁰ “Just Deserts” theory¹⁸¹ has represented a key component of sentencing reform in America since the decline in support for indeterminate sentencing in the mid-1970s.¹⁸² A utilitarian notion of proportionality, called “ends-benefits proportionality,” forbids the imposition of penalties that are excessive relative to their likely benefits.¹⁸³ Alice Ristroph observes that “[t]he most sustained and detailed arguments for proportional

178. See, e.g., Andrew Von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55 (1992) ; Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 MOD. L. REV. 451 (2004).

179. Richard S. Frase, *Theories of Proportionality and Desert*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 131, 131 (Joan Petersilia & Kevin R. Reitz eds. 2012) (“Sentencing proportionality—‘making the punishment fit the crime’—is a widely shared goal. Although this concept is most often associated with retributive theories, proportionality principles also play a role in several non-retributive accounts of the purposes of punishment.”).

180. RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 238 (2013) [hereinafter FRASE, JUST SENTENCING].

181. On which see, in particular, the seminal work of ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

182. See MICHAEL TONRY, SENTENCING MATTERS 13 (1996) (observing that starting in the mid-1970s retribution, or “just deserts” displaced rehabilitation in both academic and policy circles, “with unintended consequences that made sentences in many jurisdictions harsher and more mechanical than is necessary or just”); see also *id.*; SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975-2025, at 62–63 (2016).

183. See, e.g., FRASE, JUST SENTENCING, *supra* note 180, at 196; E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 163 (2008).

punishments come not from retributive theorists, but from the advocates of utilitarian theories of punishment.”¹⁸⁴

Making CCRs permanently available to the general public for dissemination conflicts with proportionality considerations from both retributivist and utilitarian perspectives. I consider retributive proportionality first, and then focus on ends-benefits consequentialist analyses.

1. Retributive Proportionality

Indiscriminately public CCRs are primarily at odds with retributive conceptions of punishment. Unlike other sanctions imposed by the legal system, criminal punishment entails “hard treatment” (in particular, deprivation or limitation of liberty, monetary loss) and censure, which implies stigma.¹⁸⁵ Feinberg famously defined punishment as a “symbol of infamy” to indicate the degree of stigma and social ostracism which are generally triggered within non-deviant communities by the imposition of criminal penalties.¹⁸⁶

Hard treatment and stigma represent “dependent components of punishment.”¹⁸⁷ From a retributivist perspective, the offender deserves to be punished with an amount of hardship and deprivation x and by an amount of stigma y proportionate to the degree of his or her blameworthiness. If stigmatization is to be regarded as “a conceptually distinct” element of punishment, then just desert theory of sentencing “must apply its central principles to this component as well as to the more familiar hard treatment or deprivation component of punishment.”¹⁸⁸ Hence, the stigma component of criminal punishment should not be disproportionately imposed. While social stigma is recognized as something an individual must deal with after being convicted of a crime, legislatures and policy-makers cannot justly or

184. Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 272 (2005) (discussing utilitarian theories of punishment of Bentham and Beccaria).

185. See R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 27–29 (2001); see also HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 131, 165, 252 (1968); EDWIN H. SUTHERLAND ET AL., PRINCIPLES OF CRIMINOLOGY 291 (11th ed. 1992) (noting that stigma constitutes “part of the punishment mandated by each criminal law” and therefore there is no way to repeal it); Kenneth Mann, *Punitive Civil Sanctions: The Middle Ground between Criminal and Civil Law*, 101 YALE L.J. 1795, 1809 (1992) (“[T]he special stigma associated with convictions are the core remedies used to achieve the purposes of the criminal sanction.”).

186. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 421 (1965).

187. Douglas N. Husak, *Already Punished Enough*, 18 PHIL. TOPICS. 79, 95 (1990); see also ANDREW VON HIRSCH, CENSURE AND SANCTIONS 14 (1993) (“The censure and the hard treatment are intertwined in the way punishment is structured.”).

188. Husak, *supra* note 187, at 95–96 (1990).

responsibly overlook the issues of the duration and intensity of stigma and related ramifications arising from indefinitely public CCRs.

In democratic legal systems criminal penalties are imposed by the state in the name of the people. To be clear: it would be inconsistent to maintain that convictions should be privately inflicted and not made known to the public. The problem with the public availability and dissemination of CCRs is not *whether*, but rather for *how long* information about convictions should be publicly available and subject to dissemination.

Dissemination of CCRs that perpetually or periodically stigmatize ex-offenders produces “serial injuries” that go well beyond the implementation of the penalty imposed at sentencing. Making a conviction permanently public produces harms at times that are temporally distinct from a punishment’s announcement in court at the moment when censure is expressed. Allowing criminal convictions to continue to stigmatize and haunt offenders for an indefinite time after the sentence has been fully served,¹⁸⁹ irrespective of the gravity of the underlying offense—be it a felony or a misdemeanor, a violent or nonviolent crime—makes the overall punishment undeservedly severe. After all, “if the punishment ordered by the court is meant to be commensurate or proportional to the offense, any extra hardship resulting from stigma will distort the balance between the offense and the punishment.”¹⁹⁰

2. Ends-benefits Proportionality

Ends-benefits proportionality concerns arise in connection with consequentialist theories of punishment in which punishments must be justified in instrumental terms of crime prevention, especially by means of rehabilitation, deterrence, and incapacitation.

The inherent conflict between rehabilitation and publicly available conviction records has already been highlighted.¹⁹¹ A permanent, visible stigma imposed on individuals trying to reestablish themselves

189. See Zachary Hoskins, *Ex-offenders Restrictions*, 31 J. APPLIED PHIL. 33, 39 (2014) (observing that the deserved retribution for past criminal acts cannot “justify continuing to impose burdens after [offenders] complete their sentences.”).

190. KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 168 (1989) (noting relief seems appropriate “when the lingering effects of a felony conviction add punishment beyond what is deserved”); see also NIGEL WALKER, *PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE* 161 (1980) (“[T]he sentencer should take into account what he knows to be the inevitable consequences of conviction and punishment for the offender . . .”).

191. See *supra* Part IV.A.1.

in the community makes reintegration even harder than it generally is. That unnecessary stigma should be squarely rejected because it undermines the achievement of the goal being pursued.¹⁹²

General deterrence provides no stronger justification for ongoing stigmatization. Pursuit of deterrent goals requires only that a penal sanction be known or knowable when it is imposed at a public hearing accessible to the general public and the press.¹⁹³ Punishments announced in open court are the modern equivalent of ancient corporal penalties that were implemented in public so others could witness the pain inflicted and thus be deterred. It is the condemnation expressed by the conviction and sentencing in open court that discourages people other than the offender from committing a similar offense. The communication of such condemnation plays a central role (think, e.g., of media coverage of trials). However, attaining the goal of general deterrence does not require imposition of a perpetual “mark of disgrace.”¹⁹⁴

Nor can specific deterrence justify ongoing stigmatization. Being publicly shamed theoretically might be useful in deterring offenders from repeating their offenses,¹⁹⁵ but concerns for human dignity and rights require that there be limits. Just as lengthy imprisonment or the death penalty are *prima facie* inappropriate and unjust punishments for nearly all crimes, grossly severe punishments for reasons of specific deterrence cannot be justified. Choices to make CCRs publicly available would have to be tailored to the specific characteristics of the offense of conviction.

Finally, the indiscriminate public dissemination of CCRs of ex-offenders cannot be justified in incapacitative terms. Continuing stigmatization that impedes reentry is counterproductive from a cost-benefit perspective. It substantially increases the chances that a criminal conviction leads to future criminality, “predisposing individuals to be-

192. See, e.g., Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1027–28 (1986) (stressing that ex-offenders’ “social handicap is considerably aggravated by the stigma of a criminal record, requiring additional efforts from social agencies to support the arduous process of social reintegration.”).

193. Including guilty pleas, whose details are publicly announced in court.

194. *Contra* JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 1, at 222 (“A sentencing scheme that seeks to maximize general deterrence would threaten criminal law violators with public exposure and community censure.”).

195. See Norval Morris & Gordon Hawkins, *Rehabilitation: Rhetoric and Reality*, 34 FED. PROB. 9, 12 (1970) (observing that “it is likely that the shame, hardship, and stigma involved in arrest, public trial, and conviction are the principal elements in both individual and general deterrence rather than the nature of the sentence or the disposition of offenders.”).

come the deviants they were branded to be.”¹⁹⁶ The aim of incapacitation is reached by limiting ex-offenders’ opportunities to commit further crimes. However, there is sustained evidence suggesting that exclusion of ex-offenders from employment due to their criminal past limits access to legitimate sources of income and makes “criminal alternatives more attractive.”¹⁹⁷ Employment, on the contrary, reduces the risk of recidivism.¹⁹⁸

B. Publication of Criminal Convictions as an Ancillary Penalty

Publicly available CCRs long after the times and places at which the purposes and rituals of punishment are at center stage are not defensible. Indeterminate publicity and dissemination of CCRs conflict with both retributivist and consequentialist proportionality principles. Whether, when, and why conviction records should be publicly available and widely disseminated needs fundamental rethinking.

Public availability of CCRs should be reconceptualized and formally labeled as punishment. It should be imposed as an ancillary penalty that supplements the main punishment imposed at sentencing, and only in kinds of cases specified in penal statutes. When imposed, dissemination should be applied only for a limited period chosen from within a pre-determined range. Most importantly, imposition must be limited only to cases in which a solid justification can be provided in relation to the seriousness or special characteristics of the offense of conviction. Moreover, in order to reduce informal discrimination against people with criminal convictions, individual criminal history information should generally not be available to non-criminal justice agencies, and much less to private vendors, the media, and the general public.¹⁹⁹

This is the approach now followed in most continental European countries. However, it took substantial effort to develop that framework. The nineteenth century movement for codification of the criminal law, based on Enlightenment ideas, was critical. A major goal was

196. Logan, *Informal Collateral*, *supra* note 11, at 1107.

197. Ted Chiricos et al., *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 548 (2007).

198. See, e.g., Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUSTICE Q. 382, 387 (2011); Christopher Uggen et al., *Work and Family Perspectives on Reentry*, in PRISONER REENTRY AND CRIME IN AMERICA 209, 213 (Jeremy Travis & Christy Visher eds., 2005). See also *infra* Part VI.B.

199. See *infra* Part VI.A.

to make punishment milder and more rational in terms of proportionality to the adjudicated offense.

The French experience is paradigmatic. The highly influential 1810 Napoleonic Penal Code—a model for codification in continental Europe and elsewhere—provided for temporary publication by excerpt of any felony conviction punishable by *afflictive* and *infamous* penalties.²⁰⁰ Publication was aimed at expanding public awareness of offenders convicted of the most serious offenses, thus supplementing the guilt and sentencing phases of the criminal process in open court. Publication was neither conceptualized nor formally classified as a criminal punishment. Rather, it was classified as a “penal effect” automatically stemming from felony convictions. This was also true for the loss of certain civil rights and for a vast array of disqualifications that likewise were not considered to be formal criminal penalties.

Post-Enlightenment liberalism gradually led to the affirmation of the principle of equality irrespective of the social status of the offender. That shift laid foundations for an overall milder penal ethos.²⁰¹ Subsequently, a sharp rejection of public exposure as a central component of punishments gained favor. Punishment was no longer intended to inflict a permanent degradation of status.²⁰²

Additionally, growing awareness of the burdensome and stigmatizing effects of being convicted prompted criminal law reformers to develop and propose a more rational taxonomy of the consequences of a criminal conviction. This led to adoption in most European penal

200. See CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 36 (Fr.) (1810) (“An extract shall be printed of every sentence of death; of perpetual hard labour; of hard labour for time; of transportation; of solitary imprisonment; of the pillory; of banishment; or of civic degradation. Such extract shall be posted up in the central town of the department; in that where the sentence shall have been pronounced; in the township (*commune*) where the felony has been committed; in that where the sentence shall be executed; and in that where the condemned person shall have his residence (*domicile*).”). Excerpts of convictions were posted in public places (*lieux publics*) such as the marketplace, courts, and the town hall starting on the first day of the month that followed their announcement in court. Then, every three months posted excerpts were collected and archived. When Bonneville de Marsangy developed his system of criminal conviction record repositories this provision was already in force. See *supra* Part I.A. Yet it would be incorrect to speak of a redundant clone. What Bonneville had in mind was something subtler, whose stigmatizing effects were significantly more durable than those arising from simply temporarily posting excerpts of judgments of conviction in selected public places.

201. WHITMAN, HARSH JUSTICE, *supra* note 107, at 69.

202. *Id.* at 92 (such concept requires that even criminals “should not be subjected to the intense shame and loss of social standing that public exposure carries with it”).

codes of the distinction between main (or *principal*) and ancillary (or *supplementary*) penalties that persists to date.²⁰³

With imprisonment and fines as principal penalties,²⁰⁴ a vast array of civil disabilities, disqualifications, and stigmatizing consequences became formally and explicitly labeled as ancillary penalties “limited to serious, legislatively enumerated offenses, assessed directly by the sentencing judge at the time of sentencing,” and for the most part “imposed only for a limited and relatively short period of time.”²⁰⁵

Ancillary criminal penalties also emerged from firm rejection of punitive collateral consequences not formally labeled as criminal punishments pursuant to a strict interpretation of the principle of legality of punishment expressed by the maxim *nulla poena sine lege* (there exists no punishment without a law).²⁰⁶

Ancillary criminal penalties in Europe have changed over time. Discussions centered on elimination of stigmatizing ancillary penalties that significantly impeded the social reintegration of ex-offenders. One milestone is the set of policy recommendations formulated fol-

203. The Italian Penal Code of 1930 adopted the distinction between main (*pene principali*) and ancillary (*pene accessorie*) penalties. CODICE PENALE [COD. PEN.] [PENAL CODE] art. 20. So did the German Penal Code after the first comprehensive Criminal Law Reform Act (Strafrechtsreform) of 1969 that paired main criminal punishments (*Hauptstrafen*) with additional criminal penalties (*Nebenstrafen*). STRAFGESETZBUCH [StGB] [PENAL CODE] art. 44; see also Helen Silvering, *Discussions of Sanctions*, 24 AM. J. COMP. L. 737, 748–49 (1976); Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 756–59 (2000) [hereinafter Demleitner, *Continuing Payment*]. The French Penal Code during the 1950s added a list of “other sanctions for felonies and misdemeanors” following the sections devoted to main punishments for felonies and misdemeanors. The wording “complementary penalty” (*peine complémentaire*) was embraced in the new Penal Code of 1994. See BERNARD BOULOC, DROIT PÉNAL GÉNÉRAL 452 (20th ed. 2007). The new 1995 Spanish Penal Code (Article 32) confirmed a distinction between *penas principales* (main penalties) and *penas accesorias* (ancillary penalties), with the latter limited to the deprivation of specific rights. In England and Wales, in addition to the sentence imposed, the judge or magistrate may impose on the offender, depending on the offense, so-called *ancillary orders*, supplementary penalties specifically aimed at “prevent[ing] future re-offending or repeat victimization.” See ANCILLARY ORDERS, SENT'G COUNCIL FOR ENG. & WALES, <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/ancillary-orders/> (last visited July 7, 2016).

204. Originally, alongside the death penalty, now banned in Europe. See DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 112–13, 141 (2010).

205. Demleitner, *Continuing Payment*, *supra* note 203, at 755–56.

206. Feuerbach formulated this basic principle in the nineteenth century. It applies the *nullum crimen* principle (a person may not be punished unless her conduct was defined as criminal) to punishments. See Paul Johann Anselm Ritter von Feuerbach, *The Foundations of Criminal Law and the Nullum Crimen Principle*, 5 J. INT'L. CRIM. JUST. 1005, 1008 (2007) (“Any infliction of punishment presupposes a penal law. (Nulla poena sine lege.) For only the threat of evil by law constitutes the foundation of the notion, as well as the legal possibility, of punishment.”).

lowing the session on “Legal, Administrative and Social Consequences of Conviction” at the seventh congress of the International Association of Penal Law held in Athens in 1957. They explicitly called for abolition of ancillary criminal sanctions “driven by the sole and unique goal of infamy.” Ancillary penalties were seen as acceptable only if they would prevent the offender from committing another crime of the same type as that of which he was convicted.²⁰⁷

As a result, few countries retain publication of the judgment of conviction as an ancillary criminal penalty. In some, like France, it can be imposed at sentencing in connection to enumerated offenses at the discretion of the judge.²⁰⁸ Others, Italy for instance, provide that it automatically follows a judgment of conviction resulting in life imprisonment or when expressly provided for by law (typically violations of anti-defamation laws, massive frauds against consumers, and IP offenses).²⁰⁹ In all these cases, the publication of the judgment of conviction for a fixed amount of time is allowed to serve retributive and specific deterrence purposes taking into consideration the gravity and inherent characteristics of the offense.

C. Ancillary Criminal Penalties and U.S. Criminal Law

Ancillary criminal penalties are not absent from the history of American criminal law. American colonies imported “civil death” statutes, known as bill of attainder, almost “blindly follow[ing] the En-

207. See INT’L ASSOC. OF PENAL LAW, RESOLUTIONS OF THE CONGRESSES OF THE INTERNATIONAL ASSOCIATION OF PENAL LAW (1926 – 2004), at 38–40 (José Luis de la Cuesta ed., 2009) (providing the published policy recommendations).

208. See CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 131–135 (Fr.) (providing that the court “may order the publication or dissemination of the whole judgment of conviction or an excerpt of it, or of a notice informing the public of the contents of the decision and its reasons”). The penalty is carried out in places and for the duration determined by the court. Unless otherwise provided for a specific offense, the publication of conviction cannot last longer than two months. The dissemination is carried out through the Official Gazette of the Republic, one or more other publications, or through one or more news websites. In any case, it does not apply to minor violations.

209. See CODICE PENALE [COD. PEN.] art. 36 (It.). The judgment of conviction shall be published by being posted in the town hall of the city where it was pronounced, in the city where the crime was committed, and in the city where the convicted person had his last residence. Whenever the law does not expressly specify it for a specific offense, the length of the publication shall be equal to the length of the main punishment imposed. The publication of conviction is made by excerpt unless the judge orders the judgment to be posted in its entirety. The judgment of conviction must also be posted on the website of the Ministry of Justice for no more than thirty days. If the sentencing judge does not expressly determined the duration of the publication on the website of the Ministry of Justice, it will be for fifteen days.

glish tradition.”²¹⁰ A wide range of disqualifications was imposed on convicted felons. Gabriel Chin observes that “[c]ivil death was understood as a punishment at common law in England and the United States.”²¹¹ The major difference was that, unlike in England, colonial bills of attainder were not only imposed in case of particularly heinous crimes but also for lesser offenses not punishable by death, for instance those defined as egregious violations of the moral code of the community.²¹²

American colonies followed the English common law until constitutions or statutes amended it. Civil disabilities ought to be formally pronounced in court at sentencing following the imposition of the main sentence. Therefore, in early American criminal law civil disabilities such as disenfranchisement, bans on holding public offices, or employment disqualifications were imposed as an integral component of the overall punishment inflicted on the offender.²¹³

After the American Revolution, many English legal traditions were rejected. The Constitution expressly prohibited bills of attainder.²¹⁴ Many civil disabilities were eliminated, but a significant number of states created new sets of collateral consequences that were completely detached from the sentencing stage of the criminal process. Civil disabilities gradually disappeared from the criminal law but

210. Neil P. Cohen & Dean Hill Rivkin, *Civil Disabilities: The Forgotten Punishment*, 35 FED. PROB. 19 (1971); Walter M. Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 950 (1970) (noting that civil disabilities in early American criminal jurisprudence were likely “the result of the unquestioning adoption of the English penal system”).

211. Chin, *Collateral Consequences*, *supra* note 72, at 212; *see also* NORA M. DEMLEITNER, *Civil Death*, in 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 297 (Paul Finkelman ed., 2006) (“[Civil death] developed into a penal sanction referred to as ‘attainder,’ which triggered the forfeiture of all civil and property rights. The concept ultimately took hold in the United States, albeit in an attenuated way . . . Civil death applied only to those incarcerated for life or a term of years.”).

212. The same is true today. *See* RICHARD G. SINGER, *Conviction: Civil Disabilities*, in 1 ENCYCLOPEDIA OF CRIME & JUST. 249, 249–50 (Joshua Dressler ed., 2d ed. 2002) (“Considerable variation exists among the states as to which civil disabilities are imposed and when they apply . . . [T]he same civil disability is often visited both on a person convicted of first-degree murder and on one convicted of a relatively minor crime. Some states, however, impose such disabilities only after conviction for certain enumerated felonies. As a third alternative, in some states conviction of a ‘crime of moral turpitude’ or of an ‘infamous crime’ is the basis for civil disabilities.”).

213. Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1062 (2002) (stressing that disenfranchisement had “a visible, public dimension; its purposes were articulated in the law; and it was a discrete element in punishment which required the deliberation of courts to implement. Moreover, crimes subject to the penalty of disenfranchisement were either linked to voting itself . . . or defined as egregious violations of the moral code.”).

214. *See* U.S. CONST. art. I, §§ 9–10.

their connection with the commission of a crime remained self-evident.

During the first half of the nineteenth century, many states revitalized the notion of infamy—an ancient penalty entailing the forfeiture of the offender’s political, civil, and social rights²¹⁵—to deprive convicted individuals of fundamental rights. Infamy laws were not unconstitutional bills of attainder since they were “not penal.”²¹⁶ As historian Pippa Holloway notes, during the nineteenth century while “Europe was ending a tradition of public whipping, forced labor, and infamy, the United States was endorsing and expanding such punishments and reinvigorating the concept of infamy.”²¹⁷ An example was restriction of the right to vote to citizens with “good character” or without felony convictions, but it was not the only example.²¹⁸ The change of status suffered by convicted individuals after release or discharge as a result of civil disabilities was “a technique for reinforcing the branding of felons as the untouchable class of American society.”²¹⁹

At about the same time, various regulatory initiatives banned people who had been convicted from professional licensing²²⁰ and made them ineligible for public funds, including welfare benefits.²²¹

215. See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 23 (2006) (“In ancient Rome, the . . . punishment of *infamia* could be imposed on criminal offenders. In this case, the principal penalties were the loss of suffrage and the right to serve in the Roman legions.”).

216. See, e.g., *Green v. Board of Elections*, 380 F.2d 445, 449 (2d Cir. 1967) (holding that the bill of attainder clause refers only to the use of disenfranchisement as a punishment and does not prohibit non-penal regulation of the franchise).

217. PIPPA HOLLOWAY, *LIVING IN INFAMY: FELON DISENFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP* 5 (2014).

218. See REBECCA MCLENNAN, *The Convict’s Two Lives: Civil and Natural Death in the American Prison*, in *AMERICA’S DEATH PENALTY: BETWEEN PAST AND PRESENT* 191, 197 (David Garland et al. eds., 2011) (observing that a 1821 New York statute was the first to impose disenfranchisement not only on prisoners, but also on all convicted felons, at the same time prohibiting them from holding public offices and serving on juries); see also HOLLOWAY, *supra* note 217, at 5–6 (reporting that in 1829 the Tennessee code disqualified “infamous individuals” from testifying in court (except in their own criminal cases); in 1835 the state Constitution barred them from voting. Many state Constitutions including Connecticut’s (1818), New York’s (1821), Virginia’s (1830) and Arkansas’ (1836) specified that a conviction for an “infamous crime” triggered disenfranchisement. The 1817 Mississippi and the 1819 Alabama constitutions required legislatures to disenfranchise individuals convicted of “bribery, perjury, forgery, or other high crimes and misdemeanors.” In North Carolina “election officials excluded individuals judged infamous from suffrage.”).

219. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 *UCLA L. REV.* 1895, 1898 (1999).

220. See Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 *OHIO ST. L.J.* 1, 6–7 (2014).

221. See JACOBS, *THE ETERNAL CRIMINAL RECORD*, *supra* note 1, at 257–60.

Typically, no mechanism for relief from such civil disabilities was established; decisions were highly discretionary and subject to a limited appellate review, if any.²²²

The reconfiguring of collateral “penal effects” of conviction not expressly labeled as punishment as ancillary criminal penalties in Europe happened in part since Enlightenment values required recognition of offenders’ innate human dignity and of equality among citizens of all classes. As societies became increasingly homogeneous, they required homogeneous systems of criminal laws and practices. European criminal justice systems witnessed a “*leveling-up* egalitarianism,” which extended to low-status offenders the dignity formerly accorded only to those of high status.²²³ With this not only came milder punishments, but also a firm refusal of unrestrained “collateral” consequences of conviction capable of branding an offender “as something less than a full citizen.”²²⁴

American history, by contrast, reveals a nexus between the growth of collateral consequences and race. As Michael Pinard notes, “[t]he role of race is particularly evident when it comes to felon disenfranchisement, where contemporary policies follow a long historical pattern of racial exclusion.”²²⁵ Civil disabilities were deployed to single out and exclude African-Americans. No social or political incentives existed for a clear categorization of “collateral” disabilities

222. See, e.g., C.J.M., *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 405–06 (1967).

223. See WHITMAN, *HARSH JUSTICE*, *supra* note 107, at 10. A similar process also happened in Europe with regard to the abolition of torture. See Mirjan R. Damaška, *The Quest for Due Process in the Age of Inquisition*, 60 AM. J. COMP. L. 919, 952 (2012) (“With the further blurring of social distinctions in the eighteenth century, enlightenment critique burst forth against torture. . . . The possibility that torture—if maintained—would become a truly general procedural institution ceased to be remote, and upper social strata could now more easily recognize themselves in the tormented defendant. . . . [W]hen elites sense the danger of being exposed to brutal procedural instruments designed primarily for lower social orders, the days of these instruments are numbered.”).

224. See WHITMAN, *HARSH JUSTICE*, *supra* note 107, at 86.

225. Pinard, *Confronting Issues of Race*, *supra* note 66, at 512, 513 (“Felon disenfranchisement in the United States is tied to broader efforts to prevent African Americans from voting”); see also Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, 31 HUM. RTS. 16 (2004) (“Disenfranchisement policies have served various political purposes, most notably racial exclusion. In the post-Reconstruction period . . . legislators in a number of southern states tailored their disenfranchisement statutes with the specific intent of excluding the newly freed black voters. They accomplished this by tying the loss of voting rights to crimes alleged to be committed primarily by blacks while excluding offenses held to be committed by whites.”). See generally Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002) (discussing the relationship between collateral consequences and the ‘war on drugs’ of the 1980s and 1990s, targeting primarily minority groups).

arising from a criminal conviction and to provide for additional guarantees or procedures concerning their application.

VI. POLICY IMPLICATIONS

Many punitive effects of publicly available conviction records did not originate in explicit policy decisions. They are not considered to be penal sanctions and operate outside the processes of the criminal law.²²⁶ Publicly available CCRs resemble the visible signs inscribed in earlier times on the offender's body to "perpetuate" his conviction and permanently characterize as criminal or deviant "someone who has acquitted himself of his punishment as an offender."²²⁷

The spread of information technology combined with public access to records of court proceedings led the United States to develop a system whose scope and pervasiveness are unmatched in any other Western democracy. The electronic brand of a criminal conviction constitutes today a "chronic and debilitating badge of shame," and a "permanent symbol of a spoiled identity."²²⁸ Individuals are not only exposed but also constantly scrutinized.

Once the devastating punitive effects arising from indiscriminate access, collection, and mass dissemination of CCRs are acknowledged, it should become apparent that criminal history information in the digital age deserves special attention, given the tremendous impact it may have on ex-offenders trying to settle back in the community. Reconsideration in light of "systems and practices transformed by the adoption of new technical media"²²⁹ is therefore needed, even when it would entail a radical departure from the status quo. Second chances need be effective in order to be successful.²³⁰

226. Logan, *Informal Collateral*, *supra* note 11, at 1106; *see also* Ewald, *Perils of Categorical Ambiguity*, *supra* note 74, at 89 (observing that employer and landlord background checks, although not classified as *formal* collateral consequences because not themselves state actions, must be regarded as "behaviors regulated by the government").

227. FOUCAULT, *supra* note 68, at 272.

228. Daniel S. Murphy et al., *The Electronic "Scarlet Letter": Criminal Backgrounding and a Perpetual Spoiled Identity*, 50 J. OFFENDER REHAB. 101, 102, 112 (2011).

229. *See* HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 56 (2010).

230. *See generally* David A. Green, *Penal Optimism and Second Chances: The Legacies of American Protestantism and the Prospects for Penal Reform*, 15 PUNISHMENT & SOC'Y 123 (2013); *see also* Walter Kirn, *The Mother of Reinvention: The Real Reason Americans Detest the Idea of a National ID Card*, ATLANTIC (May 2002), <https://www.theatlantic.com/magazine/archive/2002/05/the-mother-of-reinvention/302491/> (arguing that in the United States a deep-seated belief exists that "who a person was yesterday . . . doesn't determine who he'll be tomorrow . . . [T]his is the land of clean slates and second chances . . . [T]he first step toward redemption is a ritual wiping out of self, followed by construction of a new one.").

This Part argues that ex-offenders' reentry must be acknowledged as a primary governmental objective whose attainment cannot be left to policy-making implemented at the individual level. Willingness to take some "educated risks" in the reentry of ex-offenders into society is necessary to achieve the goal.

A. Reentry as a Public Policy Objective

The crucial phase of reentry of ex-offenders should be shaped by policies aimed at reducing recidivism and emphasizing the interests of communities over those of the individual. Effective arrangements must be implemented to ensure that ex-offenders can put past wrongdoing behind them. Limiting the availability and dissemination of conviction records should be seen as an element of public policy whose primary goal is enhancement of the effectiveness of reentry programs for ex-offenders.

Law and economics scholars argue that granting ready and nearly unrestricted access to criminal histories can increase the efficiency of transactions in everyday interactions between individuals, and between individuals and private entities. Richard Posner observes that "[i]nsofar as the stigma of conviction hurts merely because it conveys useful information to potential transactors with the convicted criminal . . . it creates social value that may offset the hurt."²³¹

Jacobs argues that unrestrained public access to CCRs is consistent with the core American political tradition of distrust of government: "the individual has the right to protect herself from possibly dangerous people based on her own assessment."²³² A person, he continues, "should not have to rely on government officials to decide what criminal record information she and other community members should have access to."²³³

These views fail to recognize that reentry cannot be delegated to the uncoordinated action of private citizens and entities. The ABA Commission on Effective Criminal Sanctions emphasizes that "the citizenry cannot and should not be put in the position, as individual employers and landlords and neighbors of making public policy through

231. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 226 (4th ed. 1992); see also Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. ECON. 519, 536 (1996) ("Stigma actually increases efficiency, because allocative efficiency increases as information is disclosed.").

232. JACOBS, *THE ETERNAL CRIMINAL RECORD*, *supra* note 1, at 220.

233. *Id.*

ad hoc individual decisions based solely upon an individual's criminal record."²³⁴ Reintegration should be regarded as a primary governmental objective that must prevail over partially competing interests.

Private citizens should not generally be granted access to CCRs. Nor should private commercial entities be allowed to collect and disseminate criminal history information.²³⁵ Background checks should be permissible only if the character and past behavior of an applicant is of particular salience to the position for which he or she applies (e.g., for jobs involving direct and regular contacts with children, vulnerable, or elderly people).²³⁶ In any case, the applicant's knowledge and consent should be required and employers should be allowed to reject an applicant only when a close nexus exists between prior convictions and the position the ex-offender applied for.²³⁷

234. ABA COMM. ON EFFECTIVE CRIMINAL SANCTIONS 5 (discussing the Resolution No 103D on access to and use of criminal records for non-law enforcement purposes approved by the ABA House of Delegates on February 2, 2007).

235. In Europe, private entities are not allowed to collect and disseminate criminal history information. See Article 8(5) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on data protection ("Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.").

236. Especially in continental Europe, no general presumption exists that a private employer is authorized to run a criminal background check on a job applicant. Only the subject of the record may request copy of his/her criminal history. Therefore, employers are not entitled to access to other persons' criminal history information, which is generally regarded as confidential. See Elena Larrauri, *Criminal Record Disclosure and the Right to Privacy*, CRIM. L. REV. 723, 726 (2014). This confidentiality requirement is eroded by the growing phenomenon of "enforced subject access," when employers require job applicants to make access requests to obtain their own criminal record. Some jurisdictions adopted legislative counter-measures by enacting specific provisions explicitly prohibiting discrimination based on prior convictions. Cf. Elena Larrauri, *Legal Protections Against Criminal Background Checks*, 16 PUNISHMENT & SOC'Y 50, 61-62 (2014). For a recent exception to such principle, cf. Article 10(2) of the Directive No 2011/92/EU on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography of the European Parliament and of the Council of 13 December 2011, requiring "Member States [to] take the necessary measures to ensure that employers, when recruiting a person for professional or organized voluntary activities involving direct and regular contacts with children, are entitled to request information in accordance with national law by way of any appropriate means, such as access upon request or via the person concerned, of the existence of criminal convictions" for a list of specified offences.

237. This would inevitably necessitate providing immunity to employers from negligent hiring liability, a doctrine that helped fuel the criminal history background check industry and risk aversion in hiring practices. See, e.g., Jennifer Leavitt, *Walking A Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1301 (2002); Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 292-93 (2014).

This approach would not entail an inherent distrust of individual decision-makers. Policymaking requires that parameters be set that are capable of assuring predictability and uniformity of outcomes. Furthermore, denying people information that might affect their choices or behaviors does not constitute a threatening and unorthodox exception to the American way of government. Government policies in many other fields deny the general public direct access to or the right to obtain information about individuals.

For example, nationwide if a person tests HIV positive the clinic or other testing sites have the legal duty to report such information to both state and local health departments.²³⁸ Yet special confidentiality statutes have been enacted “prohibit[ing] the attending physician and healthcare facility from releasing such information to persons other than the patient and the department of health.”²³⁹ Therefore, with the exception of certain jobs (e.g., in health care, the armed forces, and aviation), no legal requirement exists that an individual disclose to a potential employer that he or she is HIV positive nor can the employer obtain that information otherwise.²⁴⁰ The government therefore chooses to make information it collects and indexes confidential to avoid the stigma and discrimination people with HIV or AIDS would most likely face were that information publicly available.²⁴¹

From the “right to know” perspective, prospective employers are not allowed to ask health questions in pre-employment questionnaires. Likewise, during job interviews, anti-discrimination policies forbid employers to ask applicants about their health or disabilities

238. WILLIAM H. ROACH JR. ET AL., *MEDICAL RECORDS AND THE LAW* 347 (4th ed. 2006) (“Michigan law, for example, requires all persons who obtain a positive HIV result for a test subject to report the name, address, age, race, and sex of the test subject within seven days.”). To provide a further example, in the State of New York, HIV reporting means that doctors and laboratories must report all cases of HIV infection to the New York State Department of Health. Public Health Law requires HIV case reporting by name. Reporting helps the State Department of Health to accurately monitor the HIV epidemic, assess how the epidemic is changing, and create programs for HIV prevention and medical care that best serve affected people and communities. All reported information is protected by strict confidentiality laws. *Cf.* Public Health Law, Section 2786 and Article 21, Title III (section 2139), New York State HIV/AIDS Confidentiality Law, NYS Department of Health HIV/AIDS Confidentiality Regulations (Part 63: Confidentiality of HIV-Related Information).

239. *Id.* at 344.

240. *Id.*

241. See, e.g., Richard Parker & Peter Aggleton, *HIV and AIDS-related Stigma and Discrimination: A Conceptual Framework and Implications for Action*, 57 *SOC. SCI. MED.* 13 (2003).

and applicants have no legal duty to disclose a disability until after being hired.²⁴²

These policies prevent third parties from obtaining information that would be relevant to interpersonal transactions of various kinds in order to achieve a goal deemed necessary and worth pursuing from a general policy perspective.

The approach with regard to CCRs should not be any different. Reintegration should be promoted “by protecting [ex-offenders] from having to reveal their criminal histories.”²⁴³ Employers should not have access to criminal history information and individuals should not be legally obliged to disclose prior convictions, following an approach “somewhat parallel to the [recently abandoned] (in)famous . . . military policy on homosexual soldiers: ‘Don’t ask, don’t tell.’”²⁴⁴

B. Taking Educated Risks

As criminal history information became increasingly accessible, attitudes of “zero tolerance” for any risk developed concerning ex-offenders in the community. The risks, however, have not increased. What changed were perceptions.²⁴⁵ The harsher crime control policies and attitudes that developed in recent decades transformed the cultural meaning of crime and reinforced ideas about ex-offenders as a group to blame and distrust.²⁴⁶ Technological developments made ex-offenders more visible and subject to stigma than ever before.

242. See 142 U.S.C. § 12112(d)(4)(A) (“A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.”); see also Adam M. Samaha & Lior Jacob Strahilevitz, *Don’t Ask, Must Tell—And Other Combinations*, 103 CAL. L. REV. 919, 946, 955 (2015).

243. Shadd Maruna, *Reintegration as a Right and the Rites of Reintegration: A Comparative Review of De-Stigmatization Practices*, in EFFECTIVE INTERVENTIONS IN THE LIVES OF CRIMINAL OFFENDERS 121, 132 (Jon A. Humphrey & Peter Cordella eds., 2014).

244. *Id.*

245. Risk perception of crime and criminals did not become irrational after a period of rational assessment. Rather, there has been a shift in the cultural meaning of the same phenomena. See Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 748 (2008); see also Alice Ristroph, *Terror as a Theory of Punishment*, in RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 155, 159 (Michael Tonry ed., 2011) (arguing that notwithstanding no real increases in risk (crime rates have declined sharply especially over the past two decades), “for public attitudes, it is perceptions that matter, and it seems clear that perceived danger is connected to demands for aggressive policing, long sentences, and other measures that may protect public safety by containing criminal threats.”).

246. See Scott Lash, *Risk Culture*, in THE RISK SOCIETY AND BEYOND: CRITICAL ISSUES FOR SOCIAL THEORY 47, 51 (Barbara Adam et al. eds., 2000) (observing that individuals “do not look for the risks and then make inferences about who to blame. Instead they begin from social groups that they want to blame and from this make inferences about which risks to focus on.”).

As a result, with regard to penal policies in general, and criminal history policies and practices in particular, many people seem unwilling to take “educated risks” based on empirical evidence about reentry of ex-offenders. As Rachel Barkow notes, “[w]e do not approach any other area of government regulation this way. We do not ban a vaccine once we hear one story of someone having a serious reaction to it or dying from it. Instead, we carefully study the vaccine to see whether, on balance, it does more good than harm. . . . We look at the risks, and we try to figure out if the activity is worth doing, i.e. whether the good outweighs the bad.”²⁴⁷ Yet, unlike other areas of government, “criminal law is just not seen as regulation. It is seen as stories that engender visceral reactions from voters.”²⁴⁸

Pervasive dissemination of CCRs for background check purposes has not paid off. This can be demonstrated by looking at data on recidivism in the U.S. and Europe, where non-disclosure of criminal history information to third parties is the rule.

A 2014 BJS study tracking 404,638 state prisoners from thirty states released in 2005 found that 67.8 percent were re-arrested within three years after release and 76.6 percent were re-arrested within five years. More than a third (36.8 percent) were re-arrested in the first six months after leaving prison, and more than half (56.7 percent) were arrested by the end of the first year.²⁴⁹ In Europe, despite some methodological difficulties in comparison,²⁵⁰ recidivism rates within three years from release appear on average to be similar and in some cases to be substantially lower.²⁵¹

These data undermine any credible claim that heightened visibility of ex-offenders and pervasive criminal background checks are ca-

247. See Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 316, 320 (2014).

248. *Id.*

249. MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUST., *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010* (2014); see also Cheryl Lero Jonson & Francis T. Cullen, *Prisoner Reentry Programs*, 44 CRIME & JUST. 517, 525–26 (2015) (providing similar results in U.S. studies on recidivism and the reentry problem).

250. See Seena Fazel & Achim Wolf, *A Systematic Review of Criminal Recidivism Rates Worldwide: Current Difficulties and Recommendations for Best Practice*, 10 PLoS ONE 551 (June 18, 2015).

251. Cf. COUNCIL OF EUROPE, *ANNUAL PENAL STATISTICS — RECIDIVISM STUDIES*, <https://wp.unil.ch/space/publications/recidivism-studies/> (last visited April 21, 2016); see also CAROLYN W. DEADY, PELL CENTER FOR INTERNATIONAL RELATIONS AND PUBLIC POLICY, *INCARCERATION AND RECIDIVISM: LESSONS FROM ABROAD 1* (2014); *60 Minutes: Crime and Punishment* (CBS television broadcast Apr. 3, 2016), <http://www.cbsnews.com/news/60-minutes-germany-prisons-crime-and-punishment/> (“The main objective of German prisons is rehabilitation, not retribution. . . . Their recidivism rate is about half the U.S. rate.”).

pable of substantially reducing crime by excluding former offenders from businesses, professions, schools, voluntary associations, and other social contexts.²⁵² On the contrary, the comparative data suggest that excluding ex-offenders from access to legitimate jobs and re-engagement with the community is criminogenic. Many ex-offenders have been denied legitimate opportunities that make pro-social lives as law-abiding citizens more likely. Preventing third parties unfettered access to CCRs and focusing on reintegration programs are more effective ways to prevent re-offending.

CONCLUSION

CCRs are nowadays available to the general public from multiple sources and providers including criminal history data repositories, court archives, court-maintained websites, and private vendor databases. This ready availability of criminal records is unprecedented in American history, as is the continuing and perpetual stigmatization of ex-offenders. My goal in this Article has been to present a framework for re-conceptualizing the public availability and dissemination of conviction records.

Publication of records of conviction for particular offenders for limited periods should be acknowledged as an ancillary criminal penalty that supplements the main punishments imposed at sentencing. It should be allowable only to fine-tune the punishment response in terms of both retributive and utilitarian purposes in relation to the gravity or characteristics of the offense. Availability of criminal history information should largely be limited to criminal justice officials (law enforcement agencies, prosecutors, judges, and correctional authorities), with the exception of tailored forms of punitive “public notification” and employer and third-party access.

The proposed limitations to the availability and dissemination of CCRs are aimed at rejecting modernized forms of “official lynch justice”²⁵³ that subject ex-offenders to the caprices of the public, thus abandoning the state’s duty to impose “*measured* punishment.”²⁵⁴ We should look back to the history of American criminal justice. My pro-

252. This represents one of the most evident legacies of what Pat Carlen, *Imaginary Penalties and Risk-Crazed Governance*, in *IMAGINARY PENALTIES* 1 (Pat Carlen ed., 2008) calls the “risk-crazed governance” of convicted individuals following release or discharge.

253. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 *YALE L.J.* 1055, 1059 (1998).

254. *Id.* at 1091.

posals may appear daring but they are firmly rooted in the ways that stigmatizing and burdensome consequences of criminal convictions were understood and regulated as late as the early republic period, and in the confidentiality approach that dominated how conviction records were handled until the mid-1970s.

Penal institutions have been reconfigured and reframed numerous times. That will continue. Current debates on the death penalty²⁵⁵ and sentences of life without possibility of parole²⁵⁶ provide powerful examples of ongoing transformative tensions concerning criminal penalties. The same thing needs to happen concerning the stigmatizing consequences of criminal convictions. Legal scholars must advance proposals that are bold and realistic. When adjustments are not enough, reinvention is required.

255. See, e.g., Carol S. Steiker & Jordan M. Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 AM. J. CRIM. L. 189, 207 (2014) (“The United States did not become an outlier with respect to the death penalty until the latter half of the 20th century. Throughout most of our history, the United States was at the forefront of capital reform and moderation, and, indeed, it would have been at the forefront again if judicial abolition of the death penalty had “stuck” in 1972 with *Furman*.”).

256. See, e.g., Rachel E. Barkow, *Life Without Parole and the Hope for Real Sentencing Reform*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?, 190, 212 (Charles J. Ogletree & Austin Sarat eds., 2012) (“At the most fundamental level, true reform of LWOP requires a rethinking of the capacity of parole and the value of giving offenders an opportunity to show that they are not a risk to society—not to mention some faith in our ability to assess those claims.”).

Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm

LLEZLIE GREEN COLEMAN*

ABSTRACT	62
INTRODUCTION	63
I. DEFINING THE LOW-WAGE WORKFORCE	65
A. Low-Wage Work and Poverty	65
B. Low-Wage Jobs	67
C. Low-Wage Workers: Beyond the Teenager	68
D. African American Low-Wage Worker Demographics	69
II. LOW-WAGE AFRICAN AMERICAN WORKERS' ABSENCE FROM THE SCHOLARLY CONVERSATION	72
A. Low-Wage Workers and the Limitation of Labor and Employment Law	73
B. Immigration Relief to Protect Low-Wage Workers .	77
C. The Impact of Interagency Coordination on Immigrant Workers	79
D. Cultural Narratives and the Immigrant Worker Experience	81
E. Comparing Latino and African American Workers .	82

* Associate Professor of Law and Co-Director, Civil Advocacy Clinic, American University Washington College of Law; A.B. Dartmouth College; J.D. Columbia Law School. I would like to extend my appreciation to the New and Emerging Scholars Workshop at the AALS 2016 Meeting, the Clinical Law Review Writer's Workshop, and the Southeastern Association of Law Schools (SEALS) New Scholars Workshop. I am particularly indebted to my SEALS New Scholar Mentor, Angela Onwuachi-Willig, for her thoughtful guidance on an early draft. This article also benefited from thoughtful comments provided by Angela Mae Kupenda as part of the AALS New and Emerging Voices in Workplace Law Program at the AALS Annual Meeting.

III. HISTORICAL FRAMING – LOW-WAGE WORKERS AND THE CIVIL RIGHTS AGENDA...	84
IV. CHANGING DYNAMICS IN WORKER ADVOCACY: WORKER CENTERS	88
V. AFRICAN AMERICAN WORKERS RENDERED INVISIBLE BY NARRATIVES ARISING FROM THE DEGRADATION OF THE WAR ON POVERTY AND THE CRIMINALIZATION OF POVERTY	92
VI. THE LIMITS OF THE BINARY	95
A. The Black-White Paradigm Critique	95
B. The Immigrant/Citizen Low-Wage Worker Paradigm	97
C. Beyond the Binary: Critical Race Praxis in Workplace Advocacy	98
VII. VULNERABILITIES EXPOSED BY AFRICAN AMERICAN LOW-WAGE WORKER INVISIBILITY	100
A. Wage Theft in the African American Community – Underreported and Misunderstood?	100
B. Different Narratives and Implications for the Pursuit of African American Workers’ Claims	102
CONCLUSION	103

ABSTRACT

The narrative of low-wage worker exploitation has increasingly narrowed in focus to reflect the experiences of undocumented immigrant workers whose immigration status makes them particularly vulnerable to wage theft and other denials of their substantive workplace rights. Indeed, much of the scholarship in this area rests solidly at the intersection of immigrant justice and employment law. This article disrupts this paradigm by arguing that this limited narrative has rendered African American low-wage workers invisible. It also draws from the voices of low-wage worker advocates who have borrowed from current activism to announce that #BlackWorkersMatter. Given the role of paradigms in defining which issues merit our attention, analysis, and assessment, this article argues for a shift in the scholarly conversation to consider not only the historical reasons for the distancing of African Americans from worker advocacy, but also the current dynamics that have facilitated this phenomenon. This article

draws from critical race theorists' black/white binary analysis to consider whether there exists an immigrant/non-immigrant binary paradigm in the analyses of low-wage worker exploitation. Finally, it considers the particular vulnerabilities and disadvantages this paradigm creates for African American workers.

INTRODUCTION

Every person in this country benefits from the labor of our low-wage workforce. From the workers who pick the fruits and vegetables we eat, to the workers who slaughtered the chicken we ate for dinner last night, to the worker who cut the grass at our local park, to the cashier who checked us out as we purchased goods at our local CVS. In nearly every aspect of our lives, there are low-wage workers both out front and behind the scenes, making certain our days progress as expected.

Despite the reality that low-wage workers in this country are predominantly white, images and narratives of African Americans historically dominated the images and narratives of low-wage work, particularly where that work involved the labor of farm workers (sharecroppers) and domestic workers. In recent years, however, the focus on low-wage workers has shifted toward Latino workers: often recent immigrants and sometimes undocumented. This shift in our attention, however, is not based upon a mass departure of African Americans from the low-wage workforce. While the number of African Americans engaged in low-wage work has decreased as a result of immigration patterns, African Americans continue to occupy a significant number of low-wage jobs.¹ Nevertheless, the standard narrative of low-wage work has shifted to one that is inextricably linked to the exploitation of immigrants. Given the particular vulnerability of our immigrant population and the resulting high levels of wage theft and other workplace exploitation in the immigrant community, targeted efforts to address the intersections of these issues is both important and necessary. In the midst of this change, however, the experiences of African American workers have received very limited attention in the media, and even less attention in the academy. Indeed, the more common narrative of the African American work experience has become one of unemployment, rather than low-wage employment. As a

1. See *infra* Part I.D.

result, African American workers are relatively absent from our national dialogue on low-wage workers' rights.

This Article brings the experiences of African American low-wage workers to the forefront, with a particular focus on wage theft among African American workers. Part I explores the complexities of the low-wage workforce, including the competing definitions of low-wage work and poverty. It also considers the demographic of African American workers' and the job sectors that typically employ them. Part II explores current scholarship on low-wage workers and identifies the potential gaps in that analysis that lead to the absence of African American workers' experiences in the most prevalent narratives. Part III provides historical framing for the disappearance of African American low-wage workers from the narrative. Starting with the exclusion of most African American workers from coverage by the Fair Labor Standards Act and other New Deal legislation, it briefly traces the inclusion of economic rights in the early civil rights agendas and the eventual decision to focus on social and political rights. Part IV discusses changes in the advocacy strategy for and by the low-wage workforce, particularly with the increasing importance of workers' centers that are typically focused on immigrant populations and aligned with the broader immigrant justice agenda. Part V argues that the criminalization of poverty has further distanced African American workers from our dialogue on workplace exploitation. Part VI draws from the black binary critique of critical race theory to argue that the low-wage worker movement exists in a Latino-White binary that does not consider the experiences of African American workers.

Finally, Part VII considers the impact of African American workers' absence from the low-wage worker paradigm on the experiences of those workers. It explores wage theft amongst African American low-wage workers and the ways in which black workers' absence from the workplace exploitation paradigm makes them increasingly susceptible to this economic abuse, yet unlikely to file claims against their employers. Finally, this Article considers whether the creation of a vulnerable undocumented immigrant paradigm for wage theft weakens African American workers' ability to bring successful wage theft claims.

I. DEFINING THE LOW-WAGE WORKFORCE

The nomenclature “low-wage work” is often associated with jobs that pay the minimum wage.² The minimum wage, however, is only a starting point for understanding low-wage work, poverty, and the working poor.³ A more nuanced understanding of this term sheds light on the breadth of work experiences that would situate a worker within this space.⁴

A. Low-Wage Work and Poverty

Government agency reports concerning poverty provide a starting point for determining what pay constitutes low-wage work. The 2010 U.S. Census reported that about 46.5 million people (15% of the population) lived below the poverty level.⁵ Of that number, 10.6 million people were among the working poor,⁶ another term often used synonymously with low-wage workers.

According to the Bureau of Labor Statistics, the “working poor” are those who worked or looked for work at least 27 weeks in a year, but whose incomes fell below the federally-defined poverty line.⁷ Definitions of the “poverty line,” however, may vary. The U.S. Cen-

2. The federal minimum wage is currently \$7.25. *See* Federal Minimum Wage Act of 2007, 29 U.S.C. § 206 (2016). Some states have enacted minimum wage requirements that surpass the federal statute. *See* D.C. CODE § 32-1003 (2016); MD. CODE ANN., LAB. & EMPL. § 3-413(c) (West 2014); N.Y. LAB. LAW § 652 (McKinney 2016). Some cities have recently enacted \$15 minimum wages in response to workers’ demands for a living wage. For example, in Seattle, workers at companies with more than 500 workers will see the minimum wage increase to \$15 by 2017 and workers at smaller companies will see the same increase by 2021. In San Francisco, the minimum wage will increase to \$15 by 2018 and in Los Angeles, it will do so by 2020. *See* Victor Luckerson, *Here’s Every City in America Getting a \$15 Minimum Wage*, TIME (July 23, 2015), <http://time.com/3969977/minimum-wage/>. The minimum wage in Washington D.C. will increase to \$15 by 2020. *See* Melanie Trottman, *A Midyear Burst of Minimum-Wage Increases Starts on July 1: Workers in 14 U.S. Cities, States, and Counties, Plus the District of Columbia, Will Get a Pay Floor Boost*, WALL ST. J. (July 1, 2016, 11:25 AM), <http://blogs.wsj.com/economics/2016/07/01/a-mid-year-burst-of-minimum-wage-increases-starts-on-july-1/>.

3. A 2013 report noted that a full-time worker earning the minimum wage makes about \$15,000 per year. *See* SYLVIA A. ALLEGRETTO & STEVEN C. PITTS, ECON. POLICY INST., TO WORK WITH DIGNITY: THE UNFINISHED MARCH TOWARD A DECENT MINIMUM WAGE 7 (2013), <http://www.irle.berkeley.edu/cwed/allegretto/Unfinished-March-Minimum-Wage.pdf>. This amount is well-below the federal government’s definition of poverty described below.

4. *See* KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 41 (1999) (describing the minimum wage as an imperfect measure for identifying the working poor).

5. *See* CARMEN DENAVAS ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 1, 14 (2011), <http://www.census.gov/prod/2011pubs/p60-239.pdf>.

6. *See id.*

7. U.S. BUREAU OF LABOR STATISTICS, A PROFILE OF THE WORKING POOR, 2012, at 1 (2014), http://www.bls.gov/opub/reports/working-poor/archive/workingpoor_2012.pdf.

sus, for example, issues poverty thresholds that vary depending on the number of adults and children living in the house.⁸ For example, according to the 2012 census, a family of four, including two children, with household earnings of \$24,421 or less lives in poverty.⁹ The United States Department of Health and Human Services' ("HHS") poverty guidelines, used for determining eligibility for federal programs, are slightly lower.¹⁰ Under those guidelines, a family of four that earns \$24,250 or less lives in poverty under the HHS guidelines.¹¹ To further complicate matters, some programs that rely upon poverty guidelines to determine eligibility consider gross income while others consider net income.¹²

The federally-defined poverty line, however, likely underestimates the number of persons living impoverished lives. Indeed, some have questioned the validity of the Census Bureau's use of a formula designed in 1964 by the Social Security Administration that relies on the outdated assumption that the average family spends one third of their income on food.¹³ They argue that changing costs of housing and other necessities make the formula obsolete and incompatible

8. See U.S. CENSUS BUREAU, POVERTY THRESHOLDS (2015), <http://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html>.

9. See *id.* The poverty thresholds are used largely for statistical purposes, such as estimating the number of Americans in poverty. See also OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERV., 2015 POVERTY GUIDELINES (2015), <http://aspe.hhs.gov/poverty/15poverty.cfm>.

10. See OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, *supra* note 9.

11. *Id.*

12. The Women, Infants and Children (WIC) program considers applicants' gross income in calculating program eligibility. See Food & Nutrition Servs., U.S. Dep't of Agric., WIC Income Eligibility Guidelines (2016), <http://www.fns.usda.gov/wic/wic-income-eligibility-guidelines> (last visited Oct. 8, 2016). Head Start provides a particularly detailed definition of income that includes gross income from some sources and net income from others. See ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERV., HEAD START PROGRAM PERFORMANCE STANDARDS 107 (2009), <https://eclkc.ohs.acf.hhs.gov/hslc/hs/docs/hspss-final.pdf>. Recipients of Supplemental Nutrition Assistance Program (SNAP) benefits must meet both gross and net income tests. See *Supplemental Nutrition Assistance Program*, U.S. DEP'T OF AGRIC.: FOOD & NUTRITION SERV., <http://www.fns.usda.gov/snap/eligibility> (last visited Oct. 8, 2016).

13. DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* 9 (2005). Shipler further explains that this reliance on a method based upon 60-year-old spending patterns results in the underestimation of the numbers of persons living in poverty. *Id.* Indeed,

[m]ore accurate formulas, being tested by the Census Bureau and the National Academy of Sciences, would rely on actual costs of food, clothing, shelter, utilities, and the like. Under those calculations income would include benefits not currently counted, such as food stamps, subsidized housing, fuel assistance, and school lunches; living costs would include expenditures now ignored, such as child care, doctor's bills, health insurance premiums, and Social Security payroll taxes.

Id. at 9–10.

with families' current economic realities.¹⁴ Perhaps in recognition of this concern, some scholars and advocates have defined low-wage work as that which pays 200% of the minimum wage.¹⁵ Still others have defined low-wage workers more expansively as those who work for hourly wages of less than \$12/hour; that is midway between the \$7.25 minimum wage and the \$15 median wage.¹⁶

As this discussion demonstrates, the definition of low-wage work can be somewhat amorphous. For my purposes, I conceive low-wage work as not only that which pays wages that meet the federal definition of poverty, but also wages that are insufficient to permit the worker to escape the trappings of poverty, such as poor housing, failing schools, lack of affordable childcare, and substandard medical care. While the sources discussed herein do not necessarily apply the same definition of low-wage wages, they all fit within this broad conception of low-wage pay.

B. Low-Wage Jobs

Another important data point for understanding low-wage workers is the types of jobs in which they are employed. The Economic Policy Initiative defines low-wage jobs as those paying at or below the wage at which a person working as a full-time worker would have to earn to live above the federally-defined poverty line.¹⁷ Others have defined low-wage work as jobs in which at least one-quarter of the workers make less than \$10/hour.¹⁸

Low-wage jobs are largely found in five job sectors: “(1) sales and related occupations; (2) food preparation and serving related occupa-

14. *See id.* at 9; *see also* WILLIAM P. QUIGLEY, *ENDING POVERTY AS WE KNOW IT: GUARANTEEING A RIGHT TO A JOB AT A LIVING WAGE* 38–39 (2003) (arguing the official poverty line is unrealistic and providing examples of how much income is required for a family of four to meet its basic needs).

15. Michael Selmi, *Unions, Education, and the Future of Low-Wage Workers*, 1 U. CHI. LEGAL F. 147, 151 (2009) (citing URBAN INSTITUTE, *A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE* 2 (2003), <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1442&context=uclf> (mentioning the Urban Institute's definition of low-wage work as 200 percent of the minimum wage)).

16. *See id.* at 147. Furthermore, Professor William Quigley has proposed the calculation for the poverty line be based upon a determination of the amount of money a person or family needs to become self-sufficient. QUIGLEY, *supra* note 14, at 43–51.

17. REBECCA THIESS, ECON. POLICY INST., *THE FUTURE OF WORK: TRENDS AND CHALLENGES FOR LOW-WAGE WORKERS* 4 (Apr. 27, 2012), <http://www.epi.org/files/2012/bp341-future-of-work.pdf>.

18. Jane R. Williams & Alan Berube, *The Metropolitan Geography of Low-Wage Work*, BROOKINGS INST. (Feb. 10, 2014), <http://www.brookings.edu/blogs/the-avenue/posts/2014/02/10-metropolitan-geography-low-wage-work-williams-berube>.

tions; (3) building and grounds cleaning and maintenance occupations; (4) personal care and service occupations; and (5) farming, fishing, and forestry occupation.”¹⁹ Low wages are particularly prevalent in food serving and preparation and related jobs, with nearly three quarters of workers earning a wage at or below the poverty line.²⁰

Limiting the definition to these jobs creates too narrow an understanding of the types of jobs may create too narrow an understanding of the types of jobs that typify low-wage work. Professor Michael Selmi, for example, has criticized narrow definitions that equate low-wage work with poverty-level hourly wages.²¹ He argues for a broader definition that would include workers who earn above-poverty level wages, yet still live in poverty.²² Such a definition would include not only those who have come to be defined as the working poor, but also those whose incomes rise above state and government definitions of poverty, but whose lives are characterized by the conditions of poverty.²³ Others similarly argue that low-wage work is defined not only by the wages earned and the industry in which one works, but on other vulnerabilities in a worker’s life. For example, one commentator characterized low-wage jobs as those that consist of a “lack of job security and the resultant rate of high turnover, few or no benefits, a lack of paid sick days, and quite often irregular or part-time scheduling.”²⁴

C. Low-Wage Workers: Beyond the Teenager

For some, the image of a low-wage worker is a teenager working for extra money in high school or college.²⁵ This caricature, however, is misleading. More than half of workers earning \$9 or less are 25

19. See *id.* For a more detailed accounting of the occupations and their percentages of low-wage workers, see Thiess, *supra* note 17, at 9.

20. Thiess, *supra* note 17, at 6.

21. Selmi, *supra* note 15, at 150.

22. *Id.* at 150–51.

23. *Id.*

24. Trish Kahle, *The Political Economy of Low-Wage Labor*, INT’L SOCIALIST REV., <http://isreview.org/issue/95/political-economy-low-wage-labor> (last visited Oct. 8, 2016).

25. According to John Schmitt, Senior Economist at the Center for Economic Policy Research, “If you look back several decades, workers near the minimum wage were more likely to be teenagers – that is the stereotype people had. It’s definitely not accurate anymore.” Steven Greenhouse, *Low-Wage Workers Are Finding Poverty Harder to Escape*, N.Y. TIMES (Mar. 16, 2014), http://www.nytimes.com/2014/03/17/business/economy/low-wage-workers-finding-its-easier-to-fall-into-poverty-and-harder-to-get-out.html?_r=0 [hereinafter Greenhouse, *Low-Wage Workers Are Finding Poverty*]; see also ECON. POLICY INST., *FEW REWARDS: AN AGENDA TO GIVE AMERICA’S WORKING POOR A RAISE 1* (2016) (characterizing low-wage workers as “not teenagers looking to make pocket change” but as “nearly half of the U.S. workforce.”).

years or older, while the proportion of teenagers has decreased from 28% to 17%.²⁶ The low-wage workforce is also increasingly college-educated.²⁷ The raw numbers of workers making poverty or near poverty-level wages provides additional data animating the expanse of this problem beyond the teen-aged caricature: according to a recent report by the Economic Policy Institute, 41.7 million workers earn less than \$12 per hour.²⁸ As such, the low-wage workforce includes persons raising families on substandard wages.

D. African American Low-Wage Worker Demographics

A review of African American low-wage worker demographics provides a more nuanced view of their workplace experiences, although this data has received comparatively little attention from the media, scholars, advocates, and policy groups. In recent years, advocates and scholars' work reflects a national preoccupation with high rates of unemployment among African Americans. This focus was not without some justification. Between 1979 and 2011, the average rate of African American unemployment was 12.2%.²⁹ During the same time period, the overall unemployment rate peaked at 10% and the white unemployment rate peaked at 8%.³⁰ The African American unemployment epidemic reflected a lack of job opportunities, particular for unskilled low-wage labor in urban areas.³¹ The phenomenon was likely further exacerbated by discrimination in hiring in the low-wage labor market.³² Given these harsh realities, concern for the African American unemployment is reasonable.

A more cynical view of the focus on African American unemployment rather than on their workplace experiences, however, con-

26. Greenhouse, *supra* note 25.

27. See JOHN SCHMITT & JANELLE JONES, CTR. FOR ECON. & POLICY RESEARCH, LOW-WAGE WORKERS ARE OLDER AND BETTER EDUCATED THAN EVER 5 (2012), <http://cepr.net/documents/publications/min-wage3-2012-04.pdf>; Emily Jane Fox, *260,000 Graduates in Minimum Wage Jobs*, CNN MONEY (Mar. 31, 2014), <http://money.cnn.com/2014/03/31/news/economy/minimum-wage-college-graduates/>; Lawrence Mishel, *Low-Wage Workers Have Far More Education Than They Did in 1968, Yet They Make Far Less*, ECON. POLICY INST. (Jan. 23, 2014), <http://www.epi.org/publication/wage-workers-education-1968/>.

28. See ECON. POLICY INST., *supra* note 25, at 1.

29. LAWRENCE MISHEL ET AL., ECON. POLICY INST., *THE STATE OF WORKING AMERICA* 39 (12th ed. 2012).

30. *Id.*

31. See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 18–20 (1996) (discussing the significant rise in joblessness in Chicago).

32. See generally Devah Pager et al., *Discrimination in the Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777 (2009) (describing the result of an experiment of white, black, and Latino job applicants).

siders the alignment of the focus on unemployment with conservative narratives about the undeserving poor. High levels of unemployment may be twisted into support for the contention that poor African Americans find themselves in poverty as a result of a their own poor decisions or even a flawed cultural value system.³³ Such narratives have been highly racialized since the Great Migration of African Americans from the farms of the rural south to urban centers in the north and the subsequent rise in unemployment when urban jobs dried up.³⁴ This singular focus on unemployment, however, renders invisible the experiences of low-wage African American workers and makes difficult obtaining detailed information about them.³⁵

Information pieced together from various reports, prepared by government agencies, non-profit organizations, and academics, allows one to assemble a narrative of low-wage African American workers' experiences. First, the poverty rate of African American workers is generally high. According to a 2013 report, 10.5% of African American male workers and 15.6% of African American female workers are in poverty.³⁶ A 2012 report by the U.S. Bureau of Labor Statistics similarly found that 13.6% of African Americans in the labor force are considered to be the working poor.³⁷ These numbers seem to increase significantly if one broadens the definition of "working poor." According to the Economic Policy Institute, 5.9 million African Amer-

33. For example, in a 2014 radio interview, Congressman Paul Ryan opined on the source of poverty in inner cities, stating:

We have got this tailspin of culture, in our inner cities in particular, of men not working and just generations of men not even thinking about working or learning the value of the culture of work, and there is a real culture problem here that just has to be dealt with.

Wesley Lowery, *Paul Ryan, Poverty, Dog Whistles, and Electoral Politics*, WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/03/18/paul-ryan-poverty-dog-whistles-and-racism/>.

34. See NEWMAN, *supra* note 4, at 39–40; see also John A. Powell, *Post-Racialism or Targeted Universalism*, 86 DENV. U. L. REV. 785, 792 (2008) (discussing white resentment of programs that benefit non-Whites, based upon "a sense that whites that are playing by the rules are having things taken away from them and given to undeserving non-whites who do not play by the same rules").

35. Various scholars point out that the working poor, as a general demographic, regardless of race, have received little attention and analysis. According to Katherine Newman: "they do not impinge upon the national conscience, they do not provoke political outrage as welfare recipients do; they are not represented by organized labor, and few public figures (save perhaps Jesse Jackson and Hugh Price) take the time to dramatize their problems; they are too tired to take to the streets to demand a larger part of the national pie." See NEWMAN, *supra* note 4, at xiii–xiv.

36. These numbers are in sharp contrast to the 5.6% of white male and 6.7% of white female workers living in poverty. See ALLEGRETTO & PITTS, *supra* note 3, fig.8, at 8.

37. U.S. BUREAU OF LABOR STATISTICS, *supra* note 7, at 4. The same report indicated that 6.2% of Whites, 4.9% of Asians, and 13.8% of Latinos are part of the working-poor. *Id.*

icans (38% of all African American workers) make less than \$12 per hour and 8.2 million African Americans (roughly 53% of all African American workers) make less than \$15 per hour.³⁸

Second, while nearly equal percentages of African Americans and whites are employed as low-wage workers between the ages of 16 and 19,³⁹ the numbers diverge significantly as the workers age. By the time workers are 25 to 35 years old, 42.1% of African American workers are in low-wage jobs, while only 27.7% of white workers are similarly employed.⁴⁰ For workers over 35 years old, the percentage of African Americans in low-wage jobs drops to 29.2%, while the percentage of whites in similar jobs drops to 18.6%.⁴¹

In addition, a recent report revealed important demographic and geographic details about African American workers. Between 2012 and 2016, 47.6% of African American low-wage workers were older than 35, 30.1% were between the ages of 25 and 35, and 22.3% were between the ages of 16 and 24.⁴² The report also shed light on the geographic variation in the prevalence of low-wage work among African Americans. It revealed that 58.6% of African American low-wage workers reside in the South, 17.2% in the Mid-West, 16.7% in the Northeast, and 7.5% in the West.⁴³

Furthermore, data concerning industries that employ African American low-wage workers reflects the racialization of low-wage workplaces.⁴⁴ Out of the ten industries with the highest level of low-wage work, African Americans are most prevalent in the restaurant industry (75.7%) and the least prevalent in the Outpatient Health Care Services (40%).⁴⁵ The prevalence of African Americans in the restaurant industry is further complicated by reports that the restau-

38. ECON. POLICY INST., FEW REWARDS: AN AGENDA TO GIVE AMERICA'S WORKING POOR A RAISE (2016), https://www.oxfamamerica.org/static/media/files/Few_Rewards_Report_2016_web.pdf.

39. 89.3% of African American workers between the ages of 16 and 19 are low-wage and 90.9% of white workers are low-wage. Steven Pitts, *Low-Wage Work in the Black Community in the Age of Inequality*, in #BLACKWORKERSMATTER 29, 31 (2015), http://www.discountfoundation.org/sites/all/files/black_workers_matter.pdf [hereinafter Pitts, *Low-Wage Work*].

40. *Id.*

41. *Id.*

42. *See id.* at 33.

43. *Id.*

44. *See* Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 304 (2004) [hereinafter Saucedo, *The Browning of the American Workplace*].

45. Pitts, *Low-Wage Work*, *supra* note 39, at 32.

rant industry has a system of de facto segregation in which African Americans are relegated to the lowest paid jobs in that industry.⁴⁶

The intersectional experiences of African American women are also evident in their relative rates of participation in low-wage jobs. A higher percentage of African American women than men are low-wage workers: 58% of African American low-wage workers are female, while 41.9% are male.⁴⁷

A recent report analyzing the experiences of African Americans in the retail industry illuminates how exploitation in low-wage jobs is racialized. The NAACP and Demos found that while the demographic of African Americans employed in the retail industry is relatively similar to the retail workforce overall, African Americans are, nonetheless, more likely to earn poverty wages in that industry.⁴⁸ Seventeen percent of African American retail workers live below the poverty line, compared to seven percent of White and thirteen percent of Latino retail workers.⁴⁹ In addition, African Americans working in retail are more likely to be the sole breadwinners in their household.⁵⁰ In other words, even within the same industry, low-wage workers fare worse than white workers. This difference in workplace experiences merits consideration by scholars that interrogate and theorize the exploitation of low-wage workers.

II. LOW-WAGE AFRICAN AMERICAN WORKERS' ABSENCE FROM THE SCHOLARLY CONVERSATION

Much like advocates, scholars exploring the dynamics of low-wage worker exploitation have increasingly focused their analyses on

46. See Sean Thomas-Breitfeld, *Working While Black: The State of Black Power Organizing in the U.S.*, in #BLACKWORKERSMATTER 1, 2 (2015), http://discountfoundation.org/sites/all/files/black_workers_matter.pdf. In her book, *Behind The Kitchen Door*, Saru Jayaraman provides both anecdotal and statistical evidence concerning racial segregation in the restaurant sector and argues that “racial segregation is one of the restaurant industry’s most pressing, deep-seated problems, and part and parcel of every other pattern of injustice in the industry.” SARA JAYARAMAN, *BEHIND THE KITCHEN DOOR* 106 (2013).

47. Thomas-Breitfeld, *supra* note 46.

48. CATHERINE RUETSCHLIN & DEDRICK ASANTE-MUHAMMAD, *THE RETAIL DIVIDE: HOW THE RETAIL INDUSTRY IS PERPETUATING RACIAL INEQUALITY IN THE 21ST CENTURY* 11–12 (2015), <http://www.demos.org/sites/default/files/publications/The%20Retail%20Race%20Divide%20Report.pdf>. Another report found a substantial overrepresentation of African Americans in cashier positions, the lowest paid workers in sales. See Linda Burnham, *Gender and the Black Jobs Crisis*, in #BlackWorkersMatter 24 (2015), http://discountfoundation.org/sites/all/files/black_workers_matter.pdf.

49. *Id.* at 14.

50. *Id.* at 12.

the intersection of workplace rights and immigrant justice.⁵¹ The profound vulnerability created by the collision of unstable immigration status and low-wage work creates heightened levels of wage theft and other violations of wage and hour statutes.⁵² That this dynamic has drawn significant attention from scholars and advocates is not surprising. Furthermore, many immigration and immigrant justice scholars have expanded their work to include an assessment of the challenges facing immigrant low-wage workers, particularly given the enactment of more stringent restrictions placed on employers to discourage the hiring of undocumented workers. A handful of scholars have also explored more broadly the exploitation of low-wage workers and have afforded little attention to the intersectional identities that might further complicate their experiences. Finally, in the only scholarly article that explicitly assesses workplace exploitation of African American workers, they are juxtaposed to Latino workers.

A review of scholarship concerning low-wage worker exploitation reveals a particularly narrow landscape that focuses heavily on the intersection of workplace law and immigrant justice. Much of the scholarship on low-wage worker exploitation can be organized into the following categories: (1) immigrant workers and the failure of labor and employment law to adequately protect them from workplace exploitation; (2) immigration relief for exploited workers; (3) the impact of agency coordination on exploited immigrant workers; and (4) cultural narratives and the exploitation of immigrant workers.

A. Low-Wage Workers and the Limitations of Labor and Employment Law

Scholars have explored and critiqued the failure of labor and employment law to protect undocumented low-wage workers. Professor

51. See Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1108 (2012) (“Most scholarly attention and community advocacy for low-wage workers have focused on the most vulnerable within this category: the workplace abuses faced by immigrants.”).

52. As Kim Bobo explains:

Because our nation has no rational immigration system providing a path to citizenship and no stronger worker protections for immigrants, many immigrants find themselves in vulnerable situations. They are desperate to work to support themselves and their families; at the same time they face enormous backlash from communities that are scapegoating the nation's economic woes on immigrants (hardly a new approach in U.S. history), and they are terrified of being deported. This creates a context that makes it easy for employers to exploit undocumented workers.

KIM BOBO, *WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID – AND WHAT WE CAN DO ABOUT IT* 59–60 (2009).

Leticia Saucedo's early work identified, described, and problematized the experiences of the "Brown Collar" worker; that is, "a recent Latino immigrant (arriving in the United States within the past five years) who works in an occupation in which Latinos are concentrated or overrepresented."⁵³ In *The Browning of the American Workplace*, Professor Saucedo examines the increasing segregation of recently immigrated Latinos into restructured low-wage industries in which "workers tak[e] on more work for the same or less pay than their predecessors."⁵⁴ Saucedo explains that Brown Collar workplaces are typically undesirable and dangerous, and offer little opportunity for mobility.⁵⁵ She further asserts that current Title VII legal frameworks are incapable of recognizing the discriminatory creation and sustainment of segregated Brown Collar workplaces, particularly where such workplaces lack a comparator for the purposes of establishing a prima facie case of discrimination.⁵⁶ Professor Saucedo relies upon sociologist Lisa Catanzanite's longitudinal data analyses that demonstrate a positive correlation between wage depression, job segregation, and worsening workplace conditions,⁵⁷ and argues that courts consider such data "as evidence of a causal link between the employer's recruitment practices, wage penalties, or worsening conditions, and the employer's intent."⁵⁸

Professor Saucedo expands her analysis of the Brown Collar workplace by critiquing the typical narratives that assume job segregation is based upon "network hiring, job structuring, targeting subservience, and avoiding native born workers," and offers a counternarrative that "employers take advantage of the social conditions that make Brown Collar workers subservient by setting workplace conditions and pay rates."⁵⁹ In *The Employer Preference for the Subservient Worker and The Making of the Brown Collar Workplace*, Professor Saucedo problematizes the narrative that immigrant workers take jobs no one else wants by contending that employers are restructuring jobs to exploit a more vulnerable workforce and thus, creating jobs that are fundamentally different than those held by pred-

53. See Saucedo, *The Browning of the American Workplace*, *supra* note 44, at 304.

54. *Id.* at 306-07.

55. See *id.* at 307, 315.

56. *Id.* at 322-24.

57. *Id.* at 310-11.

58. *Id.* at 318.

59. Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 961-62 (2006) [hereinafter Saucedo, *The Employer Preference*].

cessor employees.⁶⁰ She then argues that Title VII, which prohibits job segregation that limits employees' opportunities, remains insufficient to address the discriminatory relegation of immigrant workers to Brown Collar jobs and advocates a change in the formal antidiscrimination doctrine to accommodate the Brown Collar worker context.⁶¹ This alternative framework, Professor Saucedo argues, would employ anti-subordination principles and Catanzanite's sociological theories that cognize practices aimed at targeting and exploiting vulnerable immigrant workers.⁶²

In her third article on the Brown Collar workplace, Professor Saucedo argues for the application of the mirror image to the "inexorable zero" standard articulated in *International Brotherhood of Teamsters v. United States*, that permits courts to infer discrimination where a protected group is entirely absent from a job or workplace.⁶³ In *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, she proposes that courts be permitted to infer discrimination where a protected group comprises all of the workers in a job or workplace.⁶⁴ Specifically, she proposes a burden-shifting framework (similar to that already employed in Title VII cases) that permits immigrant workers to establish a prima facie case where they constitute 100% of the workplace and additional anecdotal and statistical evidence.⁶⁵ The employer could then respond by demonstrating a "legitimate explanation" response to those conditions.⁶⁶ Professor Saucedo suggests that this framework would therefore broaden the remedial scheme available to brown collar workers to potentially include immigration remedies that would encourage workers to complain about exploitative workplaces.⁶⁷

In wrapping up her scholarship in this area, Professor Saucedo applies theories of discrimination to the Brown Collar workplace to further argue for the expansion of antidiscrimination law to encompass the exploitation of immigrant workers. In *Three Theories of Discrimination in the Brown Collar Workplace*, she applies structuralist,

60. *Id.* at 974.

61. *Id.* at 986.

62. *Id.* at 1019–20.

63. Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM, 447, 449 (2008) [hereinafter Saucedo, *Addressing Segregation*].

64. *Id.* at 476.

65. *Id.*

66. *Id.* at 502–03.

67. *Id.* at 503–04.

performance identity, and masculinities theories to the dynamics in the Brown Collar workplace to conceptualize the discriminatory nature of those jobs.⁶⁸ Drawing from interviews of Las Vegas residential construction workers conducted over a two-year period, Professor Saucedo concludes that the gendered narratives surrounding workplace conditions and workers' tendency to reify and solidify them are critical to our understanding of brown collar workplace exploitation and the discriminatory practices that create and sustain it.⁶⁹ Moreover, she argues that employers can reframe or disrupt these narratives and foster anti-discriminatory decision-making by emphasizing and rewarding different values and work performance.⁷⁰

Similarly, Professor Ruben Garcia has written extensively at the intersection of immigration and labor law and criticized the subordination of labor law protections to immigration enforcement. Professor Garcia's analyses of the impact of *Hoffman Plastic Compounds v. N.L.R.B.* on immigrant low-wage workers' ability to actively participate in workplace organizing are key examples of this work.⁷¹ In *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, Professor Garcia considers the impact *Hoffman* had on immigrant worker organizing and immigration reform.⁷² He questions the conflicting signals sent by the Supreme Court to immigrant workers: they are employees under the National Labor Relations Act, but they do not have the same rights as citizens to remedy violations of their right to organize.⁷³ Professor Garcia revisits *Hoffman* in *Ten Years After Hoffman Plastic Compounds, Inc. v. N.L.R.B.: The Power of a Labor Law Symbol*, where he considers where advocates have succeeded in limiting the case's application to employment statutes, but also calls for more empirical work to determine the case's impact of immigrant worker organizing.⁷⁴

68. Leticia M. Saucedo, *Three Theories of Discrimination in the Brown Collar Workplace*, 1 U CHI. LEGAL F. 345, 346 (2009) [hereinafter Saucedo, *Three Theories*].

69. *Id.* at 348.

70. *Id.* at 376–77. Professor Saucedo draws heavily from the work of organizational theorists Robin J. Ely and Deborah Myerson, who theorized how “organizations can change their process to emphasize how alternative identities are important to the life of an organization” *Id.* at 375; see also Robin J. Ely & Deborah Meyerson, *Unmasking Manly Men: The Organizational Reconstruction of Men's Identity*, 3 ACADEMIC MGMT. PROC. 1 (2006).

71. Saucedo, *Three Theories*, *supra* note 68, at 348.

72. Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003).

73. *Id.* at 737.

74. *Id.*

Jayesh Rathod broadens the discussion of immigrant low-wage work through his multi-article project that uncovers and explores the intersection of immigrant labor and the Occupation Safety and Health regime.⁷⁵ In *Immigrant Labor and the Occupational Safety and Health Regime*, Professor Rathod unearths critical trends in immigrant workers' injuries and fatalities in the workplace and considers challenges and limitations to their protection by the federal Occupational Safety and Health Administration.⁷⁶ Professor Rathod, in his follow-up piece, encourages scholars, lawmakers, and advocates to consider a more nuanced understanding of the "chilling effect"⁷⁷ of immigration status on immigrant workers' behavior.⁷⁸ Professor Rathod employs a theoretical shift that challenges the assumption that the only determining factor influencing immigrant worker decision-making is immigration status and proffers that various other intersecting factors impact immigrants' willingness and ability to pursue their workplace rights.⁷⁹

B. Immigration Relief to Protect Low-Wage Workers

A review of the scholarship also reveals Professor Saucedo's second body of work that interrogates the availability of immigration relief to exploited immigrant workers and proposes the U-visa as a mechanism to both provide immigrant workers leverage against the rights denied them in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*,⁸⁰

75. *Id.*

76. Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 481 (2009) [hereinafter Rathod, *Immigrant Labor*].

77. The "chilling effect" here refers to the belief that "workers will be reluctant to complain about substandard labor conditions, lest they draw any government attention to the fact of their unauthorized employment or undocumented status." Jayesh M. Rathod, *Beyond the "Chilling Effect": Immigrant Worker Behavior and the Regulation of Occupational Safety and Health*, 14 EMP. RTS. & EMP. POL'Y J. 267, 272 (2010) [hereinafter Rathod, *Beyond the Chilling Effect*].

78. *Id.*

79. *Id.*

80. In 2002, the Supreme Court's decision in *Hoffman Plastic Compounds, Inc.* limited the remedies, including back pay, available to undocumented workers under the National Labor Relations Board. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150–51 (2002). Subsequently, however, courts have limited its applicability to other types of employment claims. For example, courts have maintained that back pay remains a valid remedy where undocumented workers seek to recover pay for hours worked pursuant to the FLSA. See Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1370 (2009) ("Nearly every court to rule on the issue has refused to extend the back pay limitation in NLRA cases to minimum wage and overtime protections."); see, e.g., *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 254 (2d Cir. 2006); *Galdames v. N. & D. Inv. Corp.*, 2008 WL 4372889, at *7 (S.D. Fla. Sept. 24, 2006); *Cortez v. Medina's Landscaping*, 2002 WL 31175471, at *1 (N.D. Ill. Sept. 30, 2002).

and mitigate the unintended consequences for workers of the Immigration and Nationality Act's employment sanctions provisions. In *A New U: Organizing Workers and Protecting Immigrant Workers*, she explores the impact of *Hoffman*, the increase in ICE Raids focused on immigrant dominant industries, immigrant and regulatory bases, and proposed local enforcement of immigration laws on immigrant community fears and the silencing of exploited workers.⁸¹ The U-visa program provides temporary nonimmigration legal status, and a potential path to citizenship for the victims and witnesses of crimes.⁸² Professor Saucedo argues that the U-visa, which already contemplates the inclusion of workplace crimes, be more regularly sought by and awarded to the victims of workplace exploitation and related crimes.⁸³ She contends that the availability of immigration relief counteracts the chilling effect of *Hoffman* and other legal developments that have heightened immigrant communities fears, as well as provides a path toward civic participation through citizenship that could yield a more robust immigrant civil rights movement.⁸⁴ Professor Saucedo also explores employment cases that involved U-visa enumerated crimes — such as trafficking, involuntary servitude, sex crimes, and obstruction of justice — for which U-visa relief would have been appropriate, to bolster her argument for its use as part of the make-whole remedial scheme in employment law.⁸⁵ Moreover, she makes an argument for “operation-alizing the U visa” through its use as a “rights-conferring device” that inures to immigrant workers.⁸⁶ Finally, Professor Saucedo acknowledges the deficiencies in the U-visa provisions and proposes restructuring the relief to provide class-wide rather than individual relief, to provide a private right of action that would “empower crime victims to seek remedies” not provided by the criminal justice system, employment law, or tort law.⁸⁷

Professor Saucedo furthers this scholarly inquiry in *Immigration Enforcement Versus Employment Law Enforcement: The Case for In-*

81. Leticia M. Saucedo, *A New U: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 891 (2008) [hereinafter Saucedo, *A New U*].

82. *Id.* at 907; see also 8 U.S.C. § 1101(a)(15)(U)(iii); Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 311–12 (2010) [hereinafter Saucedo, *Immigration Enforcement*].

83. See Saucedo, *A New U*, *supra* note 81, at 892.

84. *Id.* at 893–905.

85. *Id.* at 921–35.

86. *Id.* at 936.

87. *Id.* at 951.

egrated Protections in the Workplace. Here, Professor Saucedo considers the unintended consequences of the employer sanctions provisions of the Immigration and Nationality Act (“INA”) and proposes ways the U-visa provision can mitigate them.⁸⁸ She proffers that the amendments to the INA have resulted in heightened immigration enforcement at workplaces, without the consistent imposition of fines against employers contemplated by the statute, resulting in the increased vulnerability and exploitation of workers.⁸⁹ She then considers the applicability of the U-visa provision to workplace crimes, focusing on indications in the legislative history that Congress intended the provision to be a “a tool for law enforcement,” “humanitarian relief those who are helpful to law enforcement,” and “protection for workers who suffer crimes in the workplace.”⁹⁰ Finally, Professor Saucedo proposes adjustments to the U-visa scheme that would better provide exploited workers access to the remedy, and therefore, better able to protect themselves from workplace exploitation.⁹¹

C. The Impact of Interagency Coordination on Immigrant Workers

Stephen Lee’s scholarly contribution to the examination of low-wage worker exploitation also sits solidly at the intersection of immigrant and employment law. Specifically, his work critiques the increase in interagency immigration coordination and its impact on workers. In *Monitoring Immigration Enforcement*, Professor Lee tackles the disruption of agency coordination between Immigration and Customs Enforcement (“ICE”) and the DOL and proposes the expansion of the DOL’s mandate to include the monitoring of immigration enforcement.⁹² Concerned with the labor consequences of immigration enforcement and the priority that ICE’s mandate has taken

88. See Saucedo, *Immigration Enforcement*, *supra* note 82, at 303.

89. *Id.* at 306–10.

90. *Id.* at 313.

91. *Id.* at 317–23. Specifically, Professor Saucedo advocates for: (1) the creation of a parallel to the T visa status protection that protects them from prosecution for claims related to their workplace exploitation; (2) the amendment of the Social Security Act to exclude the false use of social security numbers for work from criminal sanctions; (3) the increase of the 10,000 per year cap on the number of U visas available each year; (4) the explicit inclusion of work-related crimes in the U visa scheme; (5) the expansion of workplace related crimes to include wage and hour violations, discrimination, and collective bargaining violations; and (6) the definition of certain workplace-related crimes as per se evidence of mental and physical abuse in the regulations and/or the redefinition of “victim” in the provision. *Id.*

92. Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1089 (2011) [hereinafter Lee, *Monitoring Immigration*].

over the DOL's mandate and the limits of the U-visa as a remedy that would bolster worker's ability to bring claims against their employers, Professor Lee argues for the creation of a monitoring framework by which the DOL would monitor immigration enforcement decisions to "ensure that immigration officials account for the labor consequences of their enforcement decision."⁹³ Drawing insights from administrative law scholars, he considers how interagency cooperation — beyond Memoranda of Understanding that have often had limited efficacy — could decrease the likelihood that ICE employment enforcement activities under IRCA would suppress labor rights.⁹⁴

In *Workplace Enforcement Workarounds*, Professor Lee exposes the impact of the Secured Communities Program ("S-Comm") on the exploited immigrant workers and argues that S-Comm creates a workaround whereby workers arrested for asserting their employment rights are subject to deportation, even when the prosecutor drops the charges.⁹⁵ Put simply, Professor Lee contends that the Executive's workplace enforcement policy is undermined by the requirement that local law enforcement share immigration-related information with ICE on persons they arrest. He proffers that given the proliferation of the S-Comm program, employers are circumventing modern workplace enforcement policy. That is, "[t]he police enable employers to achieve the prohibited outcome (suppressing labor dissent) by acting as a workaround — an alternative path by which employers can achieve the otherwise prohibited outcome."⁹⁶ Thus, while current Executive actions, including a Memorandum of Understanding between the ICE and DOL prohibiting the former from pursuing the removal of workers where a DOL investigation exists, employers are simply reporting workers seeking to enforce their substantive rights to the police who arrest the workers and report them to ICE.⁹⁷ In order to address this phenomenon, Professor Lee proposes that the Executive amend the MOA to prohibit the police from responding to tips where the circumstances signal the existence of an ongoing work dispute or prohibit the police from conducting their immigration-related duties where labor-related investigations were underway.⁹⁸ He also pro-

93. *Id.* at 1094.

94. *Id.* at 1120–30.

95. Stephen Lee, *Workplace Enforcement Workarounds*, 21 WM. & MARY BILL RTS. J. 549, 550–51 (2012) [hereinafter Lee, *Workplace Enforcement*].

96. *Id.* at 561.

97. *Id.*

98. *Id.* at 572.

poses a back-end correction where the Executive could require ICE to exercise prosecutorial discretion to cease removal proceedings for persons involved in a workplace dispute.⁹⁹

In *Policing Wage Theft in the Day Labor Market*, Professor Lee's scholarship shifts its focus to the undocumented immigrant day laborer population and local efforts to criminalize wage theft.¹⁰⁰ Professor Lee identifies the tension between involving the criminal justice system in the protection of workers' rights and that same system's responsibility to report unauthorized workers.¹⁰¹

D. Cultural Narratives and the Immigrant Worker Experience

Professor Saucedo's third body of work addresses the role of cultural narratives in the workplace exploitation of Latino immigrant workers. In *Masculinity Narratives and Latino Immigrant Workers: A Case Study of the Las Vegas Residential Construction Trades*, Professor Saucedo identifies the changes in the construction industry that have coincided with the "Browning" of the workplace — including independent contractor arrangements that deny immigrant workers certain wage and hour protections, the movement toward piece rate wages that deny workers overtime compensation, and the deterioration of workplace safety conditions — and considers the impact of masculinity narratives imposed upon and adopted by Latino immigrant workers.¹⁰² Relying upon masculinity theory, Professor Saucedo argues that Latino immigrant workers in the construction industry manifest the broader "Blue-Collar" hypermasculinity narrative, the entrepreneurial masculinity narrative, as well as what she terms "Brown-Collar" worker masculinities.¹⁰³ According to Professor Saucedo, her interviews of Latino construction workers unearthed four narratives: (1) the narrative that Brown-Collar work is labor no one else will do; (2) the hypermasculine narrative centered on the craft, skill, and toughness required in their jobs; (3) the entrepreneurial "businessmen-in-the-making" narrative; and the (4) the breadwinner and brave border-crossing to secure employment narra-

99. *Id.*

100. Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 655–58 (2014) [hereinafter Lee, *Policing Wage Theft*].

101. *Id.*

102. Leticia M. Saucedo & Maria Cristina Morales, *Masculinities Narratives and Latino Immigrant Workers: A Case Study of the Las Vegas Residential Construction Trades*, 33 HARV. J.L. & GENDER 625, 629–34 (2010) [hereinafter Saucedo & Morales, *Masculinities Narratives*].

103. *Id.* at 637–41.

tive.¹⁰⁴ Professor Saucedo proffers that each of these narratives explains or gives value to the deteriorating realities of the construction work and helps explain why workers do not complain about their work conditions.¹⁰⁵

In *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, Professor Saucedo and Professor Maria Cristina Morales track the replication of immigrant workers' border crossing narratives in worker's discussions of their workplace experiences.¹⁰⁶ Drawing from Saucedo's prior work on masculinity narratives, Professors Saucedo and Morales consider four narratives: Endurance, Persistence, Family Provider, and Family Order. They contend that each of these narratives pervade not just worker's understandings of their border-crossing experiences, but also appear central to how they describe and process their challenges in the workplace.¹⁰⁷ Furthermore, they explore a corollary narrative – the worker as a non-rights bearer – within the workplace and its reliance on endurance and necessity that mimic the masculinity narratives.¹⁰⁸ Finally, Professors Saucedo and Morales consider the implications of these narratives for immigration and employment policy.

Professor Saucedo closes the loop on the role of masculinity narratives in shaping immigrant workers' workplace experiences in *Anglo Views of Mexican Labor: Shaping the Law of Temporary Work through Masculinity Narratives*.¹⁰⁹ Here, she explores the racialization of immigrant workers through masculinity narratives and the reinforcement of these narratives in labor, employment and immigration laws.¹¹⁰

E. Comparing Latino and African American Workers

Professors Jennifer Gordon and R.A. Lendhardt's work juxtaposing the low-wage workplace experiences of Latino and African American workers is an outlier in the literature. In *Rethinking Work and Citizenship*, Gordon and Lendhardt consider the conflict between La-

104. *Id.* at 642–50.

105. *Id.*

106. Leticia M. Saucedo & Maria Cristina Morales, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J.L. & PUB. POL'Y 641, 641 (2012) [hereinafter Saucedo & Morales, *Voices Without Law*].

107. *Id.*

108. *Id.*

109. Leticia M. Saucedo, *Anglo Views of Mexican Labor: Shaping the Law of Temporary Work Through Masculinities Narratives*, 13 NEV. L.J. 547, 547 (2013) [hereinafter Saucedo, *Anglo Views*].

110. *Id.*

tino immigrant and African American workers through the lens of citizenship or belonging and its role in shaping their respective workplace experiences.¹¹¹ Under their theory, “work is a pathway to belonging, but its direction turns very much on who is traveling it at a given moment in time.”¹¹² Gordon and Lenhardt proffer that African American workers do not view low-wage work as a pathway to respect and full citizenship, particularly given that low-wage jobs are increasingly undesirable,¹¹³ while Latino immigrant workers consider employment a pathway to acceptance in the United States and a source of financial stability that improves their standing or position in their home countries.¹¹⁴ They argue that these differing perspectives on works’ value and relationship to full citizenship yield very different workplace experiences and expectations that should inform our understanding of the racial dynamics of low-wage work.¹¹⁵

The scholarship discussed herein is not exhaustive.¹¹⁶ Indeed, a review of all of the scholarly work on low-wage worker exploitation is neither feasible nor useful for my purposes here. This review, however, provides a sense of the gap in the literature that fails to provide substantial consideration to the nuanced experiences of low-wage African American workers and their vulnerability to workplace exploitation. Scholars have produced rich and important analyses of the intersectional experiences of immigrant Latino workers. Even Gordon and Lenhardt’s work, which provides important consideration and analysis of the ways in which African American workers’ historical and current circumstances animate their understanding of work and its relationship to citizenship, presents a comparative lens that considers African Americans’ experiences in contrast with and comparison to immigrant Latino’s experiences.¹¹⁷ Accordingly, to the ex-

111. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 U.C.L.A. L. REV. 1161 (2008).

112. *Id.* at 1199.

113. Gordon and Lenhardt further explain, “[e]specially for Blacks who have not been able to escape the low-wage context, work has not delivered on its citizenship promises. The low-wage workplace is still characterized by segregation, hazardous work conditions, and few opportunities for advancement.” *Id.* at 1209–10.

114. *Id.*

115. *Id.*

116. See, e.g., Nantiya Ruan, *What’s Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1107–11 (2012); Charlotte Alexander, Anne Hale-Lock & Nantiya Ruan, *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1, 11–14 (2015); Hina B. Shah, *Broadening Low-Wage Workers’ Access to Justice: Guaranteeing Unpaid Wages in Targeted Industries*, 28 HOFSTRA LAB. & EMP. L.J. 9, 9–15 (2010).

117. See, e.g., Gordon & Lendhardt, *supra* note 111, at 1220–29.

tent the African American low wage workers' experiences are engaged in the literature, they are juxtaposed with the Latino immigrant experience.¹¹⁸

This article, therefore, begins to fill a gap in the literature by adding African American workers back into the narrative of low-wage worker exploitation. To further this end, the following section considers the historical and structural dynamics that have contributed to or exacerbated the invisibility of African American workers from both scholarship and advocacy.

III. HISTORICAL FRAMING – LOW-WAGE WORKERS AND THE CIVIL RIGHTS AGENDA

What I have thus-far characterized as the relative invisibility of African American low-wage workers from the low-wage worker narrative is most effectively understood within a historical framing that helps explain this phenomena.¹¹⁹ African American low-wage workers' experiences cannot be divorced from the vestiges of slavery and segregation within the workforce. As Kim Bobo reminds us: “[s]laves were given the messy jobs, the behind-the-scenes jobs, the hidden jobs, the backbreaking jobs. Despite some changes in who occupies various jobs, these segregated roles still exist.”¹²⁰ While the following discussion stops short of tracing the roots of low-wage work in slavery, that earliest reality of wage-less work haunts our understanding of low-wage workers today.

The historical exclusion of African Americans from the low-wage worker paradigm can be traced back to the New Deal.¹²¹ When the Fair Labor Standards Act (“FLSA”) was enacted in 1938, agricultural and domestic workers — largely African Americans at the time —

118. *Id.*

119. It is not the goal of this article to provide an extensive historical analysis. Professor Risa Goluboff's work critically explores this history with substantial depth in her book, *The Lost Promise of Civil Rights* and various law review articles. See RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 42–43 (2007) [GOLUBOFF, *THE LOST PROMISE*]. Rather, I provide a brief discussion of the history in recognition that the current dynamic is not only the result of not only current complexities in the workforce and the emergence of workers' centers, but is also situated within a historical absence of African Americans from both worker legislation as well as much of the civil rights advocacy.

120. See BOBO, *supra* note 52, at 47.

121. See generally Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Workers Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 98–107 (2010) [hereinafter Perea, *The Echoes of Slavery*].

were specifically excluded from its protections.¹²² Indeed, as Professor Juan Perea explained, the legislative history of FLSA provides a revealing lens into the explicit racial underpinnings of the exclusion of agricultural and domestic workers from the statute.¹²³ For example, Representative J. Mark Wilcox of Florida expressed southern whites' concerns about the breadth of coverage originally proposed in the FLSA:

Then there is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are to handle the matter, this delicate and perplexing problem can be adjusted; but the Federal government knows no color line and of necessity it cannot make any distinction between the races. We may rest assured, therefore, that . . . it will prescribe the same wage for the Negro that it prescribes for the white man . . . [T]hose of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. There just is not any sense in intensifying this racial problem in the South, and this bill cannot help but produce such a result . . .¹²⁴

In other words, the South could and would not countenance the provision of legal rights to African American low-wage workers that would grant them the same opportunities for economic advancement as white workers.¹²⁵ The federal statute, of course, could not explicitly deny coverage to African American workers. Rather, in order to

122. *Id.* at 104. Indeed, the exclusion of African American workers also extended to the Social Security Act. Professor John A. Powell explained that universal programs intended to benefit all Americans were based on non-universal assumptions that purposefully excluded African Americans. Accordingly, “. . . because of exclusions of agricultural and domestic workers, exclusions built-in to appease Southern resistance to the [Social Security] Act, 65% of African Americans were denied its protections.” Powell, *supra* note 34, at 789–90 (citing IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* (2005)).

123. Perea, *The Echoes of Slavery*, *supra* note 121, at 114–17 (2011).

124. 82 Cong. Rec. 1404 (1937).

125. See Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1679 (2001) [hereinafter Goluboff, *The Thirteenth Amendment*] (“In excluding agricultural and domestic workers, the New Deal refused to take on the racial political economy of the South.”). This history fits within what Professor Athena Mutua describes as White Power’s invention of “new and different institutional systematic oppressions to maintain blackness as subjugated and black people as oppressed.” Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1200 (1999).

placate concerns like those articulated by Representative Wilcox, the statute Congress adopted carved out exceptions for jobs largely held by African Americans.¹²⁶ Later iterations of the statute similarly excluded jobs traditionally held by African Americans, such as home healthcare workers.¹²⁷ Indeed, home healthcare workers only recently received statutory rights under the wage and hour laws.¹²⁸

In the midst of the exclusion of African American low-wage workers implicit exclusion from the FLSA and other New Deal statutes, the Civil Rights Division of the Department of Justice, and to a lesser extent, the NAACP's legal division,¹²⁹ were engaged in litigation that prioritized the economic interests of African American workers. Professor Risa Goluboff's work on the pursuit of economic justice through civil rights advocacy is particularly instructive here.¹³⁰

The invisibility of African American low-wage workers is a by-product of the civil rights movement's historical shift in focus from workers' rights to a political and education rights. In the 1940s and 1950s, economic rights were a critical component of efforts to secure civil rights.¹³¹ As World War II came to an end, however, the legal advocates engaged in civil rights litigation largely prioritized political rights and anti-segregation efforts over workplace justice.¹³²

126. See generally The Fair Labor Standards Act of 1938, 29 U.S.C. § 202 (1938). The National Labor Relations Act of 1935 that protected workers' right to organize in unions, likewise excluded agricultural and domestic workers. As Professor Risa Goluboff explains: "[o]n the one hand the NLRA did not guarantee labor rights workers equally. Like many of the New Deals economic protections, it excluded agricultural and domestic workers. Many of the workers were African American, so their concession marked a concession to southern white congressmen. The image of the workers entitled to such right was largely that of a white man supporting his wife and children. The work in which such rights would be protected was, by legislative fiat, industrial work." See GOLUBOFF, *THE LOST PROMISE*, *supra* note 119, at 29.

127. See 29 C.F.R. § 552.2 (2015) ("In 1974, Congress extended the protections of the Fair Labor Standards Act (FLSA or the Act) to 'domestic service' employees, but it exempted from the Act's minimum wage and overtime provisions domestic service employees who provide 'companionship services' to elderly people or people with illnesses, injuries or disabilities who require assistance in caring for themselves . . .").

128. See *id.* § 552.3.

129. The NAACP unsuccessfully appealed to the Roosevelt Administration for the nondiscriminatory application of the New Deal programs. See Risa Lauren Goluboff, "Let Economic Equality Take Care of Itself": The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, 52 U.C.L.A. L. REV. 1393, 1410 (2005) [hereinafter Goluboff, *Let Economic Equality Take Care of Itself*].

130. See generally Goluboff, *The Thirteenth Amendment*, *supra* note 125; Goluboff, *Let Economic Equality Take Care of Itself*, *supra* note 129; GOLUBOFF, *THE LOST PROMISE*, *supra* note 119.

131. See GOLUBOFF, *THE LOST PROMISE*, *supra* note 119, at 42.

132. *Id.*

Professor Goluboff recounts the Civil Rights Section's pursuit of claims based upon the Thirteenth Amendment's prohibition of peonage and involuntary servitude during the 1930s and 1940s.¹³³ As Professor Goluboff aptly recognizes, "[t]he agricultural and domestic workers excluded from the New Deal legislation were precisely the workers the Department of Justice attempted to protect through the Thirteenth Amendment."¹³⁴

The move away from a debt-based peonage to involuntary servitude was a critical step toward protecting African American workers and "Congress, the NAACP, social scientists, and African American complaints . . . increasingly began to emphasize the social and economic conditions of work in understandings of involuntary servitude."¹³⁵ Indeed, agricultural workers began to understand their rights to involve not only freedom from violent coercion in the workplace, but also their access to amenities they were routinely denied.¹³⁶

Professor Goluboff also posits that the legal unit of the NAACP, the organization that led the legal advocacy for the civil rights movement, made a concerted decision to move away from pursuing economic rights in favor of education and political rights after World War II.¹³⁷ For example, she points to the organization's representation in the early 1940's of shipyard workers who were terminated for refusing to pay dues to a discriminatory union as evidence of its early commitment to advancing workers' rights and contends that a subsequent shift away from such cases occurred in the subsequent *Brown v. Board of Education* era.¹³⁸ Advances in economic justice were typically seen as incidental to the organization's legal and political campaign to challenge Jim Crow.¹³⁹

Professor Goluboff asserts that African American workers' rights that were displaced from the civil rights doctrine led to the pursuit of "desegregation isolated from material inequality," and led to lawyers'

133. Professor Goluboff's analysis traces the movement's Supreme Court jurisprudence during this time from a reliance on contractual rights to the development of our current understanding of civil rights. Goluboff, *The Thirteenth Amendment*, *supra* note 125, at 1648–54 (2001).

134. *Id.* at 1678.

135. *Id.* at 1659–60.

136. *Id.* at 1659.

137. Goluboff, *Let Economic Equality Take Care of Itself*, *supra* note 129, at 1410–13.

138. *Id.* at 1394–95.

139. *Id.* at 1411. According to Professor Goluboff, even litigation on behalf of African American teachers who received lower wages than white teachers was considered part of the NAACP's work on educational opportunity, not economic justice. *Id.* at 1412.

focus on racial hierarchy rather than economic oppression.¹⁴⁰ She ultimately queries: “[h]ad the paradigm-shifting civil rights cases come in the context of labor, perhaps scholars would ask more about the economic progress of African Americans.”¹⁴¹

The invisibility of African American low-wage workers, therefore, may be inextricably tied to a civil rights agenda that, over time, became much less concerned with a focus on improving the economic realities of its impoverished communities and instead applied what might be considered a “trickle down” theory of civil rights advancement. The current challenges faced by low-wage workers evidence the limited efficacy of this approach.

IV. CHANGING DYNAMICS IN WORKER ADVOCACY: WORKER CENTERS

Historically, union organizing provided a voice and advocacy for low-wage workers.¹⁴² Recent years, however, have witnessed a significant decrease in the presence of unions in low-wage worker industries.¹⁴³ The industrial revolution that drew African American workers to northern cities for job opportunities and the worker rights and protections unavailable in the agrarian South came to an end in approximately 1960.¹⁴⁴ In subsequent years, the closure of those fac-

140. *Id.* at 1485–86.

141. *Id.* at 1484–85.

142. See Lawrence Mishel with Matthew Walters, *How Unions Help All Workers*, ECON. POLICY INST. BRIEFING PAPER, 1, 4–6 (Aug. 26, 2003), <http://www.epi.org/files/page/-/old/briefingpapers/143/bp143.pdf>.

143. See REBECCA THIESS, ECON. POLICY INST. BRIEFING PAPER, *THE FUTURE OF WORK: TRENDS AND CHALLENGES FOR LOW-WAGE WORKERS*, Apr. 27, 2012, at 13, <http://www.epi.org/files/2012/bp341-future-of-work.pdf> (“Union coverage has fallen dramatically over the last 30 years, with the share of unionized wage and salary workers dropping 0.4 percent per year from 1979–2010”); Janice Fine, *Worker Centers: Entering a New Stage of Growth and Development*, NEW LAB. F., <http://newlaborforum.cuny.edu/2011/10/12/working-centers-entering-a-new-stage-of-growth-and-development/> [hereinafter Fine, *Entering a New Stage*] (discussing the declining density of union participation); Shannon Gleeson, *From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers*, 43 LAW & SOC’Y REV. 669, 690 (noting the steady decline of unionization). The unionization rate in North Carolina is the lowest in the country at only 1.9%. Algernon Austin, *The Importance of Good Jobs to the Social and Economic Health of Black Communities*, in #BLACKWORKERSMATTER 42 (2015), http://www.countfoundation.org/sites/all/files/black_workers_matter.pdf; Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 743 (2003) (discussing the role of globalization in the decline in unionization).

144. See Gordon & Lenhardt, *supra* note 111, at 1208 (“Between 1915 and 1960, the push of economic difficulties in the South and the pull of jobs in the North led approximately five million blacks to leave for cities such as New York, Chicago, and Detroit.”); STEVEN SKRENTNY, *AFTER CIVIL RIGHTS* 26 (2014) (“Between 1967 and 1987, Philadelphia, Chicago, Detroit, and New

tories left many workers unemployed, underemployed, or employed in industries with little or no union participation.¹⁴⁵ Today, the industries with the highest number of low-wage workers¹⁴⁶ are also those with minimal unionization.¹⁴⁷ Indeed, the restaurant industry, which has comparatively low levels of unionization, now employs 9% of the U.S. workforce.¹⁴⁸ The influx of immigrant low-wage workers, whose participation in unions has increased, yet remains low, has also changed the dynamics of worker organizing.¹⁴⁹ Despite their relatively low numbers in union membership, immigrant workers, often aligned with immigrant justice advocates, have “been engaged in many of the leading unionization campaigns in recent years.”¹⁵⁰

York City all lost between 51% and 64% of their manufacturing jobs.”). See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* (2010) (describing the migration of black citizens from the South to northern and western cities).

145. See Oswald Johnston, *Factory Layoffs Push U.S. Unemployment to 5.4%*, L.A. TIMES (Dec. 09, 1989), http://articles.latimes.com/1989-12-09/business/fi-294_1_factory-jobs; Richey Pipparinen et al., *From Metal to Minds: Economic Restructuring in the Rust Belt*, URBAN PUBLICATIONS 1, 7 (2015) (noting that Pittsburgh’s steel industry fallout in 1984 led to an 18% unemployment rate). New York Times columnist, Steven Greenhouse, described the transition of Chattanooga’s employment opportunities:

During the last quarter of the 20th century, almost all the factories and foundries were shuttered, and with them disappeared thousands of manufacturing jobs that had once lifted workers, even those without high school degrees into the middle class or to the cusp of it. In their place have come thousands of service-sector jobs: at the aquarium and Imax theatre built to lure tourists and at hotels, nursing homes, big-box stores, brew pubs, fast-food restaurants, beauty salons and hospitals.

Steven Greenhouse, *Low-Wage Workers Are Finding Poverty Harder to Escape*, N.Y. TIMES (Mar. 16, 2004), http://www.nytimes.com/2014/03/17/business/economy/low-wage-workers-find-ing-its-easier-to-fall-into-poverty-and-harder-to-get-out.html?_r=1 [hereinafter Greenhouse, *Low-Wage Workers*].

146. See *supra* Part I.B.

147. See Fine, *Entering a New Stage*, *supra* note 143 (describing the service economy comprised of low-end construction, meatpacking, light industry and the garment industry as largely nonunion.). The reduction in union jobs is particularly troubling for women, African American, and Hispanic workers. Indeed, a 2003 Bureau of Labor Statistics survey “found that unionized women earn 33% more than nonunion women on average, African American union members earn 35% more, and unionized Hispanic workers earn 51% more.” STEVEN GREENHOUSE, *THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER* 242 (2008) (citing U.S. BUREAU OF LABOR STATISTICS, *UNION MEMBERS IN 2003*, (Jan. 21, 2004)) [hereinafter GREENHOUSE, *BIG SQUEEZE*].

148. STEVEN SKRENTNY, *AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* 26 (2014).

149. In 2002, the Supreme Court limited the remedies, including back pay, available to undocumented immigrants for violations of the National Labor Relations Act, and therefore complicated efforts to effectively organize immigrant workers. See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002).

150. STEPHEN PITTS, UC BERK. CTR. FOR LABOR RESEARCH & EDUC., ORGANIZE. . . TO IMPROVE THE QUALITY OF JOBS IN THE BLACK COMMUNITY: A REPORT ON JOBS AND ACTIVISM IN THE AFRICAN AMERICAN COMMUNITY 8 (2004), http://laborcenter.berkeley.edu/blackworkers/organize_blackworkers04.pdf [hereinafter PITTS, ORGANIZE].

In the wake of the changes, worker centers have become increasingly important spaces for worker advocacy, including, but not limited to pursuing lost wages from exploitative employers.¹⁵¹ Worker centers are “community based organizations that engage in a combination of service, advocacy, and organizing to provide support to low-wage workers.”¹⁵² These centers often provide a collaborative space for advocates, people of faith, unions, and social agencies to support workers who are not in unions.¹⁵³ According to Kim Bobo, worker centers “have sprung forth rapidly, in large part due to the national epidemic of wage theft, the relative weakness of unions in society today, and the failure of the Department of Labor to protect workers.”¹⁵⁴ Worker centers typically tackle workplace exploitation through a variety of tactics, including: (1) educating workers about their rights; (2) confronting employers who have stolen wages, (3) filing complaints with state and federal agencies and holding those agencies accountable for investigating and pursuing workers’ claims; (4) encouraging workers to organize unions; (5) challenging employment sectors that have rampant wage theft; (6) advocating for pro-worker legislation; (7) engaging allies to advocate with workers; and (8) creating worker cooperatives.¹⁵⁵

Worker centers are often the space in which workers experiencing wage theft and other workplace exploitation first learn about their rights and receive encouragement and support in recovering lost wages. The organizing at the community level is critically important, whether a case proceeds to litigation or is resolved through letter-writing or other community advocacy.¹⁵⁶ In the event an employer is unwilling to respond to a worker’s initial demand to recover wages, the worker center may engage in claims-making with the local courts or administrative agencies, or refer the case to counsel. For those claims that are low in monetary value and likely to proceed in small claims

151. See Janice Fine, *Worker Centers: Organizing Communities at the Edge of a Dream*, *Economic Policy Institute*, 1, 5–10, <http://www.epi.org/files/page/-/old/briefingpapers/159/bp159.pdf> [hereinafter Fine, *Organizing Communities*].

152. *Id.* at 1–4; see also Julie Brodie, *Post-Welfare Lawyering: Clinical Legal Education and A New Poverty Law Agenda*, 20 WASH. U. J.L. & POL’Y 201, 203 (2006) (discussing the overlap between the post-welfare realities of poverty and the emergence of worker centers).

153. See BOBO, *supra* note 52, at 101–02.

154. *Id.* at 93.

155. *Id.* at 94–100.

156. See Fine, *Organizing Communities*, *supra* note 151.

court, referring workers to pro bono counsel to represent them is particularly important.¹⁵⁷

At present, worker centers largely serve immigrant communities. Indeed, “immigrant workers have been in the forefront of the creation of worker centers . . .”¹⁵⁸ The connection between the immigrant narrative and the workplace exploitation narrative has been a source of strength for worker centers: “[b]y weaving low-wage immigrant workers’ stories into a collective narrative about work in America, and connecting these stories to statistics that demonstrate the shockingly widespread nature of workplace violations, worker centers have successfully cast workers’ struggles in moral terms.”¹⁵⁹ These moral terms have fostered successful efforts to obtain the foundation funding upon which workers’ centers depend.¹⁶⁰

The largest number of worker centers work with day laborers and are affiliated with the National Day Labor Organizing Network.¹⁶¹ Given that the day laborer workforce is nearly entirely comprised of male Latino immigrants,¹⁶² its centers’ focuses are decidedly focused on that subset of the low-wage workforce.¹⁶³

Few centers, however, serve primarily African American workers or even immigrants and African American workers.¹⁶⁴ Worker advocates, however, in several metropolitan areas are working to develop a network of African American workers’ centers.¹⁶⁵ These efforts, however, have developed slowly and have experienced various challenges, particularly concerning access to funding.¹⁶⁶ Given that worker centers, unlike unions, typically do not charge their members significant membership dues or fees, they rely upon the support of founda-

157. See Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 3 (2015) (discussing the difficulty of representation for low-income individuals in small claims and other courts).

158. PITTS, ORGANIZE, *supra* note 150, at 8.

159. Fine, *Organizing Communities*, *supra* note 151.

160. *Id.*

161. See BOBO, *supra* note 52, at 93.

162. See ABEL VALENZUELA JR. ET AL., LATINO UNION OF CHICAGO, ON THE CORNER: DAY LABOR IN THE UNITED STATES 1, 18 (2006).

163. Fine, *Organizing Communities*, *supra* note 151.

164. *Id.*

165. See *Building Black-Brown Unity*, D.C. JOBS WITH JUSTICE, www.dcjwj.org/building-black-brown-unity/ (last visited Sept. 15, 2016); see also *About*, MIAMI WORKERS CTR., <http://www.miamiworkerscenter.org/en/about-2/>; *About*, NEW ORLEANS WORKERS CTRS., <http://nowcrj.org/about-2/> (last visited Sept. 16, 2016) (bridging gaps between African American and Latino workers).

166. Thomas-Breitfeld, *supra* note 46, at 7, 9 (“[V]ery little funding is directed specifically at race-conscious efforts to organize black workers.”).

tions.¹⁶⁷ Labor policy specialist Steven Pitts has, in fact, raised concerns about the “very visible allocation of resources” by unions and foundations to immigrant worker centers, to the relative exclusion of African American communities.¹⁶⁸

In an effort to make an appeal to foundations, some advocates involved in organizing African American workers have distanced themselves from a racial or African American narrative due to concerns that such a focus makes some foundations uncomfortable.¹⁶⁹ Instead they use the terms “people of color” and “low-wage” to avoid political backlash for engaging in identity politics.¹⁷⁰ Advocates also expressed concern that the same rules may not apply to other racial minorities engaging in worker organization as “organizing focused on other constituencies – such as Asian and Latino communities – doesn’t face the same challenge to water down its messaging about the particular barriers faced by those specific identity groups.”¹⁷¹

As a result of the dynamics described above, the emergence of worker centers as critical spaces for advocacy has contributed to the invisibility of African American low-wage workers. The prevalence of work that links immigrant justice advocacy with worker advocacy has contributed to a limited narrative of workplace exploitation. Worker center funders’ discomfort with a racialized narrative of workplace exploitation has created significant challenges to advocates efforts to organize African American workers.

V. AFRICAN AMERICAN WORKERS RENDERED INVISIBLE BY NARRATIVES ARISING FROM THE DEGRADATION OF THE WAR ON POVERTY AND THE CRIMINALIZATION OF POVERTY

African American workers are largely disconnected from the worker exploitation advocacy that aligns workplace rights very closely with immigrant justice movements. Indeed, the exploited immigrant

167. According to Professor Janice Fine, “Although there are exceptions to the rule, the vast majority of worker centers do not view membership dues as a central component of their budgets or as a major strategy for achieving greater financial self-sufficiency.” JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 221 (2006) [hereinafter FINE, WORKER CENTERS]; Fine, *Organizing Communities*, *supra* note 151, at 17 (noting that Fine acknowledges that immigrant centers receive a majority of their funding from foundations).

168. PITTS, ORGANIZE, *supra* note 150, at 8.

169. Thomas-Breitfeld, *supra* note 46, at 16–17.

170. *Id.* at 16.

171. *Id.*

low-wage worker narrative often relies more heavily on an immigrant justice framing than the low-wage worker framing; that is, the source of the worker's exploitation is the lack of immigration status, not poverty.

Moreover, Professor Saucedo's work on the Brown Collar workforce and the immigrant Latino worker narrative reveals that the immigrant worker narratives center around a proclivity for hard work without complaining, a willingness to do jobs citizens are unwilling to do, and what she characterizes as the embodiment of "the traits of risk, ambition, and ultimate reward, which are inherent in entrepreneurs."¹⁷²

African American low-wage workers, however, are more likely to be tied to critical narratives concerning poverty. In recent years, a change in our country's narrative and rhetoric concerning poverty has manifested. Specifically, the poor have been increasingly characterized as the undeserving who are unwilling to work and aspects of their lives have been simultaneously rendered criminal.¹⁷³

The "undeserving poor" narrative contends "that poverty is caused not by low wages or lack of jobs and education but by the bad attitudes and faulty lifestyles of the poor."¹⁷⁴ As one commentator noted:

Picking up on this theory, pundits and politicians have bemoaned the character failings and bad habits of the poor for at least the past 50 years. In their view, the poor are shiftless, irresponsible, and prone to addiction. They have too many children and fail to get married. So if they suffer from grievous material deprivation, if they run out of money between paychecks, if they do not always have food on their tables – then they have no one to blame but themselves.¹⁷⁵

This narrative, nearly always associated with the African American poor, has been difficult to eliminate from popular culture and has been detrimental to efforts to focus attention on the experiences of African American low-wage workers.

Simultaneously, images of poverty have become increasingly racialized. While the majority of persons living in poverty are

172. See Saucedo & Morales, *Masculinities Narratives*, *supra* note 102, at 635.

173. See Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 446 (2015).

174. Barbara Ehrenreich, *It is Expensive to Be Poor*, ATLANTIC (Jan. 13, 2014), <http://www.theatlantic.com/business/archive/2014/01/it-is-expensive-to-be-poor/282979/>.

175. *Id.*

white,¹⁷⁶ the image of poverty is decidedly black.¹⁷⁷ Poverty has become disassociated from images of rural America — despite the reality that most impoverished persons live in rural communities — and distinctly tied to the media-driven images of black joblessness in urban city centers.¹⁷⁸ This racialization of the poverty narrative has driven the characterization of those in poverty as undeserving.

Media representations of welfare and public opinion concerning the recipients of welfare also reflect deeply racialized understandings of poverty. Professor Martin Gilens' research revealed that African Americans are depicted in more than half of mainstream magazine depictions of poverty.¹⁷⁹ Moreover, stories critical of welfare and poverty were more likely to depict African Americans while stories describing the faultless aspect of poverty typically depict whites.¹⁸⁰ Indeed, Professor Gilens explained:

[P]oor whites have been more likely to appear as illustrations of the deserving poor — the elderly, the working poor, and those struggling against adverse economic conditions — while poor blacks have appeared more often in unsympathetic stories on welfare abuse or the underclass.¹⁸¹

The racial alignment of deserving and undeserving poor has reverberations in the development of our policies and, as argued *infra* in Part VI, the exclusion of African Americans from the low-wage worker exploitation paradigm.

Professor Kaaryn Gustafson's work on the criminalization of poverty reveals additional layers to this phenomenon. In her book, *Cheating Welfare*, Professor Gustafson "outlines the discursive and political shifts that produced a welfare system that equates poverty with criminality . . ."¹⁸² She tracks our country's relationship with

176. According to a 2014 U.S. Census report, 40% of persons living in poverty were White, 26% were White, not Hispanic, 14% were Black, 3% were Asian, and 17% were Hispanic (all races). See CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014, at 13 tbl.3 (2014) <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf>.

177. See NEWMAN, *supra* note 4, at 39 ("poverty wears a black face . . .").

178. *Id.* at 40.

179. MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 113 (1999).

180. *Id.* at 154.

181. *Id.* Professor Lee A. Harris has argued that this phenomena may provide the causation for his findings that states with larger numbers of African American welfare families distribute less in cash assistance than others. See Lee A. Harris, *From Vermont to Mississippi: Race and Cash Welfare*, 38 COLUM. HUM. RTS. L. REV. 1, 1 (2006).

182. KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 69 (2011).

poverty from the War on Poverty in the Johnson administration, to the rise in concerns about welfare fraud and the Welfare Queen archetype¹⁸³ in the 1970s and Reagan years, through welfare reform under Clinton.¹⁸⁴ She argues that “[c]urrent welfare policies were designed to punish the poor; to stigmatize poverty, particularly poverty that leads to welfare receipt; and to create a system of deterrence to keep low-wage workers attached to the labor force.”¹⁸⁵ Professor Gustafson’s analysis of welfare policies’ manifestation of the criminalization provides yet another frame through which to understand the challenges facing low-wage African American workers.

While welfare reform in the 1990s, and the requirement that those receiving benefits transition in the workforce, has resulted in a shift away from the conception of poverty defined solely by the receipt of welfare to the present-day realities of the working poor, the prevalent narrative for poor African Americans does not as clearly reflect this shift.¹⁸⁶ Instead African Americans continue to be stereotyped as unemployed, unwilling to work, and generally undeserving.

This article now applies a critical race analysis of low-wage African American worker invisibility and considers how the creation of a binary understanding of worker exploitation has contributed to their exclusion from the prevalent narrative.

VI. THE LIMITS OF THE BINARY

A. The Black-White Paradigm Critique

Critical race theorists have challenged the limitations created by the sometimes singular focus on racial dynamics between African Americans and whites in discussions of race in the United States.¹⁸⁷

183. “The ‘welfare queen’ narrative that pervaded political discourse in the 1970s and 1980s ‘was shorthand for a lazy woman of color, with numerous children she cannot support, who is cheating taxpayers by abusing the system to collect government assistance.’” Michelle Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL’Y & L. 247, 247 (2014). According to Professor Gilman, recent political campaigns evidence a resurgence in the political salience of the term, despite the 1990s welfare reform that many have argued made it obsolete. *Id.* at 247.

184. GUSTAFSON, *supra* note 182, at 34–36.

185. *Id.* at 51.

186. According to Professor Juliet M. Brodie, we have entered a “post-welfare” era in which “‘the working poor’ has replaced ‘the welfare recipient’ as the trope of American poverty.” Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Legal Education and A New Poverty Law Agenda*, 20 WASH. U. J.L. & POL’Y 201, 203 (2006).

187. See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1243 (1994). But see Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of*

Professor Juan Perea, for example, has critiqued the black-white binary paradigm of racial discourse and argued that it “operates to exclude Latinos/as from full membership and participation in racial discourse,” is self-perpetuating, and perpetuates negative stereotypes of Latinos/as.¹⁸⁸ Paradigms set the parameters for discussions about race, determining what issues are considered relevant.¹⁸⁹ They help us determine the relevant facts for solving a problem.¹⁹⁰ Accordingly, “paradigms [drive] the fact-gathering and investigation.”¹⁹¹ As Professor Perea explains: “[d]ata-gathering efforts and research are focused on understanding the facts and circumstances that the relevant paradigm teaches us are important.”¹⁹² Moreover, as paradigms become more prevalent, they tend to “exclude or ignore alternative facts or theories that do not fit the expectations produced by the paradigm.”¹⁹³ Thus, he contends, within the black-white binary paradigm, the civil rights struggle and its history is understood as involving a conflict between blacks and whites concerning the civil rights of blacks.¹⁹⁴ In other words, since racism and antidiscrimination law is understood in black and white, there is no space for those who are neither.¹⁹⁵

Critics of the black-white binary argue that it has led to the doctrinal subordination of the interests and experiences of other racial

Civil Rights Scholarship, 12 BERKELEY J. AFR.-AM. L. & POL’Y 107, 107–10 (2010); Leslie Espinoza & Angela Harris, *Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585 (1997); Rogelio A. Lasso, *Some Potential Casualties of Moving Beyond the Black/White Paradigm to Build Racial Coalitions*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 81, 92 (2005) (“My fear is that if we abandon our focus on the Black/White Paradigm as the essential tool to dismantle white supremacy, we will also abandon poor blacks, and eventually, we will become a nation where whites are a racial minority but effectively control all the political, economic, educational, and social institutions of the republic.”).

188. Juan F. Perea, *The Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought*, 85 CAL. L. REV. 1213, 1214–15 (1997) [hereinafter Perea, *The Black/White Binary*]. Professor Athena Mutua argues that the characterization of the Black-White paradigm as a binary obscures the central role of power in the relationship between the racial groups. Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflecting on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1187–88 (1999). According to Professor Mutua, the paradigm would be better termed the “White Over Black” or “Black Subjugation to White.” *Id.* at 1179.

189. See Perea, *The Black/White Binary*, *supra* note 188, at 1216.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 1217.

194. *Id.* at 1239 (“Within the paradigm, the only facts and histories that matter are those regarding Whites and Blacks. Therefore, virtually the only stories we ever learn about civil rights are stories about Blacks and Whites struggling over civil rights for Blacks.”).

195. See Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship and the Black-White Binary*, 75 TEX. L. REV. 1181, 1185–86 (1997).

groups.¹⁹⁶ For example, Professor Robert Chang has argued that focusing on the black-white paradigm misunderstands the United States' complicated racial dynamics.¹⁹⁷ Specifically, he argues that the unawareness of Asian Americans' history and persecution in this country has prevented many from making connections between this history and the challenges Asian Americans face today.¹⁹⁸ Similarly, Richard Delgado has questioned the efficacy of the black-white binary approach to analyses of race in the law in light of this country's changing demographics.¹⁹⁹

B. The Immigrant/Citizen Low-Wage Worker Paradigm

The prevalent worker exploitation narrative has created a particular binary understanding of workers' experiences. In the current construction of advocacy for low-wage workers, the connection of that struggle to the immigrant justice movement has created a Latino immigrant/white citizen binary paradigm for wage theft and workplace exploitation. That is, the exploitation is analyzed through a lens that much of the literature discussing workers' rights and wage theft centers on the experiences and narratives of Latino immigrants.²⁰⁰ It largely focuses on this community's particular vulnerabilities, including lack of knowledge about the United States' workplace laws and their application to immigrants, and the chilling effect that threats of deportation has on workers' willingness to advocate for their substantive rights.²⁰¹ Indeed, as discussed *infra*, many scholars assessing the

196. See Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1310 (2002).

197. See Chang, *supra* note 187, at 1265 ("Most discussions of race and the law focus on African Americans to the exclusion of non-African American racial minorities.").

198. *Id.* at 1251.

199. See Delgado, *supra* note 195.

200. See BOBO, *supra* note 52, at 171–72. Some articles have raised the concerns of other immigrant groups, particularly Asian immigrants employed in sweatshops in New York City and California; see, e.g., Leslie D. Alexander, *Fashioning A New Approach: The Role of International Human Rights Law in Enforcing Rights of Women Garment Workers in Los Angeles*, 10 GEO. J. ON POVERTY L. & POL'Y 81, 82–84 (2003); Shirley Lung, *Exploiting The Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 295 (2003); Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405, 405 (1998). However, the application of the "model minority" narrative to Asians may speak to the relative absence of significant consideration of low-wage Asian immigrant workers. According to Professor Robert S. Chang, the "model minority" narrative permits only a narrow understanding of Asian Americans as "hardworking, intelligent, and successful," and therefore ignores discrimination and other challenges faced by Asian Americans. Chang, *supra* note 187, at 1258.

201. Lizzie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1, 11 (2013) [hereinafter Coleman, *Procedural Hurdles*].

experiences and challenges of low-wage workers have focused largely on dynamics within the immigrant communities, including issues that arise at the intersection of immigration and workplace justice.²⁰² Overall, our understanding of worker exploitation has become centered on a comparison between the treatment of Latino immigrant workers and white citizen workers, with less attention paid to the racialized workplace exploitation of African American workers and other groups.

Furthermore, the emergence of worker centers as locations for advocacy has led to the prevalence of a Latino-white binary approach to the complicated issues of worker exploitation. As advocates recognize, the narrative advanced to obtain the funding necessary to support these centers is often centered in the immigrant experience.²⁰³ Advocates, however, have begun pushing against that stock story in an effort to create a space for the development (and funding) of black worker centers.²⁰⁴ They work to challenge the binary paradigmatic conceptualizations that too frequently render African American workers invisible.

C. Beyond the Binary: Critical Race Praxis in Workplace Advocacy

This article has identified the binary paradigm of low-wage worker exploitation that renders African American low-wage workers invisible and the historical and contextual circumstances that have contributed to this phenomenon. Critical race praxis demands that scholars bridge the gap between theoretical considerations, their normative implications, and the potential for their translation into “operational ideas and language for anti-subordination practice.”²⁰⁵ In

202. See, e.g., Sameer Asher, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1879–80 (2007) (discussing the immigrant worker campaign in New York against a corporate chain of restaurants); Scott L. Cummings & Steven A. Boucher, *Mobilizing Local Government Law for Low-Wage Workers*, 1 U. CHI. LEGAL F. 187, 187–88, 213 (2009) (discussing low-wage workers’ various efforts to mobilize legal rights in Los Angeles). My own scholarship, in fact, has focused largely on the intersection of immigration and workplace justice. See Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL’Y & L. 397, 398 (2015) [hereinafter Coleman, *Exploited at the Intersection*]; Coleman, *Procedural Hurdles*, *supra* note 201, at 1.

203. See Thomas-Breitfeld, *supra* note 46, at 18.

204. See *id.* at 13; Pitts, *Low-Wage Work*, *supra* note 39, at 36.

205. Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 60–61 (1999) (contending that the Black-White paradigm is largely undertheorized and relying upon a critical race praxis analysis to fill the void); Adrien Katherine Wing, *Civil Rights in the*

other words, it requires that scholars endeavor to bridge the gap “between progressive race theory and political lawyering practice and the growing divide between law and racial justice.”²⁰⁶

Professor Paulette M. Caldwell’s application of critical race praxis principles to the critique of the black-white binary paradigm of racial justice is instructive here. According to Professor Caldwell, scholars often reconstruct the binary paradigm by simply creating new binary constructions of race that place whites on the top and another subordinated group at the bottom.²⁰⁷ Thus, the black-white binary is replaced with, for example, a Latino-white binary, Asian-white binary or immigrant-native citizen binary. Professor Paulette Caldwell explains that this dynamic creates “[a] competitive model [that] leads inevitably to a zero-sum framework which overshadows commonalities and emphasizes and reinscribes differences, hostilities, and ultimately, continued subordination.”²⁰⁸ They also do nothing to destabilize the racial hierarchy in which “whiteness” is always the comparator.²⁰⁹ Professor Caldwell calls for an analysis that disrupts our understandings of race and ethnicity and the black-white paradigm,²¹⁰ and ultimately argues that a focus on the paradigm and other problems of disjuncture ignores the core challenge: “our society’s crippling blindness to the inevitable results of separating civil and political rights from social and economic ones.”²¹¹

Critical race praxis generally, and Professor Caldwell’s critique specifically, requires we consider how social justice advocates should respond to the relative invisibility of African American low-wage workers in scholarship and advocacy. In recent years, some scholars and activists have advocated for the creation of black worker centers to focus on the needs of African American low-wage workers and to

Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism, 63 LA. L. REV. 717, 735 (2003) (“Another tenet that Critical Race Theorists espouse involves the necessity to engage in praxis, the combining of theory and practice.”); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering in Post-Civil Rights America*, 95 MICH. L. REV. 821, 867 (1997). Professor Yamamoto also identifies the Black-White paradigm as one possible cause for the disconnect between progressive theory and antistatutory practice. See Yamamoto, *supra*, at 825–26.

206. Yamamoto, *supra* note 205, at 828–29.

207. See Caldwell, *supra* note 205, at 65.

208. *Id.* at 63.

209. *Id.*

210. See generally *id.* at 62–92.

211. *Id.* at 109.

disrupt the prevalent immigrant worker narrative.²¹² The existence of separate worker centers, however, raises important questions: Do racial/ethnic specific centers simply re-create new binary analyses of workplace exploitation that fail to consider the potential benefits of cross-racial collaboration? Do they focus advocates too heavily on the racialized aspects of workplace exploitation and distract from the broader questions of economic justice for all workers and the structural inequality that results from the separation of civil and political rights from economic and social rights? Do social movements like BlackLivesMatter create new opportunities to successfully challenge the worker exploitation binary. Would worker centers forced to serve a more diverse group of workers, rather than centers targeting specific groups, better serve all workers' needs? Additional research on black worker centers is necessary to adequately consider these important questions.

The remainder of this article identifies and discusses two important byproducts of African American low-wage worker invisibility: underreported wage theft and the normative implication of proving wage theft cases where the stock story of the exploited immigrant worker is unavailable.

VII. VULNERABILITIES EXPOSED BY AFRICAN AMERICAN LOW-WAGE WORKER INVISIBILITY

A. Wage Theft in the African American Community – Underreported and Misunderstood?

The complicated contexts described herein that have contributed to the increasing invisibility of African American low wage workers in the workplace exploitation paradigm have likely exacerbated poverty among the African American working poor.²¹³ The relative absence of advocacy concerning wage theft within this community provides one clear example of the effects of this phenomenon.

212. Examples of black worker centers include the Workers Center for Racial Justice, the DC Black Worker Center, and the Los Angeles Black Worker Center. *See Our Work*, WORKERS CTR. FOR RACIAL JUST., <http://www.center4racialjustice.org/index.php?page=about> (last visited Oct. 15, 2016); *Black Worker Center*, ONEDC www.onedc.org/blackworkercenter (last visited Oct. 15, 2016); *Los Angeles Black Worker Center*, UCLA LAB. CTR., www.labor.ucla.edu/what-we-do/black-worker-center (last visited Oct. 15, 2016).

213. The 2014 poverty rate for African Americans was 26.2%. *See* DENAVAS-WALT & PROCTOR, *supra* note 176, at 13.

Wage theft, or the failure to pay a worker properly for all hours worked, is rampant in the low-wage workforce.²¹⁴ While the phenomena is perhaps most pervasive in vulnerable immigrant communities,²¹⁵ studies reveal significant levels of wage theft among all low-wage workers, including African Americans.²¹⁶ Indeed, a 2009 study of wage theft in Los Angeles, Chicago, and New York City by the UCLA Institute of Labor and Employment found that African Americans experienced wage theft three times more often than white workers.²¹⁷ Despite this sobering reality, legal advocacy and scholarship concerning wage theft among African American workers is scarce.

The Workers Center for Racial Justice informally surveyed African American workers in Chicago and found that 60% had experienced wage theft but that none had filed a complaint or tried to recoup their wages.²¹⁸ The center suggests that few sought a remedy for their exploitation either due to lack of awareness or a “belief that any job is better than no job.”²¹⁹ Scholars and advocates, however, have not interrogated this hypothesis and explored what discourages African American low-wage workers from enforcing their substantive rights. The standard narrative of the undocumented immigrant low-wage worker assumes that fear of immigration-related retaliation chills their ability to seek lost wages from employers.²²⁰ While Afri-

214. See Coleman, *Procedural Hurdles* supra note 201, at 8–9; Ross Eisenbrey, *Wage Theft is a Bigger Problem Than Other Theft – But Not Enough is Done to Protect Workers*, ECON. POL’Y INST. (Apr. 2, 2014), <http://www.epi.org/publication/wage-theft-bigger-problem-theft-protect/> (“Survey research shows that well over two-thirds of low-wage workers have been the victims of wage theft, but the governmental resources to help them recover their lost wages are scant and largely ineffective.”); Ruth Milkman et al., *Wage and Hour Violations in Urban Labour Markets: A Comparison of Los Angeles, New York, and Chicago*, 43 INDUS. REL. J. 378, 379 (2012) (discussing a student that found pervasive wage theft in the nation’s three largest urban labor markets).

215. See IDELISSE MALAVÉ & ESTI GIORDANI, *LATINO STATS: AMERICAN HISPANICS BY THE NUMBERS* 46 (2015); Scott Martelle, *Confronting the Gloves-Off Economy: America’s Broken Labor Standards and How to Fix Them*, LABOR & EMPLOYMENT RELATIONS ASS’N 1, 26 (Annette Bernhardt et al. eds., 2009), http://nelp.3cdn.net/0f16d12cb9c05e6aa4_bvm6i2w2o.pdf.

216. See generally MALAVÉ & GIORDANI, supra note 215; Steven Greenhouse, *Low-Wage Workers Are Often Cheated, Study Says*, N.Y. TIMES (Sept. 1, 2009), http://www.nytimes.com/2009/09/02/us/02wage.html?_r=0 [hereinafter Greenhouse, *Low Wage Workers Are Often Cheated*].

217. See ANNETTE BERNHARDT ET AL., UCLA LAB. CENTER, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES* 1, 42 tbl.5.1 (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf>.

218. WORKERS CENTER FOR RACIAL JUSTICE: DIGNITY OF WORK CAMPAIGN, <http://www.center4racialjustice.org/index.php?page=dignity-of-work-campaign> (last visited Sep. 15, 2016) [hereinafter “WCRJ Survey”].

219. *Id.*

220. See, e.g., *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (highlighting the serious consequences of admitting irrelevant evidence regarding immigration status in unpaid wage claims,

can American workers do not fear deportation, the extent of wage theft in their communities and the lack of complaints filed in pursuit of those wages suggest that other factors also deter enforcement.²²¹ For example, it is conceivable that African American workers with criminal records are particularly vulnerable to exploitation by employers aware of workers' limited employment opportunities. Additional research in this area would be useful to fully understand and respond to African American worker exploitation.

To the extent that a lack of knowledge about their right to lost wages or the mechanisms available to enforce that right exists in the African American low-wage community, then one must also consider the role played by the absence of worker centers within those communities. Worker centers often serve a critical education function as the central source of a community's access to information about their employment rights.²²² The absence of worker centers in (or serving) African American communities, therefore, may create a knowledge vacuum about employment rights that leads to a failure of African American low-wage workers to pursue wage theft claims.

B. Different Narratives and Implications for the Pursuit of African American Workers' Claims

In many parts of the country, the stock story of the exploited low-wage worker is tied very closely to immigrant workers and the vulnerability associated with their tenuous status in this country.²²³ This narrow stock story may have implications for the ability of non-Latino immigrants to bring successful claims for wage theft.

emphasizing that the information could "inhibit petitioners in pursuing their rights in the case because of possible collateral wholly unrelated consequences, because of embarrassment and inquiry . . . which was not justified."); *David v. Signal Int'l, LLC*, 257 F.R.D. 114 (E.D. La. 2009) (granting a motion for protective order restricting discovery of plaintiffs' post-termination immigration status, addresses, and employment status and acknowledging the in terrorem or chilling effect of such inquiries); *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 530 F. Supp. 2d 746, 749–50 (D. Md. 2008) (citing and agreeing with various courts' denial of discovery requests concerning parties' immigration status); *Flores v. Amigon*, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (explaining that despite the policy permitting broad discovery, the in terrorem effect of producing documents disclosing an individual's immigration status weighs in favor of granting the request for a protective order). *But see Rathod, Beyond the Chilling Effect*, *supra* note 77, at 269 (2010) (encouraging "a more nuanced understanding of immigrant worker behavior, and . . . [the situation of] immigration status and the 'chilling effect' as one of many relevant factors that guide behavior").

221. WCRJ Survey, *supra* note 218.

222. See Fine, *Organizing Communities*, *supra* note 151, at 1–2.

223. See Lung, *supra* note 200.

Very often, wage theft cases are based largely upon the testimony of the parties, with limited documentary evidence.²²⁴ As a result, credibility determinations are central to the fact-finder's determination.²²⁵ Credibility may be based, at least in part, upon the fact-finder's ability to place the worker's story in a context with which he or she is familiar. In other words, a fact-finder is more likely to find a worker's story credible when it fits into the common narrative of low-wage worker exploitation. Immigrant workers, therefore, may benefit from their ability to tell a story that exposes their increased vulnerability based upon immigration status and thus fits nicely into a stock story of worker exploitation.²²⁶ African American workers that bring claims, however, cannot access credibility by evoking this stock story.²²⁷ Rather, they may be forced to attempt to disrupt a more nefarious stock story: the public benefits-dependent, lazy worker with a questionable work ethic. In other words, the narrative of the underserving poor and the myriad of implications associated with it, may attach to African American low-wage workers, and thus impact their ability to both establish credibility and tell a compelling story of worker exploitation. More research is necessary to determine the impact of this distinction on the ability of African American workers to bring successful wage theft claims.

CONCLUSION

Low-wage work is often typified by various forms of exploitation, from wage theft to discrimination that impacts all workers, regardless of race, ethnicity, gender, and immigration status. Nevertheless, the prevalent narrative or paradigm regarding such exploitation has become increasingly tied to a single story: that of the vulnerable immigrant worker. The journey to this narrow conceptualization of low-wage workplace exploitation did not happen overnight. Rather, it must be considered within the historical framing of the move away from economic justice in the civil rights movement, the criminalization

224. I litigated wage and hour collective actions for nearly six years in private practice and the clinic in which I have taught and supervised students for the past six years maintains an active docket of individual wage and hour cases. In my experience, low-wage workers rarely have relevant documents concerning their employment and employers also similarly fail to maintain records, despite a statutory responsibility to do so. See 29 C.F.R. § 516.

225. See generally Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 264 (1996).

226. Of course, immigrant workers also face the parallel problem of convincing the fact-finder that their immigration status should have no bearing on their recovery of lost wages.

227. See Thomas-Breitfeld, *supra* note 46, at 18.

of poverty, and the rise of the worker center as the space for advocacy. Each of these dynamics has led to the emergence of a binary understanding of low-wage workers' experiences and exploitation that increasingly renders invisible African American workers.

The #BlackLivesMatter movement and its call for a reform of the criminal justice system that adequately addresses the racialized experiences of African Americans within that system has created new spaces for advocacy. It is within this space that advocates have argued that #BlackWorkersMatter. They matter, however, not simply as an altruistic goal for an inclusive society, but because their absence from the prevalent paradigms and narratives has impacted their ability to identify and bring claims of wage theft, and to tell stories of their exploitation that fact-finders will find credible. This article places African American workers back into the narrative by disrupting the binary, paradigmatic understanding of workplace exploitation.

Affirmative Action for Affordable Housing

COURTNEY LAUREN ANDERSON*

INTRODUCTION	106
I. SEGREGATION IN PUBLIC HOUSING AND AFFORDABLE HOUSING.....	111
A. Isolation and Integration.....	114
B. Education and Segregation	116
C. The Fair Housing Act.....	117
D. Disparate Impact	120
II. <i>TEXAS DEPT. OF HOUSING & COMMUNITY AFFAIRS V. THE INCLUSIVE COMMUNITIES PROJECT, INC.</i>	126
A. The Texas Case Holding	133
B. Limiting Disparate Impact	136
III. THE LOW INCOME HOUSING TAX CREDIT PROGRAM	140
A. LIHTC and the Qualified Census Tract.....	142
B. The QAP Selection Process.....	144
C. LIHTC Data Collection	147
D. Siting LIHTC Housing.....	148
IV. THE RECONCILIATION OF REVITALIZATION AND INTEGRATION	150
A. The Call for Data	152
B. The Tie-Breaker	160
C. ICP vs. the Office of the Comptroller of the Currency and the Department of the Treasury.....	164
CONCLUSION	165

* Assistant Professor of Law at Georgia State University College of Law. The author thanks her faculty members and the Health Law Professors Conference participants for their comments.

INTRODUCTION

Decades ago, segregation was openly ingrained in the fabric of government housing policies. Deeds contained racially restrictive covenants.¹ Lines were drawn around districts to indicate where black people could or could not own homes.² Neighbors worked together to publicly and actively prohibit minorities from moving in.³ As a result, patterns of racial segregation and poverty concentration proliferated the country. The Civil Rights Movement sought to end racism and usher integration and equality into the lives of Americans. Laws and regulations were passed not only to prohibit discrimination, but also to require the government to take affirmative action to reverse past discriminatory practices.⁴

A primary purpose of the Fair Housing Act of 1968 (“FHA” or the “Act”) was to create integrated living patterns in an effort to avoid the fissure of the United States into racial isolation. While the Act’s prohibition on intentional discrimination in the rental, sale, and financing of housing was explicitly stated and acknowledged,⁵ the Supreme Court did not confirm the cognizability of disparate impact under the Act until recently.⁶ Inclusive Communities Project (“ICP”) sued The Texas Department of Community Affairs (the “Department”) in a case that reached the Supreme Court in 2015.⁷ ICP claimed, among other things, that the Department’s allocation of tax credits to create affordable housing through the Low Income Housing Tax Credit (“LIHTC”) program perpetuated segregation, resulting in a disparate impact for minorities and thus violated the FHA.⁸ The LIHTC program has emerged as the largest provider of affordable

1. Isaac N. Groner & David M. Helfeld, *Race Discrimination in Housing*, 57 YALE L.J. 426, 430 (1948).

2. See generally William E. Murray, *Homeowners Insurance Redlining: The Inadequacy of Federal Remedies and the Future of the Property Insurance War*, 4 CONN. INS. L.J. 735, 737 n.6 (1998) (explaining that in some instances of insurance redlining insurers would create maps where they would draw red lines to indicate where insurance policies should not be given and these lines were openly based on race).

3. See Patrick Slevin, *NIMBYism: A Mandate for Citizen Participation?*, 78 FLA. B.J. 38, 39 (2004).

4. Juan F. Perea, *An Essay on the Iconic Status of the Civil Rights Movement and its Unintended Consequences*, 18 VA. J. SOC. POL’Y & L. 44, 47 (2010).

5. Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2518 (2015).

6. *Id.* at 2525.

7. *Id.* at 2514.

8. *Id.*

Affirmative Action for Affordable Housing

housing in the United States.⁹ The program is overseen by federal agencies and is implemented by state and local government entities.¹⁰ LIHTC provides tax credits to private developers in order to incentivize them to create housing for low-income families and individuals. Although LIHTC has been instrumental in addressing the need for affordable housing,¹¹ this success does not exempt the program from fair housing regulations,¹² including §§ 3604 and 3605 of the FHA that prohibit the perpetuation of segregation.¹³ Studies have shown that 51% of LIHTC units are sited in minority neighborhoods, a figure that is disproportionately higher than the 40% of rental units in neighborhoods with these same demographics.¹⁴ Furthermore, more than 13% of LIHTC units are located in areas that have at least a 30% poverty rate.¹⁵ This undoubtedly concentrates LIHTC units in low-income areas, and the Department believes the preferential treatment bestowed upon proposed LIHTC units that are located in areas with higher poverty rates¹⁶ is a barrier to allocating tax credits to projects that would be constructed in higher-income, higher-opportunity areas.¹⁷

The respondent in the *Texas* case, ICP, challenged what the entity believed to be a consistent, albeit unintentional, placing of affordable housing units in low-income and minority neighborhoods in the city of Dallas through the LIHTC program, ICP stated that this further enabled the socioeconomic segregation throughout Dallas.¹⁸ This was the first time the Supreme Court considered the cognizability of disparate

9. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-869R, COMMUNITY REINVESTMENT ACT: CHALLENGES IN QUANTIFYING ITS EFFECT ON LOW-INCOME HOUSING TAX CREDIT INVESTMENT 1 (2012), <http://www.gao.gov/assets/650/647549.pdf>.

10. *Overview of the Low-Income Housing Tax Credit Program (LIHTC)*, NAT'L HOUS. L. PROJECT (May 24, 2013), <http://nhlp.org/lihtcoverview>.

11. REZNICK GROUP, THE LOW-INCOME HOUSING TAX CREDIT PROGRAM AT YEAR 25: A CURRENT LOOK AT ITS PERFORMANCE 6 (Aug. 2011), http://www.cohnreznick.com/sites/default/files/reznickgroup_lihtc_survey_2011.pdf.

12. SIMON KAWITZKY ET AL., FAIR HOUS. JUSTICE CTR., CHOICE CONSTRAINED, SEGREGATION MAINTAINED: USING FEDERAL TAX CREDITS TO PROVIDE AFFORDABLE HOUSING 10 (Aug. 2013), <http://www.fairhousingjustice.org/wp-content/uploads/2013/08/FHJC-LIHTCREPORT-Aug13-Fullv1-7-WEB.pdf>.

13. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518 (2015) (holding that disparate-impact claims are cognizable under the Fair Housing Act).

14. KAWITZKY ET AL., *supra* note 12, at 9.

15. *Id.*

16. Brief for Petitioners at 4 n.2, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371) [hereinafter Brief for Petitioners, *Tex. Dep't of Hous.*].

17. *Id.* at 6–7, 52 n.4.

18. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2514.

impact in the FHA, and the Court affirmed that, in addition to intentional discrimination, the FHA prohibited actions that, while unintentional, adversely affect protected classes.¹⁹

The Department argued, among other things, that federal and state laws governing the LIHTC program, over which the Department has no control, mandate certain race-based selection criteria that cause the statistical disparity to which ICP objects.²⁰ The criterion that is most often pointed out is LIHTC's preference for projected sites in low-income areas.²¹ Many practitioners and scholars have echoed this argument as an unfortunate flaw of the LIHTC; that is, prioritizing affordable housing situated in higher-poverty areas perpetuates racial segregation, yet furthers the urban revitalization goal of the LIHTC. Choosing to site housing in higher opportunity areas would align with a main objective of the FHA,²² however, the Department believes that this would compete with the tax code within which the LIHTC is constructed.²³ The district court refused to accept this claim, insisting that the revitalization of inner cities can be simultaneously done with initiatives to improve racial integration.²⁴ This article accepts the congruency of these objectives and sets forth arguments that similarly integrate the goals of §§ 3604, 3605 and 3608 of the FHA to effectively measure and monitor progression towards these goals. This article also recognizes the overlap between fair housing and affirmative action jurisprudence and leverages the commonalities between the two in order to support the ability to challenge LIHTC programs without preventing the allocation of tax credits from pursuing its goal of urban revitalization.

Although every appellate court that heard the issue recognized the cognizability of disparate impact under the FHA,²⁵ and the Office of Housing and Urban Development (HUD) issued a Final Rule to this effect,²⁶ the *Texas* case resolved, in the affirmative that²⁷ dispa-

19. See generally *id.* (holding that disparate impact claims are cognizable under the FHA).

20. Brief for Petitioners, Tex. Dep't of Hous. *supra* note 16, at 8.

21. *Id.* at 45.

22. *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 860 F. Supp. 2d 312, 324–25 (N.D. Tex. 2012).

23. *Id.* at 325.

24. *Id.* at 326.

25. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

26. *Id.*

27. Brief for Petitioners, Tex. Dep't of Hous., *supra* note 16, at 13.

Affirmative Action for Affordable Housing

rate impact claims may be brought under the FHA.²⁸ Despite this holding by the Court, certain aspects of the opinion drastically limit the ability of this decision to end government-sponsored segregation.²⁹

The purpose of disparate impact is to offer recourse when the intent to discriminate does not exist or cannot be proven, although the results of actions are analogous to results when such an intent is present.³⁰ The three-part burden-shifting test that defines the analysis of a disparate impact claim was upheld by the Court with an important requirement.³¹ Standing alone, statistics showing that a policy has an adverse impact on a protected class will not meet the threshold requirements for making a *prima facie* case.³² The Court held that the burden is on the plaintiff to prove that the challenged policy or practice is the cause of the statistical disparity.³³ The appropriate remedy, if this and the remainder of the burden-shifting test favor the plaintiff, is to adjust the offending policy.³⁴ Further, the justices explicitly warned that a plaintiff challenging a housing investment decision involving a multi-factor analysis would be unlikely to make a *prima facie* case.³⁵ In giving this specific scenario, the justices project that the ability to bring a disparate impact claim against a LIHTC allocating agency will be difficult, if not impossible. At its core, the LIHTC is a competitive process whereby tax credits are awarded based on a series of project and developer elements.³⁶ Each state has a qualified allocation plan (“QAP”) through which points are given based on specific values and requirements.³⁷ With these restraints on disparate impact enacted by the Court in the Texas case, how can a plaintiff challenge the siting of affordable housing in low-income, minority neighborhoods? What resources are available to enable a plaintiff to show a causal link between the affordable housing development policy and segregation? The answers to these questions will allow or stymie challenges to segregated housing patterns that are perpetuated by the gov-

28. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

29. *Id.* at 2522.

30. *Id.* at 2517–19; *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

31. *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2522.

32. *Id.*

33. *Id.* at 2523.

34. *Id.* at 2524.

35. *Id.* at 2523–24.

36. *Low-Income Housing Credit*, 26 U.S.C. § 42(m)(1)(B) (2015).

37. *Id.* § 42(m)(1)(C).

ernment via a multi-billion dollar program that has provided more than 2.4 million units of affordable housing since its inception. The most important question that remains is, “[w]ill the answers to these questions result in a policy that prioritizes integration over the revitalization of impoverished areas?”

This Article sets forth two contentions. The first is that the Court’s opinion in the *Texas* case places a heavier onus for all entities required to act pursuant to the FHA and the LIHTC program to collect data showing the relationship among neighborhood demographics, QAP elements, and the siting of LIHTC housing units. Second, there is a tie-breaker mechanism in the majority of QAPs that, when triggered, is the sole factor that determines if a proposed LIHTC project moves forward or if it fails to receive tax credits.³⁸ This Article is the first to argue that such a mechanism removes the LIHTC tie-breaker analysis from one characterized initially as multi-factor to single-factor, and is therefore outside of the spectrum of cases the Court stated will fail to meet the first step of the burden-shifting test. This separation preserves the integrity of the agencies’ authority to weigh multiple elements of proposed affordable housing structures and not prioritize segregation reduction over the redevelopment and rehabilitation of low-income areas. However, enhanced scrutiny of the tie-breaker mechanism will help to ensure that LIHTC projects can be sited in higher-income areas in pursuit of socioeconomic integration. This Article is also the first to assert that there is support for analyzing the tie-breaker mechanism separately from the rest of the selection criteria in the dicta and opinions of affirmative action cases rendered by the Supreme Court.

Increasing data collection and analysis efforts, together with a new perspective on the LIHTC QAP tie-breaker, reconcile the goals of the FHA and the LIHTC, which can, at first blush, appear to be at odds with one another. However, the Fifth Circuit decisively stated that compliance with the requirements of both bodies of legislation is possible.³⁹ Comprehending the purposes of both the FHA and the LIHTC program is significant for understanding how these two policies can work together to fulfill the original promises of both. For this

38. TEX. DEP’T OF HOUS. & CMTY. AFFAIRS, HOUSING TAX CREDIT PROGRAM: 2012–2013 QUALIFIED ALLOCATION PLAN 19 (2012), https://www.novoco.com/sites/default/files/atoms/files/texas_final_12.pdf.

39. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 860 F. Supp. 2d 312, 326 (N.D. Tex. 2012).

Affirmative Action for Affordable Housing

reason, the first part of this Article provides an overview of segregation in public housing and the FHA. This will show a historical perspective that highlights the intersection of racial and socioeconomic segregation with government housing. The facts, procedural history, and opinion of the *Texas* case are highlighted in Part II. The nuances of the opinion will be explored in greater detail in order to magnify the limits of the opinion. Part III briefly explains the LIHTC, with a focus on the selection process. There have been a number of critiques of the LIHTC's requirements and administration, which will be viewed from the lens of disparate impact. The two contentions of this Article will be provided in Part IV. The first explains the type of data that should be collected and synthesized, given the *Texas* case opinion. This data would serve to address the causality requirement in the statistical disparity portion of creating a *prima facie* case. It is further argued that legislative history and government regulations support enhancing the availability and quality of data that speak to the segregative and integrationist nature of the LIHTC. This data would also provide insight into race-neutral factors that can be used to avoid racial concentration, which will avoid the overt consideration of race in LIHTC decisions – which the Court stated to be a constitutional dilemma. Prospective plaintiffs bringing disparate impact claims under the FHA that challenge the LIHTC must understand how to explain the structure and implications of the program's selection process. This is the difference between the plaintiff meeting the initial requirement of the burden-shifting process and the defendant being granted summary judgment.

I. SEGREGATION IN PUBLIC HOUSING AND AFFORDABLE HOUSING

Before the Fair Housing Act of 1968 was enacted, U.S. Attorney General Ramsay Clark, who served under President Lyndon B. Johnson stated “[t]o support legislative jurisdiction under the Fourteenth Amendment, it was shown that today’s discriminatory housing patterns are a direct outgrowth of past illegal government action and that those patterns impede State and local government in their ability to provide equal protection of the law.”⁴⁰ Concentrated poverty and segregated neighborhoods defined by racial and class divides mark the

40. Brief for Respondent at 53a, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 747 F.3d. 275 (5th Cir. 2014) (No. 13-1371).

checkered history of public housing in the United States.⁴¹ Government-subsidized housing structures have been controversial, whether they are being constructed, demolished or rehabilitated⁴² due to the failure to progress an agenda of integration and inclusion.

In the late nineteenth and early twentieth century, racial segregation codified racial preferences through express racial zoning and racially restrictive covenants.⁴³ In *Buchanan v. Warley*, the Supreme Court struck down racial zoning as unconstitutional.⁴⁴ The *Euclid* Court's decision to uphold zoning of land by use and density as a valid exercise of the police powers of local governments began the shift from de jure to de facto racial segregation.⁴⁵ Justice Sutherland's opinion gave segregationists their new argument by equating apartment buildings to a nuisance when placed next to single-family residential uses.⁴⁶ As African Americans are much more likely to rent than own detached housing⁴⁷, segregating within residential uses acted as an effective proxy for race, justified in the name of preserving property value. Throughout the twentieth and into the twenty-first century, courts have upheld ordinances on the basis of preserving property values.⁴⁸

The desire to reverse the role that the federal government played in creating racial isolation⁴⁹ was a motivating factor of the FHA.⁵⁰ In advance of describing the purpose and features of the Act, it is important to understand the historical significance and entrenched systemic racism at the federal level that laid the groundwork for the segregationist policies that exist today. The passage of the Housing Act of 1937 was intended to provide working class individuals and families

41. See generally DOUGLASS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (Harvard Univ. Press 1993).

42. Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012 n.3 (1998) [hereinafter Roisman, *Mandates Unsatisfied*].

43. Groner & Helfeld, *supra* note 1, at 429–30.

44. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (holding racial zoning unconstitutional on the limited basis racially-based restraints on the alienation of property violated Due Process Clause of the Fourteenth Amendment).

45. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

46. *Id.* at 394–95.

47. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *RENTER DEMOGRAPHICS* 16–17, <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ahr2011-3-demographics.pdf>.

48. E.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).

49. See generally MASSEY & DENTON, *supra* note 41, at 6, 10; Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

50. 42 U.S.C. § 3608(d) (2016).

Affirmative Action for Affordable Housing

with affordable housing in addition to assisting with decreasing the unemployment rate by increasing the number of jobs in the construction industry. The stated purpose of the Act is “. . . to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income. . . .”⁵¹ Public housing units were built to segregate residents by race.⁵² Many white residents relocated from public housing to the suburbs⁵³ when white individuals were given the opportunity to purchase homes in suburban areas and blacks were not.⁵⁴ In fact, housing authorities would not provide loans with favorable interest rates and other terms to “inharmoonious racial or nationality groups.” This practice excluded blacks from purchasing homes in neighborhoods occupied by mostly white residents.⁵⁵ Over time, the racial makeup of public housing residents shifted to be comprised of minority and low-income populations.⁵⁶ Local politicians represented by white, higher-income residents often vetoed the construction of public housing in these neighborhoods, concentrating the structures in minority neighborhoods.⁵⁷ The structural integrity and qualities of the housing deteriorated as racial minorities and low-income individuals became the primary tenants of public housing.⁵⁸ Light, air, space, and amenities were sacrificed in order to create cost-effective units.⁵⁹ Over time, the federal government began to outsource the creation of public housing to private developers.⁶⁰ Public housing programs in the 1940s and 1950s marked the beginning of the demolitions of properties labeled as slums or blight, and broken promises to rebuild and rehabilitate these struc-

51. JA STOLOFF, U.S. DEP’T OF HOUS. & URBAN DEV. OFFICE OF POLICY DEV. & RESEARCH, A BRIEF HISTORY OF PUBLIC HOUSING 3, http://reengageinc.org/research/brief_history_public_housing.pdf.

52. KAWITZKY ET AL., *supra* note 12, at 7.

53. Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1757 (2005).

54. *Id.* at 1755.

55. *Id.*

56. *Id.*

57. STOLOFF, *supra* note 51, at 8.

58. *Id.* at ii, 14.

59. *Id.* at 13–14.

60. *About HOPE VI*, U.S. DEP’T OF HOUS. & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=Program_offices/public_indian_housing/programs/ph/hope6/about (last visited Oct. 23, 2016); *New Markets Tax Credit Fact Sheet*, NEW MKTS. TAX CREDIT COALITION, <http://nmtc-coalition.org/fact-sheet/> (last visited Oct. 23, 2016). See generally Low-Income Housing Credit, 26 U.S.C.A. § 42 (2015) (providing private developers with an incentive to create and maintain affordable housing).

tures led to unfulfilled promises of urban redevelopment in minority communities.⁶¹

By the 1960s, subsidies and tax breaks were given to incentivize private developers to construct housing units for low-income individuals.⁶² The 1970s marked the beginning of using housing vouchers to replace the creation of public housing by the federal government, as further evidenced by the Nixon administration's freeze on many housing programs.⁶³ Housing vouchers are designed to cover the gap in rent cost after the tenant pays 30 percent of this cost.⁶⁴ Rather than construct additional housing units, the vouchers may be used for market rate housing, but defray the cost of rent to the low-income renter.⁶⁵ The same racial segregation and excess demand issues that plagued public housing programs before vouchers still infiltrate the Housing Choice Voucher program.⁶⁶ Vouchers are accepted primarily in low-income and minority neighborhoods. Low-Income Housing Tax Credits are now "the only major Federal assistance program . . . that is currently active for funding new or rehabilitated subsidized housing. . . ."⁶⁷ Studies have shown that the LIHTC has continued the cycle of segregation evident in federal housing programs. More than half of LIHTC units are located in metropolitan areas, and nearly three-fourths of these units are in neighborhoods in which half of the households are low-income. 48% of these LIHTC units are in areas that have minority populations in excess of 50%.⁶⁸ The racial segregation that was ingratiated in the design of public housing in its early years still persists today.⁶⁹

A. Isolation and Integration

Black-white integration reached a high in the 1960s and 1970s, and is still extremely prevalent⁷⁰ and can be attributed to a number of

61. STOLOFF, *supra* note 51, at 9–10.

62. *Id.* at 5.

63. *Id.* at 12.

64. Roisman, *Mandates Unsatisfied*, *supra* note 42, at 1016.

65. *Id.*

66. Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 How. L.J. 913, 926 (2005) [hereinafter Roisman, *Keeping the Promise*].

67. Roisman, *Mandates Unsatisfied*, *supra* note 42, at 1012 n.3.

68. *Id.* at 1020.

69. JOHN R. LOGAN, US2010 PROJECT, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AMERICA (2011), <http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf>.

70. Roisman, *Keeping the Promise*, *supra* note 66, at 926.

Affirmative Action for Affordable Housing

factors,⁷¹ many of which are related to housing policies as described above.⁷² The average black person lives in a neighborhood that is 41% black, and the average Hispanic person lives in a neighborhood that is 42% Hispanic.⁷³ The average white person lives in a neighborhood that is 75% white.⁷⁴ This cycle is often propelled by the tendency of white residents to move out of neighborhoods when black or Hispanic residents move in.⁷⁵ Racial minorities are also concentrated in lower-income neighborhoods. The household income of whites is about \$60,000, while the average black income is about \$35,000.⁷⁶ It is important to note that the racial segregation occurs throughout the income spectrum.⁷⁷ Poor whites live in neighborhoods that are 74% white, while affluent blacks live in neighborhoods that are 36.3% black.⁷⁸

Residential segregation results in the disproportionately high placement of minorities in neighborhoods with higher levels of poverty than their white counterparts.⁷⁹ Affluent whites, meaning those making in excess of \$75,000 per year, live in neighborhoods with a poverty level of less than 10%, while affluent blacks live in neighborhoods with poverty levels of 14% to 15% and Hispanics live in neighborhoods with poverty levels of 13%.⁸⁰ Not only do affluent blacks and Hispanics live in higher areas of poverty than their white counterparts, but they also live in environments with higher poverty levels than poor whites. Poor whites live in neighborhoods with poverty levels of 12% to 13%.⁸¹

Examining the neighborhood poverty levels can provide insight into the residents' quality of life.⁸² Living in areas with high rates of poverty concentration results in a number of disadvantages. Crime rates are higher, negative public and environmental health effects are more pronounced, and access to public services, employment, and the presence of investment are markedly lower in areas of poverty con-

71. Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1210 (2011); Orfield, *supra* note 53, at 1759.

72. Orfield, *supra* note 53, at 1754.

73. LOGAN, *supra* note 69, at 3.

74. *Id.* at 3.

75. Orfield, *supra* note 53, at 1757.

76. LOGAN, *supra* note 69, at 2.

77. *Id.* at 3.

78. *Id.*

79. *Id.* at 7–9.

80. *Id.* at 5.

81. *Id.*

82. *Id.* at 4.

centration.⁸³ Poverty-stricken neighborhoods reduce one's opportunity for the creation of generational wealth and upward income mobility.⁸⁴ Another glaring adverse effect of poverty concentration is the decrease in tax base,⁸⁵ which in turn lowers the monetary resources available for funding public schools in neighborhoods with high concentrations of low-income, minority residents.⁸⁶

B. Education and Segregation

Housing and schools share a strong connection due to the process of school districting and funding.⁸⁷ Most significantly for the purposes of this Article, racial segregation attributed to government practices resulted in the need for public school desegregation.⁸⁸ The Supreme Court declared that segregation is inherently unequal in its landmark decision, *Brown v. Board of Education* in 1954. Housing segregation results in school segregation,⁸⁹ and the racial composition of public schools speaks to the residential segregation in this country. The 1954 *Brown v. Board of Education* decision resulted in the steady desegregation of public schools from that year until 1988.⁹⁰ The Supreme Court's 1991 *Dowell* decision ended desegregation orders. Today, schools are more segregated than they were in 1968 (43.5% of black students attended majority white schools in 1968), with only 23% of black students attending schools that are majority white.⁹¹ Schools that concentrate racial minorities also concentrate students who live in poverty.⁹² For example, schools that have a black and Latino student population that exceeds 80% have a student poverty rate of at least 70%. This poverty concentration results in compromised educational

83. Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons From Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 679–80 (2011) [Seicshnaydre, *Government Housing*].

84. Orfield, *supra* note 53, at 1758.

85. *Id.* at 1759–60.

86. *Id.* at 1759.

87. Sarah Childress, *School Segregation is Back, 60 Years After "Brown,"* FRONTLINE (May 15, 2014), <http://www.pbs.org/wgbh/frontline/article/report-school-segregation-is-back-60-years-after-brown/>.

88. Orfield, *supra* note 53, at 1755–56.

89. GARY ORFIELD ET AL., CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 34 (2014), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

90. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

91. Childress, *supra* note 87.

92. *Id.*

outcomes and resources.⁹³ The State of Texas is in the top five with respect to the most segregated schools for black students.⁹⁴ Students who attend schools in low-income neighborhoods are less likely to graduate from high school and more likely to become pregnant during their teenage years.⁹⁵ Job opportunities are limited. A result of being separated from non-minorities is lowered exposure to linguistics, which adversely affects economic mobility.⁹⁶ This housing/school connection further underscores the negative and pervasive effects of segregation. In addition to sharing similar patterns of segregation, selected jurisprudence in housing and education will be paralleled in Part II of this Article for the purpose of showing precedent in distinguishing the LIHTC tie-breaker from the initial QAP selection process.

C. The Fair Housing Act

*“It thus seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo the effects of these past State and Federal unconstitutionally discriminatory actions.”*⁹⁷

The Fair Housing Act of 1968 seeks to “provide, within constitutional limitations, for fair housing throughout the United States.”⁹⁸ Namely, it prohibits discrimination in the sale, rental, and financing of housing on the basis of race, color, religion, sex, national origin, familial status, or disability. Originally introduced in 1966 by the Johnson administration, Congress passed the FHA in the wake of Dr. Martin Luther King, Jr.’s assassination.⁹⁹ Since the final statutory language resulted from a Senate compromise amendment to an omnibus House Civil Rights bill, the legislative history is sparse with no committee reports, and the hearing records are limited to discussing the broad objective of ending urban racial ghettos.¹⁰⁰ In the decades following

93. *Id.*; Wenhua Di & James C. Murdoch, *The Impact of the Low Income Housing Tax Credit Program on Local Schools*, 22 J. HOUS. ECON. 308, 309 (2013).

94. Tracy, *7 of the Most Segregated School Systems in America*, ATLANTA BLACK STAR (May 27, 2014), <http://atlantablackstar.com/2014/05/27/7-of-the-most-segregated-school-systems-in-america/5/>.

95. Orfield, *supra* note 53, at 1760.

96. *Id.* at 1761.

97. Brief for Respondent, Tex. Dep’t of Hous., *supra* note 16, at 3.

98. Fair Housing Act, 42 U.S.C. § 3601 (2015).

99. Robert G. Schwemm, Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act, 41 IND. L. REV. 717, 757 (2008) [hereinafter Schwemm, Cox, Halprin].

100. Robert G. Schwemm, *Discriminatory Housing Statements and §3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 198–99 (2001) [hereinafter Schwemm, *Discriminatory Housing*].

its passage, most states and many local governments have enacted their own fair housing laws that are equivalent to the FHA.¹⁰¹

Sections 3604 and 3608 of the FHA contain its primary substantive provisions.¹⁰² Section 3604 prohibits discrimination in the sale or rental of a dwelling or in the terms, conditions, or privileges of sale or rental of a dwelling.¹⁰³ Further, it bars discrimination in the “provision of services or facilities in connection therewith.”¹⁰⁴ The section also forbids discriminatory intent in representing dwelling availability for inspection, sale, or rental to a party.¹⁰⁵ Likewise, it bans inducing or attempting to induce the sale or rental of a dwelling by appeal to the discriminatory motives of the seller.¹⁰⁶ Combined, these provisions seek to eliminate the impact of discriminatory intent on the availability of housing, providing a cause of action where such actions occur.¹⁰⁷

Section 3608(a) grants the United States Department of Housing and Urban Development (“HUD”) the authority and responsibility to administer the provisions of the FHA.¹⁰⁸ The Act creates a proactive duty for all federal executive departments and agencies to affirmatively further fair housing.¹⁰⁹ Through a 1994 executive order, President Clinton expanded the authority of HUD and directed stronger measures be taken to affirmatively further fair housing in federal programs in order to better address still pervasive housing discrimination.¹¹⁰ The order also created the President’s Fair Housing Council, a cabinet-level organization comprised of the heads of numerous executive agencies designed to increase coordination across the executive branch in affirmatively furthering fair housing.¹¹¹ Simply refraining

101. Schwemm, *Cox, Halprin*, *supra* note 99, at 722 n.28.

102. Fair Housing Act §§ 3604, 3608.

103. *Id.* at § 3604(b).

104. *Id.*

105. *Id.*

106. *Id.* at § 3604(d).

107. *See generally id.* at §§ 3604, 3608 .

108. *Id.* at § 3608(a).

109. *Id.* at § 3608(d) (2015) (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner *affirmatively to further the purposes of this subchapter* and shall cooperate with the Secretary to further such purposes.”) (emphasis added).

110. Exec. Order No. 12892, 59 Fed. Reg. 29393 (Jan. 17, 1994) (declaring that if all of our executive agencies affirmatively further fair housing in the design of their policies and administration of their programs relating to housing and urban development, a truly nondiscriminatory housing market will be closer to achievement).

111. *Id.*

Affirmative Action for Affordable Housing

from discrimination is not enough to comply with § 3608. Governmental agencies must proactively use its resources to assist with measures that end segregation and discrimination.¹¹²

HUD officials recognized the role the agency and federal government have played in perpetuating segregation¹¹³ in the Final Rule issued by HUD:

Racially or ethnically concentrated areas of poverty merit special attention because the costs they impose extend far beyond their residents, who suffer due to their limited access to high-quality educational opportunities, stable employment, and other prospects for economic success.¹¹⁴ Because of their high levels of unemployment, capital disinvestment, and other stressors, these neighborhoods often experience a range of negative outcomes such as exposure to poverty, heightened levels of crime, negative environmental health hazards, low educational attainment, and other challenges that require extra attention and resources from the larger communities of which they are a part.¹¹⁵ Consequently, interventions that result in reducing racially and ethnically concentrated areas of poverty hold the promise of providing benefits that assist both residents and their communities.¹¹⁶

Many courts¹¹⁷ and scholars¹¹⁸ have interpreted § 3608 (d)–(e) of the FHA to be violated by the concentration of housing designed for low-income residents in neighborhoods that have a disproportionately high number of racial minorities.¹¹⁹ Sections 3604 and 3605 are also violated by policies that perpetuate segregation.¹²⁰ Because segregation violates all three sections of the FHA, it makes sense that case law and regulations addressing segregation that affect any single clause should also be applied to the other two. This will assist in understanding how to both proactively avoid and measure segregative effects of the LIHTC. Case law and regulations have recently devel-

112. KAWITZKY ET AL., *supra* note 12, at 10.

113. Roisman, *Keeping the Promise*, *supra* note 66, at 926.

114. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43709 (proposed July 19, 2013).

115. *Id.*

116. *Id.*

117. See generally Robert Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 137 n.74 (2011).

118. Orfield, *supra* note 53, at 1766 n.118, 1767 n.122; Roisman, *Mandates Unsatisfied*, *supra* note 42, at 1026 n.82, 1027, 1043, 1044–43.

119. *Id.*

120. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

oped regarding the scope of FHA interpretation¹²¹ that affects each section, or two of the three sections, but not all three. There is a HUD regulation that clearly outlines data, policy, and process requirements to ensure that certain agencies¹²² are complying with the affirmatively furthering fair housing clause of § 3608. The socioeconomic determinants described in detail above are incorporated into the siting of housing to determine if fair housing is being proactively pursued. This same information is not provided with respect to § 3604 and § 3605. This common thread is important because it supports expanding the affirmatively furthering fair housing data requirements to the LIHTC to align with the continual merger of the FHA sections. There is an immediate need to understand the combination of FHA sections as exemplified by ICP's suit against the U.S. Department of Treasury and the Office of the Comptroller of the Currency ("OCC"), in which ICP alleges violations of §§ 3604 and 3608 of the FHA¹²³ under the disparate impact theory.

The justices and the respondent in the *Texas* case recognized the duty the federal government must play in desegregation, but also placed the responsibility of proving the causal link between policies and statistical imbalance on the plaintiff.¹²⁴ Without data, the plaintiff cannot clear this hurdle. If the promise of the FHA is to be fulfilled, acts that perpetuate racial and poverty concentration, have well-documented harmful effects on the quality of life of neighborhood residents, and are contrary to the purpose of the FHA must be subject to challenge in courts of law. The next section will review the purpose of the FHA and disparate impact.

D. Disparate Impact

At the heart of the *Texas* case is whether or not the Court will recognize disparate impact claims under the FHA.¹²⁵ Disparate im-

121. Fair Housing Act, 42 U.S.C. § 3608(e)(5) (2015); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2519 (2015); 24 C.F.R. § 100 (2016).

122. See generally Fair Housing Act § 3608(e)(5) (grantees or subgrantees of Community Planning and Development programs operated by the U.S. Department of Housing and Urban Development must affirmatively further fair housing).

123. Inclusive Cmty. Project, Inc. v. U. S. Dep't of Treasury, No. 3:14-CV-3013-D, 2015 WL 4629635, at *1 (N.D. Tex. Aug. 4, 2014).

124. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2523 (2015); Brief of Hous. Scholars as Amici Curaie Supporting Respondent at 11, 17, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (No. 13-1371) [hereinafter Brief of Hous. Scholars, Tex. Dep't of Hous.].

125. *Id.* at 1.

pact theory is based on the reality that private or public actions, even taken without animus, can have a disproportionately negative impact on particular groups, especially minorities.¹²⁶ An example taken from employment discrimination is minimum height requirements for police officers.¹²⁷ Setting a minimum height requirement would disqualify more women than men because of differences in average height between genders.¹²⁸ Although the policy is facially neutral, it has a disparate impact on a particular group.¹²⁹ Likewise, because of the long history of overt racial discrimination and its long-term economic impact in the United States, racial minorities are especially vulnerable to disparate impact in housing.¹³⁰ Residential racial segregation across the United States remains pervasive more than four decades after the passage of the FHA. In most major metropolitan regions in the United States, residential racial segregation is particularly severe.¹³¹

A disparate impact claim allows a plaintiff to allege discrimination based on statistically disparate impacts the defendant's facially neutral practice has on members of a group who share a protected characteristic.¹³² Defendants can avoid liability if the challenged practice is determined to have a legitimate, nondiscriminatory policy objective and the practice is necessary to attain that objective, and there is no other practice which can achieve the same results that also has a less discriminatory effect.¹³³ The Supreme Court first recognized disparate impact claims in *Griggs v. Duke Power*, an employment discrimination case in which a unanimous Court held that Title VII of the Civil Rights Act of 1964 "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."¹³⁴ In *Inclusive Communities*, the Supreme Court primarily justifies its holding by analogy to *Griggs* and similar cases finding disparate impact cognizable in other civil rights statutes.¹³⁵

126. *Id.* at 17–18.

127. *Dothard v. Rawlinson*, 433 U.S. 321, 327 (1977).

128. *Id.* at 329.

129. *Id.*

130. Brief of Hous. Scholars, Tex. Dep't of Hous., *supra* note 124, at 1, 43–47.

131. *Id.* at 11.

132. *Id.* at 59–61.

133. Brief for Respondent, Tex. Dep't of Hous., *supra* note 97, at 23.

134. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

135. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2543–46 (2015).

As the Supreme Court stated, the *Griggs* Title VII opinion supports disparate impact liability under the FHA.¹³⁶ In *Griggs*, African American employees of Duke Power challenged the company's policy of requiring high school diplomas and standardized general intelligence tests for hiring and promotion.¹³⁷ Neither requirement was shown to be significantly related to job performance.¹³⁸ The requirements did, however, have the effect of disproportionately disqualifying African American candidates.¹³⁹ The *Griggs* court specifically rejected the argument that Title VII required a showing of intent to discriminate before an employer could be held liable for violating the statute.¹⁴⁰ To make out a *prima facie* case, the plaintiffs showed statistical evidence that the employer's practices led to significantly higher rejection rate of African American applicants for a given position as compared to white candidates.¹⁴¹ The *Griggs* Court then shifted the burden to the employer to show how their practice served a necessary business function, and they could not.¹⁴² "Governmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"¹⁴³

Courts have held disparate impact claims cognizable in the context of housing prior to the *Texas* case.¹⁴⁴ Theories of liability in Title VIII (housing discrimination) of the Civil Rights Act of 1964 drew support by analogy to holdings on Title VII liability in employment discrimination.¹⁴⁵ Every circuit to consider the question—eleven of twelve—has held that the FHA prohibits facially neutral housing practices that create disparate impacts on protected groups, even in the absence of discriminatory intent.¹⁴⁶ Congress expressed a much broader goal with the affirmatively furthering clause than merely giv-

136. *Griggs*, 401 U.S. at 428–30, 436.

137. *Id.* at 425–26.

138. *Id.* at 431.

139. *Id.* at 426.

140. *Id.* at 432.

141. *Id.* at 430 n.6.

142. *Id.* at 431.

143. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015).

144. 24 C.F.R. § 100.500 (2013).

145. Dana L. Miller, *HOPE VI and Title VIII: How a Justifying Government Purpose Can Overcome the Disparate Impact Problem*, 47 ST. LOUIS U. L.J. 1277, 1291 (2003).

146. Michael G. Allen et al., *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 156 (2014).

Affirmative Action for Affordable Housing

ing a mechanism to redress discriminatory intent.¹⁴⁷ Indeed, one of the Supreme Court's earliest FHA cases noted that the legislative intent of the clause created an obligation for proactive measures to address existing segregation and related barriers.¹⁴⁸ Courts have supported this interpretation of the affirmatively furthering clause, requiring recipients of federal housing and urban development funds to proactively initiate practices that integrate communities in addition to practicing non-discrimination.¹⁴⁹

Plaintiffs have brought disparate impact claims under the FHA in three primary contexts: lending, exclusionary zoning, and urban renewal.¹⁵⁰ Lower federal courts have found the claim cognizable in each of these contexts.¹⁵¹ In 2013, HUD supported this interpretation by issuing a regulation that establishes standards for proving disparate impact claims under the FHA.¹⁵² In this Final Rule, HUD codifies the burden-shifting framework used by a majority of federal courts considering the issue.¹⁵³ Those courts recognized at least two types of disparate impact under the FHA.¹⁵⁴ In the first type, a plaintiff shows that the practice imposes a disproportionate harm on members of a protected class.¹⁵⁵ In the second type, a plaintiff shows that the challenged practice tends to create, reinforce, or perpetuate patterns of racial segregation.¹⁵⁶ Commonly, this means the plaintiff objects to a plan that would concentrate low-income housing in an already racially segregated neighborhood in violation of the FHA.¹⁵⁷ Government officials typically counter that their programs seek to counteract blight in those same neighborhoods where there is an existing demand for affordable housing.¹⁵⁸ Although the claims may be cognizable, plain-

147. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting Senator Walter F. Mondale, "[t]he reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns'").

148. *Id.*

149. *See, e.g., Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 821–22 (3d Cir. 1970) (holding that the FHA requires HUD to affirmatively further fair housing by considering the racial and socioeconomic effects of its site selection decisions for public housing).

150. *Allen et al.*, *supra* note 146, at 162.

151. *Id.* at 159.

152. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

153. *Id.*

154. *Allen et al.*, *supra* note 146, at 160.

155. *Id.*

156. *Id.*

157. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11462 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

158. *Id.*

tiffs to date have had only minimal success when bringing these lawsuits.¹⁵⁹ Stacy Seicshnaydre's article, which was referred to in the *Texas* case opinion, finds that disparate impact claims have only a 20% success rate on appeal, and the majority of these cases that are successful are "housing barrier" cases.¹⁶⁰ Further complicating matters, the Court in the *Texas* case did not state the precise requirements in establishing a prima facie case under the FHA and seemingly raised the bar for pleadings.¹⁶¹

The Supreme Court recognized that "antidiscrimination laws must be construed to encompass disparate impact claims when their text refers to the consequences of actions and not just to the mindset of actors."¹⁶² While the *Texas* case does not mention the FHA § 3608 duty to affirmatively further fair housing, its reasoning supports the idea that a race-neutral approach is not sufficient for government policies when the outcome furthers segregation or leads to resegregation.¹⁶³ The Third Circuit ruled on this precise issue in *Shannon v. HUD*.¹⁶⁴ In *Shannon*, residents of a racially integrated neighborhood in Philadelphia sued to enjoin construction of a HUD funded housing project.¹⁶⁵ They claimed the project would lead to resegregation by further concentrating poor African Americans in an area with a high existing population of low-income residents.¹⁶⁶ The *Shannon* court held that the FHA prohibits HUD from funding any project that would segregate or resegregate a neighborhood.¹⁶⁷ Further, it held HUD must take racial and socioeconomic data into consideration in project selection, calling a purely colorblind approach "impermissible."¹⁶⁸ This obligation should apply to any entity—such as state and local governments and public housing authorities—receiving federal housing funds, such as the LIHTC.¹⁶⁹

159. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 363 (2013) [Seicshnaydre, *Disparate Impact*].

160. *Id.* at 363, 401–02.

161. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

162. *Id.* at 2518.

163. *Id.* at 2524–25.

164. *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 811–12 (3d Cir. 1970).

165. *Id.* at 811.

166. *Id.* at 812.

167. *Id.* at 821.

168. *Id.* at 820.

169. Allen et al., *supra* note 146, at 186.

Affirmative Action for Affordable Housing

The FHA clearly envisions disparate impact claims as a means of furthering its legislative purpose of eliminating racial segregation in housing across the United States. The 1988 Amendments to the FHA support this position.¹⁷⁰ By the time of the amendments, nine circuit courts of appeals had concluded the FHA encompassed disparate impact claims and Congress retained the statutory text.¹⁷¹ Disparate impact claims are consistent with the FHA's central purpose.¹⁷² "The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy."¹⁷³ Recognition of disparate impact liability under the FHA also plays a role in uncovering discriminatory intent, especially from within local, state and, federal housing agencies.¹⁷⁴ The FHA aims to ensure that a clear national policy of fair housing can be achieved in the United States without arbitrarily creating discriminatory effects or perpetuating segregation.¹⁷⁵

Yet, in spite of the clearly defined goals of the FHA, it has not been very effective in reversing the entrenched patterns of racial segregation of housing in the United States.¹⁷⁶ Some commentators blame this lack of efficacy on weak enforcement scheme, staffing problems, and delays in remedial actions.¹⁷⁷ Aside from enforcement issues, HUD's core goals are often seen to be in conflict with one another. One goal is to affirmatively further fair housing and another is to "spur economic growth in distressed neighborhoods."¹⁷⁸ This conflict has played out throughout the history of public housing in the United States and most recently in the allocation of LIHTC tax credits.¹⁷⁹ The view that these are competing economic interests, together

170. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2519 (2015).

171. *Id.*

172. *Id.* at 2521.

173. *Id.*

174. *See* 144 Cong. Rec. 2281, 2527–28 (Feb. 6, 1968) (noting Senator Edward Brooke stated, "Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph – even as he ok's public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation, and have the memos to prove it.").

175. *Title VIII: Fair Housing and Equal Opportunity*, U.S. DEP'T OF HOUS. & URBAN DEV., (Sept. 24, 2007), http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdesc/title8.

176. Johnson, *supra* note 71, at 1191–92.

177. *Id.* at 1207.

178. Miller, *supra* note 145, at 1278.

179. *See id.* at 1279–81.

with local prejudices, mismanagement, and barely disguised animus had led to a legacy of physical isolation, bad neighborhoods, poverty, and racial concentrations.¹⁸⁰ However, the district court refused to accept this bifurcation of housing civil rights objectives in its opinion and insisted that the two clauses can work together.¹⁸¹ Further, HUD is obligated to use its funds to prevent segregation and discrimination. With its recent rulemaking on disparate impact claims and the Supreme Court's endorsement in the *Texas* case, HUD may be seeking a new direction for addressing the long-standing de facto segregation in the United States.

II. TEXAS DEPT. OF HOUSING & COMMUNITY AFFAIRS V. THE INCLUSIVE COMMUNITIES PROJECT, INC.

In January 2015, the Supreme Court heard oral arguments in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*¹⁸² The case presents two connected questions: are disparate impact claims cognizable under the FHA, and if so, what are the standards and burdens of proof that should apply? The FHA forbids landlords, homeowners, state housing authorities, and others to discriminate against any person “because of” race.¹⁸³ The Court granted certiorari twice before to resolve the issue of disparate impact liability under the FHA, but both cases settled before oral arguments.¹⁸⁴

180. *See id.* at 1279–80.

181. *E.g.*, *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 860 F. Supp. 2d 312 (N.D. Tex. 2012).

182. Brief for Respondent, *Tex. Dep't of Hous.*, *supra* note 97, at 18 (ICP is a Dallas based non-profit organization that assists low-income persons in finding affordable housing and that seeks racial and socioeconomic integration in Dallas housing. In particular, ICP works with African-American families who are eligible for the Dallas Housing Authority's Housing Choice Voucher program. ICP assists voucher participants who want to move into non-minority areas in obtaining apartments in non-minority suburban neighborhoods by offering counseling, assisting in negotiations with landlords, and providing financial assistance (for example, security deposits). At times, ICP must provide “landlord incentive bonus payments” to landlords to secure housing for voucher families. J.A. 133–134. One of ICP's purposes is to assist families who want housing in areas with better schools. J.A. 133 n.3.).

183. 42 U.S.C. §§ 3604(a), 3605(a) (2012).

184. *See Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d 375, 377, 379–80 (3d Cir. 2011), *cert. denied*, 134 S. Ct. 636 (2013) (mem.). In *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, residents of the New Jersey Township of Mount Holly brought suit, claiming that the Township's proposed plan to redevelop their neighborhood violated the FHA because it had a disparate impact on minority groups. The redevelopment plan would force out most of the minority residents of the neighborhood, with only 56 planned housing units being deed-restricted as affordable housing and only 11 of those being offered on a priority basis to displaced residents. The Township would redevelop the remaining property as lower-density housing to be marketed well outside the price range of current residents. *Id.* at

Affirmative Action for Affordable Housing

The Department administers the federal LIHTC program and uses a set of state law-mandated criteria for scoring project priority.¹⁸⁵ ICP is an explicitly race-conscious non-profit organization seeking to “assist Black or African-American Dallas Housing Authority Section 8 families in finding housing opportunities in the suburban communities in the Dallas area.”¹⁸⁶ ICP sued the Department in 2008, accusing it of “disproportionately allocat[ing]” tax credits to properties located in minority-populated areas.¹⁸⁷ ICP demanded injunctive relief requiring the Department “to allocate Low Income Housing Tax Credits in the Dallas metropolitan area in a manner that creates as many LIHTC-assisted units in nonminority census tracts as exist in minority census tracts.”¹⁸⁸

Although the district court found that ICP had failed to prove disparate-treatment and dismissed its equal-protection and § 1982 claims, the district court concluded that ICP established a *prima facie* case by showing the Department “disproportionately approved tax credits for non-elderly developments in minority neighborhoods, and, conversely, has disproportionately denied tax credits for non-elderly housing in predominately Caucasian neighborhoods.”¹⁸⁹ “Specifically, the district court found that the Department ‘approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas’” and . . . 92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents.¹⁹⁰ The statistical disparity establishes

377, 379-80; *Gallagher v. Magner*, 619 F.3d 823, 829 (8th Cir. 2010), *cert denied*, 132 S. Ct. 1306 (2012) (mem.). In *Gallagher v. Magner*, owners of rental property in St. Paul, Minnesota, challenged the city’s enforcement of its housing code claiming disparate impact on minority residents. Owners claimed the city favored owner-occupied housing over rental property, with inspectors conducting proactive “sweeps” that disproportionately targeted minority housing. *Id.* at 829.

185. Petition for Writ of Certiorari, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371), at *3–4.

186. *Id.* at 6.

187. *Id.*

188. *Id.* at 7.

189. Brief for the Petitioners at 7–8, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 747 F.3d. 275 (5th Cir. 2014) (No. 13-1371) [hereinafter Brief for the Petitioners, *Tex. Dep’t of Hous.*]

190. *Tex. Dep’t of Hous. & Cmty. Aff. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2514 (2015); Brief for the Petitioners, *Tex. Dep’t of Hous.*, *supra* note 189, at 8; *see also* Complaint at 15–16, 25, *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 2015 WL 4629635 (N.D. Tex. 2014) (No. 3:14-cv-03013-D) (“The degree of racial segregation by distress levels is shown by a comparison of LIHTC units with renter occupied multifamily units. 91% of City of Dallas non-elderly LIHTC units are in 50% or greater minority census tracts with Treas-

the prima facie case, shifting the burden of proof to the Department to show its actions furthered a legitimate government interest and that no alternative course of action could be adopted that would enable the interest to be served with less discriminatory impact.¹⁹¹

The Department countered that the statistical disparity was a direct result of federal and state laws “requiring the Department to award low-income housing tax credits according to fixed criteria, some of which are correlated with race.”¹⁹² However, it is important to note the District Court’s opinion on this issue. Section 26 of the Internal Revenue Code requires that state housing agencies allocate all LIHTC credits pursuant to a QAP. Part of the definition of a QAP is “. . . any plan which . . . gives preference in allocating housing credit dollar amounts among selected projects to . . . projects which are located in qualified census tracts . . .”¹⁹³ This section does not require the preference be given to projects in QCTs be instituted as an initial threshold. Rather, this preference is given among projects that have already been selected. This important distinction means that projects located in a QCT do not have to be preferred over projects in higher-income areas. The District Court saw that compliance with these laws qualified as a legitimate governmental interest, but also held the Department failed to prove the absence of any alternative that would reduce the disparity in approval rates.¹⁹⁴ The District Court questioned why the Department had not included additional criteria¹⁹⁵ that would reduce the disparity in approval rates for LIHTC applications.¹⁹⁶ In its ruling, the District Court mandated changes to the Department’s selection criteria designed to increase the availability of LIHTC in non-minority dominated areas and required the Depart-

ment’s CDFI Distress Index 3 or 4. Only 59% of all City of Dallas renter occupied multifamily units are in 50% or greater minority census tracts with Treasury CDFI Distress Index 3 or 4, the highest levels of distress.”).

191. Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2514–15 (2015).

192. 26 U.S.C.A. § 42(d)(4)(C)(iii) (2015); Petition for Writ of Certiorari, *supra* note 185, at *9.

193. 26 U.S.C.A. § 42(m)(1)(B)(i)-(ii).

194. *Id.* at 331.

195. *Id.* at 327, 329.

196. Under Texas’s QAP, applicants that meet threshold criteria are scored and ranked by a point system that prioritizes ten state statutory criteria. Brief for the Petitioners, Tex. Dep’t of Hous., *supra* note 189, at *4–5; TEX. GOV’T CODE ANN. § 2306.6710(b)(1)(A)-(K) (West 2015). As Texas interprets the scheme, petitioners have discretion to consider additional scoring criteria, but may not give those criteria greater weight in its scoring process than the federal and state statutory criteria. Petitioners may also take into account discretionary factors outside the scoring process. Op. Tex. Att’y Gen. GA-0208 (2004).

Affirmative Action for Affordable Housing

ment to submit annual reports to the court for a five year period, certifying that “no further violations of the FHA occurred” and it was removing any “lingering effects” of past discrimination.¹⁹⁷

The District Court ordered the Department to submit a plan to revise their LIHTC allocation process in order to comply with the opinion and order issued by the District Court.¹⁹⁸ On November 22, 2013, the Department submitted its annual report connection with the remedial plan ordered by the District Court for the Northern District of Texas. Among the required implementations in the Texas QAP, the Department made the following changes:

- 1) Include in the QAP the additional below-the-line criteria regarding the quality of public education and anti-concentration and remove all other “Development Location” criteria;
- 2) Continue to include in the QAP criteria for disqualifying proposed development sites that have undesirable features and incorporate the process of identifying and addressing other potentially undesirable site features;
- 3) Conduct an annual disparate impact analysis; and
- 4) Adopt a tie breaker that favors an application proposing development in a high opportunity area.¹⁹⁹

One race-neutral change made by the Department to reduce the segregated effects of its LIHTC program was to provide equal points to projects located in high income and low-poverty areas.²⁰⁰ Since making this change, the number of LIHTC units in suburban neighborhoods in the state of Texas has increased.²⁰¹ After the state changed its formula, developers proposing projects in high-opportunity areas received more points than they had before and built tax-credit developments in the suburbs, according to Betsy Julian, the executive director of Inclusive Communities.²⁰²

197. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 2012 WL 3201401, at *4 (N.D. Tex. 2012).

198. Brief for Respondent, *Tex. Dep’t of Hous., supra* note 97, at 27.

199. A high opportunity area refers to an area as used in this report refers to an area that qualifies on the Opportunity index as set forth in the Department’s QAP. For Texas definition, see *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 860 F. Supp. 2d 312, 324–24 (N.D. Tex. 2012).

200. *Id.* at 320.

201. Alana Semuels, *The U.S. Supreme Court Walks a Fine Line on Race*, ATLANTIC (June 25, 2015), <http://www.theatlantic.com/business/archive/2015/06/supreme-court-fair-housing-segregation/396860/>; Defendant’s Annual Report Regarding Low-Income Housing Tax Credits at 5, 50–53, *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 860 F. Supp. 2d 312 (N.D. Tex. 2012) (No. 3:08-CV-0546-D).

202. Semuels, *supra* note 201.

At approximately the same time that the Department appealed to the Fifth Circuit, HUD issued a regulation that establishes standards for proving disparate impact claims under the FHA.²⁰³ The HUD regulation states the FHA imposes liability on any practice that causes discriminatory effects, including any practice that “actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”²⁰⁴ HUD also proposes a burden-shifting framework for disparate impact analysis similar to that used by the district court in the Texas case. Citing prior decisions, the Fifth Circuit held that the FHA provides for disparate impact liability,²⁰⁵ but the Fifth Circuit had no precedent upon which to base a standard for proving a disparate impact claims. The Fifth Circuit adopted the new HUD regulations and remanded to the district court to apply them.²⁰⁶

In its briefs, the Department argues FHA’s unambiguous text precludes disparate impact claims because the Act focuses on “actions with respect to the targeted individual”—not on the “effects of the action.”²⁰⁷ The FHA does not include the phrase “adversely affect,” which the Court found dispositive to establish disparate impact liability.²⁰⁸ The Department extends the argument, stating that reading disparate impact liability into Title VIII at all was based on an erroneous textual interpretation in *Griggs v. Duke Power*.²⁰⁹ They urge the Court not to expand the interpretation beyond the bounds of Title VII, stating it can remain in force under the principles of stare decisis.²¹⁰ Finally, the Department contends the 1988 amendments to the

203. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

204. 24 C.F.R. § 100.500(a) (2013).

205. See *Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 295 (5th Cir. 2009); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996).

206. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275, 282–83 (5th Cir. 2014).

207. Reply Brief for the Petitioners, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (No. 13-1371), 2015 WL 179407, at *1–2; see also *Smith v. City of Jackson*, 544 U.S. 228, 268, n.6 (2005) [hereinafter Reply Brief for the Petitioners, *Tex. Dep’t of Hous.*].

208. Compare *Smith*, 544 U.S. at 236 n.6 with *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (finding no disparate impact liability under ADEA § 4(a)(1) due to lack of the phrase “adversely affect,” but concluded ADEA § 4(a)(2) could be construed to establish disparate impact liability due to its inclusion).

209. See generally *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that aptitude tests used in hiring practices that disparately impact minorities must be reasonably related to the job).

210. Reply Brief for the Petitioners, *Tex. Dep’t of Hous.*, *supra* note 207, at *6–7.

Affirmative Action for Affordable Housing

FHA “did not ratify the courts of appeals’ decisions that erroneously recognized FHA disparate-impact claims.”²¹¹

The Department also makes a constitutional avoidance argument, claiming that finding disparate impact liability means the government can require or coerce race-based decision making, leading to further constitutional violations of equal protection. The constitutional avoidance canon does not require a constitutional violation; it requires only constitutional doubt. There is a serious argument that FHA disparate impact liability would violate the Equal Protection Clause. FHA disparate impact claims would force each regulated entity to evaluate the racial outcomes of its housing decisions and make race-based decisions to avoid liability. The Department claims this is far more than merely nudging regulated entities to use “race-conscious” mechanisms.

The Department maintains disparate impact liability is inconsistent with the legislative purpose of the FHA. They argued that this was supported by Congress’ identification of the primary purpose of the FHA as “provid[ing], within constitutional limits, for fair housing throughout the United States.”²¹² The Court confirmed that the FHA was intended to ensure fair housing for all Americans, not only those groups that had been directly harmed by prior housing discrimination.²¹³ Appellant’s arguments went on to assert that disparate impact liability interferes with programs intended to help lower-income communities, where minorities are often overrepresented.²¹⁴ It would divert resources from poorer neighborhoods, reduce the stock of decent affordable housing in those neighborhoods, and prevent municipal housing authorities from mitigating urban blight.²¹⁵ Further, the Department contends that disparate impact liability is unnecessary to achieve the FHA’s purpose because evidence of discriminatory intent is not needed to prevail on a disparate treatment claim. “Disparate treatment liability can be based on the totality of the circumstances, including evidence of disparate impact.”²¹⁶

ICP counters that both the legislative intent and statutory construction of the FHA supports the validity of disparate impact

211. *Id.* at *8.

212. 42 U.S.C. § 3601 (2012).

213. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

214. Reply Brief for Petitioners, Tex. Dep’t of Hous., *supra* note 207, at *20.

215. *Id.*

216. *Id.* at 21.

claims.²¹⁷ Appellee focused on Congressional intent as manifested by prior court decisions and federal regulations.²¹⁸ Congress enacted the FHA to remedy the perpetuation of racial segregation that denies minority families the freedom to choose dwellings within their means but outside the intentionally created racial ghettos. ICP states that the disparate impact proof standard adopted by the district court and HUD includes perpetuation of racial segregation, Congress' primary focus. Restricting affordable housing choices to racial minority neighborhoods perpetuates the existing racial segregation created and maintained by intentional government action and private accommodation. Liability for perpetuation of racial segregation is based on the harm that racial segregation inflicts on the entire community, minorities and non-minorities.²¹⁹

ICP relied on the fact that Congress has determined the need for the FHA on a continual basis since the enactment of the FHA.²²⁰ ICP asserted that congressional sponsors of the FHA meant to set a broad remedial purpose for the Act, and that the broad construction of the FHA to include non-intentional discrimination is justified by Congressional findings that the discrimination making units unavailable was not just discrimination based on personal prejudice.²²¹

ICP argues that proof of intentional discrimination is not required because the unique legal context and structure of the FHA shows that a perpetuation of segregation causes a disparate impact, and therefore is a violation of the Act.²²² ICP asserts "the text of the FHA does not explicitly require proof of intent in order to establish most discriminatory housing practices and such a requirement should not be construed into the text." Section 3604(a) and section 3605(a), and (b) do not include the words intent, purpose, or motive.²²³ The canons of statutory construction do not support reading intent into the requirements of those provisions outside Congress' express statutory language.²²⁴ Further, the broad purpose set for the FHA in § 3601

217. Brief for Respondent, Tex. Dep't of Hous. *supra* note 97, at 32–35, 42–47.

218. *Id.* at 54–56.

219. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

220. Brief for Respondent, Tex. Dep't of Hous., *supra* note 97, at 42.

221. *Id.* at 44, 46.

222. *Id.* at 42.

223. *Id.* at 48.

224. *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Cent. Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176–77 (1994).

Affirmative Action for Affordable Housing

argues against the inclusion of an intent requirement as a matter of statutory construction.

A. The Texas Case Holding

The United States Supreme Court held disparate impact claims cognizable under FHA § 3604(a) and § 3605.²²⁵ Yet, Justice Kennedy's majority opinion was careful to limit the reach of such claims as exemplified by the statement, "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' but does not displace valid governmental policies."²²⁶ In order to successfully present a prima facie case for disparate impact under the FHA, plaintiffs must show not only that a statistical disparity having an adverse impact on a protected class exists, but also point to evidence that the defendant's policies or practices actually caused the disparity.²²⁷ Therefore, race-neutral policies only violate the FHA if they can be pointed to as the reason for the perpetuation of racial segregation or another adverse impact on a minority group.²²⁸ The process and additional rationale for this data already exists within the HUD Rule for Affirmatively Furthering Fair Housing.²²⁹ The Court provided an example of a claim that would fail to clear this hurdle for a prima facie case — a housing investment decision that involved a multi-factor analysis.²³⁰ Part IV of this Article asserts that this holding emphasizes the need for data to better understand the relationship between policies and segregation in order for this causal link to be proved or disproved. Part IV also critiques the housing investment example through the lens of affirmative action in order to illustrate the significance of the LIHTC program's tie-breaker mechanism.

The Court's decision endorsed forty years of practice under the FHA, during which eleven federal appellate courts adopted the dispa-

225. *Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

226. *Id.* at 2522.

227. *Id.* at 2523.

228. There are two ways to prove a prima facie case of discrimination under the FHA without showing intent. The first is to show a greater adverse impact on one racial group than on another. The second is to show the perpetuation of racial segregation which harms the entire community. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); 24 C.F.R. § 100.500(a) (2013).

229. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5, 91, 92).

230. *Tex. Dept. of Hous. & Cmty. Affairs*, 135 S. Ct. at 2523–24.

rate impact theory of liability.²³¹ Various federal agencies, including HUD, the agency primarily responsible for enforcing the FHA, have interpreted the statute to allow disparate impact liability.²³² In this regard, the opinion is not a radical change to existing jurisprudence, with the Court comparing the FHA to Title VII of the Civil Rights Act of 1964 and the ADEA.²³³ Specifically, the Court drew a direct parallel between the results-oriented language “otherwise make unavailable” of the FHA, with “otherwise adversely affect” in Title VII.²³⁴ The Court extended the reasoning of *Griggs* and *Smith* to the FHA.

The Court affirms that disparate impact claims are “consistent with the FHA’s central purpose.”²³⁵ The purpose of the FHA is to eradicate discriminatory practices within housing throughout the United States.²³⁶ The FHA seeks to prevent the unfair exclusion of minorities from neighborhoods without proper justification. It accomplishes this purpose by barring intentional discrimination and other overt measures, such as municipalities banning certain kinds of housing. “Recognition of disparate impact liability under the FHA also plays a role in uncovering discriminatory intent,” by permitting plaintiffs to counteract disguised prejudices and covert animus.²³⁷

While the circuit courts have unanimously held disparate impact cognizable, they employed a variety of analytic methods in applying the standard.²³⁸ Most of the circuits used either a burden-shifting framework similar to the final rule²³⁹ or adopted a multi-factor analysis.²⁴⁰ Some circuits, although recognizing disparate impact liability, did not adopt either approach.²⁴¹ The Court upheld HUD’s February 2013 rule implementing the FHA’s discriminatory effects standard.²⁴²

231. Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What’s New and What’s Not*, 115 COLUM. L. REV. SIDEBAR 106, 106 (2015) [hereinafter Schwemm, *Fair Housing Litigation After Inclusive Communities*].

232. *Id.*

233. *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2516–17.

234. *Id.* at 2519.

235. *Id.* at 2521.

236. *Id.*

237. *Id.* at 2522.

238. Allen et al., *supra* note 146, at 159.

239. See, e.g., *Lapid-Laurel, L.L.C., v. Zoning Bd. of Adjustment*, 284 F.3d 442, 446 (3d Cir. 2002).

240. See, e.g., *Cent. Alabama Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1195–96 (M.D. Ala. 2011).

241. Allen et al., *supra* note 146, at 162.

242. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 32, 11460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

Affirmative Action for Affordable Housing

The rule established a three-part burden-shifting framework for establishing a disparate impact claim.²⁴³

First, the plaintiff makes a *prima facie* case by showing disparate impact. This showing typically requires a statistical analysis establishing adverse impact or perpetuation of segregation.²⁴⁴ HUD's rule is careful not to require specific statistical evidence of disparate impact; rather, it allows plaintiffs to make the most persuasive case possible. The Court in the *Texas Department of Housing & Community Affairs* case, however, adds a significant requirement to establishing the *prima facie* case. Plaintiffs must not only show a statistically significant impact, they must also provide evidence that the challenged practice or policy causes the impact.²⁴⁵ Therefore, it is not sufficient to simply prove a resulting effect; the plaintiff, at the pleading stage, must provide evidence to link the statistical outcome directly to the challenged practice.²⁴⁶

Next, the burden of proof shifts to the defendant to show the challenged practice is necessary to achieve a substantial, legitimate, and nondiscriminatory interest. "An important and appropriate means of ensuring that disparate impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies."²⁴⁷ The Court explains that a public interest exception exists, analogous to the "business necessity" defense under Title VII.²⁴⁸ Finally, the burden shifts back to the plaintiff to show that the interest could be served by another practice with a less discriminatory effect.²⁴⁹

Although it adopts the HUD rule and analytical framework, the Court provides a narrow interpretation of disparate impact liability. The opinion claims that disparate impact claims have "always been properly limited in key respects."²⁵⁰ And, "[t]he FHA is not an instrument to force housing authorities to reorder their priorities."²⁵¹ Any analysis must provide housing authorities and private developers

243. *Id.* at 11460.

244. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S.Ct. 2507, 2523 (2015).

245. *Id.*

246. *Id.* at 2523.

247. *Id.* at 2522.

248. *Id.* at 2522–23.

249. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 32 11460, 11460.

250. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S.Ct. at 2522.

251. *Id.*

with leeway to state and explain their valid interests. The Court remanded the case for re-determination based on the burden-shifting framework with its expressed limitations. On remand, the district court concluded that ICP's disparate impact claim should be decided under this burden-shifting approach adopted by HUD and the Fifth Circuit, and the court would begin its analysis under the new approach by first determining whether ICP has established a *prima facie* case for disparate impact.²⁵²

B. Limiting Disparate Impact

Although the Court wholly recognized the disparate impact claims under FHA, it set limitations on the scope of such claims. Justice Kennedy took great pains to justify the holding by analogizing the FHA to Title VIII and ADEA jurisprudence and adopting the limitations in those cases. The most significant limitation is the causality requirement that “a disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.”²⁵³ The Court went on to assert that, “[a] robust causality requirement ensures that ‘racial imbalance . . . does not, without more, establish a *prima facie* case of disparate impact’ and thus protects defendants from being held liable for racial disparities they did not create.”²⁵⁴ According to the Court, disparate impact liability is likely to lead to racial quotas and other “serious constitutional questions” without stringent limitations at the pleadings stage of a lawsuit.²⁵⁵ Indeed the Court indicates that if ICP cannot show causation on remand, the case should be dismissed.²⁵⁶

The Court identified examples of circumstances that would show a *prima facie* case of disparate impact. Unlawful zoning laws or housing restrictions that exclude minorities from certain neighborhoods without sufficient justification “reside in the heartland of disparate impact liability.”²⁵⁷ Specifically, the Court cited cases where zoning ordinances prohibited the construction of multi-family rental units and St. Bernard Parish’s infamous “blood relative” rental restriction ordi-

252. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs (Inclusive III)*, No. 3:08-CV-0546-D, 2015 WL 5916220, at *1, *12 (N.D. Tex. Oct. 8, 2015).

253. *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S.Ct. at 2523.

254. *Id.* (citing *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 653 (1989) *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k)).

255. *Id.*

256. *Id.* at 2524.

257. *Id.* at 2521–22.

Affirmative Action for Affordable Housing

nance.²⁵⁸ The Court also mentions disparate impact claims can vindicate private developer rights against a municipality's arbitrary or discriminatory ban on the construction of housing types.²⁵⁹

Yet, when it comes to vindicating the Congressional intent in the FHA of created integrated neighborhoods,²⁶⁰ the Court is a bit more circumspect. The opinion provides several scenarios where a plaintiff would be unable, or very unlikely, to make out a *prima facie* case. First, one-time investment decisions, such as a single deal by a private developer would be virtually immune from disparate impact claims.²⁶¹ There is simply no way to show that a single, prospective development caused an existing statistical disparity. Arguably, *all* one-time decisions become immune to disparate impact claims under this causality requirement. Next, if federal law limited agency discretion, then the plaintiff cannot show sufficient causality for a *prima facie* case. Governmental policies must be “artificial, arbitrary, and unnecessary barriers” to trigger liability.²⁶²

The most far reaching limitation expressed by the Court was that it “may be difficult to establish causation” with a multi-factor analysis that go into investment decisions to build or renovate housing.²⁶³ This case concerned exactly this scenario, with ICP claiming the Department's allocation of tax credits led to disparate impacts, as evidenced by the segregated housing patterns in the city of Dallas. This Article will focus on this limitation. It concerns more than simply this case, because it is a requirement of federal law that all LIHTC programs consider multiple factors in awarding the credits. There is a competitive selection process for the LIHTC program, and the qualified application plan that each state uses involves the awarding of points for a number of elements related to the proposed project. This is detailed in Part III of this article. If, on remand, this case is dismissed for failure to show causation, as hinted by the Court, then this would serve as an extremely difficult barrier for bringing a disparate impact claims due to actions done pursuant to the LIHTC program, the primary way that affordable housing is created and maintained in the United States.

258. *Id.* at 2522.

259. *Id.*

260. *Id.* at 2537 (Alito, J., Scalia, J., & Thomas J., dissenting).

261. *Id.* at 2523.

262. *Id.* at 2524 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

263. *Id.* at 2523–24.

The Court reasons that this limitation is necessary in order to avoid stifling the goal of urban revitalization. “It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation’s cities merely because some other priority might seem preferable. Entrepreneurs must be given the latitude to consider market factors.”²⁶⁴ The Court seeks to avoid a “double bind of liability,” where developers or agencies must decide between rejuvenating existing inner city neighborhoods and promoting new low-income housing in suburban communities.²⁶⁵ “If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system.”²⁶⁶

The broader concern expressed by the Court is making disparate impact claims so expansive as to inject racial considerations into all housing decisions. “Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them.”²⁶⁷ Unfortunately, other than the well-worn admonition against racial quotas, the Court did not further illuminate what “difficult questions” or “special dangers” might arise. This concern seems to echo the Department’s argument that recognizing disparate impact claims would lead to government agencies being forced to make decisions based on race. Arguably, this would be a violation of the Equal Protection Clause.²⁶⁸

Yet, the Court cannot completely avoid the specter of race, even in its own decision. The Court acknowledges the FHA’s purpose and role in eliminating racial isolation.

264. *Id.* at 2523.

265. *Id.*; see also Miller, *supra* note 145, at 1301 (“Efforts to bring about more integrated living patterns cannot be relegated merely to public housing developments.”); *Id.* (citations omitted) (“Truly effectuating the policy underlying the FHA requires reinvestment in minority neighborhoods so that these neighborhoods “are no longer deprived of essential public and private resources.”). Yet more recent HUD studies indicate simply adding low-income housing does not have a revitalizing effect on very poor, segregated neighborhoods. See Orfield, *supra* note 53, at 1756.

266. *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2524.

267. *Id.*

268. See, e.g., *Walker v. Mesquite*, 169 F.3d 973, 982–87 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000) (holding a “race-conscious remedial measure” did not pass strict scrutiny for not being narrowly tailored, but opined that a race-neutral policy based on a proxy, such as low-income, would be a valid solution).

Affirmative Action for Affordable Housing

Much progress remains to be made in our Nation's continuing struggle against racial isolation. . . The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white-separate and unequal.' . . The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.²⁶⁹

In 1968, the Kerner Commission, created in response to the 1967 race riots, call not only for improvement of public housing and efforts to produce mixed-income neighborhoods, but expressly for policies to racially integrate housing across urban and suburban America.²⁷⁰ The resolution of how to simultaneously "move beyond" explicit racial considerations while realizing the necessary and intended racial goals of the FHA is still an open question.

After a thorough examination, the U.S. Supreme Court continued its support and interpretation that disparate impact, a traditional claim in employment law matters arising from Title VII, applies to the Fair Housing Act.²⁷¹ The Supreme Court stated,

Recognition of disparate-impact claims is consistent with the FHA's central purpose. The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy. . . . These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability.²⁷²

Both the cognizability of disparate impact under the FHA and the limitation on the scope of this theory raise interesting questions for the future of LIHTC. This Article capitalizes on the increased attention on affordable housing and the Fair Housing Act by advocating for an enhanced use of data that indicate housing quality, patterns of segregation, and the socioeconomic determinants that create higher opportunity neighborhoods.

269. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525–26.

270. *Id.* at 2516; *see also* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, ch. 16 (1968), <http://www.eisenhowerfoundation.org/docs/kerne.pdf> ("We believe that the only possible choice for America is . . . a policy which combines ghetto enrichment with programs designed to encourage integration of substantial numbers of Negroes into the society outside the ghetto.").

271. 42 U.S.C. §§ 3601–3619, 3631.

272. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2521–22 (citations omitted).

III. THE LOW INCOME HOUSING TAX CREDIT PROGRAM

The LIHTC program is one of the largest federal programs that provides a subsidy for the development and rehabilitation of affordable housing.²⁷³ LIHTC provides an indirect federal subsidy for low-income housing by granting tax credits on federal income.²⁷⁴ In its simplest form, LIHTC “subsidizes the acquisition, construction, and/or rehabilitation of rental property by private developers.”²⁷⁵ LIHTC pursues its goals by providing a dollar-for-dollar tax credit for federal taxes owed, over a ten-year period.²⁷⁶ The program has distributed over \$7.5 billion in federal tax credits and preserved or developed millions of housing units.²⁷⁷ The LIHTC program has placed over 2.2 million units into service in a twenty-six-year period.²⁷⁸ Additionally, “LIHTC gives state and local LIHTC –allocating agencies the equivalent of nearly \$8 billion in annual budget authority to issue tax credits for acquisition, rehabilitation, or new construction of rental housing targeted to low-income households.”²⁷⁹ The sheer size of the program is, unfortunately, not an indication of success of affirmatively furthering fair housing. Multiple reports from governmental agencies to Congress have been critical of the program.²⁸⁰

The Low Income Housing Tax Credit (“LIHTC”) program finds its roots in a long, daunting history of the pursuit of equality, detailed earlier in this article. The LIHTC program was created as part the Tax Reform Act of 1986.²⁸¹ The United States Department of Treas-

273. John Baber, *Thank You Sir, May I Have Another: The Issue of the Unattainability of Low Income Housing Tax Credits and Proposed Solutions*, 4 U. BALT. J. LAND & DEV. 39, 39 (2014).

274. OFFICE OF THE COMPTROLLER OF THE CURRENCY, LOW-INCOME HOUSING TAX CREDITS: AFFORDABLE HOUSING INVESTMENT OPPORTUNITIES FOR BANKS 2 (2014) [hereinafter OPPORTUNITIES FOR BANKS], <http://www.occ.gov/topics/community-affairs/publications/insights/insights-low-income-housing-tax-credits.pdf>.

275. Paul Duncan et al., *Tax Incentives for Economic Development: What is the Low-Income Housing Tax Credit?*, in TAX POLICY CTR, THE TAX POLICY BRIEFING BOOK (2009), <http://tpcprod.urban.org/briefing-book/key-elements/economic-development/low-income-housing.cfm>.

276. ED GRAMLICH, NAT’L LOW INCOME HOUS. COAL., LOW INCOME HOUSING TAX CREDIT PROGRAM 1 (2014), <http://nlihc.org/sites/default/files/2014AG-254.pdf>.

277. Baber, *supra* note 273.

278. U.S. Dep’t of Hous. & Urban Dev., *Data Sets: Low-Income Housing Tax Credits*, <http://www.huduser.gov/portal/datasets/lihtc.html>. [hereinafter *Data Sets*].

279. *Id.*

280. See *id.* See generally U.S. GEN. ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM (1997), <http://www.gao.gov/assets/160/155820.pdf> [hereinafter ACCOUNTING OFFICE].

281. OPPORTUNITIES FOR BANKS, *supra* note 274, at 1.

Affirmative Action for Affordable Housing

sury (the “Treasury”) is tasked with primary oversight of LIHTC.²⁸² Treasury regulations require compliance with nondiscriminatory housing policies in order to be eligible for tax credits. One such policy is the HUD regulation that the “site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.”²⁸³ Though the LIHTC program cannot be expected to unilaterally reverse segregation in housing, it was designed to encourage the construction of affordable housing for qualified low-income individuals²⁸⁴ and must be administered pursuant to deconcentration of poverty and the reduction of racial segregation.²⁸⁵ Notably, as stated by the U.S. Supreme Court, the “federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas.”²⁸⁶ There are 9% credits and 4% credits.²⁸⁷ For each state, the annual volume cap for 9% tax credits is measured as the product of a fixed per capita rate multiplied by the state’s population. The focus of this Article is the allocation of 9% credits, which involves a competitive selection process via a Qualified Allocation Plan.

The Internal Revenue Service (“IRS”) allocates federal tax credits to state housing credit agencies (“HCA”) based on the population of a state.²⁸⁸ The tax credits are allocated to the states based upon the state’s population, with a minimum allocation of \$2.5 million dollars.²⁸⁹ LIHTC developers may rehabilitate existing housing or build new housing.²⁹⁰ Additionally, developers in the LIHTC program may have mixed-housing, whereby “[t]he project may include units for low-income households and market-rate units. The amount of credit

282. See 26 U.S.C. §§ 38, 42(a) (2015).

283. KAWITZKY, *supra* note 12, at 11.

284. Duncan et al., *supra* note 275.

285. KAWITZKY, *supra* note 12, at 1, 11.

286. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015).

287. If 50% or more of the project’s eligible costs are financed with tax-exempt private activity bonds, the project sponsor/developer may claim a 4% LIHTC without having to obtain a credit allocation from the HCA. Although the process to obtain bonds is competitive and requires the project sponsor/developer to submit an application, once the HCA decides to issue the bonds, the project sponsor/developer is not required to compete separately for a tax credit allocation.

OPPORTUNITIES FOR BANKS, *supra* note 274, at 10, 11.

288. MARK P. KEIGHTLEY, CONGRESSIONAL RESEARCH SERV., AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 2 (2013), <https://www.fas.org/sgp/crs/misc/RS22389.pdf>.

289. *Id.* at 2 n.6.

290. U.S. GOV. ACCOUNTABILITY OFFICE, LOW-INCOME HOUSING TAX CREDIT: JOINT IRS-HUD ADMINISTRATION COULD HELP ADDRESS WEAKNESSES IN OVERSIGHT 5 (2015), <http://www.gao.gov/assets/680/671419.pdf> [hereinafter JOINT ADMINISTRATION].

received is based on the number of low-income units.”²⁹¹ Properties must meet a number tests “that restrict both the amount of rent that is assessed to tenants and the income of eligible tenants.”²⁹² Projects seeking LIHTC tax credit must satisfy the “income test” and the “gross rents test.”²⁹³ Importantly, neither the income test nor the gross rents test, as explained by HUD in its report to Congress, explicitly takes into consideration key demographics such as race, age, or religion.²⁹⁴

To qualify for the credit, a project must meet the requirements of a qualified low-income project. Project sponsors/developers (project sponsors) are required to set aside at least 40% of the units for renters earning no more than 60% of the area’s median income (the 40/60 test) or 20% of the units for renters earning 50% or less of the area’s median income (the 20/50 test).²⁹⁵ These units are subject to rent restrictions such that the maximum permissible gross rent, including an allowance for utilities, must be less than 30% of imputed income based on an area’s median income.²⁹⁶

A. LIHTC and the Qualified Census Tract

The LIHTC program also provides a higher tax credit than originally allowed, for development projects that are proposed to be located in “Qualified Census Tracts” (“QCT”).²⁹⁷ QCTs are designated by the Secretary of HUD and are based upon census data.²⁹⁸ Designation is provided where “50% or more of the households have an income which is less than 60% of the area median gross income for such year or which has a poverty rate of at least 25%.”²⁹⁹ Supplementing the QCT higher tax credit is a statutory preference for QCT projects.

If a project is located in a difficult development area (DDA) or a qualified census tract (QCT), the eligible basis of the project can be increased by 30%. This allowable increase is commonly referred to as a basis boost. DDAs are locations that have high construction, land, and utility costs relative to the area median gross income.

291. *Id.*

292. KEIGHTLEY, *supra* note 288, at 3.

293. *Id.*

294. *Id.*

295. OPPORTUNITIES FOR BANKS, *supra* note 274, at 2.

296. *Id.*

297. Orfield, *supra* note 53, at 1778.

298. 26 U.S.C. § 42(d)(5)(B)(ii)(I) (2015).

299. *Id.*

Affirmative Action for Affordable Housing

QCTs are tracts with a poverty rate of at least 25%, or tracts where 50% of the households have incomes below 60% of the area median income.³⁰⁰

As stated by Professor Myron Orfield, “a plain reading of the statute shows the QCT preference applies to already selected projects—that is, projects selected subject to the duty to affirmatively further fair housing.”³⁰¹ The duty to affirmatively further fair housing arises from the Fair Housing Act, in which it declares that “[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner *affirmatively to further* the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.”³⁰² Thus, the U.S. Department of the Treasury, which the LIHTC program falls under, must “use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”³⁰³ Regardless of whether a project has a QCT designation, the federal government has a duty to ensure any housing project utilizing its credits are affirmatively furthering fair housing, while reducing discrimination and segregation.³⁰⁴

Once a state receives its allocation, it then allocates credits to developers based on its Qualified Allocation Plan (“QAP”), as required by the federal government.³⁰⁵ State-allocating agencies handle the bulk of LIHTC administration, with the federal government providing oversight.³⁰⁶ Specifically, the federal government provides low-income housing tax credits that are distributed to developers through designated state agencies.³⁰⁷ The federal government mandates that each state use a QAP to describe the criteria on which each project is measured, and the number of points that a proposed project receives

300. See Orfield, *supra* note 53, at 1778.

301. *Id.* at 1792.

302. 42 U.S.C. § 3608(d) (2016) (emphasis added).

303. NAACP, Boston Chapter v. Sec’y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987).

304. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42272 (July 16, 2015).

305. KEIGHTLEY, *supra* note 288, at 2.

306. MICHAEL K. HOLLAR, U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, UNDERSTANDING WHOM THE LIHTC PROGRAM SERVES 1 (2014) [hereinafter UNDERSTANDING WHOM THE LIHTC SERVES].

307. Tex. Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S.Ct. 2507, 2513 (2015).

if different parts of the criteria are met.³⁰⁸ Notably, states develop and create Qualified Allocation Plans with consideration of the federal government requirements.³⁰⁹ One such requirement is that projects that will be affordable for the longest period of time, and serve the lowest income levels take priority over all others.³¹⁰ QAP criteria vary from state-to-state. Each state may include requirements in addition to the ones mandated by the federal government. For instance, Texas considers whether the applicant “provide[s] free notary public service to the residents of the developments for which the allocation of housing tax credits is requested.”³¹¹

B. The QAP Selection Process

Developers seeking to participate in the LIHTC program must apply and be selected in accordance with the QAP in the particular state. Where a developer seeks to undertake the QAP selection process, they face various obstacles directly and indirectly. From a federal level, developers face the indirect implications of requirements levied on housing credit agencies. The following is a sample of codified federal requirements that have an indirect impact on LIHTC applicants.

- 1) The QAP must be approved by the governmental unit that the agency falls under.³¹²
- 2) The allocating agency must notify the “chief executive officer (or the equivalent)” of the local jurisdiction where the building is provided, and the “chief executive officer (or the equivalent)” has the opportunity to comment on the project.³¹³
- 3) At the expense of the developer, a comprehensive market study of the housing needs of low-income individuals in the area of the proposed project is conducted.³¹⁴
- 4) [A QAP must show preference] to projects serving the lowest income tenants, projects serving qualified tenants for longest duration, and QCT projects.³¹⁵

A July 2015 study by the Poverty & Race Research Action Council reviewed state QAPs in order to analyze the potential of each plan

308. *Id.*

309. KEIGHTLEY, *supra* note 288, at 2.

310. *Id.*

311. TEX. GOV'T. CODE ANN. § 2306.6710(b)(3) (West 2015).

312. 26 U.S.C.A. § 42(m)(1)(A)(i) (2015).

313. *Id.* § 42(m)(1)(A)(ii).

314. *Id.* § 42(m)(1)(A)(iii).

315. *Id.* § 42(m)(1)(B)(ii)(I-III).

Affirmative Action for Affordable Housing

to “reverse segregated housing patterns, expand housing opportunities for low income families and families of color, and use the Low Income Housing Tax Credit (“LIHTC”) to deconcentrate poverty and improve civil rights practices.”³¹⁶ The study found that only three QAPs explicitly refer to the role of LIHTC in mitigating racial segregation.³¹⁷ Indirect statements on deconcentration efforts are referenced in about nine other QAPs.³¹⁸

To be awarded a 9% tax credit, the proposed project’s developers and sponsors must apply through a competitive process for allocations of tax credits from state HCAs. The state agencies use the QAP to award points for qualified affordable housing projects. These point systems illustrate the state’s priorities for the desired type, location, ownership model, and other characteristics of the proposed affordable housing development.³¹⁹

In addition to the overall QAP requirement, the federal government has also codified ten considerations that every jurisdiction must include in its selection criteria. A sample of the considerations that a QAP must include is the project location, housing needs characteristics, the project characteristics, sponsor characteristics, public housing waiting list, and population of eligible tenants with children.³²⁰ Importantly, a state’s QAP does not have to require, or even consider the demographics of a project’s jurisdiction or its relation to the demographics of likely tenants. The nearest demographic consideration that could be extrapolated from the code, is the mandate to consider the historical nature of the project.³²¹

Each state’s QAP typically consist of the state’s methodology of allocating funds, record keeping, and enforcement. Due to the specific nature of state QAPs, dissimilarities may be found amongst the QAPs. Regardless of the stringency of a state’s QAP, a government study found that “[s]eventeen of the twenty [85%] qualified allocation plans that we reviewed provide flexibility for overriding or bypassing the allocation process.”³²² Importantly, states were not required to

316. POVERTY & RACE RESEARCH ACTION COUNCIL, BUILDING OPPORTUNITY: CIVIL RIGHTS BEST PRACTICES IN THE LOW INCOME HOUSING TAX CREDIT PROGRAM 1 (2015), <http://www.prrac.org/pdf/BuildingOpportunityII.pdf> [hereinafter CIVIL RIGHTS BEST PRACTICES].

317. *See id.* at 2 (showing the states of Massachusetts, North Carolina and Pennsylvania).

318. *See id.* at 3–4 (showing the deconcentration approaches of other states).

319. OPPORTUNITIES FOR BANKS, *supra* note 274, at 3.

320. 26 U.S.C.A. § 42(m)(1)(C)(i-ix) (2015).

321. *Id.* § 42(m)(1)(C)(x).

322. ACCOUNTING OFFICE, *supra* note 280, at 68.

include information that is pertinent “primarily for demographic information, such as race, ethnicity, and disability status.”³²³

The projects with the most points receive the tax credit allocation, and, for many states, in the event more than one project receives the highest number of points, there is a tie-breaker.³²⁴ Not only are the individual requirements of QAPs state-based, but each individual state’s tie-breaking process may also differ greatly. The tie-breaking process is utilized where LIHTC applicants have been awarded the same amount of points.

Consider Idaho, where there is a tie between two or more applicants, the applicant with the lower tax credit award per livable square foot will be given priority.³²⁵ Alternatively, Illinois’ state agency has three different tie-breakers.³²⁶ Under the Illinois tie-breaking process, total development cost is first taken into consideration, followed by tenant populations with children.³²⁷ Lastly, Illinois considers whether a project intends for tenants to eventually own the property.³²⁸ Some state tie-breakers hinge upon the number of LIHTC eligible units (in the case of mixed-purpose units) in a development.³²⁹ Similar to other requirements imposed by state (in addition to the federally mandated), the tie-breaking procedures enacted by states enjoy little, if any, oversight by the federal government. With little federal oversight, the prospect of state policies having an effect that does not affirmatively further fair housing is a highly probable reality. Contesting this reality, as well as any disparate impact that may arise, thereby falls on the citizens. Importantly, it is the harmed citizens and advocate groups, which themselves may have limited resources (considering the harmed parties may qualify for LIHTC housing) that must challenge the policies.

A state or local government does not violate the Equal Protection Clause merely by considering the racial effects of a proposed ac-

323. UNDERSTANDING WHOM THE LIHTC SERVES, *supra* note 306, at 2.

324. See generally Affordable Hous. Research Ctr., *2016 QAPs & Applications*, NOVGRADAC & Co., LLP, http://www.novoco.com/low_income_housing/lihtc/qap_2016.php (listing various state QAPs).

325. IDAHO HOUS. & FIN. ASS’N, 2015 LOW-INCOME HOUSING TAX CREDIT PROGRAM: QUALIFIED ALLOCATION FOR THE STATE OF IDAHO 13 (2015).

326. ILL. HOUS. DEV. AUTH., 2015 LOW INCOME HOUSING TAX CREDIT: QUALIFIED ALLOCATION PLAN 82–83 (2015).

327. *Id.*

328. *Id.*

329. See, e.g., N.H. HOUS. FIN. AUTH., NEW HAMPSHIRE: 2015 QUALIFIED ALLOCATION PLAN FOR THE LOW INCOME HOUSING TAX CREDIT PROGRAM 9–10 (2014), <http://www.nhhfa.org/assets/pdf/2015FinalQAP.pdf>.

Affirmative Action for Affordable Housing

tion and possibly altering its course if such action will impose disparate burdens on one racial group.³³⁰ “On the contrary, consideration of the actual consequences of government action may assist a government entity in acting in a racially neutral manner and providing equality of opportunity to its citizens.”³³¹

C. LIHTC Data Collection

Similar to QAPs, each state developed its own Tenant Income Certification form.³³² The information collected in these forms varied in substance and quantity. Often times the information gathered would be limited to rent and income data.³³³ Additionally, the LIHTC program did not originally require demographic data such as race and ethnicity,³³⁴ and as result, only a select number of jurisdictions requested such information.³³⁵

In 2008, twenty years after the LIHTC program was created, Congress mandated the collection of more robust data regarding tenants of LIHTC developments that included demographic information.³³⁶ The information gathering and maintenance falls within the responsibility of HUD. As a result, two federal agencies and all local agencies must now work in harmony to ensure the LIHTC program and its data are useful in furthering fair housing. The information gathered and reported to HUD falls into eight broad categories consisting of: (i) developmental data; (ii) household composition; (iii) gross annual income; (iv) income from assets; (v) determination of income eligibility; (vi) monthly rent; (vii) student status; (viii) and program type.³³⁷ Under the household composition category, data is collected regarding each household member’s disability status, race, age, and ethnicity.³³⁸ Only twenty of fifty-two QAPs mandate reporting on race and ethnicity in projects’ annual reports.³³⁹

330. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.* 135 S. Ct. 2507, 2525 (2015).

331. Brief for the United States as Amicus Curiae Supporting Respondent, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7336683, at *35 [hereinafter Brief of the United States, *Tex. Dep’t of Hous.*].

332. UNDERSTANDING WHOM THE LIHTC SERVES, *supra* note 306, at 1.

333. *Id.*

334. See Roisman, *Keeping The Promise*, *supra* note 66, at 928.

335. UNDERSTANDING WHOM THE LIHTC SERVES, *supra* note 306, at 1.

336. Housing & Economic Recovery Act of 2008, Pub. L. No. 110-289, § 1125(b)(3), 122 Stat. 2654, 2693–94 (2008).

337. UNDERSTANDING WHOM THE LIHTC SERVES, *supra* note 306, at 4.

338. *Id.*

339. See CIVIL RIGHTS BEST PRACTICES, *supra* note 316, at 10.

The new requirements are more comprehensive, but still have errors. For example, “many states were unable to submit information for active properties” and some states missed years of reporting.³⁴⁰ Using the data provided, HUD was able to match less than 60% of active properties in HUD’s database with properties submitted through the new mandated tenant data collection.³⁴¹ Additionally, of the states that submitted data, some only provided demographic data of a single household member.³⁴²

With such limited data, it is difficult to ascertain the depth in which LIHTC has failed, or succeeded, in affirmatively furthering fair housing. Though it may be argued that placing LIHTC developments in low-income areas may aid in revitalizing the area, such revitalization efforts have been nominal and often are ineffective in creating high opportunity neighborhoods out of low-income areas.³⁴³ Adding to the ineffectiveness of many revitalization programs is the fact that many states provide additional points for “revitalization” projects, but lack a standard definition of what constitutes “revitalization.”³⁴⁴ The failure to define the characteristic that constitutes “revitalization,” which warrants additional points, falls on both the local and federal government, as § 42 fails to define revitalization as well. Notably, only six states have a definition of what constitutes “revitalization” in their jurisdictions.³⁴⁵ Despite the data that is available, complaints, and litigation, the “LIHTC program is continuing the pattern of concentrating developments in high poverty, predominately minority areas or failing to ensure that units built in non-minority areas are available to low-income minority families.”³⁴⁶

D. Siting LIHTC Housing

Many LIHTC developments merely provide housing in locations that already have an ample supply of relatively low-cost housing,³⁴⁷ which is why many argue that the LIHTC program perpetuates segre-

340. UNDERSTANDING WHOM THE LIHTC SERVES, *supra* note 306, at 6, 7–12.

341. *Id.* at 8.

342. *Id.* at 9.

343. Jill Khadduri, *Creating Balance in the Locations of LIHTC Developments: The Role of Qualified Allocation Plans*, POVERTY, RACE, & RES. ACTION COUNCIL 2 (2013), http://www.prrac.org/pdf/Balance_in_the_Locations_of_LIHTC_Developments.pdf.

344. *See id.* at 12.

345. *Id.* at 11–14.

346. Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 569 (2008).

347. Khadduri, *supra* note 343, at 2.

Affirmative Action for Affordable Housing

gation based on income (which often times is a corollary of racial disparities and educational opportunities).³⁴⁸ These locations often have a private market that demands rent comparable to the “low-income” rent of the LIHTC developments.³⁴⁹ Moreover, the lack of data regarding LIHTC projects hinders the government in creating policy that would affirmatively further fair housing. “[D]espite the provisions for agency reports to the Treasury, the Treasury lacks data showing the total numbers of LIHTC units completed, project location, or occupant characteristics, other than income and family size.”³⁵⁰

Professor Florence Roisman has found that “[m]ost of the central city LIHTC units - 73.9%, are in census tracts with more than 50% low-income households; and 48% of the units are in tracts with more than 50% minority population. [34%] of all tax credit units are in areas with more than 50% minority population.”³⁵¹ Looking narrowly at the metropolitan area of Atlanta, Georgia (Atlanta Study), similar statistics were discovered.

In the Atlanta Study,³⁵² 206 LIHTC developments were analyzed. This sample size consists of nearly every LIHTC development located within, what is locally referred to as the “Perimeter.”³⁵³ The Atlanta Study utilized data from the U.S. Census Bureau³⁵⁴ and data compiled from HUD’s LIHTC Database by PolicyMap.³⁵⁵ The data collected included the zip code, the number of LIHTC developments in the respective zip code, the individual zip code’s poverty rate, and the average income of a zip code. As a result, nine of the twenty-eight zip

348. See generally Stacey E. Seischnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U.L. REV. 661 (2011) [hereinafter Seischnaydre, *Post-Katrina New Orleans*].

349. Khadduri, *supra* note 343, at 2.

350. Roisman, *Mandates Unsatisfied*, *supra* note 42, at 1019.

351. See *id.* at 1020 (citing ABT ASSOC. INC., DEVELOPMENT AND ANALYSIS OF THE NATIONAL LOW-INCOME HOUSING TAX CREDIT DATABASE: FINAL REPORT 4-7 (1996), <http://www.abtassociates.com/reports/D19960024.pdf>).

352. See attached Appendix.

353. The Perimeter is a colloquial reference to Interstate 285 that creates a large circle around metro-Atlanta and surrounding areas. Interstate 285 passes through the Georgia counties of Clayton, Cobb, DeKalb, and Fulton. Moreover, the Perimeter is often viewed as a boundary of inner-city Atlanta, and the suburbs, with the suburbs being very near (if inside the Perimeter) and mainly outside of the Perimeter.

354. U.S. Census Bureau, *Census 2010 Total Population*, AM. FACTFINDER: CMTY. FACTS, http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmk#none (last visited Oct. 19, 2016) [hereinafter 2010 Census].

355. Aaron King, *Low Income Housing Tax Credit (LIHTC) Update*, POLICY MAP (Aug. 21, 2015), <http://www.policymap.com/blog/2015/08/low-income-housing-tax-credit-lihtc-update/>.

codes (33%)³⁵⁶ accounted for over 58.74% of the LIHTC developments within the Perimeter. Notably the average household income of these nine zip codes equals approximately \$28,000, and there were more minorities than Whites in all but one zip code.³⁵⁷ Further, considering all nine zip codes, whites made up on average about 20% of the population, with a slight majority in 30313 and only 0.6% in 30311. On the opposite end of the spectrum, zip codes with household income greater than \$60,000 made up only 7.7% of the LIHTC developments within the Perimeter. Zip codes with household income greater than \$50,000 made up about 13%, and those with household income greater than \$40k made up just 17.5% of the LIHTC developments within the Perimeter.³⁵⁸ The Atlanta study supports Professor Roisman's findings that the majority of LIHTC developments have a tendency to be located in the poorest areas, which often times have the highest minorities. Other researchers and scholars have come to this same conclusion.³⁵⁹

IV. THE RECONCILIATION OF REVITALIZATION AND INTEGRATION

The purpose of § 3608(e)(5) of the FHA is to create an affirmative obligation for HUD and other government agencies subject to the Act's obligations to implement and support policies that progress the proliferation of fair housing in this country. Section 3608(d) extends this duty to the Department of Treasury.³⁶⁰ The Department of Treasury ("Treasury") is required to "consider [the] effect [of its actions] on the racial and socio-economic composition of the surrounding area" and "to assess positively those aspects of a proposed course of conduct that would increase that supply."³⁶¹ Scholars have opined that Treasury and HUD should work together to clarify the civil right obligation to which housing tax credits agencies and programs are beholden.³⁶² The scholarship goes on to assert that Treasury should ac-

356. The nine zip codes consisted of 30303, 30315, 30310, 30354, 30314, 30311, 30337, 30318, and 30313.

357. 2010 Census, *supra* note 354.

358. *Id.*

359. See, e.g., Keren M. Horn & Katherine M. O'Regan, *The Low Income Housing Tax Credit and Racial Segregation*, NYU FURMAN CTR. (May 2, 2011), http://furmancenter.org/files/publications/LIHTC_Analysis_Racial_Segregation_Final_all.pdf.

360. Roisman, *Mandates Unsatisfied*, *supra* note 42, at 1028–29 (internal citation omitted).

361. *Id.* at 1031 (internal citation omitted).

362. See, e.g., Horn & O'Regan, *supra* note 359; Seicshnaydre, *Post-Katrina New Orleans*, *supra* note 348.

Affirmative Action for Affordable Housing

knowledge the authority of HUD and Title VIII of the Civil Rights Act, particularly their non-discrimination requirements.³⁶³ Some courts have found that the urban revitalization and the creation of fair housing should not be superseded by the duty to affirmatively further fair housing pursuant to the FHA mandate.³⁶⁴ The placement of affordable housing in lower-income neighborhoods does have benefits and reasonable policy rationales. Land is often cheaper, which permits more units to be constructed and inhabited. Also, there may be zoning hurdles to placing multifamily structures in suburban communities. Urban revitalization is also a laudable goal that results from concentrating LIHTC units in QCT and DDAs. In the *Texas* case, the Supreme Court acknowledged the importance of housing integration pursuant to the FHA, and the LIHTC goals of urban revitalization and the creation of affordable housing, as well as the ability for the three objectives to work in concert. This acknowledgment was done within the context of recognizing the cognizability of disparate impact in the Fair Housing Act. The opinion also cautioned against the use of race in deciding where to site affordable housing units, and requires a causal link between a specific policy and statistics that show an adverse impact on minorities. An example of an adverse impact is the concentration of affordable housing in low-income and minority neighborhoods.

This Article is not the first to scrutinize the success of the Fair Housing Act and the Low-Income Housing Act.³⁶⁵ Nor is this Article the first to point out the conflicting interests that the two may have.³⁶⁶ It is the first to leverage the Supreme Court's reconciliation of these interests to attain a comprehensive data set on the LIHTC's program effects on segregation and integration. This Article is also the only scholarship to advocate for an analysis of the tie-breaker mechanism separately from the rest of the LIHTC QAP criteria. The genesis for this analysis also comes from the majority's opinion that while perpetuation of segregation violates the FHA, prohibiting multi-factor decisions in the context of housing investment is not a likely cause of action the Court is willing to support to stop such a violation. The remainder of this Article describes the need for increased data in light of the *Texas* case, and how this additional data can create synergy

363. Roisman, *Mandates Unsatisfied*, *supra* note 42, at 1031–33.

364. Roisman, *Keeping The Promise*, *supra* note 66, at 927–28 (internal citation omitted).

365. Orfield, *supra* note 53, at 1750 n.11.

366. *See id.*

between LIHTC and the FHA. The Article goes on to describe the newfound significance of the tie-breaker mechanism in a plaintiff's formulation of a prima facie case of disparate impact under the FHA.

A. THE CALL FOR DATA

One of the Article's novel contributions is the call for increased data and resources in light of the disparate impact decision and rules that have occurred within the same time frame as the veritable overhaul of the requirement to affirmatively further fair housing. Paired testing, that is, observing the treatment of one minority and one non-minority with equal qualifications in an application process or housing inquiry, has been conducted to assess unintentional forms of discrimination in the rental, sale and financing of housing.³⁶⁷ These studies confirm the existence of discriminatory practices towards prospective, minority home-seekers. It is important to note that this discrimination may not be intentional.

Pursuant to the *Texas* case, a more robust set of data points is necessary in order to accurately assess whether or not the challenged practice or policy has caused the statistical disparity. Also, data is needed to understand the full spectrum of race-neutral factors that may be analyzed in order to determine what projects should be prioritized if the tax allocating agency is attempting to mitigate segregated housing patterns. The *Texas* case court stated that “[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice,” and courts should strive to design race-neutral remedies because “remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.”³⁶⁸ In order for a local housing authority to “combat racial isolation with race-neutral tools,” the authority must be aware of what those tools are. Since very few QAPs mention race,³⁶⁹ it is important to understand the effectiveness of their substitute benchmarks. There is a significant relationship between QAPs and the location of LIHTC properties. Changes in priorities to award the siting of units in higher opportunity

367. U.S. DEP'T OF HOUS. & URBAN. DEV., OFFICE OF POL'Y DEV. & RES., HOUSING DISCRIMINATION AGAINST RACIAL & ETHNIC MINORITIES 2012, at 3 (2013).

368. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015).

369. CIVIL RIGHTS BEST PRACTICES, *supra* note 316, at 10.

areas decreases the placement of units in areas with high concentrations of poverty.³⁷⁰

There have been years of missed opportunities for the Supreme Court to weigh-in on the cognizability of disparate impact in the FHA. Simultaneously with this perceived ambiguity surrounding disparate impact in the Act was an ineffective process to measure the duty to affirmatively further fair housing that is the crux of the FHA's § 3608. 2015 was the year strides were made to mend these faults, and the two policies viewed as competing and bifurcated housing policies can be joined together by the shared need for data collection and analysis. The plaintiff in the *Texas* case alleged that the Texas Department of Housing and Community Affairs violated §§ 3604 and 3605 of the FHA.³⁷¹ The allegation was that the Department's disproportionately high allocation of tax credits to projects that were situated in minority, urban neighborhoods perpetuated segregation.³⁷² The plaintiff did not specifically reference § 3608 and its affirmatively furthering mandate in its claim. However, the Court found that, "disparate-impact claims are cognizable under the Fair Housing Act,"³⁷³ and that the Act is instrumental in integrating this country.³⁷⁴

HUD issued a Final Rule recognizing the cognizability of disparate impact under the FHA, but this rule predates the *Texas* case opinion.³⁷⁵ The Disparate Impact Final Rule is helpful in understanding the intricacies of the burden-shifting framework and confirmed what a number of courts had already interpreted.³⁷⁶ However, the Supreme Court's limitation on disparate impact liability has resulted in a need for an increase in information for courts to properly apply this more narrow view of disparate impact theory to plaintiff's *prima facie* case. In the case of LIHTC, before deciding if a state's selection criteria are responsible for perpetuating residential segregation, it is important to understand what documented neighborhood effects result from allocating credits to certain projects instead of others. What projects were rejected in order to allow the selected projects to move forward?

370. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POL'Y DEV. & RES., EFFECT OF QAP INCENTIVES ON THE LOCATION OF LIHTC PROPERTIES 15 (2015) [hereinafter EFFECT OF QAP INCENTIVES].

371. See generally *Tex. Dep't of Hous. & Cmty Affairs*, 135 S. Ct. 2507.

372. See Brief for the United States, *Tex. Dep't of Hous.*, *supra* note 331, at *6.

373. *Tex. Dep't of Hous. & Cmty Affairs*, 135 S. Ct. at 2525.

374. *Id.* at 2525–26.

375. See 24 C.F.R. § 100.500 (2013).

376. *Id.*; See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11462–63 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

What were the racial and socioeconomic compositions of neighborhoods before and after LIHTC projects were developed? Are other policies perpetuating segregation, and how are other policies being measured and evaluated?

Segregation violates §§ 3604, 3605 and 3608 of the FHA. HUD has issued a rule providing guidance on data required to evaluate compliance with § 3608's affirmatively furthering fair housing mandate. Understanding where anti-segregation objectives fit in with urban revitalization requires the measurement of impacts related to integration efforts. This measurement aligns with the *Texas* case court opinion requiring a showing of causality in the plaintiff's prima facie case.

Roisman provides a thorough critique of LIHTC's failure to be administered pursuant to the FHA.³⁷⁷ Since the publication of this landmark article,³⁷⁸ HUD has issued regulations intended to clarify and strengthen § 3608 of the FHA, which is the clause requiring certain government agencies to affirmatively further fair housing objectives.

HUD issued the Final Rule on Affirmatively Furthering Fair Housing ("the Final Rule") on July 16, 2015 (Federal Register). The central tenet of the Final Rule is to revise the mechanisms to analyze impediments to affirmatively further fair housing and create data collection mechanisms to provide information on the proximity of housing to neighborhood assets and stressors. Noticeably absent from the data collection process requirements are states' qualified action plans.

With respect to spatial elements of LIHTC, racial and socioeconomic concentration can be furthered or mitigated through a QAP. Even with small sample sizes there exist "statistically significant relationships between the changes in QAPs and the locations of tax credit allocations."³⁷⁹ That is to say, QAPs incentives have a statistical correlation with where LIHTC housing is located.³⁸⁰ Left unchecked, QAP can inadvertently segregate a community by a number of classifications such as race or income. For instance, the federal government requires that the notice to the local government be provided and that they have a reasonable opportunity to comment.³⁸¹ This requirement,

377. See generally Roisman, *Mandates Unsatisfied*, *supra* note 42.

378. *Id.*

379. EFFECT OF QAP INCENTIVES, *supra* note 370, at 16.

380. *Id.* at 15.

381. 26 U.S.C. § 42(m)(1)(A)(ii) (2015).

Affirmative Action for Affordable Housing

however, may have an adverse effect on tenants if not carefully implemented. Maryland, for example, mandates community approval and local contribution a threshold requirement.³⁸² Such a requirement places the LIHTC housing at the mercy of the local residents, and “higher-income residents are more likely to be able to mount a more effective defense of their neighborhood.”³⁸³ HUD further states that it expects such a requirement to result in LIHTC housing to place nested in neighborhoods with lower incomes or higher poverty rates.³⁸⁴ Alternatively, carefully crafted QAPs can assist with improving the livelihoods and financial prospects of the target tenants. For instance, North Carolina QAP provides increased prioritization points for LIHTC projects that are planned away from environmental hazards, industrial areas, high traffic areas, power transmission lines, waste water treatment plants, and etc.³⁸⁵

The differing QAP requirements are in large part due to the latitude granted to states in administering the LIHTC program at the state level, which is subject only to the broad codified requirements. Additionally, the Housing and Economic Recovery Act of 2008 provided states with more flexibility in how it implemented the QCT prioritization requirement.³⁸⁶ HUD has found that this flexibility has resulted in some states increasing prioritization of LIHTC applicants in QCTs, and others minimizing the prioritization to the lowest amount legally possible.³⁸⁷ Considering the lack of oversight by the federal government, the state’s ability to manipulate QAP requirements, and the lack of useful data, it is difficult to deduce how LIHTC is consistently and affirmatively furthering fair housing.³⁸⁸ In reality, an unchecked state policy may have a disparate impact on a group of people with regards to fair housing.³⁸⁹

Tax credit allocation agencies are afforded much discretion in the LIHTC project selection process, and that the variation and flexibility

382. EFFECT OF QAP INCENTIVES, *supra* note 370, at 10.

383. *Id.*

384. *See id.*

385. *Id.* at 9.

386. *Id.* at 4.

387. *Id.*

388. *See generally Data Sets, supra* note 278; ACCOUNTING OFFICE, *supra* note 280, at 68; EFFECT OF QAP INCENTIVES, *supra* note 370, at 7–16.

389. *See generally* Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2525 (holding that disparate-impact claims are cognizable under the Fair Housing Act).

permitted in ranking systems does not always result in housing units being provided in alignment with the purpose of LIHTC.³⁹⁰

Only a handful of state QAPs include language and substantial point allocations or deductions to incentivize developers to construct LIHTC properties away from environmental hazards and other elements that are harmful to residents health and wellness. For example, the QAP for Alabama considers possible point deduction for projects with proximity to environmental contaminants or hazards, and deducts points if a project is located by inadequate sidewalks.³⁹¹ About half of QAPs give a small number of points to projects that are proposed to be sited near transit.³⁹² While independent agencies' review of these factors within individual QAP are helpful in understanding what agencies prioritize, they are not situated in a broader federal scheme to address segregation. HUD is not required to consider the QAP in its determination as to compliance with required affirmatively furthering fair housing mandates. Given the significant role LIHTC plays in the creation of affordable housing and shaping the landscape of metropolitan neighborhoods, the plans should be integrated in the concerted effort to decrease racial segregation and poverty concentration, as promulgated by the Final Rule. The Texas court questioned why the Department did not include factors that offset the QCT requirement enacted by federal law. Guidance on additional factors will likely to arise from the data required by this Final Rule.

The Supreme Court's opinion in the *Texas* case also calls for remedies that are race-neutral.³⁹³ If local housing authorities are to create these remedies, they must have foundational knowledge on what factors can replace those that were found to perpetuate segregation. Is there a relation between racial segregation and other race-neutral factors? If so, what are they? And, can these elements be included in qualified allocation plans? Some commenters on the Final Rule emphasized the need for data measuring the progression towards affirmatively furthering fair housing to be coordinated among federal agencies, and not just concentrated within HUD. While HUD recog-

390. See Roisman, *Mandates Unsatisfied*, *supra* note 42, at 1015 n.22.

391. CIVIL RIGHTS BEST PRACTICES, *supra* note 316, at 4.

392. *Id.* at 6.

393. See *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2524 ("Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that . . . operates invidiously to discriminate on the basis of race.").

Affirmative Action for Affordable Housing

nized the benefits such coordination would yield, the Department did not deem it necessary to mandate this coordination.³⁹⁴

Few state QAPs that explicitly reference goals of increasing integration or reducing segregation.³⁹⁵ In fact, the Pennsylvania QAP explicitly prioritizes plans that, among other things, are “consistent with the local community’s plan to affirmatively further fair housing.”³⁹⁶ Very few states have QAP that incentivize LIHTC projects to be located in neighborhoods that are high-opportunity.³⁹⁷ Few states explicitly reference race or mandate that LIHTC project may not be in neighborhoods with disproportionately high rates of low-income, minority residents.³⁹⁸ Of the scant states that attempt to reward projects for being located in upwardly mobile neighborhoods, the amenities used to define these neighborhoods as high-opportunity are not clear enough to understand if they will serve the purpose of racial integration.³⁹⁹ Also, some QAPs require community approval prior to siting an affordable housing structure in that neighborhood, which ignites NIMBYism and the rejection of the placement in neighborhoods with lower poverty levels.⁴⁰⁰ This is reminiscent of private homeowners first seeking to maintain white neighborhoods through the use of racially restrictive covenants. Even after the courts finally stopped enforcing these covenants in 1948,⁴⁰¹ the growing real estate industry took up the gauntlet of maintaining residential segregation.

In addition to the socioeconomic and affordable housing data needed to accurately assess segregation and integration patterns, and their relation to LIHTC and other government policies and practices, the LIHTC program itself must collect and make available data related to its application process. For all QAPs, available data should include information on all LIHTC applicants, and the number of points awarded to the applicants. This would provide valuable insight with respect to the location of all proposed developments section 42 of

394. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,271, 42,298 (July 15, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, *et al.*).

395. Khadduri, *supra* note 343, at 12–13.

396. *Id.* at 12.

397. *See id.* at 15.

398. *See* CIVIL RIGHTS BEST PRACTICES, *supra* note 316, at 3; Khadduri, *supra* note 343, at 16.

399. Khadduri, *supra* note 343, at 16 n.21.

400. Baber, *supra* note 273, at 48.

401. *See generally* Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that the Fourteenth Amendment prohibits a state from enforcing restrictive covenants that would prohibit a person from owning or occupying property on the basis of race or color).

the IRS Code requires that states give preference to projects in a QCT “with a concerted community revitalization plan.”⁴⁰² Placement in a qualified census tract is a reason for the continued siting of LIHTC developments in low-income areas, since these are areas with high rates of poverty. If the siting of the LIHTC project in QCTs is part of a more holistic plan to decrease the poverty level in these neighborhoods, it is arguable that the negative effects of concentrated affordable in high poverty areas are mitigated by the urban revitalization outcomes that are more likely to result if the LIHTC project is one part of a comprehensive plan. However, the details of community revitalization plans are not available for analysis in the context of the LIHTC program, and the incorporation of the federal requirement to show preference for a revitalization plan range from increasing points for projects located in QCTs to reducing the impact of allocating points to projects located in QCTs.⁴⁰³

In fact, only 15 QAPs clearly detail what a “community revitalization plan” is, or suggested elements of such a plan.⁴⁰⁴ Also, it is not clear how local housing agencies evaluate community revitalization plans. Local housing authorities may or may not prioritize community revitalization plans designed to integrate neighborhoods.⁴⁰⁵ Some studies have shown that the community revitalization plan language is routinely ignored or left undefined.⁴⁰⁶ Further, it is not clear which, if any, elements of the community development plans indicate that the goal is to integrate neighborhoods. Some states that have clearly defined “community revitalization plans” within the LIHTC selection process have committed integration goals from these definitions.⁴⁰⁷ It is also not certain if these objectives are reached or if tax credit allocating agencies are updated on the status and efficacy of these plans.⁴⁰⁸

The second addition this portion of the segregation dialogue lies within the LIHTC selection process. The body of academic scholarship on this subject has questioned LIHTC’s priority of the mere potential of low-income neighborhood revitalization over the avoidance of racial segregation and concentration of poverty. Not only is the

402. 26 U.S.C. § 42(m)(1)(B)(ii)(III); Khadduri, *supra* note 343, at 10.

403. EFFECT OF QAP INCENTIVES, *supra* note 370, at 3.

404. CIVIL RIGHTS BEST PRACTICES, *supra* note 316, at 7.

405. Khadduri, *supra* note 343, at 10–11.

406. *Id.* at 11.

407. *See id.* at 12, 13.

408. *Id.* at 11.

Affirmative Action for Affordable Housing

claim that the siting of low-income housing in neighborhoods with high rates of poverty dubious, but it also has been shown to further lower housing prices in these neighborhoods.⁴⁰⁹ The tiebreaker mechanism has not been given much attention by scholars, but the opinion of the *Texas* case provided an unexpected opportunity to view the QAP tie-breaker in a position of much greater importance.

It is difficult to ascertain the practical impact of some of the tiebreaker elements. For example, in Texas one tie-breaker is dependent upon the proximity of the proposed project to other LIHTC housing developments. One may assume that this factor will assist in placing affordable housing units in non-minority neighborhoods with lower concentrations of poverty. However, it is possible that the units are placed in with a dearth of affordable housing units, but are still located in neighborhoods that are characterized by racial isolation and poverty concentration. The Tax Code mandates that agencies allocating the LIHTC tax credits consider project location in their selection criteria.⁴¹⁰ Specific guidance is provided only in that developers receive additional points if projects are located in qualified census tracts.⁴¹¹

The Department's annual report contains a review of LIHTC applications in order to assess the effectiveness of the changes made to the Texas QAP.⁴¹² This application information includes the poverty rate in the area of the proposed development, the size, and the number of points awarded in the selection process. There is also information describing when tie-breakers are used, and details on the location's scoring in the high opportunity index measure.⁴¹³ The collection and assessment of this data should not be reactionary, and only synthesized upon the finding of a violation of federal law. In keeping with the proactive requirements of the FHA, this data collection

409. Orfield, *supra* note 53, at 1756.

410. Roisman, *Mandates Unsatisfied*, *supra* note 42, at 1018.

411. *Id.* at 1018.

412. TEX. DEP'T OF HOUS. & CMTY. AFFAIRS, 2013 STATE OF TEXAS LOW INCOME HOUSING PLAN & ANNUAL REPORT 207 (2013), <https://www.tdhca.state.tx.us/housing-center/docs/13-SLIHP-Board-Approval.pdf> [hereinafter TEX. DEP'T OF HOUS. & CMTY AFFAIRS ANNUAL REPORT].

413. TEX. DEP'T OF HOUS. & CMTY. AFFAIRS, 2013 ANNUAL REPORT PREPARED FOR: THE HONORABLE SIDNEY A. FITZWATER, CHIEF JUDGE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION 19 (2013), <https://www.tdhca.state.tx.us/multi-family/docs/icp-docs/ICP-TDHCA-2013-AnnualReport.pdf> [hereinafter TEX. ANNUAL REPORT FOR THE HONORABLE SIDNEY A. FITZWATER].

should be integrated with the LIHTC process and related to information collection efforts underway, pursuant to § 3608 of the FHA.⁴¹⁴

The *Texas* case opinion cautions that disparate impact liability must be limited to avoid requiring race to be a deciding factor in policies and practices. While race-neutral analyses of projects are acceptable in determining whether or not to select a LIHTC project, the Court warns against the use of racial quotas, stating such use would be unconstitutional.⁴¹⁵ In deciding what race-neutral factors would be appropriate, it is important to collect data in order to comprehend the relationship among race to elements that may define the composition and placement of LIHTC housing structures. The Final Rule emphasizes the positive correlation among low-income, minority neighborhoods and neighborhood stressors such as lack of access to jobs, health care, transportation, and unsafe physical environmental issues. The Final Rule's reconfiguration of the analysis of impediments is constructed to evaluate these elements in efforts to better measure and implement methods designed to affirmatively further fair housing.

In certain tie-breaking instances, one race-neutral factor may decide whether or not a proposed LIHTC project gets funded. Assessing the segregative effect of the tie-breaker is important since the same factor may have different effects depending upon the state, or even neighborhood.⁴¹⁶ The next subsection describes the heightened importance of this implication, in light of the ability of courts to characterize the tie-breaker process of QAPs as removed from the multi-factor analysis that the Supreme Court would not want implicated in disparate impact liability.⁴¹⁷

B. THE TIE-BREAKER

The Department knew of the racial segregation in Dallas and the need for desegregated low-income housing opportunities. From 1991 to 1993, a development's likelihood of providing desegregated housing opportunities was part of the state's LIHTC selection criterion. This criterion was eliminated in 1994 despite the concern about segregation in Dallas housing.⁴¹⁸

414. 42 U.S.C. § 3608 (2012).

415. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2530 (2015).

416. Khadduri, *supra* note 343, at 10.

417. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2514–15.

418. Brief for Respondent, *Tex. Dep't of Hous.*, *supra* note 97, at 16.

Affirmative Action for Affordable Housing

LIHTC credits are extremely competitive, and investor demand has continued to increase.⁴¹⁹ The QAP process described in Part III of this Article analyzes a number of factors related to proposed LIHTC projects. The competition is extremely intense for LIHTC credits.⁴²⁰ Given the competitive nature of LIHTC credits, a number of states have built in a tie-breaker into the selection process in the event that multiple projects receive the same number of points. The numerous factors that comprise the QAP have already been analyzed by the time the tie-breaker is triggered. At this point, the decision of whether or not to select a proposed LIHTC project is no longer a multi-factor decision. One factor will decide which projects will be awarded tax credits and which will be rejected.

Affirmative action jurisprudence lends support for the assertion that the use of a tie-breaker for selection or rejection is to be treated differently than weighing multiple factors, even if both mechanisms are within a single determinative process.⁴²¹ The Supreme Court heard the first higher education affirmative action case in 1974,⁴²² and four years later the Court decided on the merits of a case with similar context.⁴²³ The decision in *Bakke* invalidated racial quotas or set-asides, and decided that the University of California at Davis School of Medicine must admit a student, because the school could not prove that absent the racial set-aside, the white student would have been admitted.⁴²⁴ The reasoning underlying the opinion is that race cannot be the decisive factor in achieving the compelling government interest

419. See generally John Henneberger, *A Culture of Greed Tarnishes the Texas Low Income Housing Tax Credit Program*, TEX. HOUSERS (July 16, 2009), <https://texashousers.net/2009/07/16/a-culture-of-unrestrained-greed-infects-the-texas-low-income-housing-tax-credit-program/>.

420. See generally Donna Kimura, *Competition Drives LIHTC Market*, AFFORDABLE HOUSING FINANCE (Mar. 06, 2015), http://www.housingfinance.com/finance/competition-drives-lihtc-market_o (“The LIHTC market can be summed up in one word—competitive. And, the battle will continue this year.”).

421. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that achieving a diverse student body is a compelling state interest that can justify the use of race in University admissions); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that the University’s admission policy violated the Equal Protection Clause of the Fourteenth Amendment because its ranking system gave an automatic point increase to all racial minorities without applicants being individually assessed); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that race may be one of several factors in a college admission policy but not the sole factor).

422. See generally *Defunis v. Odegaard*, 416 U.S. 312 (1974) (holding that since Defunis was going to graduate from the law school regardless of the Court’s ruling, the case was rendered moot).

423. See generally *Bakke*, 438 U.S. 265 (1978) (holding that race may be one of several factors in a college admission policy but not the sole factor).

424. *Id.* at 320.

to create a diverse student body.⁴²⁵ The Court was clear, however, that the use of race as one factor among many is acceptable.⁴²⁶ The Court's 2003 *Grutter* decision also upheld the constitutionality of a race-conscious admissions policy that considers race alongside other factors to determine if an applicant will be admitted.⁴²⁷ The Department cites *Grutter* in its attempt to persuade the Justices that HUD is requiring policies to reduce the prevalence of racial disparities, and that this type of racial balancing is not permitted by the Court.⁴²⁸ Although the admissions policy in *Gratz v. Bollinger* was struck down, the Court's decision in that case aligns with its previous opinions on the matter. The University of Michigan's undergraduate admissions policy was found unconstitutional because minorities were automatically awarded twenty points, which amounted to 20% of the total possible admission points.⁴²⁹ Although the set-asides in *Gratz* and *Bakke* are not tie-breakers, per se, they mirror the same effect. The disproportionately high weighing of race — one factor — at the expense of considering other factors that also contribute to a goal of the school's admissions policy is impermissible. The admissions policy at issue in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* did use a tie-breaker.⁴³⁰ If the demand for a certain high-school exceed available openings, the district would apply tie-breakers in the following order: (1) applicants with siblings at the school would be admitted; (2) applicants identifying with the race needed for the school's demographics to mirror the district's would be selected; and (3) the student who lives closest to the school would be chosen.⁴³¹ The second tie-breaker was found to be in violation of the Equal Protection clause because using racial balancing to achieve a certain racial composition is not a compelling state interest.⁴³² In his concurrence, Justice Kennedy again stressed that the consideration of racial makeup is acceptable when it

425. *Id.* at 317–18.

426. *Id.*

427. See generally *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (holding that student body diversity is a compelling state interest that can justify the use of race in University admissions).

428. Brief for Petitioners, Tex. Dep't of Hous., *supra* note 20, at 44.

429. See *Gratz v. Bollinger*, 539 U.S. 244, 270 (holding that the University's admission policy violated the Equal Protection Clause of the Fourteenth Amendment because its ranking system gave an automatic point increase to all racial minorities without applicants being individually assessed).

430. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712 (2007).

431. *Id.* at 711–12.

432. *Id.* at 704.

Affirmative Action for Affordable Housing

is part of a more broad general policy to achieve the objective of diversity.⁴³³

The promises and pitfalls of housing and education policy have moved in consort with one another throughout history,⁴³⁴ and HUD has included the connection between these two in its rule to affirmatively furthering fair housing. Both have been lauded as pathways out of poverty and indicators of mobility.⁴³⁵ Higher academic attainment is positively correlated with increased income and employment opportunities.⁴³⁶ Residing in safe and affordable housing in low-poverty neighborhoods yields greater health and education outcomes.⁴³⁷ Education and housing policies are also rife with examples of de jure and de facto segregation, with isolationist practices in one sphere further entrenching racial and economic segregation in the other. Applying the logic in affirmative action opinions to disparate impact analysis is consistent with the legal, administrative, and practical integration of housing and education. As previously noted, the tie-breaking factors range from state to state, and the effect of the tie-breakers on racial segregation is not part of the data synthesized by tax allocation agencies.

With respect to the 2013 LIHTC process, four of twenty-two projects in Texas' Urban Region Three received an equal amount of points, triggering the tie-breaker.⁴³⁸ As a result, a selected project was one located within a neighborhood where over 50% of residents are Caucasian.⁴³⁹ The Department states that, "[t]he further use of the

433. *Id.* at 788–89.

434. See generally RICHARD ROTHSTEIN, *BROWN V. BOARD AT 60: WHY HAVE WE BEEN SO DISAPPOINTED? WHAT HAVE WE LEARNED?* (2014), <http://www.epi.org/files/2014/EPI-Brown-v-Board-04-17-2014.pdf>.

435. See generally Richard Rothstein, *The Racial Achievement Gap, Segregated Schools and Segregated Neighborhoods – A Constitutional Insult*, ECON. POLICY INST. (Dec. 2014), <http://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/>.

436. U.S. Dep't of Labor, *Earnings and Unemployment Rates by Educational Attainment*, BUREAU OF LABOR STAT. (Mar. 15, 2016), http://www.bls.gov/emp/ep_chart_001.htm.

437. RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP* 37–45 (2004); Richard Rothstein, *He's Looked at Life from Both Sides Now – or Has He? Arne Duncan Claims the High Ground, but School Clinics Still Face Needless Obstacles*, ECON. POLICY INST. (Feb. 26, 2012), <http://www.epi.org/publication/education-arne-duncan-school-health-clinics/>; TAMARA WILDER ET AL., *NARROWING THE ACHIEVEMENT GAP FOR LOW-INCOME CHILDREN: A 19-YEAR LIFE CYCLE APPROACH* 46 (2008), http://www.epi.org/files/page/-/pdf/wilder_allgood_rothstein-narrowing_the_achievement_gap.pdf.

438. TEX. ANNUAL REPORT FOR THE HONORABLE SIDNEY A. FITZWATER, *supra* note 413, at 58.

439. *Id.* at 24.

Opportunity Index . . . had the intended effect of prioritizing two applications ahead of others during the tie breaking round . . . providing an additional incentive for developing affordable housing in an area with . . . low poverty rates, and higher than average median income.”⁴⁴⁰

The tie-breaker mechanism is a tool that a plaintiff may use in its argument for a *prima facie* case, to avoid the Court’s premonition that housing investment decisions that employ a multi-factor selection test will fail to clear the *prima facie* hurdle. There remain two steps in the burden-shifting framework, while not directly addressed by this article, are nonetheless affected. In order for the defendant to offer a legitimate reason for the policy, the defendant will require the data described in part IV of this Article. Even in the event that a court rejects the argument that the tie-breaker mechanism is outside of a multi-factor analysis, states should still review what single priority they have exalted above all other selection factors as the deciding factor when projects have an equal number of points.

C. ICP vs. The Office of the Comptroller of the Currency and the Department of the Treasury

In 2014, ICP (the respondent in the Texas case), filed suit against both the Department of Treasury and the Office of the Comptroller of the Currency (the “OCC”), alleging that these agencies violated §§ 3608 and 3604(a) of the FHA by causing the perpetuation of racial segregation in Dallas.⁴⁴¹ ICP alleges that this racial segregation is a result of the agencies administration and involvement in the LIHTC program.⁴⁴² As previously described, the Treasury Department administers LIHTC at the federal level.⁴⁴³ The OCC “administers the program that prohibits national bank ownership of LIHTC projects unless those investments are designed primarily to promote the public welfare, including the welfare of low and moderate-income communities or families (such as by providing housing, services, or jobs).”⁴⁴⁴ ICP states that neither the Treasury’s nor the OCC’s policies or regu-

440. *Id.* at 48.

441. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, No. 14-CV-3013-D, 2015 WL 4629635, at *1 (N.D. Tex. Aug. 4, 2015).

442. *Id.*

443. *See, e.g.*, 26 U.S.C. § 42 (2015).

444. Complaint at 2, *Inclusive Cmty. Project, Inc. v. U.S. Dep’t of Treasury*, No. 14-CV-3013-D (N.D. Tex. Aug. 4, 2015) (citing 12 U.S.C. § 24 (2008)).

Affirmative Action for Affordable Housing

lations mitigate racial segregation.⁴⁴⁵ ICP claims that these actions have actually caused a disparate impact on black and Hispanic residents in Dallas by perpetuating segregation.

Although this case has a number of similarities to the Texas case, ICP requested certain remedies that were not awarded or sought in the Texas case.⁴⁴⁶ These remedies include: “(i) limitations on future approvals for bank investments that perpetuate racial segregation without contributing to concerted community revitalization programs that will bring about nondiscriminatory neighborhood conditions; (ii) incentives for bank investments that do not perpetuate racial segregation in areas of slum, blight, and distress; (iii) the provision of housing mobility counseling assistance for those already in segregated and unequal conditions; and (iv) prohibition of local, non-federal selection criteria that prevent affirmatively furthering fair housing whether or not the criteria are shown to violate other provisions of the law.”⁴⁴⁷

The United States District Court for the Northern District of Texas dismissed ICP’s § 3604-based discriminatory intent claim.⁴⁴⁸ However, the court did not dismiss the § 3608 claim, and in light of the Texas case decision, the court did not dismiss ICP’s § 3604(a) disparate impact claim.⁴⁴⁹

CONCLUSION

Much progress remains to be made in our nation’s continuing struggle against racial isolation. In striving to achieve our historic commitment to creating an integrated society . . . The FHA must

445. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2514–15 (2015).

446. *See generally Inclusive Cmty. Project, Inc.*, 2015 WL 4629635 (holding that disparate impact claims are cognizable under the Fair Housing Act).

447. Complaint, *supra* note 444, at 7 (citing 12 U.S.C. § 24 (2008)).

448. As with ICP’s claims under 42 U.S.C. § 1982 and the Fifth Amendment, *see infra* Conclusion, the court holds that the complaint is too conclusory to plead discriminatory intent. The Court therefore grants defendants’ motion to dismiss ICP’s § 3604-based discriminatory purpose claim. The Treasury moved to dismiss the § 3604 and 3608 claims. The defendants claim that sovereign immunity bars any § 3608 claim. The court found that ICP’s claim brought under § 3608 via the second sentence of § 702 is not subject to the requirement of § 704 that “there is no other adequate remedy in a court.” Defendants also attempted to dismiss ICP’s claim that they have violated § 3608(d). Treasury and OCC stated that this claim is unreviewable under the APA, but since this is an issue of first impression, the court did not grant this motion based solely on the brief. *Inclusive Cmty. Project, Inc.*, 2015 WL 4629635, at *1, *3–5.

449. *See generally id.* at *4–5 (holding that disparate impact claims are cognizable under the Fair Housing Act). Other issues in the motion to dismiss: finally, Treasury and OCC contend that ICP has failed to state a claim under either 42 U.S.C. § 1982 or the equal protection component of the Fifth Amendment because ICP has failed to plead a *prima facie* case. The court agrees.

play an important part in avoiding the Kerner Commission's grim prophecy that our Nation is moving toward two societies, one black, one white- separate and unequal.⁴⁵⁰

This statement illustrates the Supreme Court's interpretation of the Fair Housing Act as a tool to mitigate segregation. The dicta preceding this statement in the opinion allows policies that perpetuate segregation to be challenged under the FHA by showing disparate impact, relieving plaintiffs of the requirement to show intentional discrimination when making this claim, and instead showing an adverse impact through statistical evidence.⁴⁵¹

ICP sued the Department because the Department selected affordable housing developments that were located in low-income, minority neighborhoods at disproportionately high rates, compared to other neighborhoods. The Department's argument that the federal government required this preference in order to achieve the goal of rehabilitating these underserved areas did not go unheard. The Court emphasized the need to pursue revitalization of low-income areas and to honor market forces while doing so. However, the perpetuation of segregation through socioeconomic concentration in residential housing violates the FHA, with which the Department and other tax credit allocating agencies must comply.

Although the statement above is a powerful endorsement of the strength and promise of the FHA, the Court's opinion cautions against achieving this goal in a manner that explicitly and consistently considers race, and emphasizes the need for the plaintiff to prove that the policy or practice is the result of the statistical disparity. The Court also expresses its desire to preserve the goal of revitalization as set forth by the Low-Income Housing Tax Credit ("LIHTC") program, and not to subject housing investment decisions that consider a number of elements to disparate impact exposure. This is one reason the case is currently on remand – to determine if the multi-factor nature of the LIHTC program absolves it from disparate impact liability.

The task is to create policies that increase affordable housing pursuant to integrationist objectives in a race-neutral manner, but without superseding other laudable priorities, such as urban revitalization. These policies must continue to incent private developers to create housing at below-market rental rates without the benefit of the tax

450. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525.

451. *Id.* at 2524.

Affirmative Action for Affordable Housing

credits outweighing the disparate impact liability exposure. Finally, the effectiveness of the policies must be measured to ensure that progress compliance with the aforementioned elements has taken place, and to comply with data collection initiatives set forth by HUD with respect to the FHA. Even the most carefully designed LIHTC policies must not be immune to fair housing challenges. Therefore, at a minimum, if a tax credit allocating agency's practice is the cause of an adverse segregation disparity and utilizes a QAP that does not rely solely on a multi-factor analysis, a plaintiff bringing a disparate impact claim under the FHA against that agency has made its *prima facie* case.

The tools for accomplishing this task are in existence. Affirmative action cases brought before the Supreme Court illustrated a similar struggle—mitigate racial discrimination and enhance diversity in higher education without using a method that relies solely on race to do so.⁴⁵² Tie-breakers or point systems that weigh race too heavily in admissions decisions are unconstitutional. Yet, if race is but one element among many, then the admissions test is likely to be permissible. The LIHTC program must increase affordable housing without concentrating these developments in low-income, minority neighborhoods, although the revitalizing of inner-cities is a permissible goal and valid government interest. Before evaluating the interest, a plaintiff should have the opportunity to challenge the single most important low-income housing program in America's compliance with the Fair Housing Act, without being foreclosed from this opportunity from the Justices' warning that multi-factor analysis are likely to not meet the test for a *prima facie* case. The qualified allocation plan that is the basis for LIHTC project selection certainly is a multi-factor test, until the tie-breaker mechanism is triggered. It is at this point that a single factor determines if a project is accepted or rejected. If affirmative action tie-breakers based solely on race are unconstitutional, it follows that LIHTC tie-breakers based solely on location in minority neighborhoods can be enough to at least clear the multi-factor hurdle in making a *prima facie* case for disparate impact under the FHA.

452. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that achieving a diverse student body is a compelling state interest that can justify the use of race in University admissions); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that the University's admission policy violated the Equal Protection Clause of the Fourteenth Amendment because its ranking system gave an automatic point increase to all racial minorities without applicants being individually assessed); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that race may be one of several factors in a college admission policy but not the sole factor).

FHA jurisprudence and regulations have been evolving and have become more visible in the past few years, in attempts to integrate housing patterns in the US.⁴⁵³ In July 2015, § 3608 of the FHA stated that the mandate to affirmatively fair housing was elevated from a vague, idealistic phrase that was improperly evaluated, to a clearly delineated requirement with specific benchmarks and dedicated resources to measure progress and obstacles. HUD finalized a rule recognizing the cognizability of disparate impact and setting forth a three-part burden-shifting program to analyze such claims in early 2013.⁴⁵⁴ The *Texas* case resulted in the Supreme Court's acknowledgement of the same. With each regulation and ruling comes a new process for analyzing FHA compliance, and now is the time to recognize that the entire FHA can be greater than the sum of its parts if cohesively and consistently evaluated. Affirmatively furthering fair housing, pursuant to § 3608, is certainly accomplished through eradicating segregation, the perpetuation of which is in violation of §§ 3604 and 3605.⁴⁵⁵ It follows that determining whether or not an entity is complying with its mandate to affirmatively further fair housing should consider whether or not its affordable housing program creates truly integrated housing patterns.

It is not enough to claim the integrationist objective of the FHA is at odds with the revitalization mission of LIHTC. The assertion that segregated affordable housing is preferable to no housing has been rejected as a justification for siting low-income housing in socioeconomically segregated neighborhoods.⁴⁵⁶ Both goals can and must be pursued and evaluated, and entities that refuse to do this must be held accountable. Perpetuation of racial segregation is

453. See generally *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2507 (holding that Congress specifically intended to include disparate impact claims in the Fair Housing Act, but that such claims require a plaintiff to prove it is the defendant's policies that cause a disparity); *Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013); *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (holding that allowing disparate impact claims under the FHA would both lead to adverse economic consequences and create new constitutional tensions); *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, *et al.*); *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

454. *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11,460, 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

455. See generally *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2507 (holding that Congress specifically intended to include disparate impact claims in the Fair Housing Act, but that such claims require a plaintiff to prove it is the defendant's policies that cause a disparity).

456. Roisman, *Keeping The Promise*, *supra* note 66, at 918.

Affirmative Action for Affordable Housing

achieved by defendants with the capacity to cause such an effect.⁴⁵⁷ One reason the Texas case is so significant is because the Department is the only agency in the state of Texas that can allocate LIHTCs.⁴⁵⁸ As the largest affordable housing program in the United States, the LIHTC program must be subject to the entirety of the disparate impact analysis, without using its multi-factor analysis as a shield from claims.

457. *Reinhart v. Lincoln Cty.*, 482 F.3d 1225, 1228 (2007); *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev. ex rel. VanLozenoord*, 56 F.3d 1243, 1251 (1995).

458. Joint Appendix at 98, 144, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2014) (No. 13-1371); Brief for Respondent, *Tex. Dep't of Hous.*, *supra* note 97, at 37.

Appendix-Atlanta Study

Project Name	HUD ID	Street Address	Zip Code	Nonprofit Status	Difficult to Develop Area (DDA)	Currently Active	Allocation Year	Construction Type	Zip Code Income	Housing Units by Zip code	People Below Poverty Level
Forrest Heights Apts NSP3	GAA1996025	1048 Columbia Dr.	30030	No	No	Yes	1994	Unknown	\$ 66,134.00	12837	14.7%
Columns at East Hill	GAA1996040	135 E. Hill St.	30030	Unknown	No	Yes	1994	Unknown	\$ 66,134.00	12837	14.7%
Allen Wilson Terrace, Phase 1	GAA2011010	1480 Commerce Dr.	30030	No	No	Yes	2010	New Construction	\$ 66,134.00	12837	14.7%
Brittany Apts	GAA2002120	3308 Covington Dr.	30032	No	No	Yes	2001	New Construction	\$ 33,475.00	20900	29.2%
Delano Place	GAA1993050	1575 Line St.	30032	No	No	Yes	1991	Acquisition & Rehab	\$ 33,475.00	20900	29.2%
Robins Landing	GAA2001086	3529 Glenwood Rd.	30032	No	No	Yes	1999	New Construction	\$ 33,475.00	20900	29.2%
Candler Forest	GAA2007030	2145 Candler Rd.	30032	No	No	Yes	2005	New Construction	\$ 33,475.00	20900	29.2%
Whispering Pines Apts	GAA2006295	2784 Kelly Lake Rd.	30032	No	No	Yes	2004	Acquisition & Rehab	\$ 33,475.00	20900	29.2%
Columbia Village Townhomes	GAA1999125	100 Jessica Ave	30032	No	No	Yes	1997	New Construction	\$ 33,475.00	20900	29.2%
Cedar Creek Apts	GAA0000085	3073 Cedar Creek Pkwy	30033	Unknown	Unknown	Yes	2001	Unknown	\$ 59,997.00	14088	15.9%
Cedar Creek West Apts	GAA0000090	3117 Cedar Brook Dr.	30033	Unknown	Unknown	Yes	2001	Unknown	\$ 59,997.00	14088	15.9%
Creekside Vista	GAA2007063	3100 Lumby Dr	30034	No	No	Yes	2003	New Construction	\$ 48,210.00	18468	19.2%
Forest at Columbia	GAA2001047	2505 Columbia Dr	30034	No	No	Yes	1999	New Construction	\$ 48,210.00	18468	19.2%
Candler Crossing	GAA0000075	3000 Ember Dr	30034	Unknown	Unknown	Yes	1993	Unknown	\$ 48,210.00	18468	19.2%
Magnolia Circle	GAA2003075	100 Dash Lewis Dr	30034	No	No	Yes	2001	New Construction	\$ 48,210.00	18468	19.2%
Thornberry Apts	GAA1997245	2435 Aylesbury Loop	30034	Unknown	No	Yes	1997	New Construction	\$ 48,210.00	18468	19.2%
Welcome House, SRO	GAA2009135	234 Memorial Dr. SW	30303	No	No	Yes	1990	New Construction	\$ 19,000.00	1536	55.8%
133 Trinity Ave SW	GAA1998035	133 Trinity Ave SW	30303	No	No	Yes	1996	New Construction	\$ 19,000.00	1536	55.8%
William Oliver Building	GAA1998150	32 Peachtree St. NW	30303	No	No	Yes	1996	Acquisition & Rehab	\$ 19,000.00	1536	55.8%
187 Edgewood Ave SE	GAA1994065	187 Edgewood Ave SE	30303	Yes	No	Yes	1992	Acquisition & Rehab	\$ 19,000.00	1536	55.8%
75 John Wesley Dobbs Ave NE	GAA1998050	75 John Wesley Dobbs Ave NE	30303	No	No	Yes	1996	Acquisition & Rehab	\$ 19,000.00	1536	55.8%
Farlie Poplar Apts	GAA1998045	187 Poplar St. NW	30303	No	No	Yes	1996	Acquisition & Rehab	\$ 19,000.00	1536	55.8%
Campbell Stone	GAA2007025	2911 Pharr Ct. South NW	30305	No	No	Yes	2005	Acquisition & Rehab	\$ 85,993.00	13860	8.6%
Columbia Townhomes at Edgewood, Phase II	GAA2012800	37 Hutchinson St. NE	30307	Unknown	No	Yes	Unknown	Unknown	\$ 76,591.00	9240	9.9%
Columbia Townhomes at Edgewood	GAA2011040	Unknown	30307	No	No	Yes	Unknown	Unknown	\$ 76,591.00	9240	9.9%
Columbia Senior Residences at Edgewood	GAA2006328	1281 Caroline St. NE	30307	No	No	Yes	1996	New Construction	\$ 76,591.00	9240	9.9%
Park Citi Residences	GAA2004210	165 Marion PL. NE	30307	No	No	Yes	2002	New Construction	\$ 76,591.00	9240	9.9%
Oakland Court Apts	GAA1994120	97 Sanderson ST. NE	30307	Yes	No	Yes	1992	Acquisition & Rehab	\$ 76,591.00	9240	9.9%
Imperial Hotel 2012	GAA2014040	355 Peachtree St. NE	30308	No	No	Yes	Unknown	Acquisition & Rehab	\$ 51,584.00	11231	23.7%
Columbia Plaza Apts	GAA1996220	1017 Westview Dr. SW	30310	No	No	Yes	1994	Unknown	\$ 22,861.00	14952	38.4%

Affirmative Action for Affordable Housing

920 Sells Ave SW	GAA2005025	920 Sells Ave SW	30310	No	No	Yes	2003	New Construction	\$ 22,861.00	14952	38.4%
Vernada at Colleegetown	GAA2005285	372 Legacy Dr. SW	30310	No	No	Yes	2003	New Construction	\$ 22,861.00	14952	38.4%
Ashley Colleegetown, Phase II	GAA2011020	387 Joseph E. Lowery Blvd SW	30310	No	No	Yes	Unknown	New Construction	\$ 22,861.00	14952	38.4%
Atrium At Colleegetown	GAA2008010	435 Joseph E. Lowery Blvd SW	30310	No	No	Yes	2006	New Construction	\$ 22,861.00	14952	38.4%
Gardens at Colleegetown	GAA2009103	899 Park St. SW	30310	No	No	Yes	2007	Acquisition & Rehab	\$ 22,861.00	14952	38.4%
Pittsburgh, Phase I LP	GAA2007123	765 McDaniel St. SW	30310	No	No	Yes	2005	New Construction	\$ 22,861.00	14952	38.4%
Heritage Station, Phase II	GAA2006345	765 McDaniel St. SW	30310	No	No	Yes	2004	New Construction	\$ 22,861.00	14952	38.4%
1150 Astor Ave SW	GAA2008042	1150 Astor Ave SW	30310	No	No	Yes	2006	New Construction	\$ 22,861.00	14952	38.4%
Westview Lofts	GAA2005330	1528 Ralph David Abernathy Blvd SW	30310	No	No	Yes	2002	New Construction & Acquisition & Rehab	\$ 22,861.00	14952	38.4%
Greenwich Street Apts	GAA1991005	1241 Greenwich St. SW	30310	No	No	Yes	1991	New Construction	\$ 22,861.00	14952	38.4%
416 Atwood St. sw	GAA0000030	416 Atwood St. SW	30310	Unknown	Unknown	Yes	1991	Unknown	\$ 22,861.00	14952	38.4%
Atwood Street Duplex	GAA1991015	420 Atwood St. NW	30310	No	No	Yes	1991	New Construction	\$ 22,861.00	14952	38.4%
426 Atwood St. sw	GAA1991020	426 Atwood St. SW	30310	No	No	Yes	1991	New Construction	\$ 22,861.00	14952	38.4%
432 Atwood St. NW	GAA1991010	432 Atwood St. SW	30310	No	No	Yes	1991	New Construction	\$ 22,861.00	14952	38.4%
494 Atwood St. NW	GAA1991030	494 Atwood St. SW	30310	No	No	Yes	1991	New Construction	\$ 22,861.00	14952	38.4%
835 Oglethorpe Ave SW	GAA199140	835 Oglethorpe Ave SW	30310	No	No	Yes	1996	New Construction	\$ 22,861.00	14952	38.4%
Ashley West End	GAA2001012	707 LEE ST SW	30310	No	No	Yes	1999	New Construction	\$ 22,861.00	14952	38.4%
936 Mathews St SW	GAA1990020	936 Mathews St SW	30310	Unknown	Unknown	Yes	1988	New Construction	\$ 22,861.00	14952	38.4%
932 Mathews St SW	GAA1991045	932 Mathews St SW	30310	Unknown	Unknown	Yes	1988	New Construction	\$ 22,861.00	14952	38.4%
Showcase District	GAA1990265	922 Mathews St SW	30310	Unknown	Unknown	Yes	1988	New Construction	\$ 22,861.00	14952	38.4%
924 Mathews St SW	GAA1989010	924 Mathews St SW	30310	Unknown	Unknown	Yes	1988	New Construction	\$ 22,861.00	14952	38.4%
766 Azalia St SW	GAA1991040	766 Azalia St SW	30310	Unknown	Unknown	Yes	1988	New Construction	\$ 22,861.00	14952	38.4%
770 Azalia St SW	GAA1990010	770 Azalia St SW	30310	Unknown	Unknown	Yes	1988	New Construction	\$ 22,861.00	14952	38.4%
774 Azalia St SW	GAA1990015	774 Azalia St SW	30310	Unknown	Unknown	Yes	1988	New Construction	\$ 22,861.00	14952	38.4%
Lillie R. Campbell House	GAA2008060	1830 Campbellton Rd SW	30311	No	No	Yes	2006	New Construction	\$ 27,651.00	16066	36.1%
Granada Park	GAA1995115	1870 Campbellton Rd SW	30311	Unknown	Unknown	Yes	1993	Unknown	\$ 27,651.00	16066	36.1%
Brentwood Meadows Apts	GAA2001035	1935 Alison Ct SW	30311	No	No	Yes	1999	Acquisition & Rehab	\$ 27,651.00	16066	36.1%
Brentwood Creek	GAA2001030	1935 Alison Ct SW	30311	No	No	Yes	1999	Acquisition & Rehab	\$ 27,651.00	16066	36.1%
Brentwood Heights	GAA2001145	2060 Alison Ct SW	30311	Unknown	Unknown	Yes	1999	Unknown	\$ 27,651.00	16066	36.1%
Baptist Towers	GAA2010015	1881 Myrtle Dr SW	30311	Unknown	Unknown	Yes	2008	Unknown	\$ 27,651.00	16066	36.1%
Baptist Gardens	GAA2012015	1928 Delowe Dr SW	30311	No	No	Yes	Unknown	Unknown	\$ 27,651.00	16066	36.1%
Preserve at Bent Creek	GAA2006410	1994 Bent Creek Way SW	30311	No	No	Yes	2003	New Construction	\$ 27,651.00	16066	36.1%
Wells Court Commons	GAA1996285	1856 Wells Dr SW	30311	No	No	Yes	1995	Acquisition & Rehab	\$ 27,651.00	16066	36.1%
Huntingwood Pointe - Cascade	GAA1998031	2909 Campbell Rd SW	30311	No	No	Yes	1996	Acquisition & Rehab	\$ 27,651.00	16066	36.1%
Villages of Cascade Apts	GAA0000440	3041 Landrum Dr SW	30311	No	Unknown	Yes	1997	Unknown	\$ 27,651.00	16066	36.1%
Towne West Manor	GAA2002225	330 Brownlee Rd SW	30311	No	No	Yes	2001	New Construction	\$ 27,651.00	16066	36.1%
Allen Temple	GAA2001122	3040 Middleton Rd NW	30311	No	No	Yes	2001	New Construction	\$ 27,651.00	16066	36.1%

Seven Courts	GAA2008105	2800 Martin Luther King Jr. Dr. SW	30311	No	No	Yes	2007	Acquisition & Rehab	\$ 27,651.00	16066	36.1%
2640 Martin Luther King Jr. Dr.	GAA2004803	2640 Martin Luther King Jr. Dr.	30311	No	No	Yes	2002	New Construction	\$ 27,651.00	16066	36.1%
Peaks at Martin Luther King	GAA2004260	2423 Martin Luther King Jr. Dr.	30311	No	No	Yes	2002	New Construction	\$ 27,651.00	16066	36.1%
Columbia Commons	GAA2003185	Unknown	30311	No	No	Yes	2000	New Construction	\$ 27,651.00	16066	36.1%
Gates Park Crossing HFS APTS	GAA2007070	200 Peyton Pl SW	30311	No	No	Yes	2005	Acquisition & Rehab	\$ 27,651.00	16066	36.1%
Gates Park Crossing HFOP APTS	GAA2007075	200 Peyton Pl SW	30311	No	No	Yes	2005	Acquisition & Rehab	\$ 27,651.00	16066	36.1%
Fulton County Mill Lofts	GAA1997057	170 Blvd SE	30312	No	No	Yes	1997	New Construction	\$ 39,105.00	12134	29.6%
Columbia Senior Residence at MLK	GAA2007245	125 Logan St. SE	30312	No	No	Yes	2005	New Construction	\$ 39,105.00	12134	29.6%
Columbia Tower at MLK Village	GAA2007110	380 Martin St. SE	30312	No	No	Yes	2005	Acquisition & Rehab	\$ 39,105.00	12134	29.6%
Capitol Gateway, Phase II	GAA2007035	43 Woodward Ave SE	30312	No	No	Yes	2005	New Construction	\$ 39,105.00	12134	29.6%
Capitol Gateway, Phase I	GAA2007220	89 Memorial Dr. SE	30312	No	No	Yes	2004	New Construction	\$ 39,105.00	12134	29.6%
Irwin Street Apts/ Henderson Place / Auburn Glenn Apts	GAA199065	514 Irwin St. NE	30312	Yes	No	Yes	1995	Acquisition & Rehab	\$ 39,105.00	12134	29.6%
O'Hern House - Prohct Peoples Place	GAA2004255	49 Blvd SE	30312	No	No	Yes	2002	New Construction	\$ 39,105.00	12134	29.6%
People's Place	GAA0000312	16 WM Holmes Borders Dr. NE	30312	No	Unknown	Yes	Unknown	Unknown	\$ 39,105.00	12134	29.6%
Veranda at Auburn Pointe, Phase II	GAA1993140	16 WM Holmes Borders Dr. SE	30312	Yes	No	Yes	1991	Acquisition & Rehab	\$ 39,105.00	12134	29.6%
Veranda at Auburn Pointe	GAA2011150	115 Hilliard St. SE	30312	Unknown	No	Yes	Unknown	Unknown	\$ 39,105.00	12134	29.6%
Ashley Auburn Pointe	GAA2008130	115 Hilliard St. NE	30312	No	No	Yes	2006	New Construction	\$ 39,105.00	12134	29.6%
Ashley Auburn Pointe, Phase I	GAA2010005	357 Auburn Pointe Dr. SE	30312	No	No	Yes	2007	Unknown	\$ 39,105.00	12134	29.6%
Ashley Auburn Pointe, Phase II	GAA2013003	100 Bell St. SE	30312	Unknown	No	Yes	Unknown	Unknown	\$ 39,105.00	12134	29.6%
Trestle Tree Villages Apts	GAA0000912	970 Confederate Ave SE	30312	Unknown	Unknown	Yes	Unknown	Unknown	\$ 39,105.00	12134	29.6%
City Views at Rosa Burney Park	GAA2004117	259 Richardson St. SW	30312	No	No	Yes	2002	New Construction	\$ 39,105.00	12134	29.6%
Mechanicsville Apts, Phase III	GAA2009070	565 Wells St. SW	30312	No	No	Yes	2008	New Construction	\$ 39,105.00	12134	29.6%
Columbia Mechanicsville, Phase IV	GAA2008045	520 Fulton St. SW	30312	No	No	Yes	2006	New Construction	\$ 39,105.00	12134	29.6%
Columbia Mechanicsville	GAA2007050	500 McDaniel St. SW	30312	No	No	Yes	2005	New Construction	\$ 39,105.00	12134	29.6%
Columbia Sr Residences at Mechanicsville	GAA2007055	500 McDaniel St. SW	30312	No	No	Yes	2005	New Construction	\$ 39,105.00	12134	29.6%
Mechanicsville Apts, Phase VI	GAA2011080	565 McDaniel St. SW	30312	No	No	Yes	2009	New Construction	\$ 39,105.00	12134	29.6%
Rosa Burney Manor	GAA1999190	582 Cooper St. Sw	30312	No	No	Yes	1999	New Construction	\$ 39,105.00	12134	29.6%
Toby Sexton Redevelopment	GAA2004135	490 Glenn St Sw	30312	No	No	Yes	2003	Acquisition & Rehab	\$ 39,105.00	12134	29.6%
Northside Plaza Apts	GAA1992100	440 Markham St. SW	30313	No	No	Yes	1992	New Construction	\$ 39,670.00	2472	33.0%
Legacy, Phase III	GAA1998070	528 Lovejoy St. NW	30313	Unknown	No	Yes	1996	New Construction	\$ 39,670.00	2472	33.0%
Centennial Place Apts, Phase II	GAA1997185	201 Pine St. NW	30313	No	No	Yes	1995	New Construction	\$ 39,670.00	2472	33.0%
114 Merritts Ave. NW	GAA1997085	114 Merritts Ave. NW	30313	Unknown	No	Yes	1995	Unknown	\$ 39,670.00	2472	33.0%
Centennial Place Apts, Phase III	GAA1998170	526 Centennial Olympic Park Dr. NW	30313	No	No	Yes	1996	New Construction	\$ 39,670.00	2472	33.0%
Centennial Place Apts, Phase IV	GAA1999120	526 Centennial Olympic Park Dr. NW	30313	Unknown	No	Yes	1999	Unknown	\$ 39,670.00	2472	33.0%

Affirmative Action for Affordable Housing

600 Greensferry Ave. SW	GAA/2001207	600 Greensferry Ave. SW	30314	No	No	Yes	1999	New construction	\$ 23,649.00	10817	36.6%
Vernada at Scholars Landing	GAA/0000904	130 Lawshe St. SW	30314	Unknown		Yes	Unknown	Unknown	\$ 23,649.00	10817	36.6%
Magnolia Park Apts, Phase II	GAA/2001180	777 Magnolia Way NW	30314	No	No	Yes	1999	New Construction	\$ 23,649.00	10817	36.6%
Magnolia Park Apts, Phase I	GAA/2000042		30314	No	No	Yes	1998	New Construction	\$ 23,649.00	10817	36.6%
Courtyard at Maple	GAA/1993045	55 Maple St. NW	30314	Unknown		Yes	1992	Unknown	\$ 23,649.00	10817	36.6%
Legacy, Phase I	GAA/1997080	529 Lovejoy St. NW	30314	No	No	Yes	1995	New Construction	\$ 23,649.00	10817	36.6%
Grant Park Commons	GAA/1996105	1940 Fisher Rd SE	30315	No	No	Yes	1994	Acquisition & Rehab	\$ 20,951.00	15288	44.1%
Columbia at Peopletown	GAA/2003180	222 Tuskegee St SE	30315	No	No	Yes	2001	New Construction	\$ 20,951.00	15288	44.1%
Reed Street Apts	GAA/1994155	60 Love St SW	30315	Yes	No	Yes	1992	Acquisition & Rehab	\$ 20,951.00	15288	44.1%
Square at Peopletown	GAA/1999200	875 Hank AARON Dr. SW	30315	No	No	Yes	1997	New Construction	\$ 20,951.00	15288	44.1%
Patterson Heights	GAA/1991185	876 Washington St. SW	30315	No	No	Yes	1990	Acquisition & Rehab	\$ 20,951.00	15288	44.1%
Washington Heights	GAA/1991230	954 Washington St SW	30315	No	No	Yes	1990	Acquisition & Rehab	\$ 20,951.00	15288	44.1%
Columbia High Pt Estates Sr	GAA/2002025	220 Bowen Cir SW	30315	No	No	Yes	2000	New Construction	\$ 20,951.00	15288	44.1%
201 Moury Ave SW	GAA/2003295	201 Moury Ave SW	30315	No	No	Yes	2001	New Construction	\$ 20,951.00	15288	44.1%
201 Moury Ave SW	GAA/2001205	201 Moury Ave SW	30315	No	No	Yes	2000	New Construction	\$ 20,951.00	15288	44.1%
Thornton Place	GAA/1990235	1599 Pryor Rd. SW	30315	No	No	Yes	1990	Acquisition & Rehab	\$ 20,951.00	15288	44.1%
Veranda Carver	GAA/2006417	214 Thirkield Ave SW	30315	No	No	Yes	2004	New Construction	\$ 20,951.00	15288	44.1%
178 Moury Ave SW	GAA/2008135	178 Moury Ave SW	30315	No	No	Yes	2006	New Construction	\$ 20,951.00	15288	44.1%
174 Moury Ave Sw	GAA/2003290	174 Moury Ave SW	30315	No	No	Yes	2001	New Construction	\$ 20,951.00	15288	44.1%
14 Meldon Ave Sw	GAA/2007230	14 Meldon Ave SW	30315	No	No	Yes	2006	New Construction	\$ 20,951.00	15288	44.1%
142 Meldon Ave Sw	GAA/2006250	142 Meldon Ave SW	30315	No	No	Yes	2004	New Construction	\$ 20,951.00	15288	44.1%
Amal Townhomes, Phase II	GAA/1991050	535 Amal Dr. SW	30315	No	No	Yes	1990	New Construction	\$ 20,951.00	15288	44.1%
Amal Townhome Community	GAA/1990030	535 Amal Dr. SW	30315	Unknown		Yes	1989	New Construction	\$ 20,951.00	15288	44.1%
Amal Heights Townhomes	GAA/2010153	1700 Gibben Rd. SW	30315	No	No	Yes	1990	New Construction	\$ 20,951.00	15288	44.1%
Beitar Village	GAA/2014030	345 Ashwood Ave SW	30315	Unknown		Yes	Unknown	Unknown	\$ 20,951.00	15288	44.1%
Renaissance at Park Place South	GAA/2003260	Unknown	30315	Unknown		Yes	2001	New Construction	\$ 20,951.00	15288	44.1%
Station at Richmond Oaks	GAA/2003122	1770 Richmond Cir SE	30315	No	No	Yes	2003	Acquisition & Rehab	\$ 20,951.00	15288	44.1%
Constitution Avenue	GAA/2006330	960 Constitution Rd. SE	30315	No	No	Yes	2004	New Construction	\$ 20,951.00	15288	44.1%
Colonial Square	GAA/1999122	2637 Old Hapeville Rd SW	30315	No	No	Yes	1997	New Construction	\$ 20,951.00	15288	44.1%
532 Cleveland Ave SW	GAA/2004220	532 Cleveland Ave SW	30315	No	No	Yes	2002	Acquisition & Rehab	\$ 20,951.00	15288	44.1%
Lakewood Christian Manor	GAA/2004035	2141 Springdale Rd SW	30315	No	No	Yes	2002	Acquisition & Rehab	\$ 20,951.00	15288	44.1%
2370 Stewart Ave SW	GAA/1995270	2370 Stewart Ave SW	30315	Unknown		Yes	1993	Unknown	\$ 20,951.00	15288	44.1%
Trinity Towers	GAA/2004275	2611 Springdale Rd SW	30315	No	No	Yes	2003	Acquisition & Rehab	\$ 20,951.00	15288	44.1%
Heritage Green Apts	GAA/2003220	2891 Springdale Rd SW	30315	No	No	Yes	2002	Acquisition & Rehab	\$ 20,951.00	15288	44.1%
1093 West Ave SW	GAA/2003190	1093 West Ave SW	30315	No	No	Yes	2001	New Construction	\$ 20,951.00	15288	44.1%
Phoenix House	GAA/0000335	Unknown	30315	No	Unknown	Yes	1995	Unknown	\$ 20,951.00	15288	44.1%
PRI/Columbia Mill	GAA/1996265	2249 Flat Shoals Rd.	30316	No	No	Yes	1995	Unknown	\$ 44,129.00	15120	21.7%
Columbia Mill Apts	GAA/2013007	2229 Flat Shoals Rd.	30316	Yes	No	Yes	2013	Acquisition & Rehab	\$ 44,129.00	15120	21.7%

Vineyards of Flats Shoals	GAA2005312		30316	No	Unknown	Yes	2004	New Construction	\$ 44,129.00	15120	21.7%
Highlands at East Atlanta	GAA2006347	20151 Fla Shoals Rd SE	30316	No	No	Yes	2002	New Construction	\$ 44,129.00	15120	21.7%
Reynolds Town Commons	GAA2006390	1124 Wylie St. SE.	30316	No	No	Yes	1996	New Construction	\$ 44,129.00	15120	21.7%
180 Flat Shoals Ave. SE	GAA1994015	180 Flat Shoals Ave. SE.	30316	Yes	No	Yes	1992	Acquisition & Rehab	\$ 44,129.00	15120	21.7%
Marcus Street Residences	GAA000267	810 Marcus St. SE.	30316	Unknown	Unknown	Yes	Unknown	Unknown	\$ 44,129.00	15120	21.7%
Eagles Run Apts, phase II	GAA1996240	2000 Bouldercrest Rd. SE	30316	No	No	Yes	1995	New Construction	\$ 44,129.00	15120	21.7%
Eagles Run Apts	GAA1999025	2000 Bouldercrest Rd. SE	30316	No	No	Yes	1995	Acquisition & Rehab	\$ 44,129.00	15120	21.7%
Villages of Eastlake, Phase II	GAA2000115	460 E Lake Blvd SE	30317	No	No	Yes	1999	New Construction	\$ 50,548.00	6353	17.3%
Villages of Eastlake	GAA1998245	460 E Lake Blvd SE	30317	No	No	Yes	1999	New Construction	\$ 50,548.00	6353	17.3%
Courtyards at Glenview	GAA1995085	2035 Memorial Dr. SE	30317	No	No	Yes	1995	Acquisition & Rehab	\$ 50,548.00	6353	17.3%
Presley Woods	GAA1996160	265 Kirkwood Rd. NE	30317	No	No	Yes	1996	New Construction	\$ 50,548.00	6353	17.3%
Moores Mills Village	GAA1996140	2453 Coronet Way NW	30318	No	No	Yes	1994	Acquisition & Rehab	\$ 39,421.00	25544	33.2%
Hampton Oaks	GAA1995145	1955 La Dawn Ln NW	30318	Yes	No	Yes	1993	Unknown	\$ 39,421.00	25544	33.2%
Manor at Scott's Crossing	GAA2012125	1671 James Jackson Pkwy NW	30318	Unknown	No	Yes	Unknown	Unknown	\$ 39,421.00	25544	33.2%
Park at Scott's Crossing	GAA2003280	1620 Hollywood Rd. NW	30318	Yes	No	Yes	2002	Acquisition & Rehab	\$ 39,421.00	25544	33.2%
Flipper Temple	GAA1992045	2479 Abner Ter NW	30318	No	No	Yes	2011	Acquisition & Rehab	\$ 39,421.00	25544	33.2%
Peaks at West Atlanta	GAA2002055	1212 James Jackson Pkwy NW	30318	No	No	Yes	2001	New Construction	\$ 39,421.00	25544	33.2%
Etheridge Court Development, Phase I	GAA2002142	2591 Etheridge DR. NW	30318	No	No	Yes	2002	New Construction	\$ 39,421.00	25544	33.2%
Etheridge Court Development, Phase II	GAA2003200	2500 Center St. NW	30318	No	No	Yes	2002	New Construction	\$ 39,421.00	25544	33.2%
Hollywood West, Phase I	GAA2004160	1033 Hollywood Rd. NW	30318	No	No	Yes	2003	Acquisition & Rehab	\$ 39,421.00	25544	33.2%
Columbia Grove	GAA2007235	1783 Johnson Rd. NW	30318	No	No	Yes	2004	New Construction	\$ 39,421.00	25544	33.2%
Columbia Estate	GAA2003035	Unknown	30318	No	Unknown	Yes	2001	New Construction	\$ 39,421.00	25544	33.2%
Columbia Crest Apts	GAA2003800	1903 Drew Dr. NW	30318	No	No	Yes	2001	New Construction	\$ 39,421.00	25544	33.2%
Columbia Heritage Sr Residences	GAA2004130	1900 Peery Blvd NW	30318	No	No	Yes	2002	New Construction	\$ 39,421.00	25544	33.2%
Villages at Castleberry Hill	GAA1999215	801 Northside Dr. NW	30318	No	No	Yes	1997	New Construction	\$ 39,421.00	25544	33.2%
Dogwood Apts / Preserve at Collier	GAA2006242	1000 Harwell Rd. NW	30318	No	No	Yes	2003	Acquisition & Rehab	\$ 39,421.00	25544	33.2%
Provenance at Hollowell Family	GAA2007125	2798 Peek Rd. NW	30318	No	No	Yes	2005	New Construction	\$ 39,421.00	25544	33.2%
Avalon Park Senior	GAA2007205	2798 Peek Rd. NW	30318	No	No	Yes	2005	New Construction	\$ 39,421.00	25544	33.2%
Bryton Hill Apts	GAA1996213	2527 Skyland Dr.	30319	No	No	Yes	2005	Acquisition & Rehab	\$ 87,759.00	18792	10.7%
HearthSide Brookleigh	GAA2012090	2282 Johnson Ferry Rd. NE	30319	Unknown	No	Yes	Unknown	Unknown	\$ 87,759.00	18792	10.7%
Ashford Landing Senior Residences	GAA2009015	3511 Donaldson Dr. NE	30319	No	No	Yes	2009	New Construction	\$ 87,759.00	18792	10.7%
Ashford Parkside Senior Residences	GAA2007010	3522 Blair Cir. NE	30319	No	No	Yes	2005	New Construction, Acquisition, & Rehab	\$ 87,759.00	18792	10.7%
100 Riley Ridge Rd.	GAA2003270	100 Riley Ridge Rd	30327	No	No	Yes	2001	New	\$ 139,543.00	10131	6.0%
Hidden Crest Apts	GAA2006346	3200 Stone Rd SW	30331	No	No	Yes	2003	Acquisition & Rehab	\$ 41,777.00	26695	21.4%
Greenbriar Commons	GAA1993085	3000 Stone Hogan Connector Rd	30331	No	No	Yes	1991	Acquisition & Rehab	\$ 41,777.00	26695	21.4%

Affirmative Action for Affordable Housing

Park View At Coventry Station	GAA2007120	3381 Greenbriar Pkwy SW	30331	No	No	Yes	2005	Acquisition & Rehab	\$ 41,777.00	26695	21.4%
Columbia Colony Senior	GAA2001160	2999 Continental Colony Pkwy SW	30331	No	No	Yes	1999	New Construction	\$ 41,777.00	26695	21.4%
Princeton Court Senior Res	GAA2005250	3635 Howard Dr.	30337	No	No	Yes	2003	New Construction	\$ 28,388.00	6347	35.1%
Villages of College Park	GAA2001100	4060 Herschel Rd	30337	No	No	Yes	1999	Acquisition & Rehab	\$ 28,388.00	6347	35.1%
Nu Diminisions Apts	GAA1996145	3200 Lakeview PL	30337	No	No	Yes	1994	New Construction & Acquisition & Rehab	\$ 28,388.00	6347	35.1%
Ivywood Park Apts	GAA1993100	4475 Beech Haven Trl. SE	30339	No	No	Yes	1992	New Construction	\$ 63,871.00	12359	6.6%
Chestnut Creek Apts	GAA0000100	3374 Aztec Road	30340	Unknown	Unknown	Yes	1996	Unknown	\$ 40,955.00	11432	26.7%
Chamblee Senior Residences	GAA2007045	3381 Malone Dr.	30341	No	No	Yes	2005	New Construction	\$ 52,423.00	14306	19.2%
Rosahn	GAA0000365	2198 Dresden Dr.	30341	Unknown	Unknown	Yes	2000	Unknown	\$ 52,423.00	14306	19.2%
Gateway East Point	GAA2012065	1311 Cleveland Ave	30344	No	No	Yes	Unknown	Unknown	\$ 36,830.00	15822	27.2%
Norman Berry Village Senior	GAA2006260	2840 Norman Berry Dr.	30344	No	No	Yes	2006	New Construction	\$ 36,830.00	15822	27.2%
1034 Washington Rd	GAA1991065	1034 Washington Rd	30344	No	No	Yes	1990	Acquisition & Rehab	\$ 36,830.00	15822	27.2%
Eagles Crest Apts	GAA2005802	4135 Washington Rd	30344	No	No	Yes	2003	Acquisition & Rehab	\$ 36,830.00	15822	27.2%
Laurel Ridge at Washington Road	GAA2006355	290 Laurel Ridge Way	30344	No	No	Yes	2004	New Construction	\$ 36,830.00	15822	27.2%
Regency Park / Colony 2000	GAA1997120	320 Desert Dr.	30344	No	No	Yes	1995	Acquisition & Rehab	\$ 36,830.00	15822	27.2%
Delowe Villages Apts	GAA2000228	2360 Delowe Dr.	30344	No	No	Yes	1998	New Construction	\$ 36,830.00	15822	27.2%
Delowe Place Cooperative	GAA1996060	2327 Delowe Dr.	30344	Yes	No	Yes	1994	Acquisition & Rehab	\$ 36,830.00	15822	27.2%
Connally Drive Home	GAA1993005	1888 Connally Dr.	30344	Unknown	Unknown	Yes	1993	Unknown	\$ 36,830.00	15822	27.2%
Pointview Apts	GAA1994140	Unknown	30344	No	Unknown	Yes	1992	Acquisition & Rehab	\$ 36,830.00	15822	27.2%
Hidden Cove	GAA0000225	1900 Stanton Delowe Connector	30344	Unknown	Unknown	Yes	1997	Unknown	\$ 36,830.00	15822	27.2%
Village Highland	GAA2006800	1932 Stanton Rd	30344	No	No	Yes	2002	New Construction	\$ 36,830.00	15822	27.2%
Shannon lake	GAA1996172	1 Ravinia Dr.	30346	No	No	Yes	2005	Acquisition & Rehab	\$ 63,409.00	3793	15.7%
Summerdale/Briarwood	GAA1997140	2786 Hapeville Rd SW	30354	Yes	No	Yes	1995	Acquisition & Rehab	\$ 28,230.00	7342	38.3%
445 Cleveland Ave SE	GAA0000145	445 Cleveland Ave SE	30354	No	Unknown	Yes	1998	Unknown	\$ 28,230.00	7342	38.3%
Vineyards of Browns Mills	GAA2005310	2738 Vineyards Dr. SE	30354	No	No	Yes	2004	New Construction	\$ 28,230.00	7342	38.3%
500 Cleveland Ave SE	GAA2009023	500 Cleveland Ave SE	30354	No	No	Yes	2007	New Construction	\$ 28,230.00	7342	38.3%
Woods at Glenrose	GAA1997265	50 Mount Zion Rd SW	30354	Unknown	No	Yes	1997	Unknown	\$ 28,230.00	7342	38.3%
Terraces, Phase III	GAA2008800	183 Mount Zion Rd SE	30354	No	No	Yes	2007	New Construction	\$ 28,230.00	7342	38.3%
50 Mount Zion Rd. SW	GAA2004801	50 Mount Zion Rd SW	30354	No	Unknown	Yes	2003	Acquisition & Rehab	\$ 28,230.00	7342	38.3%
Avalon Ridge	GAA2008015	183 Mount Zion Rd SE	30354	Unknown	No	Yes	2007	Unknown	\$ 28,230.00	7342	38.3%
Atlantic Station Mixed Income	GAA2006280	441 16th Street NW	30363	Yes	No	Yes	2004	New Construction	\$ 56,806.00	2587	24.3%
Centennial Place Apts, Phase I	GAA1996215	526 Centennial Olympic Park Dr. NW	30313	No	Unknown	Yes	1995	New Construction			

<http://www.policymap.com/blog/2015/08/low-income-housing-tax-credit-llhtc-update/>

http://factfinder.census.gov/naics/jst/pages/community_facts.html

Zip Code	Zip Code Count	Poverty %	Income
30030	3	14.7	66130
30032	6	29.2	33475
30033	2	15.9	59997
30034	5	19.2	48210
30303	6	55.8	19000
30305	1	8.6	85993
30307	5	9.9	76591
30308	1	23.7	51584
30310	25	38.4	22861
30311	19	36.1	27651
30312	22	29.6	39105
30313	7	33	39670
30314	6	36.6	23649
30315	30	44.1	20951
30316	9	21.7	30316
30317	4	17.3	50548
30318	17	33.2	39421
30319	4	10.7	87759
30327	1	6	139543
30331	4	21.4	41771
30337	3	35.1	28388
30339	1	6.6	63871
30340	1	26.7	40955
30341	2	19.2	52423
30344	12	27.2	36830
30346	1	15.7	63409
30354	8	38.3	28230
30363	1	24.3	56806

Missing in Action: The Absence of Potential African American Female Supreme Court Justice Nominees—Why This Is and What Can Be Done About It

APRIL G. DAWSON*

INTRODUCTION	178
I. PRESIDENTIAL SELECTION OF SUPREME COURT JUSTICE NOMINEES	
A. The Stakes of Inclusiveness	183
B. Evolution of Presidential Selection Criteria	184
1. Ivy League Law School	186
2. Federal Judicial Experience	189
3. Age	192
4. Federal Government Experience	193
5. Judicial Clerkships	195
II. THE EFFECT OF CURRENT CRITERIA: ABSENCE OF AFRICAN AMERICAN WOMEN	
A. Ivy League Law School	197
B. Federal Judicial Experience	199
C. Age	201
D. Federal Government Experience	202
E. Clerkships	203

* Associate Professor of Law, North Carolina Central University School of Law. I would like to thank Angela Onwuachi-Willig, who provided detailed and thoughtful feedback to the initial draft of this Article for my presentation at the Lutie A. Lytle Black Women Law Faculty Writing Workshop. I would also like to thank Angela Gilmore for her thoughtful comments and invaluable encouragement. I would also like to thank my research assistants, Aishah Casseus, India Ali, Hayes Jernigan, Samantha Arrington, and Jasmina Nogo for their assistance on this project. Finally, many thanks to the editors of the *Howard Law Journal* for all of their hard work.

III. WHY THE USE OF CRITERIA THAT EXCLUDE AFRICAN AMERICAN WOMEN IS PROBLEMATIC	205
A. The Use of the Current Criteria Perpetuates Discrimination Against African American Women	205
B. The Criteria Undercut the Legitimacy of the Court by Limiting Full Representation	208
1. Descriptive Representation	209
2. Substantive Representation	210
IV. SOLUTION—EXPAND THE POOL WITH THE USE OF JUDICIAL MERIT SELECTION COMMISSIONS	213
A. Use of Merit Selection Commissions in the Federal Judiciary	214
B. Use of Merit Selection Commissions in Selection of District of Columbia and State Judges	216
C. Use of Judicial Merit Selection Commissions in Foreign Countries	218
CONCLUSION	220

INTRODUCTION

As a result of the sudden death of Justice Antonin Scalia, President Obama had an opportunity to nominate a third individual to serve on the United States Supreme Court. He nominated Merrick Garland, current Chief Judge of the United States Court of Appeals for the District of Columbia Circuit. While certainly a sound choice, the selection of a white male shines a light on the absence of viable African American female nominees. The absence of African American women on the short list of potential Supreme Court Justice nominees raises questions about the role that African American women play in the federal judiciary in general and on the Supreme Court in particular. For instance, it raises questions about whether African American women, Asian American women, or any other group that has remained invisible in Supreme Court nomination discussions possess a meaningful voice in our democracy. With a Court where three of the nine Justices are over the age of 75,¹ there is a very good chance

1. Ruth Bader Ginsburg is 83, Anthony Kennedy is 79, and Stephen Breyer is 77. The oldest justice was Oliver Wendell Holmes, Jr., who retired at the age of 90, two months shy of his

the next President of the United States² will have an opportunity to nominate two or more Supreme Court Justices.

Article II, Section 2 of the U.S. Constitution provides that “[t]he President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court”³ Thus, the process of an individual attaining the position of Justice of the United States Supreme Court begins with a nomination by the President of the United States. While the Senate must approve presidential Supreme Court nominees, the vast majority of the individuals nominated by presidents have been confirmed.⁴

One-hundred and sixty-one individuals have been nominated to serve as a Justice on the United States Supreme Court.⁵ Of that number, one-hundred and fifty-four have been white men, four have been white women, two have been black men,⁶ one has been a Latina,⁷ and

91st birthday. The second oldest justice was John Paul Stevens, who retired at 90 years and two months. See *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-2012*, at 262, 472, 486, 493 (Clare Cushman ed., 3d ed. 2013) [hereinafter *SUPREME COURT JUSTICES*].

2. During the final stages of publication for this article, Donald Trump was elected President of the United States. Donald Trump’s short list of Supreme Court nominees also fails to include viable African American female nominees. See *Donald J. Trump Finalizes List of Potential Supreme Court Justice Picks*, *TRUMP CAMPAIGN WEBSITE* <https://www.donaldjtrump.com/press-releases/donald-j.-trump-adds-to-list-of-potential-supreme-court-justice-picks> (last visited Nov. 21, 2016).

3. U.S. CONST. art. II, § 2, cl. 2.

4. Of the 161 individuals who have been nominated, 124 have been confirmed. See *Supreme Court Nominations, Present-1789*, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Sept. 13, 2016).

5. *Id.*

6. While Thurgood Marshall and Clarence Thomas are the only two African American men nominated to serve on the Court, a third African American man, William H. Hastie, was considered for nomination. Hastie was the first African American federal district judge when he was appointed by President Franklin Roosevelt in 1937 to serve as the first federal district judge for the District Court of the U.S. Virgin Islands. GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 85–86 (1984). After serving two years, Hastie accepted an appointment to be dean of Howard Law School. *Id.* at 93. Hastie also became the first African American federal appellate judge when he was appointed to the Third Circuit Court of Appeals by President Truman. *Id.* at 225–27. In 1962, President Kennedy seriously considered nominating Hastie for the Associate Justice seat being vacated by Justice Whitaker who was retiring. However, due to concerns expressed by Chief Justice Warren and Justice Douglas that he was too conservative, Kennedy deferred and nominated Byron White. ROBERT KENNEDY: IN HIS OWN WORDS 66, 115–16 (Edwin O. Guthman & Jeffrey Shulman eds., 1988); see also DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 74–78 (1999). Ironically, Byron White turned out to be the conservative Warren and Douglas feared in Hastie. See, e.g., MARK TUSHNET, A COURT DIVIDED 34 (2005).

7. For purposes of this Article, I am counting Latinos as a race, not ethnicity. See IAN HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE, at viii (Rachel F. Moran & Devon W. Carbado eds., 2003); Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in RACE LAW STORIES 273, 292–301 (Rachel F. Moran & Devon W. Carbado eds., 2008); Richard Delgado et al., *Authors’ Reply Creating and Documenting a New Field of Legal Study*, 12 HARV.

none have been African American women or Asian American women.⁸ With a country in which African American female law students and lawyers outnumber African American male law students and lawyers, it is disturbing that an African American woman has never been seriously considered,⁹ let alone nominated, to serve on the High Court.

There are a variety of explanations for the lack of African American women in the pool of potential and viable Supreme Court Justice nominees.¹⁰ Historic discrimination against African American women in the legal profession is one such reason.¹¹ In the past, the ban of nearly all African American women from law schools and the legal profession alone made it impossible for African American women to even be in the running for such positions until the 1970s, when African American women began to attend and graduate from law schools in

LATINO L. REV. 103, 106 (2009) (“Race is the most useful concept for understanding Latinos because Latinos are a profoundly racialized group that has been subject, over the years, to racism of the many forms we document in the book.”).

8. Aaron Morrison, *Supreme Court Nominee 2016: Obama Missed a Diversity Opportunity, Black and Asian Leaders Say*, INT’L BUS. TIMES (Mar. 16, 2016, 4:47 PM), <http://www.ib-times.com/supreme-court-nominee-2016-obama-missed-diversity-opportunity-black-asian-leaders-say-2337920>.

9. In 1971, Jewell Stradford LaFontant, an African American woman, was on a list of possible female Supreme Court Justice candidates compiled for President Nixon to fill one of the seats being vacated by Hugo Black and John Harlan, both of whom announced in September 1971 that they would be resigning. JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 127 (2001); JOHN EHRLICHMAN, *WITNESS TO POWER: THE NIXON YEARS* 239–40 (1982); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 220 (1997). Although an early civil rights activist in Chicago in the 1940s, LaFontant became an active Republican beginning in the 1950s. In 1973, she was appointed Deputy Solicitor General by Nixon and was the first woman to hold that high of a position in the Solicitor General’s office. She served in that position until 1975. From 1989 to 1993, LaFontant served in the State Department under Bush. Eric Pace, *Jewel LaFontant-Mankarious, Lawyer and U.S. Official, Dies*, N.Y. TIMES (June 3, 1997), <http://www.nytimes.com/1997/06/03/us/jewel-lafontant-mankarious-lawyer-and-us-official-dies.html>. LaFontant also testified in support of Robert Bork’s appointment to the Supreme Court. REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS 128 (J. Clay Smith, Jr. ed., 1998); see *Nominations of Robert H. Bork to Be Associate Justice of the United States: Hearings Before the Comm. on the Judiciary*, 100th Cong. 144, 155 (1989) (listing Jewell LaFontant as a witnesses who supported Judge Bork). LaFontant’s nomination would have made her the first woman, white or black, to be nominated to serve on the Supreme Court. However, despite the intrigue, Nixon did not give LaFontant serious consideration. See EHRLICHMAN, *supra*.

10. This Article focuses on African American women; however, many of the arguments that are asserted in this Article also apply to other women of color. While in this Article, I focus my attention on the lack of viable African American women as Supreme Court nominees, the issues raised in this Article apply equally to Asian American women, Latino women (notwithstanding the appointment of Sonia Sotomayor), and other women of color.

11. See *infra* Part III.A.

larger numbers.¹² Another reason is pure politics. Because U.S. Supreme Court positions are appointments made by the President and confirmed by the Senate, politics always play a role in who is nominated and whether they are ultimately confirmed. In a profession in which women are still often viewed and treated as second-class citizens and in which African Americans are often viewed as sure-fire votes for Democrats, presidents may have concluded that little political mileage would be gained by appointing an African American woman.¹³ Though there are a wide variety of reasons which explain why African American women have remained invisible in the U.S. Supreme Court nomination process, in this Article, I focus my attention on what I contend as relatively new exclusionary criteria that are used for selecting Justices, criteria that have the effect of removing qualified and capable African American women from even being *considered* to serve on the Supreme Court. Specifically, I expose an inverse relationship between the increasing number of African American women into the legal profession and the consideration of African American women for positions on the Supreme Court. Ironically, as the number and percentage of African American women in the legal profession has grown, the criteria used for selecting judges for the bench has narrowed, resulting in the near-complete absence of African American women in meaningful discussions about potential appointments to the Supreme Court.

Part I of this Article briefly discusses the criteria used by past presidents in selecting U.S. Supreme Court nominees and examines in

12. See Kenneth Walter Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women Into the American Legal Profession, 1925-1960*, 87 CORNELL L. REV. 1405, 1423–24, 1459 n.99 (2002).

13. There were “sound” political reasons for the appointment of each of the three people of color who have been nominated and appointed to the Court. President Johnson’s 1967 appointment of Thurgood Marshall to the Supreme Court was politically warranted. Not only was there national civil unrest due to racial conflict, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 495 (2000), Johnson also recognized that he could cement a place in history by appointing the first African American to the High Court. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 295 (5th ed. 2008); YALOF, *supra* note 6, at 86–90. With Justice Marshall’s retirement in 1991, President Bush used the opportunity to appoint not only another African American to the Court, Clarence Thomas, but to appoint a proven conservative after stumbling with the appointment of David Souter, who turned out not to be the conservative Justice the Republican base had desired. *Id.* at 192–96. President Obama’s selection of the third person color to the bench, Sonia Sotomayor, was politically expedient as well. David Jackson, *Obama, Sotomayor and the Hispanic Vote*, USA TODAY (May 26, 2009, 11:50 AM), <http://content.usa.today.com/communities/theoval/post/2009/05/67282045/1#.Ug9> (noting that by making his first appointment a Latina, Obama was able to demonstrate his commitment to diversity both in terms of gender and ethnicity).

detail the current elite and exclusionary criteria that began in 1986, which is about the time when more women and racial minorities were gaining increased access to the legal profession. Part II discusses how the current exclusionary criteria—the criteria that have emerged as central since 1986—have contributed to the dearth of African American women on the short list of possible Supreme Court Justice nominees. Part III argues that use of today's elite and exclusive criteria undermine the legitimacy of the Court, first by perpetuating the exclusion of African American women (and other women of color), and second by preventing full representation on the Court, not just in terms of race and gender, but also in terms of law school, legal experience and work, childhood socioeconomic class background, and a whole host of other factors that may affect an individual's perspective on and approach to legal questions. Finally, Part IV concludes by arguing that the way to increase the available pool of potential African American female Supreme Court Justice is the use of judicial merit selection commissions.

I. PRESIDENTIAL SELECTION OF SUPREME COURT JUSTICE NOMINEES

Since 1980, when African American women began to enter the legal profession in large numbers,¹⁴ one would have expected a significant increase in the number of African American women appointed to the federal bench. One would have also expected more meaningful consideration of African American women for appointment to the U.S. Supreme Court. Ironically, however, as African American women and other once excluded groups have gained more access to entry into the legal profession, there have not been such increases. Rather, over this same period, there has been a narrowing of the once-broad criteria that were used to select Supreme Court Justices from 1789 to 1981 to the criteria today that are so elite and exclusionary that nearly all African American female lawyers have been excluded from serious consideration.¹⁵

This Part explains in detail the shift in the criteria employed by presidents to nominate potential Supreme Court Justices. Part I.A explains how the increasing lengths at which U.S. Supreme Court Jus-

14. *See infra* Part III.A.

15. *How Judges and Justices Are Chosen?*, INDEPENDENCE HALL ASS'N, <http://www.ushistory.org/gov/9d.asp> (last visited Sept. 16, 2016).

tices are sitting on the bench have raised the stakes of inclusion in the nomination process. Part I.B provides a brief overview of the history of Supreme Court Justice selection from 1789 to 1981, revealing the range of criteria that were used in selecting U.S. Supreme Court Justices for more than two hundred years. It then explains how, when, and why the use of such broad criteria began to end in 1986, and identifies the exclusive criteria that are most commonly seen as critical to obtaining a nomination for the U.S. Supreme Court today.

A. The Stakes of Inclusiveness

Ensuring the full inclusion of all groups—here, African American women—in discussions concerning potential U.S. Supreme Court nominations as well as in actual nominations is even more critical today than it has been. To begin, such inclusion has become increasingly important over time because since 1970, the rate at which Supreme Court openings become available has slowed down significantly. From 1789 to 1970, the average length of service for Justices was sixteen years, a time period that did not greatly exceed the service of the presidents who nominated them.¹⁶ Today, in most cases, a president's choice, if confirmed, will be on the bench long after the president who selected him or her has left office, as the average length of Justice service since 1970 has been twenty-five years.¹⁷ This shift in the Justices' length of service over time means that the exclusion of African American women or any other underrepresented group from consideration for a position on the bench (and thus actual nomination and confirmation for a position) may have lasting consequences for a quarter of a century or more. And with the long-lasting tenure of the Justices, a president's selection will have an even greater lasting impact on the jurisprudence of the Court.¹⁸

16. See *Frequently Asked Questions- Justices*, SUP. CT. OF U.S., http://www.supremecourt.gov/faq_Justices.aspx#faqJustice2 (last visited Sept. 15, 2016).

17. Since 1970, there have been seven Justices who have completed tenures on the Supreme Court: Harry Blackmun served for 24 years, Lewis Powell served for 15 years, William Rehnquist served for 33 years, John Paul Stevens served for 34 years, Sandra Day O'Connor served for 24 years, Antonin Scalia served for 29 years, and David Souter served for 18 years. The average length of service of these Justices is twenty-five years. Moreover, the four most senior justices have all served more than 22 years: Justice Kennedy, 28 years; Justice Thomas, 25 years; Justice Ginsburg, 23 years; and Justice Breyer, 22 years.

18. From 1994-2005, there was no change in the membership of the Court, and there were a number of long-lasting jurisprudential changes that took place during that time period. *THE SUPREME COURT: CONTROVERSIES, CASES AND CHARACTERS FROM JOHN JAY TO JOHN ROBERTS* 1151 (Paul Finkleman ed., 2014). For example, *United States v. Lopez*, marked the narrow-

Because of the length of service of the Justices and the corresponding effects on the jurisprudence of the Court, the need for inclusion in the selection process of Supreme Court Justices is paramount. However, as the length of tenure of the Justices has increased, the breadth of the selection criteria has decreased. The primary criteria used by presidents today in selecting Justices have evolved over time such that they allow a more limited number of lawyers, and even a more limited type of lawyer, to be considered for the federal bench in general, and the U.S. Supreme Court in particular.

In the next section, Part I.B., I discuss just how the criteria for Supreme Court Justices have evolved and narrowed over time before discussing the effect of those criteria on the African American women in Part II.

B. Evolution of Presidential Selection Criteria

Throughout the 200-year history of the Supreme Court, presidents have considered a wide range of factors in selecting nominees to serve on the High Court. For example, George Washington and the other first century presidents placed heavy weight on where the nominees were from geographically.¹⁹ This was an important consideration due in part to the circuit riding responsibilities of the justices.²⁰ The first century presidents also considered ideology, like most presidents throughout history. Federalist President John Adams's selection of John Marshall, a staunch Federalist himself, as Chief Justice demonstrates the importance of ideology in the selection of Supreme Court justices even during the early years of the Court.

As geographic diversity on the Court lost its importance, ideology began to play an even more dominant role. For example, after President Nixon's failed attempts to add geographic diversity on the Court with two southern nominees, his push for an ideological choice culminated in the selection of William Rehnquist, who turned out to be his most conservative appointee.

Political ideology continues to be the primary consideration of presidents today. However, in recent years, the non-ideological crite-

ing of the Court's interpretation of the federal government's power under the Commerce Clause of the U.S. Constitution. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

19. Lee Epstein et al., *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 *DRAKE L. REV.* 609, 612-13 (2008).

20. Sharon E. Rush, *Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias*, 79 *MO. L. REV.* 119, 127 (2014).

ria used for the selection of nominees have grown increasingly narrow, to the point where only a select group of lawyers could even hope to be nominated and confirmed to sit on the Court. The narrow criteria are less about demonstrated aptitude, ability, and temperament, but rather more about politics and pedigree.

The narrowing of the non-ideological criteria began nearly thirty years ago with President Ronald Reagan's nomination of Antonin Scalia in 1986 to fill the seat being vacated by William Rehnquist, who was being elevated from Associate Justice to Chief Justice following Chief Justice Burger's retirement. When President Reagan selected Scalia, he chose Scalia primarily because of his ideology.²¹ However, President Reagan also chose Scalia because he knew that Scalia's objective qualifications would not be questioned.²² Justice Scalia received his bachelor's degree from Georgetown University and his law degree from Harvard Law School.²³ He was a former assistant attorney general²⁴ and a former law school professor at the University of Chicago Law School.²⁵ Additionally, at the time Scalia was nominated, he had been a judge of four years on United States Court of Appeals for the District of Columbia Circuit.²⁶ Another selling point was Scalia's age.²⁷ At 50, Scalia was a relatively young nominee, and would be in a position to serve twenty-five or more years on the bench.²⁸

Whether inadvertent or by design, the objective qualifications of the current Justices look very similar to that of Justice Scalia. Indeed, looking at the current Court and some of the more recent nominees to the Court, both failed and successful, one can see an emerging trend—the nomination of individuals who graduated from Ivy League law schools, who were federal appellate judges, and who served in high levels of the federal government. Eleven individuals were nominated

21. YALOF, *supra* note 6, at 134, 143–44.

22. *Id.* at 151.

23. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 23–26 (2009).

24. *Id.* at 34.

25. *Id.* at 65.

26. *Id.* at 80, 99–100. In 1982, Scalia declined an earlier offer by the Reagan administration to be nominated to be a judge on the United States Court of Appeals for the Seventh Circuit in hopes of securing a seat on the more prestigious, Supreme Court feeding, D.C. Circuit. *Id.* at 80.

27. YALOF, *supra* note 6, at 147–48, 153.

28. *See id.* Scalia served for 27 years and was the longest serving member of the current Court.

after Scalia.²⁹ Of those eleven, nine graduated from Ivy League law schools,³⁰ nine were sitting federal appellate court judges,³¹ and eight had previously worked in the upper levels of government.³² An additional common characteristic that appears to be emerging is service as a judicial law clerk. Although Scalia did not serve as a judicial law clerk, six of the twelve nominees since Scalia's nomination were former federal judicial law clerks.³³

In the remaining part of this section, I discuss these criteria, which have emerged as critical factors in selection of Supreme Court Justice nominees, and detail the evolution that has occurred with each factor.

1. Ivy League Law School

With the departure of Justice Stevens from the Court and the addition of Justice Kagan in 2010, for the first time in the history of the Supreme Court all of the current Justices are graduates of Ivy League law schools.³⁴ What makes this fact even more astonishing is that Ivy

29. Robert Bork, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, John Roberts, Harriet Miers, Samuel Alito, Sonia Sotomayor, and Elena Kagan. *Supreme Court Nominations, Present-1789*, *supra* note 4.

30. Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, John Roberts, Samuel Alito, Sonia Sotomayor, and Elena Kagan. Dahlia Lithwick, *The Thing That Scares Me Most About the Supreme Court*, NEW REPUBLIC (Nov. 13, 2014), <https://newrepublic.com/article/120173/2014-supreme-court-ivy-league-clan-disconnected-reality>.

31. Robert Bork, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, John Roberts, Samuel Alito, and Sonia Sotomayor. Harriet Miers and Elena Kagan were not. *Id.*

32. Robert Bork, David Souter, Clarence Thomas, Stephen Breyer, John Roberts, Harriet Miers, Samuel Alito, and Elena Kagan. See *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 15, 2016); Andrew Cohen, *The Sad Legacy of Robert Bork*, ATLANTIC (Dec. 19, 2012), <http://www.theatlantic.com/politics/archive/2012/12/the-sad-legacy-of-robert-bork/266456/>; Harriet E. Miers Profile, WASH. POST (Oct. 27, 2005, 9:03 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/03/AR2005100300305.html>.

33. Ruth Bader Ginsburg, Stephen Breyer, John Roberts, Samuel Alito, Elena Kagan, and Merrick Garland. *Background on Judge Merrick Garland*, WHITE HOUSE (Mar. 16, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/16/background-judge-merrick-garland>; *Biographies of Current Justices of the Supreme Court*, *supra* note 32.

34. Five of the current Justices graduated from Harvard Law School (Roberts, Scalia, Kennedy, Breyer, and Kagan), three graduated from Yale Law School (Thomas, Alito, and Sotomayor), and one Justice graduated from Columbia Law school (Ginsburg, who began her law school career at Harvard and transferred and graduated from Columbia). See Lithwick, *supra* note 30. Merrick Garland, President Obama's most recent nominee graduated from Harvard Law School, and if the Senate confirms Judge Garland to fill the current vacancy on the Court, this all Ivy League Court will continue. See *Background on Merrick Garland*, *supra* note 33.

League law schools account for only *five* of the approximately *two hundred* ABA-approved law schools in the United States.³⁵

Despite this current trend of presidents nominating individuals with an Ivy League legal pedigree, the overwhelming majority of Supreme Court Justices who earned law degrees³⁶ were not graduates of Ivy League institutions. Even after most states began requiring a law degree to practice law,³⁷ presidents were not overly preoccupied with selecting an individual who graduated from a specific institution. For example, Dwight Eisenhower's five nominees, selected between 1953 and 1959, all hailed from different law schools: Earl Warren was a graduate of Berkeley, John Marshall Harlan II graduated from New York Law School, William Brennan from Harvard, Charles Whittaker received his law degree from University of Missouri-Kansas City, and Potter Stewart from Yale.³⁸ John F. Kennedy's two nominees, Byron White and Arthur Goldberg, were from Yale and Northwestern University Law School, respectively.³⁹ Although two of Nixon's six nominees received their law degrees from Harvard—Clement Haynsworth and Harry Blackmun—his other nominees received their law degrees from non-Ivy League law schools.⁴⁰ Nixon's first nominee, Warren Burger, whom he selected for Chief Justice, graduated from St. Paul College of Law (since renamed William Mitchell College of Law);⁴¹

35. Columbia University, Cornell University, Harvard University, the University of Pennsylvania, and Yale University. The other Ivy League institutions—Brown University, Dartmouth College, and Princeton University — do not have law schools. See Michelle Fabio, *Ivy League Law Schools*, ABOUT EDUC., <http://lawschool.about.com/od/lawschoolprofiles/tp/ivyleague.htm> (last updated Jan. 13, 2016).

36. Some Supreme Court Justices did not have law degrees. For example, Robert Jackson, who was nominated by Franklin Roosevelt in 1941, went to Albany Law School, but did not earn a degree. *Frequently Asked Questions- Justices*, *supra* note 16.

37. It was not until the early 1900s that legal education became formalized, and even as late as 1922, no state required a law degree to practice law. However, by about 1940, most states required a law degree to practice law. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s*, at 172–74 (1983).

38. *William J. Brennan, Jr.*, OYEZ, https://www.oyez.org/justices/william_j_brennan_jr (last visited Oct. 9, 2016); *John M. Harlan II*, OYEZ, https://www.oyez.org/justices/john_m_harlan2?
[page=1&order=title&sort=asc&sub=opinions%2F1968](https://www.oyez.org/justices/john_m_harlan2?) (last visited Oct. 9, 2016); *Potter Stewart*, OYEZ, https://www.oyez.org/justices/potter_stewart (last visited Oct. 9, 2016); *Charles E. Whittaker*, OYEZ, https://www.oyez.org/justices/charles_e_whittaker?order=field_education_value&sort=desc#! (last visited Oct. 9, 2016); *Earl Warren*, OYEZ, https://www.oyez.org/justices/earl_warren?order=title&sort=asc&page=1 (last visited Oct. 9, 2016).

39. *Arthur J. Goldberg*, OYEZ, https://www.oyez.org/justices/arthur_j_goldberg?order=field_education_value&sort=asc#! (last visited Oct. 9, 2016); *Byron White*, OYEZ, https://www.oyez.org/justices/byron_r_white?order=field_education_value&sort=desc#! (last visited Oct. 9, 2016).

40. *Supreme Court Nominations, Present-1789*, *supra* note 4.

41. *Warren Burger Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/warren-burger-9231479> (last visited Sept. 21, 2016).

Harrold Carswell graduated from Walter George School of Law; Lewis Powell received his law degree from Washington and Lee University (however, he did receive his Masters of Law degree from Harvard); and William Rehnquist graduated from Stanford Law School.⁴² President Gerald Ford's only nominee to the Court, John Paul Stevens, graduated from Northwestern University Law School.⁴³

Reagan's first two nominees were from Stanford—Sandra Day O'Connor and William Rehnquist.⁴⁴ Reagan then nominated Scalia from Harvard, Robert Bork from University of Chicago, and Anthony Kennedy from Harvard.⁴⁵ As previously noted, the Ivy League trend began to emerge around the time Reagan nominated Scalia. The exclusivity became even more entrenched following Reagan's presidency, as the next ten nominees, selected by four different presidents, all hailed from Ivy League institutions, with the exception of Harriet Miers, who graduated from Southern Methodist. Interestingly, yet not surprisingly, given the elitist trend in the nominations at the time of her nomination in 2005, Miers' nomination was criticized in part because she was not a graduate of one of the more elite law schools.⁴⁶

Despite the assumption of many to the contrary, where an individual received his or her law degree does not necessarily dictate the effectiveness or quality of that individual as a Justice. First, Robert Jackson, who had a significant impact on the Court,⁴⁷ did not receive a law school degree.⁴⁸ Additionally, other highly regarded Justices, such as Chief Justice Earl Warren, and Justices John Marshall Harlan II

42. DOUGLAS CLOUTRE, *PRESIDENTS AND THEIR JUSTICES* 74 (2010).

43. *John Paul Stevens*, OYEZ, https://www.oyez.org/justices/john_paul_stevens (last visited Sept. 21, 2016).

44. CLOUTRE, *supra* note 42, at 74.

45. ERWIN CHEMERINKSY, *THE CASE AGAINST THE SUPREME COURT* 160 (2014).

46. See Tom Curry, *For Court Clout, No Judicial Experience Needed*, NBC NEWS (May 12, 2010, 10:20:09 AM), http://www.msnbc.msn.com/id/37072697/ns/politics-supreme_court/print/1/displaymode/1098/.

47. See Bryan Garner, *Celebrating the Powerful Eloquence of Justice Robert Jackson*, ABA L.J. (Oct. 01, 2016 02:50 AM) http://www.abajournal.com/magazine/article/powerful_elquence_justice_robert_jackson.

48. See SUPREME COURT JUSTICES, *supra* note 1, at 369. That is, of course, not to say that an individual today without a legal education would be at all qualified to serve on the Supreme Court. The point is, however, that the best, brightest and most effective potential judges are not found *exclusively* at Ivy League legal institutions.

and John Paul Stevens,⁴⁹ were not products of Ivy League legal education.⁵⁰

Without a doubt, there are a number of law schools, *not just five*, that produce high quality lawyers who would make and have made outstanding Supreme Court Justices. Not only does the trend in nominating exclusively products of Ivy League law schools ignore this fact, but the trend, like the below-discussed factors, significantly and unnecessarily limits the pool of qualified applicants. And this narrowing of the pool has a disproportionate effect on African American women.

2. Federal Judicial Experience

Probably the most important of the current criterion to have emerged is prior federal appellate judicial experience. Indeed, eight of the nine current Justices were sitting federal circuit judges when nominated.⁵¹ However, the nomination of federal appellate judges to serve on the Supreme Court is a relatively new trend.⁵² Admittedly, as the federal lower courts grew in number during the 1900s, presidents began selecting with increasing frequency Supreme Court nominees who were current or former federal court of appeal judges.⁵³ However, even with the increase in the number of federal trial and appellate judges, presidents did not feel compelled, pressured, or even inclined to nominate individuals with judicial experience. For exam-

49. See TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 333–35 (1992); William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 407, 445–52 (1996); Jefferey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES (Sept. 23, 2007), <http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html>.

50. *John M. Harlan II*, supra note 38; *John Paul Stevens*, supra note 43; *Earl Warren*, supra note 38.

51. Chief Justice Roberts had been a judge on the D.C. Circuit for two years when he was nominated; Justice Scalia had been a judge on the D.C. Circuit for four years when he was nominated; Justice Kennedy had been a judge on the Ninth Circuit for thirteen years when he was nominated; Justice Thomas had been a judge on the D.C. Circuit for nineteen months when he was nominated; Justice Ginsburg had been a judge on the D.C. Circuit for thirteen years when she was nominated; Justice Breyer had been a judge on the First Circuit for fourteen years when he was nominated; Justice Alito had been a judge on the Third Circuit for sixteen years when he was nominated; and Justice Sotomayor had been a judge on the Second Circuit for eleven years when she was nominated (and prior to that had been a district court judge for the Southern District of New York for six years). Elena Kagan, the ninth and most recent Justice, had not served as a judge when she was nominated. See *Biographies of Current Justices of the Supreme Court*, supra note 32.

52. See Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1340 (2008) (describing the change in the norm of prior federal judicial experience for Supreme Court Justices).

53. *Id.* at 1337–48.

ple, from 1937-1943, Franklin D. Roosevelt nominated eight new Justices, and of those eight, only one was a federal judge.⁵⁴ John F. Kennedy made his only two Supreme Court appointments in 1962 and neither individual had former judicial experience.⁵⁵

However, beginning in 1967, the trend has been for presidents to nominate individuals who were former federal appellate judges.⁵⁶ Beginning with President Johnson's nomination of Thurgood Marshall in 1967, seventeen of the twenty-two, or 77%, of the individuals who were nominated to the Court had been former or current federal court of appeals judges.⁵⁷ In contrast, only twelve of the thirty-two, or 38%, of the new nominees from 1914 to 1967 were former or current federal appellate judges.⁵⁸

Although the trend of selecting graduates of Ivy League law schools may have developed from a certain degree of elitism, the trend of nominating federal appellate judges developed primarily as a result of politics. For instance, Nixon, who was elected on the conservative "law and order" platform,⁵⁹ was determined to name "law and order" Justices to the Supreme Court.⁶⁰ Nixon and his advisors believed that the most expeditious way to determine how an individual would adjudicate Supreme Court cases was to review an actual judicial record for a "law and order" judicial philosophy.⁶¹ As a re-

54. Roosevelt appointed a total of nine Justices to the Court. The eight new appointees were Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James F. Byrnes, Robert H. Jackson, and Wiley Blount Rutledge. Roosevelt also nominated Harlan Fiske Stone to serve as Chief Justice in 1941. Stone had previously served as an Associate Justice on the Supreme Court from 1925 to 1941. Of the eight, only Rutledge, who was serving on the D.C. Circuit, had previous judicial experience. CHRISTOPHER EISGUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 136 (2007).

55. Kennedy's nominees were Byron White, serving as Deputy Attorney General at the time of his nomination, and Arthur Goldberg, serving as Secretary of Labor at the time of his nomination. *Id.*

56. See Robert Alleman & Jason Mazzone, *The Case for Returning Politicians to the Supreme Court*, 61 HASTINGS L.J. 1353, 1358 (2010) (noting the trend in the selection of individuals with prior federal judiciary experience for service on the Supreme Court).

57. The nominees who were not federal court of appeals judges were Lewis Powell, William Rehnquist, Sandra Day O'Connor, Harriet Miers, and Elena Kagan. While Sandra Day O'Connor was not a federal appellate judge, she was an Arizona state court of appeals judge. See Curry, *supra* note 46; Harriet E. Miers Profile, *supra* note 32.

58. April Gordon Dawson, *Message to Black Women: Be Afraid, Be Very Afraid- Romney and the Future of the Supreme Court*, CLUTCH, <http://www.clutchmagonline.com/2012/11/message-to-black-women-be-afraid-be-very-afraid-romney-and-the-future-of-the-supreme-court/> (last visited Sept. 15, 2016).

59. See Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 331-37 (2012).

60. YALOF, *supra* note 6, at 131.

61. *Id.*

sult, Nixon first looked to then-current federal judges when seeking nominees to the High Court, and the first four of Nixon's six nominees were federal appellate judges.⁶² It was only after two of his federal appellate judge nominees were rejected that Nixon expanded his search of potential nominees outside of the judiciary.⁶³

Likewise, politics led to Reagan's selection of Scalia, as ideology was a primary concern in the selection.⁶⁴ Reagan's advisors focused primarily on current judges, having determined, like Nixon's advisors, that an individual's judicial record was the most expedient and accurate way to determine ideological views and judicial philosophy.⁶⁵

While presidents since Reagan have, with varying degrees of success, considered nominating non-judges,⁶⁶ since Scalia's nomination, ten of the twelve individuals nominated have been federal appellate judges.⁶⁷ And of the two nominees who were not federal judges—Miers and Kagan—only Kagan was confirmed.⁶⁸ Miers' qualifications were questioned in part because she did not have prior judicial experience; after harsh criticism, she withdrew her nomination.⁶⁹ And although Kagan was the current Solicitor General of the United States at the time of her nomination, and ultimately confirmed, her qualifications were nevertheless questioned by some because she did not have prior judicial experience.⁷⁰

Despite the current emphasis on federal judicial experience,⁷¹ history teaches us that having previous judicial experience does not necessarily determine the quality of the Justice. Many highly regarded

62. *Id.* at 70.

63. *Id.*

64. *Id.* at 142.

65. *Id.* at 98.

66. For example, Bill Clinton specifically sought to nominate a non-judge, and offered a Court vacancy to former governor of New York, Mario Cuomo; however, Cuomo declined. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 75–76, 84–85 (2008) (George H. Bush nominated non-judge Harriet Miers, and Barack Obama nominated non-judge Elena Kagan).

67. Indeed, Judge Garland, who had served as a judge on the D.C. Circuit Court of Appeals for 19 years at the time of his nomination, has more judicial experience than any other Supreme Court nominee in history.

68. STAFF OF S. COMM. ON THE JUDICIARY, 111TH CONG., *CORRECTING THE RECORD: JUDICIAL EXPERIENCE IS NOT A PREREQUISITE FOR SERVING ON THE SUPREME COURT*, (Comm. Print 2010), https://www.dpc.senate.gov/scotus/sjc_judexpnotprereq.pdf.

69. *Id.*

70. Charles W. “Rocky” Rhodes, *Navigating the Path of the Supreme Appointment*, 38 FLA. ST. U. L. REV. 537, 540–41 (2011).

71. Even Chief Justice Roberts has commented that Supreme Court Justices should be selected from the bench. Lee Epstein et al., *The Norm of Prior Judicial Experience and its Consequences for Career Diversity on the Supreme Court*, 91 CAL. L. REV. 903, 905 (2003).

Justices did not have prior judicial experience. For example, Earl Warren, Hugo Black, and William Douglas, considered by many to be outstanding jurists,⁷² had no judicial experience when appointed to the Court.⁷³ Likewise, many Justices who have been deemed ineffective or marginal Supreme Court Justices were former judges. For example, despite having served thirteen years on the D.C. Circuit when nominated, Chief Justice Warren Burger is regarded as a wholly ineffective Justice.⁷⁴ Fred Vinson also served on the D.C. Circuit before becoming Chief Justice of the Court and is considered by many to be one of the worst Justices in the history of the Court.⁷⁵

Given that prior judicial experience does not necessarily determine the quality of a Supreme Court Justice, the weight given to this factor is unwarranted.⁷⁶ Not only is undue weight unwarranted, but as discussed in Part II below, the overreliance on this factor is having a detrimental effect on the diversity of the pool from which Supreme Court nominees are being selected.

3. Age

The significance of age should be addressed at this point because, even if an individual is a federal appellate judge—one of the most important factors, if not, the most important—the age of the individual may completely remove them from consideration for nomination to the Supreme Court. Presidents have begun to appreciate more and more that their Supreme Court judicial nominees could have effects beyond the president's time in office. As a result, age has become a key consideration in the selection of Supreme Court nominees. For instance, when President Reagan considered individuals to fill the seat being vacated by Rehnquist who was being elevated from Associate

72. Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93, 135–57 (1995).

73. When nominated, Warren was governor of California, Black was a U.S. Senator, and Douglas was Chair of the Securities and Exchange Commission. Other non-judge nominees who are regarded as among the best Justices to serve on the Court include Charles Evans Hughes (governor of New York), Felix Frankfurter (law professor), Robert Jackson (Attorney General and Solicitor General), and Louis Brandies (private practice). *Id.* at 94, 134–37, 150–53.

74. Ross, *supra* note 49, at 407.

75. Bernard Schwartz, A BOOK OF LEGAL LISTS: THE BEST AND WORST IN AMERICAN LAW 32 (1997); other former judge nominees whose tenures on the bench were less than stellar include Charles Whittaker (Eighth Circuit), Sherman Milton (Seventh Circuit), *id.* at 29, and Willis Van Devanter (Eighth Circuit). Ross, *supra* note 49, at 445–52.

76. See, e.g., Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 795 (1957) (“One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero.”).

Justice to Chief Justice, Scalia was selected over Bork, in part, because Scalia, who was fifty, was nine years younger than Bork.⁷⁷ The average appointment age of the current Justices is 52.5, and all of the sitting Justices were 56 or younger when appointed, with the exception of Justice Ginsburg, who was 60 when she was appointed.⁷⁸ Thus, the trend appears to be that presidents will generally seek nominees no older than 56.⁷⁹

4. Federal Government Experience

In recent years, when a Supreme Court Justice nominee did not have prior judicial experience, that individual was most likely a high-ranking federal government official. As noted above, since 1967, only five of the twenty-two new nominees were not federal judges.⁸⁰ Of those five, three were high-ranking government officials.⁸¹ Of the remaining two, one was a state court of appeals judge and the other was in private practice.⁸²

In many cases, a nominee had been both a federal judge and a high-ranking government official. Indeed, of the eight current Justices who were former federal appellate judges, five served in high-level federal government positions prior to being appointed to the federal appellate bench.⁸³ Thus, it would be difficult to imagine an individual

77. YALOF, *supra* note 6, at 147.

78. Chief Justice Roberts was 50 at the time of his appointment; Justice Scalia was 50, Justice Kennedy was 52, Justice Thomas was 43, Justice Ginsburg was 60, Justice Breyer was 56, Justice Alito was 56, Justice Sotomayor was 55, and Justice Kagan was 50. *Biographies of Current Justices of the Supreme Court*, *supra* note 32.

79. If confirmed, Judge Garland who is 63 would be one of the oldest individuals to join the Court. It bears noting that the other two individuals on President Obama's short list, Judge Paul Watford of the Ninth Circuit and Judge Sri Srinivasan of the D.C. Circuit, are 48 and 49 respectively. Pamela Brown, *Sources: Obama Narrowing Supreme Court List*, CNN (Mar. 12, 2016), <http://www.cnn.com/2016/03/12/politics/obama-supreme-court-short-list/>.

80. Powell, Rehnquist, O'Connor, Miers, and Kagan. *Biographies of Current Justices of the Supreme Court*, *supra* note 32; Curry, *supra* note 46.

81. William Rehnquist was the Assistant Attorney General for the Department of Justice Office of Legal Counsel when nominated by President Nixon. Harriet Miers was White House Counsel when nominated by President Bush II. Elena Kagan was Solicitor General when nominated by President Obama. YALOF, *supra* note 6, at 125; see *Biographies of Current Justices of the Supreme Court*, *supra* note 32.

82. Sandra Day O'Connor was an Arizona State Court of Appeals judge when nominated, and Lewis Powell was in private practice when nominated. *Biographies of Current Justices of the Supreme Court*, *supra* note 32; Lewis F. Powell, Jr., BIOGRAPHY.COM, <http://www.biography.com/people/lewis-f-powell-jr-38967#early-life> (last visited Oct. 23, 2016).

83. Chief Justice Roberts served in the Solicitor General's office, Justice Scalia served in the White House Office of Legal Counsel, Justice Thomas was the Chairman of the Equal Employment Opportunity Commission, Justice Breyer served in the Department of Justice as a special prosecutor and counsel; and Justice Alito served in both the Attorney General's office and the Solicitor General office. *Biographies of Current Justices of the Supreme Court*, *supra* note 32.

being nominated today who was neither a federal appellate judge nor a high-level federal government official.

Like the federal appellate judge factor, serving as a high ranking federal government official has only recently become a critical factor in selection of Supreme Court nominees. While presidents have frequently scoured federal public servants for possible Supreme Court nominees, not serving as a high-ranking government official has not historically removed one altogether from consideration. For example, in 1965 when President Johnson was seeking to fill the seat vacated by Arthur Goldberg, Johnson was advised that he was “free to choose [an individual] from the federal or state judiciary, private practice, or the academic world.”⁸⁴ Indeed, of the fifteen individuals suggested to Johnson by his advisors for nomination, only two were federal government officials.⁸⁵ Of the remaining thirteen, two were federal appellate judges, six were in academia, four were state judges, and one was in private practice.⁸⁶ Johnson ultimately selected the individual who was in private practice—Abe Fortas.⁸⁷

Also like the federal judge criterion, service in a high governmental position does not determine whether an individual will make an effective or “good” Justice. A number of highly regarded Justices were neither federal judges nor federal government officials. Justices Benjamin Cardozo, Oliver Wendell Holmes and William Brennan were all state judges.⁸⁸ Chief Justices Earl Warren and Charles Evans Hughes were both state governors when selected.⁸⁹ Justice Brandeis was in private practice and Justice Frankfurter was a law professor.⁹⁰ Moreover, some of the least effective Justices served in high-level federal government positions when nominated. The most noteworthy example is Justice James Clark McReynolds. McReynolds was serving as Attorney General when nominated by Woodrow Wilson in 1914, and has frequently been labeled one of the worst Supreme Court Justices in history.⁹¹

Despite the historical inclusion of individuals with varied backgrounds in the pool of potential Supreme Court Justices, presidents

84. YALOF, *supra* note 6, at 83.

85. *Id.* at 84.

86. *Id.*

87. *Id.* at 85–86.

88. *See* SUPREME COURT JUSTICES, *supra* note 1, at 260, 337, 410.

89. *Id.* at 279, 401.

90. *See* Schwartz, *supra* note 72, at 123–44; *see also* Ross, *supra* note 49, at 414.

91. *See* Ross, *supra* note 49, at 433.

today appear to place greater emphasis on federal government experience, especially when the individual being considered does not have federal appellate judicial experience. The heavy weight given to this factor, like the above-discussed factors, is unwarranted. Moreover, as demonstrated in the next Part of this Article, this factor unnecessarily limits the pool from which Supreme Court nominees are selected.

5. Judicial Clerkships

An emerging trend appears to be the selection of individuals who served as Supreme Court law clerks. Justice Horace Gray initiated the use of a law clerk or “secretary” in 1882 when he was appointed to the Court.⁹² Following his practice as the chief Justice of the Supreme Judicial Court of Massachusetts, each year Gray would hire a graduate from Harvard Law School to serve as his law clerk.⁹³ By 1919, virtually all of the Justices had followed suit and Congress, formally recognizing the practice, began providing funding for Supreme Court law clerks.⁹⁴ During the 1940s, the Justices began employing two law clerks.⁹⁵ In the 1970s, the number of law clerks for each Justice increased to three.⁹⁶ Today, all of the Justices employ at least four law clerks.⁹⁷

Although Supreme Court clerkships provide an individual with a first-hand view of the workings of the Court, historically, presidents have not placed much weight, if any, on whether an individual clerked for a Supreme Court Justice, or any other judge. In fact, there have only been six Justices who were former Supreme Court law clerks.⁹⁸

92. *Judicial Administration and Organization: Law Clerks*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/admin_03_11.html (last visited Sept. 18, 2016).

93. *Id.*

94. *Id.* (noting that in 1930, Congress authorized federal circuit judges to hire law clerks. In 1945, Congress authorized funding for all district judges to hire law clerks).

95. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 133-34 (10th ed. 2014). See generally 28 U.S.C. § 675 (2006) (enacted in 1948 and authorizing Supreme Court Justices to appoint law clerks and secretaries).

96. See TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 174-84 (2006).

97. See JUDICIAL YELLOW BOOK 3-6, (Summer 2016); see also O'BRIEN, *supra* note 95, at 134.

98. Byron White clerked for Chief Justice Frederick Vinson during the 1946-47 term; John Paul Stevens clerked for Associate Justice Wiley Rutledge during the 1947-48 term; William Rehnquist clerked for Associate Justice Robert Jackson during the 1952-53 term; Stephen Breyer clerked for Associate Justice Arthur Goldberg during the 1964-65 term; John Roberts clerked for the then-Associate Justice William Rehnquist during the 1980-81 term; and Elena Kagan clerked for Associate Justice Thurgood Marshall during the 1987-88 term. *Frequently Asked Questions- Justices*, *supra* note 16.

Recent presidents, likewise, do not appear to have placed significant weight on this factor. It is nevertheless striking that five of the last fifteen individuals nominated were Supreme Court law clerks. Moreover, four of the last seven nominees,⁹⁹ and three of the last five *confirmed* nominees were former Supreme Court law clerks. Additionally, a majority of the current Justices, five of nine, clerked at some level, and three of those five clerked for a Supreme Court Justice.¹⁰⁰

Again, whether an individual served as a judicial law clerk does not necessarily determine or predict whether an individual will be an effective Justice. While all of the Justices who have clerked are either well regarded or too early in their tenure to be assessed, some of the most highly regarded Justices did not clerk at any level. And again, while presidents do not appear to place undue weight on this factor, the numbers suggest that this is an emerging trend and that this factor, like whether an individual attended an Ivy League institution, may in the future limit the pool of viable applicants. To the extent that presidents begin to favor individuals who have clerked for Supreme Court Justices over those who have not, this will severely narrow the pool of potential Supreme Court nominees.

In the end, the emergence of and reliance on these heavily weighted factors has resulted in the exclusion of particular groups from the U.S. Supreme Court Justice consideration, nomination, and confirmation. Although each of the criteria individually may be reasonable for consideration of Supreme Court nominees, it is the unstated requirement that a viable nominee satisfy the majority, if not all, of the criteria that has such a devastating effect on the inclusion of African American women (and other women of color) in the pool of potential nominees. What makes this combined effect especially devastating is the fact that the exclusionary effect of each criterion builds upon the others. For instance, having an Ivy League law de-

99. Merrick Garland clerked for Associate Justice William Brennan during the 1978-79 term. It bears noting that the other two individuals on President Obama's short list also clerked at the Supreme Court level. Paul Watford clerked for Associate Justice Ruth Bader Ginsburg during the 1995-98 term, and Sri Srinivasan clerked for Associate Justice Sandra Day O'Connor during the 1997-98 term. Brown, *supra* note 79.

100. Justice Ginsburg clerked for a federal district judge. Chief Justice Roberts, and Justices Alito and Kagan all clerked for federal circuit judges, and as previously noted Chief Justice Roberts, and Justices Breyer and Kagan each clerked for Supreme Court Justices. *Biographies of Current Justices of the Supreme Court*, *supra* note 32.

gree, particularly a degree from Yale or Harvard, makes it all the more likely that one will get a Supreme Court clerkship, which makes it more likely that one will get a prestigious government job, which makes it more likely that one will get a federal appellate judgeship, and ultimately be in a position for at least consideration for appointment to the High Court.¹⁰¹

In Part II below, I explain how each of the criterion identified in Part I has a negative disparate effect on African American women.

II. THE EFFECT OF CURRENT CRITERIA: ABSENCE OF AFRICAN AMERICAN WOMEN

Even if a president were predisposed to nominate an African American woman,¹⁰² the current criteria employed for selecting Justices would frustrate his or her efforts to do so. The sheer low number of people in general, and African American women in particular, who possess the above-discussed credentials contributes to the absence of African American women on any shortlist discussion of potential Supreme Court nominees.

A. Ivy League Law School

The trend of nominating individuals who have an Ivy League law degree eliminates a number of lawyers of all genders, races, and ethnicity for consideration for appointment to the High Court, but the trend has a particularly devastating effect on the number of viable African American women who could be nominated to serve on the High Court. As previously noted, Ivy League law schools account for only five of the roughly two hundred ABA accredited law schools.¹⁰³

101. See Michael McGough, *How to Diversify the Ivy League Club That Is the Supreme Court*, L.A. TIMES (Oct. 28, 2014, 11:55 AM), <http://www.latimes.com/opinion/opinion-la/la-ol-supreme-court-diversity-ivy-league-20141028-story.html>.

102. It is a common misperception that presidents do not have predispositions for whom they select and only select nominees based solely on who they deem the most qualified. FDR was predisposed to nominate a U.S. Senator. Reagan was predisposed to nominate a woman. Johnson was predisposed to nominate an African American. Bush was likewise predisposed to select an African American man to replace Thurgood Marshall. Obama was predisposed to nominate a Latino. See generally Mack, *supra* note 12.

103. Columbia University, Cornell University, Harvard University, the University of Pennsylvania, and Yale University. The other Ivy League institutions—Brown University, Dartmouth College, and Princeton University—do not have law schools.

In 2013, less than five percent of all law students were attending Ivy League institutions.¹⁰⁴ And less than five percent of Ivy League law students during that year were African American female students.¹⁰⁵ With such small numbers of African American women attending and therefore graduating from Ivy League law schools, the emergence of this criterion greatly reduces the chance that an African American lawyer will be considered for appointment to the Supreme Court.

For those who do decide to attend an Ivy League law school, the cost of the education may severely limit their post-graduation options. With law school tuition (not including living expenses) at Ivy League law schools exceeding \$55k a year,¹⁰⁶ many African American women attending Ivy League law schools require educational loans to pay for school.¹⁰⁷ As a result of post-law school debt load, many African American women may opt to accept jobs in the higher-paying private sector over lesser-paying government or public interest sector positions.¹⁰⁸ However, government positions are often the first post-graduation stepping stone on the path to an appointment to the Supreme

104. In 2013, a total of 128,641 students were enrolled in law school. Of that number 5007 students attended Ivy League law school. *Data From the 2013 Questionnaire*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_fall_jd_nonjd_enrollment.authcheckdam.pdf (last visited Sept. 14, 2016).

105. Of the 5007 Ivy League law students, 210 were African American women. *See generally* ABA Law Schools Standard 509 Information Reports for each Ivy League law school. *ABA Required Disclosures*, AM. BAR ASS'N, <http://www.abarequireddisclosures.org/> (last visited Oct. 9, 2016) (providing a database of in which readers can search for particular schools). There were a total of 6379 African American female law students enrolled in 2013. Thus, less than four percent of all African American female law students were enrolled in Ivy League law school. *See ABA Law Schools Compilation – All School Data J.D. Enrollment and Ethnicity Report*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/official-guide-to-aba-approved-law-schools.html (last visited Sept. 14, 2016).

106. *See generally* *ABA Required Disclosures*, *supra* note 105 (providing a database for readers to search particular schools' tuition). Moreover, it is often the case that one needs to have attended an Ivy League or other costly private undergraduate institution to get into an Ivy League law school. One scholar recently noted that “[t]he three most recent justices—Elena Kagan, Sonia Sotomayor, and Samuel Alito—all earned undergraduate degrees from Princeton. The other justices did their baccalaureate studies at Harvard, Stanford, Georgetown, Cornell, and Holy Cross. Members of the Court hold four international degrees: two from Oxford, and one each from the London School of Economics and the University of Fribourg.” A. E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 252 (2015). The cost of attending both a private undergraduate institution and an Ivy League law school could result in significant debt if the student does not come from an affluent background, which is often the case with African American women.

107. Christopher R. Benson, *A Renewed Call for Diversity Among Supreme Court Clerks: How A Diverse Body of Clerks Can Aid the High Court As an Institution*, 23 HARV. BLACK-LETTER L.J. 23, 29 (2007).

108. *Id.*

Court. A position as a federal government lawyer could lead to connections that facilitate further governmental appointments—judicial and executive—that could in turn lead to consideration for possible appointment on the Supreme Court. It is no coincidence that the majority of the current Justices began their legal careers in public service or public interest positions.¹⁰⁹

B. Federal Judicial Experience

As previously discussed, federal appellate experience has emerged as the most important factor being considered by presidents selecting a Supreme Court nominee.¹¹⁰ Indeed, eight of the sitting nine Justices were federal appellate judges at the time of their nomination.¹¹¹ It is also worth noting that of the four women appointed to serve on the Supreme Court during its 223 year history, three of the four were appellate judges—two were federal appellate judges, and one was a state appellate judge.¹¹² Likewise, the only two African Americans nominated to the Supreme Court were federal appellate judges.¹¹³

The trend of selecting appellate judges, particularly federal appellate judges, has had the effect of greatly reducing the number of African American women on the short list of potential Supreme Court Justice nominees because so few African American women have been appointed to the federal appellate bench. Although the first white woman was appointed to a federal appellate court in 1934,¹¹⁴ and the first African American man was appointed to a federal appellate court

109. *Biographies of Current Justices of the Supreme Court*, *supra* note 32.

110. *See supra* Part I.B.2.

111. Although Justice Kagan did not serve as a federal judge prior to her appointment, she was nominated by President Bill Clinton in 1999 to serve on the D.C. Circuit Court of Appeals. Her nomination lapsed, however, because the Senate Judiciary Committee failed to schedule a hearing. *Biographies of Current Justices of the Supreme Court*, *supra* note 32.

112. Justice O'Connor, appointed by President Reagan in 1981, was an Arizona State Court of Appeals judge. Justice Ginsburg, appointed by President Clinton in August 1993, was a judge on the federal D.C. Circuit, and Justice Sotomayor, appointed by President Obama in August 2009, was a judge on the federal Second Circuit. *Id.*

113. Thurgood Marshall was appointed by President John F. Kennedy to the U.S. Court of Appeals for the Second Circuit in 1961 and served in that position until 1965, when President Lyndon Johnson appointed Marshall to the office of U.S. Solicitor General. Marshall was serving in that position when President Johnson appointed him to the Supreme Court in 1967. Clarence Thomas was appointed to the D.C. Circuit Court of Appeals by President George H.W. Bush in 1990 and was nominated by President Bush in 1991 to serve on the Supreme Court. *Thurgood Marshall*, BIOGRAPHY.COM, <http://www.biography.com/people/thurgood-marshall-9400241#supreme-court-justice> (last visited Oct. 10, 2016).

114. Florence Ellinwood Allen was appointed by President Franklin Roosevelt to the United States Courts of Appeal for the Sixth Circuit in 1934. *See* The Honorable Anna Blackburne-

in 1950,¹¹⁵ the first African American woman was not appointed to the federal appellate bench until 1979, when President Carter appointed Amalya Kearse to the United States Courts of Appeals for the Second Circuit.¹¹⁶ Since Carter's appointment of Judge Kearse to the Second Circuit more than thirty-five years ago, only *seven* additional African American women have been appointed to the federal appellate bench out of a total of 285 appointments.¹¹⁷ Carter's only African American female appointment to the federal appellate bench was Judge Kearse. While Presidents Reagan and Bush I appointed 83 and 42 federal appellate judges, respectively, neither appointed a single African American woman to the federal appellate bench during the twelve-year span of their presidencies.¹¹⁸ President Clinton appointed three African American women to the federal appellate bench,¹¹⁹ and President Bush II appointed two.¹²⁰ President Obama has, thus far in his presidency, appointed two African American women to the federal appellate bench.¹²¹

The lack of African American women being appointed during the twelve-year Reagan and Bush I presidencies has had a devastating effect on the pool of African American female federal appellate judges who might be considered as potential Supreme Court nominees. And although the appointment of African American women to the federal appellate courts has improved since the Reagan/Bush I era, the number of African American women appointed to the federal appellate judiciary is still far outpaced by the appointment of white men, white

Rigsby, *Black Women Judges: The Historical Journey of Black Women the Nation's Highest Courts*, 53 How. L.J. 645, 657 (2010).

115. William Hastie was appointed by President Harry Truman to the United States Courts of Appeal for the Third Circuit in 1950. *Id.* at 658.

116. *Id.* at 674 (discussing the history of African American women judges).

117. JUDGESHIP APPOINTMENTS BY PRESIDENT, U.S. CTS., <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/appointments-by-president.pdf> (last visited Sept. 16, 2016).

118. See Blackburne-Rigsby, *supra* note 114, at 660–61 (explaining that based on the political climate, there was no incentive or inclination on the part of Reagan or Bush to select an African American woman because this was a period of political conservatism and there was a backlash against affirmative action and civil rights).

119. Judith Ann Wilson Rogers was appointed to the D.C. Circuit in March 1994, Ann Claire Williams was appointed to the Seventh Circuit in November 1999, and Johnnie B. Rawlinson was appointed to the Ninth Circuit in July 2000. *Biographical Directory of Federal Judges*, FED. JUD. CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Sept. 17, 2016).

120. Janice Rogers Brown was appointed to the D.C. Circuit in June 2005, and Allyson Kay Duncan was appointed to the Fourth Circuit in August 2003. *Id.*

121. Ojetta Rogerie Thompson was appointed to the First Circuit in March 2010, and Bernice Donald was appointed to the Sixth Circuit in September 2011. *Id.*

women, and African American men.¹²² Thus, the limited number of African American women on the federal bench and the significant weight given to federal appellate experience have greatly reduced the number of African American women in the pool of viable Supreme Court nominees. While all of the African American women appointed remain on the federal appellate courts (although Judge Kearse is on senior status), African American women make up less than four percent of this primary pool for Supreme Court nominees.¹²³ And that percentage shrinks even further considering the African American women federal appellate judges that graduated from an Ivy League law school, of which there is only one—Judith Ann Wilson Rogers, who received her JD from Harvard Law School in 1964.¹²⁴ And as discussed in the next section, the percentage shrinks to zero when age is considered.

C. Age

As noted above, the age of an individual will have a significant impact on their viability as a Supreme Court Justice nominee. And not only are African American female federal appellate judges few in numbers, they are all significantly older than the average age of fifty-three of the last ten Justices appointed. Of the seven current African American female federal appellate judges, the youngest is Johnnie B. Rawlinson who is sixty-three years old.¹²⁵ Thus, if the next president tasked with filling a vacant seat on the Court was inclined to further increase the diversity of the Court and nominate an African American woman with federal appellate experience, their ages virtually eliminate all of them from consideration.¹²⁶ It bears noting that the lack of

122. Since 1994, there have been 88 white males appointed to the federal courts of appeal, 46 white women, 16 black men, and only 6 black women. *Id.*

123. There are currently 179 federal appellate judges. *Federal Judgeships*, U.S. Cts., <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Sept. 28, 2016).

124. Judge Rogers also received an LL.M. from the University of Virginia in 1988. See *Biographical Directory of Federal Judges*, *supra* note 119.

125. Judge Kearse is 78, Judge Rogers is 76, Judge Williams is 67, Judge Rawlinson is 63, Judge Brown is 66, Judge Duncan is 64, Judge Thompson is 64, and Judge Donald is 64. *Id.*

126. President Obama reportedly considered Ann Claire Williams when seeking to fill the seat being vacated by John Paul Stevens. Christi Parsons, *Black Female Judge, A Former Third-Grade Teacher, Makes Supreme Court Nominee List*, L.A. TIMES (Apr. 21, 2010), <http://articles.latimes.com/2010/apr/21/nation/la-na-obama-supreme-court-20100422>. However, Judge Williams, born in 1949, would have been 61, and would not have been a viable candidate. Leah Ward Sears, who served as the first African American Chief Justice of the Georgia Supreme Court from 2005-2009, was also said to have been considered. Although Sears, born in 1955, would have been 55, some have speculated that her close relationship with Justice Thomas may have hurt her chances. See Krissah Thompson, *Friendship With Conservative Thomas Compli-*

African American female appellate judges under the age of sixty can be directly traced to the failure of presidents Reagan and Bush I to appoint a single African American woman to the federal appellate bench during a twelve year period, and only appointing three African American women between them to federal trial bench out of 438 federal trial judge appointments.¹²⁷

D. Federal Government Experience

The prominence of the criterion of high-level federal government service also significantly reduces the pool of African American women considered for a position on the Court. For example, the position of Solicitor General, often dubbed the “Tenth Justice,” represents the United States in cases pending before the Supreme Court. Generally, presidents have favored Solicitor Generals for appointment to the Supreme Court. In fact, at least four former Solicitor Generals have been appointed to the High Court: Stanley Reed, Robert H. Jackson, Thurgood Marshall, and most recently Marshall’s former law clerk, Elena Kagan. Additionally, two of the current Justices worked as attorneys in the Solicitor General’s office: John Roberts and Samuel Alito.¹²⁸

While there have been three African American men to serve as Solicitor General—Thurgood Marshall, Wade McCree, and Drew Days, and one white woman—Elena Kagan, like the majority of the highest legal positions in the federal government, there has not been an African American female to serve as Solicitor General.¹²⁹

Similarly, the Attorney General’s office has been fertile ground for consideration of potential Supreme Court Justices. In addition to being Solicitor General, Robert Jackson was Attorney General immediately preceding his appointment to the Court.¹³⁰ James McReynolds

cates *Supreme Court Chances for Georgia’s Sears*, WASH. POST (May 10, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/09/AR2009050902519.html?sid=ST2009050902584>.

127. Ann Claire Williams was appointed by Reagan in April 1985 to the United States District Court for the Northern District of Illinois; Sandra Brown Armstrong was appointed by Bush I in June 1991 to the United States District Court for the Northern District of California; and Carol Jackson was appointed by Bush I in August 1992 to the United States District Court for the Eastern District of Missouri. See J. Clay Smith, Jr., *Black Women Lawyers: 25 Years at the Bar: 100 Years in the Legal Academy*, 40 HOW. L.J. 365, 379 n.78 (1997). Reagan appointed 292 federal district judges and Bush I appointed 149 district judges. *Biographical Directory of Federal Judges*, *supra* note 119.

128. See *Biographical Directory of Federal Judges*, *supra* note 119.

129. *Id.*

130. *Id.*

was also Attorney General when he was nominated, as was Frank Murphy.¹³¹ But like the Solicitor General position, up until a few years ago there had not been an African American female Attorney General.¹³² Nor has there been an African American woman who has served as Deputy Attorney General, the number two position in the Department of Justice,¹³³ or Associate Attorney General, the number three position.¹³⁴ The over-reliance on this criterion, particularly when a potential nominee has not served as a judge, removes from the pool individuals who would nevertheless make very able Justices. And the recent reliance on this factor, coupled with the lack of any viable African American female federal appellate judge nominee, has had the effect of virtually eliminating African American women from consideration for appointment to the High Court.

E. Clerkships

As noted above, a trend of preferring individuals who have clerked at the Supreme Court appears to be emerging. Such preference would have a disproportionate negative impact on the number of African American women who might be considered for a seat on the Supreme Court. Like the legal profession in general, the history of selection of law clerks has favored white men.¹³⁵ The practice of Supreme Court Justices hiring law clerks began in 1882.¹³⁶ The first female Supreme Court law clerk was hired in 1944,¹³⁷ and the first African American male was hired in 1948.¹³⁸ However, the first Afri-

131. *Id.*

132. Appointed by President Clinton, Janet Reno was the first woman Attorney General (1993-2001) and Eric Holder, appointed by President Obama, was the first African American Attorney General (2009-2015). On November 8, 2014, President Obama nominated Loretta Lynch to succeed Eric Holder as Attorney General, and on April 23, 2015, she was confirmed by the Senate making her the first African American female U.S. Attorney General. *Attorneys General of the United States*, U.S. DEP'T OF JUST., <https://www.justice.gov/ag/historical-bios> (last visited Nov. 10, 2016).

133. There have been three females (Carol Dinkins, Jamie Gorelick, and Sally Q. Yates), and one African American male (Eric Holder) Deputy Attorney Generals.

134. There have been no women and one African American male (Tony West) Associate Attorney Generals. *Meet the Associate Attorney General*, U.S. DEP'T OF JUST., <https://www.justice.gov/asg/meet-associate-attorney-general-old> (last visited Sept. 17, 2016).

135. Mark R. Brown, *Gender Discrimination in the Supreme Court's Clerkship Selection Process*, 75 OR. L. REV. 359, 362-63 (1996); O'BRIEN, *supra* note 95, at 135.

136. Brown, *supra* note 135, at 362 n.19.

137. William Douglas hired Lucille Lomen in 1944. TODD C. PEPPERS, *supra* note 96, at 20-22; *see also* Brown, *supra* note 135, at 362-63.

138. Felix Frankfurter hired William T. Coleman, Jr. in 1948. *See* PEPPERS, *supra* note 96, at 20-22; *see also* Winkfield F. Twyman, *A Critique of the California Civil Rights Initiative*, 14 NAT'L BLACK L.J. 181, 185 (1997) (detailing the tribulations of William T. Coleman, Jr., who after

can American woman was not hired until 1974.¹³⁹ Although the number of white female Supreme Court law clerks increased dramatically since 1944, the number of African American Supreme Court law clerks, both male and female, is still disproportionately low.¹⁴⁰ Out of more than 1300 Supreme Court law clerks hired since 1974,¹⁴¹ there have been less than sixteen African American female law clerks by my count.¹⁴²

This is explained, in part, by the absence of African American Justices.¹⁴³ The vast majority of African American law clerks clerking at the federal level are hired by African American judges.¹⁴⁴ Thus, it is of no surprise that the Supreme Court comprised almost entirely of white men would have so few African American female law clerks.

The “feeder judge” phenomenon also decreases the chance African American women will be selected as Supreme Court law clerks. Feeder judges are those federal appellate judges who frequently “feed” law clerks to the Supreme Court Justices.¹⁴⁵ And it is now the case that serving as a law clerk for one of the top court of appeals

graduating first in his class at Harvard Law School, becoming the first African American editor of the Harvard Law Review, and clerking for Supreme Court Justice Felix Frankfurter, was still excluded from every law firm in Philadelphia).

139. Thurgood Marshall hired Karen Hastie Williams in 1974. PEPPERS, *supra* note 96, at 22. Williams was the daughter of William Hastie. *Karen Williams*, HIST. MAKERS, <http://www.thehistorymakers.com/biography/karen-williams-41> (last visited Oct. 10, 2016). William Hastie was the first African American federal district court and appellate court judge. See WARE, *supra* note 6, at 85–85, 225–27. William Hastie was also Thurgood Marshall’s mentor and professor at Howard University Law School. See SUPREME COURT JUSTICES, *supra* note 1, at 437.

140. See Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 76 (2008) (“[T]he number of female clerks has increased precipitously during the past three decades, while the number of African American law clerks has both grown more slowly and has varied dramatically by Justice.”).

141. Beginning in 1974, the Justices were allowed four law clerks each. Chief Justice Rehnquist routinely hired only three law clerks, and while on occasion, some Justices hired fewer than the allowable four, most of the Justices hired four law clerks for each term. See ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 45 (2006).

142. Research on file with author.

143. See Angela Onwuachi-Willig, *Clarence Thomas and Affirmative Action*, NAT’L L.J. (June 3, 2013), www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202602263004 (“[W]hen Thomas graduated from law school, there were very few black federal judges who could hire law clerks, and even fewer white judges who hired black clerks at all. Indeed, prior to Justice Thurgood Marshall’s service on the court, only one African-American had ever served as a U.S. Supreme Court law clerk for any justice. Even today, black judges hire the vast majority of African American law clerks at the federal level.”).

144. *Id.*

145. O’BRIEN, *supra* note 95, at 135; see PEPPERS, *supra* note 96, at 31–32.

“feeder” judges, the majority of whom are white males, is a “virtual requirement for any candidate to clerk at the Supreme Court.”¹⁴⁶

Like the above-discussed criteria, the emerging preference for nominees who have clerked at the Supreme Court or at the federal appellate level will have the effect of removing qualified African American female lawyers from consideration for appointment to the Court.

III. WHY THE USE OF CRITERIA THAT EXCLUDE AFRICAN AMERICAN WOMEN IS PROBLEMATIC

The use of unnecessary and overly narrow criteria that operate in practice (whether intended or not) to virtually exclude African American women from consideration for a seat on the Court raises two major issues. First, by employing unnecessarily narrow criteria that exclude African American women, the Court, which should be the ultimate defender of equality, is populated with criteria that perpetuate discrimination against African American women. Second, the criteria frustrates full representation on the Court by preventing descriptive representation, which speaks to the Court reflecting outward characteristics of the country, and by preventing substantive representation, which speaks to the Court members reflecting various viewpoints.

A. The Use of the Current Criteria Perpetuates Discrimination Against African American Women

The use of these politically induced¹⁴⁷ and exceedingly narrow criteria is perpetuating the historic discrimination and marginalization of African American women in our society in general and in the legal profession in particular. And where the process for selecting Justices to serve on our High Court—the protector of the rule of law—perpetuates invidious discrimination, such a process flies in the face of what our High Court represents.

Women and African Americans have historically been discriminated against in legal education and the legal profession. The reasons for the exclusion of women from law schools were numerous and

146. Zachary Wallander & Sara C. Benesh, *Law Clerks As Advisors: A Look at the Blackmun Papers*, 98 MARQ. L. REV. 43, 49 (2014) (quoting WARD & WEIDEN, *supra* note 141, at 107).

147. See *supra* Part I.B.

ranged from the belief that women did not have the intellectual ability to study the law, to the belief that the admittance of women in law school would be a detrimental distraction for the male students.¹⁴⁸ It was not until 1972 that all ABA-accredited schools ceased exclusionary practices against women.¹⁴⁹

Like white women, African Americans, regardless of gender, were historically excluded from law schools. Following the formalization of legal education in the early 1900s, many law schools excluded African American students through formal policies or informal practices.¹⁵⁰ “As late as 1939, thirty-four of the eighty-eight accredited law schools had formal policies excluding Blacks.”¹⁵¹ Even during early 1960’s American law schools were approximately 99% White.¹⁵²

These discriminatory practices against women and African Americans had an even more devastating effect on African American women, who were doubly offensive to the white male institutions. The overwhelming majority of the African American law students prior to the 1970s were African American men.¹⁵³ And the overwhelming majority of women law school students were white women. Underscoring the exclusion of African American women in the legal profession, Professor J. Clay Smith noted that “[t]he number of black women lawyers increased from 446 in 1970 to 11,006 in 1990” and that “[d]uring that same period the number of white women lawyers increased from 11,664 to 161,044.”¹⁵⁴

148. Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*, 53 J. LEGAL EDUC. 475, 477–78 (2003).

149. *Id.* (citing Donna Fossum, *Women in the Legal Profession: A Progress Report*, 67 WOMEN L. J. 1 (1981)).

150. Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1475–76 (1997). For example, Texas passed a law restricting attendance at the University of Texas, including its law school, to white students. *See Sweatt v. Painter*, 339 U.S. 629, 631 n.1 (1950) (citing TEX. CONST. art. VII, §§ 7, 14; TEX. REV. CIV. STAT. arts. 2643b, 2719, 2900 (Vernon 1925 & Supp.)). The University of Missouri Law School also formally excluded black applicants on the grounds that “it was ‘contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri.’” *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 343 (1938).

151. Roithmayr, *supra* note 150, at 1475–76 (citing JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 183 (1976)).

152. William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACK LETTER L.J. 1, 6 (2003).

153. Rhode, *supra* note 148, at 476–79 (2003) (citing GERALDINE R. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION*, 212–13 (1983); KAREN B. MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE PRESENT* 95, 143–47 (1986)).

154. *REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS*, *supra* note 9, at 7.

Even after women and African Americans were granted admission to law schools and allowed to graduate, they were not afforded the same legal employment opportunities as their white male counterparts. For example, when retired Justice Sandra Day O'Connor graduated from Stanford Law School in 1952 at the top of her class, private law firms would hire her only as a legal secretary.¹⁵⁵ Justice Ruth Bader Ginsburg also experienced gender discrimination when she graduated from Columbia Law School in 1959, even though she tied for first in her class.¹⁵⁶ African Americans were likewise discriminated against when seeking employment following graduation from law school.¹⁵⁷ Moreover, in many states, African Americans were frequently denied admission to the bar and a license to practice law solely due to their race.¹⁵⁸ And again, discrimination in legal employment had an even greater impact on African American women trying to find a place in the white male dominated world.

Because of the pervasive discrimination against women and minorities in legal education and the legal profession, the pool of lawyers considered by presidents before 1970, even when using more expansive criteria, was overwhelmingly white and male. If post-1970 presidents continued to use the broader criteria for selection of Supreme Court Justices, the natural consequence would have been a more diverse pool of viable nominees. However, as the profession became more diverse, the criteria employed to select Supreme Court Justices became more exclusionary.

If more narrow criteria were necessary for the selection of well-qualified Supreme Court Justices, it would be difficult to question the current criteria. However, a historic review of the selection of Supreme Court Justices demonstrates that limiting Justices to those who attend Ivy League law schools and who were federal appellate judges, for example, was not necessary to secure quality Supreme Court jurists. Indeed, many of the Justices considered by commentators to be

155. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1219 (1992).

156. Elizabeth E. Gillman & Joseph M. Micheletti, *Justice Ruth Bader Ginsburg*, 3 SETON HALL CONST. L.J. 657, 658 (1993).

157. James Lindgren, *The Private and Public Employment of African-American Lawyers, 1960-2000*, 17 J. CONTEMP. LEGAL ISSUES 281, 284 (2008).

158. Kidder, *supra* note 152, at 6; see also Wayne J. Lee, *Brown v. Board: Are We There Yet?*, 51 LA. B.J. 404 (2004).

among the “best” Justices would not have met the current criteria used by our most recent presidents.¹⁵⁹

The practical and harmful effect of the current and unnecessarily narrow criteria is the elimination from consideration of well-qualified and diverse individuals. The method of selecting Supreme Court Justices has changed in such a way that natural diversity that could and would have occurred with the diversification of the profession is thwarted. Indeed, the current narrow criteria produce a pool of viable candidates very similar to the demographic of the legal profession during and prior to the 1970s. Moreover, the use of the current exclusionary measures to populate the Supreme Court bench, measures that are reminiscent of the means of exclusion employed by legal institutions and legal employers for the specific purpose of excluding women and African Americans,¹⁶⁰ is inconsistent with the role of our High Court—the ultimate defender of justice, equality, and the rule of law.¹⁶¹ And this inconsistency severely undermines the legitimacy of the Court.

B. The Criteria Undercut the Legitimacy of the Court by Limiting Full Representation

One of the cornerstone ideas that make this government unique is the idea that the government be “of the people, by the people, and for the people.”¹⁶² Consistent with this view is the notion that our government should reflect the citizenry it serves, both descriptively (reflecting outward characteristics) and substantively (reflecting various viewpoints). Although the Supreme Court Justices are not directly elected by the people, they are nominated and confirmed by members of our government who are directly elected by the people.

159. Schwartz, *supra* note 72, at 93–94 (naming Hugo Black and Earl Warren among the greatest Supreme Court Justices).

160. I am not suggesting that the use of the current criteria was for the specific purpose of excluding women and minorities. As discussed, the current criteria developed as the confirmation process became more politicized and as presidents began selecting individuals not personally known to them. The end result is the same however – the unnecessary exclusion of a qualified and diverse pool of potential nominees. See *supra* Part I.B.

161. See Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1101 (2011) (“Exactly because law is the social glue of our society, because it is premised on the fundamental values of equality, fairness, and the rule of law, the legal profession ought to be a leader in the quest for diversity.”).

162. *The Gettysburg Address*, ABRAHAM LINCOLN ONLINE, <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> (last visited Sept. 21, 2016).

And as a co-equal branch of our government, the Supreme Court should likewise be a representative body.¹⁶³

Accordingly, where the criteria used to select Supreme Court Justices unnecessarily remove an entire demographic from consideration, i.e., African American women, use of such criteria prevents full descriptive and substantive representation. And this, in turn, undercuts the legitimacy of the Court.

1. Descriptive Representation

Descriptive representation calls for a government that reflects the outward characteristics of the people. Thus, the governing body should include members who reflect, *inter alia*, the gender, race, and ethnicity of the governed. When descriptive representation is lacking, the credibility of the representative body, in this case the Supreme Court, is undermined.

The need for descriptive representation was noted in the Supreme Court case *Grutter v. Bollinger*. Justice O'Connor, writing for the majority, stated that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."¹⁶⁴ Thus, "descriptive representation promotes legitimacy . . . by creating the appearance that a particular governmental institution is open to those from all walks of life."¹⁶⁵

If the Supreme Court Justices today were all white men of privilege (which has been the case for much of the Court's history), the country (the majority of which are non-white men) would intuitively question the legitimacy of the Court regardless of the quality of the decisions. This would be so because based on appearance alone, the Court would be perceived as tyrannical, i.e., the powerful dictating the less powerful. On the other hand, a diverse bench (or a bench that could at least acquire diversity) is perceived as a Court that will strive to ensure Justice and equality for the collective governed.

Moreover, a Court comprised of all white men of privilege would suggest to underrepresented groups that they are not capable of serv-

163. Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court As A Representative Body*, 90 MINN. L. REV. 1252, 1258 (2006).

164. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

165. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 598 (2011).

ing on the High Court due solely on their diverse characteristics.¹⁶⁶ Conversely, descriptive representation encourages individuals in underrepresented groups to aspire to enter areas historically unavailable to them.¹⁶⁷ For example, Constance Baker Motley said that one of the reasons she decided to become a lawyer was because of black lawyers she saw as role models.¹⁶⁸ One author has noted that when diverse individuals are nominated to the Court, it has the effect of generating diversity in the state judicial and political arenas.¹⁶⁹

When, despite the existence of many African American women who are qualified to serve on the Court, there are no viable African American women nominees based on the current overly narrow criteria, the promise of full descriptive representation in one of our branches of representative government is wholly thwarted. It is this lack of promise that undermines the legitimacy of the Supreme Court.

2. Substantive Representation

While descriptive representation is achieved when the Court is demographically similar to the citizens, substantive representation is achieved when the Court is comprised of Justices whose decision-making is informed by experiences that are similar to experiences of the citizenry. Thus, substantive representation can only be achieved if the Court is comprised of individuals with unique perspectives.¹⁷⁰

166. *Id.* (“[D]escriptive representation signal[s] to the underrepresented groups that certain features of one’s identity do not mark one as less able to govern.”) (internal quotations and citations omitted).

167. *Id.* (“[A] descriptive representatives may serve as a role model.”).

168. Blackburne-Rigsby, *supra* note 114, at 670.

169. Greg Goelzhauser, *Diversifying State Supreme Courts*, 45 LAW & SOC’Y REV. 761, 766–67 (2011) (“[S]tates may also be more likely to seat their first political minorities when appointments to the U.S. Supreme Court generate heightened attention to the importance of judicial diversity. Thurgood Marshall became the first black Justice appointed to the U.S. Supreme Court in 1967, and Sandra Day O’Connor became the first female appointed in 1981. Subsequently, Clarence Thomas became the second black Justice in 1991, and Ruth Bader Ginsburg became the second female justice in 1993. In 2009, Sonia Sotomayor became the third female and first Hispanic nominated to the Supreme Court. Each of these appointments were salient political events that brought diversity to the forefront of debates over judicial selection. As a result, similar to the notion of vertical diffusion in the policy adoption literature, it is reasonable to expect that these federal appointments generate increased pressure to diversify state courts and that states will learn from and imitate the federal government’s efforts to diversify its highest court.”) (internal citations omitted).

170. Scherer, *supra* note 165, at 604 (“To the extent that minority and female judges have unique perspectives that influence their decisionmaking . . . their presence on the bench is necessary to ensure that the views of more Americans are considered in the judicial decisionmaking process.”).

Judges are human, and when deciding legal issues, they are all informed by their personal experiences. As Chief Judge Harry Edwards noted, “it is inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them.”¹⁷¹ Justice Ginsburg has noted “[a] system of Justice is the richer for the diversity of background and experience of its participants. It is the poorer, in terms of evaluating what is at stake and the impact of its judgments, if its members—its lawyers, jurors, and judges—are all cast from the same mold.”¹⁷² Judge Richard Posner has maintained that “[t]he nation contains such a diversity of moral and political thinking that the judiciary, if it is to retain its effectiveness, its legitimacy, has to be heterogeneous; . . . and the members of a heterogeneous judicial community are not going to subscribe to a common set of moral and political dogmas that would make their decision-making determinate.”¹⁷³

Indeed, having diverse individuals on the Supreme Court has made for better decision-making.¹⁷⁴ Justice Thurgood Marshall’s presence on the Court has been credited as adding insight to deliberations. In commenting on what made Justice Marshall unique, Justice Brennan stated: “Above all, it was the special voice that he added to the Court’s deliberations and decisions. His was a voice of authority: he spoke from first-hand knowledge of the law’s failure to fulfill its promised protections for so many Americans.”¹⁷⁵

171. Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL’Y REV. 325, 329 (2002).

172. Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U. L. REV. 189, 190 (2003) (cited in Onwuachi-Willig, *supra* note 163, at 1274).

173. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 94 (2003); *see also* Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive? What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 106–07 (2004) (asserting that “constitutional judgments are visibly biased when the Supreme Court or other courts selectively strip out social and racial context to conform with the identity-based views of the majority”) (cited in Onwuachi-Willig, *supra* note 163, at 1274).

174. *See* Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2d 45, 49 (2009).

175. William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 23 (1991); *see also* Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221 (1992) (noting how Justice Marshall reminded the other Justices of their “moral obligation as a people to confront those tragedies of the human condition which continue to haunt even the richest and freest of countries”); O’Connor, *supra* note 155, at 1217 (“Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.”); Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992) (“Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match [H]e told us that[sic] we did not know due to the limitations of our own experience.”).

The benefit of gender diversity was underscored in the case of *Safford Unified Sch. Dist. v. Redding*.¹⁷⁶ In *Redding*, a thirteen-year-old girl sued her school after she had been strip searched by school officials looking for drugs.¹⁷⁷ During oral argument, some of the male Justices failed to appreciate the humiliation a teenage girl would feel during and after a strip search.¹⁷⁸ Justice Ginsburg, the lone woman on the Court at the time, was able to share insight that otherwise would have been lost on the other Justices, none of whom “[had ever] been a 13-year old girl.”¹⁷⁹ Ginsburg’s reproach appears to have made a difference. To many Court watchers’ surprise, the Court ruled 8-1 that the search was unreasonable. In his majority opinion, Justice Souter noted: “Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as . . . degrading.”¹⁸⁰

That diverse decision-making groups make better decisions than homogeneous groups is also well supported by social science research.¹⁸¹ And the Supreme Court, tasked with deciding the most important legal issues facing the country, is no different from other decision-making groups. Accordingly, a Court of Justices with diverse experiences leads to better decisions.¹⁸²

In addition to generating better decisions, substantive representation adds to the legitimacy of the Court.¹⁸³ Professor Nancy Scherer makes the point that “[w]hen the voices of a minority group are not engaged in an institution’s decision making [sic] process, that institution may be perceived by those excluded as illegitimate.”¹⁸⁴ She further notes that “substantive representation is a way to resolve [the] ‘tyranny of the majority’ dilemma by ensuring that racial and ethnic minorities’ interests (as well as those of other marginalized groups)

176. 557 U.S. 364 (2009).

177. *Id.* at 369.

178. Dahlia Lithwick, *Search Me: The Supreme Court is Neither Hot Nor Bothered by Strip Searches*, SLATE (Apr. 21, 2009, 7:49 PM), <http://www.slate.com/id/2216608/pagnum/2>.

179. Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY (Oct. 5, 2009, 11:16 AM), http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm.

180. *Redding*, 557 U.S., at 375.

181. SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 313–35 (2007) (explaining that formal models and data establish that better decisions are made by groups with diverse members); see also CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* 10–11 (2009) (finding that decisions made by those in a homogenous group tend to be more radicalized than moderated).

182. Onwuachi-Willig, *supra* note 163, at 1253, 1255.

183. Ifill, *supra* note 174, at 48.

184. Scherer, *supra* note 165, at 627.

are at least considered in the decision making [sic] process of any given institution.”¹⁸⁵

An African American person has a unique perspective different from a non-African American individual. Women, by the nature of their gender, have experiences that are different from experiences of men.¹⁸⁶ Accordingly, African American women have unique experiences and perspectives different from both African American men and white women. Thus, in order to have the ability to achieve full substantive representation and thereby increasing the legitimacy of the Court, the criteria used to select Supreme Court Justice nominees must not be one that has the effect of excluding African American women from *any* consideration for appointment to the High Court.

IV. SOLUTION—EXPAND THE POOL WITH THE USE OF JUDICIAL MERIT SELECTION COMMISSIONS

As discussed in this article, the current criteria are needlessly narrow and unnecessary to select qualified Supreme Court Justices. Moreover, the use of the narrow criteria harms the legitimacy of the Court by thwarting both descriptive and substantive representation, particularly where African American women are concerned.¹⁸⁷ One way to address the problem of the lack of viable African American women Supreme Court Justice candidates is to expand the criteria to include qualified individuals who, like nominees of the past, have varied backgrounds and experiences.

One logical place to begin the expansion would be the inclusion of individuals serving as state court judges.¹⁸⁸ One would expect that expanding the criteria to include state court judges would not pose a problem, particularly when Justice O'Connor, the first female and a well-regarded former member of the Court, was not a federal judge, but rather a state appeals judge in Arizona. However, if Justice O'Connor were nominated today, it is unclear whether (indeed doubtful) she would receive much public or political support. This is so because since Justice O'Connor's nomination, ten of the twelve

185. *Id.*

186. In a recent interview, Justice Ginsburg noted that the male Justices had a blind spot when it came to some women issues. Interview by Katie Couric with The Honorable Ruth Bader Ginsburg, Supreme Court Justice (July 31, 2014) <https://www.yahoo.com/news/video/exclusive-ruth-bader-ginsburg-hobby-091819044.html?ref=gs>.

187. See *supra* Part III.B.

188. While there are also too few African-American female state judges, the representation is better than in the federal judiciary.

nominees (excluding Rehnquist's nomination to be elevated to Chief Justice) were federal appellate judges, and in the public's mind, it is the rule, not the exception, that a Supreme Court Justice nominee will be a federal appellate judge.¹⁸⁹ Thus, it is highly likely that the public-at-large would view an individual with only two years of state judicial experience as lacking.¹⁹⁰ And while many politicians may be well aware that the majority of Supreme Court Justices have not been federal judges, many would nonetheless oppose an individual nominated by a president from the opposing party and cite lack of federal experience as the pre-textual reason for opposition to the nominee, where the real reason for opposition is political.¹⁹¹ These roadblocks hindering the expansion of potential nominees to include state judges also hinder the expansion beyond the other characteristics making up the current, overly narrow criteria.

The solution to the public perception and political gamesmanship problems is a judicial merit selection commission to provide a list of qualified nominees from which the president can select individuals to nominate to the Court. The use of a judicial merit selection commission would not only facilitate the identification and consideration of qualified and diverse individuals, but the system would also quiet the public and political criticism of superbly qualified individuals who do not fit the current Justice mold.

A. Use of Merit Selection Commissions in the Federal Judiciary

The use of judicial selection commissions in the selection of federal judges is not unprecedented. President Jimmy Carter utilized a judicial commission during his presidency, and such use had the in-

189. See Rhodes, *supra* note 70, at 544 ("As the public has become increasingly involved in the confirmation process, the current popular image of judges as neutral referees commands additional respect. And this conception has been realized through appointing to the High Court those who at least superficially appear less enmeshed in identity politics—those engaged in a role in the judicial system (especially federal appellate judges) who have exhibited a propensity for independent, open-minded decisionmaking [sic]. Challenging this public conception is a difficult undertaking, as President George W. Bush learned the hard way.").

190. It bears noting that while O'Connor's nomination gained much national media attention, the public scrutiny of Supreme Court nominees' confirmation hearing in her time was not what it is today. It was not until 1987, with Reagan's failed Robert Bork nomination, that the public took serious notice of confirmation hearings and began to more closely scrutinize the qualification of nominees. See RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 98 (2005) (finding the failed Bork appointment "marked a change in the newsworthiness of Supreme Court nominations," with news stories in the New York Times increasing by thirty-eight percent pre-Bork and post-Bork periods").

191. See Rhodes, *supra* note 70, at 541.

tended effect of making the federal judiciary more diverse. Although President Carter did not have an opportunity to appoint a Justice to the Supreme Court, he appointed more African Americans and women to the federal courts of appeals and district courts than any other president up to that point.¹⁹²

When President Carter took office in 1977, there had been only ten women, twenty-three African Americans, and seven Hispanics ever appointed to the federal bench.¹⁹³ Only one of the female judges was African American.¹⁹⁴ To address the issue of the lack of diversity on the federal bench, President Carter issued Executive Order 11,972 on February 14, 1977, less than a month after his inauguration, which established a commission for the selection of federal circuit judges.¹⁹⁵ Pursuant to the order, each panel of the commission was to include members of both sexes, members of minority groups, and equal numbers of lawyers and non-lawyers. The order specified that the selection panels were to cast their votes wide in seeking judicial candidates, screen and identify those well qualified for a judgeship, and submit to the president the names of five possible nominees within sixty days of the vacancy.¹⁹⁶ President Carter's plan was the first widespread diversity initiative for the federal courts.¹⁹⁷ His three-pronged diversifying approach set out to dismantle the traditional method of selecting lower court judges by the Senate, directed the merit selection committees to make concerted efforts to identify minorities and women for appellate vacancies, and directed the Attorney General to make an affirmative effort to identify qualified candidates, including women and members of minority groups for federal judgeships.¹⁹⁸ On October 20, 1978, he signed the Omnibus Judgeship Act stating: "This act provides a unique opportunity to begin to redress another disturbing feature of the Federal judiciary: the almost complete absence of women or members of minority groups . . . I am committed to these

192. See Scherer, *supra* note 165, at 588.

193. *Biographical Directory of Federal Judges*, *supra* note 119.

194. Constance Baker Motley, appointed by President Lyndon B. Johnson to the U.S. District Court for the Southern District of New York in 1966, was the first African American woman appointed to the federal bench. Amber Fricke & Angela Onwuachi-Willig, *Do Female "Firsts" Still Matter? Why They Do for Female Judges of Color*, 2012 MICH. ST. L. REV. 1529, 1530 (2012).

195. Exec. Order No. 11,972, 42 Fed. Reg. 9659-01 (Feb. 14, 1977).

196. Peter G. Fish, *Merit Selection and Politics: Choosing a Judge of the United States Court of Appeals for the Fourth Circuit*, 15 WAKE FOREST L. REV. 635, 635-36 (1979).

197. See Scherer, *supra* note 165, at 594.

198. *Id.* at 594-95.

appointments, and pleased that this act recognizes that we need more than token representation on the Federal bench.”¹⁹⁹ By the end of his term, President Carter had appointed forty-one women, thirty-three white, and one Hispanic.²⁰⁰ Seven of the female judges were African American.²⁰¹

However, within six months of taking office, President Reagan terminated the commissions and abolished the use of merit selection commissions in the selection of federal judges.²⁰² As previously noted, President Reagan failed to nominate a single African American woman to the federal appellate court during his eight years in office; nor did Reagan’s successor, George H.W. Bush.²⁰³

B. Use of Merit Selection Commissions in Selection of District of Columbia and State Judges

Judicial commissions are being effectively used in the selection of District of Columbia judges and a number of state judges. The District of Columbia has two levels of courts: the Superior Court of the District of Columbia, which is the trial level court; and the District of Columbia Court of Appeals, which is the court of last resort in the District. When Congress passed legislation establishing these courts in 1970, Congress mandated the use of a judicial commission in the selection of D.C. judges.²⁰⁴ Like other federal judges, D.C. judges are nominated by the President and confirmed by the Senate.²⁰⁵ However, the President appoints the judges, who serve a fifteen-year term, from lists submitted by the D.C. judicial nomination commission.²⁰⁶

A number of states also utilize judicial commissions for the selection of their state judges. The first state to employ a judicial merit selection system was Missouri. The Missouri Nonpartisan Selection of Judges Court Plan, commonly known as the “Missouri Plan,” was adopted in November 1940 in response to the public’s increasing dis-

199. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER, 1978, at 1803 (1979)

200. *Biographical Directory of Federal Judges*, *supra* note 119.

201. *Id.*

202. Exec. Order No. 12,305, 46 Fed. Reg. 25,421 (May 5, 1981).

203. Blackburne-Rigsby, *supra* note 114, at 660.

204. *Judicial Selection in the States: District of Columbia*, AM. JUDICATURE SOC’Y, http://www.judicialselection.com/judicial_selection/index.cfm?state=DC (last visited Sept. 18, 2016).

205. *Id.*

206. *Id.* Although District of Columbia judges are federal judges, they are Article I judges, as opposed to Article III judges which are entitled to life tenure. Theodore Voorhees, *The District of Columbia Courts: A Judicial Anomaly*, 29 CATH. U. L. REV. 917, 917 n.3 (1980).

satisfaction with the increasing role of politics in judicial selection and judicial decision-making. The new plan was adopted by initiative referendum and the goal was to fight the widespread abuse of the judicial system by political machines.²⁰⁷ Under this plan, judges are appointed by the governor from lists of nominees compiled by judicial nominating commissions. In 2010, voters refused to support a ballot initiative that would have repealed the non-partisan merit selection process.²⁰⁸

The non-partisan plan has increased the diversity on Missouri's bench. Prior to the nonpartisan plan, only two persons of color had ever been elected to the appellate and supreme courts and only one person of color remained on the bench in 2008.²⁰⁹ Furthermore, under the Missouri Plan, Missouri achieved its first female appellate judge and the first woman on the Supreme Court, its first African American to be named to the appellate bench, and the first African American to be selected for the Supreme Court.²¹⁰ In 1994, there was only one African American judge on the entire appellate bench, only one woman in the Eastern District, one in the Western District, and only one on the Supreme Court.²¹¹ By 2003, there was an African American judge on the Supreme Court, two African American judges in the Western District Court of Appeals and two on the Eastern and a total of nine women on the Court of Appeals and the Supreme Court.²¹² According to a 2008 study conducted by the Brennan Center for Justice, which surveyed ten states with merit selection systems, Missouri's state bench most closely reflects the demographics of the state's population.²¹³ The Missouri Plan has served as a model for a number of other states that use merit selection to fill some or all of the judicial vacancies.²¹⁴

207. *Nonpartisan Court Plan*, MO. CTS., <http://www.courts.mo.gov> (last visited Jan. 7, 2014).

208. MO. LAW INST., JUDICIAL SELECTION & DEMOCRACY ELECTIONS VS. MERIT SELECTION OF JUDGES (2010), http://molawinstitute.com/uploads/Judicial_Selection.pdf.

209. The Honorable Laura Denvir Stith, Address at Judicial Conference to the Missouri Bar During Kansas City Annual Meeting (Sept. 18, 2008), <http://www.courts.mo.gov/page.jsp?id=11923>.

210. Ronnie L. White, Chief Justice, Address to the Missouri Bar at the Annual Judicial Conference in Columbia (Oct. 2, 2003), <http://www.courts.mo.gov/page.jsp?id=1775>.

211. *Id.*

212. *Id.*

213. CIARA TORRES-SPELLISCY ET AL., BRENNAN CTR. FOR JUST. IMPROVING JUDICIAL DIVERSITY 16–17 (2010), https://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf.

214. *See Judicial Selection in the States: Missouri*, NAT'L CTR. ST. CTS., http://www.judicial-selection.us/judicial_selection/index.cfm?state=MO (last visited Sept. 18, 2016).

Connecticut has also adopted a merit plan for the selecting judges. Adopted in 1986, the plan provides that the judicial selection commission provides a list of qualified candidates to the governor for nomination. The governor's nominee must then be appointed by the general assembly.²¹⁵ Although the primary reason for the implementation of the judicial nomination commission was to ensure judicial independence and judicial responsibility, the use of the commission in Connecticut has resulted in diversity, which more closely reflects the demographics of the state.²¹⁶

C. Use of Judicial Merit Selection Commissions in Foreign Countries

Foreign nations have also found the wisdom in using merit selection commissions to ensure judicial diversity. For example, despite its history of apartheid, and certainly because of it, South Africa has designed a system for populating its high court to ensure racial and gender diversity. The South African Constitution, which was enacted in 1996, specifically recognizes the “need for the judiciary to reflect broadly the racial and gender composition of South Africa[.]”²¹⁷ and explicitly provides that diversity “be considered when judicial officers are appointed.”²¹⁸ To facilitate the selection of qualified diverse individuals, the South African Constitution created the Judicial Service Commission (JSC), which is tasked with providing a list of candidates (at least three more than the number of vacancies) from which the South African President selects the Constitutional Court and other court judges.²¹⁹ The Commission is a twenty-three member independent body comprised of judges, lawyers, legislative representatives from each party, and a law professor.²²⁰ When preparing the list of potential nominees, the Commission calls for nominations and con-

215. *Judicial Selection in the States: Connecticut*, NAT'L CTR. ST. CTS., http://www.judicial-selection.us/judicial_selection/index.cfm?state=CT (last visited Aug. 21, 2016).

216. See PUB. SERV. & TR. COMM'N, STRATEGIC PLAN FOR THE JUDICIAL BRANCH 19 (2008), <http://www.jud.ct.gov/committees/pst/StrategicPlan.pdf>; Peter Hardin, *Avenues to Greater Judicial Diversity Explored in Connecticut*, GAVEL GRAB (Aug. 27, 2012), <http://www.gavelgrab.org/?p=42182>; Mark Pazniokas, *For a Diverse Judiciary, Malloy Willing to Buck Tradition*, C.T. MIRROR, (Jan. 19, 2012), <http://www.ctmirror.org/story/2012/01/18/diverse-judiciary-malloy-willing-buck-tradition>.

217. S. AFR. CONST., 1996, § 174(2).

218. *Id.*

219. *Id.* § 174(4)(a).

220. *Id.* § 178(1).

ducts public interviews.²²¹ This procedure was implemented to ensure that qualified and diverse judicial applicants were presented to the South African President. Prior to the use of the JSC the South African judiciary was almost exclusively white and male.²²² Since the implementation of the JSC, the South African judiciary, while not as diverse as it is one day hoped to be,²²³ is far more diverse than it once was.²²⁴

The United Kingdom also uses a judicial selection commission. The Constitutional Reform Act of 2005 created the Judicial Appointments Commission, which is responsible for appointments of judges based solely on merit. The commission is comprised of fifteen members, seven of which are judges and magistrates, two lawyers, and six laymen.²²⁵ The reform came out of a concern regarding the lack of minorities and women on the bench.²²⁶

The use of judicial merit selection commissions is a demonstrated way to ensure diversity of courts. As diversity of the judiciary at all levels is recognized to be valuable, the use of commissions in widening the pool to include qualified diverse applicants should be a method employed.

221. *The Judicial Service Commission*, DEP'T JUST. & CONST. DEV., <http://www.justice.gov.za/faq/faq-jsc.html> (last visited Sept. 15, 2016).

222. Ruth B. Cowan, *Women's Representation on the Courts in the Republic of South Africa*, 6 U. MD. L.J. RACE RELIGION GENDER & CLASS 291, 298 (2006) ("In 1994, for instance, one hundred and sixty-one of the one hundred and sixty-six superior court judges were white males. There were only two women judges, one of whom the apartheid government had appointed as it departed. The almost all white, all male apartheid judges were, by agreement, to remain in their positions, and many of these judges maintained, as one report documented, the values and attitudes that aided and abetted a system of injustice.") (internal citations omitted).

223. See generally *id.* (discussing South Africa's efforts to promote gender equality and women's rights in the country).

224. The South African Constitutional Court is currently comprised of six Black South Africans, four White South Africans, eight men, and two women, both of whom are Black South Africans. See generally *Current Judges*, CONST. CT. OF S. AFR., <http://www.constitutionalcourt.org.za/site/judges/currentjudges.htm> (last visited Oct. 6, 2016) (directing readers to click on the eight judges' links to learn more about each one of them).

225. KATE MALLESON & RICHARD MOULES, *THE LEGAL SYSTEM* 212 (4th ed. 2010). See generally Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504 (2002) (exploring the differences in the appointment and election method of state court justices in an effort to promote gender diversity); Kate Malleson, *Rethinking the Merit Principle in Judicial Selection*, 33 J.L. & SOC'Y 126 (2006) (exploring the reasons behind the consistent rejection of affirmative action policies in relation to the judicial appointment process).

226. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 16-17 (Coase-Sandor Instit. for Law & Econ., Working Paper No. 444, 2008).

CONCLUSION

While diversity on the U.S. Supreme Court has certainly increased with three current female justices, one of whom is a Latina, the future of diversity in terms of the selection of an African American female to fill a seat on the High Court does not look so bright. The emergence of elitist and exclusionary criteria will ensure that many highly qualified individuals of all genders and ethnicity will be overlooked as potential Supreme Court Justices. However, these criteria will have a particularly devastating effect of consideration of female African American lawyers. As our society becomes more diverse and as the legal profession becomes more diverse, it is vital that the means by which we select Justices to serve on the Highest Court in the land facilitate the creation of a diverse Court.

Racial Origins of Doctrines Limiting Prisoner Protest Speech

ANDREA C. ARMSTRONG*

ABSTRACT	221
INTRODUCTION	222
I. PRISONERS' UNPROTECTED PROTESTS	226
A. Ineffective Legal Methods of Protest	229
B. Punishment for Protest	232
II. <i>ADDERLEY V. FLORIDA</i>	236
A. Adderley and Race	236
B. Adderley's Impact	242
III. <i>JONES V. NORTH CAROLINA PRISONERS'</i> <i>LABOR UNION, INC.</i>	248
A. Jones and Race	248
B. Jones' Impact	257
IV. RACE, PROTEST, AND INCARCERATION	261
CONCLUSION	263

ABSTRACT

This Article examines the racial origins of two foundational cases governing prisoner protest speech to better understand their impact in light of the Black Lives Matter movement. Two Supreme Court cases provide the primary architecture for the regulation of prisoner or detainee speech. The first, *Adderley v. Florida*, is (mis)interpreted for

* Associate Professor of Law, Loyola University New Orleans College of Law. Yale (J.D.); Princeton (M.P.A). Thanks to Brittany Beckner, Katherine Cochrane, Emma Douglas, Emily Posner, and Victor Jones for their tremendous research efforts and the Dean of Loyola for financial assistance during the writing of this paper. This Article and argument have evolved over time and I owe a debt of gratitude to Arianna Freeman, Isabel Medina, Hope Metcalf, Margo Schlanger, Rob Verchick, and participants in the Latina and Latino Critical Theory Conference (LATCRIT), the Law and Society Association, the Lutie Lytle Writing Workshop, the Tulane Faculty Forum, the Tulane Forum on the Future of Law & Inequality, and the Southern University Law & Society Faculty Forum, for their comments on earlier versions of this Article. This Article could not have been written without the support of Jean Ewing and Alice Riener.

the proposition that jails (and by analogy, prisons) are non-public spaces. Under First Amendment doctrine, non-public spaces are subject to heightened regulation and suppression of speech is authorized. The second, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, amplifies the effect of *Adderley* and prohibits prisoner solicitation for union membership. Together, these two cases effectively provide broad discretion to prison administrators to punish prisoners and detainees for their protest speech. Neither *Adderley* nor *Jones* acknowledges its racial origins. Holdings in both cases relied on race-neutral rationales and analysis, and yet the underlying concerns in each case appear tied to racial concerns and fears. Thus, this Article is a continuation of a broader critical race praxis that reminds us that seemingly objective and neutral doctrines themselves may incorporate particular ideas and notions about race. Today's protesters face a demonstrably different doctrinal landscape: should they protest within the prison or jail walls? While the content of speech by a Black Lives Matter activist may not change, the constitutional protection afforded to that speech will be radically different depending on where she speaks.

INTRODUCTION

Two inmate welders refused a direct order to build a lethal injection gurney to replace the electrocution chair at a state maximum security prison.¹ They were placed in administrative segregation – solitary confinement in a single cell for 23 hours a day – for their protest.² The next day, the other 37 welders, including one whose brother had been executed in the outgoing electric chair, similarly refused and were similarly punished.³ Hundreds of inmates assigned to farm the 18,000-acre prison engaged in a work stoppage to protest both the order and the punishment of their fellow inmates.⁴ Ultimately, the warden rescinded the order, but not before issuing hundreds of disciplinary reports to the inmates (which can affect everything from inmate classification to privileges to parole) and placing many in isolation.⁵ None of these inmates could claim their protest was protected

1. WILBERT RIDEAU, IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE 224 (2010).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 227–29.

by the First Amendment of the U.S. Constitution and thereby challenge their punishments.

While the U.S. Constitution does not stop at the prison wall, certain constitutional rights are limited once exercised within carceral facilities.⁶ Some constitutional rights, such as the right to be free from discrimination under the Equal Protection Clause of the Fifth and Fourteenth Amendment,⁷ apply with equal force whether or not an individual is incarcerated.⁸ At the other end of the spectrum, the right to bear arms under the Second Amendment is non-existent for the incarcerated.⁹ In between these two extremes, the exercise of constitutional rights of the incarcerated differs from the non-incarcerated, depending on the right claimed and the security concerns of the detention facility.

The First Amendment rights to freedom of speech, expression, and association are especially limited in the carceral context. “[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penal objectives of the correctional system.”¹⁰ Courts have applied this rule to limit and/or regulate: the content of incoming mail for prisoners, visitation, prisoner-to-prisoner contact, and media access, among other things.¹¹

6. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 545–46 (1979) (standing for the proposition that the retention of constitutional rights in prison is not without limitations and applies equally to pretrial detainees and convicted prisoners); *Overton v. Bazzetta*, 539 U.S. 126, 137 (2003) (holding that limits on visiting rights of inmates does not violate the First Amendment right to free association).

7. Although the Fifth Amendment does not contain the actual text of the Equal Protection Clause, the Supreme Court has interpreted the Fifth Amendment’s guarantee of due process by federal authorities to incorporate the guarantees of the Equal Protection Clause of the Fourteenth Amendment, which applies to states. See generally *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial segregation in D.C. public schools constituted a denial of the due process guaranteed by the Fifth Amendment).

8. See *Johnson v. California*, 543 U.S. 499 (2005) (finding that strict scrutiny similarly applied to the racial classification of an incarcerated individual).

9. 18 U.S.C. § 1791 (2010). The right to bear arms is even limited for those re-entering society after incarceration, depending on the crime and state and federal law. E.g., 18 U.S.C. § 922(g)(1) (2015) (“It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”); N.C. GEN. STAT. ANN., § 14-415.1 (West 2016); see, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (acknowledging the validity of limits on firearm ownership by felons while upholding the individual right to bear arms).

10. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

11. See, e.g., Ronald Kuby & William Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 CREIGHTON L. REV. 1005, 1015–19 (1993) (surveying cases of diminished First Amendment rights for prisoners).

In this Article, I focus on a very specific type of First Amendment speech: prisoner¹² protest speech. I use the term “protest speech” to describe nonviolent conduct and direct action methods typically employed by the Civil Rights movement.¹³ These include organizing, sit-ins, work slowdowns or stoppages, hunger strikes, petitioning, etc. “Protest speech” can involve elements of speech, expression, and association depending on how the protest is conducted.

As the example of inmate welders in Angola demonstrates, a prisoner can be punished by prison authorities for protesting inhumane conditions in the facility where he is incarcerated. Despite the Court’s emphasis that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,”¹⁴ courts have generally not been receptive to First Amendment protection for prisoners engaged in protest. Lower courts have almost uniformly held that protestative acts – such as drafting, circulating, or signing petitions or work stoppages – are not protected speech.¹⁵ Punishments vary but can run the gamut from solitary confinement to loss of visiting privileges. And prisoners continue to risk punishment, in part because, in a few cases, protest actually led to changes.¹⁶

Two Supreme Court cases provide the primary architecture for the regulation of prisoner or detainee speech. The first, *Adderley v.*

12. This Article uses the terms detainee and prisoner interchangeably to refer to those involuntarily incarcerated. Detainee usually refers to those who are incarcerated but not yet convicted. For detainees, their conditions of confinement claims are governed by the due process clauses of the Fifth and Fourteenth Amendments. Prisoners are those who have been criminally convicted and their conditions claims would be brought under the Eighth Amendment’s ban on cruel and unusual punishment. Though prisoner and detainee are distinct terms, for purposes of this First Amendment analysis, the constitutional rules limiting speech are the same.

13. Thus the term “protest speech” includes “symbolic speech” (i.e. speech that is “communicative in character” such as display of certain symbols or flags), “speech-plus conduct” (i.e. acts that consist of both expression and conduct such as sit-ins and picketing), as well as the more typical direct speech (i.e. letter writing, actual utterances). See D. Sneed & Harry W. Stonecipher, *Prisoner Fasting as Symbolic Speech: The Ultimate Speech-Action Test*, 32 How. L.J. 549, 549–50 (1989).

14. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

15. See *infra* Part II.B. But see *Birde v. Dave Gomez*, No. 13-CV-6864, 2016 WL 6070173, at *6 (N.D. Ill. Oct. 17, 2016) (finding hunger strikes were protected First Amendment activity, which was then dismissed based on defendant’s claim of qualified immunity); *Nicholas v. Miller*, 109 F. Supp. 2d 152, 156 (S.D.N.Y. 2000) (acknowledging that a few courts have recognized “political association” claims for impact litigation, but distinguishing protest from litigation).

16. See Heather Ann Thompson, *Rethinking Working-Class Struggle Through the Lens of the Carceral State: Toward a Labor History of Inmates & Guards*, 8 LAB. 15, 29 (discussing how inmate protests “helped pave the way” for improved work environments and limited governance input).

Florida,¹⁷ is (mis)interpreted for the proposition that jails (and by analogy, prisons) are non-public spaces. Under First Amendment doctrine, non-public spaces are subject to heightened regulation and suppression of speech is authorized. The second, *Jones v. North Carolina Prisoners' Labor Union, Inc.*,¹⁸ amplifies the effect of *Adderly* and prohibits prisoner solicitation for union membership. Together, these two cases effectively provide broad discretion to prison administrators to punish prisoners and detainees for their protest speech.

It is generally accepted that our country's fascination with incarceration disproportionately impacts minority communities.¹⁹ Approximately 2.3 million people are incarcerated at any given time by federal, state, and local governments.²⁰ Over the last 40 years, the rate of incarceration in the United States has increased by approximately 500%.²¹ African Americans and Latinos comprise 56% of the incarcerated, but only represent 30% of the total U.S. population.²² Beginning in the 1970's, the United States' incarceration rate increased sharply, "but much more in absolute terms for African Americans than for whites."²³ This stems, in part, from the criminalization of urban spaces following the gains of the Civil Rights era.²⁴ The racial disparities in incarceration prompted Loïc Wacquant to argue that the term "mass incarceration" shrouds the "hyper-incarceration" of primarily poor African American men from urban areas.²⁵ This fasci-

17. See *Adderley v. Florida*, 385 U.S. 39 (1966) (finding that because a jail facility is not a public forum and a state may regulate the use of its property, the First Amendment rights of the protesters were not violated).

18. See *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119 (1977) (finding that inmates do not have a right under the First Amendment to join labor unions).

19. NAT'L RESEARCH COUNCIL OF NAT'L ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 56 (Jeremy Travis and Bruce Western eds., 2014) [hereinafter GROWTH OF INCARCERATION].

20. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POLICY INITIATIVE (Mar. 14, 2016), <http://www.prisonpolicy.org/reports/pie2016.html>. The 2.3 million includes immigration detention, juvenile facilities, involuntary civil commitments and military detention, in addition to jail and prison populations. If we only look at state and federal jail and prison criminal detentions, the U.S. incarcerated approximately 1.5 million people in 2014. See E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

21. Nicole D. Porter, *Unfinished of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 WAKE FOREST J.L. & POL'Y 1, 3 (2016).

22. *Id.* at 6.

23. GROWTH OF INCARCERATION, *supra* note 19, at 58.

24. Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, J. AM. HIST. 703, 706 (2010).

25. Loïc Wacquant, *Class, Race, & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74 (2010).

nation with incarceration has created a “carceral state,” that exists “to exclude and control those people officially labeled as criminals.”²⁶

But what is missing in part from this conversation about incarceration is that in certain cases, the doctrinal rules that govern prisoner behavior themselves emerge out of specific racial contexts. Neither *Adderley* nor *Jones* acknowledges its racial origins and yet, I argue it is critical to understand the racial context in order to fully understand the impact of these two opinions. Holdings in both cases relied on race-neutral rationales and analysis and yet, the underlying concerns in each case appear tied to racial concerns and fears. Thus this Article is a continuation of a broader critical race praxis that reminds us that seemingly objective and neutral doctrines themselves may incorporate particular ideas and notions about race.²⁷

Part I of this Article explores the current risks for inmates who protest within the prison or jail walls. Part II explores *Adderley* with a particular focus on unearthing the racial dimensions of the case. Part III examines *Jones* to fully understand the impact of *Adderley* and the implications for the Civil Rights movement. Part IV places these two cases within the larger racial context of the African American Civil Rights movement. This critical race perspective is essential to understanding judicial reluctance to protect protests within carceral facilities and the doctrine facing today’s Black Lives Matter activists.

I. PRISONERS’ UNPROTECTED PROTESTS

Despite the lack of legal protection, inmates engage in protests to draw attention to prison conditions and laws that eliminate or reduce the possibility of early release. Most recently, in Fall 2016, prisoners across the nation engaged in a coordinated labor strike to protest their involuntary labor. The strike involved at least 29 facilities across 12 states and organizers claimed at least 24,000 prisoners are participating.²⁸ This national strike is the culmination of increasing isolated protests within local facilities and prisons. In 2014 and again in 2016, inmates in Alabama claim to have staged massive work stoppages as a

26. Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 261 (2011).

27. See, e.g., Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2262 (1992) (describing critical race methodology in personal terms and reflecting on the non-neutrality of the law and scholars).

28. Josie Duffy Rice, *The Biggest Prison Strike in American History Is Happening Now*, DAILY KOS (Oct. 4, 2016, 1:27 PM), <http://www.dailykos.com/story/2016/10/4/1577788/-The-biggest-national-prison-strike-in-American-history-is-happening-now>.

form of protest.²⁹ The Alabama Department of Corrections acknowledged that there had been a disturbance at the prison starting on January 1, 2014.³⁰ A spokesman for the prison said that inmates at St. Claire and Holman Correctional facilities had refused to work in the kitchen and the laundry, stating that they would like to be paid for their work.³¹ (The Thirteenth Amendment provides for an exception to the general prohibition on forced labor for those convicted of a crime.)³² An inmate who spoke with reporters stated that “all the prisoners” at both of the prisons were participating, which would be approximately 2,500 prisoners.³³ The Alabama Department of Corrections offered a different account, reporting that only a handful of inmates refused to report to work.³⁴ The inmates grievances included overcrowding, dissatisfaction with the mental health treatment available at the prison, the inadequacy of prison food, dissatisfaction with inmates’ wages, and lack of educational opportunities.³⁵ Similarly, in May 2016, inmates at two additional facilities in Alabama refused to perform their work assignments.³⁶ Inmates at the facilities said they were protesting the conditions of their confinement, good time calculations, and parole.³⁷ The work stoppage included more than 300 inmates at one facility alone.³⁸ Both facilities were put on lockdown because of the strikes.³⁹ The prisoners emailed a list of demands to the media that included the following: abolishing sentences of life

29. Brandon Moseley, *Alabama Prisoner’s Strike Continues*, ALA. POL. REP. (Jan. 7, 2014), <http://www.alreporter.com/alabama-prisoners-strike-continues/>.

30. *Id.*

31. *Id.*

32. See Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 846 (2012) (arguing that the “convict exception” in the Thirteenth Amendment should be interpreted as an exception to “involuntary servitude” but not to the prohibition on slavery).

33. Moseley, *supra* note 29. The Holman Correctional facility has a capacity for 1,002 inmates and the St. Clair Correctional facility has a capacity of 1,514. *Holman Correctional Facility*, ALA. DEP’T OF CORRECTIONS, <http://www.doc.state.al.us/facility.aspx?loc=33> (last visited Oct. 17, 2016); *St. Clair Correctional Facility*, ALA. DEP’T OF CORRECTIONS, <http://www.doc.state.al.us/facility.aspx?loc=21> (last visited Nov. 2, 2016).

34. Josh Eidelson, *Exclusive: Inmates to Strike in Alabama, Declare Prison Is “Running a Slave Empire”*, SALON (Apr. 18, 2014), http://www.salon.com/2014/04/18/exclusive_prison_inmates_to_strike_in_alabama_declare_they’re_running_a_slave_empire/.

35. *Id.*

36. Connor Sheets, *Inmates at Multiple Alabama Prisons Go on Strike in Protest Against System, Conditions*, ALABAMA.COM (May 02, 2016, 3:35 PM), http://www.al.com/news/index.ssf/2016/05/inmates_at_multiple_alabama_pr.html.

37. *Id.*

38. Raven Rakia, *Hundreds of Inmates Across Alabama Have Gone on Strike to Protest ‘Prison Slavery’*, VICE NEWS (May 13, 2016, 1:45 PM), <https://news.vice.com/article/hundreds-of-inmates-across-alabama-have-gone-on-strike-to-protest-prison-slavery>.

39. *Id.*

without parole for first time offenders; repealing the Habitual Felony Offender Act;⁴⁰ implementing education, rehabilitation and reentry programs; expanding the Alabaman Innocence Inquiry Commission; and ending prison slavery.⁴¹

In April 2016, inmates went on simultaneous strikes at seven Texas state prisons.⁴² The prisoners refused to leave their cells and report for their work assignments.⁴³ The Texas Department of Corrections responded by imposing lockdown restrictions in all seven facilities.⁴⁴ The demands, communicated by the Incarcerated Workers Organizing Committee (“IWOC”), an inmate advocacy group with contacts inside of Texas state prisons, included humane living conditions, a repeal of the \$100 medical co-pay, a right to an attorney for habeas corpus proceedings, and creation of an oversight committee for the operation of Texas jails and prisons.⁴⁵

Sometimes the protest takes the form of a hunger strike. In March 2016, approximately 1,000 of the 1,300 inmates at the Kinross Correctional Facility in the upper peninsula of Michigan engaged in a silent protest over food conditions at the facility.⁴⁶ The next day, a similar number refused to eat the meals provided by the prison.⁴⁷ The next day, only about 40 prisoners came to breakfast, compared to the usual 500.⁴⁸ That same day, 60 inmates came to lunch and only 30 for dinner.⁴⁹ Over 1,200 inmates normally go to each of those meals.⁵⁰ Inmates also engaged in silent protests at the Michigan facility by leaving the yard 20 minutes early to protest the food conditions.⁵¹

40. The Habitual Felony Offender Act is Alabama’s version of a “three-strikes” law and has led to life sentences for some repeat offenders convicted of drug charges and other low-level, nonviolent offenses. *Id.*

41. *Id.*

42. Chase Hoffberger, *Texas Inmates Strike for Better Conditions: Inmates at Seven State Prisons Have Refused to Leave Their Cells*, AUSTIN CHRON. (Apr. 6, 2016, 12:28 PM), <http://www.austinchronicle.com/daily/news/2016-04-06/texas-inmates-strike-for-better-conditions/>.

43. *Id.*

44. *Id.*

45. Kriston Capps, *Texas Prison Inmates Strike for Unionization*, CITY LAB (Apr. 8, 2016), <http://www.austinchronicle.com/daily/news/2016-04-06/texas-inmates-strike-for-better-conditions/>.

46. Paul Egan, *Prisoners Protest Food Under New Contractor Trinity*, DETROIT FREE PRESS (Mar. 22, 2016, 8:08 PM), <http://www.freep.com/story/news/local/michigan/2016/03/22/prisoners-protest-food-under-new-contractor-trinity/82120158/>.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

There is certainly evidence that would support the inmates' concerns about inhumane treatment. Prisoners have been denied adequate and life-saving medical care;⁵² may live in unsanitary conditions including a lack of running water;⁵³ may endure repeated assaults by both guards and other inmates; and can be forced in some cases to become a slave to the state.⁵⁴ Case law is replete with modern-day examples of unconstitutional prison conditions including lack of running water, unsanitary facilities, repeated excessive force, extreme heat or cold, sexual assault, and failure to provide necessary (and sometimes life-saving) medical treatment.⁵⁵

In addition, over the last few decades, many states have taken a more punitive approach to sentencing. Across the United States, governments have adopted laws that have contributed to increased sentence lengths for the incarcerated, ranging from mandatory minimum sentences to three strikes/habitual offender laws to removing the possibility of parole from life sentences.⁵⁶ Many of these particularly punitive laws apply to crimes for which minorities are disproportionately arrested.⁵⁷ Thus, not only may inmates experience inhumane treatment, but they are also subject to that inhumane treatment for longer lengths of time.

A. Ineffective Legal Methods of Protest

Inmates have few legal methods to challenge these types of prison conditions. Prisoners may describe the conditions in written outgoing mail to family, friends, politicians and the media for example.⁵⁸ While protection for outgoing mail is certainly one of the strongest constitutional protections for inmates, it is also distinctly inefficient as a means of protest particularly in the age of mass incarceration. Many prisoners are serving longer sentences, with a higher percentage serving life sentences⁵⁹ and often in locations remote from their families and communities.⁶⁰ As a result, family and social ties

52. *Brown v. Plata*, 563 U.S. 493, 504 (2011).

53. *Id.*

54. *Armstrong*, *supra* note 32, at 869–70.

55. *See, e.g., Brown*, 563 U.S. at 493–514.

56. GROWTH OF INCARCERATION, *supra* note 19, at 89.

57. *Id.* at 91.

58. *E.g., Procunier v. Martinez*, 416 U.S. 396, 400 (1974); *Turner v. Safley*, 482 U.S. 78, 78 (1987); *Pell v. Procunier*, 417 U.S. 817, 824 (1974).

59. GROWTH OF INCARCERATION, *supra* note 19, at 52–54.

60. Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons* (Oct. 20, 2015), PRISON POL'Y INITIATIVE, <http://www.prisonpolicy.org/reports/prisonvisits>

are strained and even broken and thus unavailable as potential prisoner advocates.⁶¹ Moreover, the poor and minorities are disproportionately represented in prison⁶² and even where such social ties remain, they are likely ineffective in penetrating traditional centers of power from which the poor and minorities are historically excluded.⁶³ As such, mailing protests outside the prison walls – while a protected First Amendment right – is in practice often meaningless as a form of protest.

Prisoners have also engaged in hunger strikes, in effect hurting only themselves in their refusal to eat. Hunger strikes may be unprotected in two different ways. First, courts have been divided on whether or not hunger strikes are protected First Amendment activity and the U.S. Supreme Court has not directly addressed the issue. For example, the Fifth Circuit has held that hunger strikes *may* constitute protected activity in certain circumstances.⁶⁴ A federal court in Illinois recently found that a hunger strike did constitute protected activity, while simultaneously finding the claim failed to survive defendant's claim of qualified immunity, because the right to engage in the hunger strike was not clearly established.⁶⁵ Second, even if it is protected, courts have held that wardens may forcibly feed hunger striking prisoners when medically necessary, effectively ending the prisoners' protest.⁶⁶ Wardens have argued that hunger strikes disrupt security and order in prisons, though with little supportive evidence.⁶⁷ Instead, wardens speculate that the death of a hunger striker will incite prison unrest and that the medical needs of the hunger striker drains resources from other necessary prison tasks.⁶⁸ Though wardens have failed to proffer actual examples and data to support their con-

.html. *But see* GROWTH OF INCARCERATION, *supra* note 19, at 40 (noting that 1/3 of the incarcerated population are housed in jails, which may be closer to home).

61. *See* GROWTH OF INCARCERATION, *supra* note 19, at 262.

62. *Id.* at 202–03.

63. *See* Atiba R. Ellis, *Race, Class, and Structural Discrimination: On Vulnerability Within the Political Process*, 28 J. CIV. RTS. & ECON. DEV. 33, 34 (2015).

64. *Stefanoff v. Hays Cty., Tex.*, 154 F.3d 523, 527 (5th Cir. 1998).

65. *Birido v. Dave Gomez*, No. 13-CV-6864, 2016 WL 6070173, at *6 (N.D. Ill. Oct. 17, 2016).

66. *See, e.g.*, Mara Silver, Note, *Testing Curzan: Prisoners and the Constitutional Question of Self-Starvation*, 58 STAN. L. REV. 631, 648 (2005).

67. Steven C. Bennett, *The Privacy and Procedural Due Process Rights of Hunger Striking Prisoners*, 58 N.Y.U. L. REV. 1157, 1210–17 (1983) (summarizing cases where prison officials have argued that hunger strikes present an institutional threat).

68. *Id.* at 1211–12.

clusions, some courts have nevertheless adopted these arguments in allowing prisoners to be force-fed.⁶⁹

Prisoners may also file a civil suit, but under the Prison Litigation Reform Act, prisoners must first exhaust the prison's internal administrative grievance process.⁷⁰ Filing written individual grievances with the prison administration is generally considered protected speech for prisoners under the First Amendment.⁷¹ Others have exhaustively detailed the myriad of problems with the prisoner grievance requirements,⁷² including problems in accessing prison rules and regulations, the lack of a clear procedure for filing grievances, the failure of prison authorities to meaningfully review the grievances, etc. In addition, transfer between institutions and even release can complicate the grievance filing process. For purposes of this Article, the filing of a civil suit poses two difficulties as an avenue of effective prisoner protest. First, the reasons for the protest are often, but not always, an immediate need but the grievance and civil suit process is long.⁷³ In my opening example of inmates refusing to build the lethal-injection gurney, the crisis was immediate and the process was ill-equipped to address the inmates' protests. The second difficulty is tied to the first. Where lower courts have failed to recognize a First Amendment right to nonviolent protest for prisoners, prison authorities may be less cautious in their suppression and punishment of that unprotected speech.

As a result of these legal but ineffective methods of protest, prisoners have engaged in a variety of unprotected activities to challenge their conditions, which I call "protest speech." "Protest speech" for purposes of this Article includes a range of traditional community organizing and civil rights tools, all of which are nonviolent acts. Examples include sit-ins, work stoppages and slow downs, petitions, and hunger strikes. None of these actions is designed to encourage violence, lead to escape, or otherwise threaten the safety of prisoners or staff. Yet each of these acts is accompanied by a demand.

69. *Id.*

70. 42 U.S.C. § 1997(e) (1996).

71. *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008).

72. See Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 139–40 (2008); Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291 (2007); Margo Schlanger, *Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts*, 69 U. MIAMI L. REV. 519 (2015).

73. See *infra* Part II.A.

B. Punishment for Protest

When prisoners engage in protest speech, however, they may, in some states, be convicted of additional offenses based on their acts of protest and be internally disciplined by prison authorities for disruption to the order and security of prisons.

Several states have specific criminal offenses that capture acts of protest in correctional institutions.⁷⁴ Some of these statutes define the terms “riot” and “strike” so broadly that nonviolent acts of protest become criminal acts.⁷⁵ Admittedly, it is unclear to what extent inmates are actually prosecuted under these statutes for nonviolent conduct. As a general matter, trial court convictions (unless appealed) are less commonly available in legal databases.⁷⁶ Moreover, even if an inmate is charged, an inmate may plead guilty to a lesser offense to obtain a more favorable sentence. But even if inmates are not currently being prosecuted for nonviolent protest under these statutes, the statute’s very existence may serve as a caution to engaging in protest within the prison walls.

In Connecticut, for example, a prisoner engaged in nonviolent protest may be criminally convicted of “rioting at [a] correctional institution” under Conn. Gen. Stat. § 53a-179b(a) (2011). Sub-section (a) of the statute provides:

A person is guilty of rioting at a correctional institution when he incites, instigates, organizes, connives at, causes, aids, abets, assists

74. *E.g.*, COLO. REV. STAT. ANN. § 18-8-211 (West 2016) (designating violent conduct in combination with two or more others a felony); CONN. GEN. STAT. ANN. § 53a-179c (West 2016) (designating inciting to riot at a correctional institution as a class C felony); FLA. STAT. ANN. § 944.45 (West 2016) (designating mutiny, riot, or strike in a correctional facility as a second degree felony); GA. CODE ANN. § 16-10-56 (West 2016) (designing act of violence or other tumultuous act a felony); MICH. COMP. LAWS ANN. § 752.542a (West 2016) (designating violent conduct within a facility with three or more people a crime); N.Y. PENAL LAW § 240.06 (McKinney 2016) (designating riot in the first degree as a class E felony); OHIO REV. CODE ANN. § 2917.02 (West 2016) (designating aggravated riot as a felony), and § 2917.03 (designating riot as a misdemeanor); 11 R.I. GEN. LAWS ANN. § 11-38-5 (West 2016) (designating riot within a correctional facility a crime); S.C. CODE ANN. § 24-13-430 (2010) (designating rioting in a facility as a felony); WASH. REV. CODE ANN. § 9.94.010 (West 2016) (defining the gathering of two or more inmates for the purpose of disturbing the “good order” of the institution either through the use or threat of violence or force as engaging in a riot); *see also* W.VA. CODE ANN. § 62-8-1 (West 2005) (creates felony crime for resisting lawful authority of guard or officer).

75. *E.g.*, 11 R.I. GEN. LAWS ANN. § 11-38-5 *But see, e.g.*, 18 U.S.C. § 1792 (2012) (defining riot for purposes of federal criminal offense of riot or mutiny in penal institutions as encompassing “violent” actions); MICH. COMP. LAWS ANN. § 752.542a (West 2016) (requiring both violence and threat or harm to safety of others).

76. *See generally* *Privacy/Public Access to Court Records*, NAT’L CTR. FOR ST. CT., <http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links.aspx> (last visited Nov. 14, 2016) (showing how many states give access to convictions on databases).

or takes part in any disorder, disturbance, *strike*, riot or other *organized disobedience* to the rules and regulations of such institution.⁷⁷

As Justice Scalia observed in *Johnson v. U.S.*, “[w]ho is to say which the ordinary “disorder” most closely resembles—a full-fledged prison riot, a food-fight in the prison cafeteria, or a “passive and non-violent [act] such as disregarding an order to move.”⁷⁸ In striking the residual clause of the Armed Career Criminal Act that covered “violent felonies” as void for vagueness, the Supreme Court also acknowledged that an inmate could be prosecuted for nonviolent conduct under the Connecticut rioting statute.⁷⁹

In Florida, a prisoner may be convicted of the felony of “mutiny, riot, strike” if she “instigates, contrives, willfully attempts to cause, assists, or conspires to cause any mutiny, riot, or strike in defiance of official orders, in any state correctional institution.”⁸⁰ In addition, Florida law provides for a misdemeanor for any person who “interferes with or in any way interrupts the work of any prisoner under the custody of the department or who in any way interferes with the discipline or good conduct of any prisoner.”⁸¹ Thus, a prisoner who organizes a hunger strike or sit-in may be exposed to additional criminal penalties for their nonviolent protest.

Beyond the criminal statutes governing riots and disturbances in prison, at least one state also criminalizes a particular form of protest when that protest occurs in prison. In Louisiana, an inmate convicted of “self-mutilation by a prisoner” could be sentenced to up to two additional years consecutive to the sentence being served.⁸² One de-

77. CONN. GEN. STAT. § 53a-179b(a) (2011) (emphasis added).

78. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) (holding that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (“ACCA”) violates the Constitution’s guarantee of due process). The Court expressly overruled the Second Circuit’s rationale upholding the residual clause when the Second Circuit held that though the statute had the potential to apply to nonviolent conduct, reported cases of prosecutions under this statute involved either use of a weapon or resulted in injury to a guard, an inmate, or both. *U.S. v. Johnson*, 616 F.3d 85 (2d Cir. 2010) (holding that conviction under this statute may be considered a violent felony for purposes of the Armed Career Criminal Act).

79. *Johnson*, 135 S. Ct. at 2560.

80. FLA. STAT. ANN. § 944.45 (West 2016).

81. *Id.*

82.

A. Self-mutilation by a prisoner is the intentional infliction of injuries to himself by a prisoner incarcerated in any state penitentiary or any local penal or correctional institution or while in the lawful custody of a peace officer, or the procuring or permitting of another person to inflict injury on such prisoner by means of shooting, stabbing, cutting, applying chemicals or other substances to the body, drinking or eating poisonous or toxic substances, or in any manner, when such results in permanent or temporary injury.

fendant was sentenced to an additional four years in prison after being charged with “attempting to hang himself with a sheet, sticking his finger in a light socket, cutting his wrist and arm with a blunt metal instrument on three occasions, and sticking a radio antenna in his side” although the motivation for these acts is unclear.⁸³

Prisons may also have internal rules that prohibit nonviolent protest and suffer disciplinary action as a result. For example, New York’s Department of Corrections Standards of Inmate Behavior Rule 104.12 provides that “inmates shall not lead, organize, participate or urge other inmates to participate in sit-ins, lock-ins, or other actions which may be detrimental to the order of the facility.”⁸⁴ As a result of violating these internal rules, prisoners may lose canteen privileges, earned good time credits, certain work assignments, and even be subject to administrative segregation or placement in secure housing units. For example, the punishment for circulating a petition in a Texas federal prison included forfeiture of 30 days of statutory good time, placement in disciplinary segregation for 15 days and recommendation for a disciplinary transfer.⁸⁵ In Georgia, an inmate may be disciplined for “[f]ailure to perform or complete any work, training, or other assignment, as ordered, directed or instructed, either verbally or in writing by a staff member,” whether that protest is individual or part of a group.⁸⁶ In Illinois, the punishment for engaging in a hunger strike can include loss or restriction of privileges, revocation of good time, or segregation for up to a year.⁸⁷ Even if a prisoner were to prevail in an underlying lawsuit regarding inhumane conditions, the disciplinary punishment for protesting would remain untouched. The court-ordered remedy would address the conditions but not the punishment, unless the prisoner could prove that the punishment constituted retaliation by prison officials for the original protest. However, most retaliation claims for protest speech fail because

B. Whoever commits the crime of self-mutilation by a prisoner shall be imprisoned at hard labor for a term not exceeding two years. Any sentence imposed under this Section shall run consecutively to any other sentence being served by the offender at the time of the offense.

LA. STAT. ANN. § 14:404 (2016).

83. *State v. Bay*, 503 So. 2d 745, 746 (La. Ct. App. 1987), *writ denied*, 506 So. 2d 1223 (La. 1987).

84. N.Y. COMP. CODES R. & REGS. 7 § 270.2(B)(5)(iii) (2016).

85. *Adams v. Gunnell*, 729 F.2d 362, 365 (1984).

86. Ga. Dep’t of Corr., Inmate Handbook, 125-3-2-.04 2(i), 16.

87. Ill. Adm. Code tit. 20, § 504. App’x. A Offense Numbers and Definitions (Feb. 28, 2014).

an essential element of establishing a retaliation claim is that the prisoner was engaging in protected speech.⁸⁸

Courts have acknowledged constitutional protection for prisoner protests in very limited circumstances. First, certain types of protests – such as hunger strikes discussed above – may be protected. The second type of protection offered emerges from the Due Process Clause of the Fifth and Fourteenth Amendments. Prisoners have been slightly more successful in filing procedural due process claims challenging the punishment for their protest speech. In those cases, which mainly consist of punishments for drafting, circulating, or signing petitions, courts have held that prisons failed to provide notice that such activity is prohibited.⁸⁹ Accordingly, the punishment is unconstitutional, not because the protest act itself is protected, but because the prison failed to provide notice that the act was prohibited. But where protest speech concerns disobeying a direct order, as in the lethal injection example at the beginning of this Article, or speech that is expressly prohibited, such as a sit-in or work strike, the Due Process claim will fail.

Though conditions of confinement may present real harms, inmates have few viable methods to contest these conditions, other than individual grievances presented to prison administrators. If prisoners engage in protest speech in carceral facilities, they risk a range of sanctions ranging from an additional criminal conviction to disciplinary segregation to the loss of certain privileges. These sanctions are made possible through limiting the protection of the First Amendment for speech, expression, and association when that activity occurs within the prison walls.

88. See, e.g., *Freeman v. Tex. Dep't of Crim. Just.*, 369 F.3d 854, 863 (5th Cir. 2004) (holding Freeman's protest of the chaplain's practices was not protected and therefore his challenge to his punishment and subsequent transfer to a high-security unit did not qualify as retaliation). Some prisoners have gotten around this requirement by claiming that the punishment was in response to a written grievance (which is protected speech), rather than the act of protest.

89. See generally *Wolff v. McDonnell*, 418 U.S. 539 (1974) ("If the position implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable."); *Collins v. Goord*, 581 F. Supp. 2d 563 (S.D.N.Y. 2008) ("Due process requires prison officials to provide inmates with adequate notice of what conduct is prohibited."); *Richardson v. Coughlin*, 763 F. Supp. 1228 (S.D.N.Y. 1991) (holding that the prison violated the inmate's due process rights when prison officials punished him for acquiring signatures without providing notice that the conduct was prohibited); *Duamutef v. O'Keefe*, 98 F.3d 22 (2d Cir. 1996) (finding that the inmate's due process argument had the support of caselaw because of the lack of notice).

II. ADDERLEY V. FLORIDA

Race, the Civil Rights movement, and race relations all play a critical role in understanding the lack of protection for prisoner protest. The Supreme Court's 1966 opinion in *Adderley v. Florida* held that jails are non-public fora and therefore protests on jail grounds were not protected under the First Amendment.⁹⁰ Modern applications of *Adderley* ignore the distinction between First Amendment acts outside of the jail or prison walls versus those within the prison walls.⁹¹ That distinction, however, is critically important since those within the prison walls are prohibited from leaving and therefore can not alter the time or place of their activities.⁹²

A. *Adderley* and Race

In 1966, the Supreme Court, in a 5-4 decision, affirmed the convictions of 32 individuals convicted of criminal trespass for their protest outside of a jail in Florida. The majority opinion, by Justice Black,⁹³ focuses on how the protesters disobeyed a direct order to leave the grounds of the jail and therefore were properly convicted of criminal trespass.⁹⁴ The protesters appealed their convictions, arguing they were arrested for exercising their First Amendment right to free speech.⁹⁵

On September 16, 1963, around 250 people gathered at Florida A&M campus on Monday morning at 9 AM and together, marched peacefully on the sidewalks to the local jail to protest police brutality

90. *Adderley v. Florida*, 385 U.S. 39 (1966).

91. See *Bell v. Wolfish*, 441 U.S. 520, 552 (1979) (upholding prison policy of forbidding hard-back books except by authorized manner, citing *Adderley*, as a reasonable time, place or manner restriction).

92. See, e.g., *id.* at 573 n.14 (Marshall J., dissenting).

93. Justice Black's position on civil rights issues is full of contradictions. He authored the Court's *Korematsu* opinion, judicially affirming the power of the U.S. government to detain Japanese-Americans during World War II, but also voted to deny enforcement of racially restrictive covenants at issue in *Shelley v. Kramer*. See *Korematsu v. U.S.*, 323 U.S. 214 (1944); *Shelley v. Kramer*, 334 U.S. 1 (1948). Justice Black, at one point in his life, was a member of the Ku Klux Klan and as a senator representing Alabama, consistently voted against enacting Anti-Lynching federal statute. See Debbie Eliot, *Author Interviews, A Life of Justice: 'Hugo Black of Alabama,'* NPR (Sept. 11, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4828849> (detailing an interview with biographer Steve Suitts about his biography of Justice Black); United Press International, *Justice Black Dies at 85; Served on Court 34 Years*, N.Y. TIMES (Sept. 25, 1971), <http://www.nytimes.com/learning/general/onthisday/bday/0227.html> (detailing Justice Black's life including his opposition to federal anti-lynching legislation).

94. *Adderley*, 385 U.S. at 41, 44-46.

95. Brief for Petitioners at 3, *Adderley v. Florida*. 385 U.S. 39 (1966) (No. 19).

and segregated public facilities, including the jail.⁹⁶ None of the protesters carried weapons or engaged in violence.⁹⁷ Along the way, crowds jeered and spat on the protesters.⁹⁸ The county jail building was adjacent to a grassy area, which did not have a surrounding fence or “no trespassing” signs.⁹⁹ Once arriving at the jail, the protesters obeyed orders to move further away from the jail to the public sidewalks and grassy area.¹⁰⁰ At no point did the demonstrators attempt to enter the jail or make threats to do so.¹⁰¹ The trespass at issue in this case is the alleged partial blocking of a non-public driveway leading to the jail facility.

The Supreme Court’s majority opinion in *Adderley* obscures and eliminates critical facts, thereby masking the racial implications of the case. According to the Court,

Petitioners, Harriett Louise Adderley and 31 other persons, were convicted by a jury in a joint trial in the County Judge’s Court of Leon County, Florida, on a charge of ‘trespass with a malicious and mischievous intent’ upon the premises of the county jail contrary to § 821.18 of the Florida statutes set out below. Petitioners, apparently all students of the Florida A. & M. University in Tallahassee, had gone from the school to the jail about a mile away, along with many other students, to ‘demonstrate’ at the jail their protests of arrests of other protesting students the day before, and perhaps to protest more generally against state and local policies and practices of racial segregation, including segregation of the jail. The county sheriff, legal custodian of the jail and jail grounds, tried to persuade the students to leave the jail grounds. When this did not work, he notified them that they must leave, that if they did not leave he would arrest them for trespassing, and that if they resisted he would charge them with that as well. Some of the students left but others, including petitioners, remained and they were arrested.¹⁰²

96. *Id.* at 6–7.

97. *Id.* at 7; Reply Brief for the State at 7, *Adderley v. Florida*, 385 U.S. 39 (1966) (No. 19).

98. Michael Abrams, *Harriett Adderley Went to Bat 50 Years Ago in Civil Rights Protest that Resulted in Landmark Case*, TALLAHASSEE NEWS (Sept. 25, 2013), http://www.thetallahassee.com/index.php/site/article/harriett_adderley_went_to_bat_50_years_ago_in_civil_rights_protest_that_res.

99. Oral Argument at 12:37, *Adderley v. Florida*, 385 U.S. 39 (1966) (No. 19), <https://www.oyez.org/cases/1966/19>.

100. *Id.* at 13:28.

101. *Adderley v. Florida*, 385 U.S. 39, 51 (Douglas, J., dissenting) (noting “[t]here was no violence; no threat of violence; no attempted jail break; no storming of a prison; no plan or plot to do anything but protest. The evidence is uncontradicted that the petitioners’ conduct did not upset the jailhouse routine; things went on as they normally would. None of the group entered the jail.”).

102. *Id.* at 40 (footnote omitted).

Justice Black's opinion in *Adderley*, for example, specifically did not refer to the race of the arrestees.¹⁰³ The protests took place in September of 1963.¹⁰⁴ Local government officials, likely Caucasian, faced a group of 200-250 "Negroes"¹⁰⁵ singing and dancing with no intent to disperse. The previous day, the local sheriff had arrested several individuals for attempting to integrate, i.e. enter, a Whites-only theater.¹⁰⁶ During this period, everyday people engaged in massive unrest and civil disobedience to end state-approved discrimination against African Americans.¹⁰⁷

In its summary of the facts of the case, the Court at best downplays the validity of the protesters' underlying concerns. A less charitable interpretation is that the Court implies that the protesters had a more sinister motive than simply protesting racial segregation. The Court's use of quotation marks around the word "demonstrate" and insertion of the word "perhaps," before acknowledging that racial segregation may be an issue, functions to undercut moral claims by the petitioners that their protest was valid. In fact, later in the *Adderley* opinion, Justice Black is particularly dismissive of the First Amendment rights claimed by the protesters. The First Amendment does not mean, according to Justice Black, "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."¹⁰⁸ "Propagandize" is a particularly loaded word in the context of the Cold War, the Red Scare, and efforts to link Civil Rights leaders to communism.¹⁰⁹

The trial record in the case establishes additional facts critical to understanding the racial implications. First, the Court fails to note that Florida A&M University is an HBCU (Historically Black College

103. This stands in stark contrast to a recent prior case, *Edwards v. South Carolina*. The majority opinion by Justice Stewart specifically notes the arrests of 187 "high school and college students of the Negro race" for breach of the peace while protesting segregation at the State House. The Court ultimately overturned the convictions. *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963).

104. Petitioners' Brief at 4, *Adderley v. Florida*, 385 U.S. 39 (1966) (No. 506).

105. *Id.*

106. *Adderley*, 385 U.S. at 51 (Douglas, J., dissenting).

107. *Id.*

108. *Id.* at 48; see also *Greer v. Spock*, 424 U.S. 828, 837 (1976) (upholding military base regulation that prohibited distribution of literature or political demonstrations on base) (citing this proposition in *Adderley*).

109. DONALD TIBBS, FROM BLACK POWER TO PRISON POWER: THE MAKING OF JONES V. NORTH CAROLINA PRISONERS' LABOR UNION 14-15 (2012); see also Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 4, 40 (2005), <http://mejo.unc.edu/sites/default/files/images/documents/redstates/longcivilrights.pdf>.

or University).¹¹⁰ HBCUs are defined as higher education institutions established before 1964 primarily for the education of African Americans.¹¹¹ HBCUs developed in response to the segregation of educational institutions under the aegis of “separate but equal” institutions. During the 1950’s and 60’s, Florida A&M students were integral to the Civil Rights movement in Florida.¹¹²

The protests at issue in *Adderley* were also part of a broader Civil Rights movement in Florida to claim equal rights for African Americans. In 1956, African Americans boycotted public transportation for seven months after two Florida A&M students were arrested for sitting next to a Caucasian woman on a bus. Movement organizers were arrested and convicted of “operating an illegal transportation system” for arranging alternative transportation for protesters.¹¹³ In 1960, the Civil Rights movement in Florida focused on other public accommodations, such as restaurants and theaters. In February 1960, students at Florida A&M and Florida State University were arrested and convicted of “disturbing the peace” for refusing to leave the “Whites-only” lunch counter at Woolworths.¹¹⁴ In March 1960, police reportedly used tear gas to disrupt a march of approximately 250 students protesting the arrests of fellow students during various lunch counter sit-ins.¹¹⁵ Civil Rights organizers led pickets and sit-ins in segregated downtown Tallahassee businesses, such as “Neisner’s, McCrory’s, F.W. Woolworth’s, Walgreen’s, and Sears.”¹¹⁶

The *Adderley* protests on September 16, 1963, were actually the last of three days of civil rights protests from September 14-16, including at the Joy Theater and other private establishments.¹¹⁷ Just a day before the *Adderley* protests, four African American girls died in the now infamous Birmingham church bombing.¹¹⁸ Over 350 individuals

110. See Transcript of Record at 5, *Adderley v. Florida*, 385 U.S. 39 (1966) (No. 506); *About Florida Agricultural and Mechanical University*, FAMU.EDU, <http://www.famu.edu/index.cfm?AboutFAMU&History> (last visited Aug. 12, 2016).

111. Elementary and Secondary Education Act of 1965 (ESEA), Act of Apr. 11, 1965, Pub. L. No. 89–10, 79 Stat. 27, 29 (codified at 20 U.S.C. §§ 6301–7941 (2002)).

112. *Photographs*, FLA. MEMORY PROJECT, <https://www.floridamemory.com/items/show/34856> (last visited Aug. 16, 2016).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Abrams, *supra* note 98.

118. United Press International, *Six Dead After Church Bombing*, WASH. POST (Sept. 16, 1963), <http://www.washingtonpost.com/wp-srv/national/longterm/churches/archives1.htm>.

were arrested over the three days of Florida civil rights demonstrations.¹¹⁹

The omitted racial and civil rights context is critical, in part, because of the actual charge that the protesters were convicted of. The Florida statute requires “trespass with *malicious or mischievous intent*.”¹²⁰ By negating the racial context in which the protests occurred, the Court also eliminates the actual intent of the protesters at the jail, i.e., to protest segregation of public facilities and police brutality.¹²¹ If the actual protest of the demonstrators is eliminated, then what other purpose is possible for their assembly at the jail facility other than “malicious or mischievous” intent?

In *Adderley*, the Court is quick to distinguish how the civil rights demonstration at the jail is different from a recently upheld civil rights demonstration at the South Carolina State Capitol House. In both protests, participants “sang hymns and danced.”¹²² But Justice Black argues that the critical difference is the place in which the two demonstrations were conducted, implying that the *Adderley* protesters should have selected a venue with greater First Amendment protection, such as a state-house. In addition, Justice Black focuses on the right of the persons protesting to be in that particular forum. The *Adderley* protesters had no legal right to be present on jail grounds since the jail’s primary purpose was security, whereas the other protesters had a right, as citizens, to be present in the State Capitol House.

The omission of race by the Court is even more compelling because race and the purpose of the protests was a central aspect of the demonstrators’ legal argument. The role of race in the arrests was clearly presented to the U.S. Supreme Court. For example, in their petition for certiorari, the demonstrators frame the question presented as:

Does the arrest and conviction of a group of Negroes for violating a state statute prohibiting ‘trespass . . . with a malicious and mischievous intent,’ when based solely on said Negroes peaceful congregation in front of the county jailhouse for the purpose of protesting the segregated facilities within the jail as well as the previous arrest

119. Abrams, *supra* note 98.

120. Fla. Stat. § 821.18–19 (repealed by Laws 1974, c. 74–383, § 66) (emphasis added).

121. *Adderley v. Florida*, 385 U.S. 39 (1966).

122. *Id.* at 41.

of anti-segregation demonstrators deny said Negroes rights of free speech, assembly, petition, due process, and equal protection.¹²³

In addition, during oral argument, counsel for the arrestees reminded the Court that the 32 arrestees were all African American and were singing freedom songs.¹²⁴ Instead, the Court dismisses race from the case by finding that there was no evidence that the Sheriff exercised his power to arrest because he disagreed with the substance of the protesters' grievances.¹²⁵ Under this logic, race is not implicated in *Adderley*, because the demonstrators were arrested for their presence at the jail and not the substance of their protests. Thus *Adderley*, a case of criminal arrest for engaging in civil rights protest, becomes transformed into a race-neutral case cited for two broad propositions: 1) the government is akin to a private property owner when the government restricts speech to preserve purpose of government property;¹²⁶ and 2) time, place, and manner restrictions on First Amendment rights are legitimate when necessary for significant government interests.¹²⁷

Adderley also stands in stark contrast to the increasingly liberal interpretation of the First Amendment at the time. Randall Kennedy, in his analysis of the relationship between law, litigation, and impact of the Civil Rights campaign, with particular attention to Martin Luther King, Jr., notes a "blossoming of libertarian themes in First Amendment jurisprudence."¹²⁸ In a series of cases, the Court affirmed the First Amendment rights of civil rights demonstrators to engage in sit-ins and protest marches with specific reference to the race of the arrestees.¹²⁹

To be clear, the point of unearthing the racial context of *Adderley* is not to argue that the opinion was wrongly decided or that the opinion was "racist" and therefore invalid. *Adderley* affirmed and sanctioned the use of criminal penalties against primarily African

123. Brief for Petitioners, *supra* note 95, at 3.

124. Oral Argument, *supra* note 99, at 2:56.

125. *Adderley*, 385 U.S. at 47.

126. See, e.g., *Greer v. Spock*, 424 U.S. 828, 836 (1976); *U.S. Postal Serv. v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981).

127. See, e.g., *Wood v. Moss*, 134 S. Ct. 2056, 2060 (2014); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000).

128. Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1001 (1989).

129. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 148 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Cox v. La.*, 379 U.S. 536 (1965); *La. ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

American protesters engaging in nonviolent protest speech at a site of heightened government authority, yet erased the role of race in its majority opinion. And perhaps the Court is justified in its distinction that the outside of a jail is fundamentally different than the outside of a state capitol building. But even so, race remains relevant.

The erasure of race from the *Adderley* opinion could be interpreted in a variety of ways. While it is clear that race is not addressed in *Adderley*, it is not clear why Justice Black omitted any mention of it. Was race omitted because it was deemed irrelevant and if yes, why? Or alternatively, was race omitted because it was deemed threatening within the context of generalized unrest during the Civil Rights movement? Did the omission of race have any relation to a continuing insistence¹³⁰ that the U.S. criminal justice system operates as an objective arbiter and punisher of crime? By re-situating *Adderley* within its racial context, these and additional questions become visible. More fundamentally, *Adderley* is a foundational case restricting the protest rights of the incarcerated and, as such, should be seen as a product of a distinct racial moment within our jurisprudence.¹³¹

B. *Adderley*'s Impact

Since *Adderley* was decided, the Court has further developed its First Amendment doctrine to take account of the place or space in which the speech is conducted. As discussed more fully below, courts have since interpreted *Adderley* to provide that jails are non-public spaces and accordingly, the lowest level of First Amendment protection applies to speech within those spaces. Thus, speech by detainees, by virtue of their incarceration, receives the lowest level of constitutional protection.

Generally, the First Amendment does not provide a complete blanket of protection for private speech. Rather, speech is subject to government regulation. In part, the degree to which the government may restrict the performance of speech depends on the forum in

130. See generally James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) (arguing that modern views of mass incarceration through the lens of Michelle Alexander's "The New Jim Crow" ignore the narrative of many Americans, which provides the proper punishment for crimes. The author also argues that the dichotomous racial structure of this viewpoint does not acknowledge class, other races and criminality as a part of the larger conversation about criminal justice).

131. See *supra* ILB (*Adderley*'s Impact).

which a particular message is being conveyed.¹³² As Justice Marshall explained in *Grayned v. City of Rockford*, the authority of the government to regulate speech depends in part on where the speech occurs and to what extent the speech is “incompatible with the normal activity of a particular place at a particular time.”¹³³ Thus, the government could arguably restrict speech in the reading room of a public library but not restrict the same speech when it occurs in a park.¹³⁴ In *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, the Supreme Court summarized the three types of fora in analyzing the extent to which the government may restrict forms of speech.¹³⁵

The first are *traditional public fora*, pertaining to open areas such as streets, sidewalks, and parks. These areas enjoy the widest level of private speech protection, because they “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹³⁶ Further, “use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”¹³⁷ Public fora historically have been “venues for the exchange of ideas,”¹³⁸ where a “speaker can be confident that he is not simply preaching to the choir.”¹³⁹

132. See *Grayned v. City of Rockford*, 408 U.S. 104, 115–116 (1972) (citing *Adderley* in discussing time, place, and manner restrictions for peaceful protests outside of a school in violation of the city’s anti-noise ordinance).

Appellant Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Negro students at the school had first presented their grievances to school administrators. When the principal took no action on crucial complaints, a more public demonstration of protest was planned. On April 25, 1969, approximately 200 people—students, their family members, and friends—gathered next to the school grounds. Appellant, whose brother and twin sisters were attending the school, was part of this group. The demonstrators marched around on a sidewalk about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: ‘Black cheerleaders to cheer too’; ‘Black history with black teachers’; ‘Equal rights, Negro counselors.’ Others, without placards, made the ‘power to the people’ sign with their upraised and clenched fists. *Id.* at 105. The protesters in this case were outside of a school on the public sidewalk.

133. *Id.* at 116 (holding anti-picketing ordinance unconstitutional but upholding anti-noise ordinance regarding protests on school grounds).

134. *Id.*

135. See *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 45–46 (1983).

136. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (nullifying a mayor’s ordinance which banned political meetings and the distribution of CIO literature on public grounds).

137. *Id.* at 515.

138. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (holding Massachusetts law creating buffer zones around health clinics performing abortions was not narrowly tailored and therefore violated protesters’ First Amendment rights).

139. *Id.*

The second type of fora is *designated (or limited) public fora*. Designated public fora “consist of public property which the State has opened for use by the public as a place for expressive activity.”¹⁴⁰ The crucial difference between traditional public fora and limited public fora is that the latter is specifically created by the government for certain groups to engage in expressive acts. School board meetings,¹⁴¹ college and university facilities,¹⁴² and municipal auditoriums¹⁴³ are examples of limited public fora.

Last are the *nonpublic fora*. Since these areas are not traditionally used for the expression of speech (such as parks and streets) nor are they created or opened for the expression of acts (such as municipal auditoriums and university facilities), nonpublic fora are accorded the least amount of First Amendment protection. This is because these areas have distinct governmental purposes, other than public speech or expressive acts. Commonly cited examples include jails,¹⁴⁴ public airport terminals,¹⁴⁵ military bases,¹⁴⁶ and public schools.¹⁴⁷

The government has the greatest ability to restrict speech in nonpublic fora. As noted by the Supreme Court, “the State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.”¹⁴⁸ In nonpublic fora, the government may impose time, place, or manner restrictions on speech, and it “may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely

140. *Perry Educ. Ass’n*, 460 U.S. at 45.

141. *See generally* *City of Madison Joint Sch. Dist. v. Wisc. Emp’t Relations Comm’n*, 429 U.S. 167 (1976) (finding that the school board committed a prohibited labor practice).

142. *See generally* *Widmar v. Vincent*, 454 U.S. 263 (1981) (finding that the university’s exclusionary policy violated a state regulation that speech had to be content-neutral).

143. *See generally* *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (finding that the municipal board’s decision to prohibit using the theater was an unconstitutional prior restraint).

144. *See generally* *Adderley v. Florida*, 385 U.S. 39 (1966) (finding that a jail facility may regulate the use of a jail facility). *See also* *Pell v. Procunier*, 417 U.S. 817, 827–28 (1974) (holding that limits on face-to-face interviews between the press and inmates was not an unreasonable restriction in light of alternative means of expression). This categorization is discussed in more depth *infra*.

145. *See generally* *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (finding that airports are not public fora).

146. *See generally* *Greer v. Spock*, 424 U.S. 828 (1976) (finding that military bases may constitutionally regulate speech).

147. *See* *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 804 (1985) (citing *Adderley* for the proposition that jails are not public fora and *Jones* for the same proposition in regards to prisons).

148. *Adderley*, 385 U.S. at 47.

because public officials oppose the speaker's view."¹⁴⁹ The language "as long as the regulation on speech is reasonable" implies that courts will examine the constitutionality of the government's restriction on an individual's ability to engage in expressive acts in a nonpublic forum under a rational basis standard. Accordingly, in such non-public fora, the government is free to restrict and even eliminate speech or otherwise expressive acts, so long as the restriction is not motivated by the content of the speech.

The analysis in *Adderley* was sufficiently broad to allow subsequent courts to conclude that jail and prison facilities themselves are non-public fora. Remember that the actual *Adderley* protests were not in the jail facility, but rather, at most, the "curtilage of the jail-house."¹⁵⁰ However, the Court emphasized the ability of the government "to control the use of *its own property* for its own lawful nondiscriminatory purpose,"¹⁵¹ in this case the facility itself as well as the adjacent curtilage. The Court's emphasis essentially extends the inquiry from the specific space where the protests occurred to a broader inquiry about the property as a whole.¹⁵² In so doing, the Court ascribes the purpose of the facility itself to the property as a whole. Although *Adderley* did not specifically hold that the jail was a non-public forum, subsequent cases have interpreted it as such under the broad rationale announced in *Adderley*.¹⁵³

A series of cases that have nothing to do with prisons, courts, in dicta, have characterized jails and prisons as non-public fora.¹⁵⁴ For example, the Fifth Circuit, in a case about speech on public housing grounds, indicates that jails are non-public fora, citing *Adderley* as support for that proposition.¹⁵⁵ In outlining the relevant doctrinal framework, the Eleventh Circuit notes prisons are non-public fora in a

149. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 46 (1983).

150. *Adderley*, 385 U.S. at 47.

151. *Id.* at 48 (emphasis added).

152. *But see Cornelius*, 473 U.S. at 804 (citing *Adderley* to support proposition that the "jail-house grounds" are not public fora).

153. In fact, some scholars credit *Adderley* with providing the foundation for development of the "non-public forum" doctrine. See C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 116 (1986); Martin B. Margulies, *The Davis Case and the First Amendment*, 11 ST. JOHN'S J. LEGAL COMMENT 39, 49 (1995).

154. In *Jones*, discussed *infra* Part IV, the Court did conclude, "a prison is most emphatically not a 'public forum.'" *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 136 (1977). But, that is different than concluding that prison is a non-public forum. *Jones* only establishes that prisons and jails are not public; but it does not specifically foreclose the possibility that a prison could be a limited or quasi-public forum.

155. *de la O v. Hous. Auth. of City of El Paso, Tex.*, 417 F.3d 495, 503 (5th Cir. 2005).

case concerning a university's First Amendment violations against members of the school's Gay Lesbian Bisexual Alliance student group.¹⁵⁶ Thus, *Adderley* underlies court decisions holding that jails and prisons are non-public fora more generally.

Courts in a few cases have also cited to *Adderley* when addressing speech claims *within* carceral facilities. In *Pell v. Procunier*, the regulation at issue prohibited "face-to-face interviews between press representatives and individual inmates whom they specifically name and request to interview."¹⁵⁷ Plaintiff inmates¹⁵⁸ claimed the regulation infringed on their First Amendment right to freedom of speech by denying media access to incarcerated individuals. The U.S. Supreme Court upheld the regulation as applied to the inmate plaintiffs primarily on two grounds: (1) there were available alternatives for individual contact, such as via mail or personal visits with family and friends; and (2) that the government may constitutionally regulate speech as to the time, place, and manner to further significant government interests.¹⁵⁹ The Court cited *Adderley*, among other cases, for the second proposition. Because the prison's interests are maintaining security and order, combined with deference to the judgments of prison administrators, the Court concluded that the regulation did not "abridge any First Amendment freedoms retained by prison inmates."¹⁶⁰ Lower courts have followed suit. For example, in *Paka v. Manson*,¹⁶¹ the district court upheld a prison prohibition on unions, citing to *Pell v. Procunier* and *Adderley*, because the prohibition was an appropriate "time, place, and manner" restriction. One lower court applied the *Adderley* rationale to speech by correctional employees within the prison facility. In *Israel v. Abate*,¹⁶² the district court judge cited *Adderley* as an appropriate time, place, and manner restriction in upholding restrictions on the distribution of union materials among correctional employees within the detention facility. Hence, despite its uncertain origins, it is generally taken for granted that jails and prisons after *Adderley* are non-public fora.

156. Gay Lesbian Bisexual All. v. Pryor, 110 F.3d 1543, 1548 (11th Cir. 1997).

157. Pell v. Procunier, 417 U.S. 817, 819 (1974).

158. Separately, the Court also addressed the claims of plaintiff journalists contesting the regulation. *Id.* at 829–35.

159. *Id.* at 840.

160. *Id.* at 828.

161. Paka v. Manson, 387 F. Supp. 111 (D. Conn. 1974).

162. Israel v. Abate, 949 F. Supp. 1035, 1043 n.6 (S.D.N.Y. 1996).

Designating the interior of jails and prisons as non-public fora, however, is fundamentally at odds with one of the underlying rationales for the First Amendment's place-based approach, i.e. the differing constitutional rules depending on the place in which the speech occurs.¹⁶³ A place-based approach is justified, in part, because speakers have a choice in where to express their views. Jails and prisons, by definition, require the involuntary confinement and isolation of individuals, thus incarcerated individuals lack a choice in where to express themselves.¹⁶⁴ As Justice Marshall has noted in dissent in another prisoners' rights case, it defies logic to apply "time, place, and manner" analysis to detainees, who have little to no choice in the time or place of their speech by virtue of their incarceration.¹⁶⁵

The extension of *Adderley* to speech within the facility ignores the distinction between the incarcerated and the non-incarcerated. *Adderley* may intuitively be correct that jails and prisons are not a public forum for non-incarcerated individuals. Carceral facilities may properly limit public access to the interior of a facility, for example, to prevent the introduction of contraband that would threaten the order or security of the facility.¹⁶⁶ But for the incarcerated, the facility is the *only* forum they may legally access during their incarceration.

When we reintroduce the racial context of the *Adderley* case, the paradox of the case is more readily apparent. What initially began as a case concerning the rights of African American protesters to protest segregation outside of a jail has morphed into a broad proposition that limits the First Amendment rights of the incarcerated, who are disproportionately racial minorities.

163. See, e.g., *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640 (1981) (upholding regulation banning distribution of material except from fixed and limited locations); *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (applying forum analysis to uphold restriction of solicitation and distribution of materials in airports).

164. *Pell v. Procunier*, 417 U.S. 817, 826 (1974).

165. *Bell v. Wolfish*, 441 U.S. 520, 573 n.14 (1979) (Marshall, J. dissenting) ("In each of the cases cited by the Court for this proposition, the private individuals had the ability to alter the time, place, or manner of exercising their First Amendment rights.") (holding that the prohibition against the receipt of hardback books unless mailed from the publisher or a book club was not an unreasonable restriction on prisoners First Amendment rights).

166. See *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 849 (1974) (acknowledging "the truism that prisons are institutions where public access is generally limited.") (internal citations and quotation marks omitted).

III. JONES V. NORTH CAROLINA PRISONERS' LABOR UNION, INC.

Race is also a hidden factor in *Jones v. North Carolina Prisoners' Labor Union, Inc.*¹⁶⁷ In 1977, the Court overruled a three-judge district court panel and upheld the curtailment of the rights of prisoners to organize a prisoners' union within North Carolina. The union, a direct outgrowth of the Black Power Movement, sought to improve prison conditions and "to serve as a vehicle for the presentation and resolution of inmate grievances."¹⁶⁸ In so doing, the Court applied *Adderley* to conclude that jails and prisons are not public fora,¹⁶⁹ and further narrowed the availability of nonviolent protest speech within carceral facilities.

A. *Jones* and Race

The North Carolina Department of Corrections prohibited soliciting other inmates to join the Prisoners' Union, barred Union meetings, and restricted bulk mailings related to the Union. Justice Rehnquist, writing for the majority, overturned the trial court, which had held that the state's union-related regulations had infringed on the First Amendment rights of the prisoners. Notably, the state did not directly challenge the formation of, or individual membership in, a prisoners' union.¹⁷⁰ Instead, the state regulations focused on the ability of the union to operate.¹⁷¹ The regulation was adopted in March 1975, after the incorporation of the North Carolina Prisoners' Labor Union ("NCPLU") in 1974.¹⁷² The newly introduced North Carolina regulations prohibited solicitation of new members, whether in person or by correspondence.¹⁷³ The regulations also forbid union meetings and negotiations between union representatives and correctional officials.¹⁷⁴ The new regulations stood in stark contrast to the regulations governing other inmate associations, such as Alcoholics Anonymous

167. *E.g.*, *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

168. *Id.* at 122.

169. *Id.* at 134-36.

170. *N.C. Prisoners' Labor Union, Inc. v. Jones*, 409 F. Supp. 937, 941 (E.D.N.C. 1976), *rev'd*, 433 U.S. 119 (1977).

171. *Id.*

172. *Id.* at 943.

173. *Id.* at 941.

174. *Id.* at 942.

and the Junior Council, which were allowed to both solicit new members and meet within the detention facilities.¹⁷⁵

The North Carolina Prisoners' Labor Union, Inc. ("NCPLU") was incorporated in 1974 and by the time of trial, claimed approximately 2,000 members scattered across various detention facilities within the state.¹⁷⁶ The trial court concluded that "[t]o permit an inmate to join a union and forbid his inviting others to join borders on the irrational."¹⁷⁷ And although the trial court found – based on conflicting expert testimony – that there was no consensus on the ultimate benefit (or danger) of a union in general,¹⁷⁸ the trial court also found that there was "not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions."¹⁷⁹

In *Jones*, the Supreme Court overruled the trial court and upheld the state regulations prohibiting certain union activities as a legitimate restriction on prisoners' First Amendment right to freedom of association. The Court noted that "First Amendment speech rights are barely implicated in this case."¹⁸⁰ This was the case in part because *Jones* relied heavily on *Pell v. Procunier*, which had relied in part on *Adlerley*.¹⁸¹ Under *Procunier*, prisoners only retain those First Amendment rights that are "not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."¹⁸² Accordingly, the Court held that a regulation prohibiting media access to specific inmates did not constitutionally infringe on inmates' First Amendment speech rights.

Instead, the Court focused on the First Amendment freedom of association rights of the inmates. Moreover, *Procunier* also identified and discussed four legitimate penological objectives, namely deterrence, isolation, rehabilitation, and security.¹⁸³ In *Procunier*, the Court noted that "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."¹⁸⁴ *Jones* approvingly adopted this rationale in upholding the North Carolina regulation prohibiting solicitation of

175. *Id.*

176. *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 122 (1977).

177. *N.C. Prisoners'*, 409 F. Supp. at 943.

178. *Id.*

179. *Id.* at 944.

180. *Jones*, 433 U.S. at 130.

181. See discussion *supra* III.B.

182. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

183. *Id.* at 822–23.

184. *Id.* at 823.

union membership. Thus, in *Jones*, we see an extension of *Adderley* and *Procunier* beyond individual speech, but also to association among inmates.

The Supreme Court's 7-2 majority opinion by Justice Rehnquist in *Jones* also scolded the trial court for failing to give appropriate deference to the views of the prison administrators about the potential dangers of the NCPLU.¹⁸⁵ Deference was due because of the unique circumstances of administering a detention facility and because courts are not equipped with the specific expertise required to make these administrative decisions.¹⁸⁶ A North Carolina prison official testified that a prisoners' union *could* be misused, leading to work stoppages and riots.¹⁸⁷ Although expert opinion was divided, the Supreme Court held that the trial court should have deferred to the views of the corrections officials, unless there was evidence that such views were unreasonable.¹⁸⁸

Deference, however, is particularly susceptible to the influence of race.¹⁸⁹ When courts accept correctional views at face-value, courts are also accepting of the various factors that informed the correctional views in the first place. For example, the Supreme Court would not have required North Carolina officials to explain *why* there was a potential for misuse by inmates or *why* riots were a possibility in light of the lack of violence and disruption in the first few years of the Union's existence. In a stark departure from the trial court's actual findings, the Supreme Court fully adopted the views of the correctional officials and even characterized the challenged regulations as preventing an "imminent threat of institutional disruption or violence."¹⁹⁰ One possibility for these views is the racial context in which the NCPLU emerged.

Understanding the racial context of the *Jones* case isn't to deny that the 1970's were a turbulent time in American prisons and jails. In March 1970, 1,500 prisoners at the Rikers Island Prison Complex in New York refused to eat or perform work assignments for three days

185. *Jones*, 433 U.S. at 125-26.

186. *Id.*

187. *Id.* at 127 (emphasis added).

188. *Id.* at 127-28.

189. See Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 101 (2015) (noting the potential influence of race in prison disciplinary decisions in the context of deference to the judgments of prison officials).

190. *Jones*, 433 U.S. at 136.

to protest a decrease in commutation time for good behavior.¹⁹¹ In November 1970, some reports indicated 2,100 inmates planned to strike in Folsom prison in California, which held 2,400 total.¹⁹² While the Warden claimed the strike was limited to 500 prisoners, he did pre-emptively order a general lockdown for all cells. Prison industries and kitchen operations were completely shut down during the nonviolent protest, which ultimately lasted nineteen days.¹⁹³ Perhaps one of the most infamous prison protests, the four-day standoff in Attica, occurred in 1971.¹⁹⁴ But the racial context may be helpful to understand why prisoner protest in particular became an issue in the 1970's.¹⁹⁵

Prisoners have attempted to protest inhumane living conditions for decades, well before the 1970's. For example, in the early 1950's, 31 prisoners at Angola cut their Achilles tendons to protest their conditions of confinement.¹⁹⁶ More than 50 "largely spontaneous" prison riots occurred in the early 1950's to protest living conditions.¹⁹⁷ The leaders of these riots were usually white, although people of all races were participants.¹⁹⁸ But with the increasing incarceration of Civil Rights and Black Power leaders, as well as the increased political consciousness of the incarcerated during the 1970's, these protests began to assume a racial overtone.

Jones, according to Donald Tibb's exhaustive study of the background to the case, was directly related to the rise of the Black Power Movement¹⁹⁹ and the incarceration of those leaders in jails and pris-

191. TIBBS, *supra* note 109, at 96.

192. See *id.* at 107–12 (noting that the strike at Folsom has been described as the longest prison strike, and the beginning of the prison union movement).

193. See *id.*; JOHN PALLAS & ROBERT BARBER, *From Riot to Revolution*, in *THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA* 237, 252–53 (Erik Olin Wright ed., 1973).

194. ARTHUR LIMAN, *ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA* (1972).

195. This isn't to say that race is the only factor, but that race may be a factor.

196. See *Heel Tendons Cut in Goal Protest*, *AGE* (Feb. 28, 1951), <https://news.google.com/newspapers?nid=1300&dat=19510228&id=nrVVAAAIBAJ&sjid=vr0DAAAIBAJ&pg=2935,6603888&hl=en>; Ralph Z. Hallow, *The Prison that Dared to Pray: Angola Used Faith, Family to Stem Violence*, *WASH. TIMES* (July 15, 2014), <http://www.washingtontimes.com/news/2014/jul/15/the-prison-that-dared-to-pray-angola-used-faith-fa/>.

197. See PALLAS & BARBER, *supra* note 193, at 238–39.

198. *Id.* at 240–41.

199. A notable aspect of the Black Power Movement was the Nation of Islam and its influence in prisons and jails across the country. A full discussion of the Nation of Islam and the role of Black Muslim identity is beyond the scope of this Article, which is limited to identifying the racial context of the *Jones* case. But that should not be interpreted to deny the intersectionality of race and religion and that potential influence on the outcome of *Jones*. For more on the role of the Nation of Islam and their role in prison organizing, see TIBBS, *supra* note 109, at 15–19.

ons nationwide.²⁰⁰ In 1970, Huey Newton, then Minister of Defense for the Black Panther Party, specifically addressed prisoners in an article entitled “Prison, Where Is Thy Victory?”²⁰¹ In that article, Newton argued that though the prison may hold the body, a prison can never contain an idea and urged prisoners to understand that prisons support an illegitimate state order.²⁰² In a similar vein, Civil Rights activists began advancing the idea of “blackness as uninterrupted confinement.”²⁰³

Many of the Black Power movement leaders were incarcerated during this time, providing a vehicle for transmitting the ideas to prison populations.²⁰⁴ Prominent Black Power movement organizers, such as Angela Davis and Eldridge Cleaver, were arrested and incarcerated.²⁰⁵ An inmate rights lawyer noted a similar dynamic in 1971 when he claimed “[t]he guys coming off the street, the guys who have been in the Black Panthers, in heavy actions outside, will not all of a sudden junk what they’ve learned and thought about what to organize around.”²⁰⁶ Organization and protest within prisons began to incorporate the protesters’ strategies outside of prison. Professor Thompson, in her study of labor movements and prison activism, argues that these prison unions deliberately “connected the problem of their labor exploitation to that of their racial subjugation.”²⁰⁷ This shift towards more visible political consciousness of the incarcerated was then expanded through formal and informal means by the incarcerated themselves.

The prison unionization effort began in California, according to Donald Tibbs. Members of the Black Panther Party began organizing “secret political education” classes for inmates in San Quentin.²⁰⁸

200. TIBBS, *supra* note 109.

201. *Id.* at 97.

202. See Huey P. Newton, *Prison, Where Is Thy Victory?*, in THE GENIUS OF HUEY NEWTON 19, 19–22 (Huey P. Newton ed., 1970).

203. DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA 25 (2014).

204. James B. Jacobs, *The Prisoners’ Rights Movement and Its Impacts, 1960-80*, 2 CRIME & JUST. 429, 436–37 (1980).

205. TIBBS, *supra* note 109, at 101–05; see also Jacobs, *supra* note 204, at 436–37.

206. Steven W. Roberts, *Prisons Feel a Mood of Protest: Mood of Protest, Often Highly Political and Radical, Emerges in Nation’s Prisons*, N.Y. TIMES (Sept. 19, 1971), http://www.nytimes.com/1971/09/19/archives/prisons-feel-a-mood-of-protest-mood-of-protest-often-highly.html?_r=0.

207. Thompson, *supra* note 16, at 24–25.

208. TIBBS, *supra* note 109, at 88.

George Jackson, an incarcerated and self-taught Black radical,²⁰⁹ was appointed an official field marshal for the Black Panther Party by Huey Newton while both were incarcerated at San Quentin.²¹⁰ Jackson had published *Soledad Brother*, which was being smuggled in and read in facilities across California.²¹¹ San Quentin was the site for one of the largest prison strikes at the time, in which 1,000 prisoners participated.²¹² The prisoners' demands were written by inmate Warren Wells, a member of the Black Panther Party.²¹³ Three months later, perhaps inspired by San Quentin, inmates at Folsom prison also went on strike, led by Huey Newton among others.²¹⁴ Their demands included equal treatment and the right to form a prisoners' union.²¹⁵ The demand for the union was emblematic of the Black Panther strategy at the time, which one scholar has characterized as "join[ing] two dominant defense traditions in American history, labor and anti-lynching."²¹⁶ According to Donald Tibbs, Black radicals during this time used "their ability to push their message about the exploitation of prison inmates beyond race."²¹⁷ Within months, California activists, including the formerly incarcerated, formed the first prisoners' union, the "United Prisoner Union."²¹⁸ In 1971, that Union split based on a disagreement about tactics into the United Prisoner Union and the Prisoners' Union.²¹⁹ The resulting prisoner union movement ultimately reflected the strategies and growth of the Black Power movement.

In 1971, *Outlaw*, a nationwide prisoners rights newspaper for the California-based Prisoners' Union, printed instructions on how to organize a prison union, including authorization slips designating Prisoners' Union as the collective bargaining agent.²²⁰ Within months,

209. For a fascinating history of George Jackson and the evolution of solitary confinement in the U.S., see Keramet Reiter, 23/7: Pelican Bay Prison and the Rise of Long-Term Solitary Confinement (2016).

210. *Id.* at 94.

211. *Id.*

212. *Id.* at 106.

213. *Id.*

214. TIBBS, *supra* note 109, at 107.

215. *Id.* at 112.

216. Dan Berger, "We Are the Revolutionaries": Visibility, Protest, and Racial Formation in 1970's Prison Radicalism 47 (Dec. 22, 2010) (unpublished dissertation, University of Pennsylvania), <http://repository.upenn.edu/cgi/viewcontent.cgi?article=1321&context=edissertations>.

217. TIBBS, *supra* note 109, at 116.

218. *Id.* at 112.

219. *Id.* at 122–23.

220. *Id.* at 120–24.

12,000 inmates nationwide applied for membership.²²¹ The Outlaw continued to support prisoner unionization efforts across the U.S. by highlighting organizing efforts in various institutions.²²² By the time the NCPLU was formed, prisoners had organized unions in facilities across at least ten states.²²³

The NCPLU at issue in *Jones* is a direct result of the California prisoners' unions. The North Carolina inmates wrote to the Prisoners' Union in California to request a meeting with their union representatives.²²⁴ Connor Nixon, one of the California Prisoners' Union organizers, visited North Carolina Central Prison and met with inmate Wayne Brooks. Together, they agreed to organize the first iteration of the North Carolina Prisoner Labor Union.²²⁵ The NCPLU deliberately did not portray itself as a race-based movement. In its brief to the Supreme Court, the NCPLU portrayed its leadership as "multi-racial," noting the Board of Directors is composed of seven white persons, six black persons, and one American Indian.²²⁶ This statement tracks efforts in California to shape public perception of the United Prisoners Union as "less radical" and racially-inclusive than the ideologies of some of their Black Panther and Brown Beret members.²²⁷ It also reflects the broader focus on class exploitation as a "convict class."²²⁸

During this time period, organizing unions and protests within prisons was perceived as race-based, even when the unions emphasized a "class" approach to prison reform.²²⁹ Many of the unions during this time period were founded and led by African Americans,²³⁰ but the reform focus was squarely on class. A New York Times article

221. *Id.* at 124.

222. *See, e.g.,* TIBBS, *supra* note 109, at 125 (discussing May-June 1973 edition of the Outlaw, article discusses Prisoners' Union as a national drive to organize prisoner inmates).

223. Thompson, *supra* note 16, at 24 (noting the states include California, Delaware, Maine, Massachusetts, Michigan, Minnesota, Ohio, Pennsylvania, Rhode Island, and Wisconsin, in addition to Washington, D.C.).

224. TIBBS, *supra* note 109, at 126.

225. *See id.* at 126; *see also id.* at 136 (noting Nixon subsequently absconded with the union fees and cards, but Brooks shortly organized the second iteration of the NCPLU).

226. Brief for Appellee at 7, *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (No. 75-1874).

227. Everett Holles, *Convicts Seek to Form a National Union*, N.Y. TIMES, Sept. 26, 1971, at 74.

228. TIBBS, *supra* note 109, at 117.

229. *See Berger, supra* note 216, at 243-48 (providing a broader discussion about the tensions between the Black nationalist-based prison organizing and the class-labor based prison organizing).

230. Thompson, *supra* note 16, at 25.

from 1971 describes the prisoner movement as “radical,” “political,” and often connected to the “Black Panthers.”²³¹ This perception of race is so strong that one New York Times reporter concluded, “[o]ne basic fact about the prison movement is that it is led largely by blacks and other minority groups.”²³²

Absent the racial context, *Jones* could be read as simply a fear of concerted group activity by the incarcerated. Since security was paramount, North Carolina officials did not have to wait “until the eve of a riot” to act.²³³ Rather, the Court opined, the very existence of a union – although not prohibited or contested by North Carolina regulations – could surely bring trouble. The trouble, according to the Court, lies in the union’s role in facilitating group action.²³⁴ But the Court feared not just any group action, but the action by this group in particular.²³⁵ The Court was not concerned with the activities of other groups, namely the Jay Cees or Alcoholics Anonymous, for example.²³⁶ And the Court uses race-neutral language to describe the potential danger of a union.²³⁷ “Solicitation of membership itself involves a good deal more than the simple expression of individual views as to the advantages or disadvantages of a union or its views; it is an invitation to collectively engage in a legitimately prohibited activity.”²³⁸ A union that focuses on “presentation of grievances to, and encouragement of adversary relations with, institution officials”²³⁹ would present a danger distinct from a group focused on coping with substance abuse, for example. Certain comments during oral argument, however, indicate underlying concerns about race.

During oral argument, Justice Stewart attempted to compare the Union to other externally-affiliated racially-based groups. Stewart asked counsel for the Union whether a prison could constitutionally prohibit external organizations such as the “Ku Klux Klan (“KKK”) or the Palestinian Liberation Organization (“PLO”)” from organizing chapters within a prison facility.²⁴⁰ Without any basis in the briefs

231. See Roberts, *supra* note 206.

232. *Id.*

233. *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 133 (1977).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 131–32.

239. *Id.* at 133.

240. Oral argument at 53:24, *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977) (No. 1874), <https://www.oyez.org/cases/1976/75-1874>.

submitted, during oral argument Justice Stewart sua sponte asked whether prison officials could prohibit the KKK from operating within the prison by determining in advance that the organization would lead to “racial difficulties and racial violence.”²⁴¹ He also implicitly questioned whether the stated bylaws and constitution of the NCPLU reflected its real aims, again in comparison to the KKK as well as other “dictatorships.”²⁴²

In so doing, Stewart made two troubling inferences about the NCPLU. First, his question highlights concerns about potential relationships between internal organizations and connections to other organizations. Justice Stewart specifically questioned NCPLU counsel about whether NCPLU was connected to a union also operating in California.²⁴³ Perhaps he feared that the actions by the internal organization would be influenced or directed by an external organization with different organizational objectives? Or perhaps he was concerned that the linkage to an external organization could facilitate activities by internal chapters at multiple facilities? More broadly, his concern seems to undermine the idea that the NCPLU could represent authentic issues within the facility and instead act as a mouthpiece for external objectives.

Second, Justice Stewart’s choice of comparable organizations may reflect an inference that the NCPLU was similarly linked to race. The KKK advocates for the supremacy of the Caucasian race and culture.²⁴⁴ Certainly during the 1960’s and 1970’s, the KKK was renowned for its use of private violence and threats to achieve racial objectives.²⁴⁵ The KKK held public lynchings of African Americans, bombed homes and buildings of African Americans or their sympathizers, and issued threats of violence to organizations and individuals advocating for equal rights for African Americans.²⁴⁶ Similarly, during this time, the PLO was also generally viewed as a race-based terrorist organization using violence to achieve its objectives. Another Justice, while noting that the PLO did not “openly advocate terrorism,” also stated that the Court could take judicial notice that the

241. *Id.* at 50:44.

242. *Id.* at 51:37–48.

243. *Id.* at 53:13.

244. *Ku Klux Klan*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> (last visited Nov. 5, 2016).

245. *Id.*

246. See *The Ku Klux Klan and Resistance to School Desegregation*, ANTI-DEFAMATION LEAGUE, http://archive.adl.org/issue_combating_hate/uka/rise.html.

PLO “practice[d] it.”²⁴⁷ These comparisons are all the more surprising because the NCPLU had neither advocated racial/ethnic superiority nor violence during its brief existence.

Re-situating *Jones* within its racial context makes the underlying concerns of Justice Stewart more visible. The prisoners’ union movement originated in facilities in California, which had its share of racial violence and riots.²⁴⁸ The union effort was linked to individuals and tactics adopted by the Black Panther Party.²⁴⁹ The NCPLU began its operations, in part, because of the assistance of a California-based prisoners’ union.²⁵⁰ Rightly or wrongly, these racial concerns were at the forefront of Justice Stewart’s questioning during oral argument and may have influenced others.

B. *Jones*’ Impact

The clearest impact of *Jones* is in the “major setback” to a growing prisoners’ labor movement.²⁵¹ By the time *Jones* was decided, unions had been established in at least ten other states.²⁵² By limiting protection for prisoners’ First Amendment rights to speech, expression, and association, the Court also limited their ability to bargain for improved working conditions.²⁵³ But *Jones* also has a more subtle impact as authority for subsequent doctrine-shifting cases.

More broadly, *Jones* is jurisprudentially influential in two distinct ways. First, *Jones* significantly deepened the Court’s degree of deference to the views of prison administrators. This enhanced deference was later solidified in *Turner v. Safley*,²⁵⁴ which provided the doctrinal architecture for courts to defer. Second, *Jones* is interpreted by analogy to prohibit any non-sanctioned group activity, including nonviolent activity, because of the potential of a threat to the order or security of the facility.

As to deference, the Supreme Court relied on *Jones* in deciding *Turner v. Safley*,²⁵⁵ one of the most influential cases on prisoners’

247. Oral argument, *supra* note 240, at 53:53.

248. See ERIC CUMMINS, THE RISE AND FALL OF CALIFORNIA’S RADICAL PRISON MOVEMENT 187–221 (1994); see also Sarah Spigel, *Prison Race Rights: An Easy Case for Segregation*, 95 CAL. L. REV. 2261, 2273–74 (2007).

249. TIBBS, *supra* note 109, at 130–31.

250. *Id.*

251. Thompson, *supra* note 16, at 30.

252. *Id.* at 24.

253. *Id.* at 30.

254. *Turner v. Safley*, 482 U.S. 78, 85–90 (1987).

255. *Id.* at 86.

rights.²⁵⁶ In *Turner*, the Supreme Court was confronted with two Missouri regulations: (1) preventing correspondence among inmates at different institutions; and (2) requiring the superintendent's permission for an inmate to marry.²⁵⁷ The *Turner* Court sought to articulate a broader "standard of review" for prisoners' claims of constitutional violations.²⁵⁸ The Court reviewed in detail four recent decisions involving prisoners' constitutional rights, including *Jones*.²⁵⁹ Based on those cases, the Court concluded that deference is due to the judgments of prison administrators, because otherwise, prison administrators would be unnecessarily hindered in addressing security and devising creative solutions.²⁶⁰ Moreover, courts would be engaged in second-hand micromanaging of carceral facilities, an area where the courts may lack specific expertise.²⁶¹ Accordingly, relying in part on *Jones*, the Court clarified the applicable standard and identified specific factors governing prisoners' challenges to prison rules.²⁶² *Turner* required that a regulation be "reasonably related to legitimate penological interests."²⁶³ To determine whether the regulation is reasonable, the Court examined the following four factors: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest;"²⁶⁴ (2) "whether there are alternative means of exercising the right that remain open to prison inmates;"²⁶⁵ (3) the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;"²⁶⁶ and (4) whether "ready alternatives"²⁶⁷ to accommodate the prisoners' rights are available, with the absence of such alternatives demonstrating the reasonableness of the prison regulation at issue. Nor is *Turner* limited to only situations of "presumptively dangerous" determinations.²⁶⁸ The

256. For an excellent and practical critique of the *Turner* decision itself, see David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 975 (2016).

257. *Turner*, 482 U.S. at 81–82.

258. *Id.* at 84–91.

259. *Id.*

260. *Id.* at 89.

261. *Id.*

262. *Id.* at 89–91.

263. *Id.* at 89.

264. *Id.* at 89–91.

265. *Id.* at 90.

266. *Id.*

267. *Id.* at 90–91.

268. *Id.* at 88.

Court specifically relied on *Jones* to establish that the “reasonable-ness” inquiry applies and takes account of any articulated security concerns.²⁶⁹ *Turner* thus established a “lenient”²⁷⁰ standard for prison administrators to satisfy.

Following *Turner*, deference is one of the primary drivers of the Supreme Court’s jurisprudence when deciding prisoners’ claims of constitutional violations.²⁷¹ For example, in *Van den Bosch v. Ramisch*, the Seventh Circuit upheld censorship of a prison newsletter that was critical of the parole board and the facility, even though the newsletter did not suggest group action or protest.²⁷² The Circuit Court applied *Turner* and held that the prison’s restriction on the distribution of the critical articles was reasonable because the warden’s testimony of the articles would threaten security by “encouraging distrust of staff and unrest among inmates” and “encourage disrespect on the part of the inmate.”²⁷³ The court deferred to the warden’s assessment that speech, whether describing true or fabricated events, may cause unrest simply by changing an inmate’s attitude without any physical act. Arguably, under *Van den Bosch*, any speech critical of the facility would cause unrest and therefore not be constitutionally protected.

Turner deference now applies to virtually all First Amendment challenges of prison and jail regulations, as well as some Fourth and Fourteenth Amendment due process claims. Courts will defer to the judgment of the prison administrators when deciding restrictions on access to the courts,²⁷⁴ attendance of religious services,²⁷⁵ receipt of mail²⁷⁶ and publications,²⁷⁷ and visitation.²⁷⁸ The Supreme Court also applied *Turner* to uphold a jail’s policy of mandatory strip-searches for detainees entering general population²⁷⁹ and the involuntary medication of mentally ill prisoners.²⁸⁰ Thus far, the Court has held only

269. *Id.* at 88–89.

270. *Johnson v. Cal.*, 543 U.S. 499, 513–14 (2005) (holding *Turner* does not apply to claims of racial discrimination within prisons).

271. Sharon Dolovich, *Forms of Deference in Prison Law*, 24 *FED. SENT’G. REP.* 245, 246 (2012).

272. *See Van den Bosch v. Raemisch*, 658 F.3d 778 (7th Cir. 2011).

273. *Id.* at 787.

274. *See, e.g., Lewis v. Casey*, 518 U.S. 343 (1996).

275. *See, e.g., O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

276. *See, e.g., Shaw v. Murphy*, 532 U.S. 223 (2001).

277. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401 (1989).

278. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126 (2003).

279. *See, e.g., Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1515 (2012).

280. *See, e.g., Washington v. Harper*, 494 U.S. 210 (1990).

two areas exempt from *Turner* analysis: claims of racial discrimination under the Equal Protection Clause and claims of “cruel and unusual punishment” under the Eighth Amendment.²⁸¹ *Turner* has had a “pervasively powerful impact on prisoners’ constitutional cases,”²⁸² an impact which in part was enabled by the decision in *Jones*.

Several courts have also expanded the realm of prohibited protest activities beyond the circumstances presented in *Jones*. *Jones* concerned the actual solicitation to join an organized group, which had as its mission, among other things, the presentment of group inmate grievances. Simply put, *Jones* involved group solicitation of individuals to engage in group activity. But in a Second Circuit case, the court upheld discipline for an individual’s possession of a self-authored pamphlet urging group activity, namely a work stoppage to protest prison conditions.²⁸³ The evidence presented, however, failed to demonstrate actual or attempted distribution, although possessing three copies²⁸⁴ could be construed at most as a necessary pre-cursor to an attempted violation.

The influence of *Jones* is also evident in cases prohibiting the signing of petitions. Several courts have cited to *Jones* in deciding disciplinary violations for signing group petitions protesting prison conditions.²⁸⁵ As in *Jones*, none of these cases concerned actual or threatened violence. Rather, the prohibited act in these cases was simply the act of signature, which at least superficially would appear to be less of a “group” activity than joining an existing advocacy

281. *Johnson v. Cal.*, 543 U.S. 499, 511 (2005) (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) and providing that for Eighth Amendment claims alleging “cruel and unusual punishment,” the “deliberate indifference” test applies).

282. Christopher E. Smith, *Justice Sandra Day O'Connor and Corrections Law*, 32 *HAMLIN L. REV.* 477, 495 (2009); see also Shapiro, *supra* note 256, at 975 (noting *Turner* has been cited in over 8000 court opinions).

283. See, e.g., *Pilgrim v. Luther*, 571 F.3d. 201 (2d Cir. 2009).

284. *Id.* The incarcerated plaintiff had admitted to writing a pamphlet called “Wake Up!,” which called for work stoppages in protest of prison conditions. After finding three copies of the pamphlet after searching his cell, the plaintiff was issued a disciplinary report for violation of prison rule 104.12, which prohibits “lead[ing], organiz[ing], participat[ing] or urg[ing] other inmates to participate in a work-stoppage, sit-in, lock-in, or other actions which may be detrimental to the order of [the] facility.” *Id.* at 203 n.1.

285. See, e.g., *Adams v. Gunnell*, 729 F.2d 362 (5th Cir. 1984) (remanding the case for further discussion where two federal prisoners were disciplined for engaging in “conduct which disrupts the orderly running of the institution” by signing a petition along with 34 other inmates complaining of racial discrimination in the opportunities to participate in prison programming); see also *Ajala v. Swiekatowski*, 2015 WL 1608668, at *1, *6, *11 (W.D. Wis. Apr. 10, 2015) (denying plaintiff’s claim of discrimination based on race and religion after correctional officers confiscated a petition signed by 100 inmates that had been circulated by the plaintiff with a list of demands concerning the conditions of confinement and threatened a month-long strike).

group. While these cases are harder to distinguish from *Jones*, it is nevertheless worth asking whether signing a group petition is the equivalent to joining a group activity? Is a petition prohibited because it signals a group consensus? Or because failure to respond positively to a petition's demands could lead to the types of organized activity (work stoppages, etc.) that the *Jones* court feared? Courts have failed to ask these questions, and thus expanded *Jones* to prohibit all non-individualized grievances. Moreover, citing *Jones*, at least one court has held that courts should defer to prison administrators in determining whether a given document constitutes a group petition.²⁸⁶

IV. RACE, PROTEST, AND INCARCERATION

Across the United States in the 1950's and 1960's, African Americans engaged with institutions of American law enforcement in diverse ways as part of the wider struggle for black freedom. They courted arrest and imprisonment through nonviolent demonstrations, found protection in armed self-defense from white supremacist violence that was tolerated by southern police, fought against police brutality in race riots, and made prisons sites of revolutionary activism.²⁸⁷

It is no accident that jails and prisons are a part of our nation's race and Civil Rights story. "For the Civil Rights movement, jail served many purposes: it was a rite of passage, a form of community, and a tool for political mobilization."²⁸⁸ Localities engaged in mass arrests to subdue and punish Civil Rights demonstrators. For example, in 1963 alone, approximately 20,000 people were arrested in demonstrations across 115 cities.²⁸⁹ Civil Rights activists also deliberately broke unjust laws and used their carceral detention to advocate for equality.²⁹⁰ Martin Luther King's "Letter from a Birmingham Jail" is emblematic of a larger strategy of reclaiming carceral spaces to highlight injustice.²⁹¹ "Overflowing jails joined overflowing church pews

286. See, e.g., *Felton v. Eriksen*, 2009 WL 1158685 at *9 (W.D. Wis. Apr. 28, 2009), *aff'd* 366 F. App'x 677 (7th Cir. 2010).

287. JAMES CAMPBELL, *CRIME AND PUNISHMENT IN AFRICAN-AMERICAN HISTORY* 191 (2013).

288. BERGER, *supra* note 203, at 23.

289. CAMPBELL, *supra* note 287, at 177.

290. See BERGER, *supra* note 203, at 12.

291. Martin Luther King, Jr., *Letter from a Birmingham Jail*, ATLANTIC MONTHLY (Aug. 1963), https://web.cn.edu/kwheeler/documents/Letter_Birmingham_Jail.pdf; see also BERGER, *supra* note 204, at 36 (quoting Reverend Martin Luther King Jr. as "[p]raising the movement's

to sustain the movement's energy."²⁹² In fact, many Civil Rights organizations deliberately called for demonstrators to "fill the jails."²⁹³ "[Civil Rights and Black power movements] relied on at some level turning incarceration into a spectacle of freedom."²⁹⁴ Civil Rights organizations also questioned the broader criminal justice system. For example, the Southern Christian Leadership Conference, founded by Dr. Martin Luther King, Jr., explicitly called for "dismantling the present penal [s]ystem."²⁹⁵ Thus, challenging criminal justice policies and incarceration were part of a broader Civil Rights movement demanding equal rights regardless of race.

Yet, criminal justice is different in kind from most other public government functions. The power and authority of the government is at its apex in the criminal justice context. Although there are significant questions about the privatization of prison operations and services, only the state has the authority to involuntarily deprive a person of their liberty. This fulsome expression of authority has its roots in the "social contract theory" of government as preferable to anarchy.²⁹⁶ A challenge to the moral authority of the government to detain an individual is a challenge to the heart of government itself.

Both *Adderley* and *Jones*, in different ways, challenged the legitimacy of the carceral state through a racial lens. The protesters in *Adderley* had protested at a private establishment the day before, the Joy Theater. The protesters could have marched towards any number of segregated facilities, private or public, that day. Instead, they chose the jail as their target. Their protests at the jail sought to highlight that the jail was a site of racial oppression, rather than an objectively neutral arbiter of criminality. Similarly, although the NCPLU in *Jones* was carefully presented to the Courts as a multi-racial coalition, it began – and was perceived at the time – as a race-based resistance movement. The NCPLU represented an assertion of rights of people deemed to be "criminals."

success at having 'transformed jails and prisons from dungeons of shame to havens of freedom and justice.').

292. BERGER, *supra* note 203, at 36.

293. See *id.* at 35–46 (discussing civil rights strategies); see also MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 30 (1963) (discussing the brutalities of imprisonment and the willingness to endure unjust incarceration to advance the cause of justice).

294. BERGER, *supra* note 204, at 26.

295. Paul Delaney, *S.C.L.C. Says It Is Broke but Proud*, N.Y. TIMES (Aug. 20, 1972), http://www.nytimes.com/1972/08/20/archives/sclc-says-it-is-broke-but-proud.html?_r=0.

296. John Bronsteen, *Retribution's Role*, 84 IND. L.J. 1129, 1131 (2009).

In many ways, the *Adderley/Jones* cases exemplify the “preservation-through-transformation” dynamic articulated by Professor Reva Siegel.²⁹⁷ “Preservation-through transformation” is a shorthand term to describe how contested legal status changes can spawn new regimes that may nevertheless include aspects of the prior status. For example, Professor Siegel argues that the formal abolition of slavery led to legally-sanctioned segregation, which allowed for maintaining the legal inferiority of African Americans.²⁹⁸ Thus, the regime was “transformed” from slavery to segregation, and yet many of the contested norms of slavery were “preserved” within the new regime. Professor Michelle Alexander, drawing upon Professor Siegel’s work, identifies this same dynamic at work today in the age of mass incarceration.²⁹⁹ While the Civil Rights movement may have achieved notable gains, Professor Alexander argues that the locus of racial control and subordination shifted to our criminal justice system.

This shift was neither instantaneous nor immediate, but rather evolved from a series of cases and shifts by the Supreme Court. Three years before *Adderley*, the Supreme Court summarily reversed the lower courts’ holding that an inmate failed to state a cause of action when raising a claim under 42 U.S.C. § 1983 in *Cooper v. Pate*.³⁰⁰ The plaintiff in that case, a Black Muslim, claimed the prison had denied his constitutional right to freedom of religion.³⁰¹ In another case decided one year after *Adderley*, the Court in *Lee v. Washington*, in a per curiam opinion, held that mandatory racial segregation in jails was unconstitutional.³⁰² Thus, when we adopt a racial lens, we can see the Court grappling with the intersection of prison administration, race, and rights and the ways in which the Court implicitly may have been regulating race and not prisons.

CONCLUSION

In major cities across the U.S., we have seen a rise in nonviolent actions to protest police involved killings.³⁰³ Over 1,000 people have

297. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

298. *Id.* at 1120–29.

299. MICHELLE ALEXANDER, *THE NEW JIM CROW* 197 (2010).

300. *Cooper v. Pate*, 378 U.S. 1733, 1734 (1964).

301. *Id.* at 1734.

302. *Lee v. Washington*, 390 U.S. 333, 333–34 (1968).

303. See Adam Janos et al., *300 Arrests After 2 Days of Eric Garner Protests, More Demonstrations Planned*, WALL ST. J. (updated Dec. 5, 2014), <http://www.wsj.com/articles/more-than-200-arrested-in-second-night-of-new-york-city-protests-1417792930> (describing protest that took

been arrested during nonviolent demonstrations, while protesting the killings of Eric Garner, Michael Brown, Freddie Gray, Laquan McDonald, Alton Sterling, and Philando Castille.³⁰⁴ The speeches of today mirror the speeches during the Civil Rights movement in the 1960's and 1970's: that criminal justice systems in many places were complicit in continuing civil rights abuses.³⁰⁵

The protests of today, like the Civil Rights protests, are linked to broader claims about the illegitimacy of the criminal justice system. In a sweeping policy platform, the Movement for Black Lives specifically targets the criminalization and incarceration of Black Youth.³⁰⁶ Over 50 Black-led organizations, including the Black Youth Project 100, contributed to the development of the policy platform.³⁰⁷ Many of the platform demands recall the Black Panther Party's "Ten Point Program."³⁰⁸ The platform demands, among other things, the demilitarization of law enforcement, an end to capital punishment, and significant overhauls of the conditions of detention facilities.³⁰⁹ Other Black-led movements have also questioned the legitimacy of current

place in New York City); see also Dan Keating et al., *A Breakdown of the Arrests in Ferguson*, WASH. POST (Aug. 21, 2014), <http://www.washingtonpost.com/wp-srv/special/national/ferguson-arrests/> (detailing the arrests in Ferguson, MO); see also ASSOCIATED PRESS, *159 Arrested in Berkeley as Protests Continue Over Eric Garner, Michael Brown Grand Jury Decisions*, TIMES-PICAYUNE (Dec. 9, 2014), http://www.nola.com/crime/index.ssf/2014/12/berkeley_arrests_protest_eric.html (describing protests in both Oakland, CA and Berkeley, CA in response to police involved shootings); Phil Helsel et al., *Hundreds Arrested in Protests Over Police Shootings in St. Paul*, BATON ROUGE, NBC NEWS (July 10, 2016), <http://www.nbcnews.com/news/us-news/black-lives-matter-protests-span-country-fourth-day-n606556> (describing how large protests took place in St. Paul, MN and Baton Rouge, LA).

304. See *21 Arrested Following March For Philando Castile*, WCCO (July 20, 2016), <http://minnesota.cbslocal.com/2016/07/20/arrests-philando-castile-protests/>; Bay Area News & Natalie Neysa Alund, *Ferguson Protest: 92 Arrests in Oakland During 2nd Night of Looting, Vandalism*, MERCURY NEWS (Nov. 26, 2014), http://www.mercurynews.com/crime-courts/ci_27016139/ferguson-protest-oakland-cleans-up-after-2nd-night; Janos et al., *supra* note 303; Keating et al., *supra* note 303; Patrick M. O'Connell et al., *4 Arrested in 2nd Night of Laquan McDonald Shooting Protests*, CHI. TRIB. (Nov. 26, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-cop-shooting-laquan-mcdonald-protest-met-1126-20151125-story.html>; Juan Sanchez, *30 People Arrested During Alton Sterling Protest in Baton Rouge*, WDSU (July 9, 2016), <http://www.wdsu.com/news/local-news/new-orleans/30-people-arrested-during-alton-sterling-protest-in-baton-rouge/40435214>.

305. See CAMPBELL, *supra* note 287, at 177 (describing how "local courts . . . upheld the use of injunctions, trespass, and breach of peace charges to police civil rights demonstrations").

306. MOVEMENT FOR BLACK LIVES, *A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM AND JUSTICE* (Aug. 1, 2016), <https://policy.m4bl.org/wp-content/uploads/2016/07/20160726-m4bl-Vision-Booklet-V3.pdf>.

307. *About Us*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/about/> (last visited Oct. 23, 2016).

308. Vann R. Newkirk, *The Permanence of Black Lives Matter*, ATLANTIC (Aug. 3, 2016), <http://www.theatlantic.com/politics/archive/2016/08/movement-black-lives-platform/494309/>.

309. MOVEMENT FOR BLACK LIVES, *supra* note 306.

incarceration practices by focusing on police violence. Black Lives Matter activists Johnetta Elzie and DeRay McKesson are part of the planning team for “Campaign Zero,” which advocates for limiting police intervention, improving community relations, and holding law enforcement accountable.³¹⁰ Protests today have targeted police stations,³¹¹ city government offices,³¹² and police union offices³¹³ among others.

But today’s protesters face a demonstrably different doctrinal landscape, should they protest within the prison or jail walls. While the content of speech by a Black Lives Matter activist may not change, the constitutional protection afforded to that speech would be radically different depending on where she speaks. And that difference may in fact be linked to racial fears of the past.

310. See CAMPAIGN ZERO, <http://www.joincampaignzero.org/#vision> (last visited Oct. 23, 2016).

311. Lolly Bowean, *Protesters Chain Themselves Together in Front of Chicago Police Station*, CHIC. TRIB. (July 21, 2016, 6:57 AM), <http://www.chicagotribune.com/news/local/breaking/ct-black-lives-matter-march-lawndale-police-strategies-20160720-story.html>.

312. City New Service, *Protesters Ordered Out of Los Angeles City Hall East Continue Vigil*, L.A. DAILY NEWS (Aug. 17, 2016), <http://www.dailynews.com/general-news/20160816/protesters-ordered-out-of-los-angeles-city-hall-east-continue-vigil>.

313. Kelly Weill, *Black Lives Matter Activists Take on a New Foe: Police Unions*, DAILY BEAST (July 21, 2016, 5:25 PM), <http://www.thedailybeast.com/articles/2016/07/21/black-lives-matter-activists-take-on-a-new-foe-police-unions.html>.

Restorative Justice From the Margins to the Center: The Emergence of a New Norm in School Discipline

THALIA GONZÁLEZ*

INTRODUCTION	268
I. RESTORATIVE JUSTICE IN THEORY AND PRACTICE	274
II. THEORIES OF NORMATIVE CHANGE	280
III. THE NORM CHANGE PROPOSITION: ADVANCING A NEW UNDERSTANDING OF SCHOOL DISCIPLINE IN THE UNITED STATES ..	285
A. Stage One: Norm Emergence	286
1. California	288
2. Colorado	290
3. Illinois	292
4. Maryland	293
5. Pennsylvania	295
B. Stage Two: Norm Cascade	298
C. Stage Three: Norm Internalization	306
CONCLUSION	308

Changing norms is a difficult process that requires society to discard previously held ideas, morals, and practices. In the case of school discipline, this means abandoning the long accepted practice of zero tolerance and its associated values, identities, and processes of punishment and exclusion. While there has been attention in the literature to changes in school discipline at the local, state, and federal

* Thalia González is a 2016–2017 Visiting Researcher at Georgetown University Law Center and Associate Professor in the Politics Department at Occidental College. I wish to acknowledge Matthew Cecconi and Wellesley Daniels for their valuable assistance in research and preparation of an earlier version of this Article. I wish to thank the editors of the *Howard Law Journal* for their work during the editorial process.

levels—relative to zero tolerance—scholars have not engaged in inquires tracing the emergence of restorative justice, its consequent cascade, and institutionalization as a new norm. This Article aims to do just that. Since the 2000s restorative justice norm entrepreneurs have sought to challenge the social, political, and legal consequences of the school discipline policies grounded in punitive and exclusionary responses to student behavior. Their work has clarified, socialized, and institutionalized restorative justice in local contexts and led to key changes at the state and federal levels. Within diverse contexts, the identity and practice of restorative justice evolved and with it a “first generation” of research emerged. This early work was both descriptive and prescriptive presenting theoretical constructions and empirical findings. As restorative justice has repositioned from the margins to the center there is a need for a “second generation” of studies asking new questions about outcomes, practices, and implementation, but as importantly, how an ideational and normative shift has occurred to move what was once viewed as a ‘weaker alternative’ in discipline to one that is preferred over zero tolerance and exclusion. It is within this “second generation” of study that this Article is positioned. At its foundation this Article is motivated by and grounded in descriptive analysis that identifies and articulates a more integrated understanding of the evolution of school-based restorative justice in the United States. Thus, rather than focus on a single case study, especially given the limitations of one case study to make general inferences, it explores multiple accounts and sites of school-based restorative justice. Moreover, by presenting a range of examples it seeks to promote new directions in the restorative justice research agenda aimed at refining and improving theoretical and pragmatic propositions of how localized practices have catapulted to become widely accepted, applicable, and desirable nationally.

INTRODUCTION

Over the last thirty years, the United States has undergone significant shifts in how it views youth behavior, including the practices and policies used within schools to address behaviors deemed outside socially acceptable constructions. While student misconduct was initially accepted as “within the bounds of healthy development, and

manageable via traditional school-based interventions.”¹ In the 1980s and 1990s, new social, political and legal norms emerged criminalizing once normal youth behaviors and introduced generations of students to exclusionary discipline and zero tolerance policies.²

Since then, a large body of research has developed across multiple disciplines documenting not only the far-reaching negative consequences³ of zero tolerance and punitive discipline, but also highlighting its flaws and failures.⁴ As academics, policymakers, and

1. Marilyn Armour, *Restorative Practices: Righting the Wrongs of Exclusionary School Discipline*, 50 U. RICH. L. REV. 999, 1000 (2016).

2. *Id.* at 1001–03; Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 282–83, 287–89, 291–93 (2012) [hereinafter González, *Keeping Kids in School*]; DANIEL LOSEN ET AL., ELIMINATING EXCESSIVE AND UNFAIR EXCLUSIONARY DISCIPLINE IN SCHOOLS: POLICY RECOMMENDATIONS FOR REDUCING DISPARITIES 2, 4–5 (2014), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/Disparity_Policy_Full_031214.pdf; S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 277–79 (2014); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 101 (2011) [hereinafter Skiba et al., *Race Is Not Neutral*]; RUSSELL J. SKIBA ET AL., NEW AND DEVELOPING RESEARCH ON DISPARITIES IN DISCIPLINE 5 (2014), http://www.indiana.edu/~atlantic/wp-content/uploads/2015/01/Disparity_NewResearch_010915.pdf [hereinafter SKIBA ET AL., NEW DEVELOPING REPORT]; Jeanne B. Stinchcomb et al., *Beyond Zero Tolerance: Restoring Justice in Secondary Schools*, 4 YOUTH VIOLENCE & JUV. JUST. 123, 126–28 (2006); Donald H. Stone & Linda S. Stone, *Dangerous & Disruptive or Simply Cutting Class? When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspension and Due Process Rights*, 13 J.L. & FAM. STUD. 1, 13, 25 (2011).

3. Pamela A. Fenning & Miranda B. Johnson, *Developing Prevention-Oriented Discipline Codes of Conduct*, 36 CHILD. LEGAL RTS. J. 107, 107–09 (2016). For example, in 2009, schools, on average, reported an annual suspension rate of 10%, the highest it has ever been. Daniel Losen et al., *Are We Closing the School Discipline Gap?*, CTR. FOR C.R. REMEDIES 5–7, 19 (2015), <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/>. But in many schools the average exclusion rate is actually much higher. In Pontiac, Michigan, and St. Louis, Missouri nearly a third of students are suspended annually. *Id.* at 18. When considering rates of exclusion on a statewide level, the data are no better. Florida has a 19% suspension rate, and in Texas, nearly 60% of students have been suspended by the time they graduate high school. *Id.* at 7. Nationally, African American students are suspended at three times the rate of their white counterparts, creating a “discipline gap,” which researchers argue shows the link between discipline trends and the socioeconomic chasm in academic achievement. *Id.* at 5. The discipline gap has become so well-documented that the United States Department of Justice and United States Department of Education issued a joint “Dear Colleague” letter in January 2014 urging school systems to fix discriminatory punitive practices. Letter from U.S. Dep’t of Just. & U.S. Dep’t of Educ. 4–5 (Jan. 8, 2014). See also, U.S. DEP’T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 9 (2014).

4. See Armour, *supra* note 1, at 1001–03; LOSEN, *supra* note 2; Mitchell, *supra* note 2, at 280–93; Skiba et al., *Race Is Not Neutral*, *supra* note 2; SKIBA ET AL., NEW DEVELOPING REPORT., *supra* note 2, at 2–3, 5; Stinchcomb et al., *supra* note 2, at 127, 129–30; Stone & Stone, *supra* note 2; Fenning & Johnson, *supra* note 3; Losen, *supra* note 3, at 5–7, 18–19; Letter from U.S. Dep’t of Just., *supra* note 3; U.S. DEP’T OF EDUC. *supra* note 3; TALKING POINTS: THE SCHOOL-TO-PRISON PIPELINE, ACLU 1, <http://www.aclu.org/racial-justice/school-prison-pipeline-talking-points> (last visited Sept. 21, 2016).

educators focused their efforts on macro- and micro-level assessments of discipline outcomes, impacted communities organized around the daily-lived experiences of youth attempting to thrive in zero tolerance school environments.⁵ In the face of more than a decade of demands for change from multiple constituencies, schools have begun to shift rapidly towards new norms in school discipline.

The first adoption and implementation of restorative practices occurred in the 1990s led by restorative justice norm entrepreneurs in a handful of schools.⁶ Similar to their international counterparts, restorative justice norm entrepreneurs first introduced it as a means to address safety and violence, reconstruct accepted models of discipline, decrease reliance on exclusionary practices, build community capital, and ground principles of human dignity and respect. Initially, school-based restorative justice practices were largely variants of victim-offender mediation, family or group conferencing, and circle conferencing⁷ and often temporally linked to pilot funding sources. While there is no universal definition, restorative justice has been accepted as a diverse multi-layered concept, which requires a philosophical and practical shift away from punitive and retributive control mechanisms. The broad aim of restorative justice⁸ in educational policy and practice is to be more responsive and restorative to the needs and con-

5. Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. LEGIS. 367, 367 (1991); Thalia González, *Restoring Justice: Community Organizing to Transform School Discipline Policies*, 15 U.C. DAVIS J. JUV. L. & POL'Y 1, 2 (2011) [hereinafter, González, *Restoring Justice*]; Kavitha Mediratta & Jessica Karp, *Parent Power and Urban School Reform: The Story of Mothers on the Move*, N.Y. UNIV. INST. FOR EDUC. & SOC. POL'Y 15–16 (2003), <http://www.nyu.edu/iesp/publications/cip/MOM.pdf>; DENNIS SHIRLEY, COMMUNITY ORGANIZING FOR URBAN SCHOOL REFORM 33, 34 (1997). See, e.g., *Ending the Schoolhouse to Jailhouse Track*, ADVANCEMENT PROJECT, <http://www.advancementproject.org/pages/mission> (last visited Sept. 21, 2016); *Community Organizing & Human Rights*, COMMUNITY ASSET DEV. REDEFINING EDUC. (CADRE), <http://www.cadre-la.org> (last visited Sept. 21, 2016); *About Us*, DIGNITY IN SCHOOLS CAMPAIGN, <http://www.dignityinschools.org> (last visited Sept. 21, 2016); *End the School to Jail Track*, PADRES Y JOVENES UNIDOS, <http://padresunidos.org/campaign/end-school-jail-track> (last visited Sept. 21, 2016); *About Us*, POWER U CTR. FOR SOC. CHANGE, <http://poweru.org/about-us/> (last visited Sept. 21, 2016).

6. Carol Chmelynski, *Restorative Justice for Discipline with Respect*, 71 EDUC. DIG. 17, 17–19 (2005); David R. Karp & Beau Breslin, *Restorative Justice in School Communities*, 33 YOUTH & SOC'Y 249, 254–55 (2001); González, *Keeping Kids in Schools*, *supra* note 2, at 298–99.

7. Karp & Breslin, *supra* note 6, at 252; González, *Keeping Kids in Schools*, *supra* note 2, at 301–03; Stinchcomb et al., *supra* note 2, at 124–25, 131–32, 134.

8. For purposes of this Article, the term “restorative justice” aims to capture a diverse range of practices, including but not limited to, affective statements, conferences, mediations, and circles, as well as informal restorative-based approaches used by members of the school community (teachers, administrators and other staff, students, and parents). A broad use of the term recognizes dominant findings in the field, that schools most often implement restorative justice practices along a *continuum* model to address differences across schools based on numerous student, school, and staff-level factors. Further, my use of “restorative justice” also encom-

cerns of the school community. Grounded in three core principles of repairing harm, involving stakeholders, and transforming community relationships, restorative justice prioritizes individual and community growth, contributing to an overall safer and healthier school culture.⁹

As school-based restorative justice evolved in the United States, a “first generation” of research emerged. Following the lead of international scholars, the work centered on identifying primary outcomes and establishing frameworks for sustained and effective implementation. Initial studies were descriptive and prescriptive, presenting both theoretical constructions and empirical findings. In recognizing the complexity of implementation, scholars sought to generate useful insights to challenges regarding the design and structure of practices and policies that seek to actualize a diverse multi-layered concept that requires a philosophical and practical shift away from punitive and retributive control mechanisms.

While early sites were lauded for their positive outcomes, particularly in the areas of decreased suspensions and expulsions,¹⁰ the emergent norm of restorative school discipline had not yet reached a moment of norm cascade or “tipping point.”¹¹ However, the use of restorative justice in schools has grown exponentially, moving it beyond characterizations as an alternative at the margins of educational policy. Restorative justice is no longer limited to a small number of sites, but instead, it is present in schools in more than half the states across the country and institutionalized across diverse social, political, and legal spheres. In fact, restorative justice is now identified as an essential element of discipline reform and is imperative for schools seeking to address some of the most pressing civil and human rights issues associated with zero tolerance. For example, in 2014, the Council of State Governments Justice Center issued its School Discipline Consensus Report based on field-driven and consensus-based recommendations from over 100 advisors and 600 contributors to “reduc[e] the millions of youth suspended, expelled, and arrested each year

passes a variety of terms used in the literature, such as “restorative approaches,” “restorative practices,” “restorative processes,” “restorative discipline” and other similar language.

9. Karp & Breslin, *supra* note 6, at 249–50; González, *Keeping Kids in Schools*, *supra* note 2, at 297–99; Brenda E. Morrison et al., *Practicing Restorative Justice in School Communities: The Challenge of Culture Change*, 5 PUB. ORG. REV. 335, 335 (2005) [hereinafter Morrison et al., *Practicing Restorative Justice*]; Brenda Morrison & Dorothy Vaandering, *Restorative Justice: Pedagogy, Praxis and Discipline*, 11 J. SCH. VIOLENCE 138, 138–39 (2012).

10. *See supra* Introduction.

11. *Id.*

while creating safe and supportive schools for all educators and students” and within the report restorative justice was positioned as essential to positive school climates and the development of productive learning environments.¹² But diffusion of restorative justice as a new norm in school discipline is not limited to recommendations and reports. School boards and other administrative rulemaking bodies have promulgated and passed resolutions and policies recommending and requiring restorative justice.¹³ State departments of education provide toolkits and trainings for schools seeking to implement restorative justice practices.¹⁴ Additionally, state legislatures have passed school discipline reform laws requiring alternatives to exclusionary discipline, such as restorative justice.¹⁵ As the former Secretary of the United States Department of Education, Arne Duncan has noted, “States are revising discipline laws to enhance local discretion, curtail zero-tolerance requirements, and encourage the development of alternative disciplinary approaches such as restorative justice.”¹⁶ The movement of restorative justice from a local identity to a widely accepted philosophy and practice is visible not only at the state-level, as national organizations such as the National Association of Educators¹⁷ and the American Federation of Teachers¹⁸ as well as both Presi-

12. *School Discipline Consensus Report*, JUST. CTR. COUNCIL. ST. GOV’S (Aug. 7, 2014), <https://csgjusticecenter.org/youth/school-discipline-consensus-report/>.

13. See *supra* Introduction.

14. See, e.g., *Alternatives to Suspensions and Expulsions Toolkit*, MICH. DEP’T OF EDUC., http://www.michigan.gov/mde/0,4615,7-140-74638_72831—,00.html (last visited Sept. 21, 2016); *Restorative Practices*, MINN. DEP’T OF EDUC., <http://education.state.mn.us/MDE/dse/safe/clim/prac/> (last visited Sept. 21, 2016); OREGON DEPARTMENT OF EDUC., *SCHOOL SAFETY GUIDANCE: A HOLISTIC PERSPECTIVE* (2016), http://www.ode.state.or.us/opportunities/grants/nclb/title_iv/a_drugfree/schoolsafetyguidance.pdf.

15. See *infra* Part III; see also Keith Kamisugi, *EJS Supports Restorative Justice Student Rights Legislation*, EQUAL JUST. SOC’Y (Apr. 7, 2016), <https://equaljusticesociety.org/2016/04/07/ejs-supports-restorative-justice-student-rights-legislation/>.

16. Arne Duncan, *Foreword* to *GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE*, U.S. DEP’T EDUC. (2014), <http://www2.ed.gov/policy/gen/guid/school-discipline/appendix-1-directory.pdf>.

17. Mary Ellen Flannery, *NEA and Partners Promote Restorative Justice in Schools*, NEATODAY (Mar. 24, 2014, 1:19 PM), <http://neatoday.org/2014/03/24/nea-and-partners-promote-restorative-justice-in-schools/>.

18. In 2014, the American Federation of Teachers adopted a resolution at national convention in support of personnel, training, and resources for implementing restorative justice programs. *Resources on Positive Discipline*, AM. FED’N TCHR., <http://www.aft.org/ae/winter2015-2016/resources> (last visited Sept. 21, 2016); see also *RESTORATIVE PRACTICES: FOSTERING HEALTHY RELATIONSHIPS & PROMOTING POSITIVE DISCIPLINE IN SCHOOLS 1* (2014), <http://schottfoundation.org/sites/default/files/restorative-practices-guide.pdf>.

dent Obama and presidential nominee Hillary Clinton have endorsed and supported the expansion of restorative justice in schools.¹⁹

Taken as a whole, if restorative justice was once characterized as highly localized and aimed at addressing specific behavioral issues, this construction has transformed. Restorative justice is now understood as a philosophy and practice shown not only to address disproportionality in discipline and dismantle zero tolerance, but as importantly to, “create a climate that promotes healthy relationships, develops social-emotional understanding and skills, increases social and human capital, and enhances teaching and learning.”²⁰

Thus, the purpose of this Article is two-fold: (1) to characterize how restorative justice has moved from the margins of education policy to the center, and (2) to explore the emergence and cascade of restorative justice through the norm life cycle as understood through the lens of theories of normative change.

Inquiry of this nature is important for several reasons. First, there is currently no scholarly work that traces the emergence of school-based restorative justice and its consequent cascade and institutionalization as a new school discipline norm. Second, there is a critical need for new directions in the restorative justice research agenda aimed at understanding how a localized alternative to justice has become a widely accepted, applicable, and desirable mechanism for school discipline nationally. Third, such research—on the acceptance of a non-punitive and non-exclusionary response to individual and group behaviors—may shed light on the potential for other systems in the United States to likewise shift from retributive to restorative frameworks.²¹

19. Thomas B. Edsall, *How Much Do Black Lives Matter to the Presidential Campaign*, N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/11/11/opinion/campaign-stops/how-much-do-black-lives-matter-to-the-presidential-campaign.html?_r=2; Gary Gately, *Obama Administration Unveils School Discipline Guidelines*, JUV. JUST. INFO. EXCHANGE (Jan. 9, 2014), <http://jjie.org/obama-administration-unveils-school-discipline-guidelines/106015/> (discussing proposed California legislation); Fact Sheet, *Hillary Clinton's Breaking Every Barrier Agenda: Ending the School-to-Prison Pipeline*, HILLARYCLINTON.COM, <https://www.hillaryclinton.com/briefing/fact-sheets/2016/02/18/ending-the-school-to-prison-pipeline/> (last visited Sept. 21, 2016). On July 8, 2016, the Democratic Party Platform Committee amended the party platform to include an unambiguous statement of support for the implementation of restorative justice practices. Email correspondence to author from *Project for Integrating Spirituality, Law and Politics* (on file with author).

20. Armour, *supra* note 1, at 1018.

21. While this Article is limited to considering restorative justice norm emergence in the context of schools, it does not seek to limit the potential for future analysis of a restorative justice norm life cycle in other critical areas to address issues of racial injustice, mass incarceration, and civil and human rights violations.

This Article proceeds in the following manner. Part I provides a brief description of restorative justice as a philosophy and set of practices in schools. Part II then sets forth theories of norm emergence and diffusion. Part III draws on Finnemore and Sikkink's norm life cycle theory to illustrate my norm change proposition to argue that the cascade of a new norm in school discipline is underway in the United States.

I. RESTORATIVE JUSTICE IN THEORY AND PRACTICE

The study of restorative justice can be broadly categorized within two areas: theoretical and applied/practice research. While a considerable body of empirical research illustrates the effectiveness of restorative justice in other sectors, such as diversionary practices for youth in the juvenile justice system, a comparable body of research and evaluation on the effectiveness of restorative justice as a mechanism for improving school safety is a relatively new phenomenon. This is particularly true when focusing on its development in the United States.²²

Restorative practices first emerged in the context of the juvenile justice and criminal justice systems in the 1970s. But beginning in the 1990s its application and implementation in schools has grown exponentially.²³ As a philosophy and set of practices and principles, restorative justice allows schools to develop balanced responses to a diverse set of issues ranging from safety to climate to the discipline gap to entry into the juvenile and criminal justice systems.²⁴ Schools as an

22. Research on the impact of restorative justice on suspensions and expulsions is the most readily studied area in the field and continues to grow. For example, in Pittsburgh, randomized trials are being conducted at twenty-three public schools. *District Announces Plans to Advance Restorative Practices in Pittsburgh Public Schools*, PITTSBURGH PUB. SCHS. (Apr. 22, 2015), <http://www.pps.k12.pa.us/site/Default.aspx?PageType=3&DomainID=4&PageID=1&ViewID=047e6be3-6d87-4130-8424-d8e4e9ed6c2a&FlexDataID=9725>. In California, suspensions at Cole Middle School (Oakland) decreased 87% and expulsions dropped to zero over a two-year period during the implementation of restorative justice. MICHAEL D. SUMNER ET AL., *SCHOOL-BASED RESTORATIVE JUSTICE AS AN ALTERNATIVE TO ZERO-TOLERANCE POLICIES: LESSONS FROM WEST OAKLAND* 6, 31 (2010), https://www.law.berkeley.edu/files/thcsj/10-2010_School-based_Restorative_Justice_As_an_Alternative_to_Zero-Tolerance_Policies.pdf. In San Antonio, Texas, out-of-school suspensions were reduced by 87% and in-school suspensions by 29% within the first year of implementation of restorative discipline at Ed White Middle School, and in-school suspensions decreased 52% for the pilot group in the second year. Armour, *supra* note 1, at 1020.

23. Chmelynski, *supra* note 6, at 18–19 (discussing the development of restorative practices in Pennsylvania, Minnesota and Wisconsin in the late 1990s); *see also supra* Part I.

24. González, *Keeping Kids in Schools*, *supra* note 2, at 284–85, 299; Allison Ann Payne & Kelly Welch, *Restorative Justice in Schools: The Influence of Race on Discipline*, 47 *YOUTH & SOC'Y* 539, 555 (2015); Morrison et al., *Practicing Restorative Justice*, *supra* note 9, at 337–38.

institution, at the societal level, and as communities, at the micro level, are the cornerstone for youth socialization and the social control of delinquent behavior.²⁵ In this context, restorative justice is understood as the implementation of theory and practice aimed at sustaining just and safe communities. Thus, the broad aim of school-based restorative justice practices is to prioritize community inclusion and capacity over punitive and exclusionary responses to behaviors to create safer environments. Similar to the expansion internationally, domestic norm entrepreneurs first introduced restorative justice as a means to address safety and violence, reconstruct accepted models of discipline, decrease reliance on exclusionary practices, build community capital, and ground principles of human dignity and respect.

While there is no unified theory, when focused on improving school safety, promoting positive school learning environments and increasing academic achievement, restorative justice is based on three core principles: (1) repairing harm, (2) involving stakeholders, and (3) transforming community relationships.²⁶ As Riestenberg asserts:

A restorative philosophy emphasizes problem-solving approaches to discipline, attends to the social/emotional as well as the physical/intellectual needs of students, recognizes the importance of the group to establish and practice agreed-upon norms and rules, and emphasizes prevention and early restorative intervention to create safe learning environments.²⁷

Thus, as a disciplinary paradigm and norm, restorative justice emphasizes the importance of inclusion, relationships, social capital, and the shared values, which promote pro-social behavior learned through modeling, conflict resolution, and mutual support.²⁸

(2005); Morrison & Vaandering, *supra* note 9, at 138–39; Stinchcomb et al., *supra* note 2, at 124–25, 138–39.

25. Karp & Breslin, *supra* note 6, at 252, 255–56, 259–61, 264–66; Janice Wearmouth et al., *Restorative Justice: Two Examples from New Zealand Schools*, 34 BRITISH J. OF SPECIAL EDUC. 196, 196 (2007); Stinchcomb et al., *supra* note 2, at 124.

26. Stinchcomb et al., *supra* note 2, at 131; BELINDA HOPKINS, JUST SCHOOLS: A WHOLE SCHOOL APPROACH TO RESTORATIVE JUSTICE 161 (2004); HOWARD ZEHR WITH ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 21, 25, 27 (2002).

27. Stinchcomb et al., *supra* note 2, at 134 (citing Nancy Riestenberg, *Zero and No: Some Definitions*, ROSEVILLE: MINN. DEP'T EDUC. 10 (2003)).

28. Karp & Breslin, *supra* note 6, at 254–55; Thalia González, *Socializing Schools: Addressing Racial Disparities in Discipline Through Restorative Justice in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 152 (Daniel J. Losen ed., 2015) [hereinafter, González, *Socializing Schools*]; Tom Macready, *Learning Social Responsibility in Schools: A Restorative Practice*, 25 EDUC. PSYCHOL. IN PRAC. 211, 215, 218 (2009); Brenda E. Morrison, *Regulating Safe School Communities: Being Responsive and Restorative*, 41 J. EDUC. ADMIN. 689, 692 (2003) [hereinafter Morrison, *Regulating Safe School Communities*]; Morrison & Vaandering, *supra* note 9, at 139–40; Declan Roche, *Dimensions of Restorative Justice*, 62 J.

As a relatively new field, researchers have initially focused on connections to socio-emotional learning, school climate, social capital, supportive relationships, pro-social behavior, collective problem solving, and conflict resolution skills. Early scholarship aimed at collecting quantitative data, i.e., reduction in incidents, numbers of suspensions, expulsions, office referrals, and surveys to assess climate and satisfaction with processes, in single school sites.²⁹ This research set forth the framework for school-based practices and supported, both theoretically and practically, the idea that restorative justice could positively impact school culture and school safety.³⁰ For example, the first empirical study examined the use of restorative conferences to address serious incidents in schools, such as assaults, and found that there was a reduction of repeat offending behavior and

SOC. ISSUES 217, 223–24 (2006); Stinchcomb et al., *supra* note 2, at 135–40. Citing examples from Denver and West Philadelphia, Watchel argues that “data demonstrate that social-connectedness and strong relationships are the key factors in reducing school violence, misbehavior, victimization and a wide range of other risk factors for children.” Joshua Wachtel, *Restorative Practices Can Help Close School-to-Prison Pipeline*, RESTORATIVE WORKS LEARNING NETWORK (Sept. 17, 2013), <http://restorativeworks.net/2013/09/restorative-practices-school-prison-pipeline/> [hereinafter Wachtel, *Restorative Practices*]. For example, Wachtel notes “Denver Public Schools, programs emphasizing these features resulted in a 68% reduction in police tickets and a 40% reduction in out-of-school suspensions” and “West Philadelphia High School, which saw a 50% drop in suspensions and a 52% decrease in violent acts and serious incidents.” *Id.*

29. Currently, randomized control trials are being conducted in Pittsburgh, Pennsylvania, at twenty-three public schools and in Maine at fourteen schools. See Joshua Wachtel, *NIH to Fund First Randomized Controlled Trials For Restorative Practices in 14 Maine Schools*, RESTORATIVE WORKS LEARNING NETWORK (Sept. 19, 2013), <http://restorativeworks.net/2013/09/nih-fund-first-randomized-control-trials-restorative-practices-16-maine-schools/> [Watchel, *NIH to Fund*]; Joshua Wachtel, *Pittsburgh to Transform Climate in 23 Schools*, RESTORATIVE WORKS LEARNING NETWORK (Apr. 24, 2015), <http://restorativeworks.net/2015/04/pittsburgh-to-transform-climate-in-23-schools/> [Wachtel, *Pittsburgh to Transform*]. Additionally, in 2014 the National Institute of Justice (NIJ) awarded funding to the Justice Policy Institute to study restorative circles in Central Falls Church School and North Carolina Academic Center for Excellence in Youth Violence Prevention to complete randomized group trials in twenty-four schools on the use of restorative teen courts. U.S. DEP’T JUSTICE, COMPREHENSIVE SCHOOL SAFETY AWARDS FOR FY 2014, at 14, 18–19 (2014), <http://nij.gov/topics/crime/school-crime/documents/comprehensive-school-safety-initiative-awards-fy-2014.pdf>. In 2015, NIJ funded clustered randomized control group trials in New York City schools, as well as a comparative trial of a technology-driven framework that develops, tests, and evaluates school safety practices, strategies and policies across multiple outcomes in two SOARS high schools (one in Oregon and one in Illinois) to two high schools in which SOARS was not implemented. U.S. DEP’T JUSTICE, THE COMPREHENSIVE SCHOOL SAFETY INITIATIVE: AWARDS MADE IN FISCAL YEAR 2015, at 6, 13 (2015), <https://www.ncjrs.gov/pdffiles1/nij/249228.pdf>.

30. Lisa Cameron & Margaret Thorsborne, *Restorative Justice and School Discipline: Mutually Exclusive?*, Remarks Before the Reshaping Australian Institutions Conference (Feb. 1999), http://www.iirp.edu/article_detail.php?article_id=NDYw; Gilleen McCluskey et al., *Can Restorative Practices in Schools Make a Difference?*, 60 EDUC. REV. 405, 407–09 (2008); Morrison, *Regulating Safe School Communities*, *supra* note 28, at 689, 690–694, 701–702 (2003); Sally Varnham, *Seeing Things Differently: Restorative Justice and School Discipline*, 17 EDUC. & THE L. 87, 88 (2005).

participants (victims, offenders, supporters, and administrators) were generally satisfied with the process and outcomes achieved.³¹ This work was followed by a series of theoretical and evidence-based examinations of restorative justice practices, such as conferencing, to address a wide range of behaviors from property damage, drug-related incidents, persistent class disruption, assaults, and bullying.³² In light of the negative impact of zero tolerance, there has been significant focus on behavioral outcomes such as suspensions, expulsions and restorative justice.³³ More recently, there is emerging evidence that restorative justice has an impact on racial disproportionality in discipline.³⁴

Since the late 1990s, restorative justice practices have evolved from victim-offender mediation, family and group conferencing, and circle conferencing to what is characterized as a continuum of restorative approaches. Not surprising, as the continuum model expanded, researchers shifted their study of practice implementation and expansion to reflect “whole-school” approaches.³⁵ Additionally, researchers also began to develop preliminary measures and metrics for school-wide behavioral outcomes. The emergence of the whole-school model³⁶ as a dominant feature in the academic literature represented a clear ideational shift in the acceptance and understanding of restorative justice. No longer simply a theoretical construction, restorative justice’s identity and associated practices were actively moving towards an idea or norm that would become institutionalized in mainstream education policy and practice. As Morrison and Vaandering have argued, restorative justice’s values, skills, and practices establish an institutional space that responds not only to incidents of aggression

31. Morrison et al., *Practicing Restorative Justice*, *supra* note 9, at 337–39, 342–51; Cameron & Thorsborne, *supra* note 30.

32. See *supra* note 24; Brenda Morrison, *Restorative Justice and School Violence: Building Theory and Practice*, RESTORATIVE PRACTICES E-FORUM 2–6 (2002); Dorothy Vaandering, *Implementing Restorative Justice Practice in Schools: What Pedagogy Reveals*, 11 J. PEACE EDUC. 64, 64, 66 (2014).

33. Armour, *supra* note 1, at 1019–22; see also *infra* Part III.

34. Armour, *supra* note 1, at 1022.

35. Primary practices involve the entire school community and seek to establish a value ethic and skill base. Secondary practices address specific behaviors that disrupt social relations of shared school spaces, such as classrooms, hallways, and playgrounds. Tertiary practices respond to serious harm and involve all those affected uses, conferences or circles. Morrison & Vaandering, *supra* note 9, at 144; see also Armour, *supra* note 1, at 1017; Morrison, *Regulating Safe School Communities*, *supra* note 28, at 696–97.

36. A whole-school model of restorative practices can include: affective statements, restorative circles, peer mediation, informal and formal conferences, large group circles, restorative questioning, and restorative dialogue.

and harm, but to all relationships that occur in schools, including administrator interactions, policy decisions, teacher pedagogy and curriculum, and professional and institutional development.³⁷

Like many of the comparable international studies, the research design of domestic school-based restorative justice has included the collection of qualitative information (observations, interviews, and focus groups) and school or district-wide quantitative data (capturing changes in the rates of suspensions, expulsions, behavior referrals, and attendance). For example, my earlier longitudinal study of restorative practices in Denver, Colorado found that in the initial one-year pilot at Cole Middle Schools, ninety-five students were referred to restorative justice conferencing or mediation in lieu of suspensions with 84% of the students signing restorative agreements for conflicts ranging from “trash talk” to physical altercation.³⁸ By the end of the pilot phase in 2004, police citations had declined by 86% and suspensions by over 40% with eleven of fourteen cases of fighting referred to restorative intervention and restorative agreements reached in each instance.³⁹ In 2006, Denver Public Schools began a multi-phased process of implementation across elementary, middle and high schools aimed at whole-school level adoption, which has resulted in positive outcomes across various metrics of school safety, school climate, academic achievement, suspensions and expulsions across elementary, middle and high schools.⁴⁰ In a four-year period at North High School (the first high school where restorative justice was implemented in Denver), fights decreased from more than fifty each year to ten.⁴¹ In addition to impacting disciplinary actions, Baker conducted survey sampling in Denver Public Schools finding that 30% showed improvement in school attendance and tardies.⁴²

Similarly, in South St. Paul, Minnesota, Stinchcomb, Bazemore, and Riestenberg’s analysis found that over a three-year period behavior referrals for physical aggression in an elementary school declined from 773 to 153, suspensions in a middle school reduced from 110 to

37. Morrison & Vaandering, *supra* note 9, at 144–45.

38. González, *Socializing Schools*, *supra* note 28, at 158.

39. See *supra* Part I; see also González, *Keeping Kids in Schools*, *supra* note 2, at 323–34.

40. Wesley G. Jennings et al., *Localizing Restorative Justice: An In-Depth Look at a Denver Public School Program*, 11 SOC’Y CRIME, L. & DEVIANCE 167, 167–68 (2008); González 2011, *Restoring Justice* *supra* note 5, at 27; González, *Keeping Kids in Schools*, *supra* note 2, at 323–24; González, *Socializing Schools*, *supra* note 28, at 158.

41. González, *Socializing Schools*, *supra* note 28, at 157.

42. MYRIAM L. BAKER, DPS RESTORATIVE JUSTICE PROJECT: YEAR THREE 9 (2009), <http://hermes.cde.state.co.us/drupal/islandora/object/co%3A12242/datastream/OBJ/view>.

55, and high school suspensions dropped from 132 to 95.⁴³ In addition to resolving individual conflicts, restorative justice was found to positively impact school culture.⁴⁴ Additionally, behavior referrals for physical aggression at the same elementary school decreased from 773 to 153 incidents.⁴⁵ Riestenberg has conducted subsequent analysis of the Minnesota project noting that after the second round of funding, evaluations showed reductions in behavior-related referrals and suspensions at 45% and 63% respectively.⁴⁶ Retrospective review and analysis of discipline data in 2007–2008 revealed that students who went through a restorative process were also less likely to repeat an incident.⁴⁷ Similarly, Karp and Breslin reported that referrals for violent behaviors at Lincoln Center Elementary School decreased by more than half.⁴⁸

In Lansing, Michigan, von der Embse, von der Embse, von der Embse and Levin reported in 2008–2009, after an initial five year implementation (beginning in one elementary school and expanding to nineteen high school, junior high, and elementary schools), restorative justice was used with over 1,500 students, with 507 out of 522 cases resolved, 11 expulsions and more than 1,600 suspension days avoided.⁴⁹ Their long-term surveys indicated almost 90% of the participants learned new skills in conflict resolution.⁵⁰

Utilizing qualitative methodology in a single school case study in Boston, Massachusetts, Knight and Wadhwa examined the use of restorative circles in response to fights, misbehaviors, and gang violence, finding that in addition to addressing school safety, the circles served an important school-level resilience-building strategy for both educators and students.⁵¹ Their project reflected a new area of analysis in the field—the potential for restorative justice to develop resiliency and promote equitable opportunity to participate in the school com-

43. Stinchcomb et al., *supra* note 2, at 135–37.

44. *Id.*

45. *Id.* at 136.

46. Nancy Riestenberg, *Creating the Restorative School Part I: Seeding Restorative Approaches in Minnesota*, in *RESTORATIVE APPROACHES TO CONFLICT IN SCHOOLS* 209 (Edward Sellman, Hilary Cremin & Gillean McCluskey eds., 2013).

47. *Id.* at 210.

48. Karp & Breslin, *supra* note 6, at 257.

49. Nathan von der Embse et al., *Applying Social Justice Principles Through School-Based Restorative Justice*, 38 *COMMUNIQUE* 18, 18 (2009).

50. *Id.*

51. David Knight & Anita Wadhwa, *Expanding Opportunity Through Critical Restorative Justice*, 11 *SCHOOLS: STUD. EDUC.* 11, 14–16 (2014).

munity.⁵² Similarly, Schumacher's two-year ethnographic study on the use of restorative practices with adolescent girls in public urban high schools provided interesting insights relative to restorative justice and school safety.⁵³ Employing a modified ethnographic approach, she identified four relational themes and three emotional literacy skills.⁵⁴ Key findings were two-fold. One, participants in the restorative circles felt a sense of safety within the school community, and two, the restorative circles promoted refined anger management, active listening and interpersonal sensitivity, all key aspects of pro-social behavior.⁵⁵ Such skills have been identified in earlier studies as linked to improved school climate and preventing disruptive behavior.⁵⁶

While the focus of this Article centers on a proposition of norm change, a new area of study in restorative justice, there remains a crucial need to expand current understandings of localized practices and outcomes. As such, I strongly support the continued development of the field across a range of research designs ranging from theoretical analysis to descriptive accounts and from models of practice to quantitative and qualitative studies of individual schools and districts. Such research will not only broaden the identity of restorative justice, but will also align with the significant public discourse surrounding racial justice and the goal of ending the school-to-prison pipeline.

II. THEORIES OF NORMATIVE CHANGE

Before one can evaluate a norm change hypothesis, it is important to set forth the guiding theoretical foundations for how normative change takes place. Norms are social regularities that impose informal and formal standards and constraints on human behavior in deference to the preferences of others.⁵⁷ They "come in varying strengths" with individual norms⁵⁸ "commanding different levels of agree-

52. *Id.* at 15–16.

53. Ann Schumacher, *Talking Circles for Adolescent Girls in an Urban High School: A Restorative Practices Program for Building Friendships and Developing Emotional Literacy Skills*, 1 Sage OPEN 1, 3–4 (2014).

54. *Id.* at 4.

55. *Id.* at 5–7.

56. Morrison & Vaandering, *supra* note 9, at 147.

57. See William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545, 546 (1994) (explaining social norms as those rules and standards that define the limits of acceptable behavior); see also Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1097 (1986) ("A norm exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way.").

58. Regardless of norm category, contemporary scholarship accepts that the creation and sustenance of norms is based on repeated personal interactions, so that social norms become

ment.”⁵⁹ Changing a norm is difficult, as it requires developing new meanings as to preconceived ideas and practices. In this manner it finds expression in both individual and collective intentionality. Scholars have engaged in significant discourse considering how, why, and when norms influence state practices (at any level). Broadly speaking, this discussion has been divided into theoretical accounts and practice-based approaches to understanding the mechanisms by which norms influence international, national, and local actors. When considering change and the emergence of new norms, the literature generally identifies two types of change. The first type is a “process of norm emergence and the dynamics of change from no norm to [a] norm or from one norm to another.”⁶⁰ The second is a change in a norms’ effectiveness, how the norm interacts and changes other features in a political landscape.⁶¹

For purposes of this Article the most resonant articulation of norm change is grounded in constructivist theories.⁶² Constructivists⁶³ focus on social “meaning that is constructed from a complex and

identified as “practices that parties adopt and follow in an ongoing relationship.” Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1926 (1996). Therefore, scholars generally agree that norm origination necessitates a certain degree of social “connectedness.” Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2150 (1996).

59. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 892 (1998).

60. Michal Ben-Josef Hirsch, *Ideational Change and the Emergence of the International Norm of Truth and Reconciliation Commissions*, 20 EUR. J. INT’L REL. 810, 813 (2014).

61. See generally Sheri Berman, *Ideas, Norms, and Culture in Political Analysis*, 33 COMP. POL. 231 (2001) (discussing the impact of norms on outcomes); Dionyssi G. Dimitrakopoulos, *Norms, Interests and Institutional Change*, 53 POL. STUD. 676 (2005) (discussing how norms affect the process of institutional change).

62. There is a well-established body of work in sociology that addresses the concept of social norms to explain how society shapes individual behavior, and while important to understanding the *how* of social change, such work is outside the scope of this Article. See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 339 (1997).

63. While constructivism’s focus on norms, identity, and agency has its origins in political science, it has emerged as a dominant area of study in international law. See Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT’L L. 19, 38 (2000); Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT’L ORG. 633, 640 (2000); see generally MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); NICHOLAS GREENWOOD ONUF, *WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS* (1989); *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse et al. eds., 1999); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

specific mix of history, ideas, norms, and beliefs” to derive explanations of state behavior.⁶⁴ At its foundation, “[c]onstructivism asks how norms evolve and how identities are constituted, analyzing . . . the role of identity in shaping political action and the mutually constitutive relationship between agents and structures.”⁶⁵ In their seminal work, Finnemore and Sikkink describe the norm life cycle in three stages (norm emergence, norm acceptance or cascade, and norm internalization) and identify the points at which new social meanings emerge.⁶⁶

In the first stage—emergence—norm entrepreneurs play a key role in the introduction, creation, and interpretation of a new norm by framing, articulating, and spreading ideas.⁶⁷ Sunstein postulates that norm entrepreneurs, individuals who seek to change existing norms, are critical to the emergence of a new norm and to its adoption by others.⁶⁸ Norm entrepreneurs highlight pressing social, political and legal issues or create new issues “by using language that names, interprets and dramatizes them.”⁶⁹ As Finnemore and Sikkink emphasize, in the first stage these entrepreneurs construct “cognitive frames” and, if they succeed in this effort, “the new frames resonate with broader public understandings and are adopted as new ways of talking about and understanding issues.”⁷⁰ During the process of emergence,

64. E.g., Anne-Marie Slaughter & Thomas Hale, *International Relations, Principal Theories*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 129 (Rüdiger Wolfrum ed., 2013) (citing ALEXANDER WENDT, *A SOCIAL THEORY OF INTERNATIONAL POLITICS* (2000)).

65. Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1411 (2006).

66. Finnemore & Sikkink, *supra* note 59, at 896, 902, 904 (1998) (new social meanings are what they call “agreements” or “shared moral assessments”). Although writing about the phenomenon of international norm dynamics, the authors note parallels to norm dynamics at the domestic level. See *id.* at 893 (discussing the domestic emergence of the norm of women’s suffrage). In the context of environmental protection, Vandenbergh asserts that social meaning can “shape social norms” by strengthening or modifying existing norms or by encouraging or impeding the emergence of new norms. See Michael P. Vandenbergh, *The Social Meaning of Environmental Command and Control*, 20 VA. ENVTL. L.J. 191, 204 (2001).

67. Finnemore & Sikkink, *supra* note 59, at 902 (explaining “the primary mechanism for promoting norm cascades is . . . socialization,” which occurs through a process of “emulation . . . praise (for behavior that conforms to group norms)”).

68. Sunstein, *supra* note 63, at 909 (defining “norm entrepreneurs” as people who when successful, produce “norm bandwagons,” which are created when small changes in behavior result in large ones).

69. Finnemore & Sikkink, *supra* note 59, at 897. Norm entrepreneurs create new norms by blatantly acting in a way that defies or transcends existing norms, signaling others that they should copy the new behavior.

70. *Id.*

entrepreneurs use “persuasion”⁷¹ or strategic social construction utilizing varying strategies to secure acceptance or socialization of emerging norms by state actors.⁷² Building on these ideas, Risse and Sikkink further define the theoretical framework of norm socialization processes to include three types of socialization processes, which are necessary for enduring change adaptation and strategic bargaining: (1) moral-consciousness raising (shaming, argumentation, dialogue and persuasion), (2) institutionalization, and (3) habitualization.⁷³ More recent literature has highlighted changes that occur during the norm diffusion and focus on the process of norm localization in which local and global actors change the framing and content of a norm in order to adapt or incorporate the norm.⁷⁴

When norms move toward dominant acceptance (or cascade), “institutionalization contributes strongly to the possibility for a norm cascade both by clarifying what . . . the norm is . . . and by spelling out specific procedures by which norm leaders coordinate disapproval and sanctions for norm breaking.”⁷⁵ While there is no precise definition or formula for the second stage of the norm life cycle, Sunstein observes that “[n]orm cascades occur when societies experience rapid shifts toward new norms.”⁷⁶ Similarly, Lutz and Sikkink suggest that, “norms cascades are collections of norm-affirming events. These events are discursive events—that is, they are verbal or written statements asserting the norm.”⁷⁷ Adopting the sociolegal concept of “tipping points,” Gladwell posits norm cascades are identified by the

71. *Id.* at 914 (defining persuasion as “the process by which agent action becomes social structure, ideas become norms”).

72. *Id.* at 898, 900. As norms emerge, entrepreneurs must deal with “firmly embedded alternative norms and frames that create alternative perceptions of both appropriateness and interest.” *Id.* at 897. During moments of contestation, norm entrepreneurs may need government endorsement of the new norms and agreement to include the norm in the political agenda. *Id.* at 900.

73. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms Into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 11 (Thomas Risse, et al. eds., 1999).

74. See generally Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 INT’L ORG. 239 (2004) (discussing norm diffusion and how agents reconstruct norms to fit cognitive identities); Ann Florini, *The Evolution of International Norms*, 40 INT’L STUD. Q. 363 (1996) (explaining why norms change over time).

75. Finnemore & Sikkink, *supra* note 59, at 900.

76. Sunstein, *supra* note 63, at 912 (Sunstein presents examples of norm cascade including, “the attack on apartheid in South Africa, the fall of Communism, the election of Ronald Reagan, . . . the rise of the feminist movement, and the current assault on affirmative action.”); see also Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2185 (1996) (explaining “snowball” effect in evolution of norms).

77. Lutz & Sikkink, *supra* note 63, at 655.

moment when a social idea or norm crosses a threshold that leads to widespread adoption.⁷⁸ During a norm cascade the key actors are no longer only norm entrepreneurs, but instead majority preferences reflect the new norm across a range of individuals, networks, organizations, and group stakeholders.⁷⁹ As cascade processes occur, the need for pressure from the entrepreneurs lessens.⁸⁰ One notable characteristic of internalization at the end of stage two is repeated behavior and habit.⁸¹

In the third stage of internalization,⁸² “norms may become so widely accepted that they are internalized by actors and achieve a ‘taken-for-granted’ quality that makes conformance with the norm almost automatic.”⁸³ Finnemore and Sikkink suggest the main actors in this final process of internalization are laws, professions, and bureaucracies that achieve normalization through habit and institutionalization.⁸⁴ Understood more broadly, what constitutes the critical mass to shift from cascade to internalization is a sufficient number of individuals or groups who agree with the new norm to establish broad-based adoption and consensus. As scholars have noted, it is hard to determine the precise moment in which internalization has occurred. For example, Babcock observes “internalization of a new norm also depends upon the type of norm involved and the ‘prominence’ of the norm leaders.”⁸⁵ Similarly, Koh argues the “precise sequencing among political, legal, and social internalization” will vary from case to case.⁸⁶ Further, Koh notes a norm could be socially internalized “long before it is politically or legally internalized.”⁸⁷ While Koh’s work is grounded in studying the internalization of international

78. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 12 (2002).

79. Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647, 706 (2007) (discussing how norm cascades created by localities’ actions not only impact the policy they are directed at, but also have a wider impact).

80. Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 145 (2009).

81. *Id.* at 143.

82. Norm internalization is the subject of an extensive body of scholarship investigating the social, moral, legal, psychological and philosophical reasons why individuals and society partially or fully internalize norms. Since the primary question of this Article rests on whether a norm has emerged this literature is outside its scope and not included in Part I.

83. Finnemore & Sikkink, *supra* note 59, at 904.

84. *Id.* at 905.

85. Babcock, *supra* note 80, at 143–44.

86. Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. REV. 623, 642 (1998).

87. *Id.*

norms into domestic processes, he provides a helpful framework—that norm internalization can be viewed politically, legally, and socially—for understanding the experience of restorative justice norm emergence. At each of these levels of internalization, the new norms are repeated, interpreted, and concretized. Whether looking to practices, processes, or even policies, changes in school discipline offer examples of the emerging consensus among actors affirming the distinctness of restorative justice.

III. THE NORM CHANGE PROPOSITION: ADVANCING A NEW UNDERSTANDING OF SCHOOL DISCIPLINE IN THE UNITED STATES

Acknowledging that norms are dynamic and emerge through an agreement process, Finnemore and Sikkink's work set forth a primary question central to this Article, "How do we know a norm when we see one?"⁸⁸ Applying the norm life cycle theory to analyze the process of norm creation, they argue one can look at "how agreement among a critical mass of actors on some emergent norm can create a tipping point after which agreement becomes widespread in many empirical cases."⁸⁹ While this Article cannot predict the depth of cascade or internalization of restorative justice at this stage, given its rapid and continued growth, it suggests four key indicators that can help measure this: (1) the number of schools with restorative justice practices; (2) changes in exclusionary behavioral outcomes; (3) amendments or revisions to school codes of conduct and/or discipline policies; and (4) state and/or federal laws, guidelines, and policies. Whether viewed at the micro- or macro-levels, the presence of these indicators suggest emergence and subsequent cascade of restorative justice as a norm.⁹⁰

To demonstrate my argument about normative change, this section proceeds as follows. In the first section I present five examples of "established sites" of restorative justice practice within a discussion of stage one of the norm life cycle.⁹¹ These sites were selected for their

88. Finnemore & Sikkink, *supra* note 59, at 892.

89. *Id.* at 892–93.

90. This Article acknowledges that the results from individual studies are going to reflect diversity in identified indicators depending on whether one looks at different stages to operationalize their application to the norm life cycle and norm change more generally.

91. Given the focus of this Article, the descriptive analysis of each "established site" is not meant to provide comprehensive and individualized exploration, nor does it reflect all sites of restorative justice implemented pre-2010. Rather, this section serves to present salient examples of norm entrepreneurs in tracing the emergence of school-based restorative justice.

emergence prior to 2006 and the sustained nature of restorative justice practices. Additionally, these five sites have served as models for new schools seeking to establish a common narrative with those viewed as norm entrepreneurs (“emerging sites”).⁹² In the next section, I explore the rapid expansion of school-based restorative justice following the norm life cycle into stage two, cascade. The final section presents observations regarding the current state of restorative justice in the context of the third stage, internalization.⁹³

A. Stage One: Norm Emergence

There is little doubt that school discipline in the United States is transforming. And the most common causal mechanism that is said to account for the spread of norms is human agency, either as individuals, groups, or government leaders. As Finnemore and Sikkink note:

[n]orms do not appear out of thin air; they are actively built by agents [with] . . . strong notions about appropriate or desirable behavior in their community. . . . Norm entrepreneurs are critical for norm emergence because they call attention to . . . or . . . ‘create’ issues by using language that names, interprets, and dramatizes them.⁹⁴

Given that institutionalization of any new norm is not an immediate process, the first restorative justice norm entrepreneurs were necessary to frame, articulate, debate, and facilitate the spread of ideas.

Even though individual practices initially emerged locally, commonalities existed among norm entrepreneurs across established sites.⁹⁵ First, they defined restorative justice as a philosophy and set of practices, not simply an alternative program. Second, they identified and named the bias in highly punitive school cultures and framed the disproportionate impacts of zero tolerance in terms of racial and gender disparities. Third, they articulated the connections between punitive discipline and entry into the juvenile and criminal justice systems. Fourth, they sought policy changes within their schools and districts that internalized not only restorative practices, but also its core

92. Such consensus could be a potential measure of the norm life cycle. While it is not the aim of this Article, I urge others to consider study of this nature. Such research would not only help to shape a stronger understanding of the normative identity of restorative justice, but also highlight how norm emergence is not a linear process or pre-determined by entrepreneurs. Instead, it is a dynamic process in which ideas and practices evolve and change.

93. Scholars have found it difficult to establish the specific moment or draw generalized conclusions about when cascade moves to internalization. *See* Part II.

94. Finnemore & Sikkink, *supra* note 59, at 896–97.

95. *See* Part II.

guiding principles. Fifth, they connected restorative justice with data reflecting significant decreases in exclusionary behavioral outcomes, i.e., suspensions and expulsions. And a related point, sixth, they adopted whole-school models aimed at realigning values so that relationships and connectedness became the dominant frame for all members of the school community.

Implementation among the early sites of restorative justice was based on a whole-school model and the following examples represent some of the most comprehensive practices presently in existence. While they are categorized by state for purposes of this Article, implementation has not occurred at the state level with one noteworthy exception discussed in a later section.⁹⁶ As expected in a process of norm growth and diffusion, variation in initial implementation existed such as, collaborative partnerships with local nonprofits dedicated to restorative solutions in both the criminal and juvenile justice systems or the hiring of district employees as part-time or full-time restorative justice coordinators. But as restorative justice has become increasingly internalized and acculturated, these sites have adjusted and a greater intersection of identity, values, practices, and outcomes has emerged.⁹⁷ For example, an observable trait across each of the established sites is a shared acceptance of the practice. This is evidenced in both written materials—reports, policy papers, practice guides, etc.—and behavioral practices—the use of a whole-school and continuum approach. There is also similarity of language across these sites when articulating the specific goals and values associated with the behavioral practices and related outcomes of restorative justice, as well as its use in discipline policies and codes of conduct. Moreover, whether increased institutionalization occurred as a result of additional funds coming from the local, state and federal or due to significant political and legal attention to the critical civil and human rights issues faced by students in zero-tolerance environments, restorative justice has secured a status of heightened legitimization.

96. Armour, *supra* note 1, at 1029–31 (discussing expansion in Texas and how the Texas Education Agency and the Institute of Restorative Justice and Restorative Dialogue at the University of Texas at Austin is using regional education centers to implement sustainable restorative practices in schools).

97. This is not to say that implementation adheres to a set model or practice lifted from one site to another, as this simply does not work.

1. California

In 2005, Oakland Unified School District (OUSD) began the implementation of restorative justice at a district-wide scale, in response to a growing consensus that the existing punitive policies were unhealthy for students and contradictory to positive school culture.⁹⁸ As one of the first sites to adopt restorative practices at a district-wide, whole-school basis, there are several studies in the literature.⁹⁹ While these studies did not formally name OUSD as a norm entrepreneur, it is clear that OUSD shares the characteristics attributed by scholars to norm entrepreneurship.¹⁰⁰ For example, OUSD's initial framing of restorative justice sought to establish both a practical and normative consensus regarding the harms of exclusionary discipline, in particular for students of color, and develop a growing interest in restorative justice as an alternative to zero tolerance that could potentially achieve educational, behavioral, and psychological goals.¹⁰¹ This framing expanded the status of restorative justice practices beyond a program and elevated its social value. Following the first three years of implementation, norm entrepreneurs inside and outside OUSD were successful in changing the majority preferences from zero tolerance to restorative justice and institutionalizing the restorative justice within the discipline policy.¹⁰² This was a pivotal moment that helped to firmly embed restorative justice as legitimate and communicate OUSD's values and interests to other actors. Since 2005, OUSD's long-term practices have created a social environment by which the norm of restorative justice has not only shaped the local context, but also influenced the social, political and legal meanings of discipline in California.¹⁰³

98. SONIA JAIN ET AL., *RESTORATIVE JUSTICE IN OAKLAND SCHOOLS IMPLEMENTATION AND IMPACTS: AN EFFECTIVE STRATEGY TO REDUCE RACIALLY DISPROPORTIONATE DISCIPLINE, SUSPENSIONS AND IMPROVE ACADEMIC OUTCOMES*, iv (2014), <http://www.ousd.org/cms/lib07/CA01001176/Centricity/Domain/134/OUSD-RJ%20Report%20revised%20Final.pdf>; SUMNER ET AL., *supra* note 22, at 10.

99. *See e.g.*, JAIN ET AL., *supra* note 98; JON KIDDE & RITA ALFRED, *RESTORATIVE JUSTICE: A WORKING GUIDE FOR OUR SCHOOLS* (2011), <http://www.skidmore.edu/campusrj/documents/Kidde-and-Alfred-2011.pdf>; SUMNER ET AL., *supra* note 22, at 10.

100. *See* Part II.

101. Interview with Mary Louise Frampton, Adjunct Professor of Law, Former Faculty Dir. of Thelton E. Henderson Ctr. for Soc. Justice, in Berkeley, Cal. (Oct. 23, 2012) (on file with author).

102. González, *Keeping Kids in Schools*, *supra* note 2, at 306–07.

103. *See infra* note 179. As Babcock notes, “[S]ocial meaning shapes norms especially when that meaning is articulated by some law. ‘[L]aw is expressive in the sense that it can signal, reinforce or change social meaning,’ and ‘the public can receive a message conveyed by law, whether intended or unintended, and . . . this message can have an impact on perceptions about

Similar to schools in Illinois, Pennsylvania, and Maryland, the implementation of restorative justice practices in Oakland was based on a collaborative partnership with a local nonprofit, Restorative Justice for Oakland Youth (RJOY).¹⁰⁴ During the pilot phase OUSD reported positive outcomes across a range of measures.¹⁰⁵ Presently, twenty-four schools in OUSD utilize whole-school restorative justice practices.¹⁰⁶ Consistent with other restorative justice norm entrepreneurs, OUSD utilizes a whole-school model with a primary focus on addressing disciplinary disproportionality and the discipline gap.

As the 2014 study by Jain, Bassey, Brown, and Kalra emphasized, the impact of restorative justice in these areas is measurable. For example, in addition to incremental decreases (2011–2012 and 2012–2013) in the suspension gap between African American and white students,¹⁰⁷ by 2013, schools had decreased their discipline disproportionality across multiple racial categories, if not eliminated them altogether.¹⁰⁸ Restorative justice has also had a demonstrable impact on school climate¹⁰⁹ and academic achievement.¹¹⁰ In a comparative analysis of middle schools with and without restorative justice from years 2010 to 2013, the former saw a 24.4% decline in chronic absences, while the latter saw a 62.3% increase.¹¹¹ Similarly, four-year graduation rates at restorative high schools increased by 60%,

the sources of a problem and on the social norms that develop in response to those perceptions.” Babcock, *supra* note 80, at 145–46. In 2015, RJOY became a thought partner with the Restorative Schools Vision Project (RSVP). This collaboration is funded by the California Endowment and aimed at developing state-wide diffusion of restorative justice in schools. For example, RSVP has held stakeholder convenings across California with the aim to “gather feedback to inform the findings of statewide research about restorative justice best practices in the school setting.” As RSVP notes, “[T]he convenings are part of a broader statewide campaign to end the school-to-prison-pipeline and integrate restorative practices throughout the CA public education system.” See E-mail from Alena Marie, Program Manager, Restorative Schs. Vision Project (May 16, 2016) (on file with author); Interview with Fania Davis, Exec. Dir., Restorative Justice for Oakland Youth, in Oakland, Cal. (May 19, 2016) (on file with author).

104. RJOY has remained the collaborative partner for OUSD providing direct restorative justice services across the district. Telephone Interview with Fania Davis, Exec. Dir., Restorative Justice for Oakland Youth, (Jul. 14, 2016) (on file with author).

105. SUMNER ET AL., *supra* note 22, at 14–20.

106. JAIN ET AL., *supra* note 98, at 10–12.

107. *Id.* at 45–46. Moreover, the number of African Americans students suspended in one year decreased by 29%. *Id.* at 45.

108. *Id.* at 45.

109. For example, approximately 70% of staff surveyed reported that restorative practices improved climate and 67% of students felt that restorative justice improved their emotional and social skills. *Id.* at 40–41.

110. In another study of OUSD, Kidde and Alfred, found that standardized test scores at Cole Middle School increased seventy-four points following two years of restorative justice implementation. See KIDDE & ALFRED, *supra* note 99, at 17.

111. JAIN ET AL., *supra* note 99, at 49.

compared to 7% at schools with punitive discipline¹¹² and restorative justice high schools experienced a 56% decrease in dropout rates compared to 17% in non-restorative justice high schools.¹¹³ Reading levels in grade 9 doubled in restorative justice high schools from an average of 14% to 33%, an increase of 128% compared to only 11% for non-restorative justice high schools.¹¹⁴

2. Colorado

Denver Public School (DPS), like OUSD, should be viewed as a restorative justice norm entrepreneur. While other actors were undoubtedly important in Denver, the emergence of restorative justice was largely attributed to a handful of DPS employees and the community-based organization, Padres y Jóvenes Unidos, who sought to call attention to and address the overreliance on punitive discipline and zero tolerance.¹¹⁵ Like the norm entrepreneurs identified by Finemore and Sikkink,¹¹⁶ these individuals used their status and position inside and outside DPS to secure initial acceptance of restorative justice.¹¹⁷

In 2003, DPS introduced restorative justice at a single school site.¹¹⁸ Given these successes and the positive impact on school culture, restorative justice was integrated into the Cole Middle Schools discipline protocols in fall 2004 and used as an alternative to suspensions and police citations in specific cases.¹¹⁹ In 2006, DPS began a multi-school three-year pilot phase with a specific goal to reduce sus-

112. *Id.* at 51.

113. *Id.* at 52.

114. *Id.* at 50.

115. González, *Restoring Justice*, *supra* note 5, at 23–26; Telephone Interview with Ben Cairns, Principal, DSST Cole High Sch., (Jul. 11, 2016) (on file with author); Interview with Daniel Kim, Director of Youth Organizing, Padres y Jóvenes Unidos, in Harrisonburg, Va. (Jun. 19, 2016) (on file with author).

116. *See* Part II.

117. González, *Restoring Justice*, *supra* note 5, at 25–26; Telephone Interview with Ben Cairns, *supra* note 115. This acceptance was not limited to the local level, as the 2003 Cole Middle School and 2006–2009 multi-school implementation was funded by a Colorado Department of Education grant. *See* González, *Keeping Kids in Schools*, *supra* note 2, at 323–24.

118. The Cole Middle School pilot was a community-based restorative justice initiative implemented by VORP of Metro Denver and funded by the Office of Juvenile Justice and Delinquency Prevention. The selection of the school was simple: Cole Middle School was notorious for having the largest number of suspensions, tickets, and arrests in the district. As a VORP of Metro Denver community organizer noted, “[Cole] was stereotyped as a ‘gang factory’ where teachers would see students fighting in the hall and close their door instead of intervening.” González, *Socializing Schools*, *supra* note 28, at 158.

119. *Id.*

pensions, expulsions, and police intervention in schools.¹²⁰ This goal was coupled with explicitly naming the bias of punitive school culture and framing its disproportionate impact in terms of racial disparities.¹²¹ This change in discourse about punitive discipline connected to the introduction of restorative justice has become a prevailing model for many of the schools and districts. Across all of the “established sites” the norm entrepreneurs have used framing of exclusionary practices and zero tolerance to constitute and legitimize the new norm of restorative justice.

Following the pilot phase (2006–2009), DPS invested significant resources in whole-school and district-wide implementation. Like sites in Illinois and California, DPS focused on multi-school diffusion to strengthen the pragmatic and normative meanings of restorative justice, as well as build deeper acceptance of the practice.¹²² In 2008, with a critical number of people in the district in agreement about restorative justice, DPS passed a revised discipline policy.¹²³ With the passage of the new policy, the new discipline norm of restorative justice in DPS became more firmly fixed in behavioral practice. Five years later, this institutionalization was further evidenced in a memorandum of agreement between DPS and the Denver Police Department (DPD).¹²⁴ But institutional acceptance and internalization of restorative justice in Denver has not been limited to the district level. In 2012, the state legislature voted to phase out zero-tolerance policies, and in 2013, increased funding for restorative justice programs.¹²⁵

120. González, *Keeping Kids in Schools*, *supra* note 2, at 323–24; Interview with Timothy Turley, Program Manager, Denver Pub. Sch. Prevention and Intervention Servs., in Denver, Colo. (Jun. 12, 2011) (on file with author). Key outcomes from the three years include but are not limited to: out-of-school suspensions decreasing by 5400 in 2008–09 when compared to the baseline year; teachers rating that 50% of students improved their overall social skills over the course of the program; school attendance and tardiness showed a reduction of 50% in absences per quarter and 60% in tardies per quarter; nearly 50% of the pilot group showing improvement on emotional quotient scores and over 50% improving their stress management. Baker, *supra* note 42, at 15–18.

121. Telephone Interview with Ben Cairns, *supra* note 115.

122. This work was of course strongly guided by the positive outcomes realized in the pilot and post-pilot phases. See González, *Keeping Kids in Schools*, *supra* note 2 and González, *Socializing Schools*, *supra* note 28 for a more detailed discussion of post-pilot phase outcomes.

123. González, *Socializing School*, *supra* note 28, at 161.

124. *Id.* at 163–64.

125. PADRES Y JOVENES UNIDOS & ADVANCEMENT PROJECT, LESSONS IN RACIAL JUSTICE AND MOVEMENT BUILDING: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE IN COLORADO AND NATIONALLY 23–26 (2015), <http://padresunidos.org/sites/default/files/media-root/Lessons%20in%20Racial%20Justice%20and%20Movement%20Building-Dismantling%20the%20.pdf>; Joshua Wachtel, *New Law in Colorado Will Help Make Restorative Justice Available to All Youth*, RESTORATIVE WORKS LEARNING NETWORK (May 20, 2013), <http://restorativeworks.net/2013/05/colorado-law-make-rj-available-all-youth/> [hereinafter Wachtel, *New Law in Colorado*].

Moreover, as DPS has clarified, socialized, and institutionalized restorative justice at the local and state levels, other sites across the state have emerged in such cities as Aurora, Colorado Springs, and Manitou Springs.¹²⁶ With this state-level diffusion and acculturation, positive outcomes of restorative justice practices are no longer limited to DPS.¹²⁷

3. Illinois

In 2006, norm entrepreneurs in Chicago Public Schools (CPS) began a process of introducing a new set of practices and values associated with discipline.¹²⁸ Similar to other early adopters, CPS's restorative justice practice was grounded in a continuum model. Following positive outcomes after the first three-year pilot period, CPS expanded its practices and schools, and strengthened the position of restorative justice by developing and passing a revised student code of conduct that emphasized the use of restorative practices.¹²⁹ The CPS student code of conduct "embraces the philosophy of restorative justice."¹³⁰ Such action formally signaled that restorative justice was no longer an abstract idea, but rather a concrete norm with formal standards and constraints on schools. In addition to policy changes within the district, CPS's "new frames resonate[d] with broader public under-

126. Debbie Kelley, *Three Colorado Springs D-11 Schools to Add Restorative Justice Programs*, GAZETTE (May 7, 2015, 5:31 AM), <http://gazette.com/three-colorado-springs-d-11-school-to-add-restorative-justice-programs/article/1551135>. As restorative justice has diffused across Colorado the positive outcomes have not been limited to DPS. See Padres y Jovenes Unidos and Advancement Project, *supra* note 125.

127. See NATIONAL JUVENILE JUSTICE NETWORK, SCHOOL DISCIPLINE & SECURITY PERSONNEL: A TIP SHEET FOR ADVOCATES ON MAXIMIZING SCHOOL SAFETY AND STUDENT SUCCESS 7 (http://www.njjn.org/our-work/school-discipline—security-personnel#_ftn26) (Oct. 2015) (reporting that in the 2013–2014 school year, Hinkley High School reduced suspensions by 48% after it implemented a restorative justice program).

128. Joshua Wachtel, *Chicago Fights School-to-Prison Pipeline Restoratively*, RESTORATIVE WORKS LEARNING NETWORK (Oct. 9, 2014), <http://restorativeworks.net/2014/10/chicago-fights-school-prison-pipeline-restoratively/> [hereinafter Wachtel, *Chicago*] (noting that Alternatives, Inc., began working in CPS in 1996 at Senn High School and that CPS currently collaborates with more than two dozen Chicago-based organizations to end the school-to-prison pipeline by implementing restorative practices).

129. W. DAVID STEVENS ET AL., DISCIPLINE PRACTICES IN CHICAGO SCHOOLS: TRENDS IN THE USE OF SUSPENSIONS AND ARRESTS 1 (2015), <https://consortium.uchicago.edu/sites/default/files/publications/Discipline%20Report.pdf>.

130. HIGH HOPES CAMPAIGN, FROM POLICY TO STANDARD PRACTICE: RESTORATIVE JUSTICE IN CHICAGO PUBLIC SCHOOLS 7 (2012), <http://www.suspensionstories.com/wp-content/uploads/2012/03/FromPolicyToStandardPractice.pdf>. The code also "encourages principals and administrators to adopt and implement restorative justice philosophies and practices." *Id.*

standings”¹³¹ and were “adopted as new ways of talking about and understanding issues”¹³² at the city level.¹³³

Over the last ten years, CPS has sought to become increasingly responsive to the negative consequences of zero-tolerance policies and expand restorative practices throughout the district. For example, in 2011, CPS focused additional resources on restorative practices aimed at addressing school safety and school climate.¹³⁴ With the Culture of Calm initiative, CPS expanded restorative justice in schools by the end of 2010–2011.¹³⁵ In a 2015 assessment of the program, researchers reported such notable outcomes as out-of-school suspension rates decreasing from 24% to 16% and arrest rates for African-American boys declining from 4.8 to 3.6%.¹³⁶ Similar to other norm entrepreneurs, advocates in Chicago view their collective work as more than simply “implementing a new program” and instead helping to constitute and advance a new discipline culture in Chicago.¹³⁷

4. Maryland

In 1998, Baltimore County School District (BCSD) introduced restorative justice practices in response to three central concerns: high rates of suspensions and arrests, the racial disproportionality of youth entering the school-to-prison pipeline, and the development of safe and healthy school climates.¹³⁸ Like in Oakland and Chicago, the introduction, and subsequent expansion, in BCSD has been grounded in a partnership with a community nonprofit, Community Conferencing Center (CCC).¹³⁹ The early work of CCC and BCSD broadened the

131. Finnemore & Sikkink, *supra* note 59, at 897.

132. *Id.*

133. Watchel, *Chicago*, *supra* note 128.

134. W. DAVID STEVENS ET AL., *supra* note 129, at 8.

135. *Id.*

136. *Id.* at 12, 19. The High Hopes Campaign 2012 report provides a detailed review of the outcomes of restorative justice in CPS from 2006 to 2011. For example, restorative justice schools reported a decrease of approximately one-third in suspensions from 2009–2010 to 2010–2011. See HIGH HOPES CAMPAIGN, *supra* note 130, at 7. Further, in 2008–2009, peer juries saved over 2,000 days of suspension and a 63% decrease in misconduct reports and 83% decrease in arrests over the same one-year period. See *id.*

137. Watchel, *Chicago*, *supra* note 128. Watchel notes that advocates see their work as “seeking a fundamental transformation of how young people are treated in Chicago.” *Id.*

138. González, *Keeping Kids in Schools*, *supra* note 2, at 311–12; LAURA MIRSKY, *Safer-Saner Schools: Transforming School Culture With Restorative Practices*, INT’L INST. OF RESTORATIVE PRACTICES (2003), http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/ssspilots.pdf.

139. González, *Keeping Kids in Schools*, *supra* note 2, at 311. CCC provides restorative justice practice services, teacher training, and programmatic support for BCSD. With the support of the CCC, dozens of Baltimore schools implemented informal classroom circles, which termed the Daily Rap, and community conferencing, for more serious offenses. *Id.*

scope of discipline practices and was observed by other schools across the district and city, with attention to the potential application of restorative justice in a wider range of settings.¹⁴⁰ In 2005, the Baltimore Curriculum Project (BCP) followed the lead of BCSD with the goal of whole-school culture transformation.¹⁴¹ One year later, restorative justice was established at three school sites (City Springs School, Collington Square School and Hampstead Hill Academy).¹⁴² Consistent with Finnemore and Sikkink's observations of stage one that norm entrepreneurs may need to seek endorsement of the new norms as part of a larger political agenda,¹⁴³ the initial support for BCP came from the Open Society Institute and the Goldsmith Family Foundation.¹⁴⁴ This support not only signaled a greater nexus between restorative justice and school discipline, but that norm leadership was expanding outside the initial group of entrepreneurs.

Similar to the other "established sites" of restorative justice already discussed, measurable changes in outcomes for students were realized as restorative justice spread. As a 2014 report noted, at Hampstead Hill, suspensions were reduced by 61% and office referrals by 91% (2008–2009 to 2013–2014) and at Glenmount School there was a 67% overall reduction in suspensions and 77% reduction in number of students with multiple suspensions.¹⁴⁵ In 2007, BCP expanded restorative practices to additional charter schools in Baltimore.¹⁴⁶ While not as well studied as other "established" sites,¹⁴⁷ Maryland schools have influenced the development of new social and

140. Lauren Abramson, Exec. Dir., Cmty. Conferencing Ctr., Presentation at Restorative Justice in Motion: Building a Movement Conference (Jun. 15, 2016), <http://zehr-institute.org/wp-content/uploads/2015/12/RJ-in-Motion-workshop-descriptions-1.pdf>.

141. Joshua Wachtel, *Baltimore Curriculum Project and Restorative Practices: Transforming Schools & Neighborhoods*, RESTORATIVE WORKS LEARNING NETWORK (Jan. 17, 2012), <http://restorativeworks.net/2012/01/baltimore-curriculum-project-and-restorative-practices-transforming-schools-neighborhoods/> [hereinafter Wachtel, *Baltimore*].

142. *Id.*

143. Finnemore and Sikkink, *supra* note 59, at 900.

144. Wachtel, *Baltimore*, *supra* note 141.

145. INT'L INST. OF RESTORATIVE PRACTICES, *IMPROVING SCHOOL CLIMATE: EVIDENCE FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICES 3* (2014), <http://www.iirp.edu/pdf/IIRP-Improving-School-Climate.pdf> [hereinafter IIRP 2014].

146. At City Springs School, where 99% of families live below the poverty line, restorative practices were implemented in 2007 and expanded to a whole-school approach three years later. MIRSKY, *supra* note 138, at 1–2. Suspensions rates decrease by 88% in one school year, from 2008–2009 to 2009–2010, Maryland state assessment scores increased, and the number of students functioning at grade level tripled. *Id.* at 3.

147. There is a significant opportunity for study that focuses on changes during the different stages of the norm life cycle in Baltimore specifically, but Maryland more generally. This is particularly true where the focus is on exploring the dynamic processes by which ideas about and consensus with the norm change.

political norms for school discipline evidenced at the local and state levels.¹⁴⁸ In 2013, Maryland State Board of Education revised the state code for discipline institutionalizing restorative justice as part of the framework for “school systems to use in establishing local codes of conduct and in developing new discipline-related policies.”¹⁴⁹ Three years later, House Bill 1466 was introduced by District 22 Delegate Alonzo Washington to establish a state taskforce to study restorative justice discipline practices in Maryland public schools.¹⁵⁰

5. Pennsylvania

Since the late 1990s, there have been multiple sites of implementation of school-based restorative justice in Pennsylvania.¹⁵¹ Rather than through a district-wide process or state-level prompt, restorative justice emerged at individual school sites with autonomy resting in school-level (principals, disciplinarians, teachers, etc.) norm entrepreneurs to determine the best practices for implementation.¹⁵² After release of initial data outcomes, similar to other “established sites,” expansion moved at a rapid pace.¹⁵³ For example, following the lead of Palisades School District, the first International Institute of Restorative Practices (IIRP) pilot, principals of Palisades Middle School and Springfield Township High School moved away from an adherence to punitive discipline and introduced restorative practices at their respective schools.¹⁵⁴ Given their status, these principals were instrumental to a normalization process of restorative justice among other educators.¹⁵⁵ Further, the prominence of IIRP also served to communicate the importance of restorative justice.¹⁵⁶

148. BALT. CITY PUB. SCH., CODE OF CONDUCT 2014–2015 6–7, http://www.baltimorecityschools.org/cms/lib/MD01001351/Centricity/Domain/8832/2014-15_PDFs/2014-15-CodeOfConduct-English.pdf.

149. MD. STATE DEP’T OF EDUC., THE MARYLAND GUIDELINES FOR A STATE CODE OF DISCIPLINE 3 (2014), http://archives.marylandpublicschools.org/MSDE/divisions/studentschoolsvcs/student_services_alt/docs/MDGuidelinesforStateCodeDiscipline_08072014.pdf.

150. H.B. 1466, 436th Gen. Assemb., Reg. Sess. (Md. 2016).

151. Chmelynski, *supra* note 6.

152. Jenny Escobar, Presentation at Restorative Justice in Motion: Building a Movement Conference (Jun. 15, 2016), <http://zehr-institute.org/wp-content/uploads/2015/12/RJ-in-Motion-workshop-descriptions-1.pdf>.

153. SHARON LEWIS, INT’L INST. FOR RESTORATIVE PRACTICES, IMPROVING SCHOOL CLIMATE: FINDINGS FROM SCHOOLS IMPLEMENTING RESTORATIVE JUSTICE 6–20 (2009), <http://www.iirp.edu/pdf/IIRP-Improving-School-Climate-2009.pdf> (discussing outcomes by school).

154. *Id.*

155. Telephone Interview with Ben Cairns, *supra* note 115.

156. JONATHAN STITH, NAT’L COORDINATOR FOR THE ALL. EDUC. JUSTICE, ADDRESS AT RESTORATIVE JUSTICE IN MOTION: BUILDING A MOVEMENT CONFERENCE (Jun. 16, 2016), <http://zehr-institute.org/wp-content/uploads/2015/12/RJ-in-Motion-schedule-at-a-glance.pdf>.

In 2008, restorative justice became even more dominant in the education discourse in Pennsylvania when West Philadelphia High School, a school on the state's "Persistently Dangerous Schools" list, reduced the "[v]iolent acts and serious incidents by 52% in 2007–2008" and an "additional 40% in 2008–2009."¹⁵⁷ Similarly, a study of restorative justice implementation at Pottstown High School demonstrated that the number of incidents of fighting decreased from 20 to 9 from 2005–2006 to 2008–2009¹⁵⁸ and the school was also removed from academic probation. As student test scores and behavior improved the staff also reported feeling "united and inspired to do their work."¹⁵⁹ Likewise, at Newtown Middle School, the use of restorative justice led to a decrease in physical altercations from 41 to 9 over the first three years of implementation¹⁶⁰ and at Freedom High School the use of restorative justice was attributed with reductions in serious infractions by 69% over three years and the number of students with multiple suspensions, from 330 to 120 in the same time.¹⁶¹ While no one sought to make claims of universality, the availability of data from multiple sites allowed norm entrepreneurs to more effectively frame the impacts of restorative justice in quantitative and qualitative terms, and encourage its spread.¹⁶²

Across each of these sites, the adoption, expansion, and internalization of restorative practices was not solely driven by concerns of safety and climate. Similar to other established sites, norm entrepreneurs also framed restorative justice within the context of heightened concerns for the failures of exclusionary discipline and the disproportionality of disciplinary referrals. Within this narrative behavioral outcomes were emphasized.¹⁶³ Consider Palisades High School, which following multi-year development of whole-school restorative saw administrative detentions decrease from 716 to 282 (1998–1999 to 2001–2002) and out of school suspensions, by almost half in the same

157. LEWIS, *supra* note 153, at 6–7.

158. *Id.* at 10.

159. *Id.* at 9.

160. *Id.* at 11–12.

161. IIRP 2014, *supra* note 145, at 3.

162. Interview with Jenny Escobar, Restorative Justice Coordinator, Humanitas Acad. of Art and Tech., in Harrisonburg, Va. (Jun. 17, 2016) (on file with author).

163. At Springfield Township High School first year analysis revealed 68% fewer incidents of inappropriate behavior and 71% fewer incidents of disrespect to teachers as well as of classroom disruption. LEWIS, *supra* note 145, at 20. At CSF Buxmont, studies showed a 26% reduction in aggression from 2012–2014, and 20% improved social skills. IIRP 2014, *supra* note 145, at 3.

timeframe.¹⁶⁴ While one occurrence of restorative justice in Pennsylvania would be an insufficient measure for the emergence or spreading of a norm, the status of Pennsylvania schools as sustained models over time has supported increasing institutionalization at both the local and state levels.¹⁶⁵

* * *

The first stage of the norm life cycle revolves around the actions of norm entrepreneurs seeking to change a static conceptualization of an accepted idea, practice or policy. In the case of school discipline this is a movement away from educational experiences grounded in zero tolerance and exclusion. If successful, these entrepreneurs are able to alter perceptions of other actors' "identities, interests and preferences, to transforming their discursive positions, and ultimately [to] changing procedures, policies, and behaviour."¹⁶⁶ In each of the examples discussing the processes of emergence, diffusion and institutionalization occurred at varying rates with strategies linked to the localized nature of schools. Even with this variance taken into account, shared features of emergence are present. For example, in each site the entrepreneurs framed restorative justice within the context of zero tolerance, thus, simultaneously discounting punitive discipline and promoting restorative justice, to take advantage of mounting public attention and political pressures to address discipline disproportionality, the school-to-prison pipeline, and negative impacts on education outcomes. They also used the positive outcomes of restorative justice practices to make increasingly universalistic claims about restorative justice and to create alignment with existing normative frameworks. As Keck and Sikkink note, the connectivity or constructed "linkages" between norms that are more established and those that are emerging is pivotal to establishing greater legitimacy and promoting broader acceptance.¹⁶⁷ Whether viewed individually or collectively, the early work of these entrepreneurs clarified, socialized, and institutionalized restorative justice at local, state, and federal levels. Thus, returning to this Article's norm change proposition, it is

164. LEWIS, *supra* note 153, at 15–16.

165. U.S. DEP'T OF EDUC., PENNSYLVANIA COMPILATION OF SCHOOL DISCIPLINE LAWS AND REGULATIONS 4–5, 39, 44, 73 (Jan. 12, 2016), <https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/Pennsylvania%20School%20Discipline%20Laws%20and%20Regulations.pdf>.

166. Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy Networks in International and Regional Politics*, 51 INT'L. SOC. SCI. J. 89, 90 (1999).

167. Finnemore & Sikkink, *supra* note 59, at 908.

clearly observable that from the mid-1990s to 2010, the restorative justice norm moved from a moment of emergence to the beginning stages of widespread acceptance and cascade.

B. Stage Two: Norm Cascade

Scholars acknowledge that while it is not perfectly clear when a new norm reaches a tipping point, the following cascade is marked by a “collection of norm-affirming events.”¹⁶⁸ For example, Finnemore and Sikkink suggest that there is an active process of socialization in which new norm followers emerge and adopt the norm.¹⁶⁹ In the case of school-based restorative justice, one can look at both the micro or macro-levels for examples of increasing adoption of the norm by new actors, i.e., schools, and the heightened associated processes of socialization and internalizations, i.e., practice, policy change, etc. To illustrate the current norm cascade in school discipline this section provides examples of “emerging sites” of restorative justice practice, as well as changes in social, political, and legal structures that are likely to enhance the norm’s widespread adoption and application in additional contexts.¹⁷⁰ This section is meant to highlight, not exhaustively inventory, as school-based restorative justice is dynamic and rapidly evolving.¹⁷¹ Furthermore, it is also not intended to provide detailed research analysis of the outcomes or practices at each school.¹⁷² With this being said, these examples are valuable to understanding stage two of the norm life cycle and my norm change proposition.¹⁷³ For example, while timing is not determinative of the direction of causality and the spread of a norm, similarity in practices

168. See Lutz & Sikkink, *supra* note 77.

169. Finnemore & Sikkink, *supra* note 59, at 902.

170. The sites discussed in this section were implemented after 2010 and use models set forth in “first generation” scholarship and the best practices developed in established schools. Similar to those discussed earlier these schools have implemented restorative justice to address safety, climate, academic outcomes, student connectedness, conflict resolution, reliance on suspensions and expulsions, the discipline gap, and negative outcomes of the school-to-prison pipeline, with specific attention to the latter three issues.

171. Telephone Interview with Mara Schiff, Assoc. Professor, Florida Atl. Uni. (Jul. 21, 2016) (on file with author) (noting that over the last three months she has received requests for training in school-based restorative justice by more than fifteen school districts).

172. In fact, given the nature of restorative justice one should not expect a more comprehensive picture of implementation and the associated outcomes until at least year three.

173. For example, they show not only the application of the norm in terms of behavioral manifestations by new actors and highlight the rapid rate of diffusion, but also provide a potential benchmark for future analysis of the mechanisms that have influenced the current cascade.

across multiple sites followed by institutionalization of practices in formal code or policy aligns with the stages of norm cascade.¹⁷⁴

As school-based restorative justice expands across the country there are a few sites recently recognized for their role in enhancing the public legitimacy of restorative justice and spreading it as a matter of practice and policy. These include the cities of Los Angeles, New York, and Boston, as well as the state of Texas. In some instances, this notoriety has resulted from a discursive framing process similar to that discussed earlier. In New York City, for example, activists, students, parents, and teachers have collaboratively focused on overhauling punitive disciplinary practices with an aim to change the majority preferences (of school officials and political elites) to restorative justice.¹⁷⁵ As of 2013, at least fourteen schools in New York City had sustained restorative justice as a strategy for addressing school safety resulting in the *Dignity in Schools Campaign* to call on the New York Department of Education to recognize the success of restorative schools and to enhance it with investments to ensure sustainability in the future.¹⁷⁶ Last year, their efforts helped shape political action when New York City Schools Chancellor Carmen Fariña released an updated citywide discipline code, including more than thirty references to restorative justice and outlining the framework for disciplinary responses.¹⁷⁷ For

174. See *supra* Part I.

175. UDI OFER ET AL., N.Y. CIVIL LIBERTIES UNION, SAFETY WITH DIGNITY: ALTERNATIVES TO OVER-POLICING OF SCHOOLS 7, 15 (2009), http://www.nyclu.org/files/Safety_with_Dignity.pdf; see also Jackie Schechter, *As City Prepares to Rethink School Discipline, A Look at Restorative Justice Programs in Action*, NAT'L ECON. & SOC. RTS. INITIATIVE (Jun. 23, 2014), <http://www.nesri.org/news/2014/06/as-city-prepares-to-rethink-school-discipline-a-look-at-restorative-justice-programs-in-action>; Interview with Catherine Albisa, Exec. Dir., Nat'l Econ. Rights and Soc. Rights Initiative, in N.Y.C., NY (Oct. 10, 2015) (on file with author) (describing the organizing in New York City for educational justice, school discipline reform and restorative justice); Interview with Maisie Chin, Nat'l Coordinating Comm., Dignity in Sch. Campaign, in L.A., Cal. (Aug. 25, 2015) (on file with author) (describing the role of the Dignity in Schools Campaign in New York City) [hereinafter Interview with Maisie Chi (Aug.)].

176. Like other schools across the country, New York City schools have developed their own systems and practices appropriate to their particular school environments. See, e.g., DIGNITY IN SCHOOLS CAMPAIGN, BUILDING SAFE, SUPPORTIVE AND RESTORATIVE SCHOOL COMMUNITIES IN NEW YORK CITY (2011), https://www.nesri.org/sites/default/files/FINAL_DRAFT_CaseStudies_SchoolClimate_Rev.pdf; DIGNITY IN SCHOOLS CAMPAIGN, BUILDING SAFE, SUPPORTIVE AND RESTORATIVE SCHOOL COMMUNITIES IN NEW YORK CITY (2013), http://www.dignityinschools.org/files/DSC-NY_CaseStudy_2013.pdf; DIGNITY IN SCHOOLS CAMPAIGN, BUILDING SAFE, SUPPORTIVE AND RESTORATIVE SCHOOL COMMUNITIES IN NEW YORK CITY: CASE STUDY SERIES VOL. III (2015), http://www.teachersunite.net/sites/default/files/DSC-NY_CaseStudyVol.III.2015.pdf (each case study presents descriptions of restorative justice practices and outcomes at multiple school sites in New York City).

177. DISCIPLINE CODE & BILL OF STUDENTS RIGHTS & RESPONSIBILITIES, K-12, CITYWIDE BEHAVIORAL EXPECTATIONS TO SUPPORT STUDENT LEARNING 4, 12-14 (Feb. 2015), <http://schools.nyc.gov/NR/rdonlyres/3E8B289B-5471-4872-A2F9-D9C8F27DDFC9/0/DiscCodebook->

the 2015-2016 school year, New York City schools reported a 10% decrease in school-related arrests.¹⁷⁸ That same year, the Brooklyn Community Foundation established the Brooklyn Restorative Justice Project in partnership with the New York City Department of Education and the Mayor's Leadership Team on School Climate and Discipline to develop a sustainable and effective model for school discipline reform.¹⁷⁹ The four-year, \$1.8 million pilot project will support middle and high schools seeking effective alternatives to punitive disciplinary approaches and are willing to commit to "culturally responsive and racially just restorative justice practices."¹⁸⁰ Such partnerships are an important indicator of cascade, as they signal that the key actors spreading the new norm are no longer simply the initial entrepreneurs, rather they now also include a range of individuals, networks, organizations, and group stakeholders with potentially greater social and political influence.¹⁸¹ While reform in New York City and Brooklyn has garnered more national media attention, the institutionalization of restorative justice in the state of New York, in practice and/or policy, is not limited regionally. For example, in 2014, schools in Syracuse, New York, began operating under a revised code of conduct and model of restorative discipline.¹⁸² As restorative jus-

letFeb2015finaldraft.pdf. In addition to the passage of the city-wide code and bill of rights, in July 2016, the Phase Two recommendations on school climate and discipline were released by the Mayor's Office with restorative justice receiving increased funding and support. MAYOR'S LEADERSHIP TEAM ON SCHOOL CLIMATE & DISCIPLINE MAINTAINING THE MOMENTUM: A PLAN FOR SAFETY AND FAIRNESS IN SCHOOLS 67 (2016), http://www1.nyc.gov/assets/scld/downloads/pdf/SCLT_Report_7-21-16.pdf.

178. Amy Zimmer, *Last School Year Was the Safest on Record, NYPD Chief Says*, DNAINFO (Sept. 15, 2016, 4:53 PM), <https://www.dnainfo.com/new-york/20160915/financial-district/last-school-year-was-safest-on-record-nypd-chief-says> ("[t]he emphasis on restorative justice—where everyone in the building is trained on de-escalation practices, including school safety agents—is also a big part of the work to improve relationship").

179. *Brooklyn Restorative Justice Project*, BROOKLYN COMMUNITY FOUND., <http://www.brooklyncommunityfoundation.org/brooklyn-restorative-justice-project> (last visited Sept. 24, 2016).

180. *Id.*

181. Partnerships of this nature have not been isolated to New York. For example, the California Endowment has been a key collaborator across the state supporting the development and growth of restorative practices. See, e.g., Jeff Okey, *The California Endowment to Fund School Discipline Reform in Central Valley School Districts*, CAL. ENDOWMENT, <http://tcenews.calendow.org/releases/the-california-endowment-to-fund-school-discipline-reform-in-central-valley-school-districts> (last visited Aug. 1, 2016); Interview with Maisie Chin, Exec. Dir., CADRE, in L.A., Cal. (Jul. 26, 2016) (on file with author) (describing the role of the California Endowment in funding restorative justice as an alternative to zero tolerance).

182. SYRACUSE CITY SCH. DIST., CODE OF CONDUCT: CHARACTER, AND SUPPORT (2014), <http://www.syracusecityschools.com/tfiles/folder1352/Code%20of%20Conduct%20Character%20and%20Support.pdf>; *Syracuse City Schools Move to Restorative Discipline with New Code of Conduct*, ENGAGING SCHS. (Oct. 2, 2014), <http://www.engagingschools.org/773/>.

tice continues to spread across the state of New York it provides a salient example of norm cascade not only in terms of socialization at the local level (school practices) but, as importantly, formalization or internalization within legal structures and political institutions.

Similar processes of norm cascade are present in California with support from multiple constituencies, including parents, teachers, community-based organizations, school officials, and foundations. In 2013, after a multi-year organizing campaign,¹⁸³ the Los Angeles Unified School District (LAUSD) adopted a new resolution mandating all schools within the district develop and implement restorative justice by 2020.¹⁸⁴ With the passage of the School Climate Bill of Rights, the norm of restorative justice in school discipline was formally codified into practice and policy.¹⁸⁵ In LAUSD restorative justice is now viewed as the main framework by which to address not only contemporary issues in school discipline, but to address the prior failures of zero tolerance.¹⁸⁶ LAUSD is not alone in taking such action, as Fresno Unified School District, Berkeley Unified School District, San Francisco Unified School District, and San Diego Unified School District have also passed similar resolutions in support of restorative justice.¹⁸⁷ In 2016, California Assembly member Kevin McCarty introduced AB 2489, aimed at providing state-level support for school districts seeking to implement restorative justice.¹⁸⁸

Since cascade requires widespread agreement with the norm, manifested as a critical mass of leaders adopting the norm, examples in two states would be likely insufficient to support a norm change proposition and align closely with the norm life cycle. But expansion of restorative justice has not been isolated to two cases nor is it regionally bound. In 2012, the Massachusetts legislature passed Chapter

183. Interview with Maisie Chin, Executive Director, CADRE, in L.A., Cal. (Jul. 10, 2015) (describing the campaign for the school discipline and school climate bill passage) [hereinafter Interview with Maisie Chin (Jul.)].

184. MICHELLE KING & EARL R. PERKINS, DISCIPLINE FOUNDATION POLICY: SCHOOL-WIDE POSITIVE BEHAVIOR INTERVENTION AND SUPPORT 1 (2014), <http://fixschooldiscipline.org/wp-content/uploads/2014/10/LAUSD-Discipline-Foundation-Policy-Feb.2014.pdf>.

185. Interview with Maisie Chin (Jul.), *supra* note 183 (discussing the new norm of restorative justice in LAUSD).

186. *Id.*

187. EDGAR RAKESTRAW, JR., BD. OF EDUC. OF THE OAKLAND UNIFIED SCH. DIST RESOLUTION No. 0910-120: RESTORATIVE JUSTICE,, <http://www.fixschooldiscipline.org/wp-content/uploads/2013/01/17.Oakland-USD-Board-Resolution.pdf>; CAL. DEMOCRATIC PARTY, RESOLUTION 14-07.06, www.cadem.org/our-california/resolutions/2014/support-for-the-implementation-of-restorative-justice-policies-for-all-california-school-districts (last visited Oct. 8, 2016) (the resolution was adopted on July 13, 2014).

188. Kamisugi, *supra* note 15.

222, which required alternatives to expulsion, such as restorative justice¹⁸⁹ and, the following year, Boston Public Schools (BPS) became the first district in the state to adopt a new Chapter 222-aligned code of conduct.¹⁹⁰ In 2014, schools in Falls River, Massachusetts also developed and passed a new code of conduct reflecting a specific ideational content change—the inclusion of restorative justice. The growth in restorative practices across multiple districts in Massachusetts in response to the state's actions has contributed strongly to the continued development and acceptance of restorative justice in other areas across the country.¹⁹¹ But the dynamic interplay between various institutional and governmental levels during cascade is not necessarily linear or unidirectional—local to state or state to national. For example, in Colorado it was the emergence of established localized practices that influenced diffusion of restorative justice to the state-level, and subsequent institutionalization with the adoption of new laws.¹⁹²

As a norm expands during stage two, Babcock suggests one feature contributing to its internalization is repeated behavior.¹⁹³ These changes should be observable across multiple examples over time to support a theory of norm emergence. Consider the following, from 2013 to 2016 at least sixteen districts changed either their student code of conduct or school discipline policy to include restorative justice. In some instances, this internalization into formal legal structures was also paired with the introduction of new or expansion of existing restorative practices. In 2013, the Bridgeport Connecticut School District changed its code of conduct to include restorative justice, and the Buffalo Public Schools amended its community-wide conduct and intervention support to include restorative justice.¹⁹⁴ Effective in Au-

189. MASS. GEN. LAWS ch. 71, § 37H (2014); see also *Boston Takes the Lead in MA Discipline Reform*, SCHOTT FOUND. FOR PUB. EDUC. (Sept. 13, 2013), <http://schottfoundation.org/blog/2013/09/13/boston-takes-lead-ma-discipline-reform>.

190. The adoption of the student code of conduct was done a year in advance of the 2014 deadline set by the state legislature. BOSTON PUB. SCHOOLS, STUDENT CODE OF CONDUCT (2013), http://www.bostonpublicschools.org/cms/lib07/MA01906464/Centricity/Domain/203/2013-09-05_code_of_conduct_final.pdf.

191. Interview with Maisie Chi (Aug.) (discussing the school discipline reform at the national level); Interview with Maisie Chin (Jul.), *supra* note 183 (noting that restorative justice is not just the new norm for discipline in Los Angeles, but the new norm across the country).

192. Interview with Ben Cairns, *supra* note 115; Interview with Daniel Kim, *supra* note 115.

193. Babcock, *supra* note 80, at 143.

194. BRIDGEPORT PUB. SCHOOLS, STUDENT CODE OF CONDUCT 4–5 (2013), http://www.bridgeportedu.com/Board/Policies/2013-2014/CodeOfConduct_2013-2014AbRefManual.pdf; BUFFALO PUB. SCHOOLS, STANDARDS FOR COMMUNITY-WIDE CONDUCT AND INTERVENTION SUPPORTS 12, 47

gust 2014, the amended Minnesota Public Schools code of conduct provided, “[e]ffective discipline is educational, not punitive. Effective discipline includes building relationships, repair of harm and restoring relationships and restorative practices to reengage students in their learning community.”¹⁹⁵ The same year, in addition to the passage of a revised code of conduct, Dayton Public Schools committed to the adoption of restorative justice district-wide by 2017 (pending funding), following its initial pilot in 2012 and expansion to eight schools in 2014–2015.¹⁹⁶ Similarly, the Duval County School Board and Pittsburgh Public Schools amended their respective codes of conduct to integrate restorative justice.¹⁹⁷ Pittsburgh Public Schools also received \$3 million in funding from the U.S. Department of Justice to begin implementation of restorative justice in twenty-two participating elementary, middle and high schools.¹⁹⁸

In 2015, even though restorative practices had long been present in Chicago schools, CPS amended its code of conduct and its statement of purpose specifically to articulate a commitment to a restorative approach to behavior.¹⁹⁹ Chicago was not alone in 2015 as the Schenectady City School Board of Education also implemented a new code of conduct that formalized restorative justice and restorative practices in discipline.²⁰⁰ In August 2016, the Tucson Unified School District proposed a new code of conduct aimed at moving the district from zero tolerance and prioritizing “equitable practices” such as restorative justice.²⁰¹ Similarly, the 2016–2017 revised code of conduct

(2013), <https://juvjustice.org/sites/default/files/ckfinder/files/Bufalo%20Public%20Schools%20Official%20Code%20of%20Conduct.pdf>.

195. MINNEAPOLIS PUB. SCHS., BEHAVIOR STANDARDS AND CODE OF CONDUCT, POL’Y 5200 1 (2014), http://policy.mpls.k12.mn.us/uploads/policy_5200_2014.pdf.

196. DAYTON PUB. SCHS. 2014–15 STUDENT CODE OF CONDUCT, <http://www.dps.k12.oh.us/content/documents/DPS-Student-Code-of-Conduct-2014-15-UPDATE-072914.pdf>.

197. DUVAL CNTY. PUB. SCHS., CODE OF CONDUCT, 2014–2015, at 15 (2014), http://www.jaxpef.org/media/5357/2014-15_codeofconduct_secondary.pdf; PITTSBURGH PUB. SCHS., CODE OF STUDENT CONDUCT (2014), <http://www.pps.k12.pa.us/domain/43>; see also *ELC Applauds Pittsburgh Public Schools’ New Code of Student Conduct*, EDUC. L. CNTR. (Aug. 5, 2014), <http://www.elc-pa.org/2014/08/05/elc-applauds-pittsburgh-public-schools-new-student-code-of-conduct/>.

198. Joshua Wachtel, *Pittsburgh Schools Go Restorative*, RESTORATIVE WORKS LEARNING NETWORK (Aug. 26, 2015), <http://restorativeworks.net/2015/08/pittsburgh-schools-go-restorative/>.

199. CHICAGO PUB. SCHS., STUDENT CODE OF CONDUCT FOR CHICAGO PUBLIC SCHOOLS 2, 23 (2015), <http://policy.cps.edu/download.aspx?ID=263>.

200. SCHENECTADY CITY SCH. DIST., CODE OF CONDUCT, 2015-16, at 11 (2015), <http://www.schenectady.k12.ny.us/2015-2016/2015-2016CodeofConduct.pdf>.

201. *Timeline for Code of Conduct*, Tucson Unified Sch. District, http://www.tusd.k12.az.us/contents/events_discipline.html (last visited Oct. 8, 2016).

in Lee County School District formalizes the shift from zero tolerance and exclusionary practices to restorative practices.²⁰²

Since cascade is not a “one size fits all” process, conformance with a new norm can also be presented as behavioral changes in practice. Therefore, in cities and states, where school-based restorative justice is in a nascent stage, the primary focus is on developing practices and increasing access to training.²⁰³ In Madison, Wisconsin, circle practice is being used to teach problem-solving skills and address school climate in schools in the Madison Metropolitan, Middleton-Cross Plains, Morona Grove, Oregon, Sun Prairie, and Verona districts.²⁰⁴ Similarly, Connecticut and Washington, DC, schools are piloting restorative justice as model for creating safe and respectful learning environments.²⁰⁵ In Orange County, a restorative justice behavior leaders consortium was established in eleven high schools and seventeen middle schools.²⁰⁶ Beginning in summer 2016, assistant principals and principals in the Lee County School District will be trained in restorative justice and twenty schools will compose the district’s initial pilot.²⁰⁷

Unlike the single school or even whole-district model that many sites have utilized, the Institute for Restorative Justice and Restorative Dialogue (IRJRD) at University of Texas School of Social Work and the Texas Education Agency (TEA) have sought to introduce restorative justice and change traditional mindsets in a different way. In Texas, IRJRD and TEA are using the twenty regional education service centers to provide training to all 1266 school districts across the

202. Pamela McCabe, ‘Culture’ of Discipline to Change in Lee School’s Code of Conduct, USA TODAY, (May 5, 2016, 9:31 AM), <http://www.news-press.com/story/news/education/2016/05/04/lee-code-of-conduct-restorative-justice-success-academy/83514236/>.

203. See generally COUNCIL OF THE GREAT CITY SCHOOLS, MALES OF COLOR INITIATIVES IN AMERICA’S GREAT CITY SCHOOLS: REVISING SUSPENSION AND DISCIPLINE POLICIES 1–9 (2016), <http://www.cgcs.org/cms/lib/DC00001581/Centricity/Domain/202/Suspension%20and%20Discipline.pdf> (noting sites across the country, such as Louisville where district-wide restorative justice training is being implemented).

204. Restorative Justice Program, YWCA MADISON, http://www.ywcamadison.org/site/c.cu1WLlO0JqI8E/b.7968327/k.87EF/Restorative_Justice_Program.htm (last visited Sept. 24, 2016).

205. ALEXANDRA DUFRESNE ET AL., CONN. VOICES FOR CHILDREN, TEACHING DISCIPLINE: A TOOLKIT FOR EDUCATORS ON POSITIVE ALTERNATIVES TO OUT-OF-SCHOOL SUSPENSIONS 24 (2010); Perry Saidman, *Notes from the Desk of Perry Saidman: Restorative DC is Off and Running*, PISLAP (Nov. 26, 2015), <http://www.spiritlawpolitics.org/news/2015/11/26/notes-from-the-desk-of-perry-saidman-restorative-dc-rtc-is-off-and-running>; see also Restorative DC Expansion Plan 2016–2017 (on file with author) (outlining plans for restorative justice expansion to additional elementary, middle and high schools in Washington, DC).

206. COUNCIL OF THE GREAT CITY SCHOOLS, *supra* note 203; Interview with Mara Schiff, *supra* note 171 (noting Orange County as an example).

207. McCabe, *supra* note 203.

state.²⁰⁸ The aim of the training is to “educat[e] the critical constituencies for successfully implementing sustainable restorative practices in schools.”²⁰⁹ As a result of their work, IRJRD has developed a set of thirteen best practices in support of the Texas model of implementation²¹⁰ and it has released preliminary data outcomes (2012 to 2015) for Ed White Middle School in San Antonio.²¹¹ These best practices and initial reports are aimed at reaching a tipping point in Texas to secure widespread legitimation of school-based restorative justice.²¹²

It is clear that the key actors in school-based restorative justice are no longer the norm entrepreneurs associated with the “established sites” discussed *supra*. Instead, restorative justice has spread across the country and become accepted in a diverse range of local settings, as well as manifested in formal political and legal systems. This rapid change has not gone unnoticed by the scholarly community as new studies are conducted regarding the outcomes of restorative justice.²¹³ Nor has school-based restorative justice been ignored at the national level. Whether included in the political platforms by presidential candidates,²¹⁴ promoted by national advocacy organizations,²¹⁵ or institu-

208. Armour, *supra* note 1, at 1029.

209. *Id.*; As Armour describes,

A two-day Administrator Readiness Training is offered to administrative teams to equip them with a long-term overview of what is involved in executing a whole-school approach so their planning is realistic, contextualized, and grounded in restorative principles. A five-day Restorative Coordinator Training is offered to persons who are or will be guiding their districts or schools in the process of whole school implementation over time.

Id.

210. *Id.* at 1030.

211. MARILYN ARMOUR, ED WHITE MIDDLE SCHOOL RESTORATIVE DISCIPLINE EVALUATION: IMPLEMENTATION AND IMPACT, 2012/2013, SIXTH GRADE 17–20 (2013), <https://irjrd.org/files/2016/01/Ed-White-Evaluation-2012-2013.pdf>; MARILYN ARMOUR, ED WHITE MIDDLE SCHOOL RESTORATIVE DISCIPLINE EVALUATION: IMPLEMENTATION AND IMPACT, 2013/2014, SIXTH & SEVENTH GRADES 21–25 (2014), <http://sites.utexas.edu/irjrd/files/2016/01/Year-2-Final-EW-Report.pdf>; MARILYN ARMOUR, ED WHITE MIDDLE SCHOOL RESTORATIVE DISCIPLINE EVALUATION: IMPLEMENTATION AND IMPACT, 201/2015, SIXTH, SEVENTH & EIGHTH GRADES 22–90 (2015), <http://sites.utexas.edu/irjrd/files/2016/01/Year-3-FINAL-Ed-White-report.pdf>. Additionally, Armour has published results of a study at the elementary school level. In 2015, Armour and Todic reported data collected at an urban K-3 charter school in partnership with a local community-based restorative justice organization. See MARILYN ARMOUR & JELENA TODIC, RESTORATIVE PRACTICES AT A CHARTER K-3 ELEMENTARY SCHOOL FIRST YEAR IMPLEMENTATION EVALUATION (2015), <http://sites.utexas.edu/irjrd/files/2016/01/FINAL-Restorative-Practices-at-an-Elementary-Charter-School-in-the-South-.pdf>.

212. Interview with Marilyn Armour, Director, The Institute for Restorative Justice and Restorative Dialogue, University of Texas School of Social Work, in Harrisonburg, Va. (Jun. 18, 2015) (on file with author).

213. See *supra* notes 22–29.

214. See *supra* note 19.

215. See *id.*; *supra* notes 175–77.

tionalized in federal education guidelines²¹⁶ school-based restorative justice has experienced a rapid transformation in normative identity. When all of these examples are viewed as a whole, this expansion strongly supports an argument for the presence of a norm cascade.

C. Stage Three: Norm Internalization

In considering the third stage of Finnemore and Sikkink's norm life cycle theory, it is pertinent to clarify that a linear approach to the progression of norm development is consistent with the literature, but cannot capture all of the variant expressions and processes of norm entrepreneurship, cascade or internalization. Further, it is simpler to identify a transition from the first stage of the norm life cycle (introduction of the norm by entrepreneurs) to stage two (cascade), than stage three (internalization). This is true for two reasons: one, there are not necessarily fixed precise markers and definitions, and two, not all norms need to be internalized to be followed. Posner, for example, argues that internalization of social norms unnecessary because of the phenomenon of "signaling."²¹⁷ According to Posner, change will occur when signaling by others of their intention to cooperate in some behavior is sufficiently commonplace.²¹⁸ Geisinger also posits that internalization of norms is not important for them to be effective.²¹⁹ Even Koh, who sets forth an explanation of internalization that allows for variance in norms—social, legal, and political—acknowledges the limitations of determining the precise sequence²²⁰ and testing whether a norm has been fully internalized.

Thus, while I conclude that the norm of restorative justice in school discipline has achieved the essential qualities of norm emergence and cascade, it is presently unclear to what extent it has been internalized at a national level. But there are certainly examples at the local and state levels that align with a proposition of norm internalization. For example, as institutionalization has occurred, rules and shared meanings regarding restorative justice have moved from abstractions to specific expectations. Goodman and Jinks provide one explanation of this process as "institutional isomorphism" by which a

216. See *supra* note 17.

217. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 18–27 (2000).

218. Richard A. Posner, *Social Norms, Social Meaning, and the Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 554 (1998).

219. Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 608–09 (2004).

220. Koh, *supra* note 86, at 643.

“mimesis by organizations that purposively model themselves on other similar organizations by adopting similar or identical decisions and structures.”²²¹

While the presence of isomorphism does not conclusively evidence internalization, it does however, allow one to draw inferences regarding patterns of behavior. In the case of restorative justice, the significant rise in the number of schools implementing restorative justice since 2010 is quite suggestive of the presence of an institutional isomorphism and the presence of internalization. But isomorphism is not limited to institutions. In the legal context, outcomes can result when in order to resolve a pervasive or perhaps universal problem, such as zero tolerance, several systems independent of each other reach a similar conclusion.²²² Considering the current trend of schools rapidly adopting revised discipline and conduct codes, there is a strong likelihood that legal isomorphism is also occurring. And, while more nascent in its development than the local level, the complementary movement by states to incorporate school-based restorative justice into multiple forms of codes and laws also suggests the presence of internalization. Even though it is difficult to argue that internalization has occurred at the federal level, one cannot simply discount the role of the federal government in normalizing and institutionalizing school-based restorative justice. At present, at least three government agencies have provided substantial funding to implement and study school-based restorative justice at multiple sites and it has received endorsement from a range of political actors, including President Obama. Further, the continued dismantling of zero tolerance and exclusionary discipline at the federal level will open new avenues for restorative justice to disseminate.

Therefore, rather than view the challenges of differentiating between cascade and internalization (or taken one step further partial versus full internalization) as a limitation of analysis, this provides a unique and exciting opportunity for future empirical and theoretical study aimed at actively building a deeper understanding of the social, political, and legal environments that have (or have not) internalized restorative justice. Moreover, there will be a multitude of productive lines of normative inquiry for projects concerning the directionality, strength, mechanisms, and sustainability of school-based restorative

221. RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 42–43 (2013).

222. *Id.* at 66.

justice. From an empirical standpoint, there are ripe questions to be asked regarding the nonlinear nature of norm diffusion in the United States, as well as the effects that the form and content of school-based restorative justice have on institutionalization at various levels and the engagement of each of these levels with each other. Similarly, a “second generation” research agenda could consider not only the effects of adopting school-based restorative justice, but also the motivations that influence the adoption. Such work would be influential for a larger restorative justice research agenda aimed at diffusion of justice policies into other systems.

CONCLUSION

This Article argues that the cascade of a new norm of restorative justice in school discipline is currently underway in the United States. In schools, restorative justice has been marked by its flexibility and adaptability—while still maintaining a foundation marked by core values and principles—thus allowing its expansion into more settings than previously imagined. Given rapid and continued expansion of school-based restorative justice, this Article is limited in its ability to draw full conclusions regarding the third stage of the norm life cycle, the internalization process of a new norm. Irrespective of this, it argues that the emergence and cascade of restorative justice is significant on its own and that given its current trajectory, partial or complete internalization is likely to occur at the local, state, and perhaps even the national levels. Whether through practice, codes of conduct, discipline policies, state or federal laws and guidelines, restorative justice has reconstructed accepted models of discipline, decreased reliance on exclusionary practices, and grounded school communities in principles of human dignity and respect. While it is foreseeable that criticism and skepticism will remain regarding the impacts and outcomes of school-based restorative justice, the continued growth in practices coupled with its institutionalization at local, state and federal levels signals that restorative justice is no longer viewed as an alternative program at the margins of school discipline. Rather, it is at the center of critical educational and legal policy reform.

ESSAY

Sexting Prosecutions: Teenagers and Child Pornography Laws

ANGELA D. MINOR, ESQ.*

INTRODUCTION	309
I. THE DICHOTOMY OF CHILD PORNOGRAPHY LAWS AND TEENAGE SEXTING	311
A. Legislative Intent of Child Pornography Laws	311
II. TEENAGE SEXTING AND STATE LEGISLATION	316
A. States Controlling Teenage Sexting Through Strict Laws	316
B. Prosecuting Teenage Sexting: More Prevention and Less Prosecution	318
C. The Culpability of Sending and Receiving Sexts	322
III. STATUTORY RECONSTRUCTION: AN APPEAL FOR UNIFORM LAWS IN TEENAGE SEXTING	323
CONCLUSION	324

INTRODUCTION

Sexting is deemed as the practice of sending or posting sexually suggestive messages and images, including nude or seminude photographs, through cellular telephones or over the Internet.¹ The only noted historical reference of the word ‘sexting’ dates back to 2004, where a Canadian news press, *The Globe and Mail*, used the word to

* Assistant Professor and Director of MLK, Jr. Forensics Program, Howard University Cathy Hughes School of Communications, J.D. University District of Columbia School of Law, M.Div Howard University. The author expresses her sincerest gratitude in honor of her late mother, Willie Ann Willcox, Esq., for leaving such a strong legacy and passion for law and justice and to her father, George R. Willcox, for his continuous support and to her family and friends.

1. *Miller v. Mitchell*, 598 F. 3d 139, 143 (3d Cir. 2010).

describe sexually explicit text messages between famed soccer athlete David Beckham and his assistant.² Sexting is very common; from high schoolers to Congressmen. In 2005, sexting made its debut to American print with the *Los Angeles Times*; the term disappeared and re-emerged in 2008. Since then teenagers and sexting have become a common factor.³ The era of teenage sexting is creating a legal dilemma as to whether treating minors as child pornographers is the proper means of prosecution. The likelihood of teenagers being criminally charged and convicted has increased exponentially, as sexting amongst minors vastly becomes their social interaction in this age of digital media. A study revealed that at least twenty percent of teens have sent or posted nude or seminude photographs or videos of themselves.⁴

Legislatures have considered resolving the issues of this epidemic by criminalizing the act of sexting under child pornographic standards and penalties. Consequently, minors are charged with child pornography and have no constitutional protection. The voluntary acts of minors who have engaged in sexting should be offered as an alternative means to correct this behavior before child pornography violations are held against them. The challenge of prosecuting minors under child pornographic laws is whether the legislative intent was framed to constitutionally protect minors or prosecute minors. The penalty of both criminal and civil punishments for these underage teenagers seems to deny the consent age element of the act of sexting. From a historical view, the criminal punishments of sex offenses were implemented to control adults from harming children in a sexually explicit manner. Sexting warrants a strong contrast as we are now witnessing teenagers use sexually-explicit material against other teenagers. Therefore, the overall legislative intent was not framed to address the prosecution of minors.

This Article analyzes the legislation governing teenage sexting, the prosecution of sexting, and whether teenage sexting calls for an action of reform of narrowly tailored laws specific to the prevention of sexually charged photos and protecting minors. A look at the legislative history of child pornography laws is warranted to determine

2. See, e.g., Eli Rosenberg, *In Weiner's Wake, a Brief History of the Word 'Sexting,'* ATLANTIC (June 9, 2011), <http://www.theatlantic.com/national/archive/2011/06/brief-history-sexting/351598/>.

3. *Id.*

4. Deborah L. McBride, *Risks and Benefits of Social Media for Children and Adolescents*, 26 J. PEDIATRIC NURSING 498, 498-99 (2011).

whether the intent of the statutes protects the culpability of minors who are charged with sexting violations. Part I provides a historical overview of the federal legislation of child pornography standards and the establishment of opining that teenage sexting violations fall under the purview of child pornography laws. Part II provides an overview of state legislation regarding teenage sexting and statutory construction. This Article elaborates further on alternative exceptions and standards as a suggestive means to the protection of teenage sexting. In particular, there are three separate exceptions proffered by a series of collaborative research articles on teenage sexting that are discussed and assessed as alternative means to strict prosecutorial measures. The exceptions are: 1) whether teenage sexting affords the law to look at minors as a “protected class” of individuals; 2) whether the “Best Interest of the Child Standard” offers a viable mechanism of defense; and 3) whether the law should provide teens with the “Romeo and Juliet Exception” as a mitigating factor in prosecution as noted in statutory rape cases. Part III calls for a reform of the law and the consideration of removing the prosecution of teens for sexting under child pornography statutes and the construction of a uniform statute.

I. THE DICHOTOMY OF CHILD PORNOGRAPHY LAWS AND TEENAGE SEXTING

A. Legislative Intent of Child Pornography Laws

The Communications Decency Act of 1996 (“CDA”) began the origin of legislative laws that attempted to control Internet pornography.⁵ The CDA, penalized the online transfer of “obscene or indecent” messages to any recipient under 18 and, or any material “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”⁶ The Act sought to prohibit the profusion of pornographic and obscene material on the Internet. Additionally, the CDA did not narrowly define what “indecent material” should include, causing the legislation to be struck down.⁷

The CDA, also referred to as the “The Great CyberPorn Panic,” was superseded and struck down largely due to the ruling in *Reno v.*

5. Communications Decency Act of 1996, 47 U.S.C. § 223(a) (2000).

6. *Id.* § 223(d)(1)(B).

7. *Reno v. ACLU*, 521 U.S. 844, 846 (1997).

American Civil Liberties Union (“ACLU”).⁸ Legislative history is relevant in that it contextualizes the intent and motive of protection for the areas of law that are being argued and promulgated. The legislative history of the CDA foretells the charge or admonition to regulate indecent speech or material on the Internet.⁹ The intent was considered too broad but deliberate. However, the impetuous decision of the statute was to regulate and control inappropriate communication with minors or communications between adults and minors.¹⁰ Democratic Senator James Exon stated that the Internet would lead children to inappropriate communications and introductions, calling predators on the Internet, “[t]he Barbarians [a]t the Gate!”¹¹ The CDA was initially a law that was added under the Telecommunications Act of 1996 to compensate for online communications. The perplexing debate about the CDA was the constitutionality of placing restrictions on the First Amendment. The longstanding constitutional right to free speech was simply too strong to be restricted. The CDA sought to protect minors from the acts of online predators, but did not include or seek to prevent the actions of minors perusing through online communications or becoming senders and authors of indecent materials. By the time the CDA was enacted in 1996, the development of minors sending sexually explicit photos and publishing the content was unforeseeable. The legislative intent of the Act was the prevention of child exploitation from becoming an epidemic due to the advancements on the World Wide Web.

Child pornography laws are filling the place of policing the sexting acts of minors, which poses a threat to the harm and victimization of both the juvenile sender and receiver. The teenage sexter who creates and sends the sexually explicit text arguably steps into the shoes of the adult pedophile in most child pornography cases. The adult offender’s actions and the teenage sexter are producing sexually charged material for different reasons. “It is unclear whether there is any actual harm in teens engaging in this activity, and if there is harm, it is arguably not the kind legislators envisioned when drafting the relevant child pornography statutes.”¹²

8. See generally *id.*

9. Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 64 (1996).

10. See generally *id.*

11. *Id.* at 52.

12. JoAnne Sweeny, *Do Sexting Prosecution Violate Teenagers’ Constitutional Rights?*, 48 SAN DIEGO L. REV. 951, 960 (2011).

Nevertheless, the Supreme Court's *Reno v. ACLU* ruling struck down the CDA, and all nine Justices agreed that the Act was unconstitutional as it relates to the First Amendment's Guarantees of Free Speech.¹³ The Supreme Court stated in its ruling that:

The CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. Although the Government has an interest in protecting children from potentially harmful materials, see, e.g., *Ginsberg*, 390 U. S., at 639, the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive, see, e.g., *Sable*, *supra*, at 126. Its breadth is wholly unprecedented.¹⁴

Reno argued that all online sexually graphic material should not be regulated to include the criminal conviction of adults and Internet Service Providers, in light of the fact, that it restricts the First Amendment on Free Speech. Section 230 of the CDA, which survived constitutional muster, stated: “[n]o provider or user of an interactive computer shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁵ Furthermore, the ACLU argued, and Supreme Court Justice Stevens agreed, that the CDA included all indecent material without defining indecent material. The ruling in *Reno v. ACLU* pointedly warned Congress and lawmakers that the vagueness and ambiguity of “indecent material” did not successfully articulate nor define or set parameters of what constitutes indecent. Therefore, the use of word “indecent” ineffectively described Internet pornography and content-based speech that contained pornography, nudity or obscenity. The Supreme Court was careful not to violate the First Amendment by ruling that all sexually explicit materials and speech on the Internet were unconstitutional when there exists sexually explicit speech and nudity that has been regulated and controlled with the afforded protections under the Constitution.¹⁶ The ambiguity of the CDA, controlling all indecent material on the World Wide Web and leaving “indecent” to be determined subjectively or on a case-by-case basis, infringed on the right to free speech, and thus, the Act was held unconstitutional.¹⁷

13. *See generally Reno*, 521 U.S. 844.

14. *See id.* at 846.

15. Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (2000).

16. *See Reno*, 521 U.S. at 885.

17. *Id.* at 870.

As a result, the Child Online Protection Act (“COPA”) emerged in 1998.¹⁸ COPA faces criticism similar to the CDA of 1996, as the Act criminalized all distribution of sexually charged material on a commercial website that was deemed harmful to children or minors.¹⁹ COPA did exactly what the CDA failed to provide, a legal provision that effectively regulated how online obscene material can be distributed—instead it sought to ban all distribution. Like similar statutes, COPA began to collapse. On the horizon was now the passing of the Protection of Children from Sexual Predators Act. Finally, in 1998, this Act inscribed the dissemination of obscene materials that could be upheld in a constitutionally sound manner rather than attempting to ban all indecent works on the Internet as criminal activity and unconstitutional.

The Protection of Children from Sexual Predators Act, states in part,

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, knowingly initiates the transmission of the name, address, telephone number, social security number, or electronic mail address of another individual, knowing that such other individual has not attained the age of sixteen (16) years, with the intent to entice, encourage, offer, or solicit any person to engage in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than five (5) years, or both.²⁰

In 1998, the Protection of Children from Sexual Predators Act began to address sexual predators who deliberately navigate online.²¹ The historical nature of this legislation sought to prevent online corruption from adult predators who navigated the World Wide Web seeking to sexually abuse and exploit innocent children. Social media sites are easily accessible to minors even with parental advisory software, which is often compromised. Congress and other law governing bodies began to move closer to regulating the exploitation of minors but seemed to wander on the issue of teen sexting. The evolution of laws and legislation controlling the release of sexually explicit

18. Child Online Protection, 47 U.S.C. § 231 (2000).

19. *Id.* § 231(a)(1).

20. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 314, 112 Stat. 2974 (1998).

21. The Act predated Facebook which was established in 2004, and MySpace, which existed two years earlier in 2002.

materials, child pornography, or indecency on the Internet seem to be concerned only with the use by adult predators. The distribution and depiction of minors, arguably becoming the predators within the confines of the legislation, was never the umbrella of intent concerning child pornography. Thus, prosecuting minors under child pornography laws should be deemed as fundamentally flawed.

Later, in 2000, the Children's Internet Protection Act ("CIPA"), not to be confused with COPA, mandated the use of Internet filters in the educational system for all school and libraries receiving federal funding.²² In 2003, in *United States v. American Library Association*, the Supreme Court upheld CIPA as constitutionally valid to force Internet filters upon schools and libraries supported by government funds.²³ One year later in 2004, in *Ashcroft v. ACLU*, the Supreme Court found standing to reject the omnibus legislature of COPA. COPA was struck down entirely.²⁴ Then, more recently, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today ("PROTECT") of 2003 had been enacted to prevent the illegal production, distribution, receiving, or possessing with intent to distribute, any obscene visual depiction of a minor.²⁵ PROTECT seemed to run as a "catch-all" law for criminal acts committed by adults against innocent children and minors. The legislative intent of child pornography laws fit the scope and development of adult perpetrators and the malfeasance of their actions in relation to the exploitation of children and obscene material of children. The promulgation of the CDA, COPA, CIPA and PROTECT purports and strictly enforces criminal convictions of adult behavior that is creating, distributing, producing and possibly profiting from child pornography. If courts are attempting to protect teens from the stigma resulting from their own poor judgment, why add a criminal conviction to that shame?²⁶ The legislation established, thus far, is so traverse in the movement of the protection of minors that the focus is still largely the criminal activity of adult predators and not the social communication and development of young teenagers.

22. See, e.g., *A Timeline of Legislation Aiming to Protect Youth Online*, NAT'L COALITION AGAINST CENSORSHIP, <http://ncac.org/resource/a-timeline-of-legislation-aiming-to-protect-youth-online/> (last visited Oct. 15, 2016).

23. *United States v. Am. Library Ass'n*, 539 U.S. 194, 214 (2003).

24. *Ashcroft v. ACLU*, 542 U.S. 656, 669–70 (2004).

25. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today, 18 U.S.C.S. § 1466A(a)(1)–(2) (2003).

26. See generally *id.*

II. TEENAGE SEXTING AND STATE LEGISLATION

A. States Controlling Teenage Sexting Through Strict Laws

State lawmakers consider the regulation and control of sexually explicit material amongst minors as child pornography and have sought to enforce strict legislation, relieving themselves of the implementation of constructing new legislation to prosecute minors. The complexity of considering sexting as child pornography and a punishable offense that could constitute a felonious act posits a call for reconstruction of the law. Child pornography encompasses the elements and factors of prohibiting sexual contact with minors and adults conclusively. There is no need to analyze the *Miller* Test, as it offers no deference regarding current sexting laws. Whether the trier of fact finds that it appeals to a prurient interest of an average reasonable person or if the conduct is of a patently offensive manner²⁷ is a moot factor considering that sexting is an under-aged, consent-based action. In *New York v. Ferber*, the Supreme Court held that states may regulate child pornography without applying the *Miller* test.²⁸ *Ferber* paved the way for prosecuting teens that take sexually explicit pictures of themselves.²⁹ The Court in *Ferber* made it clear that when a definable class of material bears so heavily on children, the balance of competing interests is clearly struck and it is permissible to consider the materials as without the protection of the First Amendment.³⁰ More importantly, understanding the prevention of sexual exploitation and the abuse of children in order to protect them from adult sexual predators is not a matter subject to review in the instant text.³¹ Child pornography has been deeply rooted in American Jurisprudence well before the ruling set forth in *Miller v. Mitchell*.³² The Supreme Court has yet to rule on the issue of teen sexting and lower courts have given inconsistent rulings.³³ The law in this area is therefore still undecided.³⁴ There is a verity in laws from state-to-state as it relates to sexting law provisions. An independent sexting provision or charge may or may not be expressly stated; instead, states have incor-

27. See generally *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

28. *New York v. Ferber*, 458 U.S. 747, 756 (1982).

29. See generally *id.*

30. *Id.* at 764.

31. See, e.g., *id.*

32. See generally *Miller*, 598 F.3d 139.

33. Sweeny, *supra* note 12, at 955.

34. *Id.*

porated the violations of minors sending sexually charges images into already existing laws of cyber-bullying or revenge porn statutes.

Sexting is such a ripe topic for discussion, as state laws are codified to include cyber-bullying and revenge porn provisions, but remain silent on the issue of teenagers engaging in the transmitting of sexually graphic photos as senders and receivers. This becomes problematic as lawmakers are incorporating sexting violations into already existing child pornography statutes that fall under criminal law sanctions and penalties. The chilling effects are that teenagers accused of sexting will be prosecuted and convicted per that state's criminal codes. So therefore, states have determined that sexting violations presumptively fall under revenge porn law, cyber-bullying, and/or cyber-harassment statutes. The controlling measure becomes that all forms of sexting are deemed to be criminal activity based on laws that predate the teenage sexting maelstrom.

The examination of the progression of state sexting laws offers insight on the inconsistencies of the laws and the erroneous effects of prosecuting minors. For example, the state of Maryland makes it unlawful, if a person "intentionally cause[s] serious emotional distress to another by intentionally placing a photograph, film, videotape . . ." exposing intimate parts that reveals that person's identity on the Internet.³⁵ Whereas the state of New Jersey has a revenge porn law and has created a sexting law, respectively stating, that: 1) the revenge porn law—"[a]n actor commits a crime of the third degree if, knowing . . . discloses any photograph . . . of the image of another person whose intimate parts are exposed;" but the 2) sexting law—"[e]very sexting complaint is reviewed for recommendations to be dismissed, diverted, or referred for court action based upon criteria."³⁶ The state of New Jersey recognizes that sexting laws require some level of review instead of the firm stance of prosecuting all minors involved in the creation and dissemination.

Only a few states have included "sexting" provisions in a statute including Arkansas, Connecticut, Florida, Louisiana, New Jersey,

35. MD. CODE ANN., CRIM. LAW § 3-809 (West 2016).

36. SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., STATE SEXTING LAWS 7 (2015), <http://www.cyberbullying.org/state-sexting-laws.pdf>; *see also* N.J. STAT. ANN. §§ 2C:14-9, 2C:43-3 (West 2016); 2011 N.J. Sess. Law Serv. Ch. 128 (West), <http://www.njleg.state.nj.us/2010/Bills/AL11/128.pdf>.

Rhode Island, South Dakota, Vermont, and West Virginia.³⁷ For instance, Connecticut's sexting provision states, in part:

No person who is thirteen years of age or older but under eighteen years of age may knowingly possess and voluntarily transmit by means of an electronic communication device a visual depiction of child pornography in which such person is the subject of the visual depiction to another person who is thirteen years of age or older but under eighteen years of age.³⁸

Florida's sexting law provides that sexual cyber-harassment is the willful and malicious sexual cyberharass of another. "Sexual cyberharassment means to publish a sexually explicit image . . . for no legitimate purpose, with the intent of causing substantial emotional distress."³⁹

However, what lawmakers have overlooked are the voluntary acts of teenagers publishing sexually explicit materials, innocently yet naively. Sexting is a growing trend, and there is a need to protect minors from hurting other minors and ultimately to protect minors from criminal prosecution when warranted. Sexting is one of the fastest ways some teens are becoming felons or building a criminal career.

The study of teenage behavior on social media offers hidden truths of whether sexting is a part of human nature or poor judgment. The logical approach by our governing bodies should be prevention and less prosecution. Child pornography seeks the prohibition and policing of social interaction of adult-to-juvenile online activity and not juvenile-to-juvenile activity. Lawmakers were determined to prevent the criminal activity of predators, which was undoubtedly the correct move as protectors of our constitution.

B. Prosecuting Teenage Sexting: More Prevention and Less Prosecution

The prosecution of teenage sexting is akin to the charging and sentencing of adult sex offenders. Teenagers facing this tragic legal issue have very little protection afforded under state legislation. Dependent upon the jurisdiction, it is a case-by-case analysis and defiant risk. Several arguments have been made regarding the prosecution of minors for the violations of sexting under state child pornography laws. If the law seeks to protect children from exploitation in the pro-

37. HINDUJA & PATCHIN, *supra* note 36, at 1.

38. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-196h(a)(1) (West 2016).

39. HINDUJA & PATCHIN, *supra* note 36, at 3.

duction, reproduction and distribution of their naked images, then minors or children should be treated as a “protected class,” thus not subjected to child pornography laws.⁴⁰ “The term “protected class” is most commonly used to refer to groups that are protected under Title VII of the Civil Rights Acts from discrimination based on race, religion, sex, color, or national origin.”⁴¹ “In the case of children, the status of a “protected class” under the law should protect them from prosecution under that law.”⁴² If teenagers are members of a protected class against child-pornography statutory charges and penalties, then legislatures are essentially bound to construct a proper legal remedy.

Early criminal labeling can have a negative psychological impact on young offenders.⁴³ In some states, sexting laws have been incorporated, providing a first, second, and third offense, which at the third offense carries the harshest punishment of prison for six months and/or required to register with that state’s sex offender registry.⁴⁴ Pursuant to Florida state laws, the second offense is a misdemeanor and the third offense is a felony.⁴⁵ Despite the fact that the teen sexters are being prosecuted under a Class A Misdemeanors offense, some are being convicted as felons. However, this was not the case in *Miller v. Skumanick*, where the parents of the sexters fought successfully against the prosecution of their children. In *Miller v. Skumanick*, teenage females were charged with sexting after pictures generated of the two of them in white bras from the waist up, because the State’s Attorney defined the picture as provocative.⁴⁶ The State’s Attorney sent correspondence to the two girls in the picture and to all recipients who had the pictures stored in cell phones stating that all would face felony charges, given long prison terms, and subjected to registration as sex offenders under Pennsylvania’s Registration of Sexual Offenders Act.⁴⁷ The State’s Attorney stated the convictions of all teenagers involved, approximately twenty, either senders or receivers, would be dropped if they attended a six to nine month program on education

40. Sarah Thompson, *Sexting Prosecution: Minors as a Protected Class From Child Pornography Charges*, 48 U. MICH. J.L. REFORM CAVEAT 11, 16 (2014).

41. *Id.* at 15 (citing Christina M. Sautter, *A Matter of Class: The Impact of Brown v. McLean on Employee Discharge Cases*, 46 VILL. L. REV. 421, 426 (2001)).

42. *Id.*

43. *Id.* at 16.

44. HINDUJA & PATCHIN, *supra* note 36, at 5–7, 10.

45. *Id.* at 3–4.

46. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 638–39 (M.D. Pa. 2009).

47. *Id.* at 637–38.

and counseling.⁴⁸ The families of the young females in the photos appealed the State's Attorney plea offer, contending that the pictures did not rise to the level of semi-nude, nude, or sexually explicit photos.⁴⁹ The court held that the State's Attorney was enjoined for essentially handing down such strict prosecutorial measures to all minors involved.⁵⁰

Another argument proffering an alternative to avoid draconian penalties for minors accused of sexting is to apply the "Best Interest of the Child" standard. The Best Interest of the Child standard typically governs family law child custody matters, adoptions, and guardianships. Similarly, the doctrine of the Best Interest of the Child standard purports to provide an umbrella of protection for children against harm from adults, but the laws of family law and child pornography are not interchangeable. In examining the Best Interest of the Child standard, there are a list of factors courts use to make a determination for the best suitable accommodations or the best primary custodial parent for the child. When considering prosecuting children under child pornography laws, the courts should consider the Best Interest of the Child standard, because scholars have found that youth arrests often signal serious problems to friends, families, and neighbors that bring with it a social stigma.⁵¹

Despite the fact that child pornography laws are designed to protect minors, these teens can be convicted as felons and can be forced to register as sex offenders for transmitting their own image to another teen.⁵² It has been argued that the Romeo and Juliet Exception has also been used as a point of contention and another alternative to the prosecution of sexting teens or minors. The Romeo and Juliet statute states:

Unlawful voluntary sexual relations is: (1) Engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age: (A) Voluntary sexual intercourse; (B) voluntary sodomy; or (C) voluntary lewd fondling or touching; (2) when the offender is less than 19 years of age; (3) when the offender is less than four years of age older than the child; (4) when the child

48. *Id.* at 638.

49. *Id.* at 640, 647.

50. *Id.* at 647.

51. Thompson, *supra* note 40, at 16; *see also* He Len Chung, Michelle Little, & Laurence Steinberg, *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective*, in *ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS* 68, 82–83 (D. Wayne Osgood et al. eds., 2005).

52. Sweeny, *supra* note 33, at 952.

and the offender are the only parties involved; and (5) when the child and the offender are members of the opposite sex.⁵³

The Romeo and Juliet Exception allows prison terms to become shorter, and causes post-release provision periods and sex offender registration requirements to be less harsh than when general rape, sodomy and lewd touching statutes apply.⁵⁴ The Romeo and Juliet Exception simply is not applicable to the litigious dispute of prosecuting teen sexters and offers no safe haven for the inequalities of the potential draconian sentencing passed down by child pornography statutes. The reasons are threefold: 1) the exception falls under statutory rape matters involving voluntary intercourse; 2) the exception will not protect minors from harsh prosecution; and 3) the threat of a felony conviction and sex offender registry requirements still stand as possible penalties under the law. The Romeo and Juliet Exception affords protection to minors who willingly, voluntarily, and intentionally engage in sexual intercourse; where most sexting cases involve photos and not the taping or videoing of underage intercourse. Although the goal under the Romeo and Juliet Exception is to decriminalize the penalty for minors in statutory rape cases, the same legal reasoning of lessening the convictions of minors in sexting cases is the common goal. However, applying the Romeo and Juliet Exception to teen sexting cases still enforces criminal statutes with adult penalties upon minors. A mandate of guiding factors and requirements should be developed to begin placing these sexting minors in the proper channels of our judicial system.

There should be boundaries set — as minors should not be prosecuted under child pornography statutes. Lessening the penalty still prosecutes minors under adult criminal statutes; on the other hand, the removal of any penalty sends a dangerous message to minors that the behavior behind sexting should go unpunished. Legislators have responded to the public outcry that treating juvenile sexters as child pornographers was draconian.⁵⁵ “Some of these responses included enacting or proposing legislation, which explicitly excluded sexting from child pornography laws, and removing the mandatory sex offender registration requirement.”⁵⁶ These changes in the proposed

53. KAN. STAT. ANN. § 21-3522 (1999), *repealed by* KAN. STAT. ANN. § 21-5507 (2016).

54. *State v. Limon*, 122 P.3d 22, 24 (Kan. 2005).

55. Terri Day, *The New Digital Dating Behavior – Sexting: Teens’ Explicit Love Letters: Criminal Justice or Civil Liability*, 33 HASTINGS COMM. & ENT. L.J. 69, 76 (2010).

56. *Id.*

legislation are “preferable to existing child pornography laws and provide a more proportional and appropriate response to sexting.”⁵⁷

C. The Culpability of Sending and Receiving Sexts

Upon review of statutory sexting legislation, an emphasis has been placed on the sending, receiving, and the redistribution of the text messages. Even penalties and charges are based on whether the recipient retains the message or how fast they delete the message. State legislation is dissecting the transmission of sending, receiving, distribution, reproduction, storing, and deletion as a means to prove intent of sending an image based on sexual content. The damage control needed to regulate sending and receiving poses an invasion of privacy argument. Without some form of protective rules, the current child pornography statutes throw teenage sexters into a prosecutorial dilemma and state legislatures into an epidemic of appropriating a law that is narrowly tailored to restorative plans. Arguably, in the case of traditional child pornography, “there is a clear power imbalance between an adult abuser who takes advantage of his or her position to exploit a child victim.”⁵⁸ Here, the distinction is that the harm is different, in that, child pornography involves the adult influence, manipulation, coercion, intimidation, or even being bullied, but with teen sexting, there is no merger of adult to minor abuse.⁵⁹ Moreover, the concept of self-exploitation, besides being conceptually immoral, is problematic as it punishes the victim of the crime and overlooks the purpose of the laws or the intent of law. The harm factor is significantly different in teenage sexting. Most teenagers are sexting in order to appeal to a significant other, or to experiment with sexuality, both of which draw a fine line between expressive behavior and illegal conduct. Therefore, when a teenager sends a sext message to another teenager, and that teen sends it to another and another, then and only then can the element of harm be factored into a level of criminal activity. The harm of sexting still negates the harm defined in child pornography laws. Sexting generally poses no harm to the minor who is being flirtatious or experimenting with sexuality. Unless the sexually graphic pictures reach several viewers, it is a voluntary moment of misjudgment, whereas the harm delineated in child pornography is as-

57. *Id.* at 77.

58. Matthew G. Tang, Sexting: Should Your Underaged Children Be Considered Child Pornographers? 13 (Apr. 15, 2010) (unpublished manuscript), <http://ssrn.com/abstract=1806622>.

59. *Id.*

sociated with a greater level of malice. So to assess, a level of punishment based on receiving and redistributing a sext message must be examined closer when prosecuting minors.

Sending and receiving are not culpable in nature unless the redistribution is extremely vast. Redistributing sexting pictures requires some level of intent to harm the victim with further embarrassment and rises to the level of harassment and invasion of privacy. Child pornography laws concerning minors must be amended to account for certain exceptions, strictly for sexting violations. A lesser penalty is justified. For instance, under teenage sexting prosecutions, minors can be convicted of a misdemeanor, felony, and be subjected to register as a sex offender. The purpose of the Sex Offender Registry is to place the public on notice that a pedophile is near or in the same vicinity of children. The Registry will isolate minors from society for their own voluntary misconduct. Transforming sexting laws and convictions for teenagers by creating education and diversion programs seeks to change the behavioral pattern of creating sexually explicit materials.

III. STATUTORY RECONSTRUCTION: AN APPEAL FOR UNIFORM LAWS IN TEENAGE SEXTING

Uniform laws offer guidelines and an untethered approach to the prosecuting, fast-paced changing area law. Teenage sexting should be relegated to a set of uniform laws to assess a more suitable prosecution for minors and to avoid draconian sentencing. Uniformity of the law in sexting should be mandated to offer alternative means to criminal prosecution under child pornography laws. A set criterion shaping the way charges are appropriated to minors will likely decrease the risk of exposing minors to criminal punishment. The state of “Vermont decreased the penalty for sexting and eliminated the possibility that minors charged with sexting violations will face a sex offender registry.”⁶⁰ Uniform laws for sexting should offer a category for senders, receivers, and distributions. The laws should carry the intent to prohibit the acts of sexting, but also offer to reduce felony convictions and the number of teenagers required to register as sex offenders.

60. Shannon Shafron-Perez, Comment, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 452–53 (2009) (citing VT. STAT. ANN. tit. 13 § 2802b (as amended 2009)); H.B. 14, 58th Leg., Gen. Sess. (Ut. 2009).

CONCLUSION

The prosecution of minors under child pornography laws should no longer exist. Prevention through education and lesser included offenses as well as diversion programs should be first-choice alternatives for the overall safety and well-being of minors. States legislatures should be required to codify under a uniform standard of anti-sexting laws with appropriate means of punishment.

COMMENT

The Aftermath of *Zubik v. Burwell*: The War on Contraception

VACHERIA CHERIE TUTSON*

INTRODUCTION	326
I. THE AFFORDABLE CARE ACT	329
A. What is the Affordable Care Act and the Contraceptive Mandate?	330
B. The Backlash Against the ACA	335
II. RELIGIOUS FREEDOM RESTORATION ACT OF 1993.....	338
A. The RFRA Test	340
B. RFRA Claims Against the Contraceptive Mandate	342
III. <i>ZUBIK V. BURWELL</i>	345
A. The Impact of Justice Scalia's Death and the Court's Holding.....	347
B. Religious Freedom Restoration Act Arguments	349
1. The Substantial Burden	349
2. The Legal Effect of the Accommodation	353
3. The Least Restrictive Means and Compelling Interest	356
IV. THE AFTERMATH OF <i>ZUBIK V. BURWELL</i> AND WOMEN'S CONSTITUTIONAL RIGHTS	361
V. FUTURE RECOMMENDATIONS AND CONCLUSION.....	365

* J.D. Candidate, Howard University School of Law, Class of 2017; Senior Staff Editor, *Howard Law Journal*, Vol. 60; B.A. Spelman College, 2013. Thanks to my advising professors Ziyad Motala and Alice Thomas at Howard University School of Law. I also would like to thank my friends and family who have supported me through my writing journey and law school career.

INTRODUCTION

“It was not a coincidence that women’s consciousness of their reproductive rights was born within the organized movement for women’s political equality. Indeed, if women remained forever burdened by incessant childbirths and frequent miscarriages, they would hardly be able to exercise the political rights they might win.”

—Angela Davis¹

More than 50 years later, women are still fighting for political equality that respects the virtue of reproductive freedom. Starting in the 1960s, the women’s health movement advocated for access to contraceptives as a fundamental prerequisite for the emancipation of women.² In 2011, the Obama administration provided women with a glimmer of hope by expanding the Affordable Care Act to include the “Contraceptive Mandate.”³ The Mandate requires employers to provide health care insurance that covers all FDA recommended contraceptives and preventive care services, cost-free for employees.⁴ Expanding access to contraceptives finally granted women full and equal health care coverage, addressing the longstanding gender discrimination in health care.⁵ However, religious objectors characterized the mandate as a “war on religion,” forcing employers to violate their religious beliefs by providing access to contraceptives.⁶

The reproductive rights debate naturally raises religious opposition due to the immoral connotation attached to premarital sex and fertility control methods. Respecting religious liberty, the govern-

1. ANGELA DAVIS, *Racism, Birth Control, and Reproductive Rights*, in WOMEN, RACE & CLASS 202, 208 (First Vintage Books ed. 1983).

2. *Id.* at 202. See generally Lisa C. Ikemoto, *Abortion, Contraception and the ACA: The Realignment of Women’s Health*, 55 How. L.J. 731, 735–40 (2012).

3. *Infra* Part II.

4. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54).

5. “‘Not only do [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68% more in out-of-pocket health care costs than men This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.’ The problem here was not just the cost of care but the fundamental inequity of excluding services, unique to women, from insurance coverage.” Sarah Lipton-Lubet, *Contraceptive Coverage Under the Affordable Care Act: Dueling Narratives and Their Policy Implications*, 22 AM. U. J. GENDER SOC. POL’Y & L. 343, 347 (2014) [hereinafter Lipton-Lubet, *Contraceptive Coverage*].

6. *Id.* at 360–63.

ment created an accommodation that allowed objecting employers to opt out of the mandate, while still respecting the dignity of female employees.⁷ Despite the available accommodation relieving employers of the financial and legal responsibility to provide contraceptive coverage, religious employers flooded the courts challenging the contraceptive mandate and available accommodation as a violation of religious exercise. As courts have long struggled to balance the twin concerns of protecting religious freedom and maintaining the separation of church and state, the controversial Contraceptive Mandate has unearthed a new form of “religious liberty.”⁸

The landmark decisions, *Griswold v. Connecticut* and *Roe v. Wade*, established that women have a fundamental right to contraceptives and to make their own reproductive choices without state interference.⁹ All Americans, including women, have the Constitutional right to free exercise of religion.¹⁰ On the other hand, corporations and nonprofit organizations are limited to the Religious Freedom Restoration Act (“RFRA”), enacted by Congress in 1993 to provide expansive protections for religious liberty.¹¹ Ignoring women’s constitutional rights, religious employers interpret the RFRA as an absolute license for any action motivated by religious intent. This also includes a license to deny women access to legally entitled government benefits, like contraceptives through an employer’s health insurance plan.

Before women could get comfortable with health care equality, religious nonprofit organizations reminded the country that women’s rights were inferior in the eyes of religion. Since 2012, thousands of

7. Brief for the Respondents at 25, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191), 2016 WL 537623, at *25. The accommodation made available under the Affordable Care Act respects religious liberty by allowing objecting employers to opt out of the generally applicable requirement to provide contraceptive coverage. It also respects the rights, dignity, and autonomy of female employees, students, and beneficiaries by arranging for third-parties to provide those women with the full and equal health coverage to which they are entitled by law. That approach embodies precisely the sort of “sensible balance” that Congress sought in enacting RFRA.

8. See generally Admin. Committee of the U.S. Conf. of Cath. Bishops, *United for Religious Freedom*, U.S. CONF. OF CATH. BISHOPS (Mar. 14, 2012), <http://www.usccb.org/issues-and-action/religious-liberty/march-14-statement-on-religious-freedom-and-hhs-mandate.cfm> (explaining the United States Conference of Catholic Bishop’s position on religious freedom and the contraceptive mandate).

9. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that married couples have a fundamental constitutional right to use contraception); *Roe v. Wade*, 410 U.S. 113, 153–55, 164–65 (1975) (establishing that the fundamental right underlying a woman’s choice to terminate pregnancy is her due process right to choose her own reproductive options without interference from the state).

10. U.S. CONST. amend. I.

11. See *infra* Part II.

women have been denied contraceptive coverage as a result of their employer's religious objections. Four years later, after countless numbers of cases and appeals, *Zubik v. Burwell* was the Supreme Court's golden opportunity to set modern precedent protecting women's constitutional rights against gender discrimination.¹² Unfortunately, the Court declined to rule on the merits of *Zubik*, and directed the parties to "arrive at an approach going forward that accommodates petitioners' religious exercise" while ensuring that women covered by the employers' health plans receive contraceptive coverage.¹³

The discussion below aims to draw attention to the missing interest *Zubik v. Burwell* failed to address, overlooking women's constitutional rights and the social meaning behind contraceptives. Coverage for contraception advances women's health and equality, but there is little discussion of women's value in the workforce and the inherent gender discrimination underpinning the Religious Freedom Restoration Act challenges. This article explores the competing ideologies driving *Zubik v. Burwell* and addresses why it is imperative that the Court intervenes in the Contraceptive Mandate debate to provide legal clarity. Historically, the Supreme Court has made some of the most politically transformative decisions in American government. However, the Court's inaction in *Zubik* has left women's fundamental rights in the crossfire of the controversial 2016 Presidential election. This article discusses the future risks posed to the Affordable Care Act and religious liberty as a result of a change in Presidential administration, Congress, and a vacant Supreme Court seat.

Part I of this article explores the history of the Affordable Care Act and the Contraceptive Mandate. This section also discusses the political and legal attacks against the Affordable Care Act. Part II provides a brief history on the enactment of the Religious Freedom Restoration Act of 1993, along with an overview of the nonprofit religious organizations' RFRA claims in *Zubik v. Burwell*. Part III delves into the *Zubik* decision, discusses the procedural history of the case and the fundamental disagreements between the parties under the RFRA framework. This section evaluates the parties' arguments within the bounds of the Court's order, highlighting the unlikelihood of future compromises without the Court hearing *Zubik II*. Part IV explores the aftermath of *Zubik* and the women's rights considera-

12. See *Zubik v. Burwell*, 136 S. Ct. 1557, 1560–61 (2016).

13. *Id.* at 1560.

tions inherent in conception and women's health debate. This section discusses the missing compelling interest in the social meaning of contraceptives and women's value in the workforce. In addition, this section discusses the potential impact of the 2016 presidential election on women's fundamental rights, as well as other disadvantaged groups experiencing religious discrimination. Lastly, Part V concludes with future recommendations for the Court.

I. THE AFFORDABLE CARE ACT

Barack Obama's legacy of health care reform started before he officially declared that he was running for president. At a large health care conference in 2007, Senator Obama declared that in the 2008 presidential campaign, "affordable, universal health care for every single American must not be a question of whether, it must be a question of how."¹⁴ From that moment, Obama boldly promised Americans that he would make his first year in office about health care.¹⁵ In the months and weeks leading up to the 2008 election, the start of the Great Recession significantly impacted each candidate's campaign platform. Americans were struggling to stay afloat with the soaring cost of health care along with a faltering economy and rising unemployment rates, leaving many families without health insurance or with medical expenses that consumed a large share of their incomes. By the time Obama was elected, between 45 and 50 million people in the United States had no health care coverage.¹⁶

Upholding his promise, in 2009, President Obama began to rally congressional support for the biggest health care legislation since Lyndon Johnson enacted Medicare in the 1960s.¹⁷ President Obama justified reforming the nation's health care system in hopes to control costs and provide coverage for a "burgeoning group of unemployed

14. *The Time Has Come for Universal Health Care*, OBAMA SPEECHES (Jan. 25, 2007), <http://obamaspeeches.com/097-The-Time-Has-Come-for-Universal-Health-Care-Obama-Speech.htm>.

15. Glen Thrush & Carrie Budoff Brown, *Obama's Health Care Conversion*, POLITICO (Sept. 22, 2013, 9:00 PM), <http://www.politico.com/story/2013/09/obama-health-care-conversion-obamacare-097185?o=1>.

16. Janet L. Dolgin & Katherine R. Dieterich, *Social and Legal Debate About the Affordable Care Act*, 80 UMKC L. REV. 45, 49 (2011).

17. Michael J. Graetz & Jerry L. Mashaw, *Constitutional Uncertainty and the Design of Social Insurance: Reflections on the Obamacare Case*, 7 HARV. L. & POL'Y REV. 343, 356–57 (2013). See generally Erin C. Fuse Brown, *Developing a Durable Right to Health Care*, 14 MINN. J.L. SCI. & TECH. 439, 467–71 (comparing the political challenges to Medicare and The Affordable Care Act).

people without health care coverage.”¹⁸ Under a democratic-controlled Congress, the President’s efforts to muster up bipartisan support failed. Without a single vote from republicans, the Affordable Care Act passed in the House on March 21, 2010.¹⁹

In this section, I will provide a brief overview of the Affordable Care Act and the Contraceptive Mandate’s requirements. In addition, this section explores the importance of preventive services and contraceptives for women’s health. Lastly, this section delves into the political and legal attacks on the Affordable Care Act and the current success of universal health care in America.

A. What is the Affordable Care Act and the Contraceptive Mandate?

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (“ACA”), a comprehensive health insurance reform bill to improve access, affordability, and quality in health care for Americans.²⁰ The ACA contains ten titles with hundreds of provisions that fill over 900 pages.²¹ Three of the most contentious provisions are: the Individual Mandate, the expansion of Medicaid, and the Contraceptive Mandate of the Women’s Health Amendment.²² The Women’s Health Amendment was designed to address longstanding gender discrimination in health care.²³ The Department of Health and Human Services (“HHS”) established guidelines mandating employers to provide preventative care services, including any “FDA approved contraceptive methods, sterilization

18. See Dolgin & Dieterich, *supra* note 16, at 49–50.

19. Shailagh Murray & Lori Montgomery, *House Passes Health-Care Reform Bill Without Republican Votes*, WASH. POST (Mar. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/21/AR2010032100943.html>.

20. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54); *see also Transcript: Obama’s Health Care Speech*, CBSNEWS (Sept. 9, 2009, 8:14 PM), <http://www.cbsnews.com/news/transcript-obamas-health-care-speech/2/> (explaining that it will provide more security and stability to those who have health insurance, and it will provide insurance for those who don’t. And it will slow the growth of health care costs for our families, our businesses, and our government).

21. Kathryn S. Benedict, *When Might Does Not Create Religious Rights: For-Profit Corporations’ Employees and the Contraceptive Coverage Mandate*, 26 COLUM. J. GENDER & L. 58, 74 (2013).

22. *Id.*

23. See Lipton-Lubet, *Contraceptive Coverage*, *supra* note 5, at 346. *See generally* March for Life v. Burwell, 128 F. Supp. 3d 116, 120–21 (D.D.C. 2015) (noting the women’s health amendment included then ACA preventive services coverage provision, the Health Resources and Services Administration (HRSA) guidelines, and the Human And Health Services (HHS) implementing regulations).

procedures, and patient education and counseling for all women with reproductive capacity.”²⁴ These guidelines are most popularly known as the “Contraceptive Mandate.” The Contraceptive Mandate makes preventive care services affordable and accessible for all women by requiring group health plans and health insurance issuers to cover preventive care services without cost sharing.²⁵ Since August 1, 2012, about 47 million women gained guaranteed access to additional preventive services without paying more at the doctor’s office.²⁶

The Institute of Medicine (“IOM”), under the direction of HHS, conducted a comprehensive study to determine which health care services should be covered as “essential preventive care for women.”²⁷ The IOM study found that 49% of pregnancies each year in the United States are unintended and that women with unintended pregnancies are less likely to receive proper pre-natal care.²⁸ Women having access to contraceptives “is a crucial public health protection because unintended pregnancy can have major negative health consequences for both the woman and the developing fetus.”²⁹ Additionally, women suffering from certain heart conditions, diabetes, lupus, or other health complications face life threatening health hazards from pregnancy.³⁰ It is critical that women with those conditions have

24. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54). *See generally* Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs., 801 F.3d 927, 933 (8th Cir. 2015), *cert. granted, judgment vacated sub nom.* Dep’t of Health & Human Servs., et al. v. CNS Int’l Ministries, et al., No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016) (noting contraceptive methods approved by the FDA include: intrauterine devices, levonorgestrel (plan B), and ulipristal acetate (ella). Each contraceptive method may “have the effect of preventing an already fertilized egg from developing any further by inhibit its attachment to the uterus”).

25. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8725.

26. *Affordable Care Act Rules on Expanding Access to Preventive Services for Women*, U.S. DEP’T HEALTH & HUM. SERVS. (Aug. 1, 2011), <http://www.hhs.gov/healthcare/facts-and-features/fact-sheets/aca-rules-on-expanding-access-to-preventive-services-for-women/>.

27. *See* Lipton-Lubet, *Contraceptive Coverage supra* note 5, at 347.

28. *See* COMM. ON PREVENTIVE SERVS. FOR WOMEN & INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 102–03 (2011); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8725, 8726.

29. Karen A. Jordan, *The Contraceptive Mandate: Compelling Interest or Ideology?*, 41 J. LEGIS. 1, 18 (2015).

30. *See* *Priests For Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 238, 262 (D.C. Cir. 2014), *cert. granted sub nom.* Roman Catholic Archbishop of Washington v. Burwell, 136 S. Ct. 444, *cert. granted sub nom.* *Priests for Life v. Dep’t of Health & Human Servs.*, 136 S. Ct. 446, *and vacated and remanded sub nom.* *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (“The departments determined that contraceptives prevent unintended pregnancies and the negative health risks associated with such pregnancies; they have ‘medical benefits for women who are

the ability to time their pregnancies, often waiting until their conditions are under control or ending medications that pose risk to maternal and fetal health.³¹

Before the ACA, there were no federal protections against discriminatory health insurance practices on the basis of race, age, or sex.³² Beginning in 2014, insurance companies were prohibited from using gender or health status to determine premium rates for individual or group health plans.³³ Women often experienced higher costs for health coverage or were denied coverage because of a previous medical procedure, such as a C-section.³⁴ Cost sharing is one of the most significant barriers to women receiving effective contraceptive methods and preventative care services.³⁵ Traditionally, women paid more for the same health insurance coverage available to men, and women of child bearing age spent 68% more in out-of-pocket care costs than men.³⁶

The ACA requires employers “with fifty or more full-time employees to offer ‘a group health plan or group health insurance coverage’ that provides ‘minimum essential coverage.’”³⁷ Employers with fewer than fifty employees are not required to provide health insurance, so ultimately, the contraceptive mandate does not affect tens of millions of people.³⁸ If an employer fails to comply with the Contraceptive Mandate, it is subject to penalties of \$100 per day per affected individual.³⁹ Furthermore, an employer with more than fifty employees that fails to provide employees with a group health plan is generally subject to penalties of \$2,000 per year per full-time employee.⁴⁰

Since the ACA was enacted, unmodified plans that existed prior to March 23, 2010, were “grandfathered” in and exempted from com-

contraindicated for pregnancy,’ and they offer ‘demonstrated preventive health benefits . . . relating to conditions other than pregnancy. . . .’”).

31. *Priests For Life*, 772 F.3d at 262.

32. *The Past and Future in Women’s Health: A Ten-Year Review and the Promise of the Affordable Care Act and Other Federal Initiatives*, NAT’L WOMEN’S LAW CTR., <http://hrc.nwlc.org/past-and-future> (last visited Oct. 23, 2016).

33. *Id.*

34. *Id.*

35. *Priests For Life*, 772 F.3d at 243.

36. *Id.* at 263 (“The government recognized that women pay more for the same health benefits in part because services more important or specific to women have no been adequately covered by health insurance.”).

37. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014); see also 26 U.S.C. § 4980H(a), (c)(2) (2015); 26 U.S.C. § 5000A(f)(2) (2010).

38. See *id.*

39. 26 U.S.C. § 4980D(b) (2005).

40. 26 U.S.C. § 4980H(a), (c).

plying with the Contraceptive Mandate.⁴¹ In February 2012, the government amended the ACA creating the “religious employer exemption” to remedy religious affiliated employers’ objections to the Contraceptive Mandate.⁴² As defined by the regulation, “religious employers are confined to churches, their integrated auxiliaries, and conventions or associations of churches as well as to exclusively religious activities of any religious order.”⁴³ The narrow religious employer exemption reflects HHS’s desire to “respect the religious interests of the houses of worship and their integrated auxiliaries,” without undermining the government’s interests furthered by the Contraceptive Mandate.⁴⁴ The exemption presumes that exempted religious employers are more likely than other employers to “employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such a service were covered under their plan.”⁴⁵

If employers do not fall within the exemption, HHS regulations also provide an “accommodation” for “eligible” nonprofit organizations that have religious objections to the Contraceptive Mandate.⁴⁶ An eligible organization is a nonprofit organization that holds itself out as a religious organization and opposes providing coverage for some or all of contraceptive services required on account of their religious objections.⁴⁷ The accommodation is “intended to protect religious organizations from having to contract, arrange, pay, or refer for contraceptive coverage.”⁴⁸ The accommodation was originally designed to “dissociate the objecting organizations from contraceptive coverage while ensuring” that their respective employees could obtain

41. *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, 801 F.3d 927, 933 (8th Cir. 2015), *cert. granted, judgment vacated sub nom.* *Dep’t of Health & Human Servs., et al. v. CNS Int’l Ministries, et al.*, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016). *See generally Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2763–64 (“A plan qualifies as “grandfathered” if it existed prior to March 23, 2010, and has not made any changes after that date.”).

42. *March for Life v. Burwell*, 128 F. Supp. 3d 116, 121 (D.D.C. 2015).

43. *Id.*

44. *Id.* at 121–22.

45. *Id.* at 126.

46. *Sharpe Holdings, Inc.*, 801 F.3d at 933–34; *see also* *Geneva College v. Sec’y U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 429 (3d Cir. 2015) (“An eligible organization means a nonprofit organization that holds itself out as a religious organization and opposes providing coverage for some or all of any contraceptive services requires not be covered on account of religious objections.”).

47. Jonathan T. Tan, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA’s Requirements*, 47 U. RICH. L. REV. 1301, 1318 (2013).

48. *Sharpe Holdings, Inc.*, 801 F.3d at 933–34.

coverage for contraceptives directly through separate plans.⁴⁹ In the wake of *Hobby Lobby*,⁵⁰ the accommodation applies to nonprofit entities as well as closely held, for-profit corporations. To be eligible for the accommodation, religious organizations must: (1) have religious objections to providing healthcare coverage for some or all contraceptive services, (2) hold itself out as a religious organization, and (3) comply with a self-certification process.⁵¹

Organizations have two options for the self-certification process: sending notice directly to HHS or submitting the ESBA Form 700 directly to its third party administrator (“TPA”) or health insurance issuer.⁵² Form 700 requires organizations to list three pieces of information: the name of the objecting organization, the name and title of the individual authorized to make the certification on behalf of the organization, the mailing address, email address, and phone number of the individual listed above.⁵³ Form 700 authorizes the TPA to “provide or arrange payments for contraceptives services” and requires the TPA to provide separate notice regarding those services to participants and beneficiaries enrolled in the religious organization’s group health plan.⁵⁴ The second self-certification option emerged after the Supreme Court’s decision in *Wheaton College v. Burwell*.⁵⁵ The Court permitted, in an interim order, that eligible organizations can notify the secretary of HHS in writing of its objections, instead of sending the self-certification directly to the insurer or TPA.⁵⁶ The notice must contain: the name of the organization and why it qualifies for the accommodation, its objection to coverage of some or all contraceptive services based on sincerely held religious beliefs, the insurance plan name, type, and contact information for their respective TPA.⁵⁷

49. *Priests For Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 239 (D.C. Cir. 2014).

50. 134 S. Ct. 2751.

51. See *Michigan Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 381 (6th Cir. 2015); *Sharpe Holdings, Inc.*, 801 F.3d at 933–34. The self-certification process is also referred to as notification or opting out.

52. See Tan, *supra* note 47, at 1315–16.

53. *Sharpe Holdings, Inc.*, 801 F.3d at 934–35.

54. *Id.* at 935.

55. *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2809 (2014).

56. *Michigan Catholic Conference & Catholic Family Servs.*, 755 F.3d at 745 (“[N]eed not use the form prescribed by the government, EBSA form, and need not send copies to health insurance issuers or TPA in order to obtain the accommodation.”).

57. *Id.* at 744.

After a health insurance issuer receives an accommodation notification from an objecting employer, the issuer must then exclude contraceptive coverage from the employer's plan. The health insurance issuer or TPA is required to provide separate payments for contraceptive service plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries.⁵⁸ After receiving the self-certification notice, the TPA or issuer is "designate[d]" as the "plan administrator" under ERISA for contraceptive benefits.⁵⁹ The accommodation also requires that the health insurance issuer or TPA, not the eligible organization, provide notice to the plan participants and beneficiaries regarding contraceptive coverage while maintaining separate communication from the materials distributed in connection with that employer's group health coverage.⁶⁰

B. The Backlash Against the ACA

Before the development of the Contraceptive Mandate, several significant religious institutions already had a complicated relationship with the ACA. In 2010, the United States Conference of Catholic Bishops rallied against the ACA due to an expansion of abortion regulations.⁶¹ Conversely, Sister Carol Keehan's open support for the health reform law immensely contributed to the ACA's passage.⁶² Sister Keehan is the president of the Catholic Health Association.

58. See *Geneva College v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 429 (3d. Cir. 2015) ("The insurance issuers or third party administrator must '[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the [eligible organization's] group health plan' and 'segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services.'"); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2763 (2014) (noting that although this procedure requires the TPA or health insurance issuer to bear the cost of these services, HHS has determined that this obligation will not impose any new expense on issuers because its cost would be less than or equal to the savings resulting from the services.).

59. *Sharpe Holdings, Inc.*, 801 F.3d at 935. The TPA or health insurance issuer also becomes eligible to be reimbursed for the full costs of contraceptive coverage, plus an additional allowance of "no less than 10%."

60. See *Geneva College*, 778 F.3d at 429 (specifying that the eligible organization does not administer or fund contraceptive benefits but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints.); see also 26 C.F.R. §§ 54.9815-2713A(d) (2015); 29 C.F.R. §§ 2590.715-2713A(d) (2015); 45 C.F.R. § 147.131(d) (2015).

61. Lipton-Lubet, *Contraceptive Coverage*, *supra* note 5, at 358-59; see also Jon O'Brien, *How Hobby Lobby Killed Religious Liberty*, HUFFINGTON POST (July 21, 2014, 4:15 PM), http://www.huffingtonpost.com/jon-obrien/how-hobby-lobby-killed-re_b_5606727.html (explaining the United States Conference of Catholic bishops involvement in the contraceptive mandate controversy).

62. Lipton-Lubet, *Contraceptive Coverage*, *supra* note 5, at 358-59.

Within hours of the ACA being signed into law, 26 states, numerous private individuals, and the National Federation of Independent Business filed suits against the United States Department of Health and Human Services.⁶³ Affordable Care Act opponents challenged the constitutionality of the individual mandate and the tax penalties for Americans' noncompliance.⁶⁴

In the wake of the national election in November 2010, the Democrats lost their majority position in the House of Representatives and seats in the Senate.⁶⁵ The freshly elected Republican members of the House campaigned on a promise to repeal the Affordable Care Act, which led to the creation of bills like "Repealing the Job-Killing Health Care Law Act."⁶⁶ Between 2011 to 2013, the 112th Congress launched one of the most extreme assaults on women's reproductive freedom by filing at least 87 bills containing proposals to dismantle reproductive rights.⁶⁷ Throughout 2011, several bills were presented in Congress to eliminate abortion services and family planning through the federal budget.⁶⁸ In April 2011, polarizing debates on Planned Parenthood's federal funding led the country to the brinks of a government shutdown.⁶⁹ Anti-choice politicians were willing to risk a government shutdown in order to strip Planned Parenthood of its ability to provide basic health services to low-income women. In the midst of Congress' "war on women," the Obama administration an-

63. Jenna Brady, *The Affordable Care Act: Creating Headaches Instead of Healing Them*, 53 U. LOUISVILLE L. REV. 627, 634 (2016).

64. See generally OBAMACARE FACTS, <http://obamacarefacts.com/obamacare-individual-mandate/> (last visited Oct. 24, 2016). The individual mandate is the unofficial name for the requirement to obtain coverage under the ACA. Americans must obtain and maintain minimum essential coverage throughout the year or obtain an exemption, or will have to make a shared responsibility payment for each month you went without coverage or an exemption.

65. Dolgin & Dieterich, *supra* note 16, at 70.

66. *Id.* at 71.

67. CTR. FOR REPRODUCTIVE RIGHTS, UNDER ATTACK: REPRODUCTIVE RIGHTS IN THE 112TH CONGRESS 5 (2013), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_GR_wrapUp_3.13.pdf.

68. *Id.* at 15–17.

69. *Id.* at 12. See generally Paul Kane, Phillip Rucker & David A. Fahrenthold, *Congress Agrees to Eleventh-Hour Budget Deal to Avert Government Shutdown*, WASH. POST (Apr. 9, 2011), https://www.washingtonpost.com/politics/reid-says-impasse-based-on-abortion-funding-boehner-denies-it/2011/04/08/AFO40U1C_story.html. See also Sarah Lipton-Lubet, *House Takes Aim at Women's Health in Shutdown Fight*, ACLU (Sept. 30, 2013, 2:26 PM), <https://www.aclu.org/blog/house-takes-aim-womens-health-shutdown-fight?redirect=blog/reproductive-freedom/house-takes-aim-womens-health-shutdown-fight> (noting another government shutdown over women health law).

nounced the Women's Health Amendment, which includes the controversial contraceptive mandate.⁷⁰

The political discourse on the Contraceptive Mandate birthed the fight for "religious liberty," as Congress and religious objectors joined forces in the crusade against the ACA. Just months before the 2012 presidential election, women's reproductive rights took center stage. The Republican presidential candidates publicly expressed their support for employers' religious freedom, when five candidates signed a declaration "that life begins at fertilization."⁷¹ Throughout the election, candidates like Mitt Romney framed the contraceptive mandate as a "war on religion;" while candidate Rick Santorum campaigned for a ban on contraceptives.⁷² The 112th Congress held hearings on the "state of religious liberty," evaluating if the Obama administration crossed the lines between church and state.⁷³ Interestingly, women's constitutional right to autonomy and their reproductive choices were actively excluded from Congressional hearings, because the topic was "religious freedom," an area that historically does not recognize reproductive freedom.⁷⁴

When the election results came in, the American people not only re-elected a pro-choice president, but soundly rejected the anti-woman antics that flourished during the campaign cycle. The 2012 elec-

70. Lipton-Lubet, *Contraceptive Coverage*, *supra* note 5 363–64; U.S. Dep't of Health and Human Services, *Women's Preventive Services Guidelines*, HRSA.GOV, <http://www.hrsa.gov/womensguidelines/> (last visited Oct. 22, 2016).

71. Lisa C. Ikemoto, *Abortion, Contraception and the ACA: The Realignment of Women's Health*, 55 How. L.J. 731, 766 (2012).

72. *Id.*

73. See generally Lipton-Lubet, *Contraceptive Coverage*, *supra* note 5, at 363–71; Tom Shine, *Rep. Darrell Issa Bars Minority Witness, a Woman, on Contraception*, ABC NEWS (Feb. 15, 2012), <http://abcnews.go.com/blogs/politics/2012/02/rep-darrell-issa-bars-minority-witness-a-woman-on-contraception-2/>; Cecile Richards, *Birth Control Works. . . But Only When Women Have Access to It*, HUFFINGTON POST (Feb. 15, 2013, 1:02 PM), www.huffingtonpost.com/cecile-richards/birth-control-works-but-on_b_2695975.html; Laura Bassett & Amanda Terkel, *House Democrats Walk Out of One-Sided Hearing On Contraception, Calling It An 'Automatic Regime'*, HUFFINGTON POST (Feb. 16, 2012, 11:20 AM), http://www.huffingtonpost.com/2012/02/16/contraception-hearing-house-democrats-walk-out_n_1281730.html.

74. Lipton-Lubet, *Contraceptive Coverage*, *supra* note 5, at 364–65 (noting the hearing featured a panel of all-male clergy and theologians, each testifying against the coverage requirement. Notably absent from that first panel was a woman's voice. The Democratic minority had proposed Georgetown law student Sandra Fluke as their witness. She would have testified about the importance of coverage and how she and her peers had been harmed by their university's refusal to allow contraceptive coverage in the student insurance plan. Chairman Issa, however, denied her permission to participate, determining that Ms. Fluke was not "appropriate" or "qualified." His explanation perfectly encapsulated the way in which the war on religion frame attempts to read women out of these policy debates. In his view, this was "not a hearing on the policies or the details related to the single issue of ObamaCare [sic] and this particular mandate. This hearing is about religious freedom.").

tion had the second largest gender gap in American history, 53% of the electorate was comprised of women who stood firmly against candidates threatening their reproductive rights.⁷⁵ Approaching another presidential election, Americans have another opportunity to stand against gender discrimination. The 2016 presidential election has the potential to alter the political climate and have a significant impact on the ACA, women's rights, and religious liberty.

II. RELIGIOUS FREEDOM RESTORATION ACT OF 1993

Before Congress enacted the Religious Freedom Restoration Act ("RFRA") in 1993, the First Amendment provided the only avenue for aggrieved Americans to allege violations of their religious rights against the government.⁷⁶ The Free Exercise Clause of the First Amendment states "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."⁷⁷ Under Free Exercise jurisprudence, the courts "used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest."⁷⁸ The first notable case was *Sherbert v. Verner*, followed by *Wisconsin v. Yoder*, which set forth this balancing test to determine whether a challenged government action violated the Free Exercise Clause of the First Amendment.⁷⁹ At this time, Courts ap-

75. CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 67, at 22.

76. Emily A. Herbick, *Unreasonable Religious Accommodation?: Fighting Irish Challenge the Opt-Out Form to the Affordable Care Act's "Contraceptive Mandate"*, 10 SEVENTH CIRCUIT REV. 88, 93 (2014).

77. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993) ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .").

78. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014); see also *Emp't Div. Dep't. of Human Res. of Or. v. Smith*, 110 S. Ct. 1595, 1602 (1990) (finding under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest).

79. See generally *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 92 S. Ct. 1526 (1972). See Herbick, *supra* note 76, at 93–94 ("In *Sherbert*, the Court applied this balancing test to hold that an employer could not deny unemployment benefits to a Seventh-day Adventist who was fired for refusing to work on her Sabbath. In *Yoder*, the Court applied this test to hold that Amish children, who graduated eighth grade, did not have to comply with a state law demanding compulsory school attendance until the age of 16, which their parents' opposed based on their belief that secondary education conflicts with the Amish's deeply rooted religious beliefs and way of life.").

plied a strict scrutiny standard to government actions that conflicted with religious freedom.⁸⁰

Nearly twenty years later, the Court abandoned the balancing test in *Employment Division of Human Resources of Oregon v. Smith*,⁸¹ and held that the “*Sherbert* test” was inapplicable to challenges against “generally applicable prohibitions of socially harmful conduct. . . .”⁸² In *Smith*, the Supreme Court held that the Free Exercise clause of the First Amendment did not prohibit the government from burdening religious exercise through neutral and generally applicable laws and that the Constitution did not require judges to engage in a case-by-case assessment of the religious burdens by such laws.⁸³ Congress’ disapproval of the *Smith* decision led to the enactment of the Religious Freedom Restoration Act, in efforts to protect religious liberty and restore the strict scrutiny standard set in *Sherbert*.⁸⁴

Through RFRA, Congress created a statutory right that would be more expansive than the constitutional right to Free Exercise of religion, narrowed by the *Smith* Court.⁸⁵ The Religious Freedom Restora-

80. See Eric Checketts, *Taking Free Exercise the Second Mile: Why Hobby Lobby Fails to Go Far Enough*, 41 IOWA J. CORP. L. 971, 978 (2016).

81. *Emp’t Div. Dep’t. of Human Res. of Ore.*, 110 S. Ct. at 874, 884–85 (holding that the free Exercise Clause permitted Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and therefore permitted the state to deny unemployment benefits to person dismissed from their jobs because of such religiously inspired use).

82. *Id.* at 883–85 (“Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.”)

83. *Id.* at 890 (“We have never held that an individual’s religious beliefs excuses him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”); see also Brandon M. Shields, *Burwell v. Hobby Lobby Stores, Inc.: Final Nail in the Coffin of ACA?*, 17 DUQ. BUS. L.J. 125, 129 (2015) (“the court reasoned that the balancing test, which required a ‘compelling governmental interest’ justification for governmental actions that substantially burdened a religious practice, was inapplicable to an across-the-board criminal prohibition on a particular form of conduct.”).

84. Checketts, *supra* note 80, at 978–79 (“In *Employment Division v. Smith*, . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; . . . the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”); see also 42 U.S.C. § 2000bb (2006). Expressly stated in the findings and purpose, the RFRA was enacted to “restore the compelling interest test as set forth in *Sherbet v. Verner*, and *Wisconsin v. Yonder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened.”. Checketts, *supra* note 80, at 978–79.

85. Tan, *supra* note 47 at 1338; see also Herbick, *supra* note 76, at 95 (“In order to combat the problematic ruling of *Smith*, Congress enacted the RFRA to provide very broad protection for religious freedom. Congress enacted the RFRA in order to: (1) restore the compelling interest test set forth in *Sherbert* and *Yoder*; (2) guarantee the Act’s application in all cases where free exercise of religion is substantially burdened; and (3) provide a claim or defense to individuals whose religious exercise is substantially burdened by the government. Significantly, Congress

tion Act of 1993 prohibits the federal government from substantially burdening a person's religious exercise, unless the government demonstrates that the substantial burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.⁸⁶ Congress believed that the RFRA would only be deployed against invidious discrimination and that its beneficiaries were small, politically powerless believers in need of Congress's protection.⁸⁷ Nevertheless, it is hard to imagine that anyone envisioned RFRA being utilized by for-profit corporations to fight elements of the Affordable Care Act. In this section, I will explain the three-component Religious Freedom Restoration Act test and give a brief overview of the non-profit religious organizations' claims in *Zubik v. Burwell*.

A. The RFRA Test

Courts are required to perform an objective evaluation to consider the nature of the action required of the religious objector, the connection between that action and the respective religious beliefs, and the extent to which that action interferes with or otherwise affects the religious objector's exercise of religion.⁸⁸ Courts apply a three-prong test under RFRA: (1) substantial burden, (2) compelling interest, (3) and least restrictive means.

To state a claim under RFRA, a religious objector must show that the government substantially burdened a sincere religious exercise or belief.⁸⁹ Although there is not a concrete definition of a "substantial burden," the gravity of the burden on the religious objector's freedom is determined in relation to whether the burden is shared equally between the religious and nonreligious alike.⁹⁰ Under the RFRA, the

found that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.").

86. *Geneva College v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 430 (3d Cir. 2015).

87. Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act is Bad Public Policy*, 9 HARV. L. & POL'Y REV. 129, 155 (2015).

88. *Geneva College*, 778 F.3d at 385 ("There is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept the [religious objector's] characterization of the regulatory scheme on its face.") (quoting *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F.Supp.3d 48, 71 (D.D.C. 2013)).

89. *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 937 (8th Cir. 2015).

90. Mark Strasser, *The Protection of Conscience: on ACA, RFRA and Free Exercise Guarantees*, 82 TENN. L. REV. 345, 390 (2015).

government substantially burdens the exercise of religion when it “conditions receipt of an important benefit upon conduct proscribed by a religious faith or denies such a benefit because of conduct mandated by religious beliefs, thereby putting substantial pressure on an adherent to modify his behavior” and violate his beliefs.⁹¹ As the Court of Appeals for the Seventh Circuit noted in *Korte*, “[a]t a minimum, a substantial burden exists when the government compels a religious person to ‘perform acts undeniably at odds with fundamental tenets of [his] religious beliefs.’”⁹²

The second prong, the compelling interest test, looks at whether the government’s interest is compelling generally, whether there are exceptions to the statute that undermine that interest, and what the effect of imposing that interest would be on the individual.⁹³ The government has the burden of showing that it has a “compelling interest” in applying the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened.⁹⁴ To satisfy the compelling interest prong, the government must do more than identify “broadly formulated interests justifying the general applicability of government mandates.”⁹⁵ However, several courts have accepted the government’s compelling interest in regulating broadly in order to serve the larger public good to improve “health, safety, and the general welfare” in cases where harm to the physical or mental health of an adversely affected individual was proven.⁹⁶

In determining whether a substantial burden on the exercise of religion is in furtherance of a compelling interest, the court must scrutinize the asserted harm of granting specific exemptions to particular religious plaintiffs and take adequate account of the burdens a requested accommodation may impose on non-beneficiaries.⁹⁷ The government must specifically identify an actual problem in need of solving and show that substantially burdening plaintiffs’ free exercise of religion is actually necessary to the solution.⁹⁸ When the cost of the

91. See *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981); *Shields*, *supra* note 83, at 131 (noting the federal courts have made clear that a substantial burden can take the form of a financial burden).

92. *Zubik v. Sebelius*, 983 F. Supp. 2d 576, 604 (W.D. Pa. 2013).

93. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

94. *Id.*

95. *Id.* at 420.

96. *Benedict*, *supra* note 21 at 67.

97. See *Shields*, *supra* note 83, at 131; *Strasser*, *supra* note 90, at 390–92.

98. *Shields*, *supra* note 83, at 131–32.

government's interest is less than the harm to the plaintiff's religious exercise, the plaintiff will be granted an individualized exemption.⁹⁹

Under the third prong, the government must show that it has furthered its compelling interest through the means least restrictive on a person's exercise of religion.¹⁰⁰ A regulation is the "least restrictive means" of furthering a compelling governmental interest if no alternative forms of regulation would accomplish the compelling governmental interest without infringing upon a person's exercise of religion.¹⁰¹ The Court must focus on the context of the religious objectors, and consider whether and how the government's compelling interest is harmed by granting specific exemptions to particular religious claimants.¹⁰² The government is not required to refute every conceivable alternative; instead, the court will review all evidence to ensure that none of the proffered alternative schemes would be less restrictive while still advancing the compelling governmental interests.¹⁰³ Under the RFRA, it is the obligation of the court to consider whether exceptions are required under the test set forth by Congress.¹⁰⁴ When interests of the religious adherents collide with an individual's access to a government program, supported by a compelling interest, RFRA calls on the government to reconcile the competing interests.¹⁰⁵

B. RFRA Claims Against the Contraceptive Mandate

The claim that lies at the heart of Contraceptive Mandate cases is the Religious Freedom Restoration Act challenge to the existing "accommodation" available for religious nonprofit organizations. The seminal case, *Burwell v. Hobby Lobby Stores, Inc.*,¹⁰⁶ was the first Contraceptive Mandate challenge heard by the Supreme Court in 2014. In *Hobby Lobby*, the Supreme Court held that the contraceptive mandate substantially burdened the for-profit corporations' exercise of religion, and in turn the plaintiffs were entitled to the

99. Benedict, *supra* note 21, at 66.

100. Shields, *supra* note 83, at 132.

101. *Id.*

102. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

103. *United States v. Wilgus* 638 F.3d 1274, 1289 (10th Cir. 2011).

104. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006).

105. *Priests for Life v. U.S. Dep't. of Health and Human Services*, 772 F.3d 220, 266 (D.C. Cir. 2014), *cert. granted sub nom. Roman Catholic Archbishop of Washington v. Burwell*, 136 S. Ct. 444 (2015), and *cert. granted sub nom. Priests for Life v. Dep't. of Health and Human Services*, 136 S. Ct. 446 (2015).

106. See generally *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751.

accommodation available for nonprofit religious organizations.¹⁰⁷ Most importantly, the Court held that for-profit corporations can indeed exercise religion within the meaning of RFRA.¹⁰⁸ The Court reasoned that Congress included corporations within RFRA's definition of "persons" because their purpose was to protect human beings.¹⁰⁹ In spite of the government's claim that a corporation cannot "exercise religion," the Court reinforced that business practices compelled or limited by a believer's faith fit the definition of "exercise of religion," which involves the abstention from physical acts that are engaged in for religious reasons.¹¹⁰ The "keystone" of the *Hobby Lobby* case was that the government had an existing accommodation in place that was the least restrictive means of burdening the plaintiffs' religious freedom.¹¹¹ All of the petitioners in *Zubik* are eligible for the religious exemption or the available accommodation. However, the non-profit religious organizations in *Zubik v. Burwell* claimed that the existing accommodation is *still* a substantial burden on their religious exercise because it makes the employers complicit in sin.¹¹²

In *Zubik*, the non-profit religious organizations oppose the Contraceptive Mandate, because they believed that life begins at conception, the use of contraception is contrary to the Catholic belief system, and they were unwilling to provide or facilitate access to emergency

107. More specifically, the Court recognized that the government was substantially burdening Hobby Lobby's exercise of religious freedom under RFRA by not providing an available accommodation to alleviate the for-profit employers' religious concerns. See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2782–83 ("At a minimum, the accommodation does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves [the government's] stated interests equally well").

108. More specifically, the Court recognized that the government was substantially burdening Hobby Lobby's exercise of religious freedom under RFRA by not providing an available accommodation to alleviate the for-profit employers' religious concerns. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014) "At minimum, the accommodation does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves [the government's] stated interests equally well." *Id.* at 2783.

109. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2768. "The plain terms of RFRA make it perfectly clear that Congress did not discriminate. . . against men and women who wish to run their businesses as for profit corporations in the manner required by their religious beliefs." *Id.* at 2759.

110. *Id.* at 2770. The Court found no difference between for-profit corporations and non-profit corporations' goals for furthering their religious freedom as well as advancing individual religious freedom. *Id.* at 2769.

111. Teri R. Day et al., *A Primer On Hobby Lobby: For-Profit Corporate Entities' Challenge To The HHS Mandate, Free Exercise Rights, RFRA's Scope, And The Nondelegation Doctrine*, 42 PEPP. L. REV. 55, 104 (2014).

112. *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 240 (D.C. Cir. 2014).

contraceptives and intrauterine devices that can cause abortions.¹¹³ In accordance with their sincerely held religious beliefs, the petitioners challenged the contraceptive mandate accommodation because their compliance constitutes “facilitating the destruction of human life” through the FDA approved contraceptive methods under mandate.¹¹⁴

In *Hobby Lobby*, the Supreme Court explicitly refused to decide if the existing accommodation was the overall least restrictive means for achieving the government’s compelling interest.¹¹⁵ As a result, the nonprofit religious employers in *Zubik* continued to argue that the existing accommodation is not the least restrictive means, because they are still participating in the delivery of contraceptives to their employees and plan beneficiaries.¹¹⁶ Based on their religious principles, the petitioners classified the objectionable conduct required by the accommodation as a substantial burden for three reasons: (1) the submission of the self-certification form or notice to the HHS is a “trigger” that activates substitute contraceptive coverage; (2) the religious objectors are “conduits” for providing contraceptive coverage to their employees or students; and (3) the petitioners are “facilitating” access to contraceptives through their contracted group health plan.¹¹⁷

In essence, the accommodation is a single sheet of paper. A single sheet of paper that represents the employer’s religious objections and legally relieves the employer of any responsibility connected to providing contraceptives for employees. Under the available accommodation, eligible organizations are relieved of their obligation to include contraceptive coverage on their healthcare plans, while employees still have access to all FDA approved contraceptives with-

113. E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 455 (5th Cir. 2015).

114. Reply Brief for Petitioners at 15, E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015) (Nos. 15-35, 15-105, 15-119 & 15-191), 2016 WL 1019440, at *15 [hereinafter Reply Brief for Petitioners, E. Tex. Baptist Univ.].

115. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2782 (2014) (sparking the debate). The Court firmly stated, “we do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims.” *Id.*

116. Here, the appellees are *not* faced with a “provide” or “pay” dilemma because they have a third option—notification pursuant to the accommodation—to avoid both providing contraceptive coverage to their employees and facing penalties for noncompliance with the contraceptive coverage requirement.

117. Under the “accommodation,” Plaintiffs here (*i.e.*, the “good works (faith in action) employers”) will be forced to facilitate/initiate the provision of contraceptive products, services, and counseling, through a third party, despite the fact that the sincerity of their religious beliefs — “contraception violates the sanctity of human life” and “facilitation of evil is as morally odious as the proliferation of evil”. *Zubik v. Sebelius*, 983 F. Supp. 2d 576, 606 (W.D. Pa. 2013).

out cost sharing.¹¹⁸ The nonprofit religious employers in *Zubik* argued that the notification requirement itself substantially burdens their religious beliefs, that the government's interests were not compelling, and that less burdensome alternatives should be required.

III. ZUBIK V. BURWELL

*Zubik v. Burwell*¹¹⁹ is the fourth Affordable Care Act challenge to face the Supreme Court over the last three years.¹²⁰ As this dispute worked its way through the lower courts, each federal court of appeals confronted by contraceptive mandate claims ruled in favor of the government, finding that the relationship between the religious objectors and the contraceptives was too attenuated to find a violation under the RFRA.¹²¹ Seven out of eight circuits followed the same interpretation of *Hobby Lobby Stores, Inc.*, holding that the accommodation available to nonprofit organizations, and now closely held for-profit corporations, is not a substantial burden on religious objectors' exercise of religion. However, in September 2015, the Eighth Circuit ruled against the government, and granted the religious objectors injunctive relief from complying with the ACA Contraceptive Mandate.¹²² Creating the first Contraceptive Mandate split in the federal appellate courts, the Supreme Court could no longer avoid addressing the elephant in the room. The Supreme Court granted petitions for review from the Third, Fifth, Tenth, and D.C. Circuits on November 6, 2015, and subsequently consolidated seven cases.¹²³ As the greatly anticipated sequel to *Hobby Lobby*, spectators predicted that *Zubik* would

118. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 265 (D.C. Cir. 2014).

119. *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016).

120. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012) (rejecting the protest against the ACA mandate that virtually all individuals have health insurance or pay a penalty in 2012); *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2785 (ruling against the birth control mandate for for-profit businesses with religiously devout owners); *King v. Burwell*, 135 S. Ct. 2480, 2484 (2015) (upholding the system of subsidies to help lower-income Americans afford health insurance on the government exchanges).

121. *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 463 (5th Cir. 2015).

122. *Sharpe Holdings, Inc., v. U.S. Dep't of Health and Human Servs.*, 801 F.3d 927, 945–46 (8th Cir. 2015) (holding that the accommodation placed a substantial burden on the employer's exercise of religion and there are alternative least restrictive means available that the government could consider).

123. See generally *Zubik*, 136 S. Ct. at 1557–60 (consolidating seven cases from the Third, Fifth, Tenth, and D.C. Circuits challenging the ACA contraceptive mandate).

finally provide clarity to the gaping holes left by the Supreme Court in 2014.¹²⁴

In efforts to centralize the petitioners' claims, the Court narrowed the overall question to: "does the ACA's [Contraceptive Mandate] violate the Religious Freedom Restoration Act for religious nonprofit schools, colleges, hospitals, and charities that have objections based on their faith, and does the government arrangement for exemptions cure any problem under the Act?"¹²⁵ There are a total of thirty-seven petitioners that represent a range of catholic churches, dioceses, educational institutions, hospitals, nonprofit organizations, and catholic bishops.¹²⁶ Nonprofit religious institutions have played a critical role in the history of our nation's development, providing health care, education, and social welfare services to millions of Americans. The true significance of this case revolves around the thousands of women who are the employees and students of the thirty-seven religious organizations, who have been deprived of their legal right to obtain preventive services cost-free, due to the years of continuous litigation.¹²⁷

In Section A of this section, I will discuss the impact of Justice Scalia's death on the Supreme Court's term and the Court's novel *Zubik* decision. Section B evaluates the parties' positions on the mandate and highlights fundamental disagreements that will hinder the parties from reaching any form of compromise. Lastly, Section C compares the parties' final agreements submitted to the Court and the Court's final decision, which ultimately left the parties at ground zero.

124. See generally Cristian Farias, *Supreme Court Sharply Conflicted On Whether Religious Freedom Trumps Contraception Access: The Justices Asked Hard Questions in the Sequel to 2014's Hobby Lobby Case*, HUFFINGTON POST (Mar. 23, 2016, 1:02 PM), http://www.huffingtonpost.com/entry/supreme-court-contraceptive-nuns_us_56f287e7e4b0c3ef52173cee.

125. Lyle Denniston, *Briefing Schedule Set for Birth Control Cases*, SCOTUSBLOG (Nov. 17, 2015, 5:01 PM), <http://www.scotusblog.com/2015/11/briefing-schedule-set-for-birth-control-cases/>.

126. See Marty Lederman, *Who is the "Zubik" in Zubik v. Burwell . . . and Why is He Allegedly Complicit in the Use of Contraception? [UPDATED with List and Categorization of All 37 Petitioners]*, BALKINIZATION (Nov. 8, 2015), <https://balkin.blogspot.com/2015/11/who-is-zubik-in-zubik-v-burwell-and-why.html>; *Zubik*, 136 S. Ct. at 1559–60.

127. Brief for the Respondents at 59, *Zubik*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191), 2016 WL 537623, at *59 ("The *Zubik* petitioners assert that even if the government generally has a compelling interest in ensuring that women's health coverage included contraceptive coverage, that interest is not compelling as applied to the employees of religious institutions that oppose contraception. But religious organizations opposed to contraceptives employ and enroll as students hundreds of thousands of people—not all of whom share their faiths or their religious views on contraception.") [hereinafter Brief for the Respondents, *Zubik*].

A. The Impact of Justice Scalia's Death and the Court's Holding

On February 13, 2016, Justice Antonin Scalia unexpectedly passed away in the midst of the Supreme Court's 2016 term. The sudden death of Justice Scalia led to deadlocks and compromises in some of the biggest cases of the term, including *Zubik v. Burwell*.¹²⁸ With a vacant seat, only eight members of the Court heard the parties' oral arguments in mid-March 2016. During the Court's term, President Obama expeditiously nominated Merrick Garland to the Supreme Court, a judicial moderate who currently serves as the Chief Judge of the United States Court of Appeals for the D.C. Circuit.¹²⁹ Republicans expressed unprecedented opposition to the President's nominee, refusing to hold confirmation hearings or vote on any nominee during an election year.¹³⁰ Merrick Garland has now been waiting for a confirmation hearing for 205 days, which makes him the longest pending Supreme Court nominee in history.¹³¹ The Court's fate, as well as the American people's constitutional rights, were caught in the political crossfire furthering the divide in Congress. Being that the next President would not take office for 10 months, the Supreme Court had no choice but take a unique approach to deciding the controversial cases at hand.

On March 29, 2016, after oral arguments, the Supreme Court ordered supplemental briefs from both parties addressing the question, "whether and how contraceptive coverage may be obtained by petitioners' employees through petitioners' insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive cover-

128. Ian Millhiser, *Scalia's Death Just Saved Thousands Of Women's Access To Birth Control*, THINKPROGRESS (May 16, 2016), <https://thinkprogress.org/scalias-death-just-saved-thousands-of-women-s-access-to-birth-control-fe174e4c0b38#.9is6it5fj>.

129. Jordyn Phelps et al., *President Obama Nominates Merrick Garland for Supreme Court*, ABC NEWS (Mar. 16, 2016, 10:05 AM), <http://abcnews.go.com/Politics/president-obama-nominate-merrick-garland-supreme-court/story?id=37633715>.

130. See generally Michael D. Shear et al., *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), <http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html> (noting Senator Mitch McConnell of Kentucky, the majority leader, appeared on the Senate floor shortly after the President's remarks to declare an end to Judge Garland's nomination, no matter his qualifications). Senate Republicans have vowed not to hold confirmation hearings or a vote on any nominee picked by the Democratic president for the lifetime position on the Court. Fred Imbert, *McConnell: Senate Won't Consider Garland Nomination*, CNBC (Mar. 16, 2016, 12:23 PM), <http://www.cnbc.com/2016/03/16/president-obama-to-announce-supreme-court-nominee-at-11-am-et.html>.

131. ABC News, *Where We Stand on Stalled Supreme Court Nominee Merrick Garland*, ABC NEWS (Oct. 7, 2016, 1:12 PM), <http://abcnews.go.com/Politics/stand-stalled-supreme-court-nominee-merrick-garland/story?id=42648073>.

age to their employees.”¹³² This request surreptitiously narrowed each parties’ positions, removing the core arguments that carried them to the Supreme Court in the first place.

On May 16, 2016, the Supreme Court’s per curiam decision vacated the lower courts’ judgments and remanded the cases to their respective United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits.¹³³ In light of the parties’ refined positions, the Court held on remand that, “the parties should be afforded the opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’”¹³⁴ The Court reasoned that the parties’ supplemental briefs confirmed that it is “feasible” for petitioners to provide contraceptive coverage through their insurance companies, without any form of notice from employers.¹³⁵ Furthermore, the lower courts were instructed to only consider “whether existing or modified regulations could provide seamless contraceptive coverage” to petitioners’ employees.¹³⁶ As the Court explicitly expressed no view on the merits of the cases, the concurring opinion clarified that the opinion does not “endorse the petitioners’ position that the existing regulations substantially burden their religious exercise or that the contraceptive coverage must be provided through a separate policy.”¹³⁷

In efforts to avoid another four-four split, the Supreme Court again refused to answer *Zubik’s* central question.¹³⁸ It is evident that the Court considered the consequences of a four-four split in *Zubik*, as the inconsistent decisions of the consolidated cases would still stand. A four-four decision would have created chaos in the United

132. *Zubik v. Burwell*, SCOTUSBLOG (Mar. 29, 2016), <http://www.scotusblog.com/case-files/cases/zubik-v-burwell/>.

133. *Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016).

134. *Id.* at 1560.

135. *Id.*

136. *Id.* at 1561 (Sotomayor, J., concurring) (“I also join the Court’s opinion because it allows the lower courts to consider only whether existing or modified regulations could provide seamless contraceptive coverage ‘to petitioners’ employees, through petitioners’ insurance companies, without any . . . notice from petitioners.’”).

137. *Id.* (“Such separate contraceptive-only policies do not currently exist, and the Government has laid out a number of legal and practical obstacles to their creation.”).

138. The question of substantial burden, compelling interest, and least restrictive means remains to be untouched by the Supreme Court. *Id.* at 1560 (“In particular, the Court does not decide whether petitioners’ religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.”).

States Courts of Appeals and mass confusion over insurance plans, contraceptive coverage, and the government's statutory authority. However, the *Zubik* holding is unique because it does only what it suggests: "affords an opportunity" for the parties and the Court of Appeals to reconsider, in light of the parties' new positions. The Court's instructions to provide each party great flexibility in their readiness to negotiate and compromise.

B. Religious Freedom Restoration Act Arguments

After years of litigation, the Supreme Court stripped the parties' compacted arguments to fit the narrow question: whether and how contraceptive coverage may be obtained by petitioners' employees through their employers' insurance companies, without the accommodation's notification requirement placed on employers? As this solution has proved to be a viable option for the parties, the arguments that were not addressed in the refined briefs still play a significant role in the outcome of negotiations. In this section, I plan to analyze each party's arguments within the bounds of the Court's orders to show that a compromise is an unlikely result. The petitioners and the government fundamentally disagree on core interpretations of the Religious Freedom Restoration Act, the function of the accommodation, and the breadth of the Court's orders.

1. The Substantial Burden

To bring a cognizable claim under the Religious Freedom Restoration Act, a religious objector must have a religious exercise that is substantially burdened by the federal government to receive an exemption.¹³⁹ The petitioners object to the contraceptive mandate and the available accommodation's opt-out mechanism because they believe "the accommodation fails [to] adequately . . . dissociate them from the provision of contraceptive coverage and, by making them complicit with evil, substantially burdens their religious exercise in violation of the RFRA."¹⁴⁰ Specifically, being "in compliance" with the Contraceptive Mandate violates the petitioners' sincere religious beliefs because the government forces employers to "suffer crushing penalties" for not providing the required notification or contraceptive

139. Reply Brief for Petitioners, E. Tex. Baptist Univ., *supra* note 114, at 3.

140. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 241 (D.C. Cir. 2014).

coverage.¹⁴¹ The religious employers interpret RFRA broadly to mean that “any exercise of religion” by the plaintiff is covered under the statute.¹⁴² In the eyes of the religious employers, the accommodation requires petitioners not only to object, “but to affirmatively aid the government’s efforts to get contraceptive coverage to their employees” through the information provided.¹⁴³

The government firmly believes that the petitioners’ alleged substantial burden is not cognizable under the RFRA because the objectionable actions are independent from the nature of the act required by the employers.¹⁴⁴ In seven circuits, courts have held that the religious objectors’ opposition to the Contraceptive Mandate’s accommodation is not a substantial burden because “the act of opting out . . . excuses [objecting employers] from participating in the provision of contraceptive coverage and ensures that they do not provide, pay for, or otherwise facilitate that coverage.”¹⁴⁵ Under the government and lower courts’ interpretation of RFRA, the statutory protection does not authorize religious organizations to dictate the independent actions of third parties.¹⁴⁶ Lower courts have held that, as a legal matter, petitioners’ sincere objections to the government’s arrangements

141. Reply Brief for Petitioners at 3, *Zubik*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453 & 14-1505) 2016 WL 1019439, at *3 (“The government thus concedes that Petitioners face a stark choice: violate their beliefs or suffer crushing penalties. That is the definition of a substantial burden or religious exercise.”) [hereinafter Reply Brief for Petitioners, *Zubik*].

142. *Id.* at *10 (“RFRA protects ‘any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs.’ To be sure. . . religious ‘exercise’ must involve some action by the plaintiff”); *see also* *Sharpe Holdings, Inc., v. U.S. Dep’t of Health and Human Servs.*, 801 F.3d 927, 939 (8th Cir. 2015) (“Instead, we must accept a religious objector’s description of his religious beliefs, regardless of whether we consider those beliefs ‘acceptable, logical, consistent, or comprehensible.’”).

143. Reply Brief for Petitioners, *E. Tex. Baptist Univ.*, *supra* note 114, at *4.

144. Brief for the Respondents, *Zubik*, *supra* note 127, at *41–42, 51 (“One of those limits is the principle that a sincere religious objection to the government’s conduct of its own affairs cannot establish a substantial burden that subjects the government’s actions to strict scrutiny. . . . [t]he Government may of course continue to require [petitioners’] insurers [and TPAs] to provide contraceptive coverage to [petitioners’] employees’ because ‘RFRA does not authorize religious organizations to dictate the independent actions of third-parties.’”).

145. *Id.* at 21. Instead, the Court should hold, as seven Federal Courts of Appeals have done, that “[w]hen the government establishes a scheme that anticipates religious concerns by allowing objectors to opt out but ensuring that others will take up their responsibilities, [the objectors] are not substantially burdened merely because their decision to opt out cannot prevent the responsibility from being met.” *Id.* at 52–53.

146. *Priests for Life v. U.S. Dep’t. of Health and Human Servs.*, 772 F.3d 229, 251 (D.C. Cir. 2014) (“Plaintiffs have no RFRA claim against the government arrangement with others to provide coverage to women left partially uninsured as a result of [employers’] opt[ing] out.”).

with third parties do not establish a substantial burden on petitioners' own exercise of religion.¹⁴⁷

At the forefront of contraceptive mandate cases is the divergence of interpretations of the "substantial burden" on petitioners' religious exercise. The government solely focuses on the legal significance of the accommodation's notification requirement, while the religious nonprofit organizations argue that the religious significance attached to submitting the information is the true substantial burden. The government recognizes only RFRA's legal standards, arguing that "objecting to objecting" is not a burden on their exercise of religion.¹⁴⁸ Conversely, the petitioners look beyond the tangible act of notification, and focus on the "context and consequences" of the act required.¹⁴⁹ On several occasions, the Court has clarified that it refuses to assess if a religious objector's beliefs are "mistaken or insubstantial."¹⁵⁰ However, the RFRA does require the Court to determine whether a challenged law substantially burdens the objector's religious exercise.¹⁵¹

In *Hobby Lobby*, the Court chastised the government for addressing the reasonableness of the for-profit corporations' religious beliefs.¹⁵² The real question, under RFRA, is whether the contracep-

147. Brief for the Respondents, *Zubik*, *supra* note 127, at *22 ("[R]eligious views may not accept this distinction between individual and governmental conduct."); *see also Priests for Life*, 772 F.3d at 251 ("Plaintiffs have no RFRA claim against the government's arrangements with others to provide coverage to women left partially uninsured as a result of [employers'] opt[ing] out."); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 461 (5th Cir. 2015) ("The acts that violate their faith are the acts of the government, insurers, and third-party administrators, but RFRA does not entitle them to block third parties from engaging in conduct with which they disagree.").

148. Reply Brief for Petitioners, *E. Tex. Baptist Univ.*, *supra* note 114, at *4 ("The government insists that petitioners must be 'objecting to objecting' because that is all the government has asked them to do.").

149. *See* Reply Brief for Petitioners, *Zubik*, *supra* note 141, at *11 ("[T]his court has never suggested that the basis for a religious objection must somehow inhere in 'the nature of the acts required of the religious objector, . . . without any consideration of context or consequences.'"); Reply Brief for Petitioners, *E. Tex. Baptist Univ.*, *supra* note 114, at *11 ("signing an autograph and signing a death warrant are not the same").

150. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) ("The Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.").

151. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015) ("But courts do determine whether a challenged law or policy substantially burdens plaintiffs' religious exercise. RFRA's statutory text and religious liberty case law demonstrate that courts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise.").

152. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2778 ("This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is

tive mandate's accommodation imposes "a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*. . . ." ¹⁵³ Two years later, the government relies on the proffer of the same ideology, arguing that the conduct required under the Contraceptive Mandate— notifying HHS or health insurers—has an unreasonable connection to the challenged immoral acts. ¹⁵⁴ Taking the argument one step further in *Zubik*, the petitioners argue that even with the existing accommodation, they are still sufficiently connected to the immoral acts that violate their religious exercise. ¹⁵⁵

As the accommodation might be a burden on the petitioners' religious exercise, it is the Court's duty to decide whether that burden is substantial under the RFRA framework. ¹⁵⁶ Considering the petitioners are challenging the accommodation that was created to protect their religious freedom, it was imperative for the Court to expound on the RFRA's definition of substantial burden to establish objective limits on religious exercise. The Court needed to address the difference between a substantial burden and a *de minimis* burden in the interest of women — the third party experiencing a substantial burden on

wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed.").

153. *Id.* ("This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable).").

154. *See generally Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1209 ("And Hobby Lobby supports this position well, as questioning a religious adherent's understanding of the significance of a compelled action comes dangerously close to questioning 'whether the religious belief asserted in a RFRA case is reasonable'—a 'question that the federal courts have no business addressing.'")

155. Reply Brief for Petitioners, *Zubik*, *supra* note 141, at *3–4.

156. *Little Sisters of the Poor Home for the Aged*, 794 F. 3d at 1176 ("We therefore consider not only whether a law or policy burdens religious exercise, but whether that burden is substantial. If plaintiffs could assert and establish that a burden is "substantial" without any possibility of judicial scrutiny, the word 'substantial' would become wholly devoid of independent meaning. Furthermore, accepting any burden alleged by Plaintiffs as 'substantial' would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise."); *see also* *Priests For Life v. U.S. Dep't. of Health and Human Servs.*, 772 F.3d 229, 248 (D.C. Cir. 2014) ("only action that places a substantial burden on the exercise of religion must meet the compelling state interest . . . We must give effect to each term in the governing statute . . . including the requirement that only 'substantial' burdens on religious exercise trigger strict scrutiny.").

their religious freedom and fundamental right to contraceptives.¹⁵⁷ In *Hobby Lobby*, the Court acknowledged that, “accommodations to religious beliefs or observances . . . must not significantly impinge on the interest of third parties.”¹⁵⁸ Since 2012, the petitioners’ businesses have continued to operate, the ACA has continued to operate, but the women have been denied access to cost free preventative services throughout this extensive litigation.

There should be a *Zubik II*, for the Court to weigh all three parties’ interests and rights under the RFRA balancing test.¹⁵⁹ After four years of fierce legal battle, it is naive to believe that the government and objecting religious employers can reach a common ground without any legal determinations. In the absence of the third party’s participation in the future negotiations, it is likely that women’s value in the workplace and the social meaning behind contraceptives will still be in the shadows of the contraceptive mandate debate.

2. The Legal Effect of the Accommodation

The crux of the arguments in *Zubik v. Burwell* hinge on each party’s understanding of the accommodation’s practical and legal effects. The government has fervently argued that the petitioners have mischaracterized the legal implications of the accommodation.¹⁶⁰ The petitioners argue that the accommodation forces them to “submit documents and maintain contractual relationships that materially facili-

157. *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1173–74 (“Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity. Furthermore, these de minimis administrative tasks do not substantially burden religious exercise for the purposes of RFRA.”).

158. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2790 (2014) (Ginsburg, J., dissenting).

159. See generally *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 703–04 (1985) (invalidating state statute requiring employers to accommodate an employee’s Sabbath observance where that statute failed to take into account the burden such an accommodation would impose on the employer or other employees); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (noting that in construing the Religious Land Use and Institutionalized Persons Act of 2000 “adequate account” must be taken of “the burdens a requested accommodation may impose on nonbeneficiaries.”); *id.* at 722 (“ . . . an accommodation must be measured so that it does not override other significant interests”); *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781 n.37 (noting that the impact a religious accommodation may have on third parties is an important factor, because it “will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest.”); see also *id.* at 2760 (observing that “the effect of the . . . accommodation on the women employed by Hobby Lobby . . . would be precisely zero” because they “would still be entitled to all FDA-approved contraceptives without cost sharing”).

160. Brief for Respondents, *Zubik*, *supra* note 127, at *37 (“And that is of critical importance, because petitioners’ briefs do not accurately describe how the accommodation actually works.”).

tate the government's regulatory goals."¹⁶¹ Based on this theory, the petitioners view the accommodation as a "dual purpose objection that facilities coverage through their own plan infrastructure."¹⁶² This is evident by the additional information the government requires "beyond the fact of object[ing]," because the accommodation will not work unless petitioners provide the "necessary information."¹⁶³ Playing an essential role in the regulatory scheme, petitioners' written notification is the "last piece of the puzzle" the government requires to "authorize" third parties to use employers' plan infrastructures to provide contraceptive coverage.¹⁶⁴ Even if the required information may not "empower the government" to provide the contraceptive coverage, the government still requires action from the employer and penalizes the employer's failure to comply with the accommodation.¹⁶⁵

According to the Affordable Care Act, employers that "opt-out" extinguish any legal obligation they would have to "contract, arrange, pay, or refer" for contraceptive coverage.¹⁶⁶ The government exercises its own independent authority, and statutorily requires insurers and third party administrators to provide contraceptive coverage that religious employers object to.¹⁶⁷ The employer's act of opting out gives *rise* to the occasion for the government to act, but the legal obligation does not derive from employer's "authorization or permission."¹⁶⁸ The government argues that requiring written certification is a common means of implementing a religious accommodation when the accommodation "affects the rights and duties of third parties."¹⁶⁹ Under the accommodation, the employer's health insurance contract is solely for the services that the employer did not object to. The regu-

161. Reply Brief for Petitioners, *Zubik*, *supra* note 141, at *13.

162. *Id.* at *4 (noting that petitioners object to executing documents that the government deems necessary to its efforts to get contraceptive coverage to their employees).

163. *Id.* at *3 (describing that as the government belatedly concedes, its regulatory scheme will scheme not work unless petitioners, at minimum, supply the government not just with written notice of their objections, but also with "the name and contact information for any of the plan's third party administrators and health insurance issuers.").

164. Reply Brief for Petitioners, *E. Tex. Baptist Univ.*, *supra* note 114, at *7.

165. *Id.* at *14.

166. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,878 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54).

167. Brief for Respondents, *Zubik*, *supra* note 127, at *37–38.

168. *Id.*

169. Supplemental Brief for the Respondents at 8, 10, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191) (noting to grant an accommodation, the regulations necessarily "must alter the legal rights and duties" of objecting employers, the employers' insurance companies, and "the affected employees and their beneficiaries.") [hereinafter Supplemental Brief for Respondents, *Zubik*].

lations provide that the insurance company must exclude contraceptive coverage from the employer's plan and "provide separate payments for contraceptive services" for plan participants.¹⁷⁰ The government argues that the accommodation's notification procedure ensures that the religious employer is not held legally responsible if the insurance company fails to provide the required coverage or an employee disputes a particular coverage decision.¹⁷¹

Despite the plain language of the contraceptive mandate's regulations, nonprofit religious employers refuse to believe they are properly disassociated from the immoral acts that provide contraceptives to their female employees and health plan beneficiaries.¹⁷² The petitioners have every right to their sincerely held religious beliefs, but the Court is not required to accept their proffered legal conclusions.¹⁷³ The function of the Court is to provide the final interpretation of laws and statutes enacted by Congress, like RFRA. To examine the relationship between a sincerely held religious belief and the alleged burden imposed by the government, it was imperative that the Court addressed how the accommodation actually works.¹⁷⁴ The Court's interpretation of the regulatory scheme is essential to determine if the government would even have to survive strict scrutiny, ultimately rejecting the RFRA claim.¹⁷⁵

Since the *Hobby Lobby* Court made it "abundantly clear" that they would not rule on the legality of the accommodation, several cir-

170. *Id.* at 4, 15 (But if an eligible employer opts out, the regulations assign the insurer "sole responsibility for providing such coverage.") (citing 45 C.F.R. 147.131(c)(1)(i)).

171. Supplemental Brief for Respondents, *Zubik*, *supra* note 169, at 9.

172. *Priests for Life v. U.S. Dep't. of Health & Human Servs.*, 772 F.3d 229, 240–41 (D.C. Cir. 2014) (noting the plaintiffs objected to the contraceptive coverage requirement and accommodation's opt-out mechanism because they believe, "the accommodation fails [to] adequately . . . disassociate them from the provision of contraceptive coverage and, by making them complicit with evil, substantially burdens their religious exercise in violation of the RFRA.>").

173. *See Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015) ("Thus, we 'accept[] as true the factual allegations that [Plaintiffs'] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that [their] religious exercise is substantially burdened.'").

174. *See Michigan Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 747 (6th Cir. 2015) (noting that the Third Circuit rejected Plaintiffs' argument "that the accommodation requires them to be 'complicit' in sin." The court noted that, regardless of "the reasonableness of the appellees' religious beliefs," the court's legal analysis would instead focus on "how the regulatory measure actually works"—echoing our language).

175. *See Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1191 n.46 ("It does not preclude courts from examining the relationship between a sincerely held religious belief and the alleged burden imposed by the Government. This important distinction prevents the Government from having to survive strict scrutiny whenever a plaintiff misunderstands the burden being placed upon them . . .").

cuit courts chose to reject the religious objectors' accommodation challenges.¹⁷⁶ The Fifth, Sixth, Seventh, and D.C. Circuit Courts found for the government, holding that the religious objectors "misunderstood" their role in the regulatory scheme, because the accommodation *relieves* the petitioners from complying with the contraceptive mandate.¹⁷⁷ In *Zubik*, the Court missed its second opportunity to save the Affordable Care Act from more RFRA claims by reinforcing the majority of the lower courts' decisions.¹⁷⁸ As it is a fine line to pass judgment on the substantial burden in a RFRA case, providing legal conclusions on a statutory mandate falls under the Supreme Court's responsibility.¹⁷⁹ Until *Zubik II* reaches the Court, it is highly unlikely the petitioners will have a different outlook on the accommodation.

3. The Least Restrictive Means and Compelling Interest

The *Zubik* opinion provides the most guidance in regards to the least restrictive means and compelling interest analysis under RFRA. Although the Court's holding did not rule on the merits of the case, the narrow instructions for the lower courts refined the parties' positions to only consider approaches that: (1) require contraceptive coverage to be provided to petitioners' employees, through petitioners'

176. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

177. See *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1180 ("Plaintiffs' causation argument misconstrues the statutory and regulatory framework. Federal law, not the Form or notification to HHS, provides for contraceptive coverage without cost sharing to plan participants and beneficiaries . . . But in each circumstance, Plaintiffs' causation argument fails to establish any burden on Plaintiffs' religious exercise."); see also *Priests For Life*, 772 F.3d at 252 (the Court held that "the insurers' or TPAs' obligation to provide contraceptive coverage originates from the ACA and its attendant regulations, not from the plaintiffs; self-certification or alternative notice."); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015) ("Accordingly, the plaintiffs' completion of form 700 or submission of a notice to HHS does not authorize or trigger payments for contraceptives, because the plaintiffs cannot authorize or trigger what others are already required by law to do."); see also *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1173 ("We conclude the accommodation does not substantially burden Plaintiffs' religious exercise. The accommodation relieves Plaintiffs from complying with the Mandate and guarantees they will not have to provide, pay for, or facilitate contraceptive coverage. Plaintiffs do not "trigger" or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and beneficiaries to coverage.").

178. See generally *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 939–40 (8th Cir. 2015) ("The government's argument has prevailed in several cases, in each of which the courts concluded as a matter of law that because the accommodation process does not trigger contraceptive coverage or make the religious objector complicit in the provision of that coverage, the accommodation process cannot impose a substantial burden on the exercise of religion.").

179. *The Court and Constitutional Interpretation*, SUPREMECOURT.GOV, <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Nov. 9, 2016).

insurance companies; (2) without any form of notice from petitioners; (3) while still ensuring that the affected women receive contraceptive coverage seamlessly together with the rest of their health coverage.¹⁸⁰ In this subsection, I will analyze the “feasible” approaches available to the parties in light of the limitations on the compelling interests and least restrictive means.

Following *Hobby Lobby*, the Court established that the contraceptive mandate and available accommodation furthered the government’s compelling interests in safeguarding public health; specifically, promoting public health for women, new born children, and developing fetuses.¹⁸¹ The Court recognized that the government has a compelling interest in providing contraceptive services seamlessly together with other health services without cost sharing, additional administrative, or logistical burdens, and within a system familiar to women.¹⁸² In *Zubik*, the Court placed boundaries to protect women’s rights to full and equal health coverage by instructing that all future “approaches” should not “affect the ability of the government to ensure that women . . . ‘obtain, without cost, the full range of FDA approved contraceptives.’”¹⁸³ Indirectly, the Court reinforced the government’s compelling interest by requiring the lower courts to only consider alternatives that provide access to the full range of health care services recommended for women’s specific needs, including contraceptive coverage. Women have the power to personally choose whether to use contraceptives, but it is clear that the government has a compelling interest in ensuring all women can make that choice without any interference from their respective employer.

A regulation may constitute the least restrictive means of furthering the government’s compelling interest if no alternative forms of regulation would accomplish those interests without infringing on a claimant’s religious exercise rights.¹⁸⁴ The least restrictive means must have minimal logistical and administrative obstacles.¹⁸⁵ Inadver-

180. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559–60 (2016).

181. Benedict, *supra* note 21 at, 97.

182. See *id.*; Supplemental Brief for Respondents, *Zubik*, *supra* note 169, at 1 (showing that the government has a compelling interest in ensuring that women covered by every type of health plan receives full and equal health coverage, including contraceptive coverage).

183. *Zubik*, 136 S. Ct. at 1560–61.

184. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

185. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014) (“Under the accommodation, the plaintiffs female employees would continue to receive contraceptive coverage without cost sharing for all FDA approved contraceptives, and they would continue to ‘face minimum logistical and administrative obstacles . . .’”).

tently, the Court rejected the majority of the petitioners' proposed alternatives to the accommodation by restricting all "approaches" to provide petitioners' employees contraceptive coverage through the employers' same insurance company.¹⁸⁶ Prior to these instructions, twenty-two out of thirty-seven petitioners suggested that contracting with the same insurance company, that would also provide the objectionable contraceptive coverage to employees, was "inconsistent" with their religious obligations.¹⁸⁷ The *Zubik* Court avoided passing judgment on the extent of the petitioners' religious beliefs, by requiring the petitioners to concede that absent a notification requirement, their religious exercise isn't infringed if their employees receive cost-free contraceptive coverage from the same insurance company.¹⁸⁸

Even after the religious objectors modified their positions, the petitioners' proposed alternatives failed to satisfy the criteria established under the Court's orders. The petitioners argued that contraceptive coverage had to be "truly separate," and objecting nonprofit religious employers should not be considered "complying with the mandate."¹⁸⁹ Specifically, the petitioners requested: separate policies, enrollment processes, insurance cards, payment sources, and communication to employees.¹⁹⁰ Under this regime, the petitioners are only required to make the decision to provide health insurance that excludes contraceptive coverage for employees.¹⁹¹ The contraceptive coverage would not be "an automatic and unavoidable component of the petitioners' plan," but would require a distinct enrollment process from enrolling in the employer's plan.¹⁹² Overall, the petitioners support a contraceptive-only plan, that could be offered by the insurer, on

186. *Zubik*, 136 S. Ct. at 1560.

187. Brief for Petitioners at 36, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191) ("[P]etitioners believe that in order to stay true to their Catholic faith, they may hire an insurance company only if it will not provide their students and employees with coverage that may destroy human life or artificially prevent its creation.") [hereinafter Brief for Petitioners, *Zubik*].

188. See generally *Zubik*, 136 S. Ct. 1557 (remanding the cases to the lower courts for reconsideration).

189. Supplemental Brief for Respondents, *Zubik*, *supra* note 169, at 6. ("To the contrary, they would be excused from the mandate under RFRA, by virtue of their sincerely held religious beliefs.").

190. *Id.* ("There should . . . be two separate health insurance policies.").

191. *Id.* at 6, 13. (noting the objectionable coverage would become available to petitioners' employees because of the insurance company's obligation, and not because the petitioner provided any form surrendering information, authorization, its plan, or its plan infrastructure on pain of massive penalties. The regulatory obligation should only fall on the insurance companies, making them legally responsible to offer separate contraceptive coverage to plan beneficiaries of objecting religious employers).

192. *Id.* at 10 (showing the similarities to Opt in).

the Exchange Market, or a government designated “contraceptive insurer.”¹⁹³

The Court eliminated the possibility of “contraceptive-only policies” in Justice Sotomayor’s concurring opinion, clarifying that contraceptive-only policies do not currently exist, and the instructions to the lower courts is to only consider “existing or modified regulations” to provide the seamless contraceptive coverage.¹⁹⁴ Once again, the Court’s reasoning aligned perfectly with the government’s compelling interest, holding that “standalone contraceptive-only coverage would leave in limbo all of the women now guaranteed seamless preventive care coverage . . . [and] ‘impose precisely the kind of barrier to the delivery of preventive services that Congress sought to eliminate.’”¹⁹⁵ At this juncture, petitioners’ only viable least restrictive means alternative is a “minor modification” to include the nonprofit religious organizations under the existing “religious employer” exemption.¹⁹⁶ Under the exemption, the petitioners would have no obligation to comply with the Mandate, and would not need to take any affirmative steps to avoid the consequences for excluding contraceptive coverage.¹⁹⁷ The petitioners argued that everything the government says about the exemption of religious employers “applies equal measure to religious nonprofits like petitioners.”¹⁹⁸ The petitioners relied on their Title VII of the Civil Rights Act of 1964 exemption, which provides the same statutory entitlement to only employ people who share their faith.¹⁹⁹ For the last four years of litigation, the government ex-

193. *Id.* at 15–16.

194. *See* *Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016) (Sotomayor, J., concurring) (“The opinion does not, by contrast, endorse the petitioners’ position that the existing regulations substantially burden their religious exercise or that contraceptive coverage must be provided through a “separate policy, with a separate enrollment process.”).

195. *Id.*; *Priests for Life v. U.S. Dep’t. of Health & Human Servs.*, 772 F.3d 220, 261 (D.C. Cir. 2014) (“Even small increments in cost sharing have been shown to reduce the use of preventative services The elimination of cost sharing for contraception therefore could greatly increase its use, including the use of the more effective and longer-acting methods, especially among the poor and low income women most at risk for unintended pregnancy.”).

196. Reply Brief for Petitioners, *Zubik*, *supra* note 141, at *22.

197. Supplemental Brief for Respondents, *Zubik*, *supra* note 169, at 2.

198. Brief for Petitioners, *Zubik*, *supra* note 187, at 59; Reply Brief for Petitioners, *Zubik*, *supra* note 141, at *10 (“Houses of worship and their integrated auxiliaries are not deemed in compliance with the contraceptive mandate. They are exempt.”).

199. Reply Brief for Petitioners, *Zubik*, *supra* note 141, at *19 (noting Congress has not confined its religious exemptions in the employer- employee relationship realm to houses of worship and their integrated auxiliaries. Congress has exempted any nonprofit ‘religious corporation, association, educational institution, or society’ from the obligation to comply with title VII.) Title VII of the Civil Rights Act—the federal law barring employment discrimination—allows a certain set of religious organizations to discriminate in hiring on the basis of religion (i.e. to favor members of a certain faith). That exception applies only to hiring and firing - not to

pressed that the petitioners have never “suggested that an arrangement like the one posited in the Court’s order would allay their religious objections.”²⁰⁰ Looking forward to negotiations, it is hard to imagine that the petitioners will find any alternative “approaches” that respect their exercise of religion within the confines of the Court’s orders.

In turn, the government presented the current accommodation as the most befitting solution to the Court’s order.²⁰¹ The government claims that the existing accommodation “respects religious liberty by allowing objecting employers to opt out” of the Contraceptive Mandate, while it also “respects the rights, dignity, and autonomy of female employees, students, and beneficiaries” by providing full and equal health coverage that women are entitled to by law.²⁰² Under the existing accommodation, petitioners with insurance plans have “no legal obligation to provide contraceptive coverage . . . and would not pay for such coverage,” and petitioners’ insurers would notify the petitioners’ employees.²⁰³ The only factor the government is willing, and required to change under the Court’s order, is the written notification requirement.²⁰⁴ Nevertheless, the government rationalized that the only difference is “the way the accommodation is invoked.”²⁰⁵ The government conceded that a request for an insurance policy ex-

discrimination in benefits - and only to religion. It does not permit these institutions to discriminate on the basis of sex or race. See 42 U.S.C. § 2000(e) (2012).

200. Supplemental Brief for Respondents, Zubik, *supra* note 169, at 11–12.

201. *Id.* at 4 (“The present accommodation for employers with insured plans already has each of those features.”).

202. Brief for Respondents, Zubik, *supra* note 127, at *25 (noting the “accommodation made available under the Affordable Care Act respects religious liberty by allowing objecting employers to opt out of the generally applicable requirement to provide contraceptive coverage. It also respects the rights, dignity, and autonomy of female employees, students, and beneficiaries by arranging for third parties to provide those women with the full and equal health coverage to which they are entitled by law. That approach embodies precisely the sort of “sensible balance” that Congress sought in enacting RFRA.”).

203. Supplemental Brief for Respondents, Zubik, *supra* note 169, at 4–5 (“The present accommodation for employers with insured plans already has each of those features . . . separately notify petitioners’ employees that the insurance companies will provide cost free contraceptive coverage, and that such coverage is not paid for by petitioners and is not provided through petitioners’ health plan.”).

204. *Id.* at 2, 4 (“The present accommodation for employers with insured plans already has each of those features.”).

205. *Id.* at 2–5 (“[T]he only difference between the existing accommodation and the arrangement described in the Court’s order is thus the way an eligible employer communicates its decisions to opt out of the obligation to provide contraceptive coverage.”).

cluding contraceptives, based on religious objections, could shift the legal responsibility to the health insurers.²⁰⁶

As a result of *Zubik*, the government will eventually have to amend the current regulations to change how the accommodation is invoked. However, because the Court did not rule on the merits of the RFRA claim, the government is not legally compelled to change the regulatory scheme. The Court's opinion does exactly what it says: it "affords an opportunity" for the parties to reconsider.²⁰⁷ Aside from the notification requirement, the government maintains its position that the accommodation is the least restrictive means of pursuing the government's compelling interests. Based on the administrative and logistical burdens associated with amending how the accommodation is invoked, it is unlikely that the government will implement new regulations before the accommodation is found as a substantial burden under RFRA.²⁰⁸ Furthermore, because the *Zubik* opinion gives the government the green light to start "facilitat[ing] the provision of full contraceptive coverage" to the petitioners' employees, the government has no reason to amend the current accommodation.²⁰⁹ For the reason the Contraceptive Mandate challenges were brought to the Court, only a clear definitive ruling will compel the government to modify the accommodation or force the religious objectors to comply with the contraceptive mandate.²¹⁰

IV. THE AFTERMATH OF *ZUBIK V. BURWELL* AND WOMEN'S CONSTITUTIONAL RIGHTS

As expected, months after *Zubik*, there has been minimal progress with the government and petitioners reaching an "approach"

206. *Id.* at 4 ("The present accommodation for employers with insured plans already has each of those features.).

207. *Zubik v. Burwell*, 136 S. Ct. 1557, 1562 (2016) (Sotomayor, J., concurring) ("Today's opinion does only what it says it does: 'afford[s] an opportunity' for the parties and Courts of Appeals to reconsider the parties' arguments in light of petitioners' new articulation of their religious objection and the Government's clarification about what the existing regulations accomplish, how they might be amended, and what such an amendment would sacrifice.").

208. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782–83 (2014) ("Under the accommodation, the plaintiffs female employees would continue to receive contraceptive coverage without cost sharing for all FDA approved contraceptives, and they would continue to face 'minimum logistical and administrative obstacles').

209. *Zubik*, 136 S. Ct. at 1560–61 ("Nothing in this opinion, or in the opinions or orders of the courts below, 'precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage' going forward.").

210. See Supplemental Brief for Respondents, *Zubik*, *supra* note 169, at 17 ("We respectfully submit that the court should definitely resolve the issue rather than allowing the current uncertainty to continue.").

that accommodates the petitioners' religious exercise. In August 2016, Bishop Zubik released a statement claiming that the "government has been slow to offer anything of substance," except being open to future meetings.²¹¹ Even though the government has not initiated negotiations with the petitioners, the IRS, HHS, and Department of Labor published a notice opening a new 60-day public comment period for anyone to suggest changes in how seamless contraceptive coverage can be provided while respecting the rights of religiously affiliated organizations.²¹² As the current administration is making strides to revise the Contraceptive Mandate to "accommodate" the rights of the religious objectors, women's constitutional rights have been placed on the back burner until another wave of RFRA challenges floods the courts. This Part raises concerns about the implications of *Zubik v. Burwell*, with respect to women's constitutional rights during a controversial presidential election.

The contraceptive debate is inextricably tied to the women's rights movement, because reproduction can define the course of a woman's life. Laws regarding contraceptives, abortions, or maternal conduct during pregnancy "all affect women more than men because women bear the brunt of reproductive burdens."²¹³ Traditional sex role assumptions shape efforts to control women's decisions about childbearing, supporting the presumption that women are mothers first, and workers second. Vesting women with control over whether and when to give birth breaks the customary assumption that women exist to care for others.²¹⁴ The Supreme Court has recognized that women have a constitutional right to autonomy over their reproductive choices, noting that "[the] ability of women to participate equally in economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."²¹⁵ Yet, it seems that when religion or politics raises concerns over a woman's body, women's constitutional rights are devalued at the cost of conflicting values.

The *Zubik* decision is a small victory for women's right to equal access to health care in America. However, the war on women is far

211. Brian Fraga, *Bishop Zubik: Obama Administration Extremely Aggressive on HHS Mandate*, NAT'L CATHOLIC REG. (Aug. 23, 2016, 9:03 AM), <http://www.ncregister.com/daily-news/bishop-zubik-obama-administration-extremely-aggressive-on-hhs-mandate/>.

212. *Id.* ("The deadline for the public comment period is Sept. 20[, 2016].").

213. Sarah Primrose, *The Attack on Planned Parenthood: A Historical Analysis*, 19 UCLA WOMEN'S L.J. 165, 190 (2012).

214. *See id.* at 191 n.193.

215. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 835 (1992).

from over. The national debate on women's reproductive rights will only end when the Court takes a stance on the limitation of the statutory exercise of religion. An objective awareness of the past shows that the Court's intervention is imperative when historically disadvantage groups' constitutional rights are threatened. As the Court had to take a stance on contraceptives in *Griswold v. Connecticut* and on abortion in *Roe v. Wade*, 2016 was the Court's opportunity to set modern precedent protecting women's constitutional rights.²¹⁶ The injury not addressed in *Zubik* is the most disenfranchising: the inherent discrimination against women in the workplace.

It is puzzling that the government failed to present a compelling interest in ending sex discrimination in employment for a case litigating employee benefits. A woman's ability to get pregnant has led to pervasive discrimination in the workplace. Inadequate health coverage for women, not only fails to protect women's health but places women in the workforce at a disadvantage compared to their male coworkers.²¹⁷ Congress added the Women's Health Amendment, to the Affordable Care Act to end private insurance companies punitive practices of gender discrimination.²¹⁸ However, the government's interest in eradicating gender discrimination should not be deterred by incessant religious objections. The Contraceptive Mandate empowers women as self-governing agents who are competent to make decisions for themselves and how they will devote themselves to others. As the Contraceptive Mandate cases focus heavily on the medical benefits of contraceptives, a failure to address discrimination based on pregnancy prevents a transparent discussion on eliminating gender discrimination as a whole.

If the First Amendment confirms "the freedom to think for ourselves,"²¹⁹ how is it permissible for an employer's religion to dictate their female employees' choices? The Court should have taken *Zubik*

216. See generally *Griswold v. Connecticut*, 85 S. Ct. 1678 (1965) (holding that Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy); *Roe v. Wade*, 93 S. Ct. 705 (1973) (holding that the Texas criminal abortion statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother are unconstitutional).

217. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54).

218. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 263 (D.C. Cir. 2014).

219. Laurence M. Vance, *Citizens United and The First Amendment*, FUTURE OF FREEDOM FOUND. (Aug. 1, 2012), <http://www.fff.org/explore-freedom/article/citizens-united-and-the-first-amendment/>.

one step further and removed the biased barriers to the economic advancement and social integration promised by the Contraceptive Mandate.²²⁰ The cultural importance behind a women's reproductive freedom is a taboo subject because religion has condemned women's sexual liberty. A woman's reproductive freedom represents her ability to control every facet of her life without being condemned for preventing the life-altering effects of reproduction. In *Zubik*, the Court could have established the breadth of the Religious Freedom Restoration Act, balancing the interests of religion, tolerance, and discrimination.

At a time where religious freedom has blurred the lines of church and state, women's constitutional rights are in limbo during one of the most controversial presidential elections in history. The 2016 election influences every branch of government: a new president, Congress, and a vacant seat in the Supreme Court. Republicans' unyielding efforts to dismantle the Affordable Care Act have finally reached a window of opportunity. A drastic change in administration threatens the future of President Obama's health care legacy: the Affordable Care Act. The Affordable Care Act is legislation that can be restructured by a new secretary of Health and Human Services or defunded by a polarized Congress, destined to erase the Obama Administration's eight years of progress. Depending on the election, women's access to equal health care, including cost-free preventative services that allow women to participate equally in American life, is subject to America's vote.

The Supreme Court's failure to provide concrete guidance in *Zubik* extends beyond the Contraceptive Mandate. Historically, a wide variety of religious beliefs have been the basis for discriminating against individuals in America.²²¹ Given the federal government's ex-

220. See Robin West, *Hobby Lobby, Birth Control, and Our Ongoing Cultural Wars: Pleasure and Desire in the Crossfires* 26 HEALTH MATRIX: J.L. MED. 67, 67–70 (2016).

221. See, e.g., *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944–45 (Dist. Ct. S.C. 1966), *aff'd in part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968) (detailing that a restaurant owner asserted that racial integration conflicted with his religious beliefs); *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983) (reviewing a university's assertion that interracial dating conflicted with its religious beliefs); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (recounting that a religiously identified school asserted that religious beliefs justified paying men more than women); *Equal Emp't Opportunity Comm'n v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (recounting that a religiously identified school asserted that religious beliefs justified paying men more than women); *Brock v. McGee Bros. Co.*, 867 F.2d 196, 198–99 (4th Cir. 1989). Indeed, adherents of different religious traditions come out in different places on different issues. The trial court in *Loving v. Virginia* ruled against the Lovings, asserting that “Almighty

pansive protections for the LGBT community, Contraceptive Mandate challenges only represent the beginning of the Religious Freedom Restoration Act challenges. Over the last two years, states like Indiana and North Carolina have enacted Religious Freedom legislation that permitted discrimination against the LGBT community as an extension of a person's religious liberty.²²² In America, the exercise of religion is not an absolute right under the Constitution or the Religious Freedom Restoration Act. However, *Zubik* leaves victims of religious discrimination no insight to what counts as a substantial burden on religious exercise or a compelling governmental interest.

V. FUTURE RECOMMENDATIONS AND CONCLUSION

The 2016 Presidential election will play an influential role in the future direction of the Supreme Court. The Court's vacant seat presents endless possibilities, depending on the future Justice's political, religious, and social values. Regardless of how the election ends, *Zubik v. Burwell* should have a second chance in front of nine justices. Women's right to full and equal health care coverage deserves constitutional protection, as a fundamental right to women's equality in society.

God created the races white, black, yellow, malay and red, and he placed them on separate continents The fact that he separated the races shows that he did not intend for the races to mix." *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

222. Jennifer Bendery & Michelangelo Signorile, *Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States*, HUFFINGTON POST (Apr. 15, 2016 4:17 PM), http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination_us_570ff4f2e4b0060ccda2a7a9.

