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Overcoming Toxic Polarization: Lessons in Effective Bridging

john a. powell†

Abstract

Our world is in the throes of multiple global crises, from the Covid-19 pandemic to the onset of climate change. These crises have revealed deep dysfunctions in our societies. Undergirding these dysfunctions is widening political, economic, and social polarization. Polarization has intensified to such a degree that it now constitutes what political scientists refer to as 'negative partisanship,' where policy positions are based on hostility to the opposition's view. Polarization extends beyond our politics and deeply into our culture, where it straddles divides of race, geography, religion, and gender.

This Article explores the true nature of the problem of toxic polarization, the harms that flow therefrom, and what we must do about it. Advocates for unity and experts focused on de-polarization advance bridging practices as an antidote but have inadequately theorized how power and context shapes the possibilities for change. This Article argues that bridging is necessary but that such efforts must be sensitive to structural contexts. Through unique parallels drawn from dynamic film adaptations and pivotal literary works, this Article illustrates the power of context to reduce polarization and the power of narrative to shape interpretative meaning.

I. Introduction

As the startling events and crises of 2020 recede from the foreground, we collectively turn our attention to what may come next. We have experienced an unprecedented set of simultaneous challenges and crises that impact the entire world. These challenges were not the kind one could easily ignore. Nor did we know when or if they would abate or resolve. And while there is reason and space

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for optimism, there is still much room for uncertainty and concern. Will the Covid-19 vaccine work as we have been told? Who will get the vaccine and in what time frame? Can we reach herd immunity and protect our most vulnerable? Do we have reason to believe that we can return to "normal" and if not, what is the new normal? These are just some of the questions that we carry with us.

But even with the most optimistic of outcomes for the pandemic and our politics, there remain serious concerns about how we will move into the future. These concerns include climate change, advancing technology and artificial intelligence, hate speech and social media, and the rules of the global health and economic order, to list just a few. But these issues are not what I will focus on in this Article. Instead, I will discuss the more immediate social order. Can we move together as a people, as a nation, and as a world? Or will the fragmentation and toxic polarization in our societies consume us, our institutions, and possibly our country?

While most Americans appear to be concerned with the polarization that has gripped our country and indeed the world,[1] there is no consensus even among those who are most focused on this problem on how to solve it.[2] Maybe unsurprisingly, there is not even agreement on what the divide is. There are many contenders, and they are not mutually exclusive. These include the racial divide, or more accurately the divide between people who are raced as "white" and many people of color. There is the divide between the educated, often urban-based population centers and the less-educated exurban and rural "hinterlands," often left behind by globalization and deindustrialization. There is the political divide between those who generally support(ed) Trump, many of whom

1. *See generally* Drew DeSilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/ [https://perma.cc/SN2L-XT47] (describing research that revealed increasing polarization in Congress began emerging in the 1970s); *see also* Jean Pisani-Ferry, *Responding to Europe's Political Polarization*, RÉPUBLIQUE FRANÇAISE: FRANCE STRATÉGIE (Jan. 6, 2016), https://www.strategie.gouv.fr/english-articles/responding-europes-political-polarization [https://perma.cc/M7B7-BB7C] (describing polarization in Europe).

2. *See, e.g.*, EZRA KLEIN, WHY WE'RE POLARIZED (2020) (a book long on the problem, but short on solutions). It is also true that when polarization is referenced, what is often meant is in actuality fragmentation and dehumanization. *See* NATHAN P. KALMOE & LILLIANA MASON, RADICAL AMERICAN PARTISANSHIP: MAPPING VIOLENT HISTORY, ITS CAUSES, AND THE CONSEQUENCES FOR DEMOCRACY (2022).

believe the election was stolen, and those who opposed his candidacy.[3]

There are also a growing number of people who believe in the propriety of white, Christian, male dominance, especially one that is Protestant and American, both within our country and on the global stage.[4] There are many different variations of this viewpoint, most of which would have been seen as "fringe" ten or even twenty years ago. Now it is mainstream and deeply entrenched within the Republican party, and especially by a substantial number of Trump supporters.[5]

What used to be merely a political divide has now become a deep racial and national divide. Part of the reason for this is political, racial (and to a lesser extent, gender) polarization. In 2012, for example, 88% of Mitt Romney's support came from white voters, yet Romney only won 48.1% of the overall vote.[6] As a corollary, President Obama won huge majorities of the non-white vote. Obama won 93% of the African-American vote, 71% of the Latino vote, 73% of the Asian vote, and 38% of the white vote.[7] In 2020, preliminary exit polls showed that women supported Biden

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3. See JOHN SIDES, MICHAEL TESLER & LYNN VAVRECK, IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA (2018), for a discussion on racial division. See MARTIN SANDBU, THE ECONOMICS OF BELONGING: A RADICAL PLAN TO WIN BACK THE LEFT BEHIND AND ACHIEVE PROSPERITY FOR ALL (2020), for the divide between the educated urban base and the less-educated rural base. See Jan Zilinsky, Jonathan Nagler & Joshua Tucker, *Which Republicans Are Most Likely to Think the Election Was Stolen? Those Who Dislike Democrats and Don't Mind White Nationalists*, WASH. POST (Jan. 19, 2021), https://www.washingtonpost.com/politics/2021/01/19/which-republicans-think-election-was-stolen-those-who-hate-democrats-dont-mind-white-nationalists/ [https://perma.cc/6ZYF-4FU8], for the divide between those for and against Trump.

4. *See generally* ROBERT P. JONES, THE END OF WHITE CHRISTIAN AMERICA (2017) (providing a background of the life and "death" of white Christian America).

5. PRRI Staff, *Dueling Realities: Amid Multiple Crises, Trump and Biden Supporters See Different Priorities and Futures for the Nation*, PUB. RELIGION RSCH. INST. (Oct. 19, 2020), https://www.prri.org/research/amid-multiple-crises-trump-and-biden-supporters-see-different-realities-and-futures-for-the-nation/#page-section-0 [https://perma.cc/SS44-YFVQ]; *see also* Gene Demby & Shereen Marisol Meraji, *The White Elephants in the Room*, NPR: CODE SWITCH (Nov. 18, 2020), https://www.npr.org/2020/11/17/935910276/the-white-elephants-in-the-room [https://perma.cc/UHY4-PQKS] (discussing white Evangelical voters' overwhelming support for Trump).

6. john a. powell, *The New Southern Strategy*, UC BERKELEY: BERKELEY BLOG (Jan. 30, 2013), https://blogs.berkeley.edu/2013/01/30/the-new-southern-strategy/ [https://perma.cc/K5TK-UC25] [hereinafter powell, *New Southern Strategy*].

7. *President Exit Polls – Election 2012*, N.Y. TIMES, https://www.nytimes.com/elections/2012/results/president/exit-polls.html [https://perma.cc/FZ8A-SJSH].

over Trump by a record 15 points.[8] By many accounts we are the most divided as a country since the Civil War.[9]

There were and are questions being posed about whether our democracy and its institutions can survive this intense and toxic degree of polarization. Research shows that voters are more animated and energized by opposing the other party than supporting their own policy preferences.[10] A political leader of an opposition party supporting a bill leads to sharp opposition, regardless of the content of the bill.[11]

We are divided by geography, race, and gender, but also by facts. One only has to look at the struggle over the virus and mask wearing to get a sense of how deeply we are divided by facts.[12] But it extends also to beliefs about whether the election was fraudulently stolen or the reality of climate change.[13] Some amount of disagreement on basic scientific or empirical facts may indeed be healthy, but we have long since passed that point. It is clear that polarization in our contemporary American democracy has devolved into a clear example of extensive factional divisions. Quite often when discussing the notion of factional divisions, we fail to understand that these very divisions have the ability to ignite conflict and intertwine social and political identities regardless of geographic location.[14] This refusal to acknowledge the severity of factionalism within American democracy makes the system susceptible to manipulation by "enterprising politicians at home and malevolent adversaries abroad."[15]

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8. Zachary B. Wolf, Curt Merrill & Daniel Wolfe, *How Voters Shifted During Four Years of Trump*, CNNPOLITICS, https://www.cnn.com/interactive/2020/11/politics/election-analysis-exit-polls-2016-2020/ [https://perma.cc/G8U8-7648].

9. Julia Manchester, *Analyst Says US is Most Divided Since Civil War*, HILL (Oct. 3, 2018), https://thehill.com/hilltv/what-americas-thinking/409718-analyst-says-the-us-is-the-most-divided-since-the-civl-war [https://perma.cc/7C4H-8AVZ].

10. Stephen P. Nicholson, *Polarizing Cues*, 56 AM. J. POL. SCI. 52, 64 (2012).

11. *Id.* at 56–59.

12. Carroll Doherty, Jocelyn Kiley & Nida Asheer, *Republicans, Democrats Move Even Further Apart in Coronavirus Concerns*, PEW RSCH. CTR. (June 25, 2020), https://www.pewresearch.org/politics/2020/06/25/republicans-democrats-move-even-further-apart-in-coronavirus-concerns/ [https://perma.cc/JQ6K-MBKQ].

13. See Zilinsky et al., *supra* note 3, for beliefs about the stolen election. See Deborah Lynn Guber, *A Cooling Climate for Change? Party Polarization and the Politics of Global Warming*, 57 AM. BEHAV. SCIENTIST 93, 98 (2012), for a dispute of climate change facts.

14. Reuben E. Brigety II, *The Fractured Power: How to Overcome Tribalism*, FOREIGN AFFAIRS (Mar. 2021), https://www.foreignaffairs.com/articles/united-states/2021-02-16/fractured-power [https://perma.cc/XLJ8-XQSQ].

15. *Id.*

Trump, before stepping back, reportedly considered declaring martial law and asking the states to nullify the elections.[16] He also pressured members of Congress and the Vice President to refuse to accept the certified results of the state's electoral college votes.[17] Not only was he able to get many elected officials to support these positions, many of the 74 million Americans that supported him also supported these positions. I could go on, but my point is that the polarization that has engulfed us, and indeed much of the world, did not go away because of the election and the end of the calendar year.[18]

While there will be disagreement as to the major cause for the polarization, I believe there are a number of factors that work together. Some of these reasons include rapid change in the spheres of technology, demographics, climate, and the economy. These underlying conditions will continue to challenge us. I will assert that these changes are not just impacting our condition, but also who we are—our individual and collective identities. We are experiencing not just a physical threat but also an ontological threat.[19]

While I will explore some of these issues below, the primary focus of this Article will be on how we move forward to depolarize our society. I will focus especially on one of the most frequently suggested methods, one with which I have been associated.[20] I am

16. Felicia Sonmez, Josh Dawsey, Dan Lamothe & Matt Zapotosky, *A Frustrated Trump Redoubles Efforts to Overturn Election Result*, WASH. POST (Dec. 20, 2020), https://www.washingtonpost.com/politics/tuberville-electoral-challenge-trump-conversation/2020/12/20/1658573e-42db-11eb-b0e4-0f182923a025_story.html [https://perma.cc/7WPM-7RBP]; *see also* Toluse Olorunnipa, Josh Dawsey, Rosalind S. Helderman & Emma Brown, *Trump Assembles a Ragtag Crew of Conspiracy-Minded Allies in Flailing Bid to Reverse Election Loss*, WASH. POST (Dec. 22, 2020), https://www.washingtonpost.com/politics/trump-assembles-a-ragtag-crew-of-conspiracy-minded-allies-in-flailing-bid-to-reverse-election-loss/2020/12/21/d7674cd2-43b2-11eb-b0e4-0f182923a025_story.html [https://perma.cc/7G7E-25AL].

17. Michael S. Schmidt, *Trump Says Pence Can Overturn His Loss in Congress. That's Not How It Works.*, N.Y. TIMES (Jan. 15, 2021), https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html [https://perma.cc/T5LX-49TU].

18. *See* john a. powell, *Foreword* to TRUMPISM AND ITS DISCONTENTS (Osagie K. Obasogie ed., 2020), https://belonging.berkeley.edu/trumpism-and-its-discontents/foreword [https://perma.cc/P67H-CTYP] [hereinafter powell, *Foreword*].

19. *See* JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 135–62, 197–228 (2012) [hereinafter POWELL, RACING TO JUSTICE].

20. john a. powell, *Bridging or Breaking? The Stories We Tell Will Create the Future We Inhabit*, NONPROFIT Q. (Feb. 15, 2021), https://nonprofitquarterly.org/bridging-or-breaking-the-stories-we-tell-will-create-the-future-we-inhabit/ [https://perma.cc/V344-887B] [hereinafter powell, *Bridging or Breaking?*].

referring to "bridging" as an approach to address polarization and move us to the concept of belonging.[21] Bridging entails engaging with people who hold different views, values, or identities.[22]

The call for bridging, even if that exact term is not used, is rapidly expanding in the United States and beyond.[23] I will assert that bridging in support of belonging can be a valuable tool but that it cannot do its work unless it is grounded in a more nuanced frame than is sometimes acknowledged. Part of this nuance is to situate bridging both in the context of structures and power.

There have been some efforts in this direction in the larger context of social capital, the theory of resources and power that exists through social relationships.[24] But these insights have largely been absent from the current push for bridging adopted by certain activist circles. This absence may be a critical reason for the attractiveness of bridging discourse in various parts of our society today. The failure to engage structures and power will mean almost certain failure to overcome the deep toxic polarization that we are facing. While activists are likely to have an analysis of power, their demands that addressing power dynamics be a precondition for working across divides can have the effect of indefinitely postponing bridging.[25]

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21. Rachel Heydemann & john a. powell, *On Bridging: Evidence and Guidance from Real-World Cases*, OTHERING & BELONGING INST. (Aug. 19, 2020), https://belonging.berkeley.edu/on-bridging [https://perma.cc/3AZ9-BR8W].

22. *john a. powell on How Bridging Creates Conditions to Solve Problems*, OTHERING & BELONGING INST. (Nov. 2, 2017), https://belonging.berkeley.edu/john-powell-how-bridging-creates-conditions-solve-problems [https://perma.cc/7AUY-QTNM].

23. *E.g.*, *Weave: The Social Fabric Project*, ASPEN INST., https://www.aspeninstitute.org/programs/weave-the-social-fabric-initiative/ [https://perma.cc/2MD4-E6JM].

24. *See, e.g.*, Tristan Claridge, *Explanation of Types of Social Capital*, SOC. CAP. RSCH. (Feb. 11, 2013), https://www.socialcapitalresearch.com/explanation-types-social-capital/ [https://perma.cc/27QA-2QUA] (contrasting "linking" and "bridging" social capital based upon gradients of power).

25. There are some theorists who have raised this issue of power, but they are not generally part of the folks embracing bridging nor deeply engaged in activism. They include folks such as Derik Gelderblom, Jennifer McCoy, Benjamin Press, Murat Somer, and Ozlem Tuncel. *See* Derik Gelderblom, *The Limits to Bridging Social Capital: Power, Social Context and the Theory of Robert Putnam*, 66 SOCIO. REV. 1309 (2018); Jennifer McCoy, Benjamin Press, Murat Somer & Ozlem Tuncel, Reducing Pernicious Polarization: A Comparative Historical Analysis of Depolarization (May 5, 20220) (Carnegie Endowment for Int'l Peace, Working Paper). A frequently asked question is if we can bridge and break at the same time. And while undoubtedly the answer is yes, at some point, the breaking undermines bridging. Putnam addresses this in part through the lens of bonding. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 402–14 (2001) [hereinafter PUTNAM, BOWLING ALONE]. He notes that when one is

Many activists and community organizers are predisposed toward skepticism of bridging and perhaps even the larger theory of social capital.[26] Part of the reluctance is grounded in the foundational position of power building that is core for many activists. From this perspective, the challenge to bridging becomes not a call for correction but a rejection of the underlying objective. It is only a slight exaggeration to suggest that at one pole there are those calling for bridging without addressing power to be the principal way to solve polarization. At the other pole is the rejection of bridging either outright or to load up the preconditions for bridging so that it effectively makes bridging a complete non-starter.[27] It is these positions that this Article attempts to resolve by suggesting other possibilities. I believe we must consider the issue of power to make bridging meaningful. But I also believe that putting on a number of preconditions before we begin the process of bridging would also be a mistake. I will also discuss the different goals we might have for bridging.

In the next part of the Article, I discuss the problem of polarization in more detail, and then relate polarization to various identity expressions. Following that, I will briefly lay out some parameters of bridging, bonding, and breaking and how they relate to addressing polarization on one hand and promoting belonging on the other. I will attempt to show that the failure to engage the issue of power and structural contexts will greatly limit the efficacy of these efforts. I will then look at the issue of power as raised by some organizers and suggest a reexamination of power and how to begin to bridge even as we struggle with the issues of power and structures. I will suggest this is emergent which will have to be learned and corrected by doing. But while it is critical to address power, I will also assert that to delay the process of bridging in the hope of first establishing equal power is not productive. Instead,

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tied deeply to one's own group, it is more likely that one will exclude other groups. *Id.*

26. Humnath Bhandari & Kumi Yasunobu, *What is Social Capital? A Comprehensive Review of the Concept*, 37 ASIAN J. SOC. SCI. 480, 484–85 (2009).

27. For a discussion of the call to bridge in the complete absence of power analysis, there has been a growing chorus of scholars and public intellectuals demanding that people's identities be set aside to come together over "universal issues," embodied most notably in Mark Lilla's New York Times article on identity politics, Mark Lilla, *The End of Identity Liberalism*, N.Y. TIMES (Nov. 18, 2016), https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html [https://perma.cc/W2WS-63KF]. See Olúfémi O. Táíwò, *Being-in-the-Room-Privilege: Elite Capture and Epistemic Deference*, PHILOSOPHER (OCT. 30, 2020), https://www.thephilosopher1923.org/essay-taiwo [https://perma.cc/82S4-Z5JA], for a critique of the perceived need to load up on preconditions before bridging can occur that takes place in some organizing circles.

what I suggest is that even while one attends to the issue of power, one must also be willing to explore bridging.

II. Polarization and Politics

After the murder of George Floyd, there was a series of global social justice demonstrations, unprecedented in scale and diversity of participants.[28] Millions of Americans across the United States and supporters across the globe took to the streets in support of Black Lives and demanded racial justice. From small towns to boardrooms of some of the wealthiest corporations in the world, there was both a call for racial justice and a deep stirring not to shy away from a profound focus on anti-Black racism. People of all races and virtually every sector participated.

This effort was more than just demonstrating; there was also an outpouring of money and commitment to an unprecedented extent in the United States.[29] This is all the more impressive as there was no single leadership or organization at the head of these protests.[30] The best-selling books for weeks focused on better understanding and addressing anti-Black racism. The terms "anti-Black racism," "systemic racism," and "white supremacy" were used by heads of state, police chiefs, and others more often associated with maintaining the status quo than advocating for racial justice.[31] President Biden, in his inaugural address, made a commitment to address white supremacy.[32] This was the first time that a president had publicly used the term.

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28. *See* Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html [https://perma.cc/4279-7SWR] (detailing the protests that occurred throughout the United States following George Floyd's murder).

29. *See, e.g.*, Shane Goldmacher, *Racial Justice Groups Flooded with Millions in Donations in Wake of Floyd Death*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/14/us/politics/black-lives-matter-racism-donations.html [https://perma.cc/WQ3S-URQU] (discussing the record volume of donations sent to racial justice causes and bail funds in the wake of the murder of George Floyd).

30. *See, e.g.*, Ruschell Boone, *As George Floyd Protests in NYC Became More Organized, the Leaders Got Younger*, SPECTRUM NEWS (July 1, 2020), https://www.ny1.com/nyc/all-boroughs/news/2020/07/01/george-floyd-protests-nyc-leaders-who-are-they [https://perma.cc/MK2W-C53S] (indicating that protestors in New York and nationally had no central figure leading the movement).

31. *See, e.g.*, Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020), https://time.com/5851855/systemic-racism-america/ [https://perma.cc/ND3A-C7CX] (noting that "mainstream conservatives like former President George W. Bush join[ed] moderate democrats like Joe Biden" in embracing the term "systemic racism" and calling for "a national reckoning").

32. President Joseph R. Biden, Inaugural Address at the United States Capitol (Jan. 20, 2021).

Yet, only a few weeks earlier, on January 6, 2021, a large group of Trump supporters attacked the capital with the goal of stopping or disrupting the transfer of the presidential power.[33] General Mattis, who was the Secretary of Defense under Trump, warned of the growing threat of white nationalism and white supremacy, in part reflected in the insurrection.[34] He also noted that Trump clearly shoulders some of the responsibility.[35] Other former aides and staffers for Trump have expressed similar concern, as had the Federal Bureau of Investigation.[36]

I cite these examples in particular to demonstrate that this concern is not coming just from Democrats or the political left, but from neutral observers. To have a sitting president push for an insurrection in the transfer of power is unheard of in the American context. It is this action that led to Congress impeaching Trump for an historic and unprecedented second time.[37] Despite this, Trump continues to gather wide support. Not only did more than 70 million Americans vote for him—the second largest number in history—even after his first impeachment, 68% of Republicans signaled support for his running for office again, and more than 55% indicated they would support his potential candidacy.[38] In addition, 76% believe the election was stolen or had substantial fraud, with a

33. Dan Barry, Mike McIntire & Matthew Rosenberg, *'Our President Wants Us Here': The Mob That Stormed the Capitol*, N.Y. TIMES (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/us/capitol-rioters.html [https://perma.cc/S9SC-WCCD].

34. *See* Jeffrey Goldberg, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, ATLANTIC (June 3, 2020), https://www.theatlantic.com/politics/archive/2020/06/james-mattis-denounces-trump-protests-militarization/612640/ [https://perma.cc/TDE5-V7MB].

35. Amanda Macias, *Mattis Blames Trump for Violence at Capitol, Says His Actions 'Poison Our Respect for Fellow Citizens'*, CNBC (Jan. 6, 2021), https://www.cnbc.com/2021/01/06/mattis-blames-trump-for-violence-at-capitol-says-his-actions-poison-our-respect-for-fellow-citizens.html [https://perma.cc/UXA8-FGLR].

36. *See, e.g.*, Aaron C. Davis, *Red Flags: As Trump Propelled His Supporters to Washington, Law Enforcement Agencies Failed to Heed Mounting Warnings about Violence on Jan. 6*, WASH. POST (Oct. 31, 2021), https://www.washingtonpost.com/politics/interactive/2021/warnings-jan-6-insurrection/ [https://perma.cc/23CK-GG93] (describing the red flags officials at the Department of Homeland Security, the FBI, and other agencies witnessed indicating that supporters of Trump were planning violence leading up to January 6th).

37. H.R. 24, 177th Cong. (2021).

38. Elaina Plott & Shane Goldmacher, *Trump Wins CPAC Straw Poll, but Only 68 Percent Want Him to Run Again*, N.Y. TIMES (Feb. 28, 2021), https://www.nytimes.com/2021/02/28/us/politics/cpac-straw-poll-2024-presidential-race.html [https://perma.cc/AY76-A4WD].

sizable number supporting extralegal action to right what they perceive as a wrong.[39]

I cite these facts not to legitimize these beliefs but to set the context to understand the nature of the polarization that the country faces. By many accounts, the country has not been this divided since the Civil War.[40] And while there is not a clear consensus on the nature and cause of the divide, there are some aspects that most people agree on. One of the axes of the divide is politics. At this juncture there is a sharp divide between those who identify as Democrats and Republicans.[41]

It is sometimes assumed that polarization is a byproduct of ignorance, as if it were just people misunderstanding or not knowing each other.[42] One need only to look at the Senate to recognize the fallacy of this assumption. Many of the people who are there have known each other for decades.[43] And some of the most significant enablers of a stolen election and the victimhood of white America are people who, at times, have been both very clear and critical of Trump's destructive and divisive ideology.[44] Yet, many of these folks have deeply aligned themselves with Trump and Trumpism.[45] Party affiliation, as this evidence demonstrates, is one of the societal divides that indicates polarization, but it goes much deeper than that.

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39. Chris Cillizza, *Three-Quarters of Republicans Believe a Lie about the 2020 Election*, CNNPOLITICS (Feb. 4, 2021), https://www.cnn.com/2021/02/04/politics/2020-election-donald-trump-voter-fraud/index.html [https://perma.cc/G9NH-5XGP].

40. Manchester, *supra* note 9.

41. *See* DeSilver, *supra* note 1 (describing the polarization of Congress that has widened since the 1970s).

42. *See, e.g.*, Isabella Nassar, *We Are Way Too Polarized*, HEIGHTS (Oct. 24, 2021), https://www.bcheights.com/2021/10/24/we-are-way-too-polarized/ [https://perma.cc/JS2Q-AWL9] (arguing that open-mindedness and addressing ignorance is a solution for polarization).

43. *Cf.* Bridget Mulcahy & Mackenzie Weinger, *25 Longest-Serving Senators*, POLITICO (Aug. 10, 2014), https://www.politico.com/gallery/25-longest-serving-senators?slide=0 [https://perma.cc/F2ML-99UA] (listing senators who served in Congress for decades, some of whom overlapped); *List of Current Members of the U.S. Congress*, BALLOTPEDIA, https://ballotpedia.org/List_of_current_members_of_the_U.S._Congress [https://perma.cc/YCX9-NFNC] (providing the length of time current Senators have served).

44. *See, e.g.*, Madeline Conway, *9 Times Ted Cruz Insulted Donald Trump Before Endorsing Him*, POLITICO (Sept. 23, 2016), https://www.politico.com/story/2016/09/ted-cruz-donald-trump-insults-endorse-228594 [https://perma.cc/ZDU6-AC9H] (detailing times Ted Cruz, a later supporter of the stolen election theory, was highly critical of Trump).

45. *See, e.g.*, David Drucker, *Book Excerpt: How Ted Cruz Was Converted to Trumpism*, FOX NEWS (Nov. 2, 2021), https://www.foxnews.com/politics/ted-cruz-converted-trumpism [https://perma.cc/HE2Y-2N63] (describing Ted Cruz's alignment with Trumpism).

III. Polarization and Identity

The previous section clearly shows that political polarization is intensifying, as the two major political parties embody a growing divide. But they straddle many other divides, including those of race, religion, national origin, urban/rural, sexual orientation, and much more. One's party affiliation stands for more than just one's position on issues and policies. The Republican Party, especially since Nixon, has been tinged by a strategy that appealed to white voters, the "southern" strategy and "dog whistle politics," but more recently flirted with white supremacy and white nationalism.[46] The Republican Party is no longer the party of Lincoln but the party of Trump.

It is not just Trump's reaction to the white nationalist march in Charlottesville[47] or his call for the Proud Boys to "stand back and stand by,"[48] but that Trump has espoused consistent hostility to people of color, immigrants, and Muslims. In his first official speech declaring his candidacy for President, he attacked both immigrants and Muslims.[49] He has a track record of denigrating Black public figures as having a "low IQ," such as CNN anchor Don Lemon or Congresswoman Maxine Waters, a virulent racist trope.[50]

These tendencies are found not just in his rhetoric, but in his policies and views of his allies. Many of his high-level advisors, from Steve Bannon to Steve Miller, have long histories of being affiliated with reactionary and fringe political movements, even neo-Nazis, or have been credibly accused.[51] Many extremist groups and their

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46. *See generally* IAN HANEY LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2015) (providing a background on racial politics and the middle class).

47. *See* Glenn Kessler, *The 'Very Fine People' at Charlottesville: Who Were They?*, WASH. POST (May 8, 2020), https://www.washingtonpost.com/politics/2020/05/08/very-fine-people-charlottesville-who-were-they-2/ [https://perma.cc/28SY-CWQ7] (discussing the violence in Charlottesville and Trump's response).

48. Courtney Subramanian & Jordan Culver, *Donald Trump Sidesteps Call to Condemn White Supremacists—and the Proud Boys Were 'Extremely Excited' About It*, USA TODAY (Sept. 30, 2020), https://www.usatoday.com/story/news/politics/elections/2020/09/29/trump-debate-white-supremacists-stand-back-stand-by/3583339001/ [https://perma.cc/B7CM-MZH4].

49. TIME Staff, *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), https://time.com/3923128/donald-trump-announcement-speech/ [https://perma.cc/KA95-Z4W6].

50. Davis Smith, *Trump's Tactic to Attack Black People and Women: Insult Their Intelligence*, GUARDIAN (Aug. 10, 2018), https://www.theguardian.com/us-news/2018/aug/10/trump-attacks-twitter-black-people-women [https://perma.cc/684F-RPCW].

51. Tina Nguyen, *Steve Bannon Has a Nazi Problem*, VANITY FAIR (Sept. 12, 2017), https://www.vanityfair.com/news/2017/09/steve-bannon-has-a-nazi-problem

leaders viewed Trump as their savior, leader, or guiding political force. Neo-Nazi Richard Spencer, for example, celebrated Trump's election and his post-Charlottesville equivocations by shouting "hail Trump."[52] An entirely new movement, known as Q'Anon, similarly views Trump as a savior and promulgated extreme theories about Jews and Democrats trying to take over America.[53] In the attack on the Capitol, white supremacist, Nazi, and confederate symbols and icons were proudly displayed.[54] These groups have supported Trump, and Trump has emboldened them. One of the great divides in the country today is support or non-support for Trumpism.[55] The Republican party can then be thought of as a party organized around white nationalism and white supremacy.

In terms of policies promulgated by the Trump administration, they, too, were largely consistent with an ideology of white supremacy and white nationalism. The centerpiece initiative of the Trump candidacy was the "wall" with Mexico, which was never built.[56] Instead, the Trump administration adopted a series of brutal and dehumanizing anti-immigration policies, including those that separated young migrants from their parents.[57] In addition to this, the Trump administration initiated the largest drawdown of

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[https://perma.cc/PDF5-4YSY]; Michael Edison Hayden, *Stephen Miller's Affinity for White Nationalism Revealed in Leaked Emails*, SPLC (Nov. 12, 2019), https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails [https://perma.cc/NXF7-MTL3].

52. Aleem Maqbool, *Hail Trump: White Nationalists Mark Trump Win with Nazi Salute*, BBC NEWS (Nov. 22, 2016), https://www.bbc.com/news/av/world-us-canada-38057104/hail-trump-white-nationalists-mark-trump-win-with-nazi-salute [https://perma.cc/Z2K6-C34E].

53. Ewan Palmer, *QAnon Believers Have Lost Their Savior in Trump, But Conspiracy Theory is Building Power in GOP*, NEWSWEEK (Nov. 12, 2020), https://www.newsweek.com/qanon-conspiracy-trump-future-election-biden-1544462 [https://perma.cc/9NGS-AXMR].

54. Matthew Rosenberg & Ainara Tiefenthäler, *Decoding the Far-Right Symbols at the Capitol Riot*, N.Y. TIMES (Jan. 13, 2021), https://www.nytimes.com/2021/01/13/video/extremist-signs-symbols-capitol-riot.html [https://perma.cc/J76P-V7RU].

55. *See* Michael Dimock & John Gramlich, *How America Changed During Trump's Presidency*, PEW RSCH. CTR. (Jan. 29, 2021), https://www.pewresearch.org/2021/01/29/how-america-changed-during-donald-trumps-presidency/ [https://perma.cc/JY5R-UYXH] (describing the deeply partisan and personal divides caused by Trump's presidency).

56. *See, e.g.*, Lucy Rodgers & Dominic Bailey, *Trump Wall: How Much Has He Actually Built?*, BBC NEWS (Oct. 31, 2020), https://www.bbc.com/news/world-us-canada-46824649 [https://perma.cc/B4SY-ASYM]; Simon Romero & Zolan Kanno-Youngs, *Trump's Incomplete Border Wall Is in Pieces that Could Linger for Decades*, N.Y. TIMES (Mar. 17, 2021), https://www.nytimes.com/2021/03/16/us/border-wall-trump-biden.html [https://perma.cc/S7H3-D5LT].

57. *See, e.g.*, Michael D. Shear, *Trump and Aides Drove Family Separation at Border, Documents Say*, N.Y. TIMES (Jan. 14, 2021), https://www.nytimes.com/2021/01/14/us/politics/trump-family-separation.html [https://perma.cc/QF7R-Y5GZ].

the refugee resettlement program, bringing it to its lowest level in generations.[58]

Perhaps the most offensive executive order issued by the Trump administration was the so-called "Muslim Travel Ban," a series of executive orders that restricted travel to the United States from heavily Muslim countries.[59] Although courts struck down the first two iterations, the Supreme Court ultimately upheld the third version, a decision that may well prove notorious.[60]

In addition to anti-Muslim and anti-immigrant policy, the Trump administration jettisoned both the Obama-era Fair Housing regulations relating to the federal duty to "affirmatively further fair housing" and govern "disparate impact" claims.[61] The Trump administration also implemented a broad rule restricting the scope of federal anti-racism curriculum, in addition to characterizing Black Lives Matter protestors as terrorists or criminals.[62]

Another cleavage that maps to the political divide is between rural and urban populations. Rural, in this context, is used as a stand in for low education whites. Urban is used as a stand in for mixed race and more educated populations. Despite these heuristics, it is clear that rural voters turned out in record numbers to support Trump, while urban areas were heavily Democratic leaning.[63]

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58. Bobby Allyn, *Trump Administration Drastically Cuts Number of Refugees Allowed to Enter the U.S.*, NPR (Sept. 26, 2019), https://www.npr.org/2019/09/26/764839236/trump-administration-drastically-cuts-number-of-refugees-allowed-to-enter-the-u [https://perma.cc/J579-X7PN].

59. Stephen Menendian, *Refugee and Immigration Executive Order is Unconstitutional and Antithetical to a Fair and Inclusive Society*, OTHERING & BELONGING INST. (Feb. 3, 2017), https://belonging.berkeley.edu/refugee-and-immigration-executive-order-unconstitutional-and-antithetical-fair-and-inclusive-society [https://perma.cc/2PWK-T4MG].

60. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018). It is notable that in the same decision, the Court overruled Korematsu v. United States, 323 U.S. 214 (1944), as if overturning that notorious precedent could shield it from history's sharp glare.

61. Stephen Menendian, *Disparate Impact Liability Is the Best Remedy for Structural Racism*, U.C. BERKELEY: BERKELEY BLOG (Oct. 22, 2019), https://blogs.berkeley.edu/2019/10/22/disparate-impact-liability-is-the-best-remedy-for-structural-racism/ [https://perma.cc/W23V-993Z]; Stephen Menendian, *Fair Housing and Affordable Housing Are* Not *the Same Thing*, U.C. BERKELEY: BERKELEY BLOG (Jan. 8, 2020), https://blogs.berkeley.edu/2020/01/08/fair-housing-and-affordable-housing-are-not-the-same-thing-the-trump-administrations-latest-attack-on-integration/ [https://perma.cc/W23V-993Z].

62. Stephen Menendian, *Why Trump's Diversity Training Ban is Unconstitutional*, U.C. BERKELEY: BERKELEY BLOG (Oct. 16, 2020), https://blogs.berkeley.edu/2020/10/16/why-trumps-diversity-training-ban-is-unconstitutional/ [https://perma.cc/9S4Y-EVL7].

63. Hannah Love & Tracy Hadden Loh, *The 'Rural Urban Divide' Furthers Myths about Race and Poverty – Concealing Effective Policy Solutions*, BROOKINGS INST.

There have been a number of books and articles trying to better understand the growing polarization grounded in white and ethnic supremacy and nationalism and what can be done about it.[64] One of the big divides in liberal circles is to insist that polarization is either class-based, culture-based, or race-based.[65] Many of these efforts assume that there is one primary cause and that other expressions of these phenomena are a result of that cause. So, for example, in the assertion that polarization is economically based, the argument goes that the economic anxiety caused by globalization and inequality has been exploited by the elites, in this case Trump, to stir up racism. Therefore, the conclusion that follows is that if we can fix economic inequality, the racial tension will largely go away. This argument suggests that whites continue to organize and vote against their self-interest, and a strong economic and inclusive narrative is what we must adopt. The more stringent version of this story is to not talk about race because it only further alienates this population and that most of the racial concerns are really economic concerns.[66]

There are others who insist that the primary driver for our problem is grounded in racism.[67] At the edges it suggests that all whites engage in racial resentment, which implies that resentment is always latent and can be activated under the proper circumstances. There are two factors that make this activation more robust. One factor is the changing demographics resulting in a decrease in the white majority.[68] Relatedly, the other factor is that any improvement in conditions, especially for Black people, is seen as a decline in white people's well-being.[69] The decline need not be

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(2020), https://www.brookings.edu/blog/the-avenue/2020/12/08/the-rural-urban-divide-furthers-myths-about-race-and-poverty-concealing-effective-policy-solutions/ [https://perma.cc/P6M5-LS48].

64. *See* Carlos Lozada, *The United Hates of America*, WASH. POST (Oct. 30, 2020), https://www.washingtonpost.com/outlook/2020/10/30/polarization-books-trump-election/?arc404=true [https://perma.cc/442E-GJYN].

65. *See, e.g.*, Michael Powell, *A Black Marxist Scholar Wanted to Talk About Race. It Ignited a Fury.*, N.Y. TIMES (Aug. 18, 2020), https://www.nytimes.com/2020/08/14/us/adolph-reed-controversy.html [https://perma.cc/D5AM-WV3S] [hereinafter Powell, *Black Marxist Scholar*].

66. *Id.*

67. *See id.* (mentioning that some see racism as the root of the issue).

68. *See, e.g.*, Brittany Farr, *A Demographic Moral Panic: Fears of a Majority-Minority Future and the Depreciating Value of Whiteness*, U. CHI. L. REV. ONLINE (Aug. 16, 2021), https://lawreviewblog.uchicago.edu/2021/08/16/rrs-farr-demographic/ [https://perma.cc/Z7ZP-ZWKQ].

69. *See, e.g.*, Heather McGhee & Ezra Klein, *What 'Drained-Pool' Politics Costs America*, N.Y. TIMES: EZRA KLEIN SHOW (Feb. 16, 2021), https://www.nytimes.com/2021/02/16/opinion/ezra-klein-podcast-heather-mcghee.html

material or even real, suggesting that white people's status over Black people and others is paramount. This position partially explains how some white people could vote for Obama then Trump; as long as Black people are not seen as a threat, it is acceptable, even morally praiseworthy, to vote for the first Black President. What changed—what Trump and others were able to do—was to activate both a sense of threat and resentment, partly from the ascendance of Obama himself to the presidency.[70]

There are many other variants of these arguments, including a cultural theory that ultimately backs into identity politics, but indirectly. The notion of "identity politics" is often brought up to challenge the legitimacy of a group's position: to attack marginalized groups' calls or demands as if there are larger and possibly more important issues that should receive focus. Any instance of people of color raising issues or bringing up matters that are important to them but are not "universal" or are possibly even divisive is often labeled "identity politics."[71]

Implicit in these critiques is an assumption that if we could focus on the "real" issues like the economy or the environment, we could unify. This argument came up often in the 1920s and 1930s in the context of the NAACP pushing for an anti-lynching law.[72] A more recent version of this assertion comes up in relation to the #MeToo movement by women or the challenge to policing or racialized mass incarceration from Black Lives Matter (BLM) protestors.[73] The burden is placed on these groups to avoid identity

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[https://perma.cc/X6N9-G6LJ].

70. *See generally* FRANCIS FUKUYAMA, IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT (2018) (examining how an increasing demand for recognition of one's identity has led to the emergence of populist nationalism and the implications of "identities" being defined in progressively narrower forms).

71. Mycah Denzel Smith, *What Liberals Get Wrong about Identity Politics*, NEW REPUBLIC (2017), https://newrepublic.com/article/144739/liberals-get-wrong-identity-politics [https://perma.cc/N78B-HEQQ].

72. *NAACP's Anti-Lynching Campaigns: The Quest for Social Justice in the Interwar Years*, NAT'L ENDOWMENT FOR HUMANS., https://edsitement.neh.gov/curricula/naacps-anti-lynching-campaigns-quest-social-justice-interwar-years [https://perma.cc/U25X-NAH5].

73. *See, e.g.*, David French, *There Is a Profound Difference Between Justice and Identity Politics*, NAT'L REV. (Jan. 8, 2018), https://www.nationalreview.com/2018/01/metoo-movement-meaning-beyond-identity-politics/ [https://perma.cc/W2N8-RJ3S] (claiming that "[t]he #MeToo movement must choose between an allegiance to identity politics and the pursuit of justice"); Eljeer Hawkins, *Black Lives Matter and Marxism*, SOCIALIST ALT. (Feb. 2015), https://www.socialistalternative.org/marxism-fight-black-freedom/black-lives-matter-marxism/ [https://perma.cc/N25N-8ZS6] (discussing how the Black Lives Matter movement can benefit from incorporating a class-based approach).

politics, as these politics are both seen as polarizing and even petty.[74]

This is a kind of weaponized identity politics in service of the dominant group. As Francis Fukuyama and others have asserted, all politics are identity politics.[75] The journalist Ezra Klein asserts that "[u]nfortunately the term 'identity politics' has been weaponized. It is most often used by speakers to describe politics as practiced by members of historically marginalized groups. If [you are] black and [you are] worried about police brutality, [that is] identity politics."[76] This position is clearly problematic. The underlying concern of those who broadly attack some groups for engaging in identity politics is breaking and polarization, a concern to which I will return later.[77]

Despite four years of the Trump presidency, many of these debates remain unresolved. It is clear, however, that leadership and narrative play a significant role in the processes that engender polarization across identity boundaries, which is why politics is often intertwined. Some argue that white resentment has always been there, and that Trump just gave it permission to come out. There may be some truth in this position, but there are reasons to believe it is radically overstated.

IV. White Supremacy and Racial Heterogeneity

The white resentment that builds on white nationalism and white supremacy is at least as old as the country itself. It has expressed itself in different ways at different times.[78] Some will read this to mean that this expression of racism is inevitable and that it is just what America is. That reading would be a serious mistake. America has always been many things, and it is not preordained which one will come to dominate. At times, our leaders have tamped down or shifted views. At other times, they have inflamed passions and stoked fear.[79] Much depends on which

74. *See* Alicia Garza, *Identity Politics: Friend or Foe?*, OTHERING & BELONGING INST. (Sept. 24, 2019), https://belonging.berkeley.edu/identity-politics-friend-or-foe [https://perma.cc/BD3B-7RVF].

75. FUKUYAMA, *supra* note 70, at 105–09.

76. KLEIN, *supra* note 2, at xx–xxi.

77. *See* Denzel Smith, *supra* note 71. See powell, *Bridging or Breaking?*, *supra* note 20, for a discussion of breaking.

78. *See generally* DAVID ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (rev. ed. 2007) (examining the development of white working-class racism in the United States).

79. Examples abound from history, but consider President Lyndon Johnson's efforts to pass civil rights legislation despite hostility to equal rights earlier in his

narratives prevail and which messages win out: our better angels or our darkest demons.

White supremacy and its cousin, white and Christian nationalism, are not descriptive of people's phenotype but of an ideology. You do not have to be white to embrace white supremacy, nor do all white people embrace white supremacy or white nationalism. Indeed, there is a great deal of survey data to suggest that American attitudes on race have at times gotten substantially more inclusive and more open to things like integration and interracial marriage.[80]

Many wrongly assumed that Americans would not support a Black person running for president. Obama won handily not once but twice. While it is true that he did not get the majority of white voters, he did as well as other Democratic presidential candidates. People are still trying to make sense of the large number of people, especially white people, that voted for Obama and then voted for Trump.[81] While all the reasons might not be obvious, it is clear that racial attitude, and by extension racial polarization, continues to shift.

There is no monolith among whites, Blacks, or any other group. What may look like a solid racial divide is always more complicated. Some would make the divide or racial issue more of a geographic issue.[82] Where that geography should be drawn is not entirely clear. Certainly, the south is deeply associated with white dominance, the legacy of Jim Crow, and all of the connotations that accrue to it.[83]

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political career. *See* ROBERT CARO, THE LYNDON JOHNSON YEARS (1982–2012) (detailing the life and political career of former President Lyndon Johnson in a multi-volume biography). Consider also political figures like George Wallace who built his political career on stoking racial division. *See* powell, *Foreword*, *supra* note 18.

80. *See, e.g.*, Justin McCarthy, *U.S. Approval of Interracial Marriage at New High of 94%*, GALLUP (Sept. 10, 2021), https://news.gallup.com/poll/354638/approval-interracial-marriage-new-high.aspx [https://perma.cc/Z38V-PX8V] (tracking the increase in approval of Black-white interracial marriage in the United States).

81. *See, e.g.*, Zack Beauchamp, *A New Study Reveals the Real Reason Obama Voters Switched to Trump*, VOX (Oct. 16, 2018), https://www.vox.com/policy-and-politics/2018/10/16/17980820/trump-obama-2016-race-racism-class-economy-2018-midterm [https://perma.cc/9PBN-64SN].

82. *See, e.g.*, Sarah Savat, *The Divide Between Us: Urban-Rural Political Differences Rooted in Geography*, NEWSROOM (Feb. 18, 2020), https://source.wustl.edu/2020/02/the-divide-between-us-urban-rural-political-differences-rooted-in-geography/ [https://perma.cc/98PK-XHQS] (previewing Andrew J. Reeves' study finding that proximity to big cities carries greater import than individual identities in driving the political divide).

83. *See generally* GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940 (2010) (tracing how white southerners re-established their position over newly freed Black people following the Civil War and

We have an historical sense that the Civil War had at least three dominant parties: Democrats, Republicans, and the south. While Democrats and Republicans have shifted positions on race and civil rights, the south has been more predictably opposed to civil rights and embracing white dominance.[84] The suburbs have been a northern proxy for the south. Republicans have organized around the use of racial resentment and fear to make the suburbs a Republican stronghold.[85] And most of the effort to integrate schools in the United States has been at odds with the northern suburbs.[86]

Some say the Civil Rights Movement did not die in the south but in Cicero, a white working-class Chicago suburb.[87] But then we just had an election in the old, solid south where a Black man and a Jewish man won Senate seats. Not only did they perform well in the deep south, they performed well in many Georgian suburbs.[88] Still there is much polarized voting in the United States, certainly more than the U.S. Supreme Court recognized when it gutted the Voting Rights Act,[89] but not as much as Trump and Republicans expected in the last presidential election.[90]

The debates over race, class, and geography described in the previous part of this Article founder on a few crucial shoals.[91] While much of the identity over class as cause seems right at an experiential and empirical level, much of this analysis does not adequately account for the constructedness and, at times, the fluidity of race. White identity is not just constructed, it is also

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how modern "whiteness" came to be).

84. *See* powell, *New Southern Strategy*, *supra* note 6.

85. *Id.*

86. *See* GREGORY S. JACOBS, GETTING AROUND BROWN: DESEGREGATION, DEVELOPMENT, AND THE COLUMBUS PUBLIC SCHOOLS 163 (1998).

87. *See, e.g.*, Samuel Momodu, *The Cicero Riot of 1951*, BLACKPAST (Jan. 22, 2022), https://www.blackpast.org/african-american-history/events-african-american-history/the-cicero-riot-of-1951/ [https://perma.cc/RT6J-38GA] (describing the riot that took place in the Chicago suburb of Cicero, where "a mob of approximately 4,000 whites attacked an apartment building an African American family had recently moved into").

88. Nate Cohn, *Why Warnock and Ossoff Won in Georgia*, N.Y. TIMES: UPSHOT (Jan. 8, 2021), https://www.nytimes.com/2021/01/07/upshot/warnock-ossoff-georgia-victories.html [https://perma.cc/P7PY-H2TQ].

89. Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

90. Some would explain Georgia by looking at the changing demographic and the increase in the number of Black voters in Georgia as well as their higher-than-normal participation both in the general and special elections. Still many whites in the suburbs broke from Trump and from the Republicans in the runoff. *See* Nate Cohn, Matthew Conlen & Charlie Smart, *Detailed Turnout Data Shows How Georgia Turned Blue*, N.Y. TIMES (Nov. 17, 2020), https://www.nytimes.com/interactive/2020/11/17/upshot/georgia-precinct-shift-suburbs.html [https://perma.cc/885C-DB5M].

91. *See* Powell, *Black Marxist Scholar*, *supra* note 65.

elastic, encompassing groups formerly known as non-white (such as the Irish, Italians, or Armenians), or racializing groups formerly white as non-white.[92] It is conceivable that who is white can be expanding so that despite demographic shifts white majority status is maintained indefinitely.[93]

What is also taken for granted is that there will not only be a coherent group understood as Black, but there will also be a fairly coherent group of people of color. People of color, as a category, includes all the groups that are not considered white. Clearly, the sustainability and coherence of such a varied group is questionable. This is important for addressing and understanding polarization between groups. I will not say more about this issue here except to note that most pundits interpret and create race as a fixture that is permanent instead of contested processes that constantly change.[94]

V. Bridging and Contact Theory

This Article has asserted the existence of layered but varied expressions of polarization. By many accounts the United States, and much of the world, is experiencing not only heightened intensity related to polarization, but also the difference in form, given the overlapping of gender, racial, geographic, and political polarization.[95]

In the United States, bridging has been one of the dominant if not the primary process that has been called upon to address polarization. There are a number of groups, including the one I direct, that have advanced bridging to address polarization.[96] Bridging can be described as looking for common ground, often through deeply listening to others' stories and pain.[97]

There are many ways to think of bridging. It is similar in some ways to inter-group "contact theory" and the associated efforts to address prejudice and stereotyping initiated from the research of

92. *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2d ed. 2006) (examining the construction of race and "whiteness" and the flexibility that the concept of whiteness possesses).

93. *See generally* GEORGE YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE (2003); HANEY LÓPEZ, *supra* note 92 (arguing that if Latinx people become functionally white, then we will be more white in 2050 than we are now).

94. One only has to look at the identity categories in the census. It is unusual for them to be stable over any ten-year period. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (3d ed. 2014) (examining how concepts of race are created, transformed, and used).

95. *See* powell, *Bridging or Breaking?*, *supra* note 20.

96. *See* Heydemann & powell, *supra* note 21.

97. *See* powell, *Bridging or Breaking?*, *supra* note 20.

Gordon Allport and modified and updated by Pettigrew and Tropp.[98] In broad strokes, contact theory studies the conditions under which inter-group contact will lead to cooperation rather than conflict.[99] Some of the insights derived from this research have been presented by the Supreme Court in important cases involving race and diversity. For example, these underlying themes were crucial in the University of Michigan affirmative action cases.[100] In these cases, various *amici*, especially the U.S. military, persuasively argued to the Court that diversity enhanced the quality of leadership and improved outcomes while reducing racial stereotypes.[101] In this sense, contact theory is based on the presupposition: "If only I knew you better." It is often associated with empathic listening or practice.[102]

The concept of bridging is often associated with the scholarship of Robert Putnam, whose work examines the connections between diversity, trust, and community.[103] In his most famous book, *Bowling Alone*, Putnam addresses the need to bridge with groups different than our own in order to build social capital and for the smooth working of society.[104] But before looking at the dominant way of talking about and practicing bridging with an

98. *See generally* GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954) (examining the roots of prejudice and discrimination); Thomas Fraser Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERS. SOC. PSYCH. 751 (2006) (testing inter-group contact theory and building on Allport's scholarship); Tania Singer, *Empathy and Compassion*, 24 CURRENT BIOLOGY R. 875 (2014) (analyzing empathy and compassion in a neuroscientific study). See Jim A. C. Everett, *Intergroup Contact Theory: Past, Present, and Future*, INQUISITIVE MIND (Diana Onu, ed., 2013), https://www.in-mind.org/article/intergroup-contact-theory-past-present-and-future [https://perma.cc/9DFR-WPVA], for a history.

99. Allport initially theorized four key conditions for positive intergroup effects: equal status, intergroup cooperation, common goals, and support by social and institutional authorities. Pettigrew & Tropp, *supra* note 98, at 752.

100. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

101. Joe R. Reeder, *Military Amicus Brief Cited in Supreme Court's Decision in the University of Michigan Case,* Grutter v. Bollinger, GREENBERG TRAURIG LLP (June 27, 2003), https://www.gtlaw.com/en/news/2003/6/military-amicus-brief-cited-in-supreme-courts-decision-in-the-university-of#main-content [https://perma.cc/8GXD-LG6B].

102. *See* john a. powell, *On How Bridging Creates Conditions to Solve Problems*, OTHERING & BELONGING INST. (Nov. 2, 2017), https://belonging.berkeley.edu/john-powell-how-bridging-creates-conditions-solve-problems [https://perma.cc/7AUY-QTNM].

103. Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century the 2006 Johan Skytte Prize Lecture*, SCANDINAVIAN POL. STUDS. 137 (2007) [hereinafter Putnam, *E Pluribus Unum*].

104. PUTNAM, BOWLING ALONE, *supra* note 25.

important nod to Putnam, let us first look at some of the lessons and discussions as it relates to contact theory.

While much of the work related to building cooperation and social capital has raised issues as to the conditions necessary to reduce prejudice, these efforts relate, as the term suggests, to judgments made about people with insufficient information.[105] But many prejudices are more than interpersonal suspicions or simply mistakes in judging one's character. As more recent work has shown, prejudices are social constructs that are doing some work for society and that are reflected in structural norms and cultural attitudes.[106] One could even call them our collective mental habits. They are often policed by laws and norms.

Still, these prejudices are easier to maintain under certain conditions. Or, to put it differently, there should be some conditions that cause prejudices to break down. One of those conditions is contact.[107] While it may be possible to hate under many conditions, there is reason to believe it is easier at a distance. But contact alone will not reduce prejudice. If we see groups in a role that confirms a bias or stereotype, then contact can be counterproductive to bias reduction.[108] What we see must still be interpreted. Contact theory has tried to address these concerns by exploring under what conditions prejudice is reduced. These conditions include relative equality between groups, goal sharing, and non-competition between groups.[109]

Pettigrew goes further and asserts that this is not just a process between individuals, but also that there is a role for institutions and leaders.[110] He maintains that people will try to align with institutional norms and are especially impacted by the leaders of their institution.[111] Pettigrew also challenges the

105. *See, e.g.*, Putnam, *E Pluribus Unum*, *supra* note 103, at 141 ("As we have more contact with people who are unlike us, we overcome our initial hesitation and ignorance and come to trust them more.").

106. *See* Pettigrew & Tropp, *supra* note 98.

107. *See* Everett, *supra* note 98.

108. *See* Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCH. 65, 68 (1998). *But see* Pettigrew & Tropp, *supra* note 98, at 766 ("[C]onditions should not be regarded as necessary for producing positive contact outcomes, as researchers have often assumed in the past. Rather, they act as facilitating conditions that enhance the tendency for positive contact outcomes to emerge.").

109. There is not an agreed set of conditions, but there is a general agreement that some conditions promote reduction in prejudice and others do not even when there is contact. *See* Pettigrew, *supra* note 108, at 69–70.

110. *See* Pettigrew & Tropp, *supra* note 98, at 766.

111. *See id.*

presumption that the best way to change society is to work at the individual level or that it is even the best place to start.[112]

Even in talking about the nature of prejudice and how to overcome it, we have limited our inquiry. It is clear that much of what is considered polarization is not a function of prejudice. The limitation of a prejudice perspective is clearly demonstrated by the work of political scientist Ashley Jardina. In her work studying white identity formation and politics, she points to the need to focus on the construction and maintenance of a shared identity and interests within a group.[113] While she acknowledges that reducing intergroup racial conflict will to a degree require the addressing of animus and outgroup prejudice, she asserts that this approach is too concerned with individual attitudes.[114] Rather, Jardina's research concludes, attention should be oriented to understanding group identity formation—and in her work specifically, a growing sense of and attachment to white identity.[115] Many whites, she finds, are growing more concerned with protecting group status and positionality.[116] This type of group favoritism does not require animus toward an outgroup. Equally important, such group identification is not individually based. Jardina traces the increase in the salience of white identity to a threat that throws into question the status of white hierarchy, which she contends does not need to be material or real.[117]

Group identification and consciousness is similar to the concept of bonding and, as noticed by Putnam and others, can lead to exclusion and friction even without animus. To the extent that bridging is focused on addressing prejudice, it will not engage group-based solidarity and consciousness. Similarly, two groups might be in sharp disagreement not because of prejudice but because of interest, situatedness, or power. If that is the case, we could not expect a shift in prejudice to do the work of addressing polarization. This is the subject I will next address.

VI. Bridging and Power

The call for bridging is not an abstract exercise. All over the United States, Europe, and many other parts of the world there

112. *Id.*

113. *See* ASHLEY JARDINA, WHITE IDENTITY POLITICS 155–215 (Cambridge Univ. Press 2019).

114. *Id.* at 187.

115. *Id.* at 173–77.

116. *Id.* at 179–84.

117. *Id.* at 188.

continues to be extreme polarization and factions. President Biden has made the call for unity and reducing polarization a central part of his appeal, candidacy, and goals for his presidency.[118] When one considers the state of the nation, this is more than understandable. What is less clear is if unity can be achieved and how we should proceed toward this goal.

There is often an explicit assumption that the way to address this extreme polarization is through bridging.[119] Bridging is when members of different groups reach out and engage with one another.[120] In trying to access this possibility, it is important to understand the problem(s), the different forms bridging can take, and under what conditions bridging is likely to be effective. This part of the Article tackles this matter.

There have been a number of books and articles essentially asking non-Trump supporters to understand the culture and identity of Trump supporters in the hopes of bridging this divide.[121] Some of these arguments ask us to understand the racism and sexism of these groups. One version of this argument goes something like this: "They have been looked over. They are not respected. They have been looked down upon." The issue is not that any of these assertions are entirely wrong, but the matter is presented both as a one-directional problem and a suggestion of not just understanding but a call for something more.

Many of these calls for understanding are also asking us to overlook both the harm that Trump supporters have caused and their own agency and responsibility.[122] In some versions of this

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118. Domenico Montanaro, *Biden Called for Unity in His Inaugural Address. He Might Find It Hard to Come by*, NPR (Jan. 20, 2021), https://www.npr.org/2021/01/20/958490425/biden-says-he-wants-to-unite-america-he-might-find-unity-hard-to-come-by [https://perma.cc/5AFT-RMVS].

119. *See, e.g.*, Grace Kim, *Political Polarization in America: Solutions to Bridge the Partisan Divide*, WILLIAMS REC. (Dec. 9, 2020), https://williamsrecord.com/447122/opinions/political-polarization-in-america-solutions-to-bridge-the-partisan-divide/ [https://perma.cc/FP5T-EVUX]; *Our Members - Bridging Ideological Divides*, BRIDGE ALLIANCE, https://www.bridgealliance.us/our_members_bridging_ideological_divides [https://perma.cc/URG5-U4WR].

120. *See* GREATER GOOD SCI. CTR., BRIDGING DIFFERENCES PLAYBOOK 9, https://greatergood.berkeley.edu/images/uploads/Bridging_Differences_Playbook-Final.pdf [https://perma.cc/7QQJ-PLCS].

121. *See, e.g.*, BEN BRADLEE, JR., THE FORGOTTEN: HOW THE PEOPLE OF ONE PENNSYLVANIA COUNTY ELECTED DONALD TRUMP AND CHANGED AMERICA (Little, Brown ed., 2018); ARLIE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT (The New Press 2016).

122. *See generally* Robert Pondiscio, *The Miseducation of Donald Trump Voters*, FORDHAM INST. (Jan. 6, 2016), https://fordhaminstitute.org/national/commentary/miseducation-donald-trump-voters [https://perma.cc/YF28-DPRU] ("For those of us in education and reform, perhaps it's time to make white and blue collar the new

argument, it is tantamount to demand that we accept an identitarian argument in favor of white nationalists (including accepting symbols of hate, which are packaged as "heritage") and to avoid the identity concerns expressed by marginalized groups.[123]

Obviously, there is a value to understanding different groups, even those who would attack us. But there is something deeply problematic when pundits and elites call out marginalized groups for focusing on issues of concern to us (such as police brutality, confederate statues, etc.) but call on us all to understand the white nationalist mindset. There is some indication that this might be changing after the insurrection in early January 2021, but it is nonetheless pervasive.[124] Bridging cannot be unidirectional.

A simple way of thinking about bridging is to consider how we reach across identity boundaries to people or groups that are considered different than us in some salient way. That difference can hinge on race, politics, geography, ideas, interests, religion, age, party affiliation level, and so on. It is not the difference itself but how we individually and collectively make sense of the difference that provides social meaning.

This point is worth lingering on. Too often, it is assumed that attachments to those who are similar, and disquiet if not hostility to those who are different, is natural or even an evolutionary byproduct for humans. This is not correct. As one scholar explains, "human beings are cognitively programmed to form conceptual categories and use them to classify the people they counter."[125]

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black . . . it's time once again to widen the definition of rights at risk to include working class white people too.").

123. See the discussion of the early use of the term identitarian politics. I am also suggesting that what identities are fixated on in these scenarios is really the traits most salient to the dominant group. The need to appease this group can have the impact of further marginalizing some groups. For example, President Obama, in an effort to avoid inducing anxiety for a predominantly white voter block, opted to avoid discussing race. There are a number of studies that show that even if whites would benefit, they will oppose a program if they think Blacks and other people of color will also benefit. One of the attacks on the Affordable Care Act was the concern that Blacks would benefit. *See generally* MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY (1999) (analyzing the public's complex, misinformed, and racially-charged views on welfare); ALBERTO ALESINA & EDWARD GLAESER, FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE (2006) (comparing U.S. welfare opponents' success in using racial and ethnic divisions to attack redistribution programs to a more homogenous Europe, with fewer divides to exploit to demonize the poor).

124. *See* Ryan Fan, *I Urged Sympathy for a Trump Supporter. Then January 6th Happened*, AN INJUSTICE (Jan. 6, 2022), https://aninjusticemag.com/i-urged-sympathy-for-a-trump-supporter-then-january-6th-happened-eed0009bf80 [https://perma.cc/Q3MX-R9DJ].

125. DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN

While that is true, the differences that we notice and the value and meanings we place on these differences are largely socially constructed, not naturally occurring.[126] In other words, although humans naturally classify people and things into categories, the meaning ascribed to those things is not predetermined, but socially determined.

Some differences are seen as unimportant and not an impediment to deep human connection and understanding.[127] Which differences and similarities are important is both social and situational. This is true not just between people but also within us, as our minds work out these meanings. In that sense our identity is also social and situational. If our identities such as race and nationality are socially constructed, then the difference we attach to these socially constructed groups must also be social. There is no natural identity. Our identities are forged in circumstance and social context. Amartya Sen observes that when a people is attacked or threatened based on a particular trait or condition, that trait or condition is likely to become the most salient, enlarging the salience of that identity.[128]

While most people today in the United States, and possibly Europe, would agree that a toxic level of polarization is currently plaguing society and the very functioning of government, there is less agreement on both the cause and the solution.[129] One of the major disagreements over the cause of polarization in the United States is whether our deep division is rooted in existing and growing economic inequality, or if it is our ascriptive identities like race, gender, religion, disability, immigration, or some combination.[130] Also proposed is whether the most important division is political—liberal versus conservative. This matter was covered in previous parts of this Article.[131]

Of course, these factors may be related with each other and interact or compound. The longstanding fight on the left is whether

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STRATIFICATION SYSTEM 242 (2007).

126. SCOTT E. PAGE, DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2008).

127. *Id.* at 307–08.

128. AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY 3–4 (2007).

129. *See, e.g.*, Thomas B. Edsall, *America Has Split, and It's Now in 'Very Dangerous Territory'*, N.Y. TIMES (Jan. 26, 2022), https://www.nytimes.com/2022/01/26/opinion/covid-biden-trump-polarization.html [https://perma.cc/3XWA-4KT8].

130. john a. powell, *Inequality in the Twenty-First Century*, UC BERKELEY: BERKELEY BLOG (May 2, 2014), https://blogs.berkeley.edu/2014/05/02/inequality-in-the-twenty-first-century/ [https://perma.cc/WG4X-Y9N3].

131. *See supra* Section II.

to locate the struggle against unjust social structures in an analysis of class alone or identity (like race or gender) alone. Others ask whether class and identity are intertwined, and, if so, to what extent? There is reason to believe that all of these forces are at play and are interactive or iterative. Here, however, I focus on identity. But I am using the concept of identity closer to a social construct and in a way that marks our structural situatedness.[132]

Iris Young makes the observation that much of what is called identity or identity politics is really about how we are situated within structures.[133] Another way of thinking about identity is to describe it in terms of what an individual feels or one's lived experience. This more subjective and affective way of talking about identity offers a weak basis for analysis. It suffers from both the problem of what Charles Tilly and others call methodological individualism as well as essentialism.[134] This approach of methodological individualism and essentialism makes assumptions about the unit of analysis and the nature of humans. There is a great deal of criticism, including some of my prior writing, challenging this frame.[135]

But I want to make a different point here, which is that a subjective and affective conceptualization of identity leads us to approach bridging devoid of analysis of power and structural context. Yet, much of the discussion of identity and bridging happens through the lens of essential methodological individualism.[136] Within the limitations of this framework, bridging is too narrowly defined and applied to be an effective intervention against polarization. So while I am largely focused on identity, the

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132. *See The Project on Law and Mind Sciences at Harvard Law School*, SITUATIONIST, https://thesituationist.wordpress.com/about-plsps-at-harvard-law-school/ [https://perma.cc/734H-HZN8] (analyzing the concept of identity as a social construct).

133. IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 98 (2011).

134. *Methodological Individualism*, SCIENCEDIRECT, https://www.sciencedirect.com/topics/social-sciences/methodological-individualism [https://perma.cc/2QFY-K2ZF].

135. *See generally* POWELL, RACING TO JUSTICE, *supra* note 19 ("This way of looking at suffering has led some to assume that any effort to address it must also be on individualistic or human terms. These assumptions are false. As previous discussion has emphasized, much surplus suffering is caused not by individuals directly, but by structures and institutional arrangements."); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 23 (2006) ("Whereas the question of what constitutes 'personal identity' within philosophical accounts almost always centers on the question of what internal feature of the person establishes the . . . self-identity of the person through time, the question here will be: To what extent do regulatory practices of gender formation and division constitute identity. . . ?"); Wendy Brown, *Wounded Attachments*, 21 POL. THEORY 390 (1993).

136. FUKUYAMA, *supra* note 70, at 159–60.

category that we know of as identity can be expanded as a concept to account for structural location and power relationships, which allows for a broader and more robust application of the term.

Let us turn back to Putnam and Pettigrew. The intergroup contact theorists focus on cooperation and having a common purpose or goal as a means of prejudice reduction.[137] Similarly, Putnam focuses on individuals as members of groups in order to figure out how to foster greater social capital.[138] He has shown a strong focus on people that are more or less equal horizontally.[139] It is not because he is unaware of power and inequality, but he is concerned that strong power differentials or too much inequality can distort the process.[140] But the solution cannot be therefore to ignore power. It may be that there is a background assumption that the individual or groups are relatively equal and that issue need not be attended to. But generally that is not the case.

While I agree with Putnam that power and inequality can distort the effort to bridge, I think they must be faced. Consider some examples of how power can distort bridging in terms of empathy or cooperation from popular culture. The first is the landmark book by Richard Wright, *Native Son*.[141] The other is a popular recent movie, *Knives Out*.[142]

The premise of *Native Son* is that a young Black man, Bigger Thomas, is hired by a rich white family to be a chauffeur.[143] The daughter, Mary Dalton, returns from college, and Bigger is charged with driving her and her boyfriend Jan Erlone around.[144] The white couple insists on riding in the front of the car with Bigger.[145] They insist that the social hierarchies of race and class are meaningless.[146] They fail to recognize Bigger's profound discomfort.

At one point in the book, Mary and Jan express interest in getting something to eat.[147] Bigger asks where they would like to go, and they answer that they would like to go to Bigger's favorite place to eat.[148] Bigger objects, but they ignore his objection, and they

137. Pettigrew, *supra* note 108, at 66–67.
138. Putnam, *E Pluribus Unum*, *supra* note 103, at 137–38.
139. *See, e.g.*, *id.* at 153.
140. *See, e.g.*, *id.* at 151.
141. RICHARD WRIGHT, NATIVE SON (1940).
142. KNIVES OUT (Lionsgate 2019).
143. WRIGHT, *supra* note 141, at 44.
144. *Id.*
145. *Id.* at 58–59.
146. *Id.* at 59.
147. *Id.* at 60.
148. *Id.*

all go to a place where Mary and Jan are not just the only white people, but also the only wealthy people in the restaurant.[149] It is something that Bigger and the other patrons all notice. Later, Bigger is put into an even more compromising situation as he carries Mary into her bedroom after she has passed out from drinking.[150] I will leave it to the reader to discover what happens afterward.

The second example I would like to draw out is from the film *Knives Out*.[151] Marta Cabrera is one of the protagonists. She is Latinx and works for a rich white family as a caregiver for the patriarch of the family. Marta lives with her undocumented mother. In one scene, members of the Thrombey family, the wealthy white family for whom Marta works, are discussing what should be the appropriate policies for undocumented people living in the United States. In the middle of the discussion, one of the family members turns to Marta and asks her if she has an opinion on this matter. Unlike the folks in *Native Son*, the family members are aware that they are putting her into a difficult position. She cannot fully engage in the conversation because of the power difference.

In both examples, the effort to bridge—to share an empathic space—superficially appears to be between individuals in the scene. But there are clearly background structures at play that implicate both power and identity that shape their response and experience. Much of the work on bridging today assumes that it is between individuals that don't understand each other and may harbor prejudice.[152] There is a further assumption that this prejudice is actually hurt and misunderstanding.[153] For these reasons, bridging efforts are often tied to healing, a concept that is often equally bereft of power context and suffers from methodological individualism.[154] In the next section, I begin to chart our way out of these dilemmas.

VII. Bridging and Structural Change

There is a serious problem that occurs from not being recognized or being misrecognized.[155] There has been important work showing that the failure to be seen as a self can undermine

149. *Id.* at 61–63.
150. *Id.* at 72.
151. KNIVES OUT, *supra* note 142.
152. *See, e.g.*, Pettigrew, *supra* note 108.
153. *See, e.g.*, BRADLEE, *supra* note 121.
154. *See* POWELL, RACING TO JUSTICE, *supra* note 19.
155. *See* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994).

our sense of self.[156] This is also why respecting gender identity and using preferred gender pronouns is now the norm. While recognition can be important, I suggest it is a limited issue in the context of polarization. One may need to be seen and recognized, but this is not straight forward. Being recognized by certain people is much more important than being recognized by others.[157]

One way of thinking about recognition is in a larger light than what is trying to be achieved by polarization and by bridging. Polarization can be thought of as a kind of threat. It was discussed earlier that societal change can be seen as a threat. The perceived threat does not have to be real. When pundits focus on the material threat associated with the rise of authoritarian white nationalism, they are suggesting that there is a material reality—usually read as an economic threat, perceived or real—that leads to anxiety that is exploited to gain support for white nationalism. Indeed, there is data to support such a position.[158]

The relationship between a threat and the reaction, however, may or may not be conscious in the group's mind. This insight might also suggest a solution. If you highlight people's anxiety around the economy or other material concerns, it will be easier to bridge and they are less likely to see the "other" as a threat.

But this is not simply a mechanical process. There is always the process of making meaning. Events are not self-evident but require interpretation. So, the stories we use and have inhabited are important in how we make meaning. Given the durable role of racism, it is not a surprise how easily and readily racism is deployed as a trope during economic difficulties to explain structural problems. But the assumption that this is the full story is problematic. We are not just economic animals. We are also symbolic beings, and our sense of identity and being is always unstable.

In the article *Ontological Security in World Politics: State Identity and the Security Dilemma*, Jennifer Mitzen makes a number of important claims.[159] She distinguishes ontological threat

156. *Id.* at 25; RALPH ELLISON, INVISIBLE MAN (1952).

157. *See, e.g.*, Jan E. Stets, *Identity Theory*, *in* CONTEMPORARY SOCIAL PSYCHOLOGICAL THEORIES 100 (Peter J. Burke ed., 2d ed. 2018) (arguing that positive evaluations of self from one's in-group may serve to offset negative evaluations from others).

158. *See* Thomas B. Edsall, *Status Anxiety Is Blowing Wind Into Trump's Sails*, N.Y. TIMES (Feb. 9, 2022), https://www.nytimes.com/2022/02/09/opinion/trump-status-anxiety.html [https://perma.cc/7Y4W-QC3B].

159. *See* Jennifer Mitzen, *Ontological Security in World Politics: State Identity and the Security Dilemma*, 12 EUR. J. INT'L REL. 341 (2006).

from security or material threats and argues that many conflicts are based on the ontological threat.[160] She asserts that this threat can be at a national or group level and not just at the individual level.[161] Similarly, Pettigrew and other intergroup contact theorists draw our attention to the role of context in reducing prejudice and, by extension, polarization.[162] The context is decisive in determining whether an intervention will work or not. By implication, this research suggests that the best way to change the individual heart and mind is by focusing on structure and culture.[163]

Consider the racial ontological threat that white nationalists express. The statement that "Jews will not replace us" or the claim that miscegenation is white genocide are expressions of a group ontological threat. This brings us to another point: the threat is not only to the individual, but also to the group. It may or may not be based on personal prejudice or bias.

Consider Dylann Roof as he walked into a Black church and killed nine parishioners.[164] What is particularly disturbing about this tragedy, although not as widely reported, is that prior to his attack he was in the church having fellowship with the Black members for over an hour.[165] He stated they were kind to him and he liked them.[166] He expressed regret for having to kill them, but from his perspective, what he was doing was an act to save the white race.[167] Individual outreach bridging would have failed to dissuade Roof from his murderous intent. Another approach is called for.

However, within both our contemporary American democracy as well as the broader international environment, there are an assortment of situations, events, and catastrophes that could have been ameliorated through a bridging approach. For example, despite currently existing religious divisions, Pope Francis, in an unprecedented move, elected to travel to the residence of Iraq's most

160. *Id.* at 342.

161. *Id.*

162. Pettigrew & Tropp, *supra* note 98, at 766.

163. *See id*. at 767. I am aware that this claim may be jarring to most Americans, still it is important to consider.

164. Karen Workman & Andrea Kannapell, *The Charleston Shooting: What Happened*, N.Y. TIMES (June 18, 2015), https://www.nytimes.com/2015/06/18/us/the-charleston-shooting-what-happened.html [https://perma.cc/6W69-AASV].

165. Erik Ortiz & Daniel Arkin, *Dylann Roof 'Almost Didn't Go Through' with Charleston Church Shooting*, NBC NEWS (June 19, 2015), https://www.nbcnews.com/storyline/charleston-church-shooting/dylann-roof-almost-didnt-go-through-charleston-church-shooting-n378341 [https://perma.cc/P93B-5DVD].

166. *Id.*

167. *See* Workman & Kannapell, *supra* note 164.

reclusive, and powerful, Shiite religious cleric.[168] He did this to ultimately bridge across religious lines to advocate for peace and actively combat persecution of those of certain faiths in the region.[169] It was a mutual acknowledgement of human dignity that encouraged peace building. This example highlights the possibility of bridging while reducing preconditions. It can be contended that much of the violence that becomes larger components of serious externalities of religious conflict was avoided by choosing to bridge rather than break.

Domestically, we can also observe examples of bridging being utilized to avoid tragedies. Daryl Davis, an active blues musician, often elected to sit and have conversations with active KKK members.[170] Despite being a Black man, Davis always entered into these conversations with no intention to change the minds of Klan members.[171] Often after sharing meals and small discussions, these previous affiliates abandoned the Klan themselves.[172] Bridging does not necessitate complete agreement, nor can one enter into a bridging relationship with another diametrically opposed expecting to change them. As such, this example serves as one of many ways to approach bridging across convoluted racial politics.

If we want to address the extreme problem today, at what level should the focus be and what is the aim? As stated earlier, most of the work focuses at the individual or interpersonal level.[173] The problem is that much of the polarization that we are most concerned with is not at the individual level but the group and/or institutional level. This is sometimes discussed in broader literature as the micro, meso, and macro.[174]

According to the same theorist on bridging, the micro has the least amount of agency and the least amount of power.[175] In addition, even if you could do something at the micro, it is not likely to scale up. This is in part a problem of aggregation. Mouzelis is

168. Nicole Winfield & Qassim Abdul-Zahra, *Pope, Top Iraq Shiite Cleric Deliver Message of Coexistence*, A.P. NEWS (Mar. 6, 2021), https://apnews.com/article/middle-east-islamic-state-group-ali-al-sistani-pope-francis-iraq-f95098b179f6a82157e87a7cb6cc0c3d [https://perma.cc/P9GW-ZRH7].

169. *Id.*

170. Nicholas Kristof, *'How Can You Hate Me When You Don't Even Know Me?'*, N.Y. TIMES (June 26, 2021), https://www.nytimes.com/2021/06/26/opinion/racism-politics-daryl-davis.html [https://perma.cc/2YUQ-FXF9].

171. *Id.*

172. *Id.*

173. *See supra* Section V.

174. *See* Derik Gelderblom, *The Limits to Bridging Social Capital: Power, Social Context and the Theory of Robert Putnam*, 66 SOC. REV. 1309, 1315–16 (2018).

175. *Id.* at 1315.

particularly critical of Putnam for falling prey to the problem of aggregation in his approach to bridging and focusing on small groups and individuals:[176] "[a]uthors such as Putnam (2000) and Uslaner (2009) who apply the social capital concept to societies rather than small groups, tend to think that the nature of social relations in general or in small groups can be extrapolated to society as a whole."[177] This reflects what Mouzelis describes as a logic of aggregation:

> [I]ndividual social capital situations cannot be aggregated because they are interdependent, and not independent. They are interdependent firstly due to powerful actors subsuming them. They are, in addition, interdependent because of the nature of their interconnections on the horizontal level. Of course, theorists such as Putnam do not study small groups as such.[178]

One would also need to engage at the meso- and macro-scales. At these levels, one finds the influence to potentially have the reach that includes institutions and policies. Aiming at the meso- and macro-level may be necessary to create the space or shape the institutions in which bridging may become possible. Leadership is critical at these scales. Trump and Biden operate at the macro scale, shaping broad narratives, while university presidents and corporate leaders operate at the meso-scale, exercising considerable power and resources within their respective institutions or markets.[179]

Going back to Pettigrew and others, it is clear that bridging works best under certain conditions.[180] It helps to know what problem one is trying to solve and what would count as a solution. Achieving better inter-group understanding and having a sense of shared humanity could be a goal within itself. Or it could be governing and passing certain policies. When it is not possible to create shared goals, or where goals are incompatible, it may not be possible to bridge. Consider if my sense of safety requires your subordination and possibly even death or incarceration, then preconditions for bridging may prove elusive. This is why white supremacy is such a challenge to de-polarization. It is not a stretch to assert that white supremacy requires non-white subordination; in fact, it is definitional to white supremacy.

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176. *Id.* at 1316.
177. *Id.* at 1320.
178. *Id.*
179. *Id.* at 1315.
180. *See, e.g.*, Pettigrew & Tropp, *supra* note 98, at 766–67.

As one attempts the effort to bridge, it is important to be clear on the preconditions. If there is too great of a power differential, bridging may not be possible, and one should look at what might come out of such a process with a critical eye. Bridging between individuals may be an important task, but it is not our only task. We must also look at the meso- and macro-level. To do this, we may need to either create new conditions or spaces in which bridging can occur, but should not shy from it simply because it is difficult. We have little alternative.

VIII. Conclusion

In spite of all of the problems associated with polarization, it is clear that some polarization is not only desirable but probably inevitable. The focus of this Article is the extreme and toxic polarization that is growing and threatening us and our institutions. This polarization is deeply spread across the United States and much of the world, and it is reflected in terms of race, immigration, religion, and class.[181] While all of these may contain a material impact, they are also related to recognition, dignity, and belonging.

Bridging and similar expressions such as calls for unity are now an animating force in addressing our toxic and harmful forms of polarization. Many people and groups come to bridging without any attention to power. While this might need to be a strong precondition, in part because the precondition is often met, one might not notice its central need. Still others like Mary and Jan in *Native Son* will assume that we are all individuals and our power does not matter if our heart is in the right place.[182] This Article suggests the limit of this approach.

Community organizers will likely find obvious the call to pay attention to power as a precondition. Much of organizing starts with the primary goal of building power for marginal communities. But this desire can also lead to an unhelpful position. While power imbalance can distort the effort to bridge, the loading up of preconditions can be used as a reason not to bridge. The precondition is not a call for complete equality. Many bridging conversations are likely to take place where the power differential is not so great that the conversation must be delayed.

While this Article calls for a more complex way of looking at bridging and polarization, it is not a broad rejection of bridging.

181. *See* powell, *Bridging or Breaking?*, *supra* note 20.

182. *See* Wright, *supra* note 141.

Bridging is a process that requires both a set of conditions, such as relative equality and agency, as well as a container with background or foreground goals participants can share. Where these conditions are lacking, there must be an effort to find or create them. Leadership, narrative, and structural sensitivity are the keys.

Contracting with Communities: An Analysis of the Enforceability of Community Benefits Agreements

Hannah P. Stephan†

Introduction

Community Benefits Agreements (CBAs), contracts between community members and developers, have emerged in the last few decades as a powerful tool for community groups when faced with a new development in their neighborhood.[1] Community members often have concerns about displacement due to the increased cost of living when a new development is built in a particular area,[2] so the use of a CBA can help community members address these concerns with developers in a productive way. In turn, the developers gain support from community groups for the developments, which may ease tensions in city approval proceedings and improve the general perception of developers in the neighborhood once their project is complete.[3]

The creation and enforcement of Community Benefits Agreements play a role in a wide variety of contexts, including land

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1. Julian Gross, *Community Benefits Agreements*, *in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 189, 189 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

2. *See, e.g.*, Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENV'T L. & POL'Y 291, 298 (2008) [hereinafter Salkin & Lavine, *Understanding CBAs*] ("Large-scale urban developments tend to have disproportionate impact on low-income and minority communities, and CBAs provide a mechanism for these communities to ensure that they will benefit from developments rather than being overlooked or displaced through gentrification.").

3. *See, e.g.*, Stephanie M. Gurgol, *Won't You Be My Neighbor? Ensuring Productive Land Use Through Enforceable Community Benefits Agreements*, 46 U. TOL. L. REV. 473, 491 (2015) (explaining that community members agree to support projects, which can add efficiency to development projects).

use planning,[4] race equity,[5] and environmental justice efforts.[6] Understanding each of these contexts is essential to seeing CBAs as a tool for fairer communities and as an important piece in the puzzle of equitable development, and it is important in conceptualizing why it is to the benefit of the community for these agreements to be enforceable.

Equitable development advocates are largely in favor of CBAs as a tool,[7] but some commentators caution that they should only be a piece of the land use planning puzzle rather than a singular solution for equitable development.[8] The idea of land use planning, though inherent in many past municipal-level decisions, did not emerge as a separate concept until zoning ordinances began to gain attention.[9] With demographic changes and ever-increasing levels of development,[10] land use planning will continue to be an important topic, and CBAs are poised to be a key part of the discussion.

We can also understand CBAs as a tool for race equity and as a way to elevate historically marginalized communities.[11] In general, civil rights scholars see housing policy and planning, of which CBAs can be a part, as a key element to reducing the impacts of past racist policies.[12] As early as 2006, a Minneapolis

4. *See, e.g.*, *id.* at 475 ("To ensure CBAs will operate as effectively as possible, courts should view them through the lens of traditional land use decisions.").

5. *See, e.g.*, Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 298 ("CBAs can be effective tools for promoting racial and social equity.").

6. *See* Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J.L. & POL'Y 157, 159 (2009) [hereinafter Salkin & Lavine, *CBAs and Comprehensive Planning*].

7. *See, e.g.*, Gross, *supra* note 1, at 189 ("CBAs have generated tremendous excitement among community groups and advocates of equitable development, as well as substantial interest from local government, academia, the media, planning circles, and philanthropic foundations.").

8. *See, e.g.*, *id.* at 199 (arguing that CBAs are "substantially limited as a long-term strategy for shaping economic development" because of the time and resources it takes to negotiate these agreements).

9. JULIAN CONRAD JUERGENSMEYER, THOMAS E. ROBERTS, PATRICIA E. SALKIN & RYAN MAX ROWBERRY, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 1.1 (3d ed., 2021).

10. *Id.* at § 1.3.

11. *See* CMTY. BENEFITS L. CTR., COMMON CHALLENGES IN NEGOTIATING COMMUNITY BENEFITS AGREEMENTS AND HOW TO AVOID THEM 3, 7 (2016) (centering race equity in its explanation of effective CBAs and in its statement of the mission of the CBA movement in general).

12. *See, e.g.*, Liz Enochs, *Segregation Scholar Richard Rothstein Fighting for New Civil Rights Movement with Best Weapon He Has: Research*, SHAREABLE (Sept. 3, 2020), https://www.shareable.net/segregation-scholar-richard-rothstein-fighting-for-new-civil-rights-movement-with-best-weapon-he-has-research/

organization linked CBAs and race equity in a report, stating that communities of color are often excluded from the processes in which development decisions are made, and that "CBAs provide them with a vehicle for guarding against gentrification and displacement," as well as "a mechanism through which an honest discussion of racism and its historic and current effects can occur."[13] Though the creation and implementation of CBAs will not solve the many problems created by racist policies, they can be a helpful tool that is rooted in the community with the goal of enacting important changes.

CBAs are also influential in the environmental justice movement.[14] This movement, a largely community-based effort, seeks to "ensure a fair distribution of both environmental burdens and environmental goods" by including community members in planning processes.[15] This helps avoid outcomes in which locally unwanted land uses are located in historically disinvested communities and areas,[16] which may cause negative health outcomes for communities and cause them to experience further harm.[17] CBAs can work toward this goal in a variety of ways, including by requiring that developers meet certain environmental standards, obtain Leadership in Environmental and Energy Design (LEED) certification, and obtain community input on environmental design.[18]

[https://perma.cc/L2VG-G59D] (describing residential segregation as the root of other racial disparities such as police abuse and mass incarceration).

13. MAURA BROWN, ALL. FOR METRO. STABILITY, COMMUNITY BENEFITS AGREEMENTS: AN IMPORTANT TOOL IN THE GROWING TWIN CITIES EQUITY MOVEMENT 2 (2006); *see also* Press Release, Chi. Lawyers' Comm. for Civ. Rts., Coalition Signs Community Benefits Agreement with Proposed Bucktown Dispensary (Jul. 22, 2020), https://www.clccrul.org/blog/2020/7/22/cannabis-equity-illinois-coalition-signs-community-benefits-agreement-with-proposed-zen-leaf-bucktown-dispensary [https://perma.cc/PD39-PKTJ] (describing a CBA with the goal of prioritizing individuals for marijuana dispensary jobs who have been most impacted by the past criminalization of marijuana, particularly individuals within communities of color); DANIEL KRAVETZ, EQUITABLE DETROIT COAL., FIGHTING FOR EQUITY IN DEVELOPMENT: THE STORY OF DETROIT'S COMMUNITY BENEFITS ORDINANCE 8 (2017) (explaining how a CBA was brought to fruition by a coalition led mostly by women of color).

14. *See* Salkin & Lavine, *CBAs and Comprehensive Planning*, *supra* note 6, at 159.

15. *Id.*

16. JUERGENSMEYER ET AL., *supra* note 9, at § 1.3.

17. AM. PUB. HEALTH ASS'N, CREATING THE HEALTHIEST NATION: ENVIRONMENTAL JUSTICE FOR ALL 1 ("Disproportionate exposures to pollutants and adverse effects of climate change can result in a multitude of severe health issues that are costly for the American people.").

18. *Policy & Tools: Community Benefits Agreements and Policies in Effect*, P'SHIP FOR WORKING FAMILIES, https://www.forworkingfamilies.org/page/policy-tools-

This Note will provide context and background surrounding the creation and current implementation of Community Benefits Agreements, including their effectiveness and reception in the public opinion. The primary goal of this Note is to discuss several concerns regarding the enforceability of CBAs as private contracts. Overall, this Note will argue that issues raised about the enforceability of CBAs in terms of consideration, duties of successors and assigns, and third-party enforcement should generally not prohibit a CBA from being perceived as valid and enforceable by courts or communities, though interpretation will depend on each individual contract. In Part I, this Note will provide background information about the creation and use of CBAs. In Part II, this Note will explain the current leading concerns with the enforceability of CBAs: consideration, successors and assigns, and third-party beneficiaries. This Note will provide an analysis of these concerns in Parts III–V to show that CBAs should generally be understood to be enforceable in court but are largely dependent on the specific contractual language that is employed.

I. History and Effectiveness of Community Benefits Agreements

A. History of Community Benefits Agreements

The first Community Benefits Agreement was formed in California in the 1990s, with the Hollywood and Highland agreement.[19] The growth in popularity of CBAs is a result of the desire to see accountability from large developers, due to the common problem of gentrification in low-income communities following the construction of large developments.[20] Gentrification tends to cause displacement of existing community members due to increased rent and cost of living in the area.[21] This has increasingly

community-benefits-agreements-and-policies-effect [https://perma.cc/N86U-7G72] (outlining the key provisions of current CBAs, including environmental provisions).

19. Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 301 (describing the Hollywood and Highland agreement, which was enacted in 1998 as a response to traffic, environmental, and crime concerns surrounding the development of the $388 million theater which now hosts the Oscar awards).

20. *Id.* at 298.

21. Langston A. Tolbert, *Utilizing Educational Focused Community Funds in the Fight Against Displacement and the Revitalization of Distressed Communities*, 63 HOW. L.J. 303, 307 (2020).

become a larger problem due to the growing populations in big cities.[22]

With this backdrop, the Community Benefits Agreement emerged as a contractual tool for developers and community advocates to partner on the terms for a new development. Since these agreements are private contracts, it is hard to know the exact number that are currently in effect, but researchers estimate that at least twenty major CBAs are currently in place around the country.[23] CBAs are valuable to both community organizations and developers, though the goals of each group are different. Coalitions of community organizations typically seek to avoid community member displacement and provide benefits to current residents of an area.[24] Developers seek to save money, perhaps by reduced time spent in city procedures or dealing with legal challenges; to gain a higher likelihood of approval in city processes; and to gain positive press in the community.[25] As such, CBAs outline certain benefits that a developer agrees to provide the community, which are specific to each community but may include terms such as job training programs or wage requirements.[26] In return, the community advocates typically promise to support the project in the community and at municipal meetings regarding approval of the development.[27] They may also agree not to sue the developer.[28]

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22. Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 297 (explaining that growth in the largest U.S. cities has been very rapid and with that growth comes a lot of competition for development).

23. *See Policy & Tools: Community Benefits Agreements and Policies in Effect*, *supra* note 18. It is difficult to determine the exact number of CBAs in effect, perhaps due to the private nature of contracts in general, and the fact that each CBA is generally negotiated by a different coalition of advocates in different cities. The Partnership for Working Families database is the most centralized and updated database that is readily available, which is why this database is used to provide the most accurate number of currently active CBAs. In 2011, the Public Law Center published a document outlining 18 major CBAs. *See* DANIEL J. LASALLE, PUB. L. CTR., SUMMARY AND INDEX OF COMMUNITY BENEFITS AGREEMENTS (2011), https://law.tulane.edu/sites/law.tulane.edu/files/Files/TPLC/summary-and-index-community-benefit-agreements.pdf [https://perma.cc/7PAU-RX77]. See also Amy Lavine, *Community Benefits Agreements*, BLOGSPOT, http://community benefits.blogspot.com/ [https://perma.cc/WRB9-GWC9], for a blog maintained by CBA scholar Amy Lavine that provides details about 28 CBAs.

24. *See* Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 294.

25. *See, e.g.*, Gurgol, s*upra* note 3, at 479 (explaining that CBAs provide an avenue for developers to minimize unnecessary delay caused by community action).

26. JULIAN GROSS, GREG LEROY & MADELINE JANIS-APARICIO, GOOD JOBS FIRST & CAL. P'SHIP FOR WORKING FAMILIES, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 2–3 (2005).

27. *Id.* at 2.

28. *See, e.g.*, Gross, *supra* note 1, at 193 (outlining typical community group commitments, including "release of legal claims").

Sometimes government agencies are party to the agreements, but this has raised constitutional problems, so that is less typical than the agreements between community organizations and developers.[29] In the last decade or so, prominent political leaders have also voiced their support for CBAs.[30]

B. Common CBA Terms and Examples

One key benefit of CBAs is that they are flexible to the needs of a particular community, so terms are likely to vary greatly in these agreements. However, there are several terms that are common across a wide variety of agreements:[31]

- Local hiring and contracting provisions;
- Affordable housing requirements;
- Job preparation and training programs for local residents;
- Environmental protections;
- Agreements for community organizations not to sue developers; and
- Agreements for community organizations to publicly support the project.

Depending on the project and its specific impacts, contracting parties can tailor the agreements to fit their needs.

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29. There appears to be an academic consensus on the idea that CBAs, when the government is a party, are subject to analysis under the exactions doctrine, which requires that constraints on development projects need an "essential nexus" with developer land use and promoting land use regulations. *See* Amy Lavine, *Legal & Contractual Issues of Community Benefits Agreements*, 32 ZONING & PLANNING L. REPORT (2009) (analyzing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994), which developed the exactions doctrine); *see also* Gurgol, *supra* note 3, at 495 (arguing that a CBA would be subject to this analysis and that it may be difficult for the community to show a rational relationship and an essential nexus to a public purpose for some conditions); Gross, *supra* note 1, at 196 (noting that any government involvement, including by use of a CBA ordinance, would be subject to this analysis).

30. Gavin Newsom, current California Governor and former San Francisco Mayor, expressed his support for CBAs in 2008, saying "building support for a large, mixed-use project in a disadvantaged neighborhood is a real challenge . . . . By bringing a coalition of labor and community groups to the table, the CBA process built trust, support, and credibility for this vital project." Gross, *supra* note 1, at 190. Lori Lightfoot, current Chicago Mayor, and other Chicago mayoral candidates also expressed support for CBAs during the 2019 Chicago mayoral elections. Editorial Board*, Lori Lightfoot, Toni Preckwinkle and the Obama Center: Locking in Benefits for the South Side Makes Sense*, CHI. TRIB. (Feb. 28, 2019), https://www.chicagotribune.com/opinion/editorials/ct-edit-obama-center-cba-light foot-preckwinkle-20190227-story.html [https://perma.cc/3UV6-7TQX].

31. *See, e.g.*, *Policy & Tools: Community Benefits Agreements and Policies in Effect*, *supra* note 18 (describing twenty current CBAs in effect).

A recent example of a CBA is the Nashville MLS Soccer Community Benefits Agreement, negotiated in response to plans to construct a new soccer stadium in Nashville, Tennessee, and to construct a related mixed-use development adjacent to the stadium.[32] This CBA was an agreement between Nashville Soccer Holdings, the entity which will operate the Nashville stadium and manage the team, and an organization called Stand Up Nashville, which represented the interest of Nashville community organizations,[33] regarding the development of the mixed-use parcel of land specifically.[34] The parties reached the agreement in 2018, with the CBA containing several typical provisions including affordable housing,[35] reservation of space for childcare facilities and other community spaces,[36] and minimum wage requirements.[37]

It also contains unique provisions that are particular to this development; for example, the agreement requires Nashville Soccer Holdings officials, coaches, and players to donate soccer equipment to local schools, host soccer clinics, and visit schools to promote "good sportsmanship and character development."[38] The

32. *Historic Community Benefits Agreement Reached!*, STAND UP NASHVILLE (Sept. 4, 2018), https://standupnashville.org/historic-community-benefits-agreement-reached/ [https://perma.cc/2Y72-QH5P].

33. Stand Up Nashville's member organizations are the Central Labor Council; the International Association of Bridges, Structural, Ornamental and Reinforcing Iron Workers; the International Union of Painters and Allied Trades; Nashville Organized for Action and Hope (NOAH); the Laborers' International Union of North America (LiUNA!); Partnership for Working Families; and the Service Employees International Union. *Members*, STAND UP NASHVILLE, https://standupnashville.org/members/ [https://perma.cc/92HX-3VEF].

34. Nashville MLS Soccer Community Benefits Agreement (effective Sept. 3, 2018) [hereinafter Nashville Soccer CBA], *available at* https://www.forworkingfamilies.org/sites/default/files/18-09-03%20FINAL%20NSH-SUN%20CBA%20with%20REVISED%20Exhibit%20A%20-%20SIGNED%20%2800456717xAA7B8%29.PDF [https://perma.cc/S2A5-EPQX].

35. *Id.* at 4 ("NSH voluntarily agrees that a minimum of 12% of the residential units within the Development shall be set aside for households earning 60% of the AMI/MHI . . . . NSH further voluntarily agrees that (i) an additional 4% of the residential units within the Development shall be set aside for households earning between 61% and 80%, and (ii) an additional 4% of the residential units within the Development shall be set aside for households earning between 81% and 120% of AMI/MHI . . . .").

36. *Id.* at 2 ("NSH will cause Developer to reserve no less than 4,000 sq. ft. within or in close proximity to the Development for a childcare location . . . . NSH will cause Developer to reserve 4,000 sq. ft. of retail space to the establishment of a micro-unit incubator for the use of artisans and small business merchants . . . .").

37. *Id.* at 5 ("NSH will direct hire employees . . . and pay such employees at least $15.50 per hour.").

38. *Id.* at 3 ("NSH will donate new or used soccer equipment and accessories to elementary schools, middle schools and high schools located within Metro that have

agreement, which requires at least thirty years of occupancy and use,[39] is an example of the value of CBAs. Not only was the community coalition able to negotiate economic benefits, but it was also aware of the particular needs of the community, and the parties were able to contract in a way that took those community needs into account. The stadium was approved by the city of Nashville in February 2020 and is expected to be built by May 2022.[40] Nashville Mayor John Cooper stated that he was "fully supportive of the community benefits agreement," and both the city and the developer respected the terms of the agreement while negotiating about the exact boundaries of the mixed-use development.[41] Most notably, the CBA was critical to gaining the full support of Nashville City Council members who voted on the development.[42] The community-focused formation of this agreement, its tailored terms, and its influence on city decisions all make the Nashville MLS Soccer CBA a helpful example in understanding the formation and importance of these agreements.

C. CBA Effectiveness

Several researchers have found that CBAs are an effective tool, because they provide real benefits to community members, such as increased wages,[43] and they tend to provide these

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an active soccer program . . . [,] will host an annual coaching clinic located within Metro . . . [, and] shall visit, not less than eight (8) times per year, local elementary schools throughout Metro to promote good sportsmanship and character development.").

39. *Id.* at 2.

40. Drake Hills, *Nashville SC's Stadium Construction Continues with Steel Beam Installation*, NASHVILLE TENNESSEAN (Jan. 29, 2021), https://www.tennessean.com/story/sports/nashvillesc/2021/01/29/nashville-sc-first-steel-beam-soccer-stadium-installed-fairgrounds/4262136001/ [https://perma.cc/U8YQ-9XYP].

41. Yihyun Jeong, *'We Are Out of Time': Ingram Blasts Mayor John Cooper on Stalled MLS Stadium*, NASHVILLE TENNESSEAN (Jan. 31, 2020), https://www.tennessean.com/story/news/politics/2020/01/31/mls-stadium-nashville-sc-owner-john-ingram-blasts-mayor-cooper-over-stalled-plans/4628151002/ [https://perma.cc/JFQ2-BS6T].

42. Meg Garner, *One Year Later, New Committee Launched to Oversee Critical Piece of Nashville's MLS Stadium Deal*, NASHVILLE BUS. J. (Dec. 26, 2019), https://www.bizjournals.com/nashville/news/2019/12/26/one-year-later-new-committee-launched-to-oversee.html [https://perma.cc/5CHG-AGDW] ("Signing a community benefits agreement was a critical component in persuading several council members to originally endorse the stadium deal, which received pushback after it was revealed the team's owners would build a mixed-use development on 10 acres of city-owned land neighboring the stadium.").

43. Harold Meyerson, *No Justice, No Growth: How L.A. Makes Developers Create Decent Jobs*, 14 RACE, POVERTY & ENV'T 58, 60 (2007) ("CBAs . . . have plainly boosted the wages of the construction workers . . . . Between 2000 and 2006, 104,000 construction jobs and 113,000 permanent jobs were covered under CBAs . . . .").

community benefits efficiently by lowering transaction costs associated with disputes between developers and community advocates.[44] Others have pointed out the potential pitfalls with CBAs, such as vague contract language and no effective accountability measures, which can be avoided with careful drafting, and argue that effectiveness is tied to thoughtful execution and planning during the CBA formation process.[45] It is also important to note that developers often resist these agreements, because they claim to not need accountability measures in order to make a positive impact on local community members.[46] Further, some critics point out that it is impossible for CBAs to address the needs of every community member, and the terms therefore may not be as inclusive as they appear.[47]

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44. Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773, 1773–74 (2016) (arguing that private CBAs work "more efficiently than existing government processes" and that the benefits negotiated by representative community groups enhance civic engagement). *But see* Alejandro E. Camacho, *Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOKLYN L. REV. 355, 356–57 (2013) (calling CBAs "a redundancy that leads to additional costs for both developers and community members" and finding that CBAs are generally overly favorable to developers).

45. *See* CMTY. BENEFITS L. CTR., *supra* note 11 (finding that successful CBAs are tied to transparent and inclusive processes with specific contracts, and less successful CBAs are vague and lack accountability measures); *see also* Gross, *supra* note 1, at 198 ("Because the value of a CBA lies in its inclusiveness and accountability, CBAs that fall short in these areas rightly come in for criticism.").

46. In one example, the company Tesco asserted that a CBA was unnecessary, even after pressure from the community, because Tesco "already provides well-paying jobs, has environmentally-friendly policies, and has pledged to locate stores in underserved areas." Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 319. President Barack Obama was also opposed to a CBA for his presidential library on the South Side of Chicago, primarily due to his concerns that it would be impossible to include all community voices. President Obama emphasized that the Obama Foundation was a nonprofit, implying that his motives were not financial, and that he was "not an outsider here . . . . I know that the minute you start saying, well we're thinking about signing something . . . next thing I know I've got 20 organizations that are coming out of the woodwork . . . . [W]e want to work with *everybody* in a transparent way." Pete Grieve, *Obama Explains Why He Won't Sign Community Agreement for Presidential Center*, CHICAGO MAROON (Sept. 14, 2017), https://www.chicagomaroon.com/article/2017/9/15/obama-explains-presidential-center-sign-community/ [https://perma.cc/S9BU-5AJA].

47. *See, e.g.*, Christine A. Fazio & Judith Wallace, *Legal and Policy Issues Related to Community Benefits Agreements*, 21 FORDHAM ENVTL. L. REV. 543, 551–52 (2010) (raising the concern that one "challenge is how to ensure that the groups that benefit fairly represent the community"); Steven M. Seigel, *Community Benefits Agreements in a Union City: How the Structure of CBAs May Result in Inefficient, Unfair Land Use Decisions*, 46 URB. L. 419 (2014) (arguing that labor groups hold disproportionate power in CBA negotiations).

II. Community Benefits Agreement Enforceability Is An Open Question

A key question regarding Community Benefits Agreements that has not been addressed in detail is whether CBAs are enforceable in court. Though the answer to this question depends to a certain extent on the terms of an individual contract and on state law, commentators have raised general enforceability concerns that could apply to many CBAs.[48] This Note will focus on three main issues of enforceability. The first issue is whether community organizations provide adequate consideration in agreements with developers. The second issue is how to treat any subsequent parties to the agreement in the event that a developer sells or leases space. The third issue is who the intended beneficiaries are in these agreements, and whether or not certain potential third-party beneficiaries have standing to enforce these agreements. This Note will use the Restatement (Second) of Contracts and select state law, as there is currently no case law regarding the enforceability of CBAs, to show that legal standards favor the general enforceability of Community Benefits Agreements in each of these areas.

A. Consideration

Experts have raised consideration as a potential enforceability issue from the standpoint of a community organization entering an agreement with a developer.[49] Consideration is a critical component of contract formation and generally refers to the idea that, for a contract to be valid, the promises must be "bargained for," meaning that parties must exchange promises of performance with each other.[50] In a typical CBA, the consideration provided by the

48. *See* Lavine, *supra* note 29 (raising several enforceability concerns including consideration, successors in interest, and government involvement); *see also, e.g.*, Charlotte Clarke, *Community Benefits Agreements: To the Extent Possible*, 6 J. LAND & DEV. 33, 45–47 (2016) (arguing that CBAs lack enforceability due to lack of standing for community members, legal uncertainties regarding future parties, and vague provisions); Fazio & Wallace, *supra* note 47, at 553–54 (questioning standing and successorship and arguing that CBAs need to go further to govern enforcement and monitoring).

49. *See* Gross, *supra* note 1, at 193 (noting that observers have raised this question and hypothesizing that "the persistence of this concern stems from the novelty of the real-world bargain made by the parties"); Lavine, *supra* note 29 ("This bargain can at times seem lopsided, given the relative monetary worth of these promises, and for this reason, the question has been raised whether CBAs are supported by adequate consideration.").

50. *See* RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981) ("(1) To constitute consideration, a performance or a return promise must be bargained for.

developer includes most of the substantive terms that encompass the nature of the agreement as one that provides benefits to a community: affordable housing requirements, hiring provisions, environmental covenants, and other terms negotiated by the parties.[51]

The more contentious part of the bargain is the consideration provided by the community organizations, which is typically an agreement to not bring a lawsuit preventing the development, to publicly support the development, or simply to not publicly disparage the development.[52] The major concern is that community organizations are not actually giving something up to take part in these agreements, and the agreements solely benefit those organizations. William Valletta, the former City Planning Commission general counsel of New York City, said of the Atlantic Yards CBA at a town hall event: "What is the community giving up in order to take part in the agreement? Presumably, they can't sell their vote or their participation in democracy."[53] This argument is likely getting at the fact that, most commonly, community organizations exchange a promise to speak positively about the projects in city meetings or to the press rather than exchanging money or particular services. This aspect of CBAs has not yet been litigated, but current law on consideration can be used to analyze common CBA provisions regarding community organization promises and whether or not they are likely to be adequate consideration.

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(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation. (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.").

51. *See* CMTY. BENEFITS L. CTR., *supra* note 11, at 7 (discussing typical terms of effective CBAs).

52. Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 36, 46 (2007).

53. Lavine, *supra* note 29 (citing Matthew Schuerman, *The C.B.A. at Atlantic Yards: But Is It Legal?*, OBSERVER (Mar. 14, 2006), https://observer.com/2006/03/the-cba-at-atlantic-yards-but-is-it-legal [https://perma.cc/L9DT-VAQY]); *see also* Naved Sheikh, *Community Benefits Agreements: Can Private Contracts Replace Public Responsibility?*, 18 CORNELL J.L. & PUB. POL'Y 223, 233 (2008) ("[Legal experts] doubt that the promise given by community groups to give up their democratic right to object or by their members to give up their right as citizens to vote against a project constitutes a valid promise at all.").

B. Successors and Delegation of Duty

Another open issue about CBA enforceability is what happens once the original developer inevitably sells or leases part of the development property. Practitioners in the CBA space have addressed the fact that a successor or delegee in a CBA could have a number of different legal treatments and responsibilities,[54] and that absent specific contractual language outlining these legal relationships, courts will have to decide whether the agreements within the contract will carry with the land or if they were specific to the original developer party to the agreement.[55]

This Note will address the contractual language that could lead to a variety of different legal treatments. Successors in interest may assume the entirety of the obligations under the agreement, they may have no obligations at all, or the developers may retain some obligations.

C. Third-Party Beneficiaries

Finally, this Note will address the legal questions presented by a third-party beneficiary analysis of CBAs. The direct parties to the agreement, the developer and signing community organizations, should have clear standing to enforce the CBA.[56] However, since the agreement purports to benefit the entire community, there is an argument that anyone who is part of the community may have standing to sue to enforce a CBA.[57] A beneficiary of a contract is someone who can fairly be interpreted to have a right to performance under the contract,[58] so individual community members could qualify. Part V will discuss whether this interpretation is possible and whether it is beneficial.

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54. Gross, *supra* note 1, at 194 ("From a legal perspective, some of these parties may be successors-in-interest, some may be assignees, some may be agents, and some may simply be parties to a relevant contractual relationship . . . .").

55. Lavine, *supra* note 29 (recommending contract language that clarifies how each business will be responsible under the CBA).

56. *Id.* at 4–5 (clarifying that while it is beneficial to have multiple community organizations sign the agreement to ensure its enforceability in case of dissolution, the agreement should be enforceable by any signing party).

57. *Id.* at 4.

58. *See* RESTATEMENT (SECOND) OF CONTS. § 302 (AM. L. INST. 1981) ("(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.").

One commentator has pointed out that there is some authority that is not directly on point in this area but can be used as an analogy to show that community members would have standing in court to enforce a CBA.[59] In the highlighted cases, the Oregon Court of Appeals found that members of a homeowners association had standing to enforce an agreement regarding road improvements between a developer and the county, and the Supreme Court of Appeals of West Virginia held that employees had standing to enforce lunch break requirements promised under a collective bargaining agreement since the agreement was meant to protect the employees.[60] Similarly, CBAs often include provisions that have the purpose of directly benefitting individual community members rather than the community more generally, so those individuals may have standing to bring a claim to enforce agreements.[61]

The Partnership for Working Families, a national network of economic-focused organizations, maintains a list of CBAs currently in effect.[62] This list includes links to fifteen CBAs[63] which were used to provide the information about common contract terms in Parts III–V of this Note.[64]

III. Community Benefits Agreements Likely to Contain Adequate Consideration

A. Common Terms

Terms describing consideration have the most variation within example contracts, perhaps because they may be tailored to the size and abilities of the community groups or coalitions involved in the CBA. Some provisions are very comprehensive, and several elements are common on their own or as a group of requirements:

59. Lavine, *supra* note 29.

60. *Id.*

61. *Id.* ("[A] local job applicant would have a better chance of demonstrating standing to sue if the employer failed to honor a local hiring provision in a CBA than would a neighborhood resident seeking enforcement of a CBA provision with more dispersed beneficiaries, such as a requirement to build a park.").

62. *Policy & Tools: Community Benefits Agreements and Policies in Effect*, *supra* note 18.

63. Though this list contains information about 19 CBAs, only 15 of the CBAs on the list have a valid link to their specific CBA language. Therefore, this Note analyzes the language of those 15 CBAs.

64. To collect information to inform Parts III–V of this Note, I analyzed the terms of each CBA related to consideration, successors and assigns, and third-party beneficiaries. I categorized the relevant terms to create groups of terms, and these groups are analyzed collectively in Parts III–V.

letters of support and testimony, public comment requirements, agreements not to sue, and implementation committees.

The Bayview Hunters Point CBA requires that the community organizations send a letter of support to any public body requested by the Developer, and it has an example of the language required in the letter:

> This letter states [Organization's] support of the integrated development of the Hunters Point Shipyard and Candlestick Point . . . . We are proud to join with so many community-based organizations and leaders . . . in support of this Project . . . . [Organization] and the other community-based organizations that signed the CBA believe that the Project provides strong, enforceable commitments on issues of major importance to the community. [Organization] therefore urges the developer, the City and County of San Francisco, the San Francisco Redevelopment Agency, and all community members to resolve all issues in a way that . . . allows this important project to be built in a financially feasible manner.[65]

The same CBA also requires testimony to the Redevelopment Agency of San Francisco or the city's Board of Supervisors, or other hearings upon request: "If requested by Developer in writing with at least five days' notice, at least one Lead Organization shall send at least one representative knowledgeable about the Project to speak in support of the Project . . . ."[66]

Some CBAs limit the ability of the community organizations to speak publicly about the project. For example, the Marlton Square CBA requires the following:

> From and after the date of mutual execution of this CBP, the Coalition shall not make statements in the media, in public forums, to public officials or their staffs, or to community groups or other organizations, opposing land sales or approvals related to the Marlton Square Development Project. Notwithstanding the above, the Coalition may publicly support the inclusion of this CBP into a Development Agreement.[67]

Almost every agreement provides for the creation of an implementation committee, tasked with meeting on a regular basis to review plans and progress. The terms of these types of conditions

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65. Core Community Benefits Agreement: Hunters Point Shipyard/Candlestick Point Integrated Development Project, Attachment B Support Letter (effective May 30, 2008) [hereinafter Bayview Hunters Point CBA], *available at* https://www.forworkingfamilies.org/sites/default/files/documents/BayviewHuntersPointCBA.pdf [https://perma.cc/5NSW-UHXU].

66. *Id.* at 14.

67. Marlton Square Redevelopment Project Developer Community Benefits Program, 11 (effective 2002) [hereinafter Marlton Square CBA], *available at* https://www.forworkingfamilies.org/sites/default/files/documents/cba_marltonsquare.pdf [https://perma.cc/Y3BD-XEQ6].

vary from agreement to agreement, but the Staples Center CBA provides an example of common language:

> To assist with implementation of this Community Benefits Program, address environmental concerns and facilitate an ongoing dialogue between the Coalition and the Developer, the Coalition and the Developer shall establish a working group of representatives of the Coalition and the Developer, known as the Advisory Committee. This Advisory Committee shall meet quarterly, unless it is mutually agreed that less frequent meetings are appropriate. Among other issues, the Developer shall seek the input of the Advisory Committee in the Developer's preparation of the construction management plan, the traffic management plan, the waste management plan and the neighborhood traffic protection plan. In addition, the Developer shall seek the input of the Advisory Committee in a [sic] effort to develop and implement potential solutions to other environmental concerns, including without limitation, pedestrian safety, air quality and green building principles.[68]

Finally, provisions that limit the ability of community organizations to sue, or that require withdrawal of pending claims, also appear in agreements as exemplified in the Hill District CBA:

> The Coalition will (i) cause the Notice of Appeal to be discontinued and dismissed with prejudice, and (ii) cause all other Appellants to the Notice of Appeal to discontinue and dismiss same with prejudice . . . . The Releasing Parties hereby knowingly, irrevocably and unconditionally waive, and are hereby deemed to have waived, any and all Released Claims that may arise or relate to the acts or obligations of the Released Parties prior to the date of this Agreement that do not come to the actual attention of the Releasing Parties until after the date of this Agreement, unless concealed by one or more of the Released Parties . . . . This Release and Waiver of Claims shall also constitute a covenant not to sue in the future by the Coalition or any of the other Releasing Parties, or anyone acting on their behalf or for their benefit, as to any matter that would come within the definition of a Released Claim.[69]

These terms, along with a situation in which no potential consideration is addressed in a CBA, are analyzed in the following section.

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68. Community Benefits Program for the Los Angeles Sports and Entertainment District Project, A-13 (effective May 2001), *available at* https://www.forworkingfamilies.org/sites/default/files/documents/StaplesCBA.pdf [https://perma.cc/9MHD-FDRL].

69. In this CBA, "Released Claims" include actions of public officials related to the development. Hill District Community Benefits Agreement, 14–15 (effective Aug. 19, 2008) [hereinafter Hill District CBA], *available at* https://www.forworkingfamilies.org/sites/default/files/documents/HillDistrictCBA.pdf [https://perma.cc/MME8-2KVM].

B. Analysis of Terms

1. Letters of Support and Testimony; Public Comments

These forms of consideration are analyzed together because they involve affirmative actions on the part of the community organization.[70] The main enforceability question for these promises is whether they are adequate in comparison with the consideration provided by developers in CBAs.[71] It is common for CBAs to include several pages of promises that the developer makes, often requiring significant time or money, while only providing for one or two paragraphs of community organization requirements. For example, the Bayview Hunters Point CBA referenced above, which includes one of the more comprehensive descriptions of community organization obligations, still appears to be imbalanced—the contract contains provisions about affordable housing, workforce development, and employment, which all require significant investment from the developer.[72] Though the community organization does have obligations, the time and energy required is likely to be far less.

Several sections of the Second Restatement of Contracts are relevant here. First, Section 72 states that "any performance which is bargained for is consideration."[73] The comments clarify that the consideration does not have to have an equal economic value to the promise, but rather things like duress or undue influence may make consideration invalid.[74] This is unlikely to be an issue because of the sophisticated bargaining position of most developers. Based on the basics outlined in this section of the Restatement, the exchange present in most CBAs for public support in exchange for CBA promises would appear to be valid.[75]

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70. Lavine, *supra* note 29 (asserting that CBAs that impose affirmative obligations should be more likely to have adequate consideration).

71. Several commentators have raised the question of adequacy of consideration. *See supra* discussion accompanying note 49.

72. Bayview Hunters Point CBA, *supra* note 65.

73. RESTATEMENT (SECOND) OF CONTS. § 72 (AM. L. INST. 1981). Many courts have affirmed this principle; *see, e.g.*, Design Benefit Plans v. Enright, 940 F. Supp. 200, 206 (N.D. Ill. 1996) (asserting that the parties likely could not bring a lack of consideration argument because of the "broad definition of consideration" in §§ 71 and 72); Hawkeye Commodity Promotions, Inc. v. Miller, 432 F. Supp. 2d 822, 845 (N.D. Iowa 2006) (affirming the principle in Restatement Section 72, and finding that even if defendants had raised a consideration concern, it would not have impacted enforceability).

74. RESTATEMENT (SECOND) OF CONTS. § 72 cmt. d (AM. L. INST. 1981).

75. CBA expert Julian Gross adopts this argument and begins and ends his

Section 79 of the Restatement addresses adequacy of consideration, which is also relevant in this analysis.[76] First, it is important that the Restatement notes that courts ordinarily do not inquire as to the adequacy of the consideration because of the fact that parties often assign their own values to the deal, and many promises are in fact intangible and difficult to place in terms of market value.[77] The promises of community organizations in CBAs certainly fall under this category because it is hard to put a price on the value of public testimony, and it will vary in every individual case. For example, if the community organization testimony is essential to gaining a building permit, that may be invaluable to a developer. If, however, the development is likely to be approved regardless, the testimony may be less important. For this reason, Restatement Section 79 is important because it emphasizes the fact that the parties assign value to the consideration, not the courts, and in this case that would weigh in favor of enforceability.

Finally, Section 80 of the Restatement clarifies that "two or more promises may be binding even though made for the price of one" as long as the one promise is adequate consideration.[78] Since the community organizations' promises to act are likely to be considered adequate consideration, the fact that one of these actions may be promised in exchange for several actions on the part of the developer would not render the consideration invalid.

Overall, though there is potentially an imbalance in the consideration provided between parties, the consideration if bargained for should be considered as valid. So, in CBAs which

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analysis of consideration in the CBA context with the principle that consideration is valid if bargained for, so this should not be a barrier to CBA enforcement. Gross, *supra* note 1, at 191.

76. RESTATEMENT (SECOND) OF CONTS. § 79 (AM. L. INST. 1981) ("If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) 'mutuality of obligation.'"); *see also* Rosenbaum v. DataCom Sys., No. 13 Civ. 5484 (PKC), 2014 U.S. Dist. LEXIS 18730, at *17 (S.D.N.Y. Feb. 13, 2014) (dismissing the argument that one party did not provide "full consideration" to the other and finding consideration existed even when the value of the exchange was mismatched).

77. RESTATEMENT (SECOND) OF CONTS. § 79, cmt. c (AM. L. INST. 1981) ("To the extent that the apportionment of productive energy and product in the economy are left to private action, the parties to transactions are free to fix their own valuations . . . . [I]n many situations there is no reliable external standard of value, or the general standard is inappropriate to the precise circumstances of the parties . . . . Ordinarily, therefore, courts do not inquire into the adequacy of consideration. This is particularly so when one or both of the values exchanged are uncertain or difficult to measure. But it is also applied even when it is clear that the transaction is a mixture of bargain and gift.").

78. RESTATEMENT (SECOND) OF CONTS. § 80 cmt. a (AM. L. INST. 1981).

provide that community organizations must publicly support the project in one or more of a variety of ways, consideration is not likely to be an enforceability issue.[79]

2. Implementation Committees

Many CBA agreements provide for the creation of implementation committees, which meet regularly to assess the progress of the CBA terms. Even in CBAs with no other provisions for consideration, these agreements very often still provide for an implementation committee, so the question is whether a community organization is providing adequate consideration by agreeing to serve on one of these committees.

Though the terms analyzed in the prior section can be described as promises, the Restatement provides that an act other than a promise can be consideration.[80] In this case, the act by the community organization would be the time, energy, and effort spent preparing for and attending community meetings.[81] The above analysis about adequacy of consideration applies here as well; typically, the parties and not a court would determine whether consideration is adequate, and the sophistication of the developer is likely enough to preclude any finding that CBA agreements providing for implementation committees lack consideration.

3. Agreements Not to Sue

Only two CBAs included an agreement not to sue.[82] In most cases, this provision would be recognized as a promise to forbear rather than to act.[83] The community organization is agreeing to not

79. Critics of CBA enforceability have also raised the issue that individuals cannot provide their participation in democracy as consideration. *See* discussion at *supra* note 53. The analysis of adequacy and validity of consideration applies to this criticism as well. As long as the consideration is bargained for and freely given, courts will typically not inquire as to the adequacy of that consideration, and it should be considered to be valid.

80. RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981) ("(3) The performance may consist of (a) an act other than a promise . . . .").

81. The Restatement is clear, and case law confirms, that performance can be consideration. *See id*.; *see also* Dr.'s Assocs. v. Alemayehu, 934 F.3d 245, 253 (2d Cir. 2019) (finding that consideration was adequate by adopting the performance standard outlined in § 71).

82. Hill District CBA, *supra* note 69, at 4; Ballpark Village Project Community Benefits Agreement, 14 (effective Sept. 17, 2005) [hereinafter Ballpark Village CBA], *available at* https://www.forworkingfamilies.org/sites/default/files/documents/Ballpark%20CBA.pdf [https://perma.cc/S3G5-687Y].

83. There are certain instances, such as in the Hill District CBA, *supra* note 69, at 14–15, where the community organization agrees to withdraw claims currently

bring a claim against the developer in exchange for the developer's various promises. So, the first issue is whether forbearance is valid consideration; the Restatement makes it clear that it is.[84] The more complex question was raised by CBA scholar Amy Lavine: a potential claim must actually be valid in order for forbearance in this situation to be valid consideration.[85] Restatement Section 74 clarifies that forbearance to assert an invalid claim is not consideration unless the claim is doubtful, or the party reasonably believes the claim is valid.[86] So, the question of consequence is whether the potential claims brought by a community organization would be valid.

This question can be answered by examining past lawsuits brought by community organizations or activists against developers. It is important to note that both of the analyzed agreements that included this term also prevent community organizations from taking action against local governments related to the development and its approval.[87] With this issue specifically, lawsuits are not infrequent. One organization in Los Angeles, California, sued the city, saying that a new development violated its municipal code.[88] A California group called CaRLA frequently sues cities over planned developments, particularly those not compliant with housing laws or zoning standards.[89] At least one of CaRLA's cases resulted in a legal victory, three cases settled, and several are ongoing but have gained legal victories along the way.[90] CaRLA's advocacy demonstrates that community groups likely have standing to sue cities in matters related to developments, at least in some cases, and that they will do so. There certainly are

outstanding. In this case, withdrawing the claim might be an action. However, in cases where litigation is not underway, this term would be forbearance rather than action.

84. RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981) ("(1) To constitute consideration, a performance or a return promise must be bargained for . . . .(3) The performance may consist of . . . (b) a forbearance.").

85. Lavine, *supra* note 29.

86. *See* RESTATEMENT (SECOND) OF CONTS. § 74 (AM. L. INST. 1981); *see also* Lavine, *supra* note 29; Hakim v. Payco-Gen. Am. Credits, Inc., 272 F.3d 932, 935–36 (7th Cir. 2001) ("Even if, in hindsight, the legal claim was improbable or nonexistent, 'it would be enough if at the time of [agreement] [the party] believed in good faith it was vulnerable to a claim by [the other party.]'").

87. Hill District CBA, *supra* note 69; Ballpark Village CBA, *supra* note 82.

88. CCED Chinatown, *Chinatown Fights Market-Rate Development*, KNOCK LA (May 20, 2019), https://knock-la.com/chinatown-fights-market-rate-development-dd909d79a73a [https://perma.cc/J62B-SPDB].

89. CARLA, https://carlaef.org/ [https://perma.cc/DE8W-DXN6].

90. CARLA, *Our Work*, https://carlaef.org/about-us/our-work/ [https://perma.cc/5LD5-H6RZ].

valid claims that community organizations could bring, so agreeing to forbear from any related claims appears to be valid consideration.

Overall, as long as the agreement purports to waive claims that would otherwise be valid, agreements not to sue are a legitimate form of consideration.

4. No Explicit Terms

Of the analyzed contracts, only two lacked a provision about community organization obligations and creation of an implementation committee.[91] In these cases, the contracts outline several obligations for the developer, omitting obligations for the community organization. The question here is whether the agreement can still be seen to be supported by consideration.

Restatement Section 71 says that "the creation, modification, or destruction of a legal relation" can be a performance that constitutes consideration.[92] So, the mere fact that the parties are entering into a contract together could be sufficient consideration, even though in this situation, the relative worth of the consideration may be even more imbalanced than in prior analysis of CBA terms. Restatement Section 79 also adds that courts will not ordinarily inquire into an imbalanced exchange "when it is clear that the transaction is a mixture of bargain and gift."[93] It is possible that CBAs with no clear community organization obligations could be viewed as a partial gift that will bring goodwill to the community. Further, even if the community organization has no formal obligations under the agreement, the developer can use the organization's credibility in the community to emphasize to community members that the developer should be seen positively and does have formal support from community groups. This credibility alone is arguably a benefit to the developer, even without more from the community organization.

Overall, it is likely that even in the case of no explicit consideration terms, a CBA would not be unenforceable for lack of consideration.

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91. Community Benefits Program Lorenzo Project (effective Feb. 2011) [hereinafter Lorenzo Palmer CBA], *available at* https://www.forworkingfamilies.org/sites/default/files/resources/Web_LorenzoPalmer%20CBP.pdf [https://perma.cc/ZDF2-PLED]; Operations Jobs Policy Oakland Army Base Project West Gateway (effective Oct. 11, 2012), https://www.forworkingfamilies.org/sites/default/files/documents/OABWestGateway.pdf [https://perma.cc/WP4J-8RD2].

92. RESTATEMENT (SECOND) OF CONTS. § 71(3)(c) (AM. L. INST. 1981).

93. RESTATEMENT (SECOND) OF CONTS. § 79 cmt. c (AM. L. INST. 1981).

IV. Successors and Delegation of Duty Greatly Depend on Contractual Language

A. Common Terms

Of the three terms in CBAs most subject to enforceability critiques, a term regarding successors and delegation of duties was the most likely to be included in contracts. Of the fifteen contracts analyzed, only one was silent about the treatment of successors and assigns.[94] The remainder of the agreements included terms that either contain detailed definitions of successors and delegation of duty, or brief boilerplate language.

The Ballpark Village CBA, a retail and housing development near the San Diego Padres stadium in San Diego, California, contains some of the most detailed language defining successors and assigns:

> This Agreement shall be binding upon and inure to the benefit of ACCORD, Member Organizations, ACCORD's Successors, and Successors to any Successors of ACCORD . . . Developer's Successors include, but are not limited to, any party who obtains an Interest, vertical developers, retail developers, contractors, management companies, and owners' or retail merchants' associations participating in the Project. Upon conveyance of an Interest to an entity in compliance with Section 9.4, ACCORD may enforce the obligations under this Agreement with respect to that Interest only against such entity, and neither Developer nor any owner of a different Interest shall be liable for any breach of such obligations by such entity or its Successors. Except as otherwise indicated in this Section 9.3, references in this Agreement to a party shall be deemed to apply to any successor in interest, transferee, assign, agent, representative, of that party.[95]

In addition to this language, the contract includes terms for which the developer will continue to be liable, even upon transfer or assign, including affordable housing, funding for an economic impact study, and funding for arts and culture.[96]

Many more agreements contained language that can be described as "boilerplate" and addresses successors and assigns very generally. For example, a CBA for the new Milwaukee Bucks basketball stadium in Milwaukee, Wisconsin, simply provides: "The

94. *See* Lorenzo Palmer CBA, *supra* note 91.
95. Ballpark Village CBA, *supra* note 82.
96. *Id.*

Developer agrees that the terms of this agreement shall be applicable to any successor, assignee or transferee of Developer."[97]

Most contracts contained similar language. Some contracts also included language that all covenants run with the land.[98]

B. Analysis of Terms

1. Detailed Definitions of Successors and Assigns, Boilerplate Language, and Obligations Running with the Land

Many contracts address whether obligations can be delegated by the developers in CBAs; several contracts contained a very detailed definition of successors and assigns, while others included boilerplate language or a few specific terms. These variations are analyzed together because in all cases, the language of the contract is likely to guide the way each contract will be specifically enforced.

Restatement Section 318 says that in general, delegation of duty is allowed unless it is against public policy or if the party has a "substantial interest" in the original party's performance of the duty.[99] The Restatement also allows the parties to discharge the duties of the obligor with contractual language.[100] An exception is when duties involve personal services or the exercise of skill and discretion.[101]

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97. Agreement between Milwaukee Bucks LLC and the Alliance for Good Jobs (effective May 12, 2016), *available at* https://www.forworkingfamilies.org/sites/default/files/resources/Bucks-AfGJ%20Agreement.pdf [https://perma.cc/F9GC-GJ37].

98. *See, e.g.*, Hollywood and Vine Mixed-Use Development Project Community Benefits Agreement (effective Apr. 2004) [hereinafter Hollywood and Vine CBA], *available at* https://www.forworkingfamilies.org/sites/default/files/documents/CBA GatehouseFINAL5-7-04.pdf [https://perma.cc/CYK7-ZE2T] ("The provisions of this Agreement are covenants that run with the land and bind all grantees, lessees or other transferees thereto for the benefit of and in favor of the City, the CRA and the Coalition.").

99. RESTATEMENT (SECOND) OF CONTS. § 318 (AM. L. INST. 1981).

100. *See* RESTATEMENT (SECOND) OF CONTS. § 323 (AM. L. INST. 1981) (holding otherwise, the default is that the obligor is still liable; a "purported promise by a promisor 'and his assigns' does not mean that the promisor can terminate his duty by making an assignment, nor does it of itself show an assumption of duties by any assignee").

101. RESTATEMENT (SECOND) OF CONTS. § 318 (AM. L. INST. 1981); *see also* Dimario v. Flextronics Am., LLC, No. 09-058 ML, 2010 U.S. Dist. LEXIS 132230, at *9 (D.R.I. Dec. 14, 2010) (citing the Restatement and adding that delegation is not allowed when "anything other than personal performance would be unsatisfactory"); *see also* Proriver, Inc. v. Red River Grill, LLC, 83 F. Supp. 2d 42, 51 (D.D.C. 1999) (finding duties could be delegated to an assignee because no personal skill or discretion by the assignor was required to fulfill its obligation).

The critical question then becomes whether delegation of an agreement would violate public policy or otherwise involve special skill or discretion. There are a couple of examples in the analyzed CBAs that may not be able to be delegated for these reasons. In the Nashville Soccer CBA, one of the terms of the contract provides that the coaches and players of the local professional soccer team must visit elementary schools in the area.[102] This provision of the contract could likely not be delegated because it involves the special connection of the parties to the soccer team, which may not exist with a different party. However, the same agreement contains provisions about affordable housing and workforce development.[103] These provisions are more general and therefore could conceivably be executed by sublessors or other successors in interest.

So, in the absence of policy reasons not to enforce delegation, agreements with clear language addressing successors and assigns are likely to be enforceable and the duties could successfully be delegated to third parties. More detailed language can provide additional protection for the developer such as terminating its duty by making an assignment; this would likely not happen for a contract which only includes the boilerplate terms.[104] Covenants running with the land may be particularly important as well.[105] Overall, the language around delegation is likely to be enforced as written absent special circumstances; because of the importance of the drafting language, experts recommend that parties include terms that are as detailed as possible.[106] Julian Gross describes the "flow-down" problem of successors and assigns in a CBA agreement as the breaks in the contractual chain which can cause agreement terms to go unfulfilled.[107] Gross recommends detailed language to ensure that each party down the chain of successors is made fully aware of all obligations in order that the community groups are

102. Nashville Soccer CBA, *supra* note 34 ("The coaches, players and/or officials of the NSH MLS team shall visit, not less than eight (8) times per year, local elementary schools throughout Metro to promote good sportsmanship and character development, with at least two (2) visits to elementary schools located in Promise Zone communities.").

103. *Id.*

104. *See* RESTATEMENT (SECOND) OF CONTS. § 323 (AM. L. INST. 1981).

105. Lavine, *supra* note 29 (highlighting case law that implies that explicit covenants running with the land are critical to CBA enforcement).

106. GROSS ET AL., *supra* note 26, at 55; *see also* Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 326 (suggesting that CBAs should require that subsequent parties sign a similar agreement to ensure enforceability).

107. GROSS ET AL., *supra* note 26, at 71.

most seamlessly able to enforce CBA terms for any subsequent party controlling the land.[108]

2. No Explicit Terms

It is rare, but not unheard of, that a CBA does not address successors and assigns and is silent as to whether duties can be delegated.[109] If the developer wanted to delegate the duties under the contract to a successor in interest, and expressly did so, this would be clearly allowed under the Restatement.[110] However, this would most likely come up as an enforceability issue in the event that the developer sells or leases the land without any attempt to delegate its duties under the contract. In that case, the question is whether any successor in interest would be bound to the terms of the original contract. There is no provision for automatic delegation, so the most likely situation is that the developer would be in breach of the contract in this case.

V. Community Benefits Agreements May Enable Third Party Beneficiary Claims

A. Common Terms

It is not uncommon for a CBA to contain no provision about third party beneficiaries; many agreements are silent on this. The agreements that do address it will typically outline the intended third party beneficiaries—often a city or government—and provide that those parties have the power to enforce the agreement. An example of this language comes from the Marlton Square CBA:

> Intended Beneficiaries. The City, the Agency, and the Coalition are intended third-party beneficiaries of contracts and other agreements which incorporate this CBP, with regard to the terms and provisions of this CBP. The City, the Agency and the Coalition shall each independently have the right to enforce the provisions of this CBP against all parties incorporating this CBP into contracts or other agreements.[111]

One CBA, the Hill District CBA regarding a new arena for the Pittsburgh Penguins hockey team, contained a section titled "No

108. *Id.*

109. *See* Lorenzo Palmer CBA, *supra* note 91.

110. RESTATEMENT (SECOND) OF CONTS. § 318 cmt. d (AM. L. INST. 1981) ("An obligor is discharged by the substitution of a new obligor only if the contract so provides or if the obligee makes a binding manifestation of assent, forming a novation. See §§ 280, 328 and 329. Otherwise, the obligee retains his original right against the obligor, even though the obligor manifests an intention to substitute another obligor in his place and the other purports to assume the duty.").

111. Marlton Square CBA, *supra* note 67, at 9.

Third Party Rights": "Nothing in this Agreement shall be construed to create any third party rights or benefits under any existing or presently contemplated agreement between the SEA, the URA, the Penguins Entities or any of their respective affiliates . . . ."[112]

Aside from these two examples, it was by far most common in the analyzed agreements to see no provision regarding third party beneficiaries. The following section will analyze the impact of each of these drafting decisions on whether third parties may be able to bring a claim to enforce the CBA agreement in question.

B. Analysis of Terms

1. Intended Third-Party Beneficiaries

Some contracts explicitly name third party beneficiaries, but none of the examined contracts listed general community members as beneficiaries. This applies to three of the contracts analyzed in this Note.[113] The question is whether the failure to include these third parties in the list of intended beneficiaries would mean that they are excluded and cannot have a right to enforce the agreement.

Though the Restatement is clear that a party does not have to be explicitly included in order to have rights,[114] whether a third party can enforce a CBA may differ by state. A Fifth Circuit decision provided that Texas law did not allow treatment of someone as a third party when the contract explicitly included other parties but excluded the party in question.[115] Other courts have not addressed this specific question, but the Texas decision is indicative that the failure to include a particular group in a list of intended beneficiaries could be evidence that they are not in fact intended beneficiaries.

Overall, the exclusion of community members may prohibit them from being able to enforce agreements. However, the limited availability of claims to community members may actually be advantageous in the long run. If developers are subject to claims

112. Hill District CBA, *supra* note 69, at 5.

113. Sunquest Industrial Park Project Community Benefits Plan (effective Oct. 25, 2001), *available at* https://www.forworkingfamilies.org/sites/default/files/documents/SunquestIndustrialParkProject.pdf [https://perma.cc/V9RX-MUDA]; Hollywood and Vine CBA, *supra* note 98; Marlton Square CBA, *supra* note 67.

114. RESTATEMENT (SECOND) OF CONTS. § 308 (AM. L. INST. 1981).

115. *See* Goldberg v. R.J. Longo Constr. Co., 54 F.3d 243, 247 (5th Cir. 1995) (citations omitted) (holding that "Longo's claim to be a creditor beneficiary of the agreement does not automatically fail simply because the agreement does not so identify Longo. This agreement, however, identifies its intended beneficiaries explicitly in paragraph 4 and Longo is not among them").

from hundreds or thousands of individuals, they may be less likely to enter into CBAs in the first place. Limiting the group of people who can enforce the agreement is not a surprising contractual term, nor is it necessarily negative for CBAs overall.

2. Disclaimer of Third-Party Beneficiaries

Just one contract claimed that no third parties shall have rights under the agreement.[116] The question is whether parties are able to contract away third-party beneficiaries.

This question is straightforward under the Restatement. Restatement Section 302 outlines who is defined as an intended beneficiary, but the provision starts with "[u]nless otherwise agreed between promisor and promisee."[117] It is clear that, in the case where a contract explicitly says there are no third-party rights, it will be difficult to argue that there are.

3. No Explicit Terms

Many contracts had no specific terms regarding third party rights.[118] In the case of no specific terms, the question is whether community members or other third parties are intended beneficiaries, thus giving them the right to enforce the contracts, or simply incidental beneficiaries with no right to enforcement.[119] There is some case law in different contexts, such as homeowners enforcing a homeowners' association agreement, which has been suggested to be analogous to this situation, that finds third party beneficiaries do have the right to enforce this type of agreement.[120]

In addition, the Restatement (Second) of Contracts provides further guidance. A party does not have to be explicitly recognized in the contract to be an intended beneficiary.[121] Generally, a party is intended if "recognition of a right to performance in the

116. *See* Hill District CBA, *supra* note 69.

117. RESTATEMENT (SECOND) OF CONTS. § 302 (AM. L. INST. 1981).

118. This is somewhat unexpected given the assumption that developers would want to limit claims from third parties when possible. This is particularly notable since the answer to whether a community member can enforce a CBA is not clear, and there is a high likelihood that enforceability will depend on the particular situation and framing of the agreement. It is possible that not including this term was negotiated by community organizations, or that developers were confident that third party claims would be excluded.

119. *See* RESTATEMENT (SECOND) OF CONTS. § 304 (AM. L. INST. 1981) (providing that intended beneficiaries may enforce duties); RESTATEMENT (SECOND) OF CONTS. § 315 (AM. L. INST. 1981) (providing that an incidental beneficiary cannot enforce duties).

120. *See supra* discussion accompanying notes 59–60.

121. RESTATEMENT (SECOND) OF CONTS. § 308 (AM. L. INST. 1981).

beneficiary is appropriate to effectuate the intention of the parties" and either the performance will satisfy an obligation to pay money, or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."[122] Two Restatement illustrations under Section 302 are helpful here. See Illustration 10:

> A, the operator of a chicken processing and fertilizer plant, contracts with B, a municipality, to use B's sewage system. With the purpose of preventing harm to landowners downstream from its system, B obtains from A a promise to remove specified types of waste from its deposits into the system. C, a downstream landowner, is an intended beneficiary under Subsection (1)(b).[123]

This illustration is similar to the promises contained within a CBA. Many promises have the primary purpose of protecting community members as future employees of the developer, or providing a more general benefit such as a community center or other investment. One difference between this illustration and a CBA is that the group of intended beneficiaries is relatively finite; it applies to "landowners downstream" of the plant. In contrast, CBA agreements may intend to benefit an entire community, which may be more difficult to define—it may be hard to determine whether the agreement covers a specific neighborhood, an entire city, or if there is some other measure of "community."

Illustration 14 is also helpful: "A, a labor union, enters into a collective bargaining agreement with B, an employer, in which B promises not to discriminate against any employee because of his membership in A. All B's employees who are members of A are intended beneficiaries of the promise."[124] The biggest difference between this illustration and a CBA, similar to the issue with Illustration 10, is that with a labor union, all of the employees are actually members of the labor union and therefore have a clearer reason to be considered as intended beneficiaries.[125] Most community organizations creating CBAs represent the community more generally, as discussed in the above paragraph.

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122. RESTATEMENT (SECOND) OF CONTS. § 302 (AM. L. INST. 1981).

123. RESTATEMENT (SECOND) OF CONTS. § 302 cmt. d, illus. 10 (AM. L. INST. 1981).

124. RESTATEMENT (SECOND) OF CONTS. § 302 cmt. d, illus. 14 (AM. L. INST. 1981).

125. *See* Lavine, *supra* note 29 (describing cases of labor unions and homeowners' associations where employees and homeowners, respectively, were found to be third parties of agreements).

The purpose of Community Benefits Agreements is to benefit communities.[126] There is no question that the terms in these agreements were crafted to provide a benefit to the future employees and residents of the area surrounding a particular development. However, what differentiates CBAs from the Restatement illustrations and prior case law is how finite and definable the group is, and that is likely to be the argument against enforcement of CBAs by third parties.[127] CBA scholars Amy Lavine and Patricia Salkin also raise the question of "whether CBAs are intended to benefit individual persons, or whether they are intended to benefit the community at large."[128]

Depending on the agreement, it is very possible that the community in question could be adequately finite and defined. Describing the impacted "community" specifically may be helpful in the event a third-party community member hopes to bring a claim to enforce a CBA. Some CBAs do define community, or they reference a specific geographic area in the contract.[129] In such agreements, there is a strong argument based on the Restatement that third parties could bring a claim. Community members attempting to enforce CBAs as third-party beneficiaries would also have to argue that the agreements were meant to benefit individuals in the community, rather than the community as a whole. These individuals could point to provisions such as wage requirements, affordable housing provisions, and job training programs that are expressly targeted toward individual community members. An agreement that contains many of these terms, as opposed to terms focused on community spaces or development funds, may be easier for a third-party community member to enforce.[130]

Though courts have not decided on the question of third-party community members enforcing a CBA,[131] those individuals may

126. *See, e.g.*, Gross, *supra* note 1, at 216; Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 292.

127. *See, e.g.*, Gurgol, *supra* note 3, at 493 ("Critics recognizing CBAs solely as private contracts between developers and community interest groups aver community members from the community at large will not be able to challenge the CBA as a contract because the community is not an intended third-party beneficiary.").

128. Salkin & Lavine, *Understanding CBAs*, *supra* note 2, at 326.

129. *See, e.g.*, Nashville Soccer CBA, *supra* note 34 ("This Nashville MLS Soccer Community Benefits Agreement ('Soccer CBA') is made and executed . . . for the benefit of the residents of Metropolitan Nashville and Davidson County . . . .").

130. *See also* discussion at *supra* note 61.

131. This issue was raised, but not ultimately addressed, in litigation surrounding

have strong arguments that they were intended third-party beneficiaries under Restatement law. Ultimately, the particular terms of the agreement are likely to guide enforcement.

Conclusion

Overall, whether an individual Community Benefits Agreement will be enforceable depends on both the individual contract language and state law to which the agreement is subject. However, an analysis of common contractual terms and legal principles shows that, generally, Community Benefits Agreements should be seen as enforceable when executed. The test for consideration is typically not a high standard, and the various common CBA provisions are likely to meet that standard. In addition, in most cases, obligations will run to any sublessors, subsequent developers, or other parties who take an ownership interest in the land from the initial developer, based on the inclusion of that language. Finally, there may be the possibility that third-party community members could enforce CBAs.

Though the decision about whether to implement a CBA should depend on a particular location and project, these contracts will likely continue to be a valuable and enforceable tool for community organizations hoping to work with developers to make their projects responsible and community conscious.

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the Atlantic Yards CBA. Apple v. Atl. Yards Dev. Co., LLC, No. 11-CV-5550 JG JMA, 2012 WL 2309028, at *4 (E.D.N.Y. June 18, 2012) ("This argument [that Plaintiffs were not intended beneficiaries] fails because the Plaintiffs' promissory estoppel claim is not based on any promises made in the CBA, but rather on alleged oral promises that PATP participants would receive jobs and union membership.").

An Opportunity to Learn: Engaging in the Praxis of School Finance Policy and Civil Rights

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Abstract

School finance disparity continues to pervade the schooling pipeline. Few solutions exist that reduce inequity across the United States, and research has contextualized the historical struggle for equity as existing in large part due to school funding policies that rely heavily on local level tax levies to support public schooling. Furthermore, race-based stratification that divides school districts, and thus divides school district funding, privileges higher income White districts over lower-income BIPOC districts. To address the persistent school finance disparity, in this Article we examine school finance research and litigation epistemology. We posit that resource availability is a civil right and argue that school funding equity is necessary to resolve challenges impacting BIPOC communities. Finally, we explore an opportunity-to-learn framework as a meaningful solution to mitigating disparity.

Introduction

Compulsory education in the United States has developed as one of the most integral parts of the nation's fabric, yet has aided in the creation of dividing lines between the wealthy and marginalized.[1] *Brown v. Board of Education* (1954) challenged the Supreme Court of the United States with re-interpreting the Fourteenth Amendment and revising severe racial tension present in the 1950s United States that separated students by race and provided less opportunity for educational attainment to minoritized

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1. Harry Brighouse & Adam Swift, *Putting Educational Equality in Its Place*, 3 EDUC. FIN. & POL'Y 444, 445–46 (2008).

communities.[2] In *Brown*, "separate but equal" as a proxy for racial educational equity never reconciled the historical and persistent persecution of Black, Indigenous, and People of Color (BIPOC)[3] students, prompting the Supreme Court of the United States to conclude "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[4] Yet, after the Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*, imbalanced allocation of school resources (e.g., number of teachers per pupil, student per-pupil expenditures, revenue generation through property, and facilities) through state systems of taxation, as well as state and district allocation patterns, would later prove more difficult to challenge in federal courts.[5] Nevertheless, *Brown* stands as a marker of civil rights resistance against the racial persecution of the United States and is continually relevant as advocates interrogate continued racial disparities in schooling and invoke the ethics of critique in the United States for social change in schooling.

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2. Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 276–82 (2006); Michael Heise, *State Constitutions, School Finance Litigation, and the Third Wave: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1153–54 (1995); Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 34, 40–41 (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen eds., 1999); *see generally* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994) (exploring the methodology of judicial decision-making in the most recent wave of school finance litigation); Deborah A. Verstegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. EDUC. FIN. 51 (1998) (analyzing historical school finance litigation to determine a bifurcated theory of adequacy); Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J. L. & EDUC. 167 (2002) (analyzing Vermont's controversial efforts to reform the state's education finance system).

3. Jazmen Moore & Django Paris, *Singing Counterstories to Imagine an Otherwise*, ENG. J., Mar. 2021, at 21, 22 ("[W]e use the acronym BIPOC . . . to name Black, Indigenous, and People of Color, recognizing the power of the acronym to signal the foundational relationships between Black and Indigenous/Native people within White supremacist, settler colonial constructions of race, enactments of racism, as well as to possible liberation for all people in the United States and other nation-states living out the legacies of land theft, genocide, and enslavement. We also recognize the ways 'POC' flattens the distinct, myriad experiences of other communities of color (e.g., Latinx, Asian, Pacific Islander), even as those memberships are not mutually exclusive from Blackness and Indigeneity. As well, we recognize that Blackness and Indigeneity are not mutually exclusive. Finally, BIPOC minimizes the importance of the distinct sovereign nations and Tribal communities collapsed under the terms *Indigenous* or *Native*.").

4. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

5. *See* Heise, *supra* note 2, at 1155–56; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

Now, sixty-seven years after *Brown*, full and unfettered access, participation, and inclusion of BIPOC communities in the P-20 pipeline go unrealized due to continued disparities grounded in socio-demographic conflict, including fiscal capacity and political priorities.[6] Furthermore, the belief that fair and equitable schooling is arguably not a human nor civil right has continued to lead the epistemic understanding of school finance policy and litigation, including those remedies which attempt to mitigate inequity.

School finance disparity continues to pervade the schooling pipeline, and few cogent solutions exist that reduce inequity across the United States. Law and policy research have both contextualized the historical struggle for equity as existing in large part due to school funding policies that rely heavily on local level tax levies to support public schooling.[7] Education funding formulae across the United States relies on a combination of three (federal, state, and local) major revenue sources to fund schools. Local sources are often a function of local property wealth and the tax levies assessed on property value.[8] Due to the reliance on local property values to fund schools, property poor districts are prevented from increasing or equalizing local property-based school revenue to the level of wealthier districts.[9] Concurrently, low

6. *See* Adam Gamoran, *American Schooling and Educational Inequality: A Forecast for the 21st Century*, 74 SOCIO. EDUC. 135, 142–45 (2001); Jeanne M. Powers, Gustavo E. Fischman & David C. Berliner, *Making the Visible Invisible: Willful Ignorance of Poverty and Social Inequalities in the Research-Policy Nexus*, 40 REV. RSCH. EDUC. 744, 754–55 (2016); JEAN ANYON, GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATION REFORM 20–38 (1997); SAMUEL BOWLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE 35–36 (1976) ("U.S. education is highly unequal, the chances of attaining much or little schooling being substantially dependent on one's race and parents' economic level.").

7. Lauren Nicole Gillespie, *The Fourth Wave of Educational Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989, 990 (2009).

8. Davíd G. Martínez, *Interrogating Social Justice Paradigms in School Finance Research and Litigation*, 52 INTERCHANGE 297, 300 (2021).

9. *Id.*; Gillespie, *supra* note 7; NAT'L ACAD. OF SCIS., EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 1 (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen eds., 1999); *see generally* LAWRENCE J. MILLER, MARGUERITE ROZA & CLAUDINE SWARTZ, A COST ALLOCATION MODEL FOR SHARED DISTRICT RESOURCES: A MEANS FOR COMPARING SPENDING ACROSS SCHOOLS (2004) (analyzing school district spending on shared resources using a cost allocation method); MARGUERITE ROZA, ALLOCATION ANATOMY: HOW DISTRICT POLICIES THAT DEPLOY RESOURCES CAN SUPPORT (OR UNDERMINE) DISTRICT REFORM STRATEGIES (2008) (discussing how the restrictions attached to public funding have a large impact on how those funds are allocated); MARGUERITE ROZA & PAUL T. HILL, HOW WITHIN-DISTRICT SPENDING INEQUITIES HELP SOME SCHOOLS TO FAIL (2004) (discussing school district differences in per-pupil spending that result in poor children getting less qualified teachers and poorer quality education).

property values mediate noticeable increases in school funding despite property tax increases in property poor districts.[10]

Adjudication stemming from how schools are funded through property tax levies have supported the thesis that property wealth leads to school funding inequities. The seminal case, *Serrano v. Priest (I)*, challenged California state school finance policy, problematizing how California met the Equal Protection Clause.[11] Arguments in *Serrano* asserted barriers to educational opportunity are exacerbated by local property tax wealth, and thus the program of instruction available to a student is correlated to the wealth inherent within a community and the fiscal capacity available to districts and schools that are a function of tax levies.[12] Similarly, *Rodriguez* plaintiffs claimed the local property tax-based system of funding schools violated the Fourteenth Amendment.[13] While historically *Serrano* and *Rodriguez* serve as examples of property wealth-based funding inequity, these are less anomalous, and more artifacts of school funding inequity.[14] Newer evidence also suggests

10. Gillespie, *supra* note 7.

11. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

12. *Id.* at 1244; ARTHUR E. WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY 129–30 (1968) ("[V]ariation in expenditures per pupil or per classroom is systematically related to the wealth of the local community."); *see also* Paul D. Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227, 1231 (1973) ("In *Serrano v. Priest* a Chicano citizen complained that his children's schools were much less abundantly financed than those of the children in neighboring Beverly Hills.").

13. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4–6 (1973).

14. *See generally* Bruce D. Baker, *Balancing Equity for Students and Taxpayers: Evaluating School Finance Reform in Vermont*, 26 J. EDUC. FIN. 437 (2001) (analyzing state legislation implemented to resolve issues of taxpayer equity and disparities in per-pupil spending); Bruce D. Baker, *State Policy Influences on the Internal Allocation of School District Resources: Evidence from the Common Core Data*, 29 J. EDUC. FIN. 1 (2003) (comparing resource allocation patterns across states and school districts); Bruce D. Baker, *Within-District Resource Allocation and the Marginal Costs of Providing Equal Educational Opportunity: Evidence from Texas and Ohio*, EDUC. POL'Y ANALYSIS ARCHIVES, Feb. 2009, at 1 (exploring within-district fiscal resource allocation across Texas and Ohio); BRUCE D. BAKER, AMERICA'S MOST FINANCIALLY DISADVANTAGED SCHOOL DISTRICTS AND HOW THEY GOT THAT WAY: HOW STATE AND LOCAL GOVERNANCE CAUSES SCHOOL FUNDING DISPARITIES (2014) (examining a typology of conditions that have created or reinforced the disadvantages faced by the nation's poorest school districts); Bruce D. Baker & Robert Cotto Jr., *The Underfunding of Latinx-Serving School Districts*, 101 PHI DELTA KAPPAN 40 (2020) (discussing why school districts with large Latinx enrollments are often underfunded compared to other districts in their region);; Robert Berne & Leanne Stiefel, *Measuring Equity at the School Level: The Finance Perspective*, 16 EDUC. EVALUATION & POL'Y ANALYSIS 405 (1994) (exploring conceptual, methodological, and empirical issues in school resource allocation); NAT'L ACAD. OF SCIS., *supra* note 9, at 3 (examining the "history and current status of efforts to foster fairness in educational finance systems," as well as the barriers these efforts face); Patrice Iatarola & Leanne Stiefel, *Intradistrict Equity of Public*

school funding inequity is racialized, impacting BIPOC communities.[15]

A national 2019 report by EdBuild articulated the severity of school funding inequity across the country. The report stated that across the United States, there exists a $23 billion gap between majority White and majority BIPOC school districts despite serving the same number of students.[16] Furthermore, the report goes on to state that inequity is intensified due to the race-based stratification that divides school districts, and thus divides school district funding, privileging higher income White districts over lower-income BIPOC districts.[17] Baker, Srikanth, Cotto Jr., and Green studied high-percentage LatinX districts and found that 100% LatinX districts were 2.5 times more likely to be financially constrained when compared to districts that are 0% LatinX.[18] Martínez, Begay, and Jiménez-Castellanos found that districts serving higher percentages of Indigenous students had lower local and state revenue than those districts servings lower percentages of Indigenous students.[19] Even when accounting for compensatory funding expenditures, in a study of English learners (EL) in Arizona, Martínez and Spikes discovered that districts serving a higher percentage of ELs had lower EL expenditures than those districts serving lower percentages of ELs.[20] Sosina and Weathers established that racial/ethnic segregation is associated with

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Education Resources and Performance, 22 ECON. EDUC. REV. 69 (2003) (presenting empirical evidence about input and output equity on resources, expenditures, and performance in New York City schools); Davíd G. Martínez, Oscar Jiménez-Castellanos & Victor H. Begay, *Understanding Navajo K-12 Public School Finance in Arizona Through Tribal Critical Theory*, TCHRS. COLL. REC., May 2019 (implicating policy as preventing improvement of educational outcomes by proxy of the fiscal revenue available to Navajo reservation schools); Davíd G. Martínez & Daniel D. Spikes, *Se Acabaron Las Palabras: A Post-Mortem Flores v. Arizona Disproportional Funding Analysis of Targeted English Learner Expenditures*, 13 EDUC. POL'Y 1 (2020) (discussing Arizona's implementation of policy that inhibits equity of opportunity for the English learner population); Martínez, *supra* note 8 (analyzing the methods used to conduct school finance research within the educational research community).

15. Erika Weathers, *Spending Disparities Between Districts Are Not Race Neutral*, STRATEGICDATAPROJECT (Mar. 18, 2021), https://sdp.cepr.harvard.edu/blog/spending-disparities-between-districts-are-not-race-neutral [https://perma.cc/9TFD-VYV7].

16. EDBUILD, $23 BILLION (2019), https://edbuild.org/content/23-billion [https://perma.cc/V3CR-UNJR].

17. *Id.*

18. Bruce D. Baker, Ajay Srikanth, Robert Cotto Jr. & Preston C. Green III, *School Funding Disparities and the Plight of Latinx Children*, EDUC. POL'Y ANALYSIS ARCHIVES, Sept. 2020, at 1.

19. Martínez et al., *supra* note 14, at 19.

20. Martínez & Spikes, *supra* note 14, at 19.

racial/ethnic disparities in spending, even controlling for disparities in poverty.[21] As a civil rights challenge, the segregation of funding from minoritized students, implicit or explicit, is as damaging to students and learning as was de facto segregation. Segregation of students from funding and resources in contemporary schooling mimics the segregation of students in the era of *Brown*.

A growing body of empirical evidence also supports the notion that school funding matters not only for the holistic health of the schooling system, but also to provide a high-quality system of formal education that increases students' capacity to learn and achieve within the schooling pipeline.[22] Research has also demonstrated that increased funding and targeted resources in majority LatinX urban schools were associated with improvement in reading and math achievement.[23] Funding is necessary for low-income communities to support students through the P-20 pipeline, which includes high school completion and earnings later in life, with the ultimate goal of reducing adult poverty.[24] Ultimately, funding increases have a positive impact on children from low-income families and play a role in decreasing student-to-teacher ratios, increasing teacher salaries, and extending academic semesters.[25]

The "does money matter?" debate is now all but discredited in the extant literature, and the primarily correlational nature of previous school finance research has now evolved methodologically.

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21. Victoria E. Sosina & Ericka S. Weathers, *Pathways to Inequality: Between-District Segregation and Racial Disparities in School District Expenditures*, AERA OPEN, July–Sept. 2019, at 1, 11.

22. *See* BRUCE D. BAKER, EDUCATIONAL INEQUALITY AND SCHOOL FINANCE: WHY MONEY MATTERS FOR AMERICA'S STUDENTS 85 (2018); Christopher A. Candelaria & Kenneth A. Shores, *Court-Ordered Finance Reforms in the Adequacy Era: Heterogeneous Causal Effects and Sensitivity*, 14 EDUC. FIN. & POL'Y 31, 44–45 (2019); C. Kirabo Jackson, Rucker C. Johnson & Claudia Persico, *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 4–5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20118, 2014); Julien Lafortune, Jesse Rothstein & Diane Whitmore Schanzenbach, *School Finance Reform and the Distribution of Student Achievement*, AM. ECON. J.: APPLIED ECON., Apr. 2018, at 1, 24; Martínez et al., *supra* note 14, at 25–27; Martínez & Spikes, *supra* note 14, at 26–27.

23. Julian Vasquez Heilig & Amy Williams, *Inputs and Student Achievement: An Analysis of Latina/o-Serving Urban Elementary Schools*, 10 ASSOC. MEX. AM. EDUC. J. 48, 54 (2010).

24. BAKER, *supra* note 22; *see also* C. Kirabo Jackson, Rucker C. Johnson & Claudia Persico, *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q. J. ECON. 157, 212–14 (2016) ("For children from low-income families, increasing per-pupil spending yields large improvements in educational attainment, wages, family income, and reductions in the annual incidence of adult poverty.").

25. *Id.* at 211.

The "credibility revolution" expanded research design and data aggregation and has found that investing in education early and often matters in the everyday life of a student.[26] Despite the evidence, resistance continues, and fiscal capacity disparities and inequity persist, as do the achievement gaps in the schooling pipeline. Widening achievement gaps, continued school district revenue generation, and student expenditure inequity degrade BIPOC communities, prompting the United States Department of Education Office of Civil Rights (OCR) to issue a "Dear Colleague Letter," clearly articulating that,

> Chronic and widespread racial disparities in access to rigorous courses, academic programs, and extracurricular activities; stable workforces of effective teachers, leaders, and support staff; safe and appropriate school buildings and facilities; and modern technology and high-quality instructional materials further hinder the education of students of color. . . . The allocation of school resources, however, too often exacerbates rather than remedies achievement and opportunity gaps.[27]

And finally,

> Allocation of funding should be designed to ensure the availability of equal educational opportunities for students, which may require more or less funding depending upon the needs at a particular school. Intradistrict and interdistrict funding disparities often mirror differences in the racial and socioeconomic demographics of schools, particularly when adjusted to take into consideration regional wage variations and extra costs often associated with educating low-income children, English language learners, and students with disabilities.[28]

This statement by the OCR is an attempt to formally acknowledge what most courts and fiscally conservative policymakers will not. School funding inequity persists throughout the country, and despite countless attempts to reform school finance policy, we are historically unable to ameliorate school funding inequity and injustice.

To address the persistent school finance disparity, in this Article we examine school finance research and litigation epistemology. We posit that unfettered and equitable school funding

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26. *Id.*; Robert Pianta, Jessica Whittaker, Virginia Vitiello & Arya Ansari, *Invest in Programs That Boost Children's Learning and Development*, BROOKINGS (Oct. 5, 2021), https://www.brookings.edu/blog/education-plus-development/2021/10/05/invest-in-programs-that-boost-childrens-learning-and-development/ [https://perma.cc/U4V8-XZVL].

27. U.S. DEPT. OF EDUC., OFF. OF CIV. RTS., DEAR COLLEAGUE LETTER: RESOURCE COMPARABILITY 2 (2014) [https://perma.cc/9RUK-QRTU].

28. *Id.* at 5.

and resource availability is a civil right and argue that school funding equity is necessary to mitigate political, economic, and social challenges impacting BIPOC communities in modern society. We also discuss opportunities to learn as a function of minimum resource and funding standards, and their embeddedness with Civil Rights.

I. Critical Lenses for Ontologizing School Finance Policy

We begin with two theses drawn from Paulo Freire and Derrick Bell as applied to school finance policy and praxis. In his seminal text, *Pedagogy of the Oppressed* (1970), Paulo Freire stated, "the purely reformist solutions attempted by these societies . . . do not resolve their external and internal contradictions. Almost always the metropolitan society induces these reformist solutions in response to the demands of the historical process, as a new way of preserving its hegemony."[29]

Parallel to Freire's sentiment is Derrick Bell's essay in Critical Race Theory: The Key Writings That Formed the Movement (1995) titled Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation which proffered:

> Providing unequal and inadequate school resources and excluding black parents from meaningful participation in school policymaking are at least as damaging to black children as enforced separation.
>
> Whether based on racial balance precedents or compensatory education theories, remedies that fail to attack all policies of racial subordination almost guarantee that the basic evil of segregated schools will survive and flourish, even in those systems where racially balanced schools can be achieved. Low academic performance and large numbers of disciplinary and expulsion cases are only two of the predictable outcomes in integrated schools where the racial subordination of blacks is reasserted in, if anything, a more damaging form.[30]

Both Bell and Freire provide a base to problematize the historical efforts to improve school finance inequity that persists in United States schooling despite countless reform efforts. From the perspective of Freire, reform is embedded with contradiction, and in that contradiction arises the ability to reproduce those practices customary to the society. For instance, despite the passing of civil rights policy, the United States continues to exhibit segregation of

29. PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 162 (Myra Bergman Ramos trans., Continuum Int'l Publ'g Grp. 2000) (1970).

30. Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 487–88 (1976).

BIPOC communities away from basic necessities such as schooling, housing, and healthcare.[31] Furthermore, in schooling, the reformist solution of desegregation through *Brown* did not account for how districts would develop and invest in desegregation at the time.[32] In contemporary schooling, we now see schools resegregating, and those schools with higher proportions of BIPOC students contending with sparser budgets.[33]

Derrick Bell echoed Freire's position of reformist dysconcious as the subordination of Black parents in desegregation failed to address inequity, and instead, the intention to resolve inequity through separation helped to reproduce the already violent hegemony that subjugates Black students, and by extension Black communities. If we extrapolate—through a theory of intersectionality—from Black to BIPOC students, parents, and communities, then Derrick Bell's positions of separation and subordination, and Freire's notion of reproduction through reformist efforts, work to support why the school finance outcomes outlined above (i.e., Baker, EdBuild, Martínez) persist despite seemingly positive change. There is also the intersection of school finance policy and law as supporting these theses, and thus in the next section, we review the historical underpinning of school finance ontology which, implicitly or explicitly, preserves inequity.

II. Historical Underpinnings of School Finance Epistemology

School finance policy, research, and reform efforts have focused on the provision of equal educational opportunities to students. Equal educational opportunity as an ideal is underscored by fifty years of litigation and a growing body of empirical research that developed concurrently. The research base highlights the notion that solutions to fiscal need, and increases in resource availability, often compete with sparser budgets, growing diversity, and expanding populations.[34] Simultaneously, districts have used adjudication in an attempt to align policy toward resolution.[35] These

31. Davíd G. Martínez, *We Make This Movement Towards Freedom: Policy Failures and the Radical Need for Solidarity*, UCEA REV., Fall 2020, at 13, 13.

32. Gerardo R. López & Rebeca Burciaga, *The Troublesome Legacy of* Brown v. Board of Education, 50 EDUC. ADMIN. Q. 796, 800–02 (2014).

33. *Id.* at 807–08.

34. *See, e.g.*, JASON WILLIS, KELSEY KRAUSEN, RUTHIE CAPARAS & TIA TAYLOR, RESOURCE ALLOCATION STRATEGIES TO SUPPORT THE FOUR DOMAINS FOR RAPID SCHOOL IMPROVEMENT 1–6 (2019) (outlining "strategies for how school districts can maximize the use of existing resources" by improving resource allocation strategies).

35. Margaret Goertz & Gary Natriello, *Court-Mandated School Finance Reform:*

historical policy and litigation relationships attempt to discern what quantities in compulsory education are absolutely necessary to create the greatest opportunities for students, but the characteristics of what constitutes opportunity has evolved, as has the litigation that attempts resolution.

Equality

Equality was often used in inter-district and inter-state research.[36] Equality litigation examined school funding mechanisms leading to unequal treatments through interpretation of the Fourteenth Amendment and Equal Protection Clause[37] (e.g., *Serrano v. Priest (I)*).[38] Local property taxes are a major source of public education funding. Tax levies, property wealth, and other varying amounts of local revenue fund public education, and the value placed on homes in a district determines how much tax revenue is generated. Assessed valuations impact the revenue pipeline, creating variation in the amount of revenue available for education and the resources offered to students (e.g., well-prepared teachers, smaller classrooms, and curriculum).[39] Furthermore, since school funding relies so heavily on local property value, this prevents property poor districts from increasing revenue, as a function of how much money tax levies can generate, or from

What Do the New Dollars Buy?, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 99 (Helen F. Ladd et al. eds., 1999); David H. Monk & Samid Hussain, *Structural Influences on the Internal Allocation of School District Resources: Evidence from New York State*, 22 EDUC. EVAL. & POL'Y ANALYSIS 1, 1–26 (2000); Ross Rubenstein, Leanna Stiefel, Amy Ellen Schwartz & Hella Bel Hadj Amor, *Distinguishing Good Schools From Bad in Principle and Practice: A Comparison of Four Methods*, *in* DEVELOPMENTS IN SCHOOL FINANCE 53 (W.J. Fowler ed., 2007).

36. *See* Carrington, *supra* note 12; JAMES W. GUTHRIE, GEORGE B. KLEINDORFER, HENRY M. LEVIN & ROBERT T. STOUT, SCHOOLS AND INEQUALITY 137–57 (1971); ERIC A. HANUSHEK & JOHN F. KAIN, ON EQUALITY OF EDUCATIONAL OPPORTUNITY 116–45 (Frederick Mosteller & Daniel P. Moynihan eds., 1972); RUSSEL S. HARRISON, EQUALITY IN PUBLIC SCHOOL FINANCE: VALIDATED POLICIES FOR PUBLIC SCHOOL FINANCE REFORM (1976) (summarizing research on expenditure inequality and identifying some causes and cures for this inequality).

37. In *Brown v. Board of Education*, the Equal Protection Clause was used to determine that school segregation was unconstitutional. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

38. *See* Serrano v. Priest, 487 P.2d 1241 (1971).

39. Gillespie, *supra* note 7, at 990; Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 7, 8 (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen eds., 1999) [hereinafter *Concepts of School Finance*]; *see also* Heise, *supra* note 2, at 1151 ("Variations in property values generate many of the disputes surrounding school finance. . . . As property values vary, so do local property tax bases and revenues.").

equalizing property-based education revenue to that of wealthier districts.[40] Even in as much as property poor districts can raise property taxes, the low assessed property valuations inhibit tangible increases in school funding.[41]

This argument leads to greater discourse about what exactly should be equalized, and as Espinoza summarized, the possibility that justice must work to provide: "(1) 'equality of opportunity'; (2) 'equality for all'; and (3) 'equality on average across social groups.'"[42] Questions remain, however, regarding what embodies these goals, and consensus among experts is ephemeral. Researchers search for resolution through specific relationships amongst variables including socio-demographic strata, school resources in the form of revenue generation and expenditures per-pupil,[43] and variations in facilities and human resources.[44] With little resolution after *Rodriguez*,[45] reformers continued the search for resolution through state constitution equal protection clauses.[46] This shift in strategy ended the era of litigation toward federal constitutionality and bourgeoned in an era examining equity through state constitutions.

Equity

The narrative of equity is embedded, as with equality, in history as much as it is in theory. Reports such as *Equality of Educational Opportunity* (1966) and *A Nation at Risk* (1984) increased pressure to obtain empirically driven solutions minimizing barriers to education for low-income and minoritized students.[47] Equity was built from equality arguments seeking to

40. Gillespie, *supra* note 7, at 990.

41. *Id.*; *see also* Heise, *supra* note 2, at 1151–52 ("[S]chool districts located in property-poor areas receive lower tax revenues generated by, in certain instances, comparatively higher tax rates.").

42. Oscar Espinoza, *Solving the Equity–Equality Conceptual Dilemma: A New Model for Analysis of the Educational Process*, 49 EDUC. RSCH. 343, 350 (2007).

43. *See* Matthew J. Carr, Nathan L. Gray & Marc J. Holley, *Shortchanging Disadvantaged Students: An Analysis of Intra-District Spending Patterns in Ohio*, 7 J. EDUC. RSCH & POL'Y STUD. 36, 36 (2007); THOMAS B. FORDHAM FOUND., FUND THE CHILD: BRINGING EQUITY, AUTONOMY, AND PORTABILITY TO OHIO SCHOOL FINANCE 9–10 (2008).

44. *See* Tom Owens & Jeffrey Maiden, *A Comparison of Interschool and Interdistrict Funding Equity in Florida*, 24 J. EDUC. FIN. 503, 507–09 (1999).

45. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

46. *See* Heise, *supra* note 2, at 1152; James E. Ryan & Thomas Saunders, *Forward to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL'Y REV. 463, 466–67 (2004); Christopher E. Adams, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1614–15 (2006).

47. *See* RUBEN W. ESPINOSA, FISCAL RESOURCES AND SCHOOL FACILITIES AND

answer three major questions: (1) For whom do we seek equity? (2) What is to be equitably distributed? (3) How are resources distributed, or how could resources be distributed in a manner that is most advantageous for all students?

The foundation of equity litigation focuses on inputs that have the potential to address student need through state constitutional mandate. This litigation is exemplified by *Serrano v. Priest* (II),[48] *Horton v. Meskill*,[49] *Levittown Union Free School District v. Nyquist*,[50] and *Abbott v. Burke*.[51] These cases highlight how differences in student populations require varied funding allocations. The struggle toward equity was not easy, as the statutory responsibility of states to provide an equitable education system was varied in its interpretation, something echoed through the empirical catalogue.

There are many views of what constitutes equity in education. The most salient definition—the definition most often employed in school finance research and litigation—stems from theories proposed by Drs. Robert Berne and Leanna Stiefel. Their view of equity is generally defined as two separate ideas: horizontal equity (HE), that which leads to an equal treatment of equals, and vertical equity (VE), that which leads to an unequal treatment of unequals.[52] These definitions presuppose that all students have the ability to equally take advantage of the services provided to them in order to learn the material necessary to participate in a basic level of self-sufficiency. Where HE measures resources so that every student receives an equal amount of funding, truly dictating only equality of inputs, VE delineates by allowing for supplemental funding allocation to those students who require the funds due to unexpected challenges (e.g., language barriers, physical barriers, and learning barriers) in order to obtain an equal level of education.[53] Even insofar as equity can provide some form of justice, students are not created equal, and intra-group student level

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THEIR RELATIONSHIP TO ETHNICITY AND ACHIEVEMENT IN THE LOS ANGELES UNIFIED SCHOOL DISTRICT (1985); Gloria M. Rodriguez, *Vertical Equity in School Finance and the Potential for Increasing School Responsiveness to Student and Staff Needs*, 79 PEABODY J. EDUC. 7, 8–9 (2004).

48. *See* Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (*Serrano II*).

49. *See* Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

50. *See* Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).

51. *See* Abbot v. Burke, 495 A.2d 376 (N.J. 1985).

52. Berne & Stiefel, *supra* note 14, at 406; *Concepts of School Finance*, *supra* note 39, at 18, 29.

53. Berne & Stiefel, *supra* note 14, at 406; *Concepts of School Finance*, *supra* note 39, at 18, 29; Iatarola & Stiefel, *supra* note 14, at 70.

variation must be supplemented with nuance for all students to have an opportunity to learn equal amounts of academic material.[54]

Finally, equity and equality differ substantially in their measurement. Where equality is measured as a function of resource distribution so that every student has an equal portion of the revenue available, equity measures what is most desirable and the ways in which resources are distributed so they develop the most desirable student outcomes.[55] The focus on outcomes began to dominate the discourse as policy makers sought resolution to address new accountability standards.

Adequacy

Achievement gains shape the foundation for examining educational funding and resource allocation through adequacy. Through adequacy, state constitutional education clauses are interpreted as requiring a minimum level of education for students, and to determine the amount of funding necessary to provide a minimum level of education as required by statute.[56] Adequacy is a response to the standards-based reform movement, characterized in recent educational history by the federal No Child Left Behind Act (NCLB).[57] As states began enacting educational reform by imposing rigorous academic requirements (i.e., English, math, and history), this increased pressure to meet the demands of the new academic constraints without the substantive resources necessary to implement the new policies into practice. The *Rose v. Council for*

54. Berne & Stiefel, *supra* note 14, at 406; *Concepts of School Finance*, *supra* note 39, at 18, 29.

55. *See generally* William Duncombe & John Yinger, *School Finance Reform: Aid Formulas and Equity Objectives*, 51 NAT'L TAX J. 239, 239 (1998) (arguing that "states need to refocus their aid formulas toward the achievement of outcome equity objectives" while presenting a method for using "state aid formulas . . . to achieve particular equity goals"); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 100, 100, 103 (1995) (exploring the limitations of "equality arguments" in educational funding and proposing the use of "adequacy arguments" that focus on the "quality of the services provided").

56. *See* Enrich, *supra* note 55, at 105–06, 108–09 (discussing "education clause[s]" in state constitutions that "impose an express duty on the state government to make provision for a system of public education" and arguing that one approach to education clause interpretation considers "adequacy arguments [that] . . . look directly at the quality of the educational services delivered to children . . .").

57. Kevin G. Welner, *Can Irrational Become Unconstitutional? NCLB's 100% Presuppositions*, 38 EQUITY & EXCELLENCE EDUC. 171, 171 (2005) ("The law holds schools responsible for student achievement, subjecting the schools to escalating penalties if some students fail to make adequate progress toward the hundred-percent target.").

Better Education case illustrates these shifts and outlines specific mandates of minimal education.[58]

The evolution of adequacy from the knowledge previously developed around equity is a result of the need to understand how per-pupil revenue and expenditures impact student learning and outcomes.[59] Adequacy shifts focus from revenue and expenditures and draws attention to student achievement and outcomes. Adequacy supports opportunity as determined by a measured outcome level (e.g., assessment score and grade level) and by linking revenue, expenditures, and resources to those outcomes.[60] Adequacy creates a floor, which no student should fall under. Outcomes are based on perceived ability, and the funding to obtain these outcomes is based on perceived need.[61] Student variations, however, will require different floors and funding levels. Specific funding levels that can produce the intended outcomes must in no small way be met for all students of varying abilities, intelligence, sociological, racial, and economic backgrounds. At the core of equality, equity, and adequacy arguments is the question of how districts can provide students with an equal educational opportunity—what model of education, what amounts of resources, and what types of inclusion are necessary to fully participate in our compulsory education system.

III. Perspective on Equal Educational Opportunity

Equality, equity, and adequacy seek an Equal Educational Opportunity (EEO) as one of the most fundamental tenets of education, but will over rely on perceptions of the inputs and outputs by policy makers who seek nothing more than a resolution. The Equal Educational Opportunities Act of 1974 (EEOA) operates within two distinct guidelines as written in 20 U.S.C § 1701 Congressional declaration of policy:

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58. Rose v. Council for Better Educ. 790 S.W.2d 186 (Ky. 1989).

59. Allan Odden, *Equity and Adequacy in School Finance Today*, 85 PHI DELTA KAPPAN 120, 121–23 (2003).

60. *See* William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376, 376, (1994) (describing the "shift . . . from equity to adequacy in school finance"); Odden, *supra* note 59, at 125 ("The adequacy of education dollars will be measured by the degree to which students learn to the performance standards of the education system.").

61. *See* Odden, *supra* note 59, at 121 ("Determining adequate revenue levels entails first identifying the costs of effective programs and strategies, then translating those costs into appropriate school finance structures, and finally ensuring that the resources are used in districts and schools to produce the desired results.").

1. all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

2. the neighborhood is the appropriate basis for determining public school assignments.[62]

The policy further states: "In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system."[63]

EEOA further specifies the types of indicators that would signify a dual system or a system that is not providing at least an equal opportunity, going so far as to title the section "Dual school systems as denial of equal protection; depletion of financial resources of local educational agencies; transportation of students; inadequacy of guidelines."[64] Congress further specifies what types of practices create unlawful barriers to opportunity in 20 U.S.C §§ 1703–1705.[65] Remedies necessary to overcome these barriers are outlined in 20 U.S.C §§ 1712–1718.[66] Short of formally drawing out every stipulation, EEOA provides protection so that 1) every student has the ability to equally participate in every facet of education and 2) schools operating within a compulsory system of education make the appropriate adjustments to the learning environment and provide the funding necessary so all students—regardless of perceived deficiencies (e.g., behavioral, cognitive, socio-economic, and racial)—are able to fully participate in compulsory education.[67]

Both researcher and litigation perspectives are not contrasting and recognize that, at some level, compulsory education in the United States fails in its ability to create equal learning opportunities for all. Explicit and implicit barriers have a lasting effect on student learning. Litigation has relied heavily on

62. 20 U.S.C. § 1701(a)(1–2).

63. § 1701(b).

64. § 1702.

65. §§ 1703–1705.

66. §§ 1712–1718.

67. *See generally* Julian R. Betts & John E. Roemer, *Equalizing Opportunity for Racial and Socioeconomic Groups in the United States through Educational-Finance Reform*, *in* SCHOOLS AND THE EQUAL OPPORTUNITY PROBLEM 209, 209 (Ludger Woessmann & Paul E. Peterson eds., 2007) ("Education is perhaps the main tool that democracies use to attempt to equalize economic opportunities among citizens. It is commonly thought that opportunity equalization, in that dimension, is implemented by the provision of equal educational resources to all students. We argue here that that is not so, and we attempt to compute the distribution of educational spending in public schools in the United States that would equalize opportunities for a measure of economic welfare—namely, earning capacity.").

contemporary research that has provided sound empirical evidence, concluding that the quality of opportunities present in education (e.g., segregation, teacher training, facilities, school leadership, classroom environment, school demographics, and school size) impact student learning, hinder cognitive growth, and contribute to—and maintain—the socio-demographic achievement gap.[68]

Despite these facts, in our contemporary education system, legislation and policy constrains the generation of revenue and the manner in which it is distributed across communities. Providing students with an equal educational opportunity is not incongruent when juxtaposed against equality, equity, or adequacy. However, policymakers must be willing to attune school finance practices and re-evaluate how they, and their view of the inputs and outputs of schooling, affect student learning.

In summary, the stated goal of equality, equity, adequacy, and equal educational opportunity, work toward remedying insufficiency in compulsory education and to implicate social justice as a function of schooling. However, this goal precludes the fallacy that opportunity for all is a goal of the hegemony or, invoking Freire and Bell, that reform agreed upon by the hegemony seeks to increase opportunity for all communities, including BIPOC communities—something historically inaccurate.[69] Even throughout the post-*Brown* era of desegregation, once the initial decision of *Brown (I)* was submitted, schools remained largely segregated and largely unequal.[70] After *Brown (II)*, many southern

68. *See* Berne & Stiefel, *supra* note 14, at 419 (discussing how poorer districts receive fewer resources in "allocated and direct categories," leading to substantial burdens in areas of nonclassroom management and oversight); *see also* Linda Darling-Hammond, *The Right to Learn and the Advancement of Teaching: Research, Policy, and Practice for Democratic Education*, 25 EDUC. RSCH. 5, 10–15 (1996) (discussing the resources necessary for building knowledge around teaching and opportunities in public schools); Linda Darling-Hammond, *Securing the Right to Learn: Policy and Practice for Powerful Teaching and Learning*, 35 EDUC. RSCH. 13, 15–20 (2006) (discussing current inequality in public education based on the resources available to teachers and students, as well as the resources and policies necessary to close current achievement gaps); Linda Darling-Hammond, *Teacher Education and the American Future*, 61 J. TCHR. EDUC. 35, 42–45 (2010) (highlighting the challenges for teacher education and the barriers these challenges pose for equity in access to learning); Minorini & Sugarman, *supra* note 2, at 63–65 (discussing the future of school finance litigation in light of the history of school finance litigation); Thomas J. Labelle, *Book Reviews*, 15 AM. EDUC. RSCH. J. 570, 570–72 (1978) (reviewing JOHN OGBU, MINORITY EDUCATION AND CASTE: THE AMERICAN SYSTEM IN CROSS-CULTURAL PERSPECTIVE (1978)); WISE, *supra* note 12, at 129–30 ("[V]ariation in expenditures per pupil or per classroom is systematically related to the wealth of the local community.").

69. *See* Bell, *supra* note 30, at 487–88.

70. López & Burciaga, *supra* note 32, at 800.

states requested desegregation exemptions due to "logistical complications and demographic barriers."[71] Thus, while equality, equity, adequacy, and opportunity are necessary for addressing school finance disparities, critique is an inevitability, especially with regards to a high-quality education as a civil right for BIPOC communities.

IV. School Finance and Civil Rights

In the 1960s, Civil Rights activists argued schooling was a mechanism to mediate social disparities. School finance policy and litigation, however, were unable to ameliorate pervasive schooling inequities, and in contemporary society, educational policy scholarship illustrates the presence of fiscal disparity as informing the ever-present achievement gap.[72] School finance inequities are highlighted in a report by the United States Commission on Civil Rights which states, "all across the United States . . . there are many millions of students who are unable to access a quality public education due to inequities in public education finance."[73] The report continues by detailing,

> Poorer schools often have less experienced and lower-paid teachers, fewer high-rigor course offerings, substandard facilities, and less access to school materials and resources. School districts that serve the most disadvantaged students often require higher levels of funding to overcome the financial challenges of serving the needs of disadvantaged students, including students with disabilities, and English language learners, particularly those who come from low-income households and who are also students of color.[74]

As a civil right, school funding equity is necessary to mitigate the impact of social challenges. The United States Commission on Civil Rights Report questions how localities address the process of allocating funds toward schools and how these allocations guarantee an equal educational opportunity for all students, despite differences in socio-demography.[75] To educate all students, the

71. *Id.*

72. *See* Heise, *supra* note 2, at 1168; Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, *in* WHITHER OPPORTUNITY? RISING INEQUALITY AND THE UNCERTAIN LIFE CHANCES OF LOW-INCOME CHILDREN 91, 110–11 (Richard J. Murnane & Greg J. Duncan eds., 2011); Verstegen, *supra* note 2, at 67–68.

73. U.S. COMM'N ON CIV. RTS., PUBLIC EDUCATION FUNDING INEQUITY IN AN ERA OF INCREASING CONCENTRATION OF POVERTY AND RESEGREGATION: BRIEFING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS HELD IN WASHINGTON, DC 3 (2018) [hereinafter U.S. COMM'N ON CIV. RTS. BRIEFING].

74. *Id.* at 7.

75. *Id.* at 27–56.

United States must confront barriers that devalue equity and school finance as a civil right.

Ontologizing school finance as a civil right matter is crucial because current education reform efforts, such as market-based school choice, seek to ignore the structural inequities that have historically plagued school funding in BIPOC communities and sabotaged the success of their educators and students.[76] Research continues to highlight a salient and logical artifact of schooling: more schooling revenue and access to better schools are directly related to higher value property.[77] Recent peer reviewed research has shown that in gentrifying urban communities, as the proportional intensity of White students increases in schools, so do the resulting resources and demands for schools.[78]

Consistently, race is demonstrated as being an important factor in school finance. This indication clearly illustrates that school finance as a function of race is a civil rights matter.[79] In fact, the NAACP Task Force on Quality Education argued that school finance reform is at the root of civil rights issues in education:

> To solve the quality education problems that are at the root of many of the issues . . . school finance reform is essential to ensure that resources are allocated according to student needs. States should undertake the kinds of weighted student formula reforms that Massachusetts and California have pursued, and the federal government should fully enforce the funding-equity provisions in Every Student Succeeds Act (ESSA).[80]

The NAACP Task Force on Quality Education further argued that resource inequities directly impact the provision of high-quality schools due to disparities in teacher salaries and working conditions, such as class sizes and the availability of supplies and materials (i.e., textbooks and technology).[81] To remedy these disparities for BIPOC students, financial resources should be available to provide the opportunity for BIPOC students to learn in

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76. *See* Julian Vasquez Heilig, *Reframing the Refrain: Choice as a Civil Rights Issue*, 1 TEX. EDUC. REV. 83, 89 (2013).

77. *See* WISE, *supra* note 12, at 129–30.

78. See ALEXANDRA FREIDUS, URB. EDUC., "A GREAT SCHOOL BENEFITS US ALL": ADVANTAGED PARENTS AND THE GENTRIFICATION OF AN URBAN PUBLIC SCHOOL 1141 (2016), for a discussion of research that shows "as the numbers of free- and reduced-lunch eligible students decreased, the number of middle-class families [at a specific school] markedly increased. . . . [Discussions] about improved school facilities and new programming speak to the school's material and physical upgrade following the influx of newcomers."

79. *See* NAACP TASK FORCE ON QUALITY EDUC., JULY 2017 HEARING REPORT 8 (2017).

80. *Id.* at 27.

81. *Id.* at 26–27.

challenging and supportive learning environments, guided by well-prepared and caring teachers, staff, and administrators. The unfortunate historical circumstance is that schools serving BIPOC students were sabotaged through funding insufficiency early, and still are today.[82] This history prevented schools from making the classroom investments necessary to raise student achievement and ensure that all students receive high-quality educational opportunities.

The importance of theoretical and conceptual research that helps to inform policy decisions and praxis about civil rights in the school funding process cannot be overstated. The critical perspectives of Bell and Freire discussed above stand as a testament to the overwhelming use of frameworks incapable of informing critically conscious school finance research, adjudication, and policy praxis.[83] Of the greatest challenges is how to move forward from the ontology of previous frameworks that are no longer sufficient to address school finance disparity in aggregate, and even less positioned to address the intersectional nuances of race-based inequity.[84] Furthermore, conceptually, theoretically, and methodologically the field must continue to evolve in order to produce tools which can help support effective school finance policy solutions into the future.[85] The final section of this Article explores an opportunity-to-learn framework that sets minimum resource access points and minimum standards of funding availability.

V. Civil Rights and an Opportunity to Learn

An opportunity to learn is crucial for supporting individuals across the United States. The challenge, however, is situated in the reality that some school districts have the resources to provide students with educational opportunities, while other districts are encumbered due to minimal resource availability.[86] School finance

82. *See* U.S. COMM'N ON CIV. RTS. BRIEFING, *supra* note 73, at 3.

83. *See* Bell, *supra* note 30, at 487–88; FREIRE, *supra* note 29, at 162.

84. Martínez, *supra* note 8, at 299–304 (acknowledging the failures of previous movements toward school finance equality and how new frameworks have sought to overcome these challenges).

85. *Id.* at 308–10 (discussing how school finance research can "defin[e] justice through novel . . . research"); *see also* Eric A. Houck, *Intra-District Resource Allocation: Key Findings and Policy Implications*, 43 EDUC. & URB. SOC'Y 271, 289–90 (identifying current issues in surrounding intra-district resource allocation and proposing policy solutions to create more equitable school finance frameworks).

86. Julian Vasquez Heilig, *A New Approach to Remedy Education Inequity?: Opportunity to Learn (OTL) "State Minimums" for School Finance*, CLOAKING INEQUALITY (Apr. 15, 2018), https://cloakinginequity.com/2018/04/15/a-new-approach-to-remedy-education-inequity-opportunity-to-learn-otl-state-minimums-

resources are imperative to maintaining a high-quality education.[87] The decades of debate about if money matters have only succeeded in degrading what we have always known—that money matters in the lives of students at all levels and that money is necessary to obtain resources necessary for students to learn.[88] In this final section we revisit the Opportunity to Learn framework and outline its utility in the school finance debate.

The Opportunity to Learn (OTL) framework measures a student's ability to access resources characteristic of high-quality schools.[89] OTL is an adequacy centered approach to configure the resource inputs necessary to improve student success and helps to address longstanding school finance inequities in the United States.[90] Derek W. Black, a prominent law professor at the University of South Carolina, outlined in his seminal text *Education Law: Equality, Fairness, and Reform*, that OTL includes access to high quality early childhood education, access to highly effective teachers, and a broad curriculum designed to prepare all students to matriculate through the P-20 pipeline and to participate in the democratic process.[91] Although OTL may seem implausible for every district, there was language embedded in federal education code.[92]

President Bill Clinton's reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA), the Improving America's Schools Act of 1994 (IASA), and The Goals 2000: Educate America Act of 1994 all included language supporting OTL standards.[93] There were constrictions on how districts would adhere to OTL, however, due to the vagueness of the policy language, states could reject OTL standards and adopt their own, diminishing a national

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for-school-finance-aera18/ [https://perma.cc/653V-JBFC].

87. *See* U.S. COMM'N ON CIV. RTS. BRIEFING, *supra* note 73, at 14.

88. *See id.* at 3–10.

89. Heilig, *supra* note 86.

90. *Id.*

91. *Id.* (citing DEREK BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM (2d ed. 2016)).

92. H.R. 6, 103d Cong., 108 Stat. 3518 (1994) (listing "opportunity-to-learn standards or strategies" among the factors that a state may include in its education plan under the Improving America's Schools Act of 1994).

93. *See id.* (discussing ESEA); Robert B. Schwartz, Marian A. Robinson, Michael W. Kirst & David L. Kirp, 3 BROOKINGS PAPERS ON EDUC. POL'Y 173, 195 (2000) (discussing OTL and Goals 2000); Derek W. Black, *Abandoning the Federal Role in Education*, 105 CAL. L. REV. 1309, 1323 (2017) ("Congress hoped it could demand equal academic outputs through the IASA and prod equal academic inputs through Goals 2000. However, a new Republican majority revoked the voluntary OTL standards later that year.").

effort.[94] There was also resistance to OTL based on what advocates believed were inequitable expectations without proper fiscal support.[95] Opposition grew through the belief that low-income students were forced to meet the same standards as students in well-resourced districts. Despite critiques, the 1990s saw a rise in educational reform and codified into law reform hyper-focused on academic standards that linked academic success to high-stakes testing and accountability.[96] High-stakes testing and accountability proponents during the No Child Left Behind (NCLB) era operated under a "prevailing theory of action . . . that schools and students who are held accountable to [high-stakes testing and accountability policies] will automatically increase educational output: Educators will try harder, schools will adopt more effective methods; and students will learn more."[97] What testing advocates neglected to recognize, however, was the embedded disparities in schooling that impact achievement and their relationship to race/ethnicity and socio-economic status.

Research has shown the impact of poverty on learning is profound.[98] Furthermore, poverty is unequally distributed across racial and ethnic backgrounds, with a higher proportion of minoritized communities being affected by poverty.[99] Centering Freire, however—in the case of OTL—purely reformist testing regimes impeded equity by focusing on the need for increased achievement.[100] The policy dynamics of the time required higher proportions of students to meet specific standards, and, in testing for those standards, neglected to account for how specific communities would align to the standards and testing.[101] They also did not address resource insufficiency.[102] Standards and testing

94. Heilig, *supra* note 86.

95. *See, e.g.*, LAURA S. HAMILTON, BRIAN M. STECHER & KUN YUAN, RAND CORP., STANDARDS-BASED REFORM IN THE UNITED STATES: HISTORY, RESEARCH, AND FUTURE DIRECTIONS 31 (2008) ("There were also concerns about excessive state or federal control over what schools do and about the costs of equalizing school and district offerings if OTL information demonstrated inequalities.").

96. *See* Jennifer Jellison Holme & Julian Vasquez Heilig, *High-Stakes Decisions: The Legal Landscape of High School Exit Exams and the Implications for Schools and Leaders*, 22 J. SCH. LEADERSHIP 1177, 1178–79 (2012).

97. Julian Vasquez Heilig & Linda Darling-Hammond, *Accountability Texas-Style: The Progress and Learning of Urban Minority Students in a High-Stakes Testing Context*, 30 EDUC. EVALUATION & POL'Y ANALYSIS 75, 75 (2008).

98. *See* U.S. COMM'N ON CIV. RTS. BRIEFING, *supra* note 73, at 89–104.

99. *See id.* at 94–96 (examining the presence of wealth disparities and concentrated poverty among different racial and ethnic groups).

100. FREIRE, *supra* note 29; *see* Heilig, *supra* note 86.

101. Heilig, *supra* note 86.

102. *Id.*

served to further degrade community schooling and, with the hindsight of NCLB, students in minoritized communities were ultimately left behind, still struggling to obtain resources necessary to support healthy community schooling and raise the metrics of achievement required by states.[103]

To improve learning opportunities for marginalized students, a proactive national policy agenda should focus on ensuring the coordinated provision of minimal standards of service.[104] Minimal standards of service include access to well-trained and certified teachers and administrators, timely curriculum and texts, up-to-date facilities, and wrap-around services to support neuro-divergent learners and the health, nutrition, housing, and family wellness of students.[105] Students also require time on task and quality of instruction.[106] To ensure Opportunity to Learn standards are met, policy makers must align specific standards for access to certified subject-matter experts with pedagogical knowledge and should work to minimize inadvertent inequities due to years of teaching experience variations across districts. To implement these standards effectively, we also suggest the development of state minimum revenue standards and expenditure per-pupil standards across priorities.

At the legislative level, school funding is input oriented, and yearly governors' budgets and omnibus revenue bills dictate how Opportunities to Learn develop within a district.[107] Having national OTL minimum standards for revenue and expenditures per-pupil to ensure minimal standards of service access would allow policymakers to determine how to raise revenue in order to meet the minimum access standards.[108] Once fiscal minimum standards are established, policymakers can then determine what minimum level of funding is acutely feasible for every district and realign revenue through increases in general fund appropriations.[109] From the standpoint of legal praxis, states would then be held

103. *See* Jennifer L. Jennings & Douglas Lee Lauen, *Accountability, Inequality, and Achievement: The Effects of the No Child Left Behind Act on Multiple Measures of Student Learning*, 2 RSF J. SOC. SCIS. 220, 222–25 (2016).

104. *See* Heilig, *supra* note 86.

105. *Id.*

106. Lori Wade, *Time-on-Task: A Teaching Strategy that Accelerates Learning*, FIND COURSES (Mar. 5, 2020), https://www.findcourses.com/prof-dev/career-development/time-on-task-18285 [https://perma.cc/7SQG-2R2U].

107. *See* Heilig, *supra* note 86 ("School funding should be input oriented, working forward from the ingredients necessary for student success instead of backwards from legislative whims.").

108. *See id.*

109. *Id.*

accountable for providing the minimum OTL revenue standard while the district is liable for providing the minimum standard level of access to resources.

As a civil right, we argue for access beyond equality, equity, or adequacy. We argue for complete and differentiated levels of service for every student, and funding that allows for the provision of those services. This model deviates from past models in that high-standards are not determined by testing and metrics, but determined by access, availability, and how policymakers are supporting access and availability in every community. School finance reform in the United States has attempted to mediate schooling disparities, but has had little success. OTL allows policy makers to consider omni-directional reforms that promote student learning through differentiation beyond large sub-group categories or minimum achievement levels. Focusing on access of high-quality resources and the funding necessary to obtain those resources helps to establish and promote equitable schooling conditions for all students.

Conclusion

There is limited literature that frames school finance policy as being informed by civil rights. We conclude that as a civil right, sufficient school funding to access quality schooling services is necessary to ameliorate the historical disparities, segregation, and persecution of BIPOC communities in schooling. School finance policy praxis is often grounded in the hegemony and reproduction of White privilege that seeks to continue the status quo while simultaneously highlighting self-serving and passive school finance reform devoid of community participation. Inequity is reified by power brokers who seek to maintain oppressive practices in BIPOC communities. We conclude that by intersecting civil rights dialogue with school finance policy praxis, through the OTL framework, it is possible to minimize the schooling inequity to which BIPOC communities are accustomed. In essence we view OTL as both a liberatory practice and form of educational justice. Power brokers in the school finance policy pipeline must question their own epistemology and interrogate how oppression is embedded in their practices. They must recognize heuristics purposefully and consistently employed to make consequential decisions that have sabotaged public education in BIPOC communities. Individuals at all levels must bind themselves to each other in oppositional resistance against the hegemony and its reproduction of oppression.

BIPOC communities have engaged in oppositional resistance in order to support each other and institutionalize liberation as a community practice. BIPOC communities have had to find support amongst each other and find ways to circumvent those systems that wish to oppress our students within the schooling pipeline. By doing so, we have continued to assert our presence and make known our intentions to continue fighting for liberation, despite the constant violence and resistance to unencumbered BIPOC freedom. Thus, we maintain that sound policy solutions must include intersecting ideologies of civil rights and school finance equity in their strictest form. As a community of scholar-advocates, we maintain a critical hope that we are valuable and will impact, in our own way, school finance discourse. To do so we must continue advocating for alternative school finance approaches for our communities and for our students in order to assert ourselves into education reform and promote alternatives to the historical resource disparity that has oppressed BIPOC students and families.

Beyond Deliberate Indifference: Rethinking Institutional Responsibility and Title IX Liability in K-12 Education

Gabrielle Maginn†

"Every choice those adults made was devastating to her. There was nothing we could do, nothing we could show that would make them have compassion for her."

Danielle Bostick, about the response of school officials to her 15-year-old daughter's sexual assault by a classmate.[1]

"School is supposed to be a resourceful place, somewhere you can trust. That wasn't what it turned out to be. It turned out to be somewhere where they just turned their backs against you."

Jane Doe, a 14-year-old who was suspended after reporting a sexual assault.[2]

"[Title IX] is . . . an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they

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1. Erica L. Green, *'It's Like the Wild West': Sexual Assault Victims Struggle in K-12 Schools*, N.Y. TIMES (May 11, 2019), https://www.nytimes.com/2019/05/11/us/politics/sexual-assault-school.html [https://perma.cc/F3BZ-XPJ9].

2. Tyler Kingkade, *Schools Keep Punishing Girls — Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, 74 MILLION (Aug. 6, 2019), https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/ [https://perma.cc/4XG2-KGH7].

will have a fair chance to secure the jobs of their choice with equal pay for equal work."

Senator Birch Bayh.[3]

Introduction

Since the mid-2000s, stories about sexual assault and harassment[4] at colleges and universities across the United States have grabbed headlines.[5] Students, mostly but not exclusively young women,[6] have come forward with accounts of sexual misconduct at the hands of professors and peers.[7] These young

3. 118 CONG. REC. 5808 (1972).

4. I use the terms sexual assault and harassment to describe a range of behaviors from rape (through both physical force and coercion), to intimate partner violence, to unwanted kissing or touching, to stalking, to persistent and repeated comments, "jokes," or threats that are sex- or gender-based. See ELLIE L. YOUNG, BETTY Y. ASHBAKER & BRIAN K. YOUNG, NAT'L ASS'N OF SCH. PSYCHS., SEXUAL HARASSMENT: A GUIDE FOR SCHOOL PERSONNEL (2010), for a more detailed explanation of what, exactly, constitutes sexual harassment in schools.

5. *See, e.g.*, Amanda Arnold, *Surviving the 'Predators' Club'*, CUT (Nov. 19, 2018), https://www.thecut.com/2018/11/dartmouth-professors-sexually-assaulted-students-lawsuit.html#_ga=2.250025294.911091880.1605557878114183776 7.1603730767 [https://perma.cc/P55S-QDW2]; Eliza Gray, *Colleges Are Breaking the Law on Sex Crimes, Report Says*, TIME (July 9, 2014), https://time.com/2969580/claire-mccaskill-campus-sexual-assault-rape/ [https://perma.cc/L2JG-JUPB]; Richard Pérez-Peña, *1 in 4 Women Experience Sex Assault on Campus*, N.Y. TIMES (Sept. 21, 2015), https://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html [https://perma.cc/235N-C3U4].

6. While 13% of all college students report experiencing rape or sexual assault through physical force, violence, or incapacitation, 25.9% of women students report experiencing sexual assault or rape as compared to 6.8% of men. Transgender, genderqueer, and gender nonconforming students report rates of sexual assault similar to the rates for women (22.8%). Undergraduate women report experiencing other forms of sexual harassment at a rate of 59.2%. DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, SHAUNA HARPS, REANNE TOWNSEND, GAIL THOMAS, HYUNSHIK LEE, VANESSA KRANZ, RANDY HERBISON & KRISTIN MADDEN, AM. ASS'N OF UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT VII–VIII (rev. 2020) [hereinafter AAU CAMPUS CLIMATE SURVEY].

7. *See* Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2016), https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra [https://perma.cc/CDZ8-EKLZ] (discussing the letter read in court by Chanel Miller, who was raped by Stanford student Brock Turner); Carole Bass, *Alexandra Brodsky '12, '16JD: 'My School Betrayed Me'*, YALE ALUMNI MAG. (July 18, 2013), https://yalealumnimagazine.com/blog_posts/1517-alexandra-brodsky-12-16jd-br-my-school-betrayed-me [https://perma.cc/4FRW-MNBT] (profiling Alexandra Brodsky, a sexual assault survivor at Yale who went on to establish the advocacy group Know Your IX); Emily Bazelon, *Have We Learned Anything From the Columbia Rape Case?*, N.Y. TIMES MAG. (May 29, 2015), https://www.nytimes.com/2015/05/29/magazine/have-we-learned-anything-from-the

people have engaged in activism and legal fights intended to hold their institutions accountable for failure to adequately respond to their assaults.[8] At the same time, thousands of words in op-ed columns have been expended by hand-wringing commentators worried about everything from due process for the accused to the end of free speech on campus as a result of the increased focus on sexual harassment at universities.[9] Meanwhile, a similar explosion in complaints about sexual assault and harassment has swept the nation's K-12 institutions.[10] In 2019, the Department of Education's Office for Civil Rights (OCR) reported a fifteen fold increase in sexual harassment complaints at K-12 schools over the previous ten years.[11] However, primary and secondary schools are far behind

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-columbia-rape-case.html [https://perma.cc/4MLE-NNTK] (discussing Emma Sulkowicz's rape case against a peer at Columbia and her "Carry That Weight" protest); Sarah Brown, *'This is a Fight We Can Win'*, CHRON. HIGHER EDUC. (Jan. 22, 2017), https://www.chronicle.com/article/this-is-a-fight-we-can-win/ [https://perma.cc/LPP2-TCZU] (detailing Brodsky's activism during and after college); Doreen St. Félix, *The Irrepressibly Political Survivorship of Chanel Miller*, NEW YORKER (Oct. 11, 2019), https://www.newyorker.com/culture/culture-desk/the-irrepressibly-political-survivorship-of-chanel-miller [https://perma.cc/SG89-CZY2] (discussing the release of Miller's book).

8. *See* sources cited *supra* note 7.

9. *See* Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/ [https://perma.cc/MF4D-4SP5] (arguing that colleges punish students for relatively minor infractions out of a sense of "political correctness"); Michael Powell, *Trump Overhaul of Campus Sex Assault Rules Wins Surprising Support*, N.Y. TIMES (June 25, 2020), https://www.nytimes.com/2020/06/25/us/college-sex-assault-rules.html [https://perma.cc/R87N-X49N] (detailing how some feminist scholars support new Title IX policies because of concern for due process rights of the accused); Bari Weiss, *The Limits of 'Believe All Women'*, N.Y. TIMES (Nov. 28, 2017), https://www.nytimes.com/2017/11/28/opinion/metoo-sexual-harassment-believe-women.html?searchResultPosition=71 [https://perma.cc/G348-5DA3] (criticizing the broader "#MeToo" movement for being too willing to believe sexual assault allegations); Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/ [https://perma.cc/5FPR-YFQ2] (describing problems with what some see as overly-punitive sexual assault policies on campus). See Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016), for a legal perspective arguing that increased government involvement has criminalized normal sexual behavior on campus.

10. *Stats Revealed by AP Investigation of Student Sexual Assaults*, ASSOCIATED PRESS (Apr. 30, 2017), https://apnews.com/article/b8ac6e2eb19b4aa090f272afeb57fb25 [https://perma.cc/LE9B-J958] ("More than 2,800 cases of sexual assault, involving more than 3,300 victims, were reported at elementary and secondary schools during 2013 and 2014.").

11. U.S. DEP'T OF EDUC., OFF. OF CIV. RTS., 2017–2018 CIVIL RIGHTS DATA COLLECTION: SEXUAL VIOLENCE IN K-12 SCHOOLS 3 (2020). It should be noted that an increase in *reported* instances of sexual harassment may not correspond with an

higher education when it comes to investigating and dealing with these incidents.[12] Both K-12 schools and universities are subject to Title IX of the Education Amendments of 1972, which declares that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[13] However, K-12 institutions have failed to comply with Title IX, leaving victims with significant hurdles to obtain justice from the legal system.[14]

A cursory overview of K-12 Title IX cases reveals a litany of horrors: a 5-year-old girl in Massachusetts who was forced to pull down her dress and spread her legs by an older student on the school bus nearly every day for months,[15] a 14-year-old boy in Arkansas who committed suicide after enduring months of homophobic bullying,[16] a 12-year-old boy in Texas who was severely bullied and then raped by a classmate in the bathroom,[17] a 14-year-old girl in Alabama who was raped after being used as "bait" by her

actual increase in *cases* of sexual harassment. It is possible that the increase in reports is an indication that students and their parents have more knowledge of reporting procedures now than they did in the past. Brendan L. Smith, *What It Really Takes to Stop Sexual Harassment*, MONITOR ON PSYCH, Feb. 2018, at 36 [https://perma.cc/CP4D-V7TE] (noting that successful training programs on sexual harassment in the workplace may result in an elevated number of reports). *But see An Underreported Problem: Campus Sexual Misconduct*, AAUW, https://www.aauw.org/resources/article/underreported-sexual-misconduct/ [https://perma.cc/P4P7-3X6Q] (arguing that the fact that 79% of schools with grades 7–12 reported zero instances of sexual harassment in 2015–2016 indicates a lack of reporting).

12. *See* Emma Brown, *Sexual Violence Isn't Just a College Problem. It Happens in K-12 Schools, Too*, WASH. POST (Jan. 17, 2016), https://www.washingtonpost.com/local/education/sexual-violence-isnt-just-a-college-problem-it-happens-in-k-12-schools-too/2016/01/17/a4a91074-ba2c-11e5-99f3-184bc379b12d_story.html [https://perma.cc/MFX8-MQ5K]; Green, *supra* note 1; Mark Keierleber, *The Younger Victims of Sexual Violence in School*, ATLANTIC (Aug. 10, 2017), https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418/ [https://perma.cc/Z69F-TU2T].

13. 20 U.S.C. § 1681.

14. *See* Emily Suski, *The School Civil Rights Vacuum*, 66 UCLA L. REV. 720, 755 (2019) (arguing that primary and secondary schools are failing in their Title IX responsibilities to students); Michelle R. Smith, *Students Sexually Abused at School Face Lengthy Legal Fights*, ASSOCIATED PRESS (May 22, 2017), https://apnews.com/article/2de61582c2274b0f9c2e393365b15baf [https://perma.cc/KW9W-ST5R] (detailing parents' efforts to hold schools accountable for Title IX violations in court).

15. Hunter v. Barnstable Sch. Comm., 456 F. Supp. 2d 255, 259 (D. Mass. 2006).

16. Est. of Barnwell v. Watson, 44 F. Supp. 3d 859, 861 (E.D. Ark. 2014).

17. Wilson v. Beaumont Indep. Sch. Dist., 144 F. Supp. 2d 690, 691 (E.D. Tex. 2001).

school to catch another student in the act of sexual harassment.[18] These experiences are not only horrifying to confront, but also have long-lasting implications for students' mental health and future educational attainment.[19]

While the sexual abuse is not perpetrated by the school itself,[20] schools can be held liable when they both have knowledge of sexual harassment or assault and fail to respond reasonably.[21] Yet, the current state of Title IX enforcement in the K-12 setting is confusing and inconsistent. This leaves public school districts across the country, already strapped for resources even before the COVID-19 crisis,[22] vulnerable to liability. More importantly, it fails schoolchildren and denies many of them the full promise of Title IX:

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18. Hill v. Cundiff, 797 F.3d 948, 962–63 (11th Cir. 2015).

19. *See Adult Survivors of Child Sexual Abuse*, RAINN, https://www.rainn.org/articles/adult-survivors-child-sexual-abuse [https://perma.cc/MBF9-K7M6] (citing guilt, shame, blame, flashbacks, and low self-esteem as experiences adult survivors of child sexual abuse have); COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, THE AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE OPINION NO. 498, ADULT MANIFESTATIONS OF CHILDHOOD SEXUAL ABUSE 2 (2011) (detailing how childhood sexual abuse can result in eating disorders, substance abuse, anxiety, depression, PTSD, and increased risk of sexual abuse later in life); NAT'L WOMEN'S L. CTR., HOW TO PROTECT STUDENTS FROM SEXUAL HARASSMENT: A PRIMER FOR SCHOOLS 1 (2007) (discussing increased risk of dropping out stemming from sexual harassment at school and "talking less in class, not wanting to go to school, and finding it hard to pay attention in school").

20. While cases in which a teacher or other staff member perpetrated the sexual abuse will be discussed, the focus of this Note is peer-on-peer sexual harassment and assault. Not only is this the most common form of sexual misconduct experienced by students at school, but it is also the most difficult to pursue legally in terms of Title IX liability. Cindy Long, *The Secret of Sexual Assault in Schools*, NAT'L EDUC. ASS'N NEWS (Dec. 4, 2017), https://www.nea.org/advocating-for-change/new-from-nea/secret-sexual-assault-schools [https://perma.cc/27TR-2SDL] ("For every adult-on-child sexual assault, there were seven such assaults by students . . . ."); Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2082–83 (2016) (finding that the strongest responses from courts tend to come from cases where teacher-student harassment is involved).

21. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) ("[D]amages may not be recovered . . . unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999) ("If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment.").

22. *See* MICHAEL LEACHMAN, KATHLEEN MASTERSON & ERIC FIGUEROA, CTR. ON BUDGET & POL'Y PRIORITIES, A PUNISHING DECADE FOR SCHOOL FUNDING (2017) (describing how public school budgets are still feeling the effects of the Great Recession); Cory Turner, *America's School Funding Crisis: Budget Cuts, Rising Costs, and No Help in Sight*, NPR (Oct. 23, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/10/23/926815076/americas-school-funding-crisis-budget-cuts-rising-costs-and-no-help-in-sight [https://perma.cc/TZV6-8P2D] (detailing COVID-19's impact on school funding).

the right to an education free from discrimination on the basis of sex. Further complicating the issue is that overly punitive consequences for sexual assault and harassment can have negative effects on young perpetrators who are often victims themselves, especially at the primary school level.[23]

Recent decisions from the Ninth and Tenth Circuits regarding Title IX liability at the university level offer a pathway for a more sensible and effective Title IX jurisprudence in K-12 schools. *Karasek v. Regents of the University of California*[24] built on and expanded the precedent established in *Simpson v. University of Colorado Boulder*,[25] recognizing that a claim for actions (or inaction) *prior* to a sexual assault could serve as a cognizable theory of Title IX liability against not only an individual university program[26] but an entire institution.[27] This Note argues that applying *Karasek* and *Simpson* at the K-12 level as a means of Title IX enforcement will shift the focus to institutional responsibility as opposed to individual wrongdoing on the part of a student, and could function as a better avenue to protect students than the system as it currently stands. The proactive nature of these kinds of claims are the most effective way of combatting sexual assault and harassment, and the legal standard should reflect that fact to incentivize schools to take proper action *before* sexual assault and harassment interfere with students' education. Part I provides an overview of Title IX, the current status of Title IX enforcement at the K-12 level, and a review of the *Karasek* and *Simpson* decisions. Part II argues that applying the "pre-assault" form of liability established in *Simpson* and expanded upon in *Karasek* at the K-12 level provides an especially useful avenue for ensuring Title IX compliance. Finally, Part III discusses the limits of Title IX as it

23. DAVID FINKELHOR, RICHARD ORMROD & MARK CHAFFIN, U.S. DEP'T OF JUST., JUVENILES WHO COMMIT SEX OFFENSES AGAINST MINORS 3 (2009) ("A number have experienced a high accumulated burden of adversity, including maltreatment or exposure to violence; others have not. In some cases, a history of childhood sexual abuse appears to contribute to later juvenile sex offending."); Jeanette Der Bedrosian, *When the Abuser Is a Child, Too*, JOHNS HOPKINS MAG. (Spring 2018), https://hub.jhu.edu/magazine/2018/spring/children-who-are-child-sexual-abusers/ [https://perma.cc/Z3PA-ET87] (arguing that sexual abuse by children should be viewed as a "preventable public health issue" instead of a criminal matter).

24. Karasek v. Regents of Univ. of Cal., 948 F.3d 1150, 1170 (9th Cir. 2020).

25. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1178–79 (10th Cir. 2007) (explaining this standard in the context of an official supervisory policy implemented by the institution).

26. *Id.* at 1178.

27. *Karasek*, 948 F.3d at 1170.

currently stands and possible ways forward that would ensure all students receive equal access to education, as is promised to them.

I. Title IX: From *Alexander* to *Karasek*

Part I provides a brief overview of Title IX jurisprudence as it relates to institutional liability for sexual assault and harassment. First, this Part explains the current status of Title IX enforcement in K-12 schools and how it differs from the university level. Next, it outlines the largest challenges in holding institutions accountable for Title IX failures given the current standards. Finally, this Part summarizes the pre-assault theory of liability as explained by the Tenth and Ninth Circuits in *Simpson* and *Karasek*, respectively.

A. History and Purpose of Title IX

Title IX was signed into law by President Richard Nixon in 1972.[28] The law was intended to fill the gap left by Title VI of the Civil Rights Act of 1964, which applied to any program that received Federal funding and prohibited discrimination based on race, color, and national origin, but omitted sex as a protected class.[29] Although the popular understanding of Title IX has largely centered on its impact on women's sports,[30] the Second Circuit in *Alexander v. Yale* held that sexual harassment of women students qualified as discrimination "on the basis of sex" and was thus prohibited under the statute.[31] The *Alexander* decision, along with Title VII

28. Presidential Statement on Signing the Education Amendments of 1972, 1972 PUB. PAPERS 701 (June 23, 1972). Nixon's signing statement did not even mention the sex discrimination element of the bill, focusing instead on busing.

29. 42 U.S.C. § 2000d; Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 CLEV. ST. L. REV. 463, 467–69 (2007).

30. *See* Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325 (2012) (giving an overview of the most impactful Title IX cases as related to athletics); Jeré Longman, *For Those Keeping Score, American Women Dominated in Rio*, N.Y. TIMES (Aug. 22, 2016), https://www.nytimes.com/2016/08/23/sports/olympics/for-those-keeping-score-american-women-dominated-in-rio.html?_r=0 [https://perma.cc/T85Z-N3K4] (crediting the protections of Title IX with the success of women athletes representing the U.S. at the 2016 Olympic Games). See *Benefits—Why Sports Participation for Girls and Women*, WOMEN'S SPORTS FOUND. (Aug. 30, 2016), https://www.womenssportsfoundation.org/advocacy/benefits-sports-participation-girls-women/ [https://perma.cc/5F7F-RDTK], for a description of the importance of equal access to athletics for girls and women.

31. Alexander v. Yale Univ., 631 F.2d 178, 184 (2d Cir. 1980). While the court found that none of the defendants in *Alexander* had standing to bring a suit as they had all graduated, the recognition of sexual harassment as sex discrimination that could theoretically deny one the full benefits of an educational program would

workplace sexual harassment decisions in the late 1980s,[32] paved the way for students across the country to sue their institutions for inadequate responses to sexual harassment and assault. Title IX's scope includes virtually every educational institution in the United States, as the Supreme Court in *Grove City College v. Bell* ruled that the statute applied not solely to public universities and primary and secondary schools, but also to any institution receiving any form of federal funding.[33]

B. The Current Status of Title IX Enforcement in K-12 Schools

In the forty years since *Alexander* was decided and sexual harassment and assault were recognized as cognizable harms that are eligible for relief under Title IX, courts have refined the liability standards for schools. While the courts have clarified the circumstances in which schools can be held liable for the failure to respond to sexual assault and harassment, they have never identified proactive procedures that establish best practices or whose absence constitutes prima facie evidence of negligence.

1. The *Gebser/Davis* standard

Gebser v. Lago Vista Independent School District, decided in 1998, established the standard of institutional liability in Title IX cases.[34] Prior to the *Gebser* decision, lower courts were free to adopt their own standards when evaluating Title IX lawsuits.[35] Predictably, this abundance of differing legal standards led to confusion and inconsistency among state and circuit courts.[36] While

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revolutionize Title IX liability. Additionally, the suit succeeded in scaring Yale into setting up grievance procedures for dealing with sexual harassment and assault complaints, and universities across the country quickly followed suit. Ann Olivarius, *Title IX: Taking Yale to Court*, NEW J. (Apr. 18, 2011), http://www.thenewjournalatyale.com/2011/04/title-ix-taking-yale-to-court/ [https://perma.cc/8WNZ-SAHE].

32. Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 824 (2002).

33. Grove City Coll. v. Bell, 465 U.S. 555, 564 (1984). A handful of religious colleges do not accept any federal funding to avoid Title IX compliance requirements. This is extremely rare because federal funding includes Pell Grants and other financial aid. Ibby Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, ATLANTIC (July 7, 2016), https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/ [https://perma.cc/XE8H-WYWF].

34. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

35. Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 106 (2010) ("One commentator counted seven different standards in play during the pre-*Gebser* period . . . .").

36. *Id.* at 104.

Gebser brought clarity by imposing a uniform approach, it also established what has been described as "an unmistakably high standard,"[37] which "largely destroyed" the incentive for proactivity in preventing sexual assault and harassment on campuses.[38] Post-*Gebser*, "damages may not be recovered [under Title IX] unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."[39] The practical effect of the *Gebser* ruling was to hold that school officials who made no effort to discover whether sexual harassment was occurring in their institutions had no liability due to their lack of knowledge.[40]

One year later, the Supreme Court decided *Davis v. Monroe County Board of Education*. *Davis* clarified that the *Gebser* rule applied to peer-on-peer sexual harassment[41] and added another hurdle for plaintiffs by defining deliberate indifference as actions that are "clearly unreasonable"[42] and "at a minimum, cause[] students to undergo harassment or make[] them liable or vulnerable to it."[43] The deliberate indifference standard has proved to be particularly difficult for plaintiffs to argue successfully.[44] Courts have found that schools were not deliberately indifferent to harassment when they responded with essentially the bare minimum to reports of sexual misconduct.[45] Some have gone so far

37. *Id.* at 106.

38. MacKinnon, *supra* note 20, at 2063–64.

39. *Gebser*, 524 U.S. at 277. The perpetrator in *Gebser* was a teacher, and, at the time of the decision, it was unclear whether the ruling extended to peer-on-peer sexual harassment. Justin F. Paget, *Did* Gebser *Cause the Metastasization of the Sexual Harassment Epidemic in Educational Institutions? A Critical Review of Sexual Harassment Under Title IX 10 Years Later*, 42 U. RICH. L. REV. 1257, 1257 (2008).

40. *Gebser*, 524 U.S. at 292.

41. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999).

42. *Id.* at 648.

43. *Id.* at 644–45 (internal quotes omitted).

44. MacKinnon, *supra* note 20, at 2069 ("[A] close reading . . . shows a vast disproportion between the number of cases that have lost on deliberate indifference and those that have won.").

45. *See* Porto v. Town of Tewksbury, 488 F.3d 67, 73 (1st Cir. 2007) ("[A] claim that the school system could or should have done more is insufficient to establish deliberate indifference . . . ."); Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610 (8th Cir. 1999) (finding that a school district was not indifferent because they did not "turn a blind eye and do nothing"); Doe v. D'Agostino, 367 F. Supp. 2d 157 (D. Mass. 2005) (finding that meeting with a student's parents and visiting the classroom of a teacher accused of sexually harassing students does not amount to deliberate indifference).

as to hold that a school's "negligent or careless conduct" still does not rise to the level of deliberate indifference.[46]

2. Differences in Title IX enforcement at the K-12 and university levels

In the decades since the decision in *Alexander* alerted colleges and universities to the fact that they could be held liable for their failure to respond adequately to reports of sexual assault or harassment, institutions of higher education have developed systems for dealing with sexual misconduct complaints.[47] Additionally, there has been an explosion of student activism since the early 2010s regarding sexual assault and harassment on campuses—students across the country have spoken out about their experiences and attempted to hold their schools accountable, either in the media or through the legal system.[48] As a result, the vast majority of universities have a publicized grievance procedure in place for reports of sexual harassment and assault, sexual harassment training for students and staff, and a dedicated Title IX coordinator.[49] Information about these procedures has reached the majority of college students: sixty-six percent have reported at least some knowledge of how to make a report of sexual harassment or assault on their campuses.[50] Under Title IX, schools may resolve complaints through informal procedures, but they cannot require students to utilize informal processes if the reporting student would prefer to pursue a formal process.[51] When colleges resolve sexual assault and harassment complaints through formal processes, this

46. T.L. v. Sherwood Charter Sch., 68 F. Supp. 3d 1295, 1309 (D. Or. 2014). ("Negligent or careless conduct is not deliberate indifference.").

47. MacKinnon, *supra* note 20, at 2063.

48. *See* sources cited *supra* note 7.

49. 34 C.F.R. § 306.8 (2020).

50. AAU CAMPUS CLIMATE SURVEY, *supra* note 6, at 67 (finding that 34% of students felt "somewhat" knowledgeable, 23% felt "very" knowledgeable, and 9% felt "extremely" knowledgeable about where to make a report of sexual assault or harassment at their school).

51. Schools sometimes use informal processes to avoid reporting statistics through the Clery Act, which requires universities to disclose campus crime statistics. *See* 20 U.S.C. § 1092(f). The subject of one element of the complaint in *Karasek*, discussed in detail later in this Note, was the University of California Berkeley pushing students who reported sexual assault or harassment to resolve their complaints through informal processes. Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1171 (9th Cir. 2020). *But see* Brian A. Pappas, *Sexual Misconduct on Campus*, DISP. RESOL. MAG. (Winter 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/sexual-misconduct-on-campus/ [https://perma.cc/Z6AY-5B2J] (arguing that both formal and informal systems are needed in order to properly address sexual assault and harassment in colleges).

formal process must involve a live hearing wherein the accused and the survivor[52] both have the opportunity to offer evidence, cross-examine the opposing party, and be represented by counsel.[53] A neutral party must preside over the hearing and determine the consequences for the accused, if any.[54]

K-12 institutions, on the other hand, are "light years" behind their higher education counterparts when it comes to having policies in place to address sexual assault and harassment complaints.[55] Guidance from the Department of Education (DOE) that went into effect in August 2020 states that primary and secondary schools may provide a live hearing but must allow a decision-maker to "ask [each] party and any witnesses [any] relevant questions and follow-up questions, including those challenging credibility . . . that a party wants asked of any party or

52. Instead of the term "victim" or "complainant," I use the term "survivor" to refer to individuals who have been sexually assaulted. *See* NATASHA ALEXENKO, JORDAN SATINSKY & MARYA SIMMONS, RAINN, SEXUAL ASSAULT KIT INITIATIVE, VICTIM OR SURVIVOR: TERMINOLOGY FROM INVESTIGATION THROUGH PROSECUTION.

53. 34 C.F.R. § 106.45 (2020). These new regulations went into effect in August 2020 and contradict earlier guidance from the Department of Education under the Obama administration. A 2011 "Dear Colleague" letter, which has since been rescinded, "strongly discourage[d]" schools from allowing the parties to cross-examine each other, citing the potentially "traumatic" effects on the survivor. Russlynn Ali, Assistant Sec'y for Civ. Rts., Off. for Civ. Rts., U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence 12 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/9YL4-2SVC].

54. Examples of consequences imposed by schools on perpetrators can include altered academic schedules, restricted participation in extracurricular activities, altered living arrangements, or a no-contact order. *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/ [https://perma.cc/YQ2N-QVDC]. The August 2020 regulations now allow colleges to use either a "clear and convincing evidence" standard or a "preponderance of the evidence" standard. 34 C.F.R. § 106.45(b)(1)(vii) (2020). Colleges are free to decide some of the administrative particulars of the hearings, with varying results. Anecdotally, my undergraduate institution, Wheaton College (Mass.), until 2011 held sexual harassment hearings in front of the College Hearing Board, which was comprised of faculty and other students and was the same body that doled out consequences for offenses like plagiarism and underage drinking. Wheaton has since established a separate Sexual and Gender-based Misconduct Hearing Board to hear sexual assault and harassment cases so students would not be forced to have sensitive cases heard by their classmates. *See How to Report Sexual Assault Information*, WHEATON COLLEGE MASS., https://wheatoncollege.edu/campus-life/campus-safety/sexual-and-gender-based-misconduct-response-and-resources/how-to-report/ [https://perma.cc/H858-YTLY]; Erica Coray, *Victim Protection or Revictimization?: Should College Disciplinary Boards Handle Sexual Assault Claims?*, 36 B.C. J. L. & SOC. JUST. 59 (2016) (providing a more nuanced discussion of the limitations of college disciplinary boards when it comes to adjudicating sexual assault cases).

55. Green, *supra* note 1, at 1.

witness."[56] K-12 institutions are subject to the same requirements for a publicized grievance procedure and a dedicated Title IX coordinator as colleges are, but compliance with these requirements appears to be far lower at the primary and secondary level than at the university level.[57] Most school districts have just one Title IX coordinator for the entire district, sometimes comprising tens of thousands of students.[58] Additionally, many Title IX coordinators do "double-duty," also serving as HR staff or counselors, and have little to no special training regarding handling sexual assault and harassment cases.[59] One attorney described talking to school employees identified by their institutions as Title IX coordinators and discovering that they did not know that they had such responsibilities.[60]

The absence of any kind of clear reporting structure at most K-12 schools means parents must do the heavy lifting to advocate for their children. In practice, this reliance upon parental advocacy means parents who do not have knowledge of the legal system, access to attorneys, strong English language skills, or the ability to get time off work are unable to navigate this confusing and unintuitive system.[61] School districts are leaving these families, who are more likely to be low-income and families of color, to fend for themselves, and children are left to deal with the consequences.[62] An effective, robust Title IX framework would

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56. 34 C.F.R. § 106.45 (2020).

57. Tyler Kingkade, *K-12 Schools Keep Mishandling Sexual Assault Complaints*, NBC NEWS (May 25, 2020), https://www.nbcnews.com/news/us-news/k-12-schools-keep-mishandling-sexual-assault-complaints-will-new-n1212156 [https://perma.cc/JW24-FPG7] (describing shortcomings of K-12 sexual assault complaint procedures). See 34 C.F.R. § 306.8 (2020), for a discussion of K-12 grievance procedure and designated staff member requirements.

58. Elizabeth J. Meyer, Andrea Somoza-Norton, Natalie Lovgren, Andrea Rubin & Mary Quantz, *Title IX Coordinators as Street-Level Bureaucrats in U.S. Schools: Challenges Addressing Sex Discrimination in the #MeToo Era*, 26 EDUC. POL'Y ANALYSIS ARCHIVES 1, 15 (2018) (concluding that "demand for [Title IX coordinators'] services exceeds supply").

59. Kingkade, *supra* note 57. The school budget crisis has drastically impacted school support staff, even without considering the added responsibilities of serving as Title IX coordinator. In Minnesota, for example, the drastic reductions in the number of school counselors in high schools have been linked to the state's abysmal graduation rates for students of color. Laura Yuen & Brandt Williams, *Without Support, Minnesota Students Left Behind at Graduation*, MPR NEWS (Mar. 7, 2016), https://www.mprnews.org/story/2016/03/07/graduation-gap-minnesota [https://perma.cc/68R2-8S5F].

60. Kingkade, *supra* note 57.

61. Suski, *supra* note 14, at 760–63 (discussing the burden shifting from schools to families and the disproportionate impact on low-income students, who now comprise the majority of public school attendees in the U.S.).

62. *Id.*

ensure that students and parents know how and where to report instances of sexual misconduct and create proactive educational interventions for students on the subject of sexual assault and harassment.

C. Karasek, Simpson*, and the "Pre-Assault" Theory of Liability*

1. *Simpson* recognizes a university program can violate Title IX for its actions before an assault takes place

Lisa Simpson and Anne Gilmore, students at the University of Colorado Boulder (CU), sued CU for violating Title IX after they were sexually assaulted by CU football players and high school football recruits during a recruiting event at the college.[63] In an effort to entice top high school football players to choose CU, the football program hosted recruits on its campus and "promised an opportunity to have sex" with "female 'Ambassadors'" the University paired them with.[64] While CU football coaches themselves were not the ones who promised recruits sex on their visits, the coaches paired recruits with players who "knew how to 'party'" and communicated to these host players that the point of the recruitment program was to "show recruits a good time."[65]

Simpson's and Gilmore's reported sexual assaults were not the first to happen in the CU football program, nor were they the first to happen during the recruiting program itself.[66] In fact, the Boulder District Attorney's (DA) office had specifically warned CU officials about the prevalence of sexual assault within the football recruitment program.[67] At a meeting in February 1998, Assistant

63. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1173 (10th Cir. 2007).

64. *Id.*

65. *Id.* at 1180.

66. There were numerous allegations of sexual assault by CU players in the late 1980s and 1990s, including those by Miles Kusayanagi, who was accused of being the "Duct Tape Rapist," responsible for eight separate sexual assaults in Boulder in 1986. Tim Murphy, *40 Years of College Football's Sexual Assault Problem*, MOTHER JONES (Dec. 5, 2013), https://www.motherjones.com/politics/2013/12/college-football-sexual-assualt-jameis-winston/ [https://perma.cc/9TA6-9F7M]; Rick Reilly, *What Price Glory?*, SPORTS ILLUSTRATED (Feb. 27, 1989), https://vault.si.com/vault/1989/02/27/what-price-glory-under-coach-bill-mccartney-colorado-football-has-taken-off-but-so-has-ugly-criminal-behavior-among-the-buffalo-players [https://perma.cc/98LE-EG8U]. Additionally, in 1997 a high school-aged girl alleged that she was sexually assaulted at an off-campus party hosted by CU football players for visiting recruits. *Simpson*, 500 F.3d at 1181.

67. *Simpson*, 500 F.3d at 1182.

DA Mary Keenan told CU officials that she was worried that "women [were] being made available to recruits for sex" and that the reported 1997 sexual assault of a high school student during a party for CU football recruits was not an isolated incident but part of a concerning pattern.[68]

Deciding on an appeal against a motion for summary judgment, the Tenth Circuit found that a violation of Title IX could occur "when . . . caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient."[69] The court distinguished *Gebser* and *Davis* because, in those cases, there was "no element of encouragement of the misconduct by the school district."[70] The court reasoned that both general information about the risk of sexual assault on college campuses, especially assault perpetrated by athletes, and the specific actions of the CU football program, which included several past incidents of sexual assault, could be seen as official "encouragement of the misconduct."[71] The Tenth Circuit reversed summary judgment and remanded the case.[72] CU later settled with Simpson and Gilmore for $2.8 million.[73]

2. *Karasek* establishes that an entire institution can be liable for its failures prior to a sexual assault

Over a decade after *Simpson*, Sofie Karasek, Aryle Butler, and Nicoletta Commins sued University of California, Berkeley (UC Berkeley) for violating Title IX in its response to each of their assaults, which occurred in three separate school-sponsored

68. *Id.* at 1182.

69. *Id.* at 1178.

70. *Id.* at 1177.

71. *Id.* at 1177, 1181–84. The specific incidents cited by the court as evidence of the CU football program's misconduct included: a 1989 *Sports Illustrated* article about the culture of CU football players and sexual assault; the Boulder District Attorney holding a meeting with the football program and warning them to clean up the high school recruiting program after previous incidents that occurred during the program, including the 1997 sexual assault of a high school student at an off-campus party hosted by a CU football player for recruits; the sexual harassment of Katharine Hnida, a CU football player, in 1999, which was so severe it led to her leaving the university; the 2001 rape of a woman student trainer by a CU football player; and the hiring of an assistant coach in 2001 who had previously been accused of sexual assault and banned from the CU campus.

72. *Id.* at 1184–85.

73. Howard Pankratz, *$2.8 Million Deal in CU Rape Case*, DENVER POST (Dec. 5, 2007), https://www.denverpost.com/2007/12/05/2-8-million-deal-in-cu-rape-case/ [https://perma.cc/T97X-93GE].

programs.[74] The *Karasek* plaintiffs claimed that the university had not only violated Title IX when it responded to their individual assaults but also by "maintaining a general policy of deliberate indifference to reports of sexual misconduct," which resulted in a "heightened [] risk" of sexual assault for plaintiffs.[75]

The Ninth Circuit dismissed each of the plaintiffs' individual claims but vacated the district court's dismissal of the aforementioned "pre-assault" claims, which hold the institution or program responsible for the environment created prior to the plaintiff's sexual assault.[76] The court disagreed with UC Berkeley's characterization of the *Simpson* holding as limited to "a 'specific problem in a specific program'" and instead held that such a pre-assault claim can apply to an entire school's official policy.[77] The court set forth a four-part test for determining whether a pre-assault claim could survive a motion to dismiss: "(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment (3) in a context subject to the school's control, and (4) the plaintiff was harassed as a result."[78]

Like the Tenth Circuit in *Simpson*, the Ninth Circuit avoided the *Gebser*/*Davis* standard by arguing that a plaintiff need not prove deliberate indifference or adequate notice to a specific incident of harassment or assault if the incident stems from a school's official policy.[79] In the instant case, the evidence the court cited to support a pre-assault claim included "a 2014 report prepared by the California State Auditor detailing several deficiencies in UC [Berkeley]'s handling of sexual-harassment cases between 2009 and 2013," "an administrative Title IX claim filed in 2014 by thirty-one women, alleging that UC [Berkeley] has not adequately responded to complaints of sexual assault since 1979," and the incongruity between what university officials said publicly about sexual assault and how they handled complaints in reality.[80]

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74. Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1156 (9th Cir. 2020).

75. *Id.*

76. *Id.* at 1171.

77. *Id.* at 1170. Indeed, the Tenth Circuit in *Simpson* does emphasize the amount of control that the head football coach had over the football program, comparing it to the control that a police chief has over the force. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1184 (10th Cir. 2007).

78. *Karasek*, 948 F.3d at 1169.

79. *Id.*

80. *Id.* at 1160, 1170–71. Seventy-six percent of Title IX complaints at UC Berkeley were resolved via early resolution (informal) processes, possibly to avoid having to report additional sexual assaults as required by the Clery Act.

While expanding the ability of students to file these pre-assault claims against entire institutions can be viewed as a win for advocates, the Ninth Circuit's ruling is not a cure-all. The court ruled that there must be a "causal link" between the school's action or indifference and an assault but did not specify what, exactly, that link would have to look like for a pre-assault claim to succeed.[81] On remand, the district court found that, out of the three plaintiffs, only Sofie Karasek's pre-assault claim adequately alleged that UC Berkeley created and maintained a policy that evinced "deliberate indifference" to reports of sexual misconduct within the organization Karasek was a member of at the time of her assault.[82] While the claim that the district court allowed to advance was, like the football program in *Simpson*, related only to a specific campus organization, not a whole university, the Ninth Circuit was unequivocal in its holding that it is possible to bring a pre-assault claim like Karasek's against an entire institution.[83]

II. *Karasek* and *Simpson* in Primary and Secondary Schools

Part II examines both the positive and negative ramifications of applying the *Karasek* and *Simpson* pre-assault theory of liability at the K-12 level. While there are potential stumbling blocks when it comes to employing this strategy, this Part argues that the pre-assault theory of liability is the most effective tool to address Title IX violations in primary and secondary schools because of the proactive nature of these types of claims. Finally, this Part addresses more specifically the aforementioned challenges, including the limiting effect of the *Davis*/*Gebser* standard and the other potential options for pursuing Title IX liability.

A. Applying Pre-Assault Claims at the K-12 Level

As of April 2021, there are no examples of a successful pre-assault claim brought at the K-12 level. In fact, there are very few examples of any pre-assault claims in cases involving primary or secondary school students at all.[84] While the precedent of *Karasek*

81. *Id.* at 1171.

82. Karasek v. Regents of the Univ. of Cal., No. 3:15-cv-03717-WHO, 2020 U.S. Dist. LEXIS 212770, at *45 (N.D. Cal. Nov. 12, 2020).

83. *Karasek*, 948 F.3d at 1170.

84. Roe v. Cypress-Fairbanks Indep. Sch. Dist., 2020 U.S. Dist. LEXIS 217596 (S.D. Tex. Nov. 20, 2020) (holding that a high school student's violent sexual assault on school property by her boyfriend did not meet the four-part test articulated in

is new, *Simpson* was decided in 2007, and there have been a few other relatively high-profile cases where plaintiff college students invoked a pre-assault claim with some success.[85] Similar to the $2.8 million settlement in *Simpson*, some of these cases have resulted in large awards—including an undisclosed six-figure settlement in *Williams v. Board of Regents of the University System of Georgia*.[86] Significantly, settlements for pre-assault cases can also include non-monetary terms, such as when Arizona State University (ASU) settled a complaint for both $850,000 and an agreement to review and change its sexual harassment policies.[87] These types of non-monetary settlements can carry great significance for survivors who often feel deeply betrayed by their institutions.[88]

Indeed, the student who brought the case against ASU stated that she agreed to settle in part because "she believed the non-monetary terms of the settlement [would] make a significant contribution to making Arizona's campuses safer and reducing the risk of sexual harassment and assault for all students."[89] It is difficult to know how these settlements compare to other post-assault Title IX awards at the collegiate level, as there is no national database tracking this information. Public Justice, a nonprofit legal advocacy organization, does track settlements and

Karasek for pre-assault claims); Torres v. Sugar-Salem Sch. Dist. #322, 2020 U.S. Dist. LEXIS 177052 (D. Idaho Sept. 24, 2020) (rejecting a motion for summary judgment brought by defendant school district that argued that *Karasek* changed Title IX law such that plaintiff's claims were brought under the wrong theory of liability).

85. *See* Walker, *supra* note 35, at 114 (discussing pre-assault cases that follow the precedent of *Simpson*).

86. *Id.* at 124.

87. *Id.* at 126.

88. *See, e.g.*, Carly Smith & Jennifer Freyd, *Dangerous Safe Havens: Institutional Behavior Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 120 (2013) (explaining that the effects of sexual assault that occurs in a context where the survivor's safety is dependent on an institution can be more severe); Katie J.M. Baker, *Rape Victims Don't Trust the Fixers Colleges Hire To Help Them*, BUZZFEED NEWS (Apr. 25, 2014), https://www.buzzfeednews.com/article/katiejmbaker/rape-victims-dont-trust-the-fixers-colleges-hire-to-help-the [https://perma.cc/TB5X-ZXWW] (detailing survivor activists' resistance to universities hiring attorneys they see as solely serving the institution at the expense of students); Jennifer Steinhauer, *Behind Focus on Sexual Assaults, a Steady Drumbeat by Students*, N.Y. TIMES (Apr. 29, 2014), https://www.nytimes.com/2014/04/30/us/sexual-assault-on-university-campuses.html?_r=0 [https://perma.cc/Q594-UY6R] (quoting a student as comparing sexual assault in college and the military because both are institutions where one expects to be protected but is in reality treated "poorly").

89. Walker, *supra* note 35, at 126 (internal quotation marks omitted).

awards at the K-12 level, which can range from four to nine figures.[90]

Although lack of data prevents any meaningful comparisons between pre- and post-assault claims at the university level, it is clear that pre-assault claims can result in not only monetary awards, but potential policy and culture change on campus.[91] Unique to pre-assault claims is the emphasis on the institution's failures *prior* to the assault or harassment, which necessarily encourages a more holistic view of the institution's general sexual assault and harassment policies, not only its Title IX grievance procedure (which is implicated in post-assault cases). In primary and secondary schools, which overall have much less robust Title IX procedures and less clear instructions for how and where to report instances of sexual assault or harassment,[92] pre-assault claims could be very effective. While pre-assault cases in universities necessitate looking at whether the institution followed its own policies and procedures, bringing pre-assault cases in K-12 settings—where policies and procedures are unclear or not communicated to students, parents, or even staff—seems more likely to result in a win for plaintiffs and a restructuring of how schools approach handling assault and harassment.

1. Institutional control in the K-12 setting

Another difference between K-12 schools and institutions of higher education is the degree to which they are able to "control" their students. On remand in *Karasek*, Judge William H. Orrick discussed the importance of determining the level of control a school exercises over the situation in which the harassment or abuse

90. PUB. JUST., JURY VERDICTS AND SETTLEMENTS IN K-12 HARASSMENT & BULLYING CASES (2020). Note that the awards on the very high end of the range (eight to nine figures) are almost always a result of a case where a teacher or other school employee abused multiple children over many years. There are smaller awards listed, some as low as $75, but these come from cases of bullying, not sexual abuse. Additionally, the terms of some settlements are undisclosed or confidential, making it difficult to form a complete picture of the K-12 Title IX landscape. *See also* Michelle R. Smith, *A Look at Student-on-Student Sex Abuse Verdicts, Settlements*, ASSOCIATED PRESS (May 22, 2017), https://www.ap.org/explore/schoolhouse-sex-assault/a-look-at-student-on-student-sex-abuse-verdicts-settlements.html [https://perma.cc/2FZ2-8KAW] (highlighting select peer-on-peer sexual abuse verdicts and settlements).

91. The ASU settlement established a system-wide student safety coordinator who was responsible for hiring staff on each of the system's three campuses to listen to and address reports of student sexual assaults. *See* Lester Munson, *Landmark Settlement in ASU Rape Case*, ESPN (Jan. 30, 2009), https://www.espn.com/espn/otl/news/story?id=3871666 [https://perma.cc/YJT9-2GXM].

92. *See supra* Part I.B.2.

occurs at length, eventually dismissing one of the plaintiff's complaints for failing to satisfy this necessary element of a pre-assault claim.[93] Judge Orrick did not articulate a standard for pre-assault control or clarify whether such a standard might differ from the post-assault *Davis* standard, which requires an institution to exercise control over both the harasser and the context in which the harassment occurs.[94] While this standard might remain unclear, it is evident that primary and secondary schools have more control over their minor students than universities do over adult students, a contrast acknowledged by the Court in *Davis*.[95] This control, while not absolute, is substantial enough to grant schools the ability to infringe on the constitutional rights of students in order to protect them, a right not granted to other actors.[96] While courts have historically shied away from fully recognizing the level of control schools have over children out of deference to the authority of parents,[97] laws such as mandated reporter statutes for child abuse and Title IX accept the reality that parents are incapable of being in control of and protecting their children while they are at school.[98]

Courts have acknowledged that K-12 schools have more control over their students than colleges do,[99] and this control necessarily comes with the greater level of responsibility primary and secondary schools have in terms of shaping future citizens. Public primary and secondary schools have long been recognized as transmitting not only educational knowledge to young people, but social and cultural values as well.[100] Scholarship suggests that

93. Karasek v. Regents of the Univ. of Cal., No. 3:15-cv-03717-WHO, 2020 U.S. Dist. LEXIS 212770, at *33–37 (N.D. Cal. Nov. 12, 2020); *see supra* note 78 and accompanying text (explaining the four-part pre-assault test articulated in *Karasek*).

94. *Id.* at *33–34 (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644 (1999)).

95. *Davis*, 526 U.S. at 649 ("[A] university might not . . . be expected to exercise the same degree of control over its students that a grade school would enjoy . . . .").

96. *See* Suski, *supra* note 14, at 743–44.

97. D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (arguing that the physical custody of students at school was not sufficient to establish a custodial relationship of the type that would trigger a 14th Amendment responsibility). See Deshaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 198–99 (1989), for more discussion of what relationships have been recognized by the Court as imposing this duty.

98. See Suski, *supra* note 14, at 741–44, for an examination of the conflicting messages with regards to control, responsibility, and authority that are communicated to schools.

99. *See supra* note 95.

100. The Court in *Bethel* justified limiting the free speech of public school students by reasoning:

institutions themselves can tolerate and even encourage sexual assault and harassment through both the actions of authorities and the institution's own unique cultural values.[101] The OCR has recognized this fact, finding that a California district was in violation of Title IX based on its response to complaints, and that "sexually harassing behavior permeates the educational environment at the school sites."[102]

Children spend the majority of their days at school, and the influence of teachers, administrators, coaches, and other adults can have a significant impact on their worldview. When these adults do not take sexual assault seriously, turn a blind eye, or dismiss sexual harassment as "harmless," children internalize these messages.[103] While colleges must contend with older students who come to campus with opinions and attitudes towards sexual harassment that are more fully-formed and must meet students where they are to an extent, K-12 institutions have more influence over forming these attitudes. This control, combined with schools' duty under Title IX to ensure equal access to educational opportunities,[104] should set a lower bar for plaintiffs attempting to prove "deliberate indifference"[105] in K-12 schools than in colleges and universities. It also lends credence to the importance of developing an effective sexual harassment policy in schools, the existence of which can

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. *The inculcation of these values is truly the "work of the schools."*

Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986) (emphasis added) (citation omitted).

101. *See* MacKinnon, *supra* note 20, at 2056 (discussing how college campuses can be "rape-prone"); Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5 (1981) (examining why some institutions are more tolerant or encouraging of sexual assault than others).

102. Letter from Arthur Zeidman, Dir., Off. for Civ. Rts., Region IX California, U.S. Dep't. of Educ., to Bruce Harter, Superintendent, West Contra Costa Unified Sch. Dist. (Nov. 6, 2013), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09095001-a.html [https://perma.cc/BG5X-974Y].

103. Ann C. McGinley, *Schools as Training Grounds for Harassment*, 2019 U. CHI. LEGAL F. 171, 222 (2019).

104. 20 U.S.C. § 1681.

105. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (explaining that a school's "response [to alleged sexual harassment] must amount to deliberate indifference" in Title IX cases).

serve as an important indicator for students and teachers alike of what their school community values.[106]

2. Establishing appropriate pre-assault standards

The standard established by the Supreme Court in *Gebser* and expanded upon in *Davis* states that an appropriate school official must have actual notice of the harassment and that the school must be deliberately indifferent to said harassment in order for a plaintiff to prevail on a Title IX claim.[107] The *Gebser/Davis* standard has been troubling since its inception due to the high burden it imposes on those who have experienced sexual harassment or assault and the resultant reduced chances for any kind of real change in the handling of sexual misconduct cases.[108] These bureaucratic burdens can be particularly high for elementary and secondary school students. Studies of child and adolescent brain development have established that young people have far more difficulty making decisions and planning than adults do.[109] These kinds of differences between child and adult brains make the calculations required to

106. Long, *supra* note 20 ("[C]reating a respectful school culture is more effective than classroom lessons alone in creating sustainable, positive changes in student attitudes and behavior . . . .").

107. *Gebser*, 524 U.S. at 277; Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999).

108. *See, e.g.*, MacKinnon, *supra* note 20, at 2069 (discussing the high bar of the deliberate indifference standard); Diane L. Rosenfeld, *Changing Social Norms? Title IX and Legal Activism Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J. L. & GENDER 407, 408 (2008) ("The requirements of 'actual notice' and 'deliberate indifference' set forth in the *Gebser/Davis* line of cases have created a heavy burden on plaintiffs and made the protections of Title IX inaccessible to many.") (footnote omitted); Suski, *supra* note 14, at 744 (advocating for a turn towards the Title VII constructive notice standard in Title IX cases because of the difficulty of proving deliberate indifference); Walker, *supra* note 35, at 128 (describing surviving a motion to dismiss for Title IX cases as a "daunting challenge" which continues to grant schools "a certain degree of practical immunity from Title IX liability").

109. *See* Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 1184, 1187 (2012) (explaining the importance of emotion in decision-making for adolescents); Dana G. Smith, Lin Xiao & Antoine Bechara, *Decision Making in Children and Adolescents: Impaired Iowa Gambling Task Performance in Early Adolescence*, 48 DEVELOPMENTAL PSYCH. 1180, 1186 (2012) (finding less efficient and effective responses to cognitive demands among children and adolescents); Stacie L. Warren, Yuan Zhang, Katherine Duberg, Percy Mistry, Weidong Cai, Shaozheng Qin, Sarah-Nicole Bostan, Aarthi Padmanabhan, Victor G. Carrion & Vinod Menon, *Anxiety and Stress Alter Decision-Making Dynamics and Causal Amygdala-Dorsolateral Prefrontal Cortex Circuits During Emotion Regulation in Children*, 88 BIOLOGICAL PSYCHIATRY 576, 582 (2020) (finding that anxiety and stress can result in less confident decision-making in children).

decide to make a potentially risky or frightening disclosure of sexual abuse much more difficult for children.[110]

Additionally, the *Gebser/Davis* standard requires very specific disclosure of sexual harassment or abuse in order for said disclosure to qualify as "actual notice."[111] Requiring this kind of specificity from young children who may be unable to articulate what exactly is happening to them is misguided at best.[112] While some school employees simply misunderstand students' attempted disclosures, others ignore, dismiss, or even willfully cover up said disclosures, foreclosing the possibility of meaningful action by the school.[113] Since teachers, the main adult point of contact for children at school, do not qualify under *Gebser* as an appropriate school official for purposes of reporting,[114] students are required to find a higher

110. Emily Suski, *The Title IX Paradox*, 108 CALIF. L. REV. 1147, 1181 (2020).

111. *Gebser*, 524 U.S. at 290 (holding that, in order for the actual notice requirement to be satisfied, "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf" must be informed and fail to respond). The list of cases in which courts failed to find actual notice is long. *See, e.g.*, Rost v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114 (10th Cir. 2008) (failing to find actual notice where a disabled child was unable to articulate what kind of harassment she was experiencing); Gabrielle M. v. Park Forest-Chicago Heights, 315 F.3d 817, 819 (7th Cir. 2003) (failing to find actual notice where a kindergarten student was only able to tell teachers her classmate was "bothering her" and doing "nasty stuff"); Baynard v. Malone, 268 F.3d 228 (4th Cir. 2001) (finding that the school did not have actual notice of sexual abuse by a teacher, despite reports that the teacher in question had molested students in the past).

112. Many victims of childhood sexual abuse either fail to report the abuse altogether or significantly delay reporting for months or even years. Kamala London, Maggie Bruck, Daniel B. Wright & Stephen J. Ceci, *Review of the Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviewers*, 16 MEMORY 29, 31 (2008). Some studies have found that the more severe the abuse is, the less likely a child is to report it. *See* Mary L. Paine & David J. Hansen, *Factors Influencing Children to Self-Disclose Sexual Abuse*, 22 CLINICAL PSYCH. REV. 271, 273 (2002).

113. Linda Charmaraman, Ashleigh E. Jones, Nan D. Stein & Dorothy L. Espelage, *Is It Bullying or Sexual Harassment? Knowledge, Attitudes, and Professional Development Experiences of Middle School Staff*, 83 J. SCH. HEALTH 438, 442 (2013) (finding that middle school teachers had difficulty identifying sexual harassment between students); BILLIE-JO GRANT, STEPHANIE B. WILKERSON, DEKOVEN PELTON, ANNE COSBY & MOLLY HENSCHEL, U.S. DEP'T OF JUST., A CASE STUDY OF K-12 SCHOOL EMPLOYEE SEXUAL MISCONDUCT: LESSONS LEARNED FROM TITLE IX POLICY IMPLEMENTATION 55–56 (2017) (reporting that schools not only fail to train staff so they lack knowledge about sexual harassment, but teacher-perpetrators are often transferred between schools rather than disciplined); Jenn Abelson, Bella English, Jonathan Saltzman & Todd Wallack, *Private Schools, Painful Secrets*, BOS. GLOBE (May 6, 2016), https://www.bostonglobe.com/metro/2016/05/06/private-schools-painful-secrets/OaRI9PFpRnCTJxCzko5hkN/story.html [https://perma.cc/85QH-RG8X] (finding over two hundred victims at sixty-seven elite New England private schools whose cases were dismissed or covered up by administrators).

114. *Gebser*, 524 U.S. at 290.

authority to appeal to if their initial report goes unheard. Expecting children to fulfill this duty after their initial report was ignored or dismissed is unrealistic. Students who have been sexually harassed or abused at school report feeling nervous or afraid of not being believed—adding additional hurdles only makes disclosure even less likely.[115] In a setting where already half of students who experience sexual harassment never report it,[116] requiring students to report their harassment or abuse within the overly rigid *Gebser/Davis* framework suppresses reporting and hampers Title IX claims.

In the stifling context of *Gebser/Davis*, pre-assault claims offer a way to clarify the legal standard to provide greater emphasis on the pre-assault procedures a school district needs to have in place in order to avoid liability. Both the Tenth Circuit in *Simpson* and the Ninth Circuit in *Karasek* established that a plaintiff need not prove either deliberate indifference or actual notice of a specific incident in order for a pre-assault claim to proceed.[117] Since a pre-assault claim deals with a school's *official policy* violating Title IX, reporting students do not need to have made school officials aware of a specific incident of harassment or abuse in the particular way required by *Gebser* and *Davis*.[118] This relaxed reporting standard could make a large difference at the K-12 level, where children struggle with both recognizing sexual harassment and assault as well as reporting it in the legally required ways.[119]

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115. Suski, *supra* note 110, at 1181.

116. CATHERINE HILL & HOLLY KEARL, AAUW, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2–3 (2011) (outlining that one-half of students who reported being sexually harassed said that they told "no one" while only nine percent reported the incident to an adult at school).

117. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007); Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1169 (9th Cir. 2020).

118. *Karasek*, 948 F.3d at 1159.

119. This is not to downplay the challenges faced by college students or even adults who struggle with the decision to report their sexual harassment or assault. Barriers to reporting exist at every age. *See* Marjorie R. Sable, Fran Danis, Denise L. Mauzy & Sarah K. Gallagher, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. COLL. HEALTH 157 (2006) (finding that college students cite shame, guilt, and embarrassment as reasons for not reporting); Shalia Dewan, *Why Women Can Take Years to Come Forward With Sexual Assault Allegations*, N.Y. TIMES (Sept. 18, 2018), https://www.nytimes.com/2018/09/18/us/kavanaugh-christine-blasey-ford.html [https://perma.cc/65TZ-556V] (discussing the way that the trauma of sexual assault can affect memory and recall); Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), https://time.com/time-person-of-the-year-2017-silence-breakers/ [https://perma.cc/C7B4-YDTF] (awarding Time's "Person of the Year" to women who came forward with sexual harassment and assault allegations against some of the most powerful men in Hollywood after the abuse had been going on for years).

B. Potential Issues and Complications

1. Risk of an increased burden on schools.

One of the main concerns with possibly opening schools up to more liability by enabling pre-assault claims at the K-12 level is the risk of stretching budgets that are already thin, especially in the nation's public schools.[120] Indeed, K-12 schools already spend millions to settle Title IX cases.[121] The budget crisis in schools should not be taken lightly, especially when the economic burden falls disproportionally on students of color and students who live in poverty, and the effects of underfunded schools can follow children well into adulthood.[122] However, the answer to the school budget crisis is not to reduce services for children. Title IX does not contain an exception that dictates that students are entitled to equal educational opportunities only when their institutions can afford them. The answer to the budget crisis certainly does not lie in allowing for little to no real legal recourse to children who have been sexually harassed or abused at school.[123] Student safety is non-negotiable, and in recent years schools have been increasingly willing to pay large amounts of money on fixes like metal detectors, social-media monitoring software, and other measures intended to protect students in the event of a shooting.[124] While the

120. *See* sources cited *supra* note 22.

121. *See* sources cited *supra* note 90; Erica L. Green, *Proposed Rules Would Reduce Sexual Misconduct Inquiries, Education Dept. Estimates*, N.Y. TIMES (Sept. 10, 2018), https://www.nytimes.com/2018/09/10/us/politics/campus-sexual-misconduct-rules.html [https://perma.cc/FHA4-N53K] (discussing the Trump administration's proposed Department of Education regulations on Title IX that would reduce investigations and thus liability, saving schools money).

122. *See, e.g.*, Dennis J. Condron & Vincent J. Roscigno, *Disparities Within: Unequal Spending and Achievement in an Urban School District*, 76 SOC. EDUC. 18, 32 (2003) (finding that higher spending results in increased achievement); Rachel R. Ostrander, *School Funding: Inequality in District Funding and the Disparate Impact on Urban Migrant School Children*, 2015 BYU EDUC. & L.J. 271, 283 (2015) ("The effect of the current system of determining funding has resulted in the concentration of economically disadvantaged urban and migrant racial minorities into these low performing schools who receive minimal funds."); Michelle Chen, *How Unequal School Funding Punishes Poor Kids*, NATION (May 11, 2018), https://www.thenation.com/article/archive/how-unequal-school-funding-punishes-poor-kids/ [https://perma.cc/9VSH-RDLW] (finding that poor districts have fewer teachers per child and are more likely to cut school services and programs than wealthier districts).

123. See Suski, *supra* note 110, at 1201, for a more detailed examination of the challenges of balancing strapped school budgets with the rights of students under Title IX.

124. John Woodrow Cox & Steven Rich, *Armored School Doors, Bulletproof Whiteboards and Secret Snipers*, WASH. POST (Nov. 13, 2018),

effectiveness of these expensive improvements is debatable, it is clear that schools and communities value the safety of students while they are at school. This same willingness to spend additional money should extend to Title IX measures and training. Lastly, schools themselves have liability insurance specifically intended to pay out Title IX claims, so some of the concern about impacts on school budgets may be over-exaggerated.[125]

Pre-assault claims, because of their more holistic focus on Title IX policy overall, have the added bonus of being more preventative than post-assault claims.[126] After a settlement or judgment for a pre-assault claim, a school that improves its Title IX procedures as well as its school culture surrounding sexual harassment will be much less likely to face additional Title IX lawsuits in the future.

2. Other potentially fruitful avenues of pursuing liability and accountability exist

a. Civil liability for school officials individually

There is no right of action against individuals under Title IX—only institutions can be sued under the statute.[127] Some commentators have suggested either (1) expanding Title IX case law to include an ability to bring suit against individuals or (2) relying more heavily on either other federal statutes or state tort law in cases that would traditionally fall under Title IX.[128] One avenue for these kinds of suits is § 1983 of the Civil Rights Act of 1871, which provides that any person acting under color of law who deprives another person of "any rights, privileges, or immunities secured by

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https://www.washingtonpost.com/graphics/2018/local/school-shootings-and-campus-safety-industry/ [https://perma.cc/V5V7-S33N] (discussing the emerging "school safety" industry); Jon Schuppe, *Schools Are Spending Billions on High-Tech Security. But Are Students Any Safer?*, NBC NEWS (May 20, 2018), https://www.nbcnews.com/news/us-news/schools-are-spending-billions-high-tech-security-are-students-any-n875611 [https://perma.cc/KJK4-SS6M] (examining use of military security technology in public schools).

125. *See* Suski, *supra* note 110, at 1201.

126. *See* discussion *supra* Part II.A.1.

127. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 641 (1999) ("The Government's enforcement power may only be exercised against the funding recipient . . . and we have not extended damages liability under Title IX to parties outside the scope of this power.").

128. *See* Christine Tamer, *Bullied LGBQ Students Are Afraid but Their Schools Aren't (and That's the Problem): Why It's Time to Move On from Broken Title IX to State Tort Law as a Solution*, 25 TEX. J. C.L. & C.R. 153 (2020); Jennifer Kirby Tanney, *A Backdoor to Individual Title IX Liability? The Implications of* Fitzgerald v. Barnstable School Committee *on the Liability of Teachers and Administrators for Peer-to-Peer Harassment*, 26 WIS. J. L. GENDER & SOC'Y 23 (2011).

the Constitution and laws" is civilly liable.[129] Courts have interpreted § 1983 to allow claims for violations of rights that were created by federal statute, which includes Title IX.[130] Title IX and § 1983 claims are often brought concurrently, but they have the potential to reach both different situations and different actors.[131]

Section 1983's requirement that officials be acting under color of law when the violation of rights occurred requires proof that these individuals were acting as part of the school's official policy.[132] This indictment of a school or district's policy would appear to line up with the pre-assault claims that can be brought under Title IX after *Karasek*. However, unlike Title IX, § 1983 requires proof of *intentional* discrimination, a higher bar.[133] Additionally, § 1983 has more limited options in terms of recovery—punitive damages can never be awarded under the statute.[134] Lastly, there is lingering doubt over whether claims against individual teachers or administrators under § 1983 are lawful. The Supreme Court has never explicitly ruled on whether or not this is the case,[135] and there is concern that allowing these kinds of claims under § 1983, based on the rights established by Title IX, which does not allow for suits against individuals, would disregard Congressional intent.[136] While § 1983 suits may be valuable for some plaintiffs, in cases where the district's official policy regarding sexual harassment is at fault, Title IX *Karasek* claims provide a more fruitful and effective avenue of enforcement because they avoid the requirement that the district intentionally discriminate against the plaintiffs.

Another suggested avenue for sexual harassment and assault claims in K-12 schools is increased reliance on state tort law. Every state in the country has an anti-bullying law on the books.[137] Some of these statutes are stronger than others, both in the range of

129. 42 U.S.C. § 1983.

130. *See* Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (acknowledging that actions under § 1983 can be brought for violations of federal statutory law); Tanney, *supra* note 128, at 37 (explaining that in order for the rights created by the statute to be recognized under § 1983, the "statute must create binding obligations, rather than merely Congressional preferences, and the interest must not be vague and the statute must be intended to benefit the party bringing suit") (footnote omitted).

131. Shailini Jandial George, *Do Sexual Harassment Plaintiffs Get Two Bites of the Apple?: Sexual Harassment Litigation After* Fitzgerald v. Barnstable School Committee, 59 DRAKE L. REV. 41, 59–60 (2010).

132. *Id.* at 60.

133. Tanney, *supra* note 128, at 41.

134. *Id.* at 39.

135. *Id.* at 54.

136. *Id.* at 61.

137. Tamer, *supra* note 128, at 191–93.

behavior and protected groups they cover and in their enforcement mechanisms.[138] However, they are currently much less effective than they could be—a 2015 survey found that over a quarter of schools did not have an anti-bullying policy that complied with their state's law.[139] When effective, anti-bullying laws can be particularly valuable for their ability to reach low-level verbal harassment that, while often extremely painful for young people,[140] does not meet the "severe and pervasive" threshold required to bring a suit under Title IX.[141] However, courts have repeatedly held school districts immune from the tort claims that arise from violations of these anti-bullying laws.[142]

Supporters argue that abandoning Title IX as the main avenue for regulation of discriminatory behavior in schools, and turning instead to an expansion of state tort law to allow for claims under anti-bullying laws, would more effectively communicate "societal values" and force school districts to comply out of fear of liability.[143] However, falling back on state law necessitates abandoning the

138. *Id.* at 193–94.

139. RYAN M. KULL, JOSEPH G. KOSCIW & EMILY A. GREYTAK, GLSEN, FROM STATEHOUSE TO SCHOOLHOUSE: ANTI-BULLYING POLICY EFFORTS IN U.S. STATES AND SCHOOL DISTRICTS 5 (2015) (finding that 26.3% of districts in states with laws requiring an anti-bullying policy did not have one. Among states that named sexual orientation as a protected class in their anti-bullying law, 38.7% of schools did not provide protection based on actual or perceived sexual orientation. This number was even more stark for states that provided protection based on gender identity and expression: 60.3% of schools failed to provide protection based on those categories).

140. *See, e.g.*, Jannick Demanet & Mieke Van Houtte, *The Impact of Bullying and Victimization on Students' Relationships*, 43 AM. J. HEALTH EDUC. 104, 108 (2012) (finding that both victims and perpetrators of bullying feel less connected to their peers, families, and teachers than their classmates that are not involved in bullying); Dieter Wolke, William E. Copeland, Adrian Angold & E. Jane Costello, *Impact of Bullying in Childhood on Adult Health, Wealth, Crime, and Social Outcomes*, 24 PSYCH. SCI. 1958, 1967 (2013) ("Involvement with bullying in any role was predictive of negative health, financial, behavioral, and social outcomes in adulthood."); Dieter Wolke & Suzet Tanya Lereya, *Long-Term Effects of Bullying*, 100 ARCHIVES DISEASE CHILDHOOD 879, 880 (2015) (finding that children who were victims of bullying had worse mental health outcomes in adulthood, including increased levels of depression, anxiety, suicidal ideation, and psychotic experiences).

141. Tamer, *supra* note 128, at 176.

142. *See* Castillo v. Bd. of Educ., 103 N.E.3d 596, 598–601 (Ill. App. Ct. 2018) (finding that a school was not liable for violation of the district's anti-bullying statute after a student was attacked off-campus and harassed on-campus because school officials were immune); A.F. v. Hazelwood Sch. Dist., 491 S.W.3d 628, 635 (Mo. Ct. App. 2016) (dismissing bullying claims against a school and school officials because the claims were barred by official immunity); Est. of Brown v. Cypress Fairbanks Indep. Sch. Dist., 863 F. Supp. 2d 632, 639 (S.D. Tex. 2012) (dismissing a claim arising from a school district's violation of the state's anti-bullying policy after a teenager committed suicide due to homophobic bullying for failure to state a claim upon which relief can be granted).

143. Tamer, *supra* note 128, at 198–99.

hope for federal consistency that a federal law like Title IX offers. Instead, the decisions on what qualifies as harassment, which categories are protected, and how to incentivize schools to comply, would be left up to states, resulting in a patchwork of enforcement. This is not mere speculation—a similar shift towards deference to state law is happening in the area of rights for transgender students in schools with disastrous consequences.[144]

In 2016, the Obama DOE distributed a "Dear Colleague" letter instructing schools and universities that, under Title IX, transgender students were required to be treated in a way that was consistent with their gender identity, not their sex assigned at birth.[145] The letter stated that this required schools to allow transgender students to use bathrooms and locker rooms and to participate in sex-segregated athletics consistent with their gender identity.[146] The victory for trans youth was short-lived, however, as the Trump administration rescinded the letter, and the guidance along with it, in February 2017.[147] In the years since, there has been an increase in laws regulating treatment of transgender young people:[148] laws prohibiting schools from allowing transgender students to use the bathrooms or locker rooms that align with their gender identity, that ban their participation on sports teams that

144. Elly Belle, *What High School Is Like for Transgender Students*, TEEN VOGUE (Sept. 15, 2018), https://www.teenvogue.com/story/what-high-school-is-like-for-transgender-students [https://perma.cc/S2SU-NDX5] (detailing the challenges trans youth face at school); Rachel Savage, *Barred, Bullied, Depressed: Life for Many U.S. Trans Students*, REUTERS (Aug. 15, 2019), https://www.reuters.com/article/us-usa-lgbt-education/barred-bullied-depressed-life-for-many-u-s-trans-students-idUSKCN1V609P [https://perma.cc/6RZ7-66NJ] (detailing the disastrous mental health outcomes for trans students).

145. Dear Colleague Letter on Transgender Students, Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., Off. for Civ. Rts., U.S. Dep't of Educ. 3 (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/673W-G25H].

146. *Id.*

147. Rebecca Hersher & Carrie Johnson, *Trump Administration Rescinds Obama Rule of Transgender Students' Bathroom Usage*, NPR (Feb. 22, 2017), https://www.npr.org/sections/thetwo-way/2017/02/22/516664633/trump-administration-rescinds-obama-rule-on-transgender-students-bathroom-use [https://perma.cc/QPT2-6LKM].

148. *See* Diana Ali, *The Rise and Fall of the Bathroom Bill: State Legislation Affecting Trans & Gender Non-Binary People*, NASPA (Apr. 2, 2019), https://www.naspa.org/blog/the-rise-and-fall-of-the-bathroom-bill-state-legislation-affecting-trans-and-gender-non-binary-people [https://perma.cc/V8A9-4RK5]; *The Coordinated Attack on Trans Student Athletes*, ACLU (Feb. 26, 2021), https://www.aclu.org/news/lgbt-rights/the-coordinated-attack-on-trans-student-athletes/ [https://perma.cc/7Q3Y-8SYD]; *Legislative Tracker: Youth Sports Bans*, FREEDOM FOR ALL AMS., https://freedomforallamericans.org/legislative-tracker/student-athletics/ [https://perma.cc/6WU2-6XJD] [hereinafter *Legislative Tracker*].

align with their gender identity, and that limit their access to healthcare are under consideration in several statehouses.[149] Transgender students in these states are subject to the debate over their right to do something as simple as use the bathroom safely, while their peers in the fifteen states that have laws protecting students on the basis of gender identity can attend school without these worries.[150] This unequal treatment from state to state is what we risk if Title IX enforcement is left to states, and students' safety in school and their legal recourse are too valuable to be dictated by where they live.

Ultimately, both § 1983 claims and state tort law fail students for the very same reason that some advocate for their use—they emphasize individual wrongdoing on the part of school officials. While there are of course instances of individuals failing students, a much larger concern for enforcing Title IX in K-12 schools is the institutional failures of districts that do not have effective anti-harassment policies, do not train teachers to recognize sexual harassment, and often ignore or mishandle reports of sexual harassment and assault when they are made aware of them. Any purported solution that focuses on the actions of individuals will be ineffective when the issue is system-wide. To truly improve

149. As of March 2021, twenty-two states have anti-trans bills under consideration. *Legislative Tracker*, *supra* note 148. *See* H.B. 1, 2021 Leg., Reg. Sess. (Ala. 2021) (requiring schools to, among other things, disclose students' gender identities to their parents); H.B. 3, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (requiring students to show proof of their sex assigned at birth in order to participate in sex-segregated athletics); S.B. 331, 58th Leg., 1st Sess. (Okla. 2021) (prohibiting students of the male sex from joining sports teams for women or girls); H.B. 1298, 67th Leg. Assemb., Reg. Sess. (N.D. 2021) (designating all athletic events as exclusively for males or exclusively for females, based upon sex assigned at birth); H.B. 1476, 67th Leg. Assemb., Reg. Sess. (N.D. 2021) (prohibiting, among many other things, "[e]xposing students to a curriculum concerning nonsecular self-asserted sex-based identity ideology or sexual orientation orthodoxy"); H.B. 1217, 96th Leg. Sess., Reg. Sess. (S.D. 2021) (establishing that female sports teams are only available to biologically female students); S.B. 373, 87th Leg., Reg. Sess. (Tex. 2021) (requiring students to participate in athletics based on sex assigned at birth); Jordan Williams, *Transgender Athletes Could Face Criminal Charges Under Proposed Minnesota Bill*, HILL (Mar. 2, 2021), https://thehill.com/homenews/state-watch/541265-transgender-athletes-could-face-criminal-charges-under-minnesota-bill?rl=1 [https://perma.cc/MB88-86G6] (explaining a proposed Minnesota bill that would make transgender girls who participate in women's sports or use the women's bathroom or locker room guilty of a petty misdemeanor); Yue Stella Yu, *Tennessee Senate Passes Bill Barring Transgender Students from Playing High School Sports Under Their Gender Identity*, TENNESSEAN (Mar. 1, 2021), https://www.tennessean.com/story/news/politics/2021/03/01/tennessee-senate-votes-pass-transgender-athlete-bill/6869465002/ [https://perma.cc/558J-WSH7].

150. *Equality Maps: Safe School Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/safe_school_laws [https://perma.cc/4KWN-5ALZ].

educational opportunity for children in the nation's schools, districts need to be incentivized to comply with Title IX by making their campuses safer and less conducive to sexual harassment and assault. Title IX pre-assault claims are the best legal strategy because their focus is on actions the school took before the incident occurred.

b. Increased reliance on criminal penalties for juvenile offenders

Another option for approaching the problem of instances of sexual harassment and assault in K-12 settings is pursuing criminal cases against young offenders. This approach shifts focus from the institution to individual wrongdoers, but advocates argue that it may make schools safer overall by both removing students who may be more "dangerous" and illustrating to other young people the high penalties associated with sexual harassment and assault.[151] However, the benefits derived from harshly prosecuting juvenile sex offenses, and subsequently subjecting children and teenagers to a lifetime on the sex offender registry, seem negligible when compared with the high costs.[152]

Unlike adult sex offenders, juveniles who commit sex crimes do not appear to be at high risk for recidivism.[153] This may have to do with the types of crimes for which young people are typically convicted: they tend to be prosecuted for statutory rape, often for consensual sex with other teens, and distributing child pornography (sometimes pictures they have taken of themselves).[154] Statutory rape laws in particular are troubling as they risk criminalizing "widespread and largely harmless conduct" and tend to result in convictions of Black boys and LGBTQ and gender nonconforming youth at higher rates than other kids.[155] Being placed on the sex offender registry is a harsh punishment that follows young people

151. *See* FINKELHOR ET AL., *supra* note 23, at 10 (discussing different community approaches to juvenile sex crimes, including an aggressive law enforcement approach). See VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT (2010), for a more comprehensive discussion of the different theories of criminal punishment.

152. RICHARD B. BELZER, THE COSTS AND BENEFITS OF SUBJECTING JUVENILES TO SEX-OFFENDER REGISTRATION AND NOTIFICATION 5–8 (2015).

153. Elizabeth J. Letourneau & Michael F. Caldwell, *Expensive, Harmful Policies that Don't Work, or How Juvenile Sexual Offending Is Addressed in the U.S.*, 8 INT'L J. BEHAV. CONSULTATION & THERAPY 23, 26 (2013).

154. Charisa Smith, *#WhoAmI?: Harm and Remedy for the Youth of the #MeToo Era*, 23 U. PA. J. L. & SOC. CHANGE 295, 326–27 (2020).

155. Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 173, 216–21, 226–27 (2017).

for life and can be life-altering: dictating where they can live and work and branding them with a "scarlet letter" of sorts.[156] Judges and district attorneys know the harshness of this sentence, and there are indications that they may actually prosecute fewer juvenile sex crimes in states that have sex offender registry requirements.[157]

As research about adolescent brain development progresses, and the reality of overcriminalization and over-policing of people of color, and Black boys in particular, enters the public consciousness, the trend has been to look for alternatives to criminal punishment for young offenders.[158] Schools have not been immune from this examination of racist patterns in policing. Since the murder of George Floyd by a Minneapolis police officer in May 2020, schools in Minneapolis, Denver, Seattle, and Portland have cut ties with their police departments, and many more districts have faced renewed pressure from activists to eliminate or drastically alter the use of police in schools.[159] A turn towards increasing criminalization of juvenile sex crimes would be a step in the wrong direction.

156. Letourneau & Caldwell, *supra* note 153, at 26; *see also* Sarah Stillman, *The List*, NEW YORKER (Mar. 6, 2016), https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes [https://perma.cc/QZ5K-L8UL] (listing some of the consequences of being on the sex offender registry for crimes committed as a juvenile, such as "[h]omelessness; getting fired from jobs; taking jobs below minimum wage, with predatory employers; not being able to provide for your kids; losing your kids; relationship problems; deep inner problems connecting with people; deep depression and hopelessness; this fear of your own name; the terror of being Googled").

157. Letourneau & Caldwell, *supra* note 153, at 27.

158. *See* Smith, *supra* note 154, at 342 ("[A] scientific consensus has emerged that adolescents should be considered within a special legal category; that the overwhelming majority of offending youth under eighteen should remain in juvenile court to account for their diminished culpability, developmental capacity, and amenability to rehabilitation and treatment; and that youth under eighteen are not as equally mature as adults.").

159. *See* Dahlia Bazzaz & Hannah Furfaro, *Police Presence at Seattle Public Schools Halted Indefinitely*, SEATTLE TIMES (Aug. 12, 2020), https://www.seattletimes.com/education-lab/police-presence-at-seattle-public-schools-halted-indefinitely/ [https://perma.cc/2LDZ-S8AK]; Kalyn Belsha, *Some School Districts Are Cutting Ties with Police. What's Next?*, CHALKBEAT (June 9, 2020), https://www.chalkbeat.org/2020/6/9/21285709/some-school-districts-are-cutting-ties-with-police-whats-next [https://perma.cc/TC64-RZPF]; Lauren Camera, *The End of Police in Schools*, U.S. NEWS (June 12, 2020), https://www.usnews.com/news/the-report/articles/2020-06-12/schools-districts-end-contracts-with-police-amid-ongoing-protests [https://perma.cc/V4J9-SQ76]; Katie Reilly, *Oakland Is Disbanding its School Police Force as George Floyd's Death Drives the Push for Police-Free Schools*, TIME (June 25, 2020), https://time.com/5859452/oakland-school-police/ [https://perma.cc/MVR7-D3XW]; Mary Retta, *Minneapolis Public Schools Abolished Their Police First*, NATION (June 19, 2020), https://www.thenation.com/article/activism/minneapolis-public-schools/ [https://perma.cc/2NYG-JSWR].

Instead, schools would be better off developing effective policies on sexual harassment and assault and communicating to teachers the best ways to recognize and shut down harassment when it occurs.

III. Fulfilling the Promise of Title IX For K-12 Students

A. Karasek *Can Reshape Liability and Restore Title IX, But Not Alone*

Like most solutions to complicated problems, pre-assault claims in the vein of *Karasek* and *Simpson* are not a cure-all for the ills of peer-on-peer sexual harassment and assault in the nation's primary and secondary schools. To truly revolutionize Title IX liability, we need a reimagining of how courts approach these cases. Why is this level of ignorance and dereliction of duty in schools acceptable? Children who are sexually harassed or assaulted in school by their peers are victimized twice: first by their classmates and then by the institutions who are supposed to protect them. In failing young victims, we fail young perpetrators as well, kids who often need just as much support as those they victimize.[160]

Under the current system, parents who drop their kindergarteners off at school and head to their workplaces enjoy more robust protections against sexual harassment and assault than their children.[161] Restructuring liability under Title IX so that schools no longer "have an incentive not to know about sexual harassment . . . and when they do, to do little to nothing about it"[162] will undoubtedly be a long process, but a necessary one if the goal of equal access to education regardless of sex is to be realized. Pursuing *Karasek*-style pre-assault claims that hold institutions responsible for their failures to address sexual violence is only the first step. Real change will require not only legal and policy transformation but cultural shifts in schools and in society at large—a tall order.

B. Recommendations for a New Department of Education Approach

On December 22, 2020, then President-Elect Biden announced his plans to nominate Miguel Cardona as his Secretary of

160. *See* sources cited, *supra* note 23.

161. McGinley, *supra* note 103, at 209 ("[T]he school authorities whom we must trust to care for and educate our children are held to a much lower standard than employers who permit hostile work environments to occur.").

162. MacKinnon, *supra* note 20, at 2085.

Education.[163] Cardona, who was confirmed by the Senate on March 1, 2021, inherits a DOE that is facing a wide variety of pressing issues.[164] Schools across the country are grappling with a mounting crisis as COVID case numbers continue to climb and districts must make tough decisions between delivering education remotely or in-person.[165] Under Betsy DeVos, the Trump administration's DOE attempted to promote alternatives to traditional public schools, rolled back Obama-era protections for transgender students, and passed new Title IX guidance, all of which advocates expect the Biden administration's DOE to address.[166] Cardona's first moves as Education Secretary have indicated that his primary goal is to get students back to in-person schooling as quickly as possible.[167] This is an admirable mission, as many students (and their caretakers) have struggled with remote learning.[168] As students return to in-

163. Elissa Nadworny & Cory Turner, *Biden Picks Connecticut Schools Chief Miguel Cardona as Education Secretary*, NPR (Dec. 22, 2020), https://www.npr.org/sections/biden-transition-updates/2020/12/22/949114642/biden-to-pick-connecticut-schools-chief-miguel-cardona-as-education-secretary [https://perma.cc/Q4WX-2QQ3].

164. Michael Stratford, *Senate Confirms Cardona as Education Secretary*, POLITICO (Mar. 1, 2021), https://www.politico.com/news/2021/03/01/senate-cardona-confirmation-education-secretary-472163 [https://perma.cc/7G75-2VJP].

165. *Operating Schools During COVID-19: CDC's Considerations*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 15, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html [https://perma.cc/M5KP-5ANF] (detailing CDC recommendations for how schools should operate during the pandemic); Dyani Lewis, *What New COVID Variants Mean for Schools Is Not Yet Clear*, NATURE (Jan. 21, 2021), https://www.nature.com/articles/d41586-021-00139-3 [https://perma.cc/B8HK-PWLF] (explaining that new, more contagious variants of COVID may have an impact on the ability of children to attend in-person school); Kate Taylor, *13,000 School Districts, 13,000 Approaches to Teaching During Covid*, N.Y. TIMES (Jan. 21, 2021), https://www.nytimes.com/2021/01/21/us/schools-coronavirus.html [https://perma.cc/YH8R-T3DK] (reporting on the many different measures schools are taking to educate students).

166. Erica L. Green, *Biden's Education Department Will Move Fast to Reverse Betsy DeVos's Policies*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/us/politics/biden-education-devos.html [https://perma.cc/4SMX-2BAG]; Cory Turner, *How Education Secretary Betsy DeVos Will Be Remembered*, NPR (Nov. 19, 2020), https://www.npr.org/2020/11/19/936225974/the-legacy-of-education-secretary-betsy-devos [https://perma.cc/WX4P-PVFF]; Jo Yurcaba, *After Trump 'Onslaught': What LGBTQ Advocates Want from Biden's First 100 Days*, NBC NEWS (Jan. 19, 2021), https://www.nbcnews.com/feature/nbc-out/what-lgbtq-advocates-want-biden-s-first-100-days-n1254751 [https://perma.cc/3BQ3-BTZ7].

167. Rachel Martin & Cory Turner, *New Education Secretary Miguel Cardona Wants Schools Open 'As Soon As Possible'*, NPR (Mar. 4, 2021), https://www.npr.org/2021/03/04/973561015/education-secretary-cardona-has-a-plan-to-open-schools-for-in-person-learning [https://perma.cc/SB28-4YA2].

168. *See* Ginia Bellafante, *Are We Losing a Generation of Kids to Remote Learning?*, N.Y. TIMES (Nov. 6, 2020), https://www.nytimes.com/2020/11/06/nyregion

person learning, some will once again face in-person sexual harassment and assault and will need the support of their institutions. Other students will be dealing with the ramifications of sexual harassment that happened during online schooling.[169] Institutions will need to deal with these new instances of online sexual harassment as well as lingering effects from incidents that occurred before the switch to remote school occurred in March 2020.[170] Unfortunately, the vast majority of K-12 schools will be unprepared for this task.

A top priority for the new DOE should also be issuing guidance for school districts that establishes that districts have an affirmative duty to educate teachers and administrators on signs of student sexual abuse and how to address sexual harassment and abuse. Additionally, the administration should advocate for a legislative fix to Title IX that eliminates the *Gebser/Davis* standard, which would allow many more claims to survive even the pre-trial motion stage and put schools on notice that they must conform to Title IX regulations. To truly fix Title IX, schools need not only clear information on best practices with regards to dealing with sexual harassment and creating safe schools, but also the knowledge that the DOE takes enforcement of Title IX seriously. Without this kind of two-pronged approach, schools will not be incentivized to take proactive measures that prevent sexual assault before it occurs, and Title IX will continue to fail students around the country.

/nyc-remote-learning.html [https://perma.cc/8W2D-QZP2]; Erica L. Green, *Surge of Student Suicides Pushes Las Vegas Schools to Reopen*, N.Y. TIMES (Jan. 24, 2021), https://www.nytimes.com/2021/01/24/us/politics/student-suicides-nevada-coronavirus.html [https://perma.cc/CTZ5-UG23]; Alec MacGillis, *The Students Left Behind by Remote Learning*, PROPUBLICA (Sept. 28, 2020), https://www.propublica.org/article/the-students-left-behind-by-remote-learning [https://perma.cc/N3ZK-KX9T]; Catherine E. Shoichet, *These Kids Are Getting Left Behind When Schools Go Online*, CNN (July 31, 2020), https://www.cnn.com/2020/07/31/us/distance-learning-inequality/index.html [https://perma.cc/EWE2-43R2]. *But see* Nora Fleming, *Why Are Some Kids Thriving During Distance Learning?*, EDUTOPIA (Apr. 24, 2020), https://www.edutopia.org/article/why-are-some-kids-thriving-during-remote-learning [https://perma.cc/3YYJ-WW2M] (detailing how children with social anxiety and some learning disabilities are doing better with remote learning).

169. *See* EQUAL RTS. ADVOCS., GUIDANCE FOR TITLE IX ADMINISTRATORS DURING COVID-19 (2020), https://www.equalrights.org/issue/equality-in-schools-universities/covid19-guidance-title-ix-administrators/ [https://perma.cc/2JLF-4ZDV]; Shiwali Patel & Amy Leipziger, *Schools Adjusting to Remote Learning Are Leaving Survivors of Sexual Violence Behind*, HILL: CHANGING AMERICA: OPINION (Feb. 3, 2021), https://thehill.com/changing-america/opinion/537218-schools-adjusting-to-remote-learning-are-leaving-survivors-of-sexual [https://perma.cc/8QMM-RAL7].

170. EQUAL RTS. ADVOCS., *supra* note 169.

Conclusion

When Title IX was passed in 1972, it was seen as a workaround for the stalled Equal Rights Amendment.[171] In the popular imagination, it remains largely a federal law governing women's participation in high school and college sports.[172] Title IX's potential is huge: the promise of an educational environment in which no student is subject to harassment or abuse on the basis of sex is one that many people have fought for. Unfortunately, the current state of Title IX precedent when it comes to peer-on-peer sexual assault at the K-12 level falls far short of this promise. Children across the country are subject to horrifying instances of sexual harassment and assault while at school, and the teachers and administrators who are supposed to protect them are either unaware, ignorant, or incompetent. The possibility of bringing *Karasek*-style pre-assault claims that force schools to take a more holistic approach to the evaluation of not only Title IX reporting procedures, but the culture of their institutions, offers a promising avenue of Title IX liability. While pre-assault claims at the K-12 level will not fix sexual assault and harassment in schools overnight, it offers a chance to materially improve the lives of many thousands of children in the nation's schools, and to send a message to all school districts and officials that the federal government takes adherence to Title IX standards seriously.

171. Dana Hunsinger Benbow, *Sen. Birch Bayh, in Tears: 'I Had No Idea That Title IX Would Have This Kind of Impact'*, INDYSTAR (Mar. 14, 2019), https://www.indystar.com/story/sports/2019/03/14/sen-birch-bayh-tears-i-had-no-idea-title-ix-would-have-impact/3161553002/ [https://perma.cc/5S68-LKTD].

172. *See* sources cited *supra* note 30.

Automating Judicial Discretion: How Algorithmic Risk Assessments in Pretrial Adjudications Violate Equal Protection Rights on the Basis of Race

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Abstract

Many American jurisdictions use algorithmic risk assessments when setting bail or deciding whether to detain criminal defendants before trial. Although the use of risk assessments has been touted as a reform to protect public safety and reduce bias against defendants, algorithmic risk assessments' opacity and racialized recommendations present serious concerns. This Article examines whether algorithmic risk assessments used during pretrial adjudications violate Fourteenth Amendment Equal Protection rights on the basis of race. The Article begins with an overview of algorithmic risk assessments in the pretrial justice system, focusing on the history of their implementation and how they work. The Article then examines the limited judicial opinions on the constitutionality of these risk assessments. Next, the Article analyzes pretrial algorithmic risk assessments with respect to Equal Protection rights, arguing that they facially discriminate on the basis of race. Additionally, the Article argues that these risk assessments result in disparate treatment of members of this protected class because of one of three types of intentional discrimination: deliberate indifference to racial targeting, discriminatory animus from algorithm designers, or discriminatory intent from the algorithm itself under a proposed theory of partial legal capacity for artificial intelligences. Finally, the Article contends that the use of algorithmic risk assessments is not narrowly tailored, and in many pretrial contexts the state cannot meet its burden of proving that the algorithms are narrowly tailored, due to their opacity. The Article concludes with a discussion of promising and more equitable alternative approaches to pretrial justice.

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Introduction

Each year, over half a million people in the United States are held in local jails before trial, even though they have not been convicted of a crime.[1] Although pretrial preventive detention for public safety has been legally sanctioned since *United States v. Salerno* was decided in 1987, most legally innocent people in pretrial detention are held not for public safety reasons, but due to a racially differential inability to make cash bail.[2] These stints in

1. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/EN4P-BVWW].

2. *See* United States v. Salerno, 481 U.S. 739 (1987); Christine Scott-Hayward

pretrial detention, however brief, have been found to worsen case outcomes and lead to job losses, housing disruptions, family problems, or other damages.[3] In that context, many state and local jurisdictions have adopted the use of predictive analytics as part of pretrial justice reform in recent years.[4] These tools use computational algorithms[5] to evaluate a criminal defendant's risk of rearrest before trial or failure to appear in court. Defendants are assigned a "risk score" ranging from low to high that judges use

& Sarah Ottone, *Punishing Poverty: California's Unconstitutional Bail System*, 70 STAN. L. REV. ONLINE 167, 168 n.6, 170 (2018) [https://perma.cc/C9AS-3DRR]; Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201–02 (2018), https://www.princeton.edu/~wdobbie/files/bail.pdf [https://perma.cc/KYP6-F9Y9]; *see generally* MIKAELA RABINOWITZ, INCARCERATION WITHOUT CONVICTION: PRETRIAL DETENTION AND THE EROSION OF INNOCENCE IN AMERICAN CRIMINAL JUSTICE (2021) (highlighting how not being able to make cash bail leads to guilty pleas and in-turn mass incarceration); CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM (2019) (discussing the social and economic ramifications of not being able to make bail).

3. *See* Natalie Goulette & John Wooldredge, *Collateral Consequences of Pretrial Detention*, *in* HANDBOOK ON THE CONSEQUENCES OF SENTENCING AND PUNISHMENT DECISIONS 271, 278–81 (Beth M. Huebner & Natasha A. Frost eds., 2018) (reviewing prior research on the effects of pretrial detention); *see also* Sara Wakefield & Lars Højsgaard Andersen, *Pretrial Detention and the Costs of System Overreach for Employment and Family Life*, 7 SOCIO. SCI. 342 (2020) (demonstrating the effect of pretrial detention on jobs and family); Christopher Thomas, *The Racialized Consequences of Jail Incarceration on Local Labor Markets*, RACE & JUST., May 2022, at 1, 11–14 (demonstrating that pretrial detention has racialized negative effects on local labor markets); Christopher M. Campbell, Ryan M. Labrecque, Michael Weinerman & Ken Sanchagrin, *Gauging Detention Dosage: Assessing the Impact of Pretrial Detention on Sentencing Outcomes Using Propensity Score Modeling*, J. CRIM. JUST., Aug. 2020, at 1, 9–10 (2020) (finding that people detained pretrial are about twice as likely to be sentenced to prison as people released pretrial).

4. *See* Sarah L. Desmarais, Samantha A. Zottola, Sarah E. Duhart Clarke & Evan M. Lowder, *Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature*, 48 CRIM. JUST. & BEHAV. 398, 398 (2021); Sharad Goel, Ravi Shroff, Jennifer Skeem & Christopher Slobogin, *The Accuracy, Equity, and Jurisprudence of Criminal Risk Assessment*, *in* RESEARCH HANDBOOK ON BIG DATA LAW 9, 9 (2021); Lila Kazemian, Candace McCoy & Meghan Sacks, *Does Law Matter? An Old Bail Law Confronts the New Penology*, 15 PUNISHMENT & SOC'Y 43, 45–46 (2013).

5. *See* THOMAS H. CORMEN, CHARLES E. LEISERSON, RONALD L. RIVEST & CLIFFORD STEIN, INTRODUCTION TO ALGORITHMS 5 (3d ed. 2009) (defining algorithms broadly as "any well-defined computational procedure that takes some value, or set of values, as input and produces some value, or set of values, as output"); *see also* Mariano-Florentino Cuéllar & Aziz Z. Huq, *Toward the Democratic Regulation of AI Systems: A Prolegomenon* 1, 5 (Univ. of Chi. Pub. Law Working Paper No. 753, 2020) (distinguishing between AI technology, defined as "technology relying on computing algorithms to discern patterns in data, and then trigger actions or recommendations in response," and the more legally pertinent concept of AI systems, defined as "a sociotechnical embodiment of public policy codified in an appropriate computational learning tool and embedded in a specific institutional context").

when making release or bail decisions. Theoretically, these algorithmic risk assessment tools (hereinafter RATs) reduce the burden of work for courts, reduce biases among judges and court officials, and make more accurate predictions about defendant "riskiness."[6] However, compelling objections have been raised about the use of these algorithmic RATs in the criminal justice system generally, calling into question whether these tools are the best way to achieve these goals.[7]

Almost all states have adopted the use of RATs at some stage of the criminal justice process, ranging from arrest to parole.[8] Currently over eighteen states and dozens of other local jurisdictions have enacted legislation mandating the use of crime RATs in pre- and post-trial stages.[9] Yet, an extremely limited number of courts have opined on the novel issue of whether algorithm-based RATs in the criminal justice system violate a defendant's constitutional rights.[10]

The rapid adoption of algorithmic RATs in the criminal justice system has already prompted legal and policy debate over issues of

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6. *See* Evan M. Lowder, Carmen L. Diaz, Eric Grommon & Bradley R. Ray, *Effects of Pretrial Risk Assessments on Release Decisions and Misconduct Outcomes Relative to Practice as Usual*, 73 J. OF CRIM. JUST. 1, 1–2 (2021); N.Y. Crim. Pro. Law § 510.30; Michael Rempel & Tia Pooler, *Reducing Pretrial Detention in New York City*, 23 SISTEMAS JUDICIALES 1, 3 (2020) (noting that riskiness is usually conceptualized with respect to public safety, but a few states, such as New York, only allow one legal justification for pretrial detention: risk of not attending future court appearances).

7. *See* Aziz Z. Huq, *Artificial Intelligence and the Rule of Law* (U. Chi., Pub. L. Working Paper No. 764, 2021); Tim O'Brien, *Compounding Injustice: The Cascading Effect of Algorithmic Bias in Risk Assessments*, 13 GEO. J. L. & MOD. CRITICAL RACE PERSP. 39, 41 (2021); Gina M. Vincent & Jodi L. Viljoen, *Racist Algorithms or Systemic Problems? Risk Assessments and Racial Disparities*, 47 CRIM. JUST. & BEHAV. 1576, 1577 (2020).

8. Melissa Hamilton, *We Use Big Data to Sentence Criminals. But Can the Algorithms Really Tell Us What We Need to Know?*, GOV'T TECH. (Jun. 6, 2017), https://www.govtech.com/data/We-Use-Big-Data-to-Sentence-Criminals-But-Can-the-Algorithms-Really-Tell-Us-What-We-Need-to-Know.html [https://perma.cc/MYF3-MZRJ].

9. *See* Brief for the United States as Amici Curiae, Loomis v. Wisconsin, 137 S. Ct. 2290 (2017) (No. 16-6387) 2017 WL 2333897; *AI in the Criminal Justice System*, ELEC. PRIV. INFO. CTR., https://epic.org/algorithmic-transparency/crim-justice/ [https://perma.cc/L5D7-S9WD] (detailing the use of artificial intelligence in the criminal justice system by state); John Villasenor & Virginia Foggo, *Algorithms and Sentencing: What Does Due Process Require?*, BROOKINGS (Mar. 21, 2019) https://www.brookings.edu/blog/techtank/2019/03/21/algorithms-and-sentencing-what-does-due-process-require/ [https://perma.cc/MS65-AG74] (quoting MODEL PENAL CODE: SENTENCING (AM. L. INST, Proposed Final Draft 2017)).

10. Erin Harbinson, *Understanding 'Risk Assessment' Tools What They Are and the Role They Play in the Criminal Justice System: A Primer*, 75 BENCH & BAR MINN. 14, 16 (2018) (stating only Indiana and Wisconsin "have considered th[e] issue directly . . .").

race and ethnicity and RATs' impact on people of color. For example, some scholars and legal actors assert that these new RATs present a more inclusive, objective, and complete report on defendants, thus reducing potential racial and ethnic biases from judges.[11] Conversely, other experts have raised serious concerns about the use of these tools in the legal field because they are opaque, operate at a massive scale "to sort, target, or 'optimize' millions of people" in racialized ways, and are reinforced by bias-multiplying feedback loops.[12] This raises the question, does the use of RATs in the criminal justice system in fact violate a defendant's constitutional rights? As these tools become more widely adopted in jurisdictions across the United States, critical examination of these nuanced and complex systems needs to guide this new regime of algorithmic pretrial justice that could be imperiling the fundamental rights of people of color in particular.

This Article examines whether algorithmic RATs used during pretrial adjudications violate a criminal defendant's Fourteenth Amendment Equal Protection rights. Particularly, the Article argues that these tools impermissibly use race and ethnicity to calculate a defendant's risk score. Part I presents an overview of algorithmic RATs in the pretrial justice system, focusing on the history of their implementation, how they work, and which jurisdictions have adopted their use so far. Part II examines the limited judicial opinions on the constitutionality of pretrial algorithmic RATs. Part III analyzes the use of pretrial RATs vis-à-vis Fourteenth Amendment Equal Protection rights. This Section argues that the instruments facially discriminate on the basis of suspect classifications. This Section alternatively argues that pretrial RATs result in disparate treatment of members of these protected classes due to one of three forms of discriminatory intent:

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11. *See, e.g.*, Adam Neufeld, *In Defense of Risk-Assessment Tools*, MARSHALL PROJECT (Oct. 22, 2017), https://www.themarshallproject.org/2017/10/22/in-defense-of-risk-assessment-tools [https://perma.cc/EP4U-5TAB] (defending the use of algorithmic risk assessment tools and discussing what needs to be done to make them successful); *but cf. More than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Jul. 30, 2018), https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/ [https://perma.cc/FU5T-YJH7] (emphasizing that ending money bail requirements does not necessarily mean pretrial risk assessments are the more equitable solution).

12. CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 12 (2016); *see also* Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CAL. L. REV. 345, 398 (2019) (reviewing how "high-crime feedback loops" are created by racially biased policing).

deliberate indifference to racial targeting, discriminatory animus from algorithm designers, or discriminatory intent from the algorithm itself under a novel theory of partial legal capacity for artificial intelligences. Further, this Section contends that the tools' use is not narrowly tailored, and the state cannot meet its burden of proof of narrow tailoring due to the tools' opacity. Part IV lists important limitations and considerations of an Equal Protection challenge to algorithmic RATs. Lastly, Part V concludes that the tools violate Equal Protection rights and should be banned from use in pretrial adjudications.

I. Overview of Algorithmic Risk Assessments Used in the Pretrial Justice System

Predictive analytic systems have permeated throughout many steps of the criminal justice processes. For instance, many police departments use "hot-spot maps" based on algorithmic risk assessments to strategize deployment of officers and surveillance of specific neighborhoods.[13] Some police departments also use "focused deterrence" approaches to algorithmically identify "high-risk" potential reoffenders within "risky" social networks, who the police then target with either social services or, most commonly, police contact or arrest on low-level crimes as a way to purportedly deter them from committing future crimes.[14] In courts, algorithms are commonly used to create risk assessments of individuals accused of committing a crime.[15] It is contended that these risk assessments help judges and other court officials make important determinations, including whether defendants are "dangerous" to

13. *See* Lyria Bennett Moses & Janet Chan, *Algorithmic Prediction in Policing: Assumptions, Evaluation, and Accountability*, 28 POLICING AND SOC'Y 806, 808 (2018); Laura Myers, Allen Parrish & Alexis Williams, *Big Data and the Fourth Amendment: Reducing Overreliance on the Objectivity of Predictive Policing*, 8 FED. CTS. L. REV. 231, 236 (2015); *see also* Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOCIO. REV. 977 (2017) (describing how police use algorithmic predictions in practice).

14. *See* Anthony A. Braga, David Weisburd & Brandon Turchan, *Focused Deterrence Strategies and Crime Control: An Updated Systematic Review and Meta-Analysis of the Empirical Evidence*, 17 CRIMINOLOGY & PUB. POL'Y 205, 208–09 (2018); *see generally* ANDREW FERGUSON, THE RISE OF BIG DATA POLICING (2017) (analyzing the effect of big data on policing).

15. *See* Vienna Thompkins, *What Are Risk Assessments — and How Do They Advance Criminal Justice Reform?*, BRENNAN CTR. FOR JUST. (Aug. 23, 2018) https://www.brennancenter.org/our-work/analysis-opinion/what-are-risk-assessments-and-how-do-they-advance-criminal-justice-reform [https://perma.cc/7EDC-TFPU]; CYNTHIA A. MAMALIAN, STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 10 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PJI_PretrialRiskAssessment.pdf [https://perma.cc/5F6T-PVEX].

the community or whether they are likely to reoffend.[16] How do these RATs work? And how did they become a standard practice in the pretrial justice system?

In 1961, a young journalist started the Manhattan Bail Project (which grew into the organization now known as the Vera Institute of Justice), pioneering the use of simple pretrial risk assessments in an effort to reduce discriminatory bias among judges and release more criminal defendants pretrial.[17] The project's "Vera Point Scale" involved an interviewer at arraignment ticking off a checklist of five weighted static factors purportedly associated with failing to appear in court among prior defendants (since flight risk was historically the only legally permissible risk to consider for pretrial detention).[18] Only 1.6% of defendants released using the Vera Point Scale failed to appear, compared to 3% of those released on bail without the Scale.[19] Despite this success, the first wave of the checklist was found to focus too much on local ties to the community, so to accommodate people without such ties who were nonetheless low flight risks, the Vera Point Scale was modified.[20] The subsequent tool was so successful that it quickly spread from New York to other jurisdictions and was used widely for decades.[21]

However, after the punitive turn of the late 1970s and throughout the 1980s,[22] many judges started to explicitly consider

16. *See* MAMALIAN, *supra* note 15, at 18–20. Note that reoffending is usually operationalized as being arrested again before trial, despite the extensive literature documenting racial disparities in arrests, holding constant levels of committing crimes, as discussed below.

17. *See* Scott Kohler, *Vera Institute of Justice: Manhattan Bail Project*, *in* CASEBOOK FOR THE FOUNDATION: A GREAT AMERICAN SECRET 81, 81–82 (2007); *see also* SCOTT-HAYWARD & FRADELLA, *supra* note 2, at 95–96 (explaining standardization promotes both consistency and transparency concerning pretrial release).

18. *See* MARION C. KATSIVE, NEW AREAS FOR BAIL REFORM: A REPORT ON THE MANHATTAN BAIL REEVALUATION PROJECT 32–33 (1968) (noting in the first Vera Point Scale "[t]he defendant is evaluated on the basis of five factors - length of residence in jurisdiction, length of time at present employment, source of support, ties to family in the area in terms of frequency of contact, and prior conviction record").

19. *See* Kohler, *supra* note 17.

20. *See* KATSIVE, *supra* note 18, at app. 3 (showing the later modified checklist focused on a more inclusive set of facts that could be cited in support of bail reduction, which one checklist from that period listed as "family ties verified in court[,]" "[h]as job to return to[,]" "[r]eturn date more than a week away[,]" "[n]o prior record[,]" "[l]ast conviction more than 4 years earlier[,]" "[e]vidence probably won't support conviction[,]" "[a]ge (if over 50)[,]" "[f]emale with dependent children[,]" and "[i]llness or pregnancy").

21. Kohler, *supra* note 17, at 82.

22. *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2012) (explaining how social, economic,

"danger" to the community in their pretrial detention determinations.[23] This punitive turn toward a new type of risk became institutionalized after the *Salerno* decision in 1987.[24] In that decade and the 1990s, there was an explosion of criminological research on risk assessments generally and in the pretrial context specifically.[25] Most RATs in this period were simple clinical weighted checklists like the Vera Point Scale, though more complex actuarial pretrial risk assessments were beginning to get developed; yet, by the turn of the twenty-first century, only twelve local jurisdictions were using formal algorithmic RATs in pretrial hearings.[26] Since then, algorithmic pretrial RATs have proliferated.

Most of today's pretrial algorithmic RATs are regression-based—that is, designed to statistically analyze complex interactions of variables to predict how likely a defendant is to either get rearrested before trial or fail to appear in court.[27] Some of them combine administrative data from "court and demographic records with some sort of questionnaire administered by a court official, such as a pretrial services officer . . . ."[28] The tools assign a numerical value and weight based on considerations of static and dynamic factors such as demographic data, criminal history, employment status, level of education, and family background.[29] Weighting of these interacting factors is a particularly important part of the models because it influences the output variable that the model predicts. Nevertheless, some commercial RATs keep this weighting information private due to the proprietary nature of their products.[30] Most of the current pretrial RATs are regression-based,

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and political forces in the late twentieth century reshaped criminological thought).

23. *See* PRETRIAL JUST. INST., OVERVIEW OF RESEARCH FINDINGS ON PRETRIAL RISK ASSESSMENT AND PRETRIAL SUPERVISION 2–3 (2008).

24. United States v. Salerno, 481 U.S. 739 (1987).

25. *See* PRETRIAL JUST. INST., *supra* note 23, at 5 (finding that "study after study has failed to replicate the findings of previous studies," suggesting that researchers were not converging on a reliable set of predictors).

26. *See* SCOTT-HAYWARD & FRADELLA, *supra* note 2, at 95–96.

27. *See* Matt Henry, *Risk Assessment: Explained*, APPEAL (Dec. 14, 2019), https://theappeal.org/risk-assessment-explained/ [https://perma.cc/QL6Z-FUCU].

28. *See id.*

29. *See id.*; Anna Maria Barry-Jester, Ben Casselman & Dana Goldstein, *The New Science of Sentencing*, MARSHALL PROJECT (Aug. 4, 2015), https://www.themarshallproject.org/2015/08/04/the-new-science-of-sentencing [https://perma.cc/MAL2-73SG].

30. *See* Henry, *supra* note 27 ("The process of setting the weights is known as training the model. In the machine learning context, this is known as supervised learning. A data set is fed into the model that contains a set of features, such as age, number of prior arrests, etc. . . . . [I]f the model is supposed to predict likelihood of rearrest within two years (as it is in many risk assessment tools), the data used to train the model would have a big data set formatted much like a spreadsheet that

such as COMPAS and the more transparent Arnold Venture's Public Safety Assessment (hereinafter the PSA).[31]

The newest generation of RATs involve machine learning, making them a type of artificial intelligence.[32] Unlike earlier generations of pretrial risk assessments, which relied to varying extents on expert judgment from psychologists, social workers, probation officers, or other justice system actors, machine learning algorithmic RATs do not depend on human judgment. Instead, these algorithms are designed to mimic how humans learn how to solve complex tasks, changing on their own to learn new rules and rationales for decision-making.[33] Designers identify a particular outcome of interest (such as likelihood of arrest before trial), then design algorithms that explore a given dataset and identify complex patterns to make predictions, evolving as they work through more data to get closer to the desired outcome; in supervised machine learning, the algorithms learn how to use training data to replicate a human-identified pattern, whereas in unsupervised machine learning, the algorithms are even more divorced from human oversight, instead teaching themselves some inherent structure in the unlabeled data.[34] The key aspect of machine learning RATs for the purposes of this paper's argument is that the precise ways the algorithms use data points such as race and ethnicity are inherently unknowable because they are not programmed directly by humans. In short, both types of pretrial RATs are "designed to do one thing: take in the details of a defendant's profile and spit out a recidivism

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associated values of the input variables with a value for the output variable (i.e., prediction).").

31. *See* Tim Brennan, William Dieterich & Beate Ehret, *Evaluating the Predictive Validity of the COMPAS Risk and Needs Assessment System*, 36 CRIM. JUST. & BEHAV. 21, 24 (2009) (describing how COMPAS uses "logistic regression, survival analysis, and bootstrap classification methods . . .").

32. *See* Doaa Abu Elyounes, *Bail or Jail? Judicial Versus Algorithmic Decision-Making in the Pretrial System*, 21 COLUM. SCI. & TECH. L. REV. 376, 389 (2020) (discussing a machine learning RAT developed by Professor Jon Kleinberg at Cornell University); *see also* Mariano-Florentino Cuéllar & Aziz Z. Huq, *Privacy's Political Economy and the State of Machine Learning: An Essay in Honor of Stephen J. Schulhofer*, N.Y.U. ANN. SURV. AM. L. 2 (forthcoming) (explaining the increase of machine learning in America after 9/11); Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 89 (2014) (discussing the interplay between artificial intelligence and law).

33. *See* L. Karl Branting, *Artificial Intelligence and the Law from a Research Perspective*, 14 SCITECH LAW. 32, 34–35 (2018).

34. *See* STUART J. RUSSELL & PETER NORVIG, ARTIFICIAL INTELLIGENCE 657 (4th ed. 2021); THOMAS W. MALONE, DANIELA RUS & ROBERT LAUBACHER, ARTIFICIAL INTELLIGENCE AND THE FUTURE OF WORK, MIT Research Brief 17 (Dec. 2020), https://workofthefuture.mit.edu/wp-content/uploads/2020/12/2020-Research-Brief-Malone-Rus-Laubacher2.pdf [https://perma.cc/L23Z-62W5].

score—a single number estimating the likelihood that [the defendant] will reoffend" before trial (or, in some jurisdictions, not show up to court).[35] As explained below, the tools have been criticized for being biased, treating defendants differently on the basis of their race or ethnicity, and heavily influencing a judge's decision-making.

II. Judicial Interpretations Directly Addressing Algorithms Used in Criminal Justice and Other Relevant Settings

Few courts have opined on the novel issue of whether algorithm-based RATs in the criminal justice system violate a defendant's constitutional rights. At the state level, Wisconsin and Indiana are the only two states where their highest courts have addressed the issue directly, generally affirming the use of algorithmic risk assessments for sentencing determinations. Conversely, federal courts have declined to rule on whether the use of predictive analytics violates a criminal defendant's constitutional protections. There is, however, a recent civil case in a Texas district court that may shed some light on the issue. There, a teachers' union brought an action against a school district, alleging that the district's use of an algorithmic evaluation system used to terminate teachers for ineffective performance violated their due process and equal protection rights. The following sections summarize these three cases.

A. State of Wisconsin v. Loomis

In 2013, the State of Wisconsin charged defendant Eric Loomis with five criminal counts for allegedly participating as the driver in a drive-by shooting.[36] While Loomis denied his involvement in that shooting, he ultimately accepted a guilty plea to only two of the lesser charges: "attempting to flee a traffic officer and operating a motor vehicle without the owner's consent."[37] Subsequently, the circuit court ordered a pre-sentence investigation, resulting in a report (hereinafter PSI) that included a risk assessment prepared by COMPAS, a privately-owned algorithmic tool.[38] COMPAS reports only present "risk scores displayed in the form of a bar chart,

35. *See* Karen Hao, *AI is Sending People to Jail – and Getting it Wrong*, MIT TECH. REV. (Jan. 21, 2019), https://www.technologyreview.com/s/612775/algorithms-criminal-justice-ai/ [https://perma.cc/39FA-A67E].

36. State v. Loomis, 881 N.W.2d 749, 754 (Wis. 2016).

37. *Id.*

38. *Id.*

with three bars that represent pretrial recidivism risk, general recidivism risk, and violent recidivism risk."[39]

These scores are based on the defendant's criminal history and an interview conducted with the defendant. However, the scores are not individualized; they are a standardized prediction of recidivism "based on a comparison of information about the individual to a similar data group."[40] Based in part on these scores, Loomis was sentenced by the trial court to six years in prison followed by five years of extended supervision.[41]

On appeal, Loomis challenged the use of COMPAS at sentencing, alleging it violated his right to due process.[42] Specifically, Loomis argued that (1) "the proprietary nature of COMPAS prevent[ed him] from challenging the COMPAS assessment's scientific validity," (2) COMPAS risk assessments impermissibly take gender into account, and (3) the use of aggregate data to calculate risk scores violated his right "to an individualized sentence."[43] The Wisconsin Supreme Court ultimately affirmed his sentence.[44]

First, the court found that Loomis did not meet "his burden of showing that the circuit court actually relied on gender as a factor in sentencing."[45] Moreover, even if COMPAS did consider gender, the court determined that such a factor is necessary to promote statistical accuracy.[46] The State specifically argued in this regard that "because men and women have different rates of recidivism and different rehabilitation potential, a gender neutral risk assessment would provide inaccurate results for both men and women."[47] Second, the court found that the proprietary nature of the COMPAS algorithm did not infringe upon Loomis's due process rights because COMPAS largely relies on reviewable public data.[48] A practitioner's guide to COMPAS explained that "the risk scores are based largely on static information (criminal history), with limited use of some dynamic variables (i.e., criminal associates,

39. *Id.*
40. *Id.*
41. *Id.* at 756 n.18.
42. *Id.* at 757.
43. *Id.* at 753, 757. The Wisconsin Court of Appeals certified these questions to the State's Supreme Court.
44. *Id.* at 754.
45. *Id.* at 767.
46. *Id.*
47. *Id.* at 765.
48. *Id.* at 761.

substance abuse)" and a questionnaire filled by the defendant.[49] In other words, "to the extent that [his] risk assessment is based upon his answers to questions and publicly available data," Loomis "had the opportunity to verify that the questions and answers listed on the COMPAS report were accurate," even though the algorithmic formula, which predicts the score, is unavailable for review.[50] Lastly, the court agreed that COMPAS did use aggregate, unvalidated data to calculate his risk score.[51] Nevertheless, COMPAS risk assessments were not a "determinative factor" in his sentencing.[52] As such, sentencing ultimately relies on the discretion of a judge, which is informed by many factors included in the PSI.

The Wisconsin Supreme Court acknowledged that while sentencing courts may consider COMPAS RATs for sentencing determinations, they may not use risk scores to determine "whether an offender is incarcerated"; "the severity of the sentence"; or "whether an offender can be supervised safely and effectively in the community."[53] In addition, sentencing courts were required to generally explain the factors used to make sentencing decisions. The court further mandated that PSIs containing a COMPAS assessment include a "written advisement listing [its] limitations."[54] The five limitations were: (1) "[t]he proprietary nature of COMPAS . . . prevent[s] disclosure of . . . how risk scores are determined"; (2) because COMPAS only relies on aggregate data, it was unable to identify "a particular high-risk individual"; (3) "[s]ome studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism"; (4) "[a] COMPAS risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed"; and (5) COMPAS was originally intended "for use by the Department of Corrections in making determinations regarding treatment, supervision, and parole."[55]

The Wisconsin Supreme Court, however, acknowledged the possibility of an equal protection challenge based on the use of gender in statistical generalizations. In its reasoning, the court specifically referenced *Craig v. Boren*, where an Oklahoma law was

49. *Id.*
50. *Id.*
51. *Id.* at 765.
52. *Id.* at 764–65.
53. *Id.* at 769.
54. *Id.*
55. *Id.* at 769–70.

challenged for prohibiting the sale of 3.2% beer to men under twenty-one years of age and women under eighteen years of age.[56] There, the United States Supreme Court declared that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"—a standard that was not met in *Craig*.[57] The *Loomis* court specifically noted the Supreme Court's explanation that sociological and empirical justifications for gender-based classifications may not pass judicial scrutiny because "the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups."[58] Notwithstanding the Wisconsin court's analogy of *Craig v. Boren* to the *Loomis* facts, the court refused to entertain the equal protection challenge because Loomis failed to directly raise it.[59] Accordingly, the court only focused on his due process claims.

In a concurrence, Justice Shirley Abrahamson agreed with the judgment, but stated she would have required sentencing courts to specifically "evaluate on the record the strengths, weaknesses, and relevance to the individualized sentence . . . ."[60] Such explanation was necessary because COMPAS risk assessment had "garnered mixed reviews in the scholarly literature and in popular commentary and analysis."[61] In addition, Justice Abrahamson raised a concern with the "court's lack of understanding of COMPAS . . . ."[62] She took issue with the court's denial of "[COMPAS' then owner] Northpointe's motion to file an amicus brief," since it could have provided critical information about COMPAS.[63]

B. Malenchik v. State

Unlike the *Loomis* court's cautionary allowance of algorithmic risk assessments in sentencing, the Supreme Court of Indiana

56. *See id.* at 766; *see also* Craig v. Boren, 429 U.S. 190 (1976).

57. *Craig*, 429 U.S. at 197.

58. *Loomis*, 881 N.W.2d at 766 (quoting *Craig*, 429 U.S. at 208–09).

59. *Id.* ("Notably, however, Loomis does not bring an equal protection challenge in this case. Thus, we address . . . Loomis's constitutional due process right [claims] . . . .").

60. *Id.* at 774 (Abrahamson, J., concurring).

61. *Id.* at 774–75.

62. *Id.* at 774 ("At oral argument, the court repeatedly questioned both the State's and defendant's counsel about how COMPAS works. Few answers were available.").

63. *Id.*

enthusiastically affirmed their use in *Malenchik v. State*.[64] In late 2008, defendant Anthony Malenchik was convicted and sentenced to six years in prison, pursuant to his guilty plea to theft and his admission to being a habitual offender.[65] In preparation for sentencing, the trial court was presented with a PSI indicating that Malenchik "f[ell] into the High Risk/Needs category" and "ha[d] a high probability of having a Substance Dependence Disorder," based on reports created by algorithmic risk assessment instruments, including one named Level of Service Inventory–Revised (hereinafter LSI–R).[66] LSI–R generally measures recidivism by taking into consideration a defendant's "areas of Criminal History, Education and Employment, Financial, Family, Accommodations, Leisure and Recreation, Companions, Alcohol and Drugs, Emotional and Personal Issues, and Attitudes and Orientation," combined with other demographic information.[67] LSI–R is a privately owned algorithmic tool.[68]

The Supreme Court of Indiana granted transfer from the appellate court to resolve the specific issue of whether a trial court may consider, and to what extent, reports from algorithmic risk assessment instruments when making sentencing determinations.

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64. *See* Malenchik v. State, 928 N.E.2d 564 (Ind. 2010).

65. *See id.* at 566; *see also* Malenchik v. State, 908 N.E.2d 710 (Table), 2009 WL 1577832, *3 (Ind. Ct. App. 2009) (affirming the conviction after Malenchik appealed his sentence, arguing the trial court abused its discretion).

66. *Malenchik*, 928 N.E.2d at 567.

67. *Id.*; *see also* Anthony W. Flores, Christopher T. Lowenkamp, Paula Smith & Edward J. Latessa, *Validating the Level of Service Inventory—Revised on a Sample of Federal Probationers*, 70 FED. PROB. 44, 45 (2006) (citations omitted).

> The LSI-R measures 54 risk and need factors about 10 criminogenic domains that are designed to inform correctional decisions of custody, supervision, and service provision. The theoretically informed predictor domains measured by the LSI-R include criminal history, education/employment, financial situation, family/marital relationships, accommodation, leisure and recreation, companions, alcohol or drug use, emotional/mental health, and attitudes and orientations.
>
> The LSI-R assessment is administered through a structured interview between the assessor and offender, with the recommendation that supporting documentation be collected from family members, employers, case files, drug tests, and other relevant sources as needed. The total risk/need score produced by the LSI-R is indicative of the number of predictor items (out of 54) scored as currently present for the offender. The LSI-R score is then actuarially associated with a likelihood of recidivism that was derived from the observed recidivism rates of previously assessed offenders. Last, domain scores of the LSI-R are used to identify an offender's most promising treatment targets.

Id.

68. *See* MEGAN E. COLLINS, EMILY M. GLAZENER, CHRISTINA D. STEWART & JAMES P. LYNCH, FOLLOW-UP REPORT TO THE MSCCSP: USING ASSESSMENT INSTRUMENTS DURING CRIMINAL SENTENCING 10 (2015) ("[T]he LSI-R and LS/CMI are proprietary tools offered by Multi-Health Systems Inc.").

Malenchik argued, as relevant here, (1) that "such models have not been recognized as scientifically reliable so as to qualify for admissibility under Indiana Evidence Rule[s]"; (2) "that the scoring models lack objective reliability"; (3) "they are not relevant to statutory aggravating circumstances"; (4) "they are unfairly discriminatory"; (5) "the use of the LSI–R test in this case impinged upon his right to counsel"; (6) "the use of scoring models conflicts with Indiana's constitutional requirement that the penal code be founded on principles of reformation and not vindictive justice"; and (7) "using such scores may lead to an unwise fundamental change in Indiana's sentencing system."[69] The State countered that the algorithmic tools were permissible because they were "employed consistently with [their] proper purposes and limitations."[70] Ultimately, the court found that the use of algorithmic RATs was not unlawful for sentencing decisions because the tools enhance and supplement considerations for judges making such determinations, as opposed to deciding on their own a defendants' sentencing outcome.[71]

As to the objective reliability of the algorithmic instruments, the court repeatedly asserted that scoring models, particularly LSI–R, have "widespread acceptance" and are "widely recognized as valid and reliable" by governmental and scholarly communities.[72] The court assured that these algorithmic tools do not constitute aggravating circumstances, but rather help judges make comprehensive sentencing evaluations.[73] Although Malenchik argued that LSI–R was discriminatory because "a person's family disharmony, economic status, personal preferences, or social circumstances should never bear any weight with a sentencing judge,"[74] the court disagreed. The court instead reasoned that sentencing courts were statutorily mandated to consider these

69. *Malenchik*, 928 N.E.2d at 567–68.

70. *Id.* at 568.

71. *Id.* at 573–74.

72. *Id.* at 568–71 (finding that "academic literature has demonstrated for decades [that] objective actuarial risk/needs instruments more accurately predict risk and identify criminogenic needs than the clinical judgment of officers," and these models "are well supported by empirical data and provide target areas to change an individual's criminal behavior, thereby enhancing public safety").

73. *Id.* at 572 ("The nature of the LSI–R is not to function as a basis for finding aggravating circumstances, nor does an LSI–R score constitute such a circumstance. But LSI–R scores are highly useful and important for trial courts to consider as a broad statistical tool to supplement and inform the judge's evaluation of information and sentencing formulation in individual cases.").

74. *Id.* at 574 (internal quotation marks omitted).

factors in PSIs.[75] Addressing the overarching goals and purposes of the algorithmic tools, the court asserted that the tools did not violate the Indiana Constitution because they "provide usable information based on extensive penal and sociological research to assist the trial judge in crafting individualized sentencing schemes with a maximum potential for reformation."[76] As such, the court concluded that algorithmic risk assessments serve an appropriate purpose in line with the current prescribed sentencing objectives and limitations, and would not significantly change the sentencing system.[77]

C. Houston Federation of Teachers, Local 2415 v. Houston Independent School District

No federal court has opined on the issue of algorithmic risk assessments used in the criminal justice system. However, a teacher's union representing over 6,000 members filed a federal civil suit alleging that a privately owned algorithmic tool used by the Houston Independent School District (hereinafter the School District) to terminate teachers for ineffective performance during the 2011–2015 school years violated, in part, their constitutional right to equal protection.[78] The tool, Educational Value–Added Assessment System (hereinafter EVAAS), generally "compar[es] the average test score growth of students taught by the teacher compared to the statewide average for students in that grade or

75. *See id.*; IND. CODE § 35-38-1-9(b)(2).

76. *Malenchik*, 928 N.E.2d at 575.

77. Notably, in 2015, 30,347 people were incarcerated in Indiana prisons, where "Black people constituted 10% of state residents, but . . . 34% of people in prison" and "Black people were incarcerated at 2.7 times the rate of [W]hite people . . . ." VERA INST. OF JUST., INCARCERATION TRENDS IN INDIANA 1–2 (2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-indiana.pdf [https://perma.cc/S5MT-YNZE]. "In 2018, there were 23,844 people in the Wisconsin prison system," where "Black people constituted 7% of state residents, but . . . 41% of people in prison" and "[i]n 2017, Black people were incarcerated at 10.9 times the rate of [W]hite people . . . ." VERA INST. OF JUST., INCARCERATION TRENDS IN WISCONSIN 1–2 (2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-wisconsin.pdf [https://perma.cc/6WMD-7M2G].

78. Hous. Fed'n of Teachers, Loc. 2415 v. Hous. Indep. Sch. Dist., 251 F. Supp. 3d 1168, 1171 (S.D. Tex. 2017). The plaintiffs also claimed procedural and substantive due process violations, which will not be discussed in this Article. *See id.* at 1173 (asserting that plaintiffs raised violations of "1. procedural due process, due to lack of sufficient information to meaningfully challenge terminations based on low EVAAS scores; 2. substantive due process, because there is no rational relationship between EVAAS scores and HISD's goal of employing effective teachers; 3. substantive due process, because the EVAAS system is too vague to provide notice to teachers of how to achieve higher ratings and avoid adverse employment consequences").

course."[79] Specifically, plaintiffs argued that the School District's policy of aligning teachers' instructional performance ratings with EVAAS scores, which "subverts the independence of the instructional practice score," wrongly classified teachers with no rational explanation.[80]

The District Court for the Southern District of Texas admitted that plaintiffs presented a "novel claim" with no controlling precedent in an analogous context.[81] Nevertheless, the court rejected plaintiff's argument, finding that the termination policy was not a classification system.[82] Assuming there was a classification, the court found that EVAAS passed rational basis review under a substantive due process claim—the same standard it would have applied to an equal protection claim. In analyzing the due process claim, the court found that even if the algorithmic tool was imperfect, "the loose constitutional standard of rationality allows governments to use blunt tools which may produce only marginal results."[83] As such, the district court denied summary judgment on the substantive due process claim.[84]

III. An Equal Protection Analysis of Algorithmic Risk Assessments

The Equal Protection Clause of the Fourteenth Amendment declares that "[no] State shall . . . deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that "all persons similarly circumstanced shall be treated alike."[85] An Equal Protection claim may be raised when the state facially classifies individuals or when it acts discriminatorily "as applied."[86] Facial classifications are reviewed under tiered levels of scrutiny.[87] "As applied" classifications are reviewed under the same scheme, but claimants must also prove there was a discriminatory

79. *Id.* at 1172.

80. *Id.* at 1183.

81. *Id.* ("This appears to be a novel claim, and the court has found no authority addressing an equal protection claim in an analogous context.").

82. *Id.* at 1175.

83. *Id.* at 1182.

84. *Id.* at 1183.

85. U.S. CONST. amend. XIV, § 1; Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)).

86. *See* Washington v. Davis, 426 U.S. 229 (1976); Romer v. Evans, 517 U.S. 620 (1996).

87. *Facially Neutral Laws Implicating a Racial Minority*, LIBRARY CONG.: CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-3-1-4/ALDE_00000825/ [https://perma.cc/6A5K-LXYQ].

impact and intent by the state.[88] Race and ethnicity are considered suspect classifications reviewed under strict scrutiny.[89] To trigger this level of scrutiny, members of the class must be treated categorically differently, which this Article argues is the case in the pretrial detention context.[90] Such classifications must be narrowly tailored to meet a compelling government interest.[91] If a court finds that the use of race or ethnicity does not pass muster under its appropriate level of scrutiny, the law or policy is declared unconstitutional.

Here, the overarching question is whether the government is violating criminal defendants' Equal Protection rights by using algorithmic assessments that include race and ethnicity to calculate risk scores used for pretrial determinations. From the *Loomis* and *Houston Federation of Teachers, Local 2415* opinions, it seems very likely that courts will treat algorithm-based classifications within the existing Equal Protection tiered-scrutiny framework.[92] First, we argue there is significant evidence to show that the government facially classifies individuals impermissibly. However, even assuming, *arguendo*, that the risk assessment classifications are facially neutral, we then argue that they have a disparate impact, and that the government intentionally discriminated on the basis of race under one of three types of legal intentionality (deliberate indifference to racial targeting, discriminatory animus from algorithm designers, or discriminatory intent from the algorithm itself). Lastly, we show how the use of algorithmic assessments is not narrowly tailored to meet the government's purported goal of reducing bias in pretrial adjudications and how the government cannot meet its burden of proving RATs are narrowly tailored, due to the opacity of the algorithms' black box mechanisms.

A. Algorithmic Risk Assessments Explicitly Use Suspect Classifications

Race and ethnicity are suspect classifications.[93] An Equal Protection Clause challenge based on these classifications must be

88. *Id.*

89. *Id.*

90. *See* Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147, 1192–93 (2017); *see, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 251–57 (2003); Grutter v. Bollinger, 539 U.S. 306, 312–16 (2003).

91. *Gratz*, 539 U.S. at 246.

92. *See* State v. Loomis, 881 N.W.2d 749, 754 (Wis. 2016); Hous. Fed'n of Teachers, Loc. 2415 v. Hous. Indep. Sch. Dist., 251 F. Supp. 3d 1168 (S.D. Tex. 2017).

93. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 216 (1995); Regents of

reviewed under strict scrutiny because they "are simply too pernicious to permit any but the most exact connection between justification and classification."[94] Generally, suspect classifications, especially racial classifications, must be used as a "last resort."[95] And in such cases, they must be narrowly tailored to meet the government's stated compelling interest.[96]

Creators of algorithmic RATs deny using suspect classifications in their calculations.[97] For instance, one of the major market competitors selling regression-based RATs is Northpointe, Inc. (now doing business as Equivant). Their algorithmic risk assessment tool COMPAS, the one at issue in Loomis, is used by many states, including New York and California, both of which rank in the top five states with the largest pretrial detainee population.[98] Northpointe firmly denies that COMPAS uses race as a variable, but due to the proprietary nature of their algorithm, Northpointe refuses to reveal its variables.[99] However, there is strong scholarly consensus that algorithmic risk assessments almost all use static factors like race, either explicitly or in other ways.[100]

Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978).

94. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (quoting Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

95. Bartlett v. Strickland, 556 U.S. 1, 21 (2009) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in judgment)); *see* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2237 (2016) (quoting *Croson*, 488 U.S. at 519).

96. *Bartlett*, 556 U.S. at 21; *see also Grutter*, 539 U.S. at 326.

97. *See* Mark MacCarthy, *Standards of Fairness for Disparate Impact Assessment of Big Data Algorithms*, 48 CUMB. L. REV. 67, 80 (2017) ("[O]rganizations do not intend to discriminate and do not use sensitive classifiers like race and gender."); *see also* SARAH PICARD, MATT WATKINS, MICHAEL REMPEL & ASHMINI KERODAL, BEYOND THE ALGORITHM: PRETRIAL REFORM, RISK ASSESSMENT, AND RACIAL FAIRNESS 5 (2018) (stating "[t]he tool did not explicitly use race or ethnicity in calculating risk scores").

98. *See* Jason Tashea, *Risk-Assessment Algorithms Challenged in Bail, Sentencing and Parole Decisions*, A.B.A. J. (2017), http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole [https://perma.cc/P6FY-FFBJ] (identifying California, Michigan, New York, and Wisconsin as states that have adopted the use of COMPAS); *see also* Wanda Bertman & Alexi Jones, *How Many People in Your State Go to Local Jails Every Year?*, PRISON POL'Y INITIATIVE (Sept. 18, 2019), https://www.prisonpolicy.org/blog/2019/09/18/state-jail-bookings/ [https://perma.cc/R6DA-U6RS] (comparing the number of jailed individuals in various states and the seriousness of their offenses).

99. Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, 4 SCI. ADVANCES, 1, 1 (2018), https://advances.sciencemag.org/content/4/1/eaao5580 [https://perma.cc/EE4B-27MV] ("[T]he data used by COMPAS do not include an individual's race . . . .").

100. *See, e.g.*, Kelly Hannah-Moffat, *Actuarial Sentencing: An "Unsettled" Proposition*, 30 JUST. Q. 270, 270–96 (2013); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237–43 (2015);

Even assuming that race is not explicitly used in algorithmic RATs, there is substantial evidence proving that many of these tools use other variables as proxies for race.[101] In an American Society of Criminology handbook on risk assessments, for example, the risk assessment scholar Robert Brame concluded that "one of the important lessons of the methodological literature on risk assessment is that leaving variables like race and ethnicity out of [the] recidivism risk assessments guarantees that they will still be there."[102] Similarly, an analysis of an algorithmic risk assessment designed to replicate the PSA (which is used in more than forty jurisdictions) found that the PSA algorithm included information on detainee race via proxy variables, concluding that "there are likely *no* truly [racially] uncorrelated input variables in real-world data, and, as a result, that likely *all* of the commonly used algorithms may violate core principles underlying antidiscrimination law by allowing race to contaminate predictions of risk."[103] The consensus is strong that risk assessments use race either explicitly or implicitly through proxies.

Even if racial proxies are used, laws and policies that employ proxies are commonplace, so the question is whether the proxy acts as a means to an impermissible end.[104] Equal Protection doctrine requires that the government state a legitimate purpose for non-suspect classifications.[105] However, a claimant may challenge the

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Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2251–54 (2019).

101. *See* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 804–05 (2014) (arguing that, by directing judges to use these algorithmic risk assessments, they are directed to "explicitly consider a variety of variables . . . not just in special contexts in which one of those variables might be particularly relevant (for instance, ability to pay in cases involving fines), but routinely, in all cases. This is not a fringe development"); *see also* Sonja B. Starr, *The Risk Assessment Era: An Overdue Debate*, 27 FED. SENT'G REP. 205, 205–06 (2015) (drawing on scholarship that argues risk factors like prior arrests become proxies for race).

102. Robert Brame, *Static Risk Factors and Criminal Recidivism*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 67, 82 (Faye S. Taxman ed., 2016) (providing a generalized test of this finding using a simulated dataset with known covariance between race and other factors).

103. Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 371 (2020).

104. *See* Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CAL. L. REV. 315, 328 (1998) ("The dominant inquiry of Equal Protection case law is about fit: How tight is the correlation between the trait used in the statute and its purported target?").

105. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 968, 985 (1996) (stating, "to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation[,]" and "[o]ur Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes").

state's purported purpose if the non-suspect classification ultimately serves a non-legitimate end or as a stand-in for a suspect classification, and courts are likely to strike them as unlawful.[106] The Supreme Court has also applied this reasoning within the Fourteenth Amendment Due Process framework.[107]

Algorithmic assessment tools have been found to use some variables as stand-ins for suspect classifications, as data scientists are generally sanctioned from using race and ethnicity altogether. The nonprofit coalition Partnership on AI found that these assessment tools use "imperfect proxies such as crime reports or arrests" to calculate the *likely possibility* of recidivism.[108] Recidivism is measured by these algorithms as whether the defendant is likely to get arrested before trial, rather than whether the defendant will commit a crime, per se.[109] This definition of recidivism, which does not narrowly capture the "public safety" objective in pretrial determinations, is chosen by data scientists because "the target for prediction (having actually committed a crime) is unavailable" as a variable.[110] The choice to define recidivism this way, however, presents a significant problem, considering contacts with the criminal justice system are not equally distributed, particularly around racial groups.[111] In essence,

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106. *See, e.g.*, Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 609 (2d Cir. 2016) (explaining that terms like "affordable housing" served as "[r]acially charged code words [which] may provide evidence of discriminatory intent") (quoting Smith v. Fairview Ridges Hosp., 625 F.3d 1076, 1085 (8th Cir. 2010)); Floyd v. City of New York, 959 F. Supp. 2d 540, 586 (S.D.N.Y. 2013) ("Crime suspect data may serve as a reliable proxy for the pool of *criminals* exhibiting suspicious behavior. But there is no reason to believe that crime suspect data provides a reliable proxy for the pool of *non-criminals* exhibiting suspicious behavior. Because the overwhelming majority of people stopped fell into the latter category, there is no support for the City's position that crime suspect data provides a reliable proxy for the pool of people exhibiting suspicious behavior.").

107. *See, e.g.*, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143 (1994) (explaining that gender "may not serve as a proxy for bias" for removing jurors through peremptory strikes).

108. P'SHIP ON AI, REPORT ON ALGORITHMIC RISK ASSESSMENT TOOLS IN THE U.S. CRIMINAL JUSTICE SYSTEM 16 (2019), https://www.partnershiponai.org/wp-content/uploads/2019/04/Report-on-Algorithmic-Risk-Assessment-Tools.pdf [https://perma.cc/A3E2-CD3M].

109. *Id.* n.14.

110. *Id.*

111. *See, e.g.*, Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 801 (2018); David S. Kirk, *The Neighborhood Context of Racial and Ethnic Disparities in Arrest*, 45 DEMOGRAPHY 55, 73–74 (2008); Rory Kramer & Brianna Remster, *Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops*, 52 LAW & SOC'Y REV. 960, 986–88 (2018); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 1016–17 (2020); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-*

policy-salient variables like criminality and arrest become proxies for race.

Partnership for AI also determined that "in complex settings like criminal justice, virtually all statistical predictions will be biased even if the data was accurate, and even if variables such as race are excluded, unless specific steps are taken to measure and mitigate bias."[112] To do so, the data are trained by inputting variables that mimic omitted variables that are relevant causal factors. But these variables may be highly correlated with race or explicitly serve as proxies for race.[113] The ACLU has argued that data like a defendant's age, substance use, family relationships, and community ties can serve, alone and together, as proxies for race.[114] These variables are clearly legally permissible when employed for legitimate purposes, but in this context, they serve as stand-ins for race and ethnicity.

In machine learning risk assessments, race or its proxies are also used in a slightly different way—that is, in the training data through which the artificial intelligence learns about the world and how to make predictions about recidivism. A 2017 study published in *Science* found that "standard machine learning can acquire stereotyped biases from textual data that reflect everyday human culture."[115] Researchers found that historic biases and stereotyped attitudes involving race can permeate the training data used by algorithms, even if training data explicitly exclude race and ethnicity as variables.[116] While the algorithm may or may not itself expressly use race in the black box decision-making of its

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Bargaining, 59 B.C. L. REV. 1187, 1194–1200 (2018).

112. P'SHIP ON AI, *supra* note 108, at 18.

113. *Id.*

114. ACLU OF KANSAS, CHALLENGING PRE-TRIAL RISK ASSESSMENT TOOLS (2019), https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/Pretrial_Justice_Task_Force/PJTFReporttoKansasSupremeCourt.pdf [https://perma.cc/HA3T-J7YR].

115. Aylin Caliskan, Joanna J. Bryson & Arvind Narayanan, *Semantics Derived Automatically from Language Corpora Contain Human-like Biases*, 356 SCIENCE 183, 183 (2017).

116. *Id.* at 185; *see also* David Arnold, Will Dobbie & Peter Hull, *Measuring Racial Discrimination in Algorithms* 2 (Becker Friedman Inst. Working Paper No. 2020-184, 2020) (finding that "a sophisticated machine learning algorithm discriminates against Black defendants, even though defendant race and ethnicity are not included in the training data. The algorithm recommends releasing [W]hite defendants before trial at an 8 percentage point (11 percent) higher rate than Black defendants with identical potential for pretrial misconduct, with this unwarranted disparity explaining 77 percent of the observed racial disparity in algorithmic recommendations. We find a similar level of algorithmic discrimination with regression-based recommendations, using a model inspired by a widely used pretrial risk assessment tool").

predictions, the algorithm's construction and training may be racialized because of the initial use of deeply racialized data. In other words, the criminal justice system is so deeply racist that by using criminal justice data to train algorithms, developers are creating naively racist artificial intelligence. Artificial intelligences are tasked with figuring out how to predict future rearrest before trial as their singular focus without legal restrictions on how to approach this goal.[117] These artificial intelligences are therefore dutifully examining patterns in the data and accurately detecting that in the recent past, at least, one of the best ways to predict who will be arrested in the future is to consider either the color of their skin or closely correlated proxies for race.

In addition, training an algorithm to make decisions may inadvertently create feedback loops that ultimately classify people based on their race and ethnicity. For example, the Netflix movie-streaming algorithm presents users with many options, and the user ultimately makes a choice that is then introduced as new knowledge that trains the algorithm to choose other movies.[118] The algorithm, however, does not consider that the user's choice was originally shown by the algorithm. As a result, a user receives recommendations similar to the choice the user initially made. Similarly, in the criminal justice context, poor minority groups are more likely to score higher in risk assessment predictions because the tools have large amounts of their data, which puts them at risk of more policing and indictments (which creates more data), ultimately reinforcing the systems' biases towards these groups.[119] In other words, the outcomes of predictions unjustly influence future predictions.

One objection that has been raised is that algorithmic risk assessments might not trigger strict scrutiny because they do not consistently and categorically disadvantage members of the suspect class. With machine-learning algorithms in particular, it has been argued that "consideration of class membership will not necessarily, or even often, give rise to categorically different treatment . . . [because] . . . most machine-learning applications will be used to forecast complex phenomena . . . that are not easily

117. *See generally* RUSSELL & NORVIG, *supra* note 34 (explaining various forms and methods of machine learning relevant to algorithms).

118. David Chong, *Deep Dive into Netflix's Recommender System*, TOWARDS DATA SCI. (Apr. 30, 2020), https://towardsdatascience.com/deep-dive-into-netflixs-recommender-system-341806ae3b48 [https://perma.cc/RS4G-7HZ2].

119. *See* VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018).

predicted by standard, less powerful, statistical techniques."[120] However, even if that were the case more generally for algorithmic risk assessments, in the pretrial detention context, and particularly with respect to regression-based RATs, there is compelling evidence that algorithmic RATs treat racial groups differently, as will be further discussed below.[121]

In short, there is significant proof that algorithmic RATs classify individuals based on their race and ethnicity. These algorithms either explicitly use racial assumptions or impermissibly use variables as proxies for race. Algorithms can also engage in feedback loops, where racial biases are reinforced through the dynamism between inputs and outputs of data. Most importantly, how could a court know whether a privately owned algorithm actually uses suspect classifications as variables if they are not reviewable due to the proprietary nature of the tool? And similarly, how can courts examine whether proxy variables are legally permissible because they purportedly serve a legitimate purpose? The assertion of opacity of algorithms is not a valid argument of constitutional soundness.

B. Substantial Evidence of Discriminatory Intent and Disparate Impact

A court may find that state actors are not explicitly classifying individuals based on their race or ethnicity. However, a criminal defendant may still raise an Equal Protection claim by showing that algorithmic risk assessments result in racially disparate treatment of individuals, so long as it was motivated by racial animus. In *Washington v. Davis*, the Supreme Court held that a claimant may use racial impact as a relevant fact that bears on the question of racial intent—the key element.[122] The Court has also clarified that disparate treatment must be "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[123] Therefore, an Equal Protection challenge of this nature must necessarily include proof of disparate treatment and discriminatory intent.

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120. *See* Coglianese & Lehr, *supra* note 90, at 1196.

121. *See, e.g.*, *id.*, n.232 ("Regression analysis is more susceptible [than machine learning] to tacit bias because it is driven by theories about how individuals are likely to behave."); *see also* Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043 (2019) (demonstrating that constitutional law is unsuited to correct racial discrimination resulting from using RATs in the criminal justice system).

122. *See* Washington v. Davis, 426 U.S. 229 (1976).

123. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

1. Racial and Ethnic Disparate Impact

There is ample evidence that many algorithmic RATs used in criminal adjudications impact defendants differently based on their race or ethnicity. For instance, a ProPublica study analyzed the COMPAS risk score assessments for more than seven thousand people arrested in Broward County, Florida between 2013 and 2014.[124] They concluded that predictions were biased against Black defendants.[125] The analysis showed that while the overall accuracy of risk predictions for both Black and White defendants were very similar (61%), "[B]lack [individuals] are almost twice as likely as [W]hite [individuals] to be labeled a higher risk but not actually re-offend."[126] Conversely, White defendants received false negatives almost twice as often as their Black counterparts.[127] Similarly, University of Texas, Austin Law Professor Melissa Hamilton's study, which used the same dataset as ProPublica, found that COMPAS "is not well calibrated for Hispanics" in almost identical ways.[128] Put differently, COMPAS risk scores favor White defendants with both false positives and negatives.[129]

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124. Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/QES8-KCKE].

125. *See id.*; *see also* Alexandra Chouldechova, *Fair Prediction with Disparate Impact: A Study of Bias in Recidivism Prediction Instruments*, 5 BIG DATA 153, 161 (2017) (using the ProPublica data, researchers "demonstrate[d]" how using a recidivism prediction instrument that has "different false postive [sic] and false negative rates between groups can lead to disparate impact when individuals assessed as high risk receive stricter penalties"); *see also* Melissa Hamilton, *Investigating Algorithmic Risk and Race*, 5 UCLA CRIM. JUST. L. REV. 53, 97–98 (2021) (finding that the PSA RAT has racially disparate impacts, demonstrates racialized group bias, and inconsistently classifies and predicts White and Black outcomes in ways that are not consistent with prevailing theories of algorithmic fairness). *But see* WILLIAM DIETERICH, CHRISTINA MENDOZA & TIM BRENNAN, NORTHPOINTE, INC., RSCH. DEP'T, COMPAS RISK SCALES: DEMONSTRATING ACCURACY EQUITY AND PREDICTIVE PARITY (2016) (disputing ProPublica's allegations); *but cf.* Jeff Larson & Julia Angwin, *Technical Response to Northpointe*, PROPUBLICA (July 29, 2016), https://www.propublica.org/article/technical-response-to-northpointe [https://perma.cc/N9N2-LJ9V].

126. *See* Angwin et al., *supra* note 124 (finding the "Labeled Higher Risk, But Didn't Re-Offend" rates were 44.9% for Black defendants and 23.5% for White defendants).

127. *Id.* (finding "Labeled Lower Risk, Yet Did Re-Offend" rates were 28.0% for Black defendants versus 47.7% for White defendants).

128. Melissa Hamilton, *The Biased Algorithm: Evidence of Disparate Impact on Hispanics*, 56 AM. CRIM. L. REV. 1553, 1577 (2019).

129. *See generally* Goel et al., *supra* note 4, at 6 (providing an overview of recent research on this issue); *see also* Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671 (2016) (arguing that algorithms inherit racial biases in the data they rely on).

Another factor unique to RATs and disparate impact is that due to the scale and objective consistency of RATs, some classes of people could be likely to always get classified as high risk and in need of incarceration. Advocates of RATs tout the absence of individual bias or inconsistency in determinations of riskiness, as compared to fallible human judges spitballing riskiness using their subjective discretion.[130] However, the downside of that consistency is that any error the algorithm makes is repeated mercilessly every single time. Compared to humans, there is much less stochastic variation in the algorithms.[131] What this means is that if COMPAS or the PSA, for instance, determine that someone with a combination of some particular factors is at high risk of rearrest before trial, every member of that suspect classification will also be rated high risk. With judicial discretion, there is always room for the statistical error of mercy or of considering the particularities of a person's life that do not show up in models that by design simplify the messiness of the real world. The algorithms lack any such unexpected divergence from their predictions, since unconstrained algorithms are designed to objectively maximize predictive validity as best as possible, without subjective mercy or distraction.[132] When combined with the scale of their use, where every judge in a state might be relying on the exact same RAT, the potential for pretrial release recommendation becomes very difficult for someone who is a member of a group identified as high risk by the algorithm. For defendants with an unlucky combination of variables, it could be akin to not having any alternative to one particular judge's idiosyncratic biases. Any racial or ethnic biases within the algorithms are multiplied and compounded at scale, relentlessly.[133]

130. *See* Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and a Solution*, 29 CORNELL J. L. & PUB. POL'Y 257, 270–71, 283–85 (2019); *see* Mayson, *supra* note 100, at 2278 ("Subjective prediction is vulnerable to irrational bias."); *see also* Cass R. Sunstein, *Algorithms, Correcting Biases*, 86 SOC. RSCH.: AN INT'L Q. 499, 502 (2019) (arguing pretrial judges "suffer from a cognitive bias that produces severe and systematic errors").

131. *See generally* RUSSELL & NORVIG, *supra* note 34 (explaining how machine learning causes algorithms to repeat information with near-perfect consistency).

132. *See* Sam Corbett-Davies, Sharad Goel, Emma Pierson, Aziz Z. Huq & Avi Feller, *Algorithmic Decision Making and the Cost of Fairness* 1–10 (Stan. Univ., Working Paper, Feb. 17, 2017). *See generally* O'NEIL, *supra* note 12 (arguing for a similar problem of scale in another context).

133. *See generally* O'NEIL, *supra* note 12, at 124 (explaining the process by which biases are replicated by algorithms).

2. Discriminatory Intent

We argue below that discriminatory intent may be inferred from: (1) deliberate indifference to racial targeting; (2) discriminatory animus from the algorithm's designer; and (3) discriminatory intent from the machine.[134]

First, in *Floyd v. City of New York*, the district court determined that "the use of a facially neutral policy applied in a discriminatory manner, or through express racial profiling, targeting [minority populations] violates bedrock principles of equality."[135] At issue in this case was whether the New York Police Department's stop-and-frisk policy violated Fourteenth Amendment protections of Black and Latino individuals. The court reasoned that plaintiffs there showed a state "*policy* of indirect racial profiling" where the state acted "*deliberately indifferent* to the intentionally discriminatory application" of that policy.[136] According to the court, a state policy includes "the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law."[137] In *Floyd*, a policy directing officers to target young Black and Latino men "based on local crime suspect data" and racial animosity by the police commissioner were sufficient to prove intent.[138]

Regarding algorithmic RATs, states have clearly ignored these tools' discriminatory impact on Black and Latino defendants. In fact, states in the last decade have aggressively enacted legislation and executive policies mandating the use of these tools, despite criticism from communities, experts, and advocacy organizations.[139]

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134. *See* Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J.L. & TECH. 889, 911 (2018); *see also* Jason R. Bent, *Is Algorithmic Affirmative Action Legal?*, 108 GEO. L.J. 803, 826 (2020) (explaining how instructions to computers can inject race into the algorithm); *see also* Coglianese & Lehr, *supra* 90, at 1198 (acknowledging that some opponents of algorithms argue the inclusion of a race variable itself shows discriminatory intent); *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 664 (S.D.N.Y. 2013) (finding a facially neutral police policy failed strict scrutiny where it resulted in higher levels of stops among non-White drivers).

135. *Floyd*, 959 F. Supp. 2d at 664. Companies like Equivant, which owns COMPAS, claim they do not engage in express racial profiling, but, as argued above, that is either false or they use proxies impermissibly to racially profile.

136. *Id.* at 660.

137. *Id.* at 558, 564 (quoting Connick v. Thompson, 563 U.S. 51, 61 (2011)).

138. *Id.* at 660.

139. *See, e.g.*, Tom Simonite, *Algorithms Should've Made Courts More Fair. What Went Wrong?*, WIRED (Sept. 5, 2019), https://www.wired.com/story/algorithms-shouldve-made-courts-more-fair-what-went-wrong/ [https://perma.cc/B9K4-7RAS] (explaining that a 2011 Kentucky law requires judges consider an algorithmic risk

Moreover, judges have used algorithmic risk assessments in ways that disadvantage Black defendants, and which a reasonable person would expect them to be aware disadvantage Black defendants. A 2019 study by the Harvard John M. Olin Center for Law, Economics, and Business found that "judges were more likely to override the [bail] recommended default for moderate risk [B]lack defendants than similar moderate risk [W]hite defendants," likely "suggest[ing] that interaction with the same predictive score may lead to different predictions by race."[140] The study further argued that such results may be caused by judges being unresponsive to policy changes or acting with racial animosity.[141]

As such, a *Floyd* intent framework could be applied to algorithmic RATs because state actors have both deliberately ignored the adverse effects on Black and Latino defendants, as well as mandated their use without consideration of scientific studies warning against their use.[142]

Second, human bias from data scientists creating and training the algorithms may encroach into the data.[143] A data scientist makes a series of choices when designing the formulas to be used by the algorithmic tool. As University of Chicago Law School Professor Aziz Z. Huq explains: "an algorithm's designer might be motivated by either an animosity toward a racial group, or else a prior belief that race correlates with criminality, and then deliberately design the algorithm on that basis."[144] Such design-making "might occur through either a choice to use polluted

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assessment when posting bail); *see also* Elizabeth Hardison, *After Nearly a Decade, Pa. Sentencing Commission Adopts Risk Assessment Tool Over Objections of Critics*, PA. CAPITAL-STAR (Sept. 5, 2019), https://www.penncapital-star.com/criminal-justice/after-nearly-a-decade-pa-sentencing-commission-adopts-risk-assessment-tool-over-objections-of-critics/ [https://perma.cc/RPC7-9VK3] (illustrating a 2019 Pennsylvania law adopting the use of algorithmic risk assessment for sentencing determinations).

140. Alex Albright, *If You Give a Judge a Risk Score: Evidence from Kentucky Bail Decisions* 1 (Harv. John M. Olin Ctr. for L., Econ., & Bus. Fellows' Discussion Paper Series, Discussion Paper No. 85, 2019), http://www.law.harvard.edu/programs/olin_center/Prizes/2019-1.pdf [https://perma.cc/VA78-EZHC].

141. *Id.* at 25.

142. *See* Angwin et al., *supra* note 124 (finding that from a sample of seven thousand criminal defendants in Broward County, Florida, Black defendants were "77 percent more likely to be pegged as at higher risk of committing a future violent crime and 45 percent more likely to be predicted to commit a future crime of any kind" than their White counterparts, controlling for race, gender, age, criminal history, and recidivism).

143. *See* P'SHIP ON AI, *supra* note 108, at 15–22; *see also* SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018) (explaining how human bias encroaches into computer programs run by algorithms).

144. Huq, *supra* note 121, at 1089.

training data or the deliberate selection of some features but not others on racial grounds."[145] Some state courts have singled out algorithms' developers as legally responsible for the algorithms in some respects.[146] However, the opaque or proprietary nature of the algorithmic tools may prohibit defendants from determining how the data scientist designed the algorithm. If the algorithm is unreviewable, then it is challenging to directly detect the designer's motivation.

Indirect evidence of intentionality can be deduced from an important mathematical proof by the statisticians Jon Kleinberg and colleagues, which has since been replicated.[147] Analyzing the ProPublica COMPAS data, they found that there are three main ways to operationalize racial equality: racial equality of false negatives, racial equality of false positives, and racial parity of outcomes.[148] They proved that in a context of unequal initial conditions (i.e., racial disparity in recidivism rates), it is mathematically impossible for the three types of equality to be achieved simultaneously, so there is a necessary trade-off between the three forms of equality.[149] This trade-off implies that creators of the assessments are making choices about trade-offs, intentionally or unintentionally. Minimizing racial inequality in risk assessments became such a priority among legal and policy decision-makers that most current assessments include attempts to minimize racial disparities.[150] Kleinberg and colleagues' proof then implies that any intentional act of reducing inequality in one

145. *Id.*

146. *See, e.g.*, People v. Wakefield, 175 A.D.3d 158, 169–70 (N.Y. App. Div. 2019) (holding that the "true accuser" within a Confrontation Clause challenge was the writer of the source code for an algorithm used in software that calculates the probability of a defendant's presence at the scene of the crime, considering that said algorithmic source code writer was "the declarant in the epistemological, existential and legal sense rather than the sophisticated and highly automated tool powered by electronics and source code that he created"), *lv denied*, 34 N.Y.3d 1083 (N.Y. App. Div. 2019), *lv granted*, 35 N.Y.3d 1097 (N.Y. App. Div. 2020).

147. JON KLEINBERG, SENDHIL MULLAINATHAN & MANISH RAGHAVAN, INHERENT TRADE-OFFS IN THE FAIR DETERMINATION OF RISK SCORES (2017), https://arxiv.org/pdf/1609.05807.pdf [https://perma.cc/9BGF-WZU5].

148. *See id.* at 4. There are other models of equality, but similar arguments hold for those models. *See* Huq, *supra* note 121, at 1053 (2019) (arguing that the law "provides no creditable guidance" about which model of fairness or equality to apply to risk assessments); Richard Berk, Hoda Heidari, Shahin Jabbari, Michael Kerns & Aaron Roth, *Fairness in Criminal Justice Risk Assessments: The State of the Art*, 50 SOCIO. METHODS & RSCH., 3, 34–35 (2021).

149. KLEINBERG ET AL., *supra* note 147, at 17.

150. Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and a Solution*, 29 CORNELL J.L. & PUB. POL'Y 257, 289 (2019).

dimension necessarily involves intentionally increasing inequality in one of the other dimensions. Assessment developers cannot argue that remaining inequalities were unintentional or incidental since the trade-offs force a developer to make a choice between inequalities.

Third, for machine learning algorithmic RATs, can intent also be inferred from decisions made by machines based on their "deep learning" and autonomous decision-making?[151] The Supreme Court has not yet ruled on whether machines that replace human decision-making should be treated like natural persons for Equal Protection intent purposes. Still, there is great interest in the question of legal personhood for artificial entities and autonomous devices.[152] For instance, judges are barred from considering race and ethnicity when making bail or sentencing determinations.[153] However, judges rely on an algorithmic assessment that, as mentioned above, directly or indirectly uses prohibited classifications. Furthermore, the machine is able to learn and apply racial biases and stereotypes (racial animosity), as in the case of the Netflix algorithm. The algorithm selects a defendant's features to make a choice of who the defendant is, without ever needing to use race or ethnicity as a factor. The machine then would be liable for discriminatory intent just like a court officer who created a bail determination report or PSI.[154] In other words, if one treats a

151. These arguments about AI's intermediate level of legal intentionality do not as clearly apply to regression-based RATs because their algorithms are not inherently opaque and independent like the machine learning RATs. However, that makes the regression-based RATs more likely to be found to use race facially (or some other elements discussed above), and machine learning RATs more likely to pass a facial discrimination Equal Protection Clause review, but fail a disparate impact plus intent review.

152. *See* Gerhard Wagner, *Robot, Inc.: Personhood for Autonomous Systems?*, 88 FORDHAM L. REV. 591, 593 (2019) (prepared for the symposium *Rise of the Machines: Artificial Intelligence, Robotics, and the Reprogramming of Law*); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (expanding personhood rights for artificial corporate entities based on an Equal Protection claim); Anat Lior, *AI Entities as AI Agents: Artificial Intelligence Liability and the AI Respondeat Superior Analogy*, 46 MITCHELL HAMLINE L. REV. 1043 (2020) (arguing for the application of strict liability to humans responsible for damages caused by AI entities acting as the human's agent).

153. *See* 28 U.S.C. § 994(d) ("The Commission shall assure that the [sentencing] guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."); U.S. PROB. OFF. FOR THE W. DIST. OF N.C., THE PRESENTENCE INVESTIGATION REPORT: A GUIDE TO THE PRESENTENCE PROCESS 6 (2009) ("[C]ertain demographic data such as age, race and sex are precluded from consideration in the sentencing process both by statute and by the guidelines . . . .").

154. *See* Kimberly Mok, *Mathwashing: How Algorithms Can Hide Gender and Racial Biases*, NEW STACK (Dec. 8, 2017), https://thenewstack.io/hidden-gender-

machine as a human, would we permit the human to do this? Here, absent judicial precedent, the answer is *likely no*. Thus, while the *Loomis* and *Malenchik* courts held that algorithmic assessments are one of many factors considered by a judge in making sentencing determinations, treating these tools as human-like systems may alter judicial review of the intent issue.

A useful legal model has been developed in Germany[155] that could be applied to the most advanced RATs.[156] In the German model of *Teilrechtsfähigkeit*, or partial legal capacity, advanced machine-learning algorithms such as unsupervised machine learning RATs would be treated as legal subjects in some limited ways that entail some independent legal capacity under the indirect supervision of humans. In this partial legal capacity model, algorithms "are not legal persons with full legal capacity, they are still legal subjects, yet the range of their subjectivity is limited by their specific functions."[157] Some U.S. courts have already suggested that more independent AI systems could have something like *Teilrechtsfähigkeit* in, for example, the context of Sixth Amendment Confrontation Clause challenges.[158] In the pretrial risk

racial-biases-algorithms-can-big-deal/ [https://perma.cc/7343-PLYN] ("In one recent study which trained an off-the-shelf machine learning AI system on 2.2 million words, Princeton University researchers used a word-association technique to map out what kind of links the system would [make] between words and concepts. It found that the system would associate words such as 'flower' and 'music' as being more pleasant concepts than words like 'insects' and 'weapons.'").

155. Jan-Erik Schirmer, *Artificial Intelligence and Legal Personality: Introducing "Teilrechtsfähigkeit": A Partial Legal Status Made in Germany*, *in* REGULATING ARTIFICIAL INTELLIGENCE 123 (Thomas Wischmeyer & Timo Rademacher eds., 2020) ("[I]ntelligent agents would be treated as legal subjects as far as this status followed their function as sophisticated servants. This would both deflect the 'autonomy risk' and fill most of the 'responsibility gaps' without the negative side effects of full legal personhood."); *see also* Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513, 549 (proposing "a new category of a legal subject, halfway between person and object"); Wagner, *supra* note 152, at 608 (2019) (developing a comparable intermediary tort liability status for AI systems using "a functional explanation that is in tune with the general principles and goals of tort law, namely compensation and deterrence," which is particularly needed when "people injured by a robot may face serious difficulties in identifying the party who is responsible for the misbehavior of the device").

156. This analysis applies to machine learning RATs since they share important characteristics with human decision-making, such as processing information independently without direct human supervision, unlike regression-based RATs that require direct supervision and would be more comparable to very sophisticated tools.

157. Schirmer, *supra* note 155, at 135. This model has previously been applied in Germany to preliminary companies, homeowners' associations, and fetuses.

158. *See* People v. Wakefield, 175 A.D.3d 158, 169–70 (N.Y. App. Div. 2019) (finding that "an artificial intelligence-type system" involving "distributed cognition between technology and humans" could itself be a declarant in a Sixth Amendment challenge, depending on the level of human supervision and the totality of the

assessment context, machine learning RATs would be legal subjects only in the sense that they are responsible for independently performing functions for human subjects,[159] such as using race to accurately predict risk of recidivism. Legal questions about artificial intelligence will only become more common in the near future, and the model of partial legal capacity could resolve many pressing legal dilemmas, such as conflicts involving driverless cars.[160]

C. Algorithmic Risk Assessments Do Not Pass Judicial Strict Scrutiny

The last step of a suspect class Equal Protection analysis requires a showing that the means chosen to achieve a compelling government interest be narrowly tailored. Many states purportedly employ algorithmic RATs to eliminate or reduce racial disparities in the criminal justice system.[161] Proponents also advocate for their "potential to streamline inefficiencies, reduce costs, and provide rigor and reproducibility for life-critical decisions."[162] However, the use of algorithmic assessment tools is not narrowly tailored to meet those objectives because they are not the least restrictive means necessary to achieve those government interests—they do not produce considerably better assessments, and they negatively influence judges. Further, the opacity of many RATs makes it impossible for the government to meet its burden of proof that they are narrowly tailored.

Studies have found that algorithmic risk calculations for recidivism are no more accurate or less racially biased than human predictions. For example, a high-profile 2018 Dartmouth University study found that COMPAS risk calculations were "nearly identical"

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circumstances); *see also* Itiel E. Dror & Jennifer L. Mnookin, *The Use of Technology in Human Expert Domains: Challenges and Risks Arising from the Use of Automated Fingerprint Identification Systems in Forensic Science*, 9 L., PROBABILITY & RISK 47, 48–49 (2010).

159. *See* Schirmer, *supra* note 155, at 136 (emphasizing that algorithmic partial legal capacity does not require complete intentional autonomy, since a "trading algorithm does not trade on its own account, but on the account of the person who deploys it. In other words, we are looking at the typical 'master-servant situation', in which the servant acts autonomously, but at the same time only on the master's behalf").

160. *See generally* Neal Katyal, *Disruptive Technologies and the Law*, 102 GEO. L.J. 1685 (2014) (discussing the potential problems arising from the development of mass surveillance, 3D printing, and driverless cars).

161. *Id.*; *see* Adam Neufeld, *Commentary: In Defense of Risk-Assessment Tools*, MARSHALL PROJECT (Oct. 22, 2017), https://www.themarshallproject.org/2017/10/22/in-defense-of-risk-assessment-tools [https://perma.cc/FU5T-YJH7].

162. P'SHIP ON AI, *supra* note 108, at 7.

to untrained humans at predicting recidivism.[163] The study also confirmed ProPublica's finding that COMPAS racially disproportionately assigns false positives and negatives to criminal defendants, showing that these tools are no better than judges overall.[164] Further, they found that, although COMPAS uses 137 variables in an opaque algorithm, the same accuracy could be achieved with a simple linear regression with only two variables: age and total number of previous convictions.[165] These two equivalent and more narrowly tailored alternatives suggest that risk assessments like COMPAS are not the least restrictive means necessary to achieve the state's objectives.

Judges are supposed to consider, but not rely on, algorithmic assessments in pretrial adjudications.[166] However, studies find that judges sometimes completely rely or are heavily influenced by these assessments. Also known as *automation bias*, cognitive biases may cause judges to over-rely on algorithmic assessments because of "the brain's natural tendency to rely on heuristics, or simple rules of thumb, when dealing with complicated mental tasks."[167] The empirical research on how judges use RATs is limited, but a 2019 Harvard University study simulated pretrial judicial discretion with respect to automated risk assessments using an online survey experiment to assess how people make predictions about pretrial risk, both with and without RATs.[168] The results were consistent with automation bias, with researchers finding that participants' behavior heavily mimicked that of the algorithms, "which can be racially biased even when race is not included as an explicit

163. Dressel & Farid, *supra* note 99, at 3; *see* Jongbin Jung, Connor Concannon, Ravi Shroff, Sharad Goel & Daniel G. Goldstein, *Simple Rules for Complex Decisions* 9 (Stan. Univ., Working Paper, Apr. 4, 2017) (demonstrating that humans using simple weighted checklists comparable to the early Vera Scale are as accurate as complex algorithmic risk assessments at predicting rearrest before trial).

164. Dressel & Farid, *supra* note 99, at 3.

165. *See id.*

166. *See* Brief for the U.S. as Amicus Curiae at ¶ 98, Loomis v. Wisconsin, 137 S. Ct. 2290 (2017) (No. 16-6387); Andrea Nishi, *Privatizing Sentencing: A Delegation Framework for Recidivism Risk Assessment*, 119 COLUM. L. REV. 1671, 1672 (2019).

167. Andrew Lee Park, *Injustice Ex Machina: Predictive Algorithms in Criminal Sentencing*, UCLA L. REV.: L. MEETS WORLD (Feb. 19, 2019), https://www.uclalawreview.org/injustice-ex-machina-predictive-algorithms-in-criminal-sentencing/ [https://perma.cc/5Y4P-43BE] (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1125 (1974)).

168. *See* Ben Green & Yiling Chen, *Disparate Interactions: An Algorithm-in-the-Loop Analysis of Fairness in Risk Assessments* (Conf. on Fairness, Accountability, and Transparency, 2019), https://scholar.harvard.edu/files/19-fat.pdf [https://perma.cc/XBT4-VXRB].

factor."[169] In a related court context, an ongoing study of prosecutorial discretion suggests that prosecutors were strongly influenced by RATs, even though they were unaware of what elements went into the scores.[170] Prosecutors who had been prepared to offer defendants diversion programs were swayed to not do so "because the risk assessment showed too high of a risk," even though after being pressed the prosecutors could not explain the elements of the score or what determined the risk levels.[171]

Another weakness in the narrowly tailored step of the Equal Protection argument could be that some RATs are too opaque to prove that they are narrowly tailored. As discussed above, machine-learning RATs evolve specific processes on their own in response to real-world data, so their precise algorithms are not programmed or known by any human.[172] Although regression-based RATs are not inherently opaque in the same way, RATs like COMPAS are de facto opaque because their algorithms are protected as trade secrets. Yet according to the Supreme Court, "[u]nder strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests."[173] It is the burden of the state to prove that no other alternative that is less intrusive of the right could work to achieve those interests. If the black-box algorithms driving machine learning RATs are by nature too unidentifiable to prove that they are or are not narrowly tailored (or if corporations like the designers of COMPAS refuse to open the black box of the algorithm to prove it), then the government using these risk assessments would necessarily fail to meet their burden of proof.[174]

In sum, the government cannot meet its burden of proof that algorithmic assessment tools are narrowly tailored to meet the

169. *Id.* at 8.

170. Chiara C. Packard, *"The Question Is, Should You Charge?": A Multi-Site Case Study Exploring Prosecutor's Use of Discretion in Wisconsin* (Soc'y for the Study of Soc. Probs. Ann. Conf., 2021).

171. *Id.*

172. *See, e.g.*, Coglianese & Lehr, *supra* note 90, at 1199 ("Given how machine-learning analysis works on a black-box basis, it is virtually impossible for anyone to know a priori what a given variable's likely importance in the algorithm will be or what its ultimate effects will be on any disparities of predictions.").

173. Johnson v. California, 543 U.S. 499, 505 (2005) (internal quotation marks omitted) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

174. This is less applicable to regression-based algorithms that are more transparent in their processes, but that transparency in turn makes those RATs more vulnerable to discriminatory intent claims. For instance, in a defense of machine learning RATs, Coglianese and Lehr admit that algorithmic "[r]egression analysis is more susceptible to tacit bias because it is driven by theories about how individuals are likely to behave." Coglianese & Lehr, *supra* note 90, at 1205 n.232.

government's purported goal of reducing bias in the criminal justice system. These tools do not perform better than untrained humans or judges, nor do they perform better than simple and utterly transparent regressions of two variables. In addition, they impact judicial discretion by pointing judges to ultimately make racially biased determinations. Furthermore, these algorithmic tools carry significant weight, if not complete weight, in a judge's determination of pretrial adjudications. Therefore, algorithmic assessments are not the least restrictive means necessary to achieve the state's purported compelling purpose of, among other things, reducing biases in judges and releasing more defendants pretrial.

IV. Limitations and Other Considerations

One major limitation of an Equal Protection challenge against privately owned RATs is that their algorithms are considered trade secrets, and therefore it would be hard for courts to evaluate the legally relevant processes. As a result of their trade secret status, the algorithms may not be evaluated by the general public or criminal defendants without consent of the company. Companies often do not grant consent because it may result in criticism and revelation of secret information, both of which could cut into corporate profit.[175] Courts have sided with companies on this issue. For example, in 2014, the Urban Justice Center filed a Freedom of Information Law (FOIL) request in New York State for COMPAS's "instruction manuals, training guides and information regarding scoring for the COMPAS Reentry Assessment tool," as part of an administrative challenge.[176] The request was denied because of the "trade secrets" exemption under FOIL, as "these materials are the sole property of Northpointe."[177] However, the trade secrecy argument may empower courts to ban privately-owned algorithms altogether, since they lack government and public review, as was mandated by the court in *Loomis*. In fact, courts could start reviewing these tools in camera or through protective orders.[178]

175. *See* Andrew A. Schwartz, *The Corporate Preference for Trade Secret*, 74 OHIO ST. L.J. 623 (2013) (discussing the benefits of trade secrets for corporations).

176. Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System* 14 n.51 (Apr. 14, 2017) (unpublished manuscript) (on file with author) ("This FOIL request was submitted in connection with an Article 78 ruling finding that the COMPAS tool was not adequately tailored for use on individuals with mental illness.").

177. *Id.*

178. *But see* Nishi, *supra* note 166, at 1682–83 n.70 ("Although in civil cases these protections can be overcome through protective orders or in camera review, the use

Another limitation is that the Supreme Court requires an individualized inquiry for Equal Protection challenges. In *McClesky v. Kemp*, the Court held that "[s]tatistics at most may show only a likelihood that a particular factor entered into some decisions," and are usually insufficient to show a particularized injury.[179] The Court reasoned that "the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing" were permissible in jury selection claims, but not in reviewing judicial discretion in capital sentencing.[180] Pretrial determinations are closer in the procedural stage to jury selection, but are made by judges like in capital sentencing determinations. Therefore, in the event a defendant is unable to review their individualized assessment due to the algorithm's proprietary nature and corporate trade secrecy, it is unclear whether a court would accept statistical generalizations to find particularized harm of an individual defendant, particularly in the face of companies who refuse to reveal their algorithms.

Conclusion

Algorithmic RATs in pretrial adjudication are not constitutionally sound. Their opacity, biases, judicial influence, and racially disparate treatment of Black and Latino defendants, all of whom are legally innocent, likely do not pass muster under the Equal Protection framework. Nonetheless, many states continue to advocate for their implementation in the criminal justice system, especially with bail reform gaining traction in jurisdictions across the United States.

We reject the idea of modifying or improving these algorithms to make them marginally less discriminatory, since the constitutional problems with risk assessments are fundamental, not fixable at the margins. For example, there is simply no way to use arrest data algorithmically that is not discriminatory, since racial discrimination is always already baked into prior arrest data. Instead, many less racially discriminatory alternatives to pretrial risk assessments have been proposed, such as public health approaches to identifying pretrial needs of people charged with crimes.[181] Indeed, major organizations like the Pretrial Justice

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of these techniques in the criminal context may conflict with a defendant's Sixth Amendment right to a public trial.").

179. McCleskey v. Kemp, 481 U.S. 279, 308 (1987).

180. *Id.* at 294.

181. *See, e.g.*, ALICIA VERANI, RODRIGO PADILLA-HERNANDEZ, TALI GIRES, KAITLYN FRYZEK, RACHEL PENDLETON, ETHAN VAN BUREN & MÁXIMO LANGER,

Institute have called for abolition of both bail and algorithmic risk assessments.[182] Similarly, as part of its recent pretrial reforms, New York City experimented successfully with a system of behavioral nudges in the form of phone calls and texts reminding people of court dates, which significantly reduced rates of failing to appear in court.[183]

Notwithstanding these promising alternatives, the focus of this Article is not to comprehensively assess alternatives to risk assessments, but rather to identify their unconstitutionality. As argued above, the use of risk assessments is legally impermissible because it violates the Equal Protection rights of people of color, who are too often doomed by these algorithms to be swept up into the system. Machine learning risk assessments in particular are not narrowly tailored to minimize discrimination; they are naively racist systems that are inscrutably tailored to maximize predictive accuracy by any means necessary. Yet no one should be subjected to the pains of pretrial incarceration because they are a member of a particular racial or ethnic class. It is time to think beyond algorithmic risk assessments and reimagine equitable alternatives to pretrial justice.

CREATING A NEEDS-BASED PRE-TRIAL RELEASE SYSTEM: THE FALSE DICHOTOMY OF MONEY BAIL VERSUS RISK ASSESSMENT TOOLS 1 (2019) https://law.ucla.edu/sites/default/files/PDFs/Academics/CJP Pretrial Proposal - 2020.pdf [https://perma.cc/WTG2-49C5] (proposing a public health approach to pretrial justice that eschews RATs and prioritizes support services and "a presumption of release").

182. *Updated Position on Pretrial Risk Assessment Tools*, PRETRIAL JUST. INST. (Feb. 7, 2020), https://static1.squarespace.com/static/61d1eb9e51ae915258ce573f/t/61df34bb945c52230a215be9/1642018002889/PJI+Statement+Against+Risk+Assessments [https://perma.cc/538L-3HHM] (arguing that "[r]egardless of their science, brand, or age, these tools are derived from data reflecting structural racism and institutional inequity that impact our court and law enforcement policies and practices. Use of that data then deepens the inequity"); *see also The Case Against Pretrial Risk Assessment Instruments*, PRETRIAL JUST. INST. (Nov. 2020), https://static1.squarespace.com/static/61d1eb9e51ae915258ce573f/t/61df300e0218357bb223d689/1642017935113/The+Case+Against+Pretrial+Risk+Assessment+Instruments--PJI+2020.pdf [https://perma.cc/5SDC-5NDZ] (arguing that "[p]retrial risk assessment instruments (RAIs) are constructed from biased data, so the RAIs perpetuate racism[;] RAIs are not able to accurately predict whether someone will flee prosecution or commit a violent crime[;] RAIs label people as 'risky' even when their odds of success are high[;] [and] RAI scores inform conditions of release, but there is no proven connection between RAI scores, specific conditions, and pretrial success").

183. *See* Russell Ferri, *The Benefits of Live Court Date Reminder Phone Calls During Pretrial Case Processing*, 18 J. EXPERIMENTAL CRIMINOLOGY 149, 160 (2022) (finding that phone call reminders reduced failures to appear by thirty-seven percent); Alissa Fishbane, Aurelie Ouss & Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear For Court*, 370 SCIENCE 1 (2020) [https://perma.cc/8BNS-YWJ9] (finding that text message reminders reduced failures to appear by twenty-one percent, and redesigned forms reduced them by thirteen percent).

Corporate Management Should All Be Feminists

Joan MacLeod Heminway†

"It's nice to say 'I wish my board had more gender diversity.' But if you want it, you have to go out and make it happen. . . . You have to find a way to get past the usual way of doing things."[1]

"Culture does not make people. People make culture. If it is true that the full humanity of women is not in our culture, then we can and must make it our culture."[2]

I. Introduction

The title of this essay may alienate some readers, including the very people who may benefit from it most—corporate directors and officers. Specifically, the title directs the reader to a potentially uncomfortable normative conclusion, using what may be an off-putting "f" word. The word "feminist" has specific discomforting, even negative, connotations for a certain percentage of the population.[3] I know. I used to be part of that populace. If you have

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1. Moira Forbes, *Will Corporate Boards Remain A Boys' Club?*, FORBES (Nov. 30, 2015), https://www.forbes.com/sites/moiraforbes/2015/11/30/will-corporate-boards-remain-a-boys-club/?sh=5b88c5c3f08b [https://perma.cc/8SRA-X4LG] (quoting Shelly Lazarus, Chairman Emeritus, Ogilvy & Mather).

2. CHIMAMANDA NGOZI ADICHIE, WE SHOULD ALL BE FEMINISTS 46 (2014).

3. *See, e.g.*, *id.* at 8 (explaining that the feminist labeling of the author by a friend "was not a compliment"); *id.* at 9 (noting advice given to the author that she not label herself a feminist, "since feminists are women who are unhappy because they cannot find husbands"); *id.* at 11 (observing that the "word *feminist* is so heavy with baggage, negative baggage"); Gargi Bhattacharya & Margaret S. Stockdale, *Perceptions of Sexual Harassment by Evidence Quality, Perceiver Gender, Feminism, and Right Wing Authoritarianism: Debunking Popular Myths*, 40 L. & HUM. BEHAV. 594, 604 (2016) (mentioning "the negative stereotype of feminists"); Deborah L. Rhode, *Appearance as a Feminist Issue*, 69 SMU L. REV. 697, 698–99 (2016) (describing several negative perceptions of feminists).

read this far, however, I encourage you to forge on. This essay is less about feminism (although it *is* about feminism) than it is about effective, efficient corporate management in the United States.

A. Corporations and Their Management

Efficacious corporate management is important because corporations are major engines of economic production. They also occupy important social roles in communities and individual lives as gateways to health insurance, as charitable donors, as partners in construction and service projects, and more. And, whether we like it or not, corporations also are political actors. Corporations' widely acknowledged activities in these three arenas have the capacity to enhance, eliminate, and otherwise alter economic, social, and political policies and institutions.[4]

Under state law common throughout the United States, by default, a corporation is managed by or under the direction of a specific decision-making body: a board of directors.[5] Yet, despite the

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4. *See generally, e.g.*, Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 493 (2019) ("[C]orporations need to determine how they will use their legal, political, economic, and social clout in a particular social movement."); Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J. 685, 687 (2021) (identifying "the concentrated economic, social, and political power of corporations and employers"); Jonathan Kolieb, *Advancing the Business and Human Rights Treaty Project Through International Criminal Law: Assessing the Options for Legally-Binding Corporate Human Rights Obligations*, 50 GEO. J. INT'L L. 789, 790 (2019) ("Corporations . . . have accrued sufficient socioeconomic and even political and military power that their conduct and business decisions have the potential to adversely impact the human rights of millions of people, including along their supply chains, amongst their employees and customers, and in the communities surrounding their operations."); Dalia T. Mitchell, *From Vulnerable to Sophisticated: The Changing Representation of Creditors in Business Reorganizations*, 16 N.Y.U. J. L. & BUS. 123, 162 (2019) (observing that, in the wake of World War II, "corporations were embraced as dominant economic, social, and political institutions"); Michael R. Siebecker, *A New Discourse Theory of the Firm After* Citizens United, 79 GEO. WASH. L. REV. 161, 164 (2010) (noting "the growing influence of corporations in all aspects of economic, social, and political life"); Lua Kamál Yuille, *Corporations, Property, & Personhood*, 97 DENV. L. REV. 557, 578 (2020) (mentioning "[t]he sociocultural, political, and economic functions of corporations").

5. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2021) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."); TENN. CODE ANN. § 48-18-101(b) (2021) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the charter."). The Model Business Corporation Act, a corporate statute prototype on which many U.S. corporate laws are based, is worded in similar fashion, providing that:

> Except as may be provided in an agreement authorized under section 7.32, and

prominence of the board's management role as defined by statute, many construe management and managers to include only corporate officers and others with day-to-day leadership, decision-making, or supervisory responsibilities. One academic commentator offers the following by way of explanation:

> Boards' focus on high-level tasks, with a particular emphasis [on] monitoring and strategy, can generally be contrasted with the tasks managers perform. . . . [T]he law . . . offers only minimal guidance on the role and tasks of managers. To start, there is no legal definition of a "manager." In fact, the term is sometimes broadly used as a label for both directors and other high-level decisionmakers within corporations.[6]

This essay uses that broad label, defining corporate management and managers to include a corporation's board of directors as well as its senior officers.[7] However, the most particular focus of the diversity, equity, and inclusion thrust of this essay is corporate boards of directors.

As a result of the corporation's role in larger economic, social, and political spheres, the management and control authority of a corporate board of directors includes decision-making that influences those spheres. Various theories of the corporation recognize the corporation's role in society;[8] corporate social

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> subject to any limitation in the articles of incorporation permitted by section 2.02(b), all corporate powers shall be exercised by or under the authority of the board of directors, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of the board of directors.

MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS'N 2016).

6. Martin Petrin, *Corporate Management in the Age of AI*, 2019 COLUM. BUS. L. REV. 965, 976 (footnotes omitted). Professor Petrin describes the board's management role as follows:

> This general reference to "management" by the board would, by itself, represent a misleading or at least highly inaccurate description of what modern boards do. It is only the DGCL's additional reference to corporations being managed "under the direction" of the board that provides a more accurate reflection of contemporary governance. Public companies are rarely managed by the board. Rather, the board transfers significant managerial responsibilities to officers and managers. In turn, the board supervises management and only retains for itself a limited number of high-level managerial tasks.

Id. at 972 (footnotes omitted); *see also* Jeffrey M. Lipshaw, *The False Dichotomy of Corporate Governance Platitudes*, 46 J. CORP. L. 345, 362–63 (2021) ("[T]he role of the board of directors is ambiguous. The board can be viewed purely as the shareholders' means of monitoring the managers. Or the board can be viewed as participating in the active management of the firm.").

7. *Accord* Robert J. Rhee, *Corporate Ethics, Agency, and the Theory of the Firm*, 3 J. BUS. & TECH. L. 309, 312 n.20 (2008) (referencing "[t]he managers, broadly defined as the board of directors and officers").

8. *See, e.g.*, Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 356–57 (2017) (explaining why, under a collaboration theory of

responsibility (also known as CSR) recognizes greater corporate obligation—and, at times, accountability—in that context.[9] A given corporation's role in society is largely determined by its management, including its board of directors (as the highest-order corporate manager). Indeed, the structure and composition of a corporate board of directors may determine the corporation's social consciousness and impact the board's decision-making. Notably, policy makers and researchers have identified director independence, gender, race, and LGBTQ+ status as board composition factors that warrant study.[10]

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the corporation, the corporation has an obligation to behave in a socially responsible manner); Fan, *supra* note 4, at 448–49 (2019) (noting, quoting Kent Greenfield, that "stakeholder theory 'challenge[s] the American corporation to broaden its role in society and enlarge the obligations it owes beyond the bottom line'"); Matteo Gatti & Chrystin Ondersma, *Can A Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1, 14 (2020) ("Stakeholder theory, sometimes described as a communitarian approach, holds that managers and directors could and should cater to the interests of and to maximize the value allocated to employees, creditors, customers, suppliers, local communities, the environment, and society as a whole."); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 716 (2002) ("[P]rogressive scholars contend that directors ought to consider the impact of their decisions on a wider range of constituents than shareholders, and thus ought to consider the implications of their actions on employees, consumers, suppliers (in some cases), the community, and the environment.").

9. *See, e.g.*, Jay Butler, *Corporate Commitment to International Law*, 53 N.Y.U. J. INT'L L. & POL. 433, 451 (2021) ("CSR's primary focus relates to a company's voluntary commitments and cultivation of internal value systems for reorienting its behavior. Further, CSR is inclusive of both socially beneficial aims as well as legally obligatory norms."); Tom C.W. Lin, *Executive Private Misconduct*, 88 GEO. WASH. L. REV. 327, 349 (2020) ("CSR programs are initiatives businesses take to positively impact a wide range of local, national, and international stakeholders beyond just their shareholders and employees."); Jennifer J. Riter, *An Exploration of the Extractive Industries Transparency Initiative as a Model for Incorporating Collaborative Accountability into Collective Global Governance*, 40 U. PA. J. INT'L L. 839, 857 (2019) ("[A] number of corporate entities are furthering their means of self-monitoring through voluntary participation in sector-specific public-private partnerships. These collaborative attempts take the CSR model one step further and promote systemic community development . . . .").

10. *See, e.g.*, Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 239–63 (2002) (reporting on a study of board independence); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921, 944–50 (1999) (providing the results of an examination of board independence); Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 589–607 (2006) (offering an analysis of women and boards of directors); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306 (2003) ("[S]cholarship suggests that reform proposals should discourage groupthink by promoting more diversity on boards in terms of gender, race, class, ethnicity, age, national origin, sexual orientation, and socio-economic background, as well as expertise and temperament."); Darren Rosenblum & Daria Roithmayr, *More Than A Woman: Insights into Corporate Governance After the*

B. Diversity and the Corporate Board of Directors

The focus on board structure and composition has prompted studies, deliberation, and writing (including books, articles, and legislative and regulatory drafting) on the lack of diversity on corporate boards of directors (and, most notably for purposes of this essay, the boards of U.S. public companies), especially in the past twenty years.[11] This essay focuses in on gender diversity, equity, and inclusion specifically. Although the essay speaks in terms of men and women, its overall contentions and the suggestions that emanate from them also may relate to people whose genders do not conform to these binary distinctions.

Many also have engaged in research and writing about the rationale for increased gender diversity on boards of directors—why it may be beneficial for women to have a greater presence in the corporation's central management body. Arguments for increasing the number and percentage of women on corporate boards have included (among others): their actual or potential role in increasing profitability or shareholder value;[12] their potential utility in adding

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French Sex Quota, 48 IND. L. REV. 889, 900 (2015) (describing empirical and theoretical studies and analysis of board composition focused on sex); Shaker A. Zahra & Wilbur W. Stanton, *The Implications of Board of Directors' Composition for Corporate Strategy and Performance*, 5 INT'L J. MGMT. 229 (1988) (studying the financial impact of racial diversity on boards of directors).

11. *See, e.g.*, Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61, 65 (2012) ("The boards of directors of public companies in the United States are far from heterogeneous."); Alexander M. Nourafshan, *From the Closet to the Boardroom: Regulating LGBT Diversity on Corporate Boards*, 81 ALB. L. REV. 439, 441–42 (2018) ("White men hold roughly seventy percent of board seats among Fortune 500 companies."); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837, 838 (2003) (noting "the relative absence of diversity at the highest levels of the American corporate governance structure"); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 379 (2014) ("Close to three-quarters of members of corporate boards of the largest American companies are white men."); Janis Sarra, *Rose-Colored Glasses, Opaque Financial Reporting, and Investor Blues: Enron as Con and the Vulnerability of Canadian Corporate Law*, 76 ST. JOHN'S L. REV. 715, 724 (2002) ("The Enron directors were in a position to prevent many of the failures in governance that occurred. The fact that this did not occur is in part a function of board culture and lack of diversity in representation on the Board."); Amy Deen Westbrook, *We('re) Working on Corporate Governance: Stakeholder Vulnerability in Unicorn Companies*, 23 U. PA. J. BUS. L. 505, 533 (2021) ("The technology sector, where most unicorns are found, long has been criticized for its 'boys' club' mentality, with regard to both investment and operations. Founder dominance often exacerbates and is exacerbated by the lack of gender diversity on unicorn boards. Most unicorns lack even a single woman director.").

12. *See, e.g.*, David A. Carter, Betty J. Simkins & W. Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 51 (2003) (concluding that "[a] critical factor in good corporate governance appears to be the relationship

distinctive views to product, service, employment, and other operational decisions;[13] the basic premise that boards of directors should mirror the various constituencies and communities served by the corporations they manage;[14] the potentially positive role of diversity in governance and collective decision-making (including the so-called 'wisdom of the crowd');[15] and 'doing the right thing' by

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between board diversity and shareholder value creation"); Cristian L. Dezsö & David Gaddis Ross, *Does Female Representation in Top Management Improve Firm Performance? A Panel Data Investigation*, 33 STRATEGIC MGMT. J. 1072, 1084 (2012) (finding that firms generate more economic value with at least one woman in top management); Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 160 (2019) ("A growing body of studies has linked gender-diverse boards and improved corporate performance."). It should be noted that the actual profit and shareholder-wealth effects of adding female members to a board of directors is unclear. *See, e.g.*, Jeremy Galbreath, *Is Board Gender Diversity Linked to Financial Performance? The Mediating Mechanism of CSR*, 57 BUS. & SOC'Y 863, 864 (2018) ("Are women on boards of directors positively linked to financial performance? Although there is some confirmatory evidence, other studies have yielded negative or neutral results." (citations omitted)); Corinne Post & Kris Byron, *Women on Boards and Firm Financial Performance: A Meta-Analysis*, 58 ACAD. MGMT. J. 1546, 1546 (2015) ("Despite a relatively large body of literature examining the relationship between female board representation and firm performance, the empirical evidence is decidedly mixed."); *id.* at 1563 ("[O]ur results suggest that board diversity is neither wholly detrimental nor wholly beneficial to firm financial performance.").

13. *See, e.g.*, Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms' Risk Oversight?*, 70 SMU L. REV. 327, 355 (2017) ("[S]uccessful implementation of board diversity strategies requires a thoughtful exploration of the specific talent, background, unique perspective, and experience that women bring to the executive suite or boardroom."); Kaitlin D. Wowak, George P. Ball, Corinne Post & David J. Ketchen Jr., *The Influence of Female Directors on Product Recall Decisions*, 23 MFG. & SERV. OPERATIONS MGMT. 895 (2020) (identifying various ways in which women respond to product recalls and related decision-making differently from men).

14. *See, e.g.*, Janis Sarra, *Class Act: Considering Race and Gender in the Corporate Boardroom*, 79 ST. JOHN'S L. REV. 1121, 1142–43 (2005) (noting support for "proposals to encourage companies to pursue diversity on corporate boards that 'mirror[s] the diversity of the workforce and society' thereby bringing a variety of qualified viewpoints to corporation decision making"); Erica Hersh, *Why Diversity Matters: Women on Boards of Directors*, HARV. SCH. PUB. HEALTH (July 21, 2016), https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/ [https://perma.cc/DE3H-5UVE] ("[D]iverse boards often better mirror customer and client bases.").

15. *See, e.g.*, Nili, *supra* note 12, at 162 ("Empirical evidence on board processes and socio-psychological research on small-group dynamics have supported the argument that diverse boards are associated with better decision-making and governance."); Jie Chen, Woon Sau Leung, Wei Song & Marc Goergen, *When Women Are on Boards, Male CEOs Are Less Overconfident*, HARV. BUS. REV. (Sept. 12, 2019), https://hbr.org/2019/09/research-when-women-are-on-boards-male-ceos-are-less-overconfident [https://perma.cc/6F9C-GU6W] ("Having women on the board results better [sic] acquisition and investment decisions and in less aggressive risk-taking, yielding benefits for shareholders."); Joan MacLeod Heminway, *Women in the Crowd of Corporate Directors: Following, Walking Alone, and Meaningfully Contributing*, 21 WM. & MARY J. WOMEN & L. 59, 85–86 (2014) (concluding that women's board

treating qualified women fairly and equitably.[16] The International Finance Corporation offers a cogent statement of the business case for women in business management.

> A growing body of research shows a range of business benefits associated with gender diversity on boards and in senior leadership—and with a robust pipeline of female management talent. Benefits include improved financial performance and shareholder value, reduced risk of fraud and corruption, increased customer and employee satisfaction, greater investor confidence, and enhanced market knowledge and reputation. Studies also point to the positive influence of gender-diverse management and boards on a company's sustainability profile.[17]

Research and popular press publications repeat these and other related and intersecting arguments for increased female membership on public company boards of directors.[18] This essay

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membership and participation may contribute to pre-conditions for crowd wisdom); Rhode & Packel, *supra* note 11, at 393–401 (identifying reasons why diversity may enhance board decision-making and monitoring functions); Cindy A. Schipani, *Improving Board Decisions: The Promise of Diversity*, 39 L. & INEQ. 295, 302–07 (2021) (identifying and exploring how board membership diversity may help boards in better monitoring executives).

16. *See, e.g.*, Nili, *supra* note 12, at 159 ("Advocates . . . rely on moral or social justifications in their push for gender diversity on the board. Their case is premised on the intrinsic notion that increasing diversity is the 'right thing to do,' predominantly because the efforts to improve diversity are aimed at correcting the lingering effects of discrimination." (footnote omitted)); Cristina Banahan & Gabriel Hasso, *Across the Board Improvements: Gender Diversity and ESG Performance*, HARV. L. SCH. F. ON CORP. GOV. (Sept. 6, 2018), https://corpgov.law.harvard.edu/2018/09/06/across-the-board-improvements-gender-diversity-and-esg-performance/ [https://perma.cc/C9VM-FLP6] ("[T]here is the normative argument based on equity and fairness, which suggests that women and men should have an equal opportunity to attain leadership positions, including corporate board memberships.").

17. *Women on Boards and in Business Leadership*, WORLD BANK GRP. (Nov. 2019), https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/topics/women+on+boards+and+in+business+leadership [https://perma.cc/6YRB-JMVF].

18. *See, e.g.*, Akshaya Kamalnath, *Corporate Governance Case for Board Gender Diversity: Evidence from Delaware Cases*, 82 ALBANY L. REV. 23, 24–41 (2018) (summarizing identified benefits of diverse boards); Sudheer Reddy & Aditya Mohan Jadhav, *Gender Diversity in Boardrooms – A Literature Review*, 7 COGENT ECON. & FIN. 1, 2 (2019) (reviewing "the evolution of literature on board gender diversity in areas related to corporate governance and corporate finance"); Kim Elsesser, *The Truth About Women's Impact On Corporate Boards (It's Not Good News)*, FORBES (June 23, 2016), https://www.forbes.com/sites/kimelsesser/2016/06/23/the-truth-about-womens-impact-on-corporate-boards-its-not-good-news/?sh=503df2db5ecb [https://perma.cc/8S6M-ZNDP] ("Greater profits, greater CEO pay and enhanced problem-solving are just a few of the claimed advantages of increasing the number of women on a company's board of directors."); Anna Meyer, *New Report: Companies With Diverse Boards Out Performed Their Peers During the Pandemic*, INC., https://www.inc.com/anna-meyer/diversity-board-directors-covid-pandemic.html

does not add content to the business case for increased gender diversity on boards of directors. It assumes that increased gender diversity is a desired corporate objective.

The very fact that rationales for greater female participation on boards of directors are obligatory as a predicate for change reflects a history of gender inequality and a presumed basis or justification for any inequity—in other words, the apparent need for rationales suggests an underlying assumption that women do not or may not belong on corporate boards in greater numbers or proportions. Certainly, boards of directors of publicly held corporations have historically been, and some continue to be, a "Boys' Club."[19] If women were treated and seen as co-equals with men in this context, the need for rationales for female board nominations, appointments, and participation would not exist, and work would begin immediately to increase the inclusion of women on corporate boards.

C. Sexism, Anti-Sexism, Feminism, and Corporate Management

The need to justify female inclusion on corporate boards of directors signifies the existence of sexism. Like feminism, sexism—whether overt or inadvertent—has uncomfortable denotations and connotations in and outside corporate governance.[20] Accordingly, just as one may deny being a feminist, one may deny being a sexist—in each case to avoid scrutiny or disparagement.

Arguably, however, it is not sexist *individuals* who stand in the way of meaningful progress in the gender diversification of

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[https://perma.cc/MFF4-RNLA] ("[C]ompanies with more than 30 percent of board seats occupied by women delivered better year-over-year revenue in 11 of the top 15 S&P 500 sectors than their less-gender-diverse counterparts.").

19. *See, e.g.*, sources cited *supra* note 11; *see also* Danielle Hartley, *Corporate Boardrooms and the National Football League: A Gender Diversity Marriage Made in Corporate Governance Heaven*, 98 DENV. L. REV. 197, 198 (2020) ("To speed up progress regarding gender diversity on corporate boards, it is necessary to implement new, mandatory rules rather than waiting for the old boys' club to organically progress toward true gender diversity." (footnote omitted)); Jena McGregor, *The Boardroom is Still an Old Boy's Club*, WASH. POST (Sept. 25, 2013), https://www.washingtonpost.com/news/on-leadership/wp/2013/09/25/corporate-boardrooms-are-still-old-boys-clubs/ [https://perma.cc/Y4BG-ZVCW] (observing that, in corporate boards of directors, "the old boy's club is still very much alive. Not only did first-time racial minorities and women get significantly less mentoring than their white male peers, but that lack of guidance had a real impact . . .").

20. *See* Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 613 (2007) ("Sexism is not a term often encountered in polite company. In conventional usage, it conveys discrimination based on sex and seems to require some conscious action. Yet there is also a subtle side of sexism: a cluster of social expectations and practices that reinforce sex-based inequality.").

corporate boards of directors. Rather, it likely is unchallenged sexist *policies* and *ideas*—programs, processes, and conceptions that engrain behaviors and exclude women (whether explicitly or implicitly) from full, equal corporate board membership (not mere numerical equality, but the attainment of equal influence). This essay argues that exposing and dismantling these policies and ideas is essential to making lasting, effectual progress in diversifying corporate boards of directors.

The identification and reversal of sexist policies and ideas are time-consuming and challenging tasks. They require more than management team members—directors and officers—who do not understand themselves to be sexist. They require a change in mindset and corporate management culture. They require members of corporate management that are affirmatively anti-sexist. Although definitions of anti-sexism may differ,[21] this essay labels anti-sexism as feminism and feminism as anti-sexism. Feminists, in this conception, are anti-sexists.[22] This essay contends that corporate management should all be feminists. They should step up, speak up, and take action to change the existing gender deficit on U.S. corporate boards.

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21. *See* Sara Mills, *Caught Between Sexism, Anti-Sexism and 'Political Correctness': Feminist Women's Negotiations with Naming Practices*, 14 DISCOURSE & SOC'Y 87, 90 (2003) ("[I]t is not possible to say clearly what constitutes sexism, anti-sexism or 'political correctness' . . . . [S]exism, anti-sexism and 'PC' are now all contested terms and have a range of meanings for different people.").

22. Definitions of feminism and feminist also vary. *See, e.g.*, Ann Bartow, *Some Dumb Girl Syndrome: Challenging and Subverting Destructive Stereotypes of Female Attorneys*, 11 WM. & MARY J. WOMEN & L. 221, 233 (2005) ("Feminism does not have a universally recognized governing body, and 'feminism' is not a brand or trademark with a fixed social or commercial meaning. Investigations into what feminism is, or should be, have fueled debates and created rich bodies of varied scholarship."); Mary E. Card, *Founding Mothers: The Women Who Raised Our Nation*, ARMY LAW., March 2005, at 99, 99 n.11 ("The term 'feminist' is used throughout this paper. '[A] precise, or even meaningful, definition of feminism has perplexed many lexicographers, writers both female and male, and feminists themselves.'" (citation omitted)); Cheryl B. Preston, *This Old House: A Blueprint for Constructive Feminism*, 83 GEO. L.J. 2271, 2285 (1995) (observing, with respect to the word feminism, that "[a] single word, even one with eight letters, is a very small gate to keep intellectual explorers out of a garden—indeed, a garden full of flowers, as well as some weeds and thorns"). However, broad definitions may coalesce around similar concepts. *See* ADICHIE, *supra* note 2, at 47 (citing the following dictionary definition: "*a person who believes in the social, political, and economic equality of the sexes*"); Card, *supra*, at 99 n.11 ("[F]or the purposes of this paper, feminist is defined as a person who believes in political, economic, and social equality for women and in eradicating gender discrimination.").

II. Two Influential Texts

Two primary texts, read together, support my assertion that corporate directors and officers should be feminists. Each text has received popular acclaim over the past few years in one context or another. One manuscript addresses feminism and the other focuses on anti-racism. Neither addresses public company board composition directly.

A. We Should All Be Feminists

The first text, Chimamanda Ngozi Adichie's book-length essay entitled *We Should All Be Feminists*,[23] gives this essay its title. In her essay, Adichie defines a feminist, in aspirational fashion, as "a man or woman who says, 'Yes, there's a problem with gender as it is today and we must fix it, we must do better.'"[24] Under this definition, corporate managers who recognize and commit to remedying gender inequities on corporate boards are feminists.

But Adichie's book implies more: her essay underscores the importance of gendered perspectives and gender consciousness. She begins the essay with a formative story about a conversation she had with a dear childhood friend, Okoloma—the first person to label Adichie a feminist.[25] That conversation catalyzes Adichie's quest to find a personal understanding of feminism and the essence of a feminist.

Thus, Adichie comes to her definition of feminism experientially. Her essay not only illuminates her own awakening to the importance of gender and feminism but also acknowledges the discomfort of others with discussions of both concepts.[26] Focusing on the perspectives of men specifically, she offers a pair of key insights: men do not commonly think about gender, and "that is part of the problem."[27] If corporate directors and officers, largely men, do not have a regular awareness of gender, they may be less likely to identify biases in their assumptions or to question the non-obvious roles gender and gender stereotypes play in their decision-

23. *See* ADICHIE, *supra* note 2.
24. *Id.* at 48.
25. *Id.* at 7–8.
26. *Id.* at 40–42.
27. *Id.* at 42.

making.[28] Adichie concludes that men need gender awareness to be able to challenge the status quo.[29]

B. How to Be an Antiracist

The second text, Ibram X. Kendi's *How to Be an Antiracist*,[30] is a book about racism and anti-racism that furnishes this essay with ideas for implementing feminism as anti-sexism that are complementary and supplementary to those of Adichie. In his book, Kendi defines racism and anti-racism by reference to a person's response to a racially discriminatory or biased policy or idea. Specifically, Kendi explains racism as "a marriage of racist policies and racist ideas that produces and normalizes racial inequities."[31] He defines a racist as "[o]ne who is supporting a racist policy through their actions or inaction or expressing a racist idea."[32] Kendi describes an antiracist as "[o]ne who is supporting an antiracist policy through their actions or expressing an antiracist idea."[33] The undefined use of "racist" and "antiracist" in definitions derivative of those same terms is unsatisfying (although, perhaps, unavoidable on some level). Kendi's monograph ultimately illuminates the definitions and the terms "racist" and "antiracist" contextually. Kendi notes that neither racism nor antiracism is a permanent condition for any individual; the same person may be a racist in one context and an antiracist in another.[34]

These teachings of Kendi's book resonate with the teachings of Adichie's essay. If one substitutes notions of sexism for racism and feminism for antiracism in much of Kendi's text, the resonance becomes apparent. For example, gendered translations of the

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28. *See* Lorrie L. Luellig, *Why* J.E.B. v. T.B. *Will Fail to Advance Equality: A Call for Discrimination in Jury Selection*, 10 WIS. WOMEN'S L.J. 403, 435–36 (1995) ("While men and women both absorb some amount of sexism from living in our culture, women are more likely to identify their entrenched sexist assumptions. Because sexism is so pervasive in our society, the ability to check peoples' judgments against outside reality is severely inhibited."); Rhode, *supra* note 20, at 617–18 ("[S]ocial science research documents the role of 'cognitive' or 'unexamined' bias in accounting for gender inequality. Such biases build on group-based stereotypes and have influences that are often outside individual awareness. . . . These group-based stereotypes predispose individuals to perceive information in ways that conform to pre-existing associations.").

29. ADICHIE, *supra* note 2, at 42–43.

30. *See* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST (2019).

31. *Id.* at 17.

32. *Id.* at 22.

33. *Id.*

34. *See id.* (analogizing the labels "racist" and "antiracist" to "peelable nametags that are placed and replaced based on what someone is doing or not doing, supporting or expressing in each moment. These are not permanent tattoos").

concepts quoted in the immediately preceding paragraph yield the following definitions:

- Sexism is a marriage of sexist policies and sexist ideas that produce and normalize gender inequities.
- A sexist is a person who is supporting a sexist policy through their actions or inaction or expressing a sexist idea.
- A feminist is a person who is supporting an anti-sexist policy through their actions or the expression of an anti-sexist idea.
- Neither sexism nor anti-sexism is a permanent condition for any individual; the same person may be a sexist in one context and an anti-sexist in another.

Under Kendi's definitional rubric, as translated for use in defining feminists and feminism (rather than antiracists and antiracism), feminists must recognize a gender problem and commit to fixing it. This is consistent with Adichie's ultimate definition of a feminist.[35] However, by suggesting that a feminist must act to achieve or voice a corrective plan or conception, Kendi's definition of a feminist extols anti-sexist action or expression. In this way, Kendi's ideas build in a consonant manner on Adichie's evolved perception of the feminist persona.[36]

Kendi advocates a focus on antiracism as the key means to limit and eliminate racism, an end-goal that he admits has almost no prospect of complete success. Nevertheless, he refuses to completely abandon hope.

> What gives me hope is a simple truism. Once we lose hope, we are guaranteed to lose. But if we ignore the odds and fight to create an antiracist world, then we give humanity a chance to survive, a chance to live in communion, a chance to be forever free.[37]

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35. *See supra* text accompanying note 24.

36. It bears noting that Kendi does discuss feminism in his book, most prominently in Chapter 14, which focuses on gender. *See* KENDI, *supra* note 30 at 181–92. Among other things, Kendi avers that:

> To be feminist is to reject not only the hierarchy of genders but of race-genders. To truly be antiracist is to be feminist. To truly be feminist is to be antiracist. To be antiracist (and feminist) is to level the different race-genders, is to root the inequities between the race-genders in the policies of gender racism.

Id. at 189.

37. *Id.* at 238.

The commitment to antiracist behavior underlying this statement of faith echoes Adichie's commitment and call to feminist action. "*All* of us," Adichie argues, "women and men, must do better."[38]

III. Being a Feminist Corporate Manager

It is the job of corporate management to "do better" in creating a culture of gender diversity, equity, and inclusion in the firm. A corporate culture of gender parity holds promise to increase the internal pipeline of female leaders who can rise through management (or otherwise ascend) to board seats. An anti-sexist culture is also likely to enable a corporation to identify and attract appropriate, successful, sustainable outside talent for its board of directors more naturally and easily.

What can we learn from Adichie and Kendi that represents affirmative action that corporate management can take to increase board diversity? Several matters of focus for directors and officers seem apparent from an analysis and assessment of these authors' writings. These focal points include increasing gender awareness, committing to anti-sexist policies and ideas, and adopting or advocating anti-sexist policies or ideas. Collectively, they require that corporate management should all be feminists, as that concept is defined by Adichie in her essay (and, to a lesser and more indirect extent, Kendi in his book). Although the suggested course of conduct is stated here as a series of three gender-specific actions, these prescriptions also may be adapted for use in enhancing board diversity in other aspects.

A. Increase Gender Awareness

First, members of corporate management should increase their gender awareness. This first step requires continuing education and communication. Corporate directors and officers should seek out information about gender in informing themselves as a predicate to decision-making, oversight, and (in general) the exercise of corporate management and control. They should listen with an open mind to those who offer gendered viewpoints relevant to those responsibilities. And they should inquire where they fail to understand and endeavor to reach understanding.

The dialogue will not be stress-free. Adichie aptly notes that "[g]ender is not an easy conversation to have. It makes people uncomfortable, sometimes even irritable. Both men and women are resistant to talk about gender, or are quick to dismiss the problems

38. ADICHIE, *supra* note 2, at 48.

of gender. Because thinking of changing the status quo is always uncomfortable."[39]

Although diversity trainings have a mixed record of success (depending on the success measurement used and the type of training assessed),[40] gender awareness may be heightened through appropriately supported, targeted, ongoing management education programs. For example, "men may have an important role in promoting equality since they are less likely to elicit backlash and resistance. . . . [T]asking male managers with proactively promoting gender-equitable policies may lead to more buy-in by men."[41] Yet, the presence of women, including as discussion leaders, may be helpful in promoting anti-sexist norms.[42]

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39. *Id.* at 40.

40. *See, e.g.*, Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 44 (2001) ("While the desire to find a 'quick fix' for the problem of employment discrimination is understandable, that educational efforts positively affect entrenched bias is a hypothesis that has yet to be proven."); Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1438 (2008) ("[E]vidence on whether diversity training actually works to reduce bias is mixed, and some studies suggest that it may activate rather than reduce bias."); Soohan Kim, Alexandra Kalev & Frank Dobbin, *Progressive Corporations at Work: The Case of Diversity Programs*, 36 N.Y.U. REV. L. & SOC. CHANGE 171, 198 (2012) ("While diversity training has been the flagship practice in many corporations' equal opportunity programs, it has not been shown to increase workforce diversity."); Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145, 162 (2016) ("Some research suggests that diversity training programs aimed at improving attitudes toward people from different racial or ethnic minority groups do not work and can actually exacerbate attitudes, particularly when individuals are required to attend such trainings." (footnote omitted)); Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 373 (2008) ("[D]iversity training programs that stress tolerance and inclusion on the basis of various identity characteristics may not create appreciable results in terms of changing workforce demographics and practices . . . ."); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1069–70 (2011) ("A large-scale review of diversity initiatives across multiple industries found that training programs did not significantly increase the representation or advancement of targeted groups."); Sara Rynes & Benson Rosen, *A Field Survey of Factors Affecting the Adoptions and Perceived Success of Diversity Training*, 48 PERSONNEL PSYCH. 247, 263 (1995) ("[O]ur results confirm previous speculation that both the adoption and perceived success of diversity training depend on the broader organizational context, particularly top management support.").

41. Justine Tinkler, Skylar Gremillion & Kira Arthurs, *Perceptions of Legitimacy: The Sex of the Legal Messenger and Reactions to Sexual Harassment Training*, 40 LAW & SOC. INQUIRY 152, 169 (2015).

42. *See id.* Specifically, one study of policy training found that:

> [W]hen a female narrates the policy training, male participants evaluate men and women as equally competent and status worthy. While this effect may, in part, be due to subjects not wanting to appear sexist in the presence of a woman,

B. Increase Commitment to Anti-Sexist Policies and Ideas

Second, corporate managers should commit to anti-sexist policies and ideas.[43] This requires overcoming inertia with specific feminist conduct. In his book, Kendi lists a series of steps to being an antiracist. Those steps, transmuted into gender terms, include:

- Ceasing to use "I am not a sexist" or "I can't be a sexist" as a defense of denial,
- Admitting the definition of "sexist" as a person who supports sexist policies or expresses sexist ideas,
- Confessing any sexist policies supported and sexist ideas expressed,
- Accepting the socialized source of those sexist policies and ideas,
- Acknowledging the definition of an anti-sexist as someone who is supporting anti-sexist policies or expressing anti-sexist ideas,
- Struggling for anti-sexist power and policy within one's sphere of influence,
- Struggling to remain at the anti-sexist intersections of sexism and other bigotries, and
- Struggling to think with anti-sexist ideas.[44]

These steps represent a personal path to developing a commitment to anti-sexist policies and ideas.

Although this individualized personal commitment is significant in its effects on corporate directors and officers themselves, the ultimate goal is collective commitment to a feminist approach. As one commentator notes:

> [A] feminist approach can do more than look at issues of gender and discrimination; feminist thinking can provide the framework by which business law itself can be revamped for the benefit of all. Feminist analysis cannot only uncover inherent problems, but it can also provide the medium and basis for remedying those ills of business culture that cause society and all its members to suffer.[45]

> it still points to a mechanism for positive change. If women discourage men from expressing overtly sexist attitudes, then policy training communicated by women can be one way to develop workplace norms that proscribe sexist attitudes and behaviors.

Id.

43. *Accord* Rhode, *supra* note 20, at 640 ("A key factor in equalizing opportunities is a commitment to that objective, which should be reflected in organizational priorities, policies, and reward structures.").

44. *See* KENDI, *supra* note 30, at 226.

45. Barbara Ann White, *Feminist Foundations for the Law of Business: One Law*

Thus, although commitments to anti-sexist policies and ideas are personal and individual, their aggregate impact may be quite broad—even moving beyond their intended effects on diversity, equity, and inclusion in the corporation.

C. Adopt or Advocate Anti-Sexist Policies and Ideas

Third, corporate directors and officers should adopt or advocate anti-sexist policies and ideas. This third step is critical; it is where the management activities of directors and officers are focused on broader culture and climate change in the firm. This more active phase of the corporate management feminist revolution (such as it is) presents several challenges, three of which are noted in the succeeding paragraphs: the hidden—even subversive—nature of some corporate sexism, the effort that may be required to change the way in which corporate managers conduct their affairs, and the potential for directors and officers to be distracted or derailed from their promise to forward anti-sexist policies and ideas.

1. Challenges

For one thing, sexist programs, processes, and conceptions may not be obvious. Although policies and ideas that expressly sort people by gender and gendered employment-related outcomes (including, for instance, unexplained gender pay gaps) offer clear signals that sexism may exist in a corporate culture, other sexist policies or ideas may be less discernible. In fact, the absence of clear procedures, instructions, criteria, or metrics for hiring, appointment, retention, rewards, or other corporate undertakings may be or result in sexism. "[C]ourts have concluded that, just like an explicitly sexist pay and promotion policy, a policy that lacked any guidelines could knowingly result in women being discriminated against in violation of Title VII."[46] In addition, corporate management may adopt an anti-sexist program or process that is a mere façade—a pretense designed or used to hide sexist practices.[47]

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and Economics Scholar's Survey and (Re)view, 10 UCLA WOMEN'S L.J. 39, 55 (1999).

46. Sergio J. Campos, *The Uncertain Path of Class Action Law*, 40 CARDOZO L. REV. 2223, 2265 (2019).

47. *See* Pádraig Floyd, *Wells Fargo Accused of Holding 'Fake Interviews' to Pad Diversity Efforts*, AGENDA (May 23, 2022), https://www.agendaweek.com/c/3615894/463374?referrer_module=searchSubFromAG&highlight=diversity [https://perma.cc/99FN-39XV].

Moreover, introducing greater gender consciousness into management structures, conduct, and decision-making may be difficult. Corporate boards of directors and officers construct and acculture themselves to behavioral norms for the purpose of conducting their work.[48] Although many of these norms are tailored to the specific firm,[49] some are more general. For instance, it has been observed that "corporate America has developed a CEO-centric culture in the boardroom. Corporate boards of directors have developed a set of behaviors in which deference to, and rubber-stamping of, CEO decision-making is the norm."[50] Adding new elements to the decision-making and oversight activities of corporate managers disrupts these norms directly and indirectly.

In addition, the process of formulating, proposing, discussing, and determining to make policy and idea changes is likely to test the ongoing commitment of corporate managers to anti-sexist policies and ideas.[51] Among other things, there is a general awareness of gendered patterns of thought that relate to expected male and female traits that are somewhat entrenched and may be hard to address and change. Specifically, observers note a

> [M]ismatch between the qualities traditionally associated with women and those associated with professional success. These stereotypes of femininity leave women stuck in a double bind. What is assertive in a man seems abrasive in a woman, and female leaders risk seeming too feminine or not feminine enough. On the one hand, they may appear too "soft"—unable or unwilling to make the tough calls required of those in positions of power. On the other hand, they may appear too tough—strident and overly aggressive or ambitious. Attitudes toward self-promotion reflect a related mismatch between leadership and femininity. Women are expected to be nurturing, not self-serving; entrepreneurial behaviors viewed

48. *See* Alicia Alvarez, Susan Bennett, Louise Howells & Hannah Lieberman, *Teaching and Practicing Community Development Poverty Law: Lawyers and Clients As Trusted Neighborhood Problem Solvers*, 23 CLINICAL L. REV. 577, 597 (2017) ("It would come as no surprise to lawyers who work with the board of directors of any major corporation that boards develop informal decision making norms that are unique to their organizations and that evolve over time and reflect the culture of their organization." (quoting Micahel Useem, *How Well-Run Boards Make Decisions*, HARV. BUS. REV. (Nov. 2006), https://hbr.org/2006/11/how-well-run-boards-make-decisions/ar/1)).

49. *Id.*

50. R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829, 839 (2003).

51. *Cf.* Athena Mutua, *Why Retire the Feminization of Poverty Construct?*, 78 DENV. U. L. REV. 1179, 1198 n.108 (2001) ("Anti-sexist initiatives in the context of patriarchal societies seem to engender resistance and intra-community strain in and of themselves.").

> as appropriate in men are often viewed as distasteful in women. Indeed, some executive coaches have developed a market niche in rehabilitating "bully broads," female managers who come across as insufficiently feminine.[52]

These mismatched attributes and the related expectations that corporate management brings to in-role genders constitute sexist ideas that must be acknowledged and renounced.

Although this point is easily made, the goal is not effortlessly reached. Stereotypes of this kind often are socialized into people over a significant number of years and are supported or amplified by cognitive biases.

> [C]ognitive biases compound the force of traditional stereotypes. People are more likely to notice and recall information that confirms their prior assumptions than information that contradicts those assumptions; the dissonant data is filtered out. For example, when employers assume that a working mother is unlikely to be fully committed to her career, they more easily remember the times when she left early than the times when she stayed late.[53]

It is important for corporate managers to hold each other accountable for their commitment to anti-sexist policies and ideas in the face of deeply rooted perceptions about gender.[54] The gender awareness of each director and officer will become important to adhering to management's commitment to anti-sexist policies and ideas and fulfilling corporate management's overall feminist mission.

2. Anti-Sexist Policy Adoption or Advocacy

Policy adoption or advocacy must proceed with knowledge of these and other challenges and with strategies and tactics for overcoming them. In searching for and correcting sexist policies, members of corporate management should think broadly and deeply, engaging their gender awareness and holding steadfast in their commitment to anti-sexism as they seek out obvious and non-obvious programs and processes that may have sexist attributes or impacts. Ideally, all employment-related and appointment-associated polices should be scrutinized for what they provide—and

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52. Rhode, *supra* note 20, at 621 (footnotes omitted).

53. *Id.* at 624.

54. *See id.* at 640–41 ("Decision makers need to be held responsible . . . . A necessary first step is commitment from the top. An organization's leadership needs to both acknowledge the importance of diversity and equality and make progress in achieving them a factor in employee evaluations and compensation." (footnote omitted)).

for what they fail to provide[55]—and policy initiatives should be assessed for their impact.[56]

Significantly, existing policies that are or appear to be facially gender-neutral may inadvertently screen out suitable, qualified women from consideration at one or more key junctures because of female-correlated factors. Key policies ripe for reconsideration in this regard include: employee and executive hiring guidelines; management succession plans; rubrics and procedures relating to employee performance evaluations;[57] mentoring and other employee support initiatives;[58] and criteria for employee advancement, recognition, and benefits.[59] Among other things, it is important that hiring, appointment, and all positive and negative personnel actions and decisions be based on demonstrated knowledge, skills, and performance criteria apposite to the role served or to be served, rather than, e.g., a specific pedigree, personal relationship, or affinity.[60] Honest reevaluations of these policies

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55. *See id.* at 638 ("[P]ractices that affect workplace opportunities should . . . be subject to scrutiny.").

56. *See id.* at 641 ("[O]rganizations need concrete assessments of results. A management truism is that organizations get what they measure. Too few organizations adequately measure gender equity."). Specifically,

> [e]mployers should compile information on recruitment, hiring, promotion, retention, and quality of life. Decision makers need to know whether men and women are advancing in equal numbers and whether they feel equally well supported in career development. Where possible, employers should assess their progress by comparing their programs with those of similar workplaces as well as with the best practices identified by experts.

Id.

57. *See, e.g.*, *id.* at 638 ("Decision makers should screen written assessments for stereotypical characterizations, develop objective, outcome-related criteria to supplement subjective evaluations, and review assignments to ensure equal opportunities for career development." (footnote omitted)).

58. *See, e.g.*, *id.* ("Mentoring practices require . . . attention. Many organizations need formal support structures that can keep talented women, particularly women of color, from falling through the cracks. Well-designed initiatives that evaluate and reward mentoring activities can improve participants' skills, satisfaction, and retention rates." (footnote omitted)); *id.* at 638–39 ("Women's networks in workplaces, professional associations, and minority organizations can also be helpful. . . . Affinity groups for women of color . . . can be especially critical in reducing participants' sense of isolation and providing concrete strategies for dealing with subtle biases.").

59. *See id.* at 639–40 (noting that policy changes of this kind "will require a redefinition of workplace structures to take into account female as well as male life patterns . . . . At a minimum, this means ensuring that employees who seek temporary adjustments in hours or schedules do not pay a permanent price" (footnote omitted)).

60. *See* Stefanie K. Johnson & David R. Hekman, *Women and Minorities Are Penalized for Promoting Diversity*, HARV. BUS. REV. (Mar. 23, 2016), https://hbr.org/2016/03/women-and-minorities-are-penalized-for-promoting-diversity [https://perma.cc/96J4-HTMS] ("It is well known that people tend to favor and promote those who

almost certainly will require the abandonment or modification of deep-seated, sexist conceptions, including those relating to traditional gender roles in and outside the firm.

3. Anti-Sexist Idea Adoption or Advocacy

The adoption or advocacy of anti-sexist ideas also must recognize and meet the challenges of a feminist approach, including those previously identified here—non-obvious sexism, difficulties in bringing gender into existing behavioral norms, and the entrenched nature of sexism (even in the wake of a commitment to anti-sexism). A questioning attitude borne of management's mindfulness about gender and anti-sexist commitment is essential to the task. Entrenched ideas that require reassessment include the belief that there is a scarcity of women qualified to serve as directors and the conviction that nominating committees and directors always or generally value and select the "best qualified person" for director vacancies and open board positions, regardless of gender. These ideas often are intertwined and may be fueled by cognitive bias.

> [P]eople share what psychologists have labeled a "meritocratic worldview" or "just world" bias. People want to believe that in the absence of special treatment, individuals generally get what they deserve and deserve what they get. Perceptions of performance are frequently adjusted to match observed outcomes. If women, particularly women of color, are underrepresented in positions of greatest prominence, the most psychologically convenient explanation is that they lack the necessary qualifications or commitment. These perceptions can, in turn, prevent women from getting assignments that would demonstrate their capabilities, establishing a self-fulfilling cycle.[61]

Corporate management needs to thoroughly inspect the reasons for identified gender inequity through its lens of gender awareness and with a firm commitment to anti-sexism. Directors and officers must not rely on glib, rote explanations for a lack of gender diversity in their corporations and on their boards of directors.

Other sexist conceptions that present barriers to sustainably diverse corporate boards include the view that workplace family

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are similar to them—and that this in-group bias is problematic because it reinforces stereotypes and inequality."); Arthur Levitt Jr., *If Corporate Diversity Works, Show Me the Money*, WALL ST. J. (Jan. 20, 2021), https://www.wsj.com/articles/if-corporate-diversity-works-show-me-the-money-11611183633 [https://perma.cc/WAH6-LVNM] ("Searches for directors are formally structured, but in the end they depend on informal social networks where friends recommend each other. In my experience, many such searches are closer to a social-club recruitment process than a serious contemplation of someone's task-specific skills.").

61. Rhode, *supra* note 20, at 624.

care options[62] are accommodations and the conviction that they are exclusively for the benefit of women.

> Although these initiatives are often described as "accommodations" for women's "special" needs, this description miscasts both the problem and the solution. Many of the obstacles that women face stem from the traditional assumption that "normal" workers are employed, full-time and full-force, for their entire working lives. What women need is not accommodation, but equal recognition. . . . [F]amily and quality of life concerns need to be seen not just as women's issues, but also as organizational priorities. Options like parental leave and flexible schedules should be gender-neutral in fact as well as in form, and men should be encouraged to take advantage of them.[63]

The noted concept of equal recognition is especially critical to changing sexist ideas. It builds from increased gender awareness and is reinforced by a commitment to anti-sexist policies and ideas. Only when corporate managers can appreciate a gender other than their own and pledge effort to acknowledge and respect gender difference through ideas (as well as policies) can they generate the viable, lasting cultural changes needed to create and sustain diversity, equity, and inclusion on U.S. corporate boards of directors.

IV. Conclusion

This essay does not raise new arguments for increasing gender diversity on corporate boards of directors or elsewhere. Those arguments exist and are evaluated routinely by policy makers, academics, and corporate constituents, including corporate directors and officers. Rather, this essay assumes a genuine desire on the part of U.S. corporate management to increase gender diversity on their boards of directors.

The core idea, as the essay's title suggests, is that all corporate management should be feminists. That notion, including the embedded definition of feminism, derives from two texts—an essay on feminism and a book on racism. Read together, these texts allow for an exploration of feminism, writ large, and policy-oriented (if not policy-driven) economic, social, and political equality.

Ultimately, this essay engages a somewhat limited exploration—one undertaken in the corporate managerial context—

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62. *See id.* at 639 ("Best practices and model programs are readily available on matters such as flexible and reduced schedules, telecommuting, leave policies, and childcare assistance." (footnote omitted)).

63. *Id.* at 639–40.

that may have broader implications outside the firm. Specifically, the essay affirms the idea that corporate directors and officers must develop and maintain a new attitude and approach for women to become and remain ordinary course, wholly participatory, and productively engaged members of corporate boards of directors (the core decision-making body of corporations—critically important economic, social, and political institutions). This change in mindset requires focused action on the part of corporate management. Specifically, corporate managers must increase their gender awareness, commit to anti-sexist policies and ideas, and adopt or advocate anti-sexist policies and ideas.

The insights proffered in this essay are not intended to be mutually exclusive of other approaches to advancing gender diversity, equity, and inclusion in the corporate board context. In particular, it should be noted that California has enacted legislation, signed into law by the governor, that mandates specified gender and racial or ethnic compositions for certain public company boards of directors.[64] In addition, in August 2021, the U.S. Securities and Exchange Commission approved a rulemaking request from the Nasdaq Stock Market that generally requires each Nasdaq-listed firm (subject to certain exceptions) either to include two diverse directors (one female and one from a specified racial, ethnic, sexual orientation, or sexual identity group) or explain why

64. *See* CAL. CORP. CODE § 301.3 (2021); A.B. 979, 2019–2020 Leg., Reg. Sess. (Cal. 2020). Almost ten years ago, the California legislature also enacted a law providing that "[t]he Secretary of State shall develop and maintain a registry of distinguished women and minorities who are available to serve on corporate boards of directors." CAL. CORP. CODE § 318. On the eve of the publication of this essay, in May 2022, a Los Angeles Superior Court judge ruled that California's statute mandating gender diversity on public company boards of directors violates the equal protection clause of California's constitution. *See* Amanda Gerut, *'Train Has Left the Station' — California Board Diversity Ruling to Be Appealed*, AGENDA (May 20, 2022), https://www.agendaweek.com/c/3613584/463634?referrer_module=searchSubFromAG&highlight=diversity [https://perma.cc/SL5B-GZLW]; Jody Godoy, *California Law Requiring Women on Company Boards Struck Down*, REUTERS (May 16, 2022), https://www.reuters.com/legal/legalindustry/california-law-requiring-women-company-boards-struck-down-2022-05-16/ [https://perma.cc/C4AJ-6AJD]; Alisha Haridasani Gupta, *Another California Board Diversity Law Was Struck Down, but It Already Had a Big Impact.*, N.Y. TIMES (May 19, 2022), https://www.nytimes.com/2022/05/19/business/california-board-diversity-women.html [https://perma.cc/4W2V-87P7]. Other legal challenges have also been brought against the California mandate (and against a parallel, later adopted California statute requiring public company board representation from other under-represented populations). *See* Virginia Milstead, *Rulings in 2022 Could Bring Clarity on California and Nasdaq Board Diversity Mandates*, SKADDEN (Jan. 19, 2022), https://www.skadden.com/insights/publications/2022/01/2022-insights/litigation/rulings-in-2022-could-bring-clarity [https://perma.cc/HWA5-G8MD]. Thus, at this writing, the validity of the statute remains unclear.

it does not have a board of directors with membership conforming to those requirements.[65] Feminist corporate management will be better able to comply with mandates of these kinds through their gender consciousness, anti-sexist commitment, and support for anti-sexist policies and ideas. Moreover, legislative and regulatory initiatives of the kind forwarded in California and by the Nasdaq Stock Market may serve as catalysts for anti-sexist management introspection and action.[66] Indeed, law has the capacity to change the behavioral norms of corporate management.[67]

As a general matter, it is hoped that this essay will refocus at least some broader academic and practical discussions of gender—and other elements of difference, for that matter—in the corporate board context on structures, systems, and processes rather than on counting female directors (or other directors of difference) or on analyzing and specifying the particular roles they may serve in corporate governance.[68] In doing so, the essay seeks to change not only the beliefs of corporate management, but also those of external corporate constituents and the public at large. By changing perspectives and attitudes over time, market and societal reactions to the presence of women on corporate boards should normalize. For example, to the extent that capital markets currently penalize firms

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65. SEC. AND EXCH. COMM'N, RELEASE NO. 34-92590, SELF-REGULATORY ORGANIZATIONS; THE NASDAQ STOCK MARKET LLC; ORDER APPROVING PROPOSED RULE CHANGES, AS MODIFIED BY AMENDMENTS NO. 1, TO ADOPT LISTING RULES RELATED TO BOARD DIVERSITY AND TO OFFER CERTAIN LISTED COMPANIES ACCESS TO A COMPLIMENTARY BOARD RECRUITING SERVICE (August 5, 2021), 86 FR 44424. The validity of the Nasdaq board diversity rules is being challenged in a legal action brought in the U.S. Court of Appeals for the Fifth Circuit. *See* Breanna Bradham & Patricia Hurtado, *Nasdaq Board-Diversity Plan Challenged in Court as 'Unfair'*, BLOOMBERG (Aug. 18, 2021), https://www.bloomberg.com/news/articles/2021-08-18/nasdaq-s-board-diversity-plan-challenged-in-court-as-unfair [https://perma.cc/E528-KP3R]; Milstead, *supra* note 64.

66. *See* Amanda Gerut, *'Significant Movement' in Adding Women to Boards*, AGENDA (Aug. 17, 2020), https://www.agendaweek.com/c/2845193/353183?referrer_module=searchSubFromAG&highlight=significant%20movement%20women%20boards [https://perma.cc/TB47-64Q8] (noting optimism "that the surge of women joining boards over the past year—and in the next 18 months as the next phase of California's diversity law comes into force—will beget more diversity as more women are appointed to nom-gov committees and can scour their own networks for diverse candidates").

67. *See, e.g.*, Peter C. Kostant, *Team Production and the Progressive Corporate Law Agenda*, 35 U.C. DAVIS L. REV. 667, 685–86 (2002) ("[T]he rich narratives contained in Delaware court opinions that describe how boards should behave have profoundly shaped norms of director behavior.").

68. *See* Nili, *supra* note 12, at 152 ("Gender diversity discourse . . . must look beyond the numbers of female directors on the board . . . ."). It should be noted that Professor Nili specifically advocates a closer inspection of the substantive roles that women play on corporate boards. *Id.* I do not disagree with this premise, but this essay asks the reader to extend the discourse one step further.

that add female directors to their boards (even if only for a discreet period of time),[69] that observed effect eventually should abate.

The exhortation of corporate managers to embrace feminism is intended to be provocative and is designed to both disrupt the status quo and have a lasting impact on corporate culture and climate. This disruption is a necessary component of the feminist approach. As Adichie notes in her essay,

> If we do something over and over again, it becomes normal. If we see the same thing over and over again, it becomes normal. . . . If we keep seeing only men as heads of corporations, it starts to seem "natural" that only men should be heads of corporations.[70]

This essay urges that directors and officers change what they do and change what they see—in order to effectuate change in what we all see. Corporate management should all be feminists.

69. *See, e.g.*, Isabelle Solal & Kaisa Snellman, *Women Don't Mean Business? Gender Penalty in Board Composition*, 30 ORG. SCI. 1220 (2019) (finding, in a study of 1,644 U.S. public companies that corporations appointing women to their boards of directors suffer a decline in their market value for two years after the appointment).

70. ADICHIE, *supra* note 2, at 13.

Breaking Away or Still Broken? A Critique of the Minnesota Supreme Court's Treatment of the Severe or Pervasive Standard for Sexual Harassment Hostile Work Environment Cases in *Kenneh v. Homeward Bound*

Anne Bolgert†

Sexual harassment is both a severe and pervasive problem in American workplaces.[1] This is disproportionately true for women, particularly women in low-wage positions, both because of large power imbalances between workers and employers and because women in low-wage positions are more likely "to accept [the harassment] because they [cannot] afford to lose their jobs."[2]

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1. *See, e.g.*, ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE § 12.01, 7 (5th ed. 2022 & Supp. 1 2019) (citing an Associated Press-NORC Center for Public Affairs Research 2017 poll finding that "[t]hree in 10 women and 1 in 10 men say that they've personally experienced sexual misconduct at work" and "that a majority of Americans think broad sectors of society are not doing enough to prevent sexual misconduct, including institutions such as the entertainment industry, colleges and universities, state and federal governments, the military and the news media. 'The sweeping nature of the national reckoning shows no sign of being resolved soon,' the poll found").

2. *Id.* at 1, 3 (citing Center for American Progress analysis of Equal Employment Opportunity Commission data which found that "the most sexual-harassment charges filed by workers from any one industry between 2005 and 2015 were in one sector accommodation and food services," as well a 2016 Hart Research Associates study); *see also* LISA RABASCA ROEPE, SEXUAL HARASSMENT: HAVE WORKPLACES BECOME LESS TOLERANT OF INAPPROPRIATE BEHAVIOR? (2020), http://library.cqpress.com/cqresearcher/cqr_ht_harassment_2020 [https://perma.cc/X6VU-HE4W] (explaining harassment often occurs by those in positions of power, which makes workers feel deterred from reporting to stay in their superior's good graces); Trina Jones & Emma E. Wade, *Me Too?: Race, Gender, and Ending Workplace Sexual Harassment*, 27 DUKE J. GENDER L. & POL'Y 203, 209 (2020) ("The voices of relatively privileged women . . . tend to shape discussions of sexual harassment and sexual assault, even though such violations disproportionately affect more marginalized women.").

Unfortunately, the United States Supreme Court-developed "severe or pervasive" standard, which federal courts and most states apply in determining whether workplace conduct constitutes sex discrimination through creation of a hostile work environment, has made it extraordinarily difficult for plaintiffs to seek justice and relief after being subjected to workplace sexual harassment.[3]

However, based on the calls for change from women's and workers' advocates and the shift in norms associated with the #MeToo movement, several states have sought to break away from the federal sexual harassment standard and case law.[4] They have done so by replacing the legal standard applied in sexual harassment cases or by placing guardrails on the application of the severe or pervasive standard under their state human rights law in order to ease the burden for plaintiffs.[5]

This Note examines one such state effort. In June 2020, Minnesota became one of the most recent states to attempt a change, with the Minnesota Supreme Court reevaluating the severe or pervasive standard's application to sexual harassment cases brought under the Minnesota Human Rights Act (MHRA) in *Kenneh v. Homeward Bound*.[6] After failed efforts in the state legislature to change the standard statutorily,[7] the *Kenneh* court

3. Marshall H. Tanick, *Perspectives: Is Severe or Pervasive' Too Severe or Perverse?*, MINN. LAW. (Jan. 21, 2020), https://minnlawyer.com/2020/01/20/perspectives-is-severe-or-pervasive-too-severe-or-perverse/ [https://perma.cc/P623-BY4N] ("The 'severe or pervasive' terminology coupled with the rather restrictive way it generally has been interpreted by the courts has raised the hackles of many claimants, nearly all of them women, and their advocates. They view the phrase and the strict treatment frequently accorded it by courts as creating undue hurdles that are often difficult to overcome.").

4. ANDREA JOHNSON, RAMYA SEKARAN & SASHA GOMBAR, NAT'L WOMEN'S L. CTR., 2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES 16–17 (2020).

5. California "enacted legislation to clarify the 'severe or pervasive standard'" in 2018. New York "explicitly remove[d] the restrictive 'severe or pervasive' standard for establishing a hostile work environment claim" in 2019. *Id.* Delaware passed a law that establishes the standard for sexual harassment as conduct which "has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment." 81 Del. Laws 399 (2018); *see also* Leslie A. Pappas, *Delaware Expands Sexual Harassment Protections to More Workers*, BLOOMBERG (Aug. 29, 2018), https://news.bloomberglaw.com/daily-labor-report/delaware-expands-sexual-harassment-protections-to-more-workers-1 [https://perma.cc/6CHJ-KQPV] (explaining how the new Delaware law protects more workers by broadening the categories of workers covered under the law and requiring employers to distribute information sheets about sexual harassment to employees).

6. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 226 (Minn. 2020).

7. H.F. 4459, 90th Leg., Reg. Sess. (Minn. 2018); S.F. 2295, 91st Leg., Reg. Sess. (Minn. 2019).

acknowledged the shortcomings of the severe or pervasive standard and addressed its scope and function. Though the court retained the standard, it wrote, "[f]or the severe-or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace."[8] The court also cautioned lower courts against "usurping the role of a jury when evaluating a claim on summary judgment," noting that "whether the alleged harassment was sufficiently severe or pervasive as to create a hostile work environment is 'generally a question of fact for the jury.'"[9]

The *Kenneh* ruling prompted both praise and critique by workers and victims' advocates,[10] but the question remains as to what, if any, impact the *Kenneh* court's interpretation of the severe or pervasive standard may have on lowering the barriers to justice for plaintiffs bringing hostile work environment sexual harassment claims under the MHRA. This Note will critically analyze the *Kenneh* decision's attempt to answer that question. Part I will provide background on the severe or pervasive standard's development and application, critique of the standard, calls for change fueled by the #MeToo movement, and state responses to those calls for change. Part II will critique the Minnesota Supreme Court's approach in *Kenneh* by analyzing whether it adequately addresses the severe or pervasive standard's shortcomings for plaintiffs and proposing additional needed change.

This Note argues that *Kenneh*'s approach has the potential to serve greater justice for victims of sexual harassment in the workplace by directing lower courts to use summary judgment sparingly in such cases, increasing the likelihood that juries will hear cases and thus apply their post-#MeToo conceptions of sexual harassment to cases. However, *Kenneh*'s impact on plaintiffs' ability to seek justice under the MHRA will ultimately be limited: though

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8. *Kenneh*, 944 N.W.2d at 231.

9. *Id.* at 232 (citing Johnson v. Advoc. Health & Hosps. Corp., 892 F.3d 887, 901 (7th Cir. 2018)).

10. *See* Kevin Featherly, *Sexual Harassment Cases Through a New Lens*, MINN. LAW. (June 10, 2020), https://minnlawyer.com/2020/06/10/sexual-harassment-cases-through-a-new-lens/ [https://perma.cc/6WW9-V9KU] (citing both an attorney who called the ruling "landmark" for plaintiff employees and another attorney who argued that "the ruling does not fundamentally alter the landscape because it neither changes the framework for summary judgment nor dismantles the review standard."); *see also* Susan Fitzke, *Severe or Pervasive Remains the Standard to Evaluate Claims of Sexual Harassment in Minnesota*, JD SUPRA (June 7, 2020), https://www.jdsupra.com/legalnews/severe-or-pervasive-remains-the-12721/ [https://perma.cc/QGU8-6JC2] (calling the ruling a "significant victory" for employers).

providing some guardrails for lower courts' use of the severe or pervasive standard and rejection of federal case law as precedent, the *Kenneh* court's retention of the federal standard's language risks also retaining the confusion that has plagued its application and erroneous reliance on federal case law. In order for Minnesota to make lasting change in its sexual harassment legal protections, it will need to adopt a new standard, either judicially or legislatively, that will distance it from the harmful precedent of federal sexual harassment law, and the previous Minnesota case law that relied on federal precedent.

I. Background

A thoughtful analysis of *Kenneh v. Homeward Bound* requires an understanding of the legal and political background of the severe or pervasive standard. This section briefly describes the development of the severe or pervasive standard, outlines significant criticism of the standard, discusses the interaction of the standard's application with the #MeToo movement, and provides examples of strategies adopted by two other jurisdictions responding to the severe or pervasive standard's shortcomings for plaintiffs.

A. Development of the Severe or Pervasive Standard

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against individuals in several protected groups, including on the basis of sex.[11] In 1986, the Supreme Court held in *Meritor Savings Bank v. Vinson* "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[12] The Court then outlined the standard for the plaintiff to prove their hostile work environment case based on allegations of sexual harassment: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive work environment.'"[13] Further, under that standard, the plaintiff must prove that the work environment was both objectively and subjectively hostile or abusive.[14]

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11. 42 U.S.C. § 2000e.

12. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

13. *Id.* at 67 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

14. Carol Schultz Vento, Annotation, *When is Work Environment Intimidating, Hostile or Offensive, so as to Constitute Sexual Harassment Under State Law*, 93 A.L.R.5th 47, at § 2 (2001).

The Court affirmed *Meritor*'s severe or pervasive standard seven years later in *Harris v. Forklift Systems*, and elaborated that determining whether a work environment is hostile or abusive requires "looking at all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[15] The Court has minimally refined or commented on the standard since,[16] so the elements established by *Meritor* and *Harris* remain the defining language of the severe or pervasive standard as applied to sex discrimination cases based on creation of a hostile work environment through sexually harassing workplace conduct.[17]

A significant majority of states have enacted antidiscrimination laws that mirror Title VII and are interpreted to prohibit sexual harassment.[18] Though Title VII itself does not contain the words "severe or pervasive," most states, including Minnesota, have treated the standard as "a free-standing tenet" of anti-discrimination law, with lower courts adopting the Supreme Court's standard and utilizing federal case law as precedent in construing state statutes and deciding sexual harassment cases.[19]

B. Critique

Scholars and advocates have critiqued the severe or pervasive standard as disproportionately burdensome for plaintiffs, with this burden growing over time. "As a result of this heightened burden, lower courts routinely dismiss claims alleging sexual misconduct

15. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

16. *See, e.g.*, Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 238 (2018) (noting that Oncale v. Sundowner, 523 U.S. 75 (1998), refined the standard, including by "caution[ing] courts against enforcing Title VII's anti-harassment mandate as a 'civility code'").

17. *See, e.g.*, Fox v. Pittsburg State Univ., 257 F. Supp. 3d 1112, 1130 n.86 (D. Kan. 2017) (citing *Meritor Sav. Bank*, 477 U.S. at 67, and *Harris*, 510 U.S. at 21, in analysis of Title VII sexual harassment claims).

18. Rachel Farkas, Brittany Johnson, Ryann McMurry, Noemi Schor & Alison Smith, *State Regulation of Sexual Harassment*, 20 GEO. J. GENDER & L. 421, 424 ("[F]orty-seven states and Washington, DC have implemented anti-discrimination statutes that either expressly or impliedly prohibit sexual harassment in the private workplace."). *But cf.* CONTE, *supra* note 1, at 1 (noting that "[T]he conditions under which a state action can be maintained will vary under the terms of the statute . . ."); Farkas et al., *supra* note 18, at 435 ("While most state statutes at least partially mirror Title VII, many go further to effectively expand Title VII anti-discrimination protections to cover LGBT workers and workers in settings with fewer than fifteen employees.").

19. Tanick, *supra* note 3; *see* CONTE, *supra* note 1.

that is sometimes flagrant."[20] Critics cite numerous cases in which plaintiffs allege "egregious conduct that, in many cases, would be criminal or at least would outrage any reasonable person."[21] For example, one plaintiff in the Eighth Circuit failed to clear the severe or pervasive hurdle to survive dismissal of their hostile work environment sexual harassment claim even when alleging that "the supervisor grabbed and squeezed the employee's nipple while stating 'this is a form of sexual harassment.'"[22] Another plaintiff's case was dismissed despite alleging, amongst other actions, "that a harasser asked him to watch pornographic movies and to masturbate together" and "suggested that the plaintiff would advance professionally if the plaintiff caused the harasser to orgasm."[23] Scholars offer several explanations for these exasperating results for plaintiffs, as will be discussed below.

1. Who is Reasonable?

First, the flexible nature of the standard has given lower courts significant discretion in determining what behavior is severe or pervasive enough to create a hostile or abusive work environment for a "reasonable" person.[24] The standard does "not differentiate between genders, obfuscating whether it ought to be viewed through the prism of a hypothetical woman, man, or asexual individual."[25] It also does not acknowledge how contextual factors

20. Kenneth R. Davis, *The "Severe and Pervers-ive" Standard of Hostile Work Environment Law: Behold the Motivating Factor Test*, 72 RUTGERS U. L. REV. 401, 416–17 (2020).

21. Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 119 (2003); *see also* Tippett, *supra* note 16, at 241.

22. Sheila Engelmeier & Heather Tabery, *Severe or Pervasive: Just How Bad Does Sexual Harassment Have to Be in Order to Be Actionable?*, MSBA, https://www.mnbar.org/archive/msba-news/2020/01/21/severe-or-pervasive-just-how-bad-does-sexual-harassment-have-to-be-in-order-to-be-actionable [https://perma.cc/HPY8-CLYH] (citing Duncan v. Cnty. of Dakota, 687 F.3d 955, 959 (8th. Cir. 2012)) [hereinafter Engelmeier & Tabery, *Severe or Pervasive?*].

23. *Id.* (citing LeGrand v. Area Res. for Cmty. & Hum. Servs., 394 F.3d 1098 (8th Cir. 2005)).

24. *See* Tippett, *supra* note 16, at 237.

25. Tanick, *supra* note 3; *see also* Jones & Wade, *supra* note 2, at 219 ("What remains unclear is whether the allegedly harassing behavior is to be evaluated from the point of view of a reasonable person—or whether the standard should be that of a reasonable woman, or a reasonable victim in the plaintiff's shoes. . . . Importantly, each of [these] standards . . . necessitates a different level of attention to the specific context and power dynamics between the parties. . . . [E]mployment of a reasonable person standard perpetuates existing inequalities by failing to adjust for experiential

such as "race, class, gender identity, and age," create power dynamics that influence how sexual harassment is targeted by harassers and perceived by victims.[26] Therefore, judges, who are arguably "not as sensitive to the realities of what may or may not be acceptable in the workplace,"[27] have underestimated and diminished "the severity of harassment and the impact it would have on a reasonable person" when analyzing a plaintiff's prima facie case.[28] This has, on the whole, disadvantaged plaintiffs and blocked them, based on the potentially limited worldview of the judge, from having their cases heard by peer-comprised juries.[29]

2. Narrowing Over Time, or "The Infinite Regression of Anachronism"

Second, the judicial discretion in interpreting the severe or pervasive standard has built on itself to allow more and more

differences."); Druhan V. Blair, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355, 356–57 (stating that because of the vagueness of the severe or pervasive standard and "because individuals have different perceptions of what behaviors are severe enough to constitute harassment," three scholarly proposed legal ideas—"the reasonable woman standard, the acknowledgment that individuals view supervisor harassment as more severe, and the importance of workplace integration"—"should . . . be integrated into sexual harassment law").

26. Jones & Wade, *supra* note 2, at 214, 219–20.

27. Tanick, *supra* note 3.

28. Evan D. H. White, *A Hostile Environment: How the "Severe or Pervasive" Requirement and the Employer's Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C. L. REV. 853, 875 (2006); *see also* Elizabeth M. Schneider & Nancy Gertner, *"Only Procedural": Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767, 773–78 (2012–2013) (describing how the Supreme Court's holdings in *Twombly* and *Iqbal*, which invite "the exercise of judicial subjectivity, for judges to 'fill in the gaps' of the truncated factual or legal record with what 'they know' or, more significantly, what they *think* they know" in order to determine "plausibility" at the pleading stage, are problematic for plaintiffs in employment discrimination cases, if not through outright dismissal, then at least through an "impact on the subsequent [procedural] rulings that a judge must make—the discovery that a court allows (for example, only discovery on the 'plausible' claims), the class certification decision, and the efficacy of expert testimony" which "make summary judgment for the employer even more likely").

29. Tanick, *supra* note 3; *see* Engelmeier & Tabery, *Severe or Pervasive?*, *supra* note 22; *see also* Michael W. Pfautz, *What Would a Reasonable Jury Do? Jury Verdicts Following Summary Judgment Reversals*, 115 COLUM. L. REV. 1255, 1285 (2015) (citing Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 320, 338–39 (2012)) ("[S]tudies have empirically shown how judicial behavior can vary based on a judge's personal background. Weinberg and Nielsen powerfully demonstrate that white judges grant summary judgment in employment discrimination cases more often than minority judges do. . . . And judges may be out of touch with the workplace experiences of most Americans.").

egregious workplace behavior over time.[30] Williams et al., call this trend "the 'infinite regression of anachronism,'" or

> the tendency of courts to rely on cases that reflect what was thought to be reasonable ten or twenty years ago, forgetting that what was reasonable then might be different from what a reasonable person or jury would likely think today. These anachronistic cases entrench outdated norms, foreclosing an assessment of what is reasonable now.[31]

In her study of sexual harassment case law in several circuits fifteen years after *Meritor* was decided, Beiner calls the trend simply, "Bad Precedent Leads to Bad Precedent."[32] For example, in the 1993 case *Saxton v. AT&T Co.*, the Seventh Circuit Court of Appeals affirmed summary judgment for the employer, finding that despite the plaintiff alleging that her supervisor had "rubbed his hand along her upper thigh," and "pulled her into a doorway and kissed her," amongst other harassing behaviors, no "reasonable person would find that her supervisor's conduct created a hostile environment."[33] *Saxton* was cited positively by courts in the Seventh Circuit more than three hundred times by 2001, and in seventy-nine of those cases that positive citation occurred in the context of the citing court's severe or pervasive analysis.[34] In the 2019 case analysis by Williams et al., the authors note that subsequent citing cases like those discussed by Beiner "use the infinite regression of anachronism to ratchet up the standard for what constitutes a hostile environment in their circuit."[35] In other words, courts use outdated decisions as comparators for current cases and find no harassment took place if those comparators had

30. Sarah David Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #METOO Movement*, 22 RICH. PUB. INT. L. REV. 237, 245–54 (2019); *see also* Tippett, *supra* note 16, at 241–42 (discussing how lower courts have interpreted "severe or pervasive" to be overly stringent, snowballing as judges have been provided an ever growing body of law supporting a "crimped interpretation"); Davis, *supra* note 20, at 425 (noting the original EEOC guidelines made no mention of "severe or pervasive," and it has not supported this restrictive interpretation by the Supreme Court); JOHNSON, SEKARAN & GOMBAR, *supra* note 4, at 16–17 (highlighting that New York and California have enacted legislation to remove or clarify the "severe or pervasive" standard to correct for the overly restrictive interpretation developed by the courts).

31. Joan C. Williams, Jodi L. Short, Margot Brooks, Hilary Hardcastle, Tiffanie Ellis & Rayna Saron, *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 145 (2019).

32. Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791, 817–18 (2002); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

33. Beiner, *supra* note 32, at 814–15.

34. *Id.* at 818, n.129.

35. Williams et al., *supra* note 31, at 145.

similar fact patterns to the case at hand. This trend becomes both more problematic and entrenched over time. Thus, the vague content of the severe or pervasive standard, its interpretation by judges, and its narrowing over time, has made it more and more difficult for plaintiffs to prove that the behavior they were subjected to passes the severe or pervasive threshold.[36]

3. The "Norm Cascade"

The discrepancy between the severity or pervasiveness necessary to constitute a hostile work environment at summary judgment and an average person's conception of sexual harassment that creates an intolerable work environment has become more pronounced in the wake of the #MeToo movement.[37] This movement went viral on social media in 2017,[38] after the *New York Times*

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36. Former U.S. District Judge Nancy Gertner has also described the role of "Asymmetric Decisionmaking" in contributing to the disproportionate barriers faced by plaintiffs generally in federal employment discrimination cases:

> When the defendant successfully moves for summary judgment in a discrimination case, the case is over. Under Rule 56 of the Federal Rules of Civil Procedure, the judge must "state on the record the reasons for granting or denying the motion," which means writing a decision. But when the plaintiff wins, the judge typically writes a single word of endorsement—"denied"—and the case moves on to trial. Of course, nothing prevents the judge from writing a formal decision, but given caseload pressures, few federal judges do. . . . The result of this practice—written decisions only when plaintiffs lose—is the evolution of a one-sided body of law. Decision after decision grants summary judgment to the defendant . . . . After the district court has described—cogently and persuasively, perhaps even for publication—why the plaintiff loses, the case may or may not be appealed. If it is not, it stands as yet another compelling account of a flawed discrimination claim. If it is appealed, the odds are good that the circuit court will affirm the district court's pessimistic assessment of the plaintiff's case. . . . Although judges do not publish all the opinions they write, the ones they do publish exacerbate the asymmetry. The body of precedent detailing plaintiffs' losses grows. Advocates seeking authority for their positions will necessarily find many more published opinions in which courts granted summary judgment for the employer than for the employee. . . . But the problem is more than just the creation of one-sided precedent that other judges follow. The way judges view these cases fundamentally changes. If case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most claims are trivial.

Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 113–15 (2012).

37. Heydemann & Tejani, *supra* note 30, at 248; *see also* Ann C. McGinley, *#MeToo Backlash or Simply Common Sense?: It's Complicated*, 50 SETON HALL L. REV. 1397, 1416 (2020) (describing the difference between cultural and legal definitions of sexual harassment, where "culture often finds harassment even though the law would say the behavior is not sufficiently severe or pervasive . . .").

38. Though providing a more in-depth history of the #MeToo movement is beyond

published allegations against Harvey Weinstein for predatory sexual behavior.[39] Unlike previous instances in which highly publicized sexual harassment cases have led to a temporary surge in public attention on the issue,[40] change in societal understanding of sexual harassment after #MeToo may be longer lasting.

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the scope of this Note, it is important to highlight how the viral launch and staying power of #MeToo after the *Times* Weinstein article and speaking out of high-profile celebrities, though important and admirable, "illustrates the critical need for an intersectional approach [to discussions of gender and sexual harassment]" through the differential way in which the claims of working class women and women of color are treated in comparison to upper-class white women. Jones & Wade, *supra* note 2, at 208. Jones and Wade explain:

> Me Too did not begin in 2017, nor did it begin on Twitter or Facebook. The phrase Me Too was first coined in 2006 by Tarana Burke, a Black woman activist who had just 500 Twitter followers when the *Times'* article broke. In 2006, Burke was living and working in Alabama where she had just founded Just Be, Inc. The organization's goal was to empower and promote the general wellbeing of young girls of color. In her work with Just Be, Burke encountered a number of girls who, both knowingly and unknowingly, disclosed experiences of sexual violence not unlike her own. Burke set up a 'Me Too' Myspace page to raise awareness of the issue and to establish a supportive community. This Myspace page was Me Too's first virtual home, and soon, Me Too became an organization. Thus, from its inception, Me Too was intended "to help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathways to healing."
>
> Despite Burke's best efforts, the hashtag and the term did not go viral for over a decade. It was not until October 2017 when the Weinstein exposé broke and high-profile celebrities began to speak out about their experiences that the movement amassed widespread attention and support. . . . [W]ealthy celebrities and upper-middle-class White women are more likely than lower-income women and women of color to garner attention when they speak. Their concerns are taken more seriously, and they are more likely to be believed.
>
> . . .
>
> Erasure of the activism and experiences of poor women and women of color is . . . part of the social discourse in the United States; it is also reflected in the ways in which U.S. law is taught and created.

Id. at 208–10.

39. CONTE, *supra* note 1, at 1 ("*Bloomberg* analyzed statistics of allegations since the *New York Times* reported allegations of serial predation by Harvey Weinstein a year ago, and found that at least 425 prominent people across industries, including state and local lawmakers, have been publicly accused of sexual misconduct, a broad range of behavior that spans from serial rape to lewd comments and abuse of power. According to the National Women's Law Center, in the past year, state legislators introduced over 100 bills to strengthen protections against workplace harassment, and 11 states and two localities have passed new protections.").

40. L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?* 3 (Ctr. for Interdisc. L. & Pol'y Stud. Pub. L. & Legal Theory Working Paper Series, No. 453, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236309# ("Prior incidents in which sexual harassment has grabbed the national attention, such as the allegations made by Law Professor Anita Hill in 1991 against now-Associate Justice of the United States Supreme Court Clarence Thomas, have arguably not had staying power.").

Williams et al., argue that #MeToo is a "norm cascade" and the impact is here to stay:

> Typically social norms change slowly. In the late 1990s . . . sexual harassment was seen as a "tsking" matter: Only 34% of Americans thought it was a serious problem.
>
> Then came Alyssa Milano's #MeToo tweet on October 15, 2017, which was retweeted over a million times across eighty-five countries. Almost immediately, the percentage of Americans who believe that sexual harassment is a serious problem shot up to 64%. By late 2017, roughly 75% of Americans believed that sexual harassment and assault were "very important" issues for the country. That is a norm cascade.[41]

For Williams et al., this norm cascade magnifies the importance of juries in sexual harassment hostile work environment cases, access to which the severe or pervasive standard has disproportionately functioned to deny.[42] The authors argue that juries, not judges, should be given the opportunity to inform "community standards of appropriate behavior in the workplace" by "grappling with facts and establishing norms about what conduct is considered appropriate in the age of #MeToo."[43]

McGinley suggests that sending all sexual harassment hostile work environment cases to juries is not the only solution to adapting the law to the norm cascade, as judicial norm perceptions may also be subject to the shift.[44] Thus, McGinley argues that in response to the #MeToo movement, "[c]ourts should change their strict interpretation of the sex- and gender-based harassment cases by jettisoning reliance on cases decided before the norm cascade and,

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41. Williams et al., *supra* note 31, at 142; *see also* Cass R. Sunstein, *#MeToo as a Revolutionary Cascade*, 2019 U. CHI. LEGAL F. 261, 262, 271 (2019) (arguing that the #MeToo movement meets the three conditions of a "revolutionary cascade" ("(a) preference falsification, (b) diverse thresholds, and (c) interdependencies") and has revealed a change in "preferences, experiences, beliefs, and values," and has been "about the *transformation* of preferences, beliefs, and values . . .").

42. Williams et al., *supra* note 31, at 224; *see also supra* Section I.B.

43. Williams et al., *supra* note 31, at 224. However, despite the #MeToo movement, juries' evaluations of credibility are still informed by sexist stereotypes which can continue to harm plaintiffs. *See* Nicole Brodeur, *People Are More Likely to Believe Sexual Harassment Claims from Women Who Are 'Conventionally Attractive,' Study Says*, CHI. TRIB. (Feb. 22, 2021), https://www.chicagotribune.com/featured/sns-study-more-likely-believe-sexual-harassment-attractive-women-20210222-dalk43emgndrbeff2og33lsm5m-story.html [https://perma.cc/K69H-WAJQ] (describing study published in January 2021 which found that "people are more apt to believe sexual harassment claims by women who are young, 'conventionally attractive' and appear and act feminine. Women who don't fit that prototype not only are less likely to be believed, but also are presumed to be unharmed by harassing behavior . . . ." Thus "[t]he findings have implications for workplaces and courtrooms, where credibility and perceived harm are important to making a case . . .").

44. McGinley, *supra* note 37, at 1424.

in doing so, analyze cases with reference to how reasonable jurors would react today, given the norm cascade."[45]

C. Calls for Change: State Law Approaches to Change

In addition to scholarly critique and recommendations for legal adaptations, the #MeToo Movement has brought about increased calls for change and political attention to those calls. In response, state legislatures have introduced bills addressing employer practices, such as by limiting nondisclosure agreements where employers prevent employees from discussing their experience of discrimination or harassment, and requiring anti-harassment training.[46] Several states have also specifically attempted to reform the severe or pervasive standard in recognition of its role in blocking victims' access to justice.[47] These reforms have taken the approach of adopting an entirely new standard to replace severe or pervasive, or retaining the standard but "adding guardrails to the 'severe or pervasive' language to indicate expressly how the standard should and should not be interpreted."[48]

1. Adoption of a New Standard: New York City and State

New York is not the only state that has adopted a new standard for analysis of hostile work environment sexual harassment cases,[49] but it serves as a case study here. Even before

45. *Id. But see* Pfautz, *supra* note 29 (documenting disproportionate rate of summary judgment errors in civil rights cases).

46. JOHNSON, SEKARAN & GOMBAR, *supra* note 4, at 2 ("Three years after #MeToo went viral, the unleashed power of survivor voices has led to more than 230 bills being introduced in state legislatures . . . ."); Heydemann & Tejani, *supra* note 30, at 255; *see also* Tamra J. Wallace, *Nine Justices and #MeToo: How the Supreme Court Shaped the Future of Mandatory Arbitration and Sexual Harassment Claims*, 72 ME. L. REV. 417, 418 (2020) (describing how "the Supreme Court's continued stance to liberally applying the [Federal Arbitration Act] to uphold arbitration agreements contained within employment agreements over the past decades" necessitates legislation to protect vulnerable workers who have been victims of workplace sexual harassment); Christopher Cole, *End 'Forced Arbitration,' Ex-Fox Host Carlson Urges House*, LAW360 (Feb. 11, 2021), https://www.law360.com/employment/articles/1354189/end-forced-arbitration-ex-fox-host-carlson-urges-house [https://perma.cc/M9TL-6PJC] (providing an example of current federal congressional debate on the issue of arbitration and sexual harassment).

47. JOHNSON, SEKARAN & GOMBAR, *supra* note 4, at 16–17.

48. Heydemann & Tejani, *supra* note 30, at 255.

49. *See* Kathryn Barcroft, *Hostile Work Environment: Is NYC's Standard the Path Forward in the Era of #MeToo?*, N.Y.L.J. (Apr. 11, 2019), https://www.law.com/newyorklawjournal/2019/04/11/hostile-work-environment-is-nycs-standard-the-path-forward-in-the-era-of-metoo/ [https://perma.cc/8YV7-8BQW] ("Delaware is another state that has taken affirmative action to modify the standard for sexual

the #MeToo movement, New York City recognized that their local Human Rights law had "'been construed too narrowly to ensure protection of the civil rights of all persons covered by the law'" and "passed the Local Civil Rights Restoration Act of 2005" to "assert that the provisions of the New York City Human Rights Law (NYCHRL) were to be 'construed independently from similar or identical provisions of New York state or federal statutes.'"[50] This began an iterative process between the legislature and courts that ultimately led to adoption of a new standard by both the city and state legislatures for analysis of sex discrimination claims asserting creation of a hostile work environment through sexual harassment.[51]

That iterative process continued in 2009, when the New York State Appellate Division had the first opportunity to interpret the city's Restoration Act as applied to a sexual harassment hostile work environment case.[52] The court held that the City's instruction to courts in the Restoration Act to construe the Human Rights Law "*more broadly than federal civil rights laws and the State* [Human Rights Law]" required a rejection of the severe or pervasive standard, which "has routinely barred the courthouse door to women who have, in fact, been treated less well than men because of gender."[53] The court thus adopted a new standard: "For [Human Rights Law] liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender."[54] The court explained that this new standard would both maximize deterrence and align more closely with other discrimination liability standards.[55] This new standard was explicitly adopted by the City in 2016 in a second Restoration Act.[56]

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harassment claims. Delaware HB 360, which went into effect January 1st, broadens the definition of a hostile work environment in Delaware's Discrimination in Employment Act, in recognition of the high bar to sexual harassment claims. The new Delaware law provides that sexual harassment is unlawful if the conduct 'creates an intimidating, hostile, or offensive work environment.'").

50. Heydemann & Tejani, *supra* note 30, at 255–56 (citing N.Y.C. LOC. L. NO. 85 (2005); N.Y.C. Human Rights Law, N.Y. ADMIN. CODE §§ 8-101–107 (2005)).

51. Heydemann & Tejani, *supra* note 30, at 255–57.

52. Williams v. N.Y.C. Hous. Auth., 61 A.D.3d 62 (N.Y. App. Div. 2009); *see also* Heydemann & Tejani, *supra* note 30, at 255–57 (describing New York City's adoption of a new standard).

53. *Williams*, 61 A.D.3d at 73–74 (emphasis in original).

54. *Id.* at 78.

55. *Id.*

56. Heydemann & Tejani, *supra* note 30, at 257; Barcroft, *supra* note 49, at 2.

New York State, with momentum from the #MeToo movement and using New York City's lowered burden of proof as guidance, passed legislation amending its anti-discrimination law to eliminate the severe or pervasive standard.[57] Instead, an employer is liable for harassment "when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories," including sex, "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims."[58] New York's local and state courts and legislatures thus each played roles in the replacement of the severe or pervasive standard in its anti-discrimination, anti-harassment law.

2. Interpretation Guardrails: California

California took a different approach to updating its sexual harassment law in the wake of #MeToo. The California legislature passed a bill, which took effect on January 1, 2019, that added a section to California's Fair Employment and Housing Act "declar[ing] its intent with regard to application of the laws about harassment contained in this part."[59] The bill does not strike the severe or pervasive standard language but adopts Justice Ruth Bader Ginsburg's articulation of the plaintiff's burden of proof under the standard, set forth in her concurrence in *Harris v. Forklift Systems*:

> [I]n a workplace harassment suit the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.[60]

The law goes on to affirm, or reject, specific holdings of several Ninth Circuit and California state court sexual harassment cases in order to place further guidelines on the standard's application.[61] In doing so, the law establishes that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence

57. Engelmeier & Tabery, *Severe or Pervasive?*, *supra* note 22, at 25 (citing N.Y. Sess. A8421 (N.Y. 2019)).

58. N.Y. Sess. A8421, 2 (N.Y. 2019).

59. CAL. GOV'T CODE § 12923 (West 2019).

60. *Id.* (citing Harris v. Forklift Sys., 510 U.S. 17, 25–26 (1993)) (internal quotations omitted).

61. Barcroft, *supra* note 49; Heydemann & Tejani, *supra* note 30, at 258–59; *see* JOHNSON, SEKARAN, & GOMBAR, *supra* note 4, at 17.

of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment"; that "a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decision maker, may be relevant, circumstantial evidence of discrimination" in order to establish a hostile work environment; and that "[t]he legal standard for sexual harassment should not vary by type of workplace."[62] Finally, the law states that, "[h]arassment cases are rarely appropriate for disposition on summary judgment."[63]

With this background in place, this Note will now analyze the unique approach to potential legal evolution of the severe or pervasive standard taken by the Minnesota Supreme Court in *Kenneh v. Homeward Bound*.

II. *Kenneh v. Homeward Bound*: Critiquing Minnesota's Approach

Like many other states, the Minnesota legislature reconsidered the state's sexual harassment law following the 2017 #MeToo movement, attempting both New York's approach of rejecting the severe or pervasive standard and California's approach of placing guardrails on the standard's application.[64] The Minnesota House introduced a bill in 2018 to amend the MHRA definition of sexual harassment.[65] The bill rejected the application of the federal severe or pervasive standard to MHRA sexual harassment claims, explicitly stating, "[a]n intimidating, hostile, or offensive environment . . . does not require the harassing conduct or communication to be severe or pervasive."[66]

The Minnesota Senate took a different approach in the bill it introduced in 2019.[67] Like California's legislation,[68] this bill retained the severe or pervasive standard but sought to modify its application.[69] The bill stated that "courts should not be bound by prior federal case law holding that conduct does not rise to the level

62. CAL. GOV'T CODE § 1293 (West 2019) (rejecting Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000); affirming Reid v. Google, Inc., 235 P.3d 988 (Cal. 2010); disapproving Kelley v. Conco Cos., 196 Cal. App. 4th Supp. 191 (Cal. Ct. App. 2011)).

63. *Id.* (affirming Nazir v. United Airlines, Inc., 178 Cal. App. 4th. Supp. 243 (Cal. Ct. App. 2009)).

64. *See supra* Part I.C.

65. H.F. 4459, 90th Leg., Reg. Sess. (Minn. 2018).

66. *Id.*

67. S.B. 2295, 91st Leg., Reg. Sess. (Minn. 2019).

68. *See supra* Part I.C.2.

69. S.B. 2295, 2019 Reg. Sess. (Minn. 2019).

of actionable sexual harassment if the conduct described therein would be considered severe or pervasive in the state" and specifically rejected the holdings of several Eight Circuit cases "as inconsistent with the severe or pervasive standard for sexual harassment under state law."[70] Further, though the bill noted that "state law is not a general civility code" nor a "strict liability statute" for employers, it provided that "a single significant instance of harassing conduct or communication" may constitute severe or pervasive harassment.[71]

The Minnesota Supreme Court took up the issue shortly after neither of the bills passed, granting review in *Kenneh v. Homeward Bound*.[72]

A. Case Summary and Holdings

Assata Kenneh brought a sexual harassment claim against her employer, Homeward Bound, under the MHRA, alleging that the actions of a co-worker, Anthony Johnson, created a hostile work environment.[73] These actions, occurring between the months of February and June 2016, included offering to cut Kenneh's hair in his home the first day they met, telling Kenneh that he "'likes it pretty all day and night'" and "'beautiful women and beautiful legs,'" "talking to [Kenneh] in a seductive tone and lick[ing] his lips in a suggestive manner," telling Kenneh "'I will eat you–I eat women,'" following Kenneh to a gas station, and repeatedly calling Kenneh "'sexy,'" "'pretty,'" and "'beautiful,'" and "simulat[ing] oral sex with his tongue."[74]

Kenneh made a written complaint to Homeward Bound, which resulted in an investigation and an assurance from Homeward Bound "that Johnson would receive additional sexual harassment training and would be instructed not to be alone with Kenneh."[75] When Johnson's behavior continued despite the investigation and training, Kenneh made two additional complaints to her supervisor,

70. *Id.* (rejecting holdings in McMiller v. Metro, 738 F.3d 185 (8th Cir. 2013); Anderson v. Fam. Dollar Stores of Ark., Inc., 579 F.3d 858, 860 (8th Cir. 2009); LeGrand v. Area Resources for Cmty. & Hum. Servs., 394 F.3d 1098 (8th Cir. 2005); and Duncan v. General Motors Co., 300 F.3d 928 (8th Cir. 2002)).

71. *Id.*

72. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 231 (Minn. 2020); Fitzke, *supra* note 10 ("Shortly after the House bill failed, the Minnesota Supreme Court granted review in *Kenneh*.").

73. *Kenneh*, 944 N.W.2d at 228.

74. *Id.* at 226–27.

75. *Id.* at 227.

which again resulted in no change.[76] In June 2016, Kenneh "arrived late to work and was unprepared for a meeting" because "she did not want to come to work because of Johnson."[77] Homeward Bound then denied Kenneh's request to "return to a flex-schedule position that would allow her to avoid interactions with Johnson," and terminated Kenneh's employment.[78]

The district court found that Johnson's conduct failed to satisfy the severe or pervasive standard for sexual harassment, hostile work environment claims, calling the standard a "high bar" for actionable sexual harassment.[79] The court thus granted summary judgment to Homeward Bound, finding that though "'some of the conduct was 'boorish and obnoxious' and that the statement, 'I will eat you. I eat women,' was both 'objectively and subjectively unacceptable,'" the conduct "does not constitute pervasive, hostile conduct that changes the terms of employment and exposes an employer to liability under the Minnesota Human Rights Act."[80]

After the court of appeals affirmed, Kenneh sought review in the Minnesota Supreme Court.[81] Kenneh, with the support of six amici, asked the court to abandon the severe or pervasive standard and associated federal precedent in analysis of hostile work environment sexual harassment claims.[82] Kenneh and supporting amici argued "that the severe-or-pervasive standard is notorious for its inconsistent application and lack of clarity" and that "federal courts tend to interpret the meaning of 'severe or pervasive' archaically, which places federal interpretations directly at odds with Minnesota's statutory directive to construe the Human Rights Act liberally."[83] Homeward Bound argued in response that rejecting the severe or pervasive standard would interfere with the need for legal consistency and predictability, including across state lines, and that the court "must exercise judicial restraint" because the state legislature "has recently shown an interest in redefining sexual harassment . . . ."[84]

The court rejected Kenneh's request, holding that "Kenneh has not presented us with a compelling reason to abandon our

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 228.
80. *Id.* (quoting directly from the trial court's order granting summary judgment in Hennepin County District Court File No. 27-CV-17-391).
81. *Id.*
82. *Id.* at 229; Fitzke, *supra* note 10.
83. *Kenneh*, 944 N.W.2d at 230 (citing Minn. Stat. § 363A.04).
84. *Id.*

precedent," and that the severe or pervasive standard "continues to provide a useful framework for analyzing the objective component of a claim for sexual harassment under the Minnesota Human Rights Act."[85] However, the court continued, "tak[ing] this opportunity to clarify how the severe-or-pervasive standard applies to claims under the Human Rights Act."[86] The court's first point of clarification was that Minnesota courts utilizing the standard are not bound by federal decisions utilizing the same framework.[87] Second, "[f]or the severe-or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace."[88] Third, the court emphasized the fact-intensive nature of an inquiry into whether sexual harassment rises to the level of severe or pervasive: "each case in Minnesota state court must be considered on its facts, not on a purportedly analogous federal decision. A single severe incident may support a claim for relief."[89] At the same time, "[p]ervasive incidents, any of which may not be actionable when considered in isolation, may produce an objectively hostile environment when considered as a whole."[90] In order to maintain the fact-intensiveness of the inquiry, the court "caution[ed] courts against usurping the role of a jury when evaluating a claim on summary judgment," emphasizing that "whether the alleged harassment was sufficiently severe or pervasive as to create a hostile work environment is 'generally a question of fact for the jury.'"[91]

Applying this clarified standard to Kenneh's case, and "[c]onsidering the totality of the circumstances," the court "conclude[d] that Kenneh presented sufficient evidence for a reasonable jury to decide, on an objective basis, that Johnson's alleged behavior was sufficiently severe or pervasive to substantially interfere with her employment or to create an intimidating, hostile, or offensive employment environment."[92] Therefore, "[t]he district court . . . erred in granting summary judgment to Homeward Bound."[93]

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85. *Id.* at 230, 226.
86. *Id.* at 231.
87. *Id.*
88. *Id.*
89. *Id.* at 231–32 (citations omitted).
90. *Id.* at 232 (citations omitted).
91. *Id.* (citations omitted).
92. *Id.* at 233.
93. *Id.* at 234.

B. Early Commentator Response

That the *Kenneh* court took time to clarify how the severe or pervasive standard should be applied indicates that it will have some impact on future cases. Yet, the mixed response of commentators closely involved with the *Kenneh* decision demonstrates that this impact was not immediately clear following the case. One attorney who filed an amicus brief in support of Kenneh praised the decision, calling "the ruling 'a landmark,' even though it preserves the standard that his brief argued against," because it "lowers the bar for purposes of establishing illegal harassment," "explicitly rejects the previously favored approach of deferring to federal precedent when deciding these cases," and states that "these cases should be decided at trial, not on summary judgment."[94]

Yet, another brief-filing attorney disagreed, "argu[ing] the ruling does not fundamentally alter the landscape because it neither changes the framework for summary judgment nor dismantles the review standard."[95] Another observer called the decision "a significant victory for employers," elaborating that the court's retention of the severe-or-pervasive standard "allows employers greater predictability under the MHRA. *Kenneh* made clear that any attempt to change the MHRA's sexual harassment definition will have to go through the legislature."[96]

Others have suggested that the *Kenneh* decision lies somewhere between a landmark for plaintiff employees and a victory for defendant employers, concluding that the court's retention of the standard combined with its emphasis on the evolution of workplace norms and focus on the facts of each case amounts to a "nuanced" though "significant shift for hostile work environment claims under the MHRA."[97]

C. Impact and Insufficiency

It is still too early to know the aggregate effect of *Kenneh*'s clarification of sexual harassment standards on the outcomes in lower Minnesota courts. This Note argues that while recent decisions indicate that *Kenneh*'s caution regarding summary judgment has slightly influenced lower courts' considerations,

94. Featherly, *supra* note 10.

95. *Id.*

96. Fitzke, *supra* note 10.

97. Sheila Engelmeier & Heather Tabery, Paskert *and* Kenneh*: The 'Severe or Pervasive' Standard in 2020*, 77 BENCH & BAR MINN. 24, 29 (2020) [hereinafter Engelmeier & Tabery, Paskert *and* Kenneh].

ultimately, there is reason to be skeptical that the Minnesota Supreme Court's holdings will be sufficient to give plaintiffs meaningful relief. A critique of *Kenneh*'s potential impact on summary judgment as well as the retention of the severe or pervasive standard follows.

1. Summary Judgment

Since *Kenneh* was decided in June 2020, there has only been one lower court summary judgment decision applying *Kenneh* to a sexual harassment claim brought under the MHRA.[98] In the case, *Schroeder v. Axel H. Ohman, Inc.*, Schroeder alleged that her co-worker made graphic sexual comments on at least four occasions over the course of approximately one year.[99] Eventually, and after a series of potentially retaliatory actions by the employer following Schroeder's report of the harassment, she left the job and was hired at a different company.[100] On the defendant's motion for summary judgment, the District Court analyzed Schroeder's federal Title VII sexual harassment claims and state MHRA claims jointly.[101] The court cited *Kenneh* as "rejecting employee's attempt to renounce federal severe-or-pervasive standard but clarifying that a MHRA sexual harassment claim must be considered on its facts, not on a purportedly analogous federal decision."[102] Applying "the standard under both Title VII and the MHRA [of] whether a reasonable person could find the alleged behavior objectively abusive or offensive, and that Plaintiff actually perceived the conduct as abusive," the court denied the defendant's motion for summary judgment, finding that "[h]ere, Plaintiff has presented sufficient evidence upon which a reasonable jury could find the alleged behavior was objectively abusive or offens[ive]."[103]

On the one hand, *Schroeder*'s citation to *Kenneh*'s emphasis on making fact-intensive considerations of MHRA sexual harassment claims might be perceived as a step toward interrupting the

98. As of electronic searches conducted via Westlaw and LexisNexis on February 6, 2021.

99. Schroeder v. Axel H. Ohman, Inc., No. 19-1836 (MJD/TNL), 2021 WL 396779, at *1–2 (D. Minn. Feb. 4, 2021) (describing the statements that plaintiff alleged her co-worker made to her, including that he could "'see her tits'"; stating "'you like it bent over,' 'I bet you can't handle eight inches,' 'I would show you, but I don't want to hurt you,' . . . . 'You know I got a big dick,' 'That's not a sock I got in there. That's my real bulge,' and 'Do you want to look at it?'").

100. *Id.* at *4.

101. *Id.* at *4–6.

102. *Id.* at *5.

103. *Id.* at *6.

injustice that plaintiffs have endured in both state and federal sexual harassment cases when judges have quickly disposed of their claims based on precedent allowing egregious conduct on the part of defendants.[104] Yet, this optimism is undercut, even in light of summary judgment being denied to the employer here, by the court's joint state and federal analysis, which demonstrates that courts may not actually interpret sexual harassment claims under the MHRA differently after *Kenneh*, an argument which will be explored further in the following section.

Courts have also applied *Kenneh*'s summary judgment cautions to non-sexual harassment claims. In the weeks immediately after the *Kenneh* decision, a district court denied summary judgment to the defendant in a personal injury case, emphasizing that, "[i]ndeed, the Minnesota Supreme Court recently 'cautioned' trial courts 'against usurping the role of the jury when evaluating a claim on summary judgment.'"[105] Another district court trial order cited *Kenneh*'s warning in an employment injury case, writing in a denial of summary judgment to the defendant:

> [T]he current state of the law in Minnesota state courts is clear: in granting summary judgment, trial courts should be cautious when there are contested facts about what really happened. As recently as last week, the Minnesota Supreme Court reversed an order granting summary judgement. . . . The decision in this order is to apply the law as decided by the Minnesota Supreme Court. . . . [The plaintiff] is entitled to have a jury decide the merits of his case.[106]

Similarly, in August of 2020 the Court of Appeals of Minnesota cited *Kenneh* in its reversal of a district court grant of summary judgment to the defendant medical clinic in a medical malpractice suit.[107]

Though these cases did not involve sexual harassment claims, they indicate that the *Kenneh* decision is influencing courts to be

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104. *See supra* Part I.B.

105. Krause v. Martinez, No. 27-CV-19-2618, 2020 WL 4915385, at *4 (D. Minn. June 30, 2020) (citing Kenneh v. Homeward Bound, Inc., No. A18-0174, 2020 WL 2893352, at *6 (Minn. June 3, 2020), as "reiterating that '[S]ummary judgment is a blunt instrument' that is 'inappropriate when reasonable persons might draw different conclusions from the evidence presented'").

106. Reed v. Soo Line R.R. Co., No. 27-CV-18-10179, 2020 WL 4218226, at *3 (D. Minn. June 9, 2020) (citing Kenneh v. Homeward Bound, Inc., No. A18-0174, 2020 WL 2893352 (Minn. June 3, 2020)).

107. Ingersoll v. Innovis Health, LLC, No. 60-CV-17-1135, 2020 WL 4434605, at *2 (Minn. Ct. App. Aug. 3, 2020) (citing Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 228 (Minn. 2020)) ("Appellant argues that the district court erred when it granted summary judgment . . . because the actions of appellant and her husband were not, as matters of law, intervening, superseding causes of her husband's death. We agree.").

more hesitant generally in granting summary judgment. That hesitancy in future sexual harassment cases may lead to a greater number of those cases being heard by juries, whose conceptions of workplace behavior are more likely to correspond with post-#MeToo norms, thus increasing opportunities for relief for plaintiffs.[108]

Conversely, lower courts have also cited *Kenneh* in non-sexual harassment cases granting summary judgment, demonstrating that judges have not taken *Kenneh* to mean that summary judgment should be denied blindly, and countering the argument that jury trials will soon excessively burden the judicial system and clog up the courts.[109] However, even if *Kenneh* does result in a greater cost to the system due to more cases reaching juries,[110] this expense is justified by the need to remedy the disproportionate burden that has been borne by sexual harassment plaintiffs and the importance of jury access in achieving justice in these cases.[111]

2. Retention of "Severe or Pervasive"

The *Kenneh* decision's statements regarding summary judgment may lead to more cases being heard by juries, thus making initial strides in addressing the inequality for plaintiffs in sexual harassment law in Minnesota. However, if the MHRA, and the decisions interpreting it, are to truly reflect evolving workplace norms and provide a means of protection against harmful workplace behavior, the Minnesota Supreme Court or the legislature will need to explicitly reject Minnesota's utilization of the severe or pervasive standard, as the standard's bounds and specifics of application remain elusive and, this Note argues, will continue to disproportionately disfavor plaintiffs by allowing continued reliance on outdated precedent.

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108. *See supra* Part I.B.3.

109. *See, e.g.*, Novak v. Gjerde & Pederson, No. 19HA-CV-20-314, 2020 WL 7296627 (D. Minn. Oct. 21, 2020); Casanova v. Tri-Cnty. Cmty. Corr., No. 60-CV-18-2160, 2020 WL 4280999 (Minn. Ct. App. July 27, 2020); Enerwise Power Sol. Corp. v. Renewable Energy Fund, LLC, No. 27-CV-19-7420, 2020 WL 6882791 (D. Minn. Sep. 25, 2020).

110. *See* Scott Brister, *The Decline of Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 209 (2005) ("While estimates vary, some estimate that the marginal cost of each jury trial is ten times that of each bench trial.").

111. *See supra* Part I.B.; *see also* Williams et al., *supra* note 31, at 145–47 (arguing that in order to interrupt the "infinite regression of anachronism" which has unjustly limited access to juries by sexual harassment plaintiffs, and in light of the updated conceptions of workplace norms following the #MeToo movement, "[e]ven judges who felt confident that they knew what was reasonable in the past should not assume they know what Americans believe is reasonable today. Those judges should be more inclined to let juries decide what's reasonable now").

The *Kenneh* court stated that "[o]ur use of the of the severe-or-pervasive framework from federal Title VII decisions does not mean that the conclusions drawn by those courts in any particular circumstances bind Minnesota courts in the application of our state statute."[112] Yet, retaining the standard means that courts will continue to cite the federal law which established it and the state cases which adopted it, as the Minnesota Supreme Court itself did in *Kenneh*.[113] Additionally, though the *Kenneh* court specifically overruled the application of the severe or pervasive standard in one Minnesota Court of Appeals case,[114] and wrote disapprovingly of statements made in several others,[115] its attempt to clarify the standard's application, in discussing Title VII as well as MHRA claims, fails to provide explicit guidance to lower courts as to which previous interpretations to disregard and which to embrace.

California's recent sexual harassment cases support the hypothesis that the Minnesota Supreme Court's retention of the severe or pervasive standard will result in similar application as before the *Kenneh* clarification, and lower courts will continue to cite to the outdated case law that *Kenneh* discouraged. The California legislature's approach to updating its sexual harassment law, by amending the law to clarify the intended application of the severe or pervasive standard and cautioning courts against disposing of sexual harassment cases on summary judgment, is similar to *Kenneh*'s approach, but is more specific.[116] Whereas *Kenneh* only explicitly overrules a portion of a previous case,[117] the California legislation attempted to set firm boundaries on the standard for courts by endorsing the reasoning of three different decisions, and rejecting two others.[118]

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112. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 230–31 (Minn. 2020).

113. *See id.* at 229, 231 (discussing the development of the severe or pervasive standard in federal Title VII law and the adoption of the standard in Minnesota).

114. *Id.* at 231 n.4 ("To the extent that the court of appeals' analysis in *Geist-Miller*, 783 N.W.2d 197, is inconsistent with this opinion, it is overruled.").

115. *Id.* at 231 ("Today, reasonable people would likely not tolerate the type of workplace behavior that courts previously brushed aside as an 'unsuccessful pursuit of a relationship,' or 'boorish, chauvinistic and decidedly immature . . . .'") (citing Geist-Miller v. Mitchell, 783 N.W.2d 197, 203 (Minn. Ct. App. 2010); Duncan v. Gen. Motors Corp., 300 F.3d 928, 935 (8th Cir. 2002); McMiller v. Metro, 738 F.3d 185, 188–89 (8th Cir. 2013)).

116. CAL. GOV'T CODE § 12923 ("The Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision Kelley v. Conco Companies (2011) 196 Cal.App.4th 191.").

117. *Kenneh*, 944 N.W.2d at 231.

118. The law states, in part:

Yet, despite those specific boundaries, it is not clear that lower courts have updated their application of the severe or pervasive standard to hostile work environment sexual harassment claims or interrupted the "infinite regression of anachronism" that has developed out of the federal law.[119] For example, in the 2019 case *Jernigan v. Southern California Permanente Medical Group*, a California trial court evaluated a state law hostile work environment claim after the updated legislation's enactment.[120] In its hostile work environment analysis which culminated in granting summary judgment to the employer, the court cited *Lewis v. City of Benicia*, which cites to *Kelley v. The Conco Companies*, one of the cases explicitly disapproved of in the sexual harassment legislation.[121] The case also cites to *Fuentes v. AutoZone, Inc.* in supporting its decision, a case which cites to the United States Supreme Court's majority opinion in *Harris v. Forklift Systems*, contrary to the California legislature's endorsement of Justice Ruth Bader Ginsburg's concurrence.[122] In doing so, the trial court avoided

> [T]he Legislature affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17 that in a workplace harassment suit "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job." (Id. at 26) . . . . A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment. In that regard, the Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in *Brooks v. City of San Mateo* (2000) 229 F.3d 917 and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act . . . .[T]he Legislature affirms the decision in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 in its rejection of the 'stray remarks doctrine.' . . . In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties. The Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191. Harassment cases are rarely appropriate for disposition on summary judgment. In that regard, the Legislature affirms the decision in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 and its observation that hostile working environment cases involve issues 'not determinable on paper.'"

CAL. GOV'T CODE § 12923.

119. *See supra* Part I.B.2.

120. Jernigan v. S. Cal. Permanente Med. Grp., Inc., No. BC703698, 2019 Cal. Super. LEXIS 12827 (Cal. Sup. Dec. 6, 2019).

121. *Id.* at *8; Lewis v. City of Benicia, 224 Cal. App. 4th Supp. 1519, 1525 (Cal. Ct. App. 2014); CAL. GOV'T CODE § 12923.

122. *Jernigan*, 2019 Cal. Super. LEXIS 12827, at *8; CAL. GOV'T CODE § 12923; Fuentes v. AutoZone, Inc., 200 Cal. App. 4th Supp. 1221, 1227 (Cal. Ct. App. 2011).

citing directly to the particular cases forbidden by the updated legislation, but because it was applying the severe or pervasive standard, it continued to cite to the line of cases which have established the narrowed standard over time.[123]

Jackson v. Pepperdine University, a 2020 case, also demonstrates the manner in which California courts continue to treat the federal severe or pervasive standard and the "updated" state standard in substantially the same way.[124] In the case, the court explicitly discussed whether its analysis would differ based on the recent California legislation because whether that legislation would be retroactive was in dispute.[125] The court did not address the retroactivity issue, determining that "both before and after its enactment, the totality of the circumstances Jackson alleged do not reflect conduct sufficiently severe to constitute actionable sexual harassment."[126] The court acknowledged its inability under the legislation to rely on certain precedent, but concluded that the formulation of a court's inquiry into what constitutes a hostile work environment under the new legislation is "extremely similar" to that established by earlier case law.[127]

These post-legislation California cases demonstrate that, because the severe or pervasive standard originated in Title VII law and has permeated sexual harassment cases in both federal and state contexts, it is unlikely that it can shake its origins and history and be applied in a new and unique manner to state Human Rights Act hostile work environment claims. The early embodiment of this minimally altered application of the severe or pervasive standard in Minnesota is seen in the *Schroeder* case discussed above.[128] In *Schroeder*, the district court wrote that the elements of a Title VII and an MHRA hostile work environment sexual harassment claim are the same, and confirmed that under both types of claims, the court analyzes the harassing conduct under the severe or pervasive standard.[129] *Schroeder*'s side-by-side application of the standard to federal and state claims thus demonstrates the risk that courts will brush aside the *Kenneh* court's direction that, "[i]n Minnesota, the standard must evolve to reflect changes in societal attitudes

123. *See supra* Part I.B.2.

124. Jackson v. Pepperdine Univ., No. B296411, 2020 WL 5200946, at *1–10 (Cal. Ct. App. Sept. 1, 2020).

125. *Id.* at *1.

126. *Id.* at *2.

127. *Id.* at *9.

128. Schroeder v. Axel H. Ohman, Inc., No. 19-1836 (MJD/TNL), 2021 WL 396779 (D. Minn. Feb. 4, 2021).

129. *Id.* at *5.

towards what is acceptable behavior in the workplace,"[130] and instead continue to apply the standard in the same pre-*Kenneh* way, citing the precedent that the *Kenneh* court hoped to evolve beyond.[131]

This risk of federal courts engaging in joint Title VII and MHRA sexual harassment hostile work environment analyses that fail to acknowledge any unique qualities of the severe or pervasive standard under Minnesota law is especially true as the Eighth Circuit, just a few months prior to *Kenneh*, retained the severe or pervasive standard in *Paskert v. Kemna-ASA Auto Plaza, Inc.*, "doubling down on the notion that the severe or pervasive standard sets a tremendously 'high threshold,' at least in federal courts applying federal law in this jurisdiction."[132] With the United States Supreme Court subsequently denying Paskert's petition for certiorari, the severe or pervasive standard remains ensconced in federal law and the federal cases pose a danger of continuing to inform state precedent through side-by-side Title VII and MHRA hostile work environment analyses.[133]

D. Recommendations for Further Change

Because of the continuing lack of clarity and risk of confusing influence of federal precedent, as well as state precedent that relied on federal law, the Minnesota Supreme Court or Minnesota state legislature should reject the severe or pervasive standard and adopt a new standard in order to increase the ability of plaintiffs to have a meaningful opportunity for justice when bringing sexual

130. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 231 (Minn. 2020).

131. The difficulty of applying an "evolved" or "expanded" standard by trial courts has been demonstrated in disability law. In 2008, Congress passed the Americans with Disabilities Act Amendments Act [ADAAA], which "explicitly disavow[ed] the reasoning of the four Supreme Court decisions that narrowed the scope of the [Americans with Disabilities Act]'s disability definition." Stephen F. Befort, *An Empirical Examination of Case Outcomes under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2042–43 (2013). However, while the "ADAAA emphasizes that the definition of disability should be broadly construed and clarifies and expands the definition's meaning in several ways," there is some evidence that courts have continued to interpret the definition of disability in a less-than-expansive way, thus mitigating the increase in plaintiff-friendly outcomes intended by the ADAAA. *Id.* at 2042–43, 2066–68.

132. Engelmeier & Tabery, Paskert *and* Kenneh, *supra* note 97, at 25 (citing Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535 (8th Cir. 2020)).

133. Michael Angell, *High Court Won't Weigh in on Bar for Sex Harassment Claims*, LAW360 (Dec. 7, 2020), https://www.law360.com/articles/1335107/print?section=appellate [https://perma.cc/86JH-5UVV]; *see also* Engelmeier & Tabery, *Severe or Pervasive?*, *supra* note 22 ("Minnesota state law cases are invaded by the 8th Circuit's standard.").

harassment claims under the MHRA. One option for this rejection and adoption of a new standard would be to build on California's approach. California's legislation "affirm[ed] its approval" for Justice Ruth Bader Ginsburg's standard proposed in her concurrence in *Harris v. Forklift Systems*, that a plaintiff in a hostile work environment sexual harassment case must prove "that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'"[134] However, instead of solely "affirming" that standard, either the Minnesota Supreme Court or legislature should explicitly denounce the severe or pervasive standard and replace it with Ginsburg's.

Based on the *Kenneh* court's reluctance to overturn precedent, particularly in the realm of statutory interpretation, this replacement of the severe or pervasive standard would ideally be enacted by the state legislature.[135] Because the MHRA does not actually contain the words "severe or pervasive,"[136] this legislation would likely take the form of amending the MHRA to denounce the severe or pervasive standard and related precedent and to insert the new standard, as proposed in a previous bill.[137]

However, if the legislature fails to act, the replacement of the standard by the Minnesota Supreme Court is possible and justified. As noted, the severe or pervasive standard is not codified in the MHRA, and was not expressly adopted by the Minnesota Supreme Court as the standard for interpreting hostile work environment sexual harassment cases until 2013.[138] Thus the court would not be overturning any statutory language but instead would overturn the case which adopted that standard for interpreting the statute.[139] Though the *Kenneh* court expressed a desire to maintain stability

134. CAL. GOV'T CODE § 12923 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

135. *Kenneh*, 944 N.W.2d at 230 ("[T]he doctrine of stare decisis has special force in the area of statutory interpretation because the Legislature is free to alter what we have done.") (citing Schuette v. City of Hutchinson, 843 N.W.2d 233, 238 (Minn. 2014)).

136. Minnesota Human Rights Act, MINN. STAT. § 363A.03 (2020).

137. H.F. 4459, 90th Leg., Reg. Sess. (Minn. 2018) ("An intimidating, hostile, or offensive environment under paragraph (a), clause (3), does not require the harassing conduct or communication to be severe or pervasive.").

138. Brief for Emp. Law. Ass'n Upper Midwest, et al. as Amici Curiae Supporting Appellant, Kenneh v. Homeward Bound, Inc., (No. A18-0174), 2018 WL 5111128, at *3 (Minn. Ct. App. May 17, 2018) (citing Rasmussen v. Two Harbors Fish Co., 832 N.W.2d 790, 796–97 (Minn. 2013)).

139. *Id.*

in the law under stare decisis,[140] it failed to mitigate the inconsistency and instability of the law it was choosing to retain, instead making the contradictory suggestion that the standard must evolve.[141] As this Note has argued, maintaining the standard with its inconsistent and frequently offensive precedent for the sake of stability, while also modernizing with society, poses the risk both of continued inconsistency and lack of evolution as applied in the lower courts.[142] As the Minnesota Supreme Court has previously stated, "[s]tare decisis promotes stability in the law, but it 'does not bind [the court] to unsound principles.'"[143] The severe or pervasive standard has proven to be "unsound," and rejecting it can better serve the public policy of the MHRA of protecting employees against harm and promoting workplace safety and equality.[144] Further, like in New York, where the state legislature subsequently enacted a law following that new court-adopted standard,[145] the Minnesota Supreme Court's replacement of the severe or pervasive standard in the next hostile work environment sexual harassment case may

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140. The Court of Appeals of Minnesota recently defined the doctrine of stare decisis as:

> [A] foundation stone of the rule of law that instructs appellate courts to stand by yesterday's decisions. Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. "The doctrine of stare decisis directs us to adhere to our former decisions in order to promote the stability of the law and the integrity of the judicial process." Adherence to the principle of stare decisis promotes the important values of "stability, order, and predictability."

State v. Ahmed, No. 19-1222, 2020 Minn. App. LEXIS 266, at *4–5 (Minn. Ct. App. Apr. 6, 2020).

141. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 231 (Minn. 2020).

142. *See supra* Part II.C.

143. Cargill, Inc. v. Ace Am. Ins. Co., 784 N.W.2d 341, 352 (Minn. 2010) (citing Oanes v. Allstate Ins. Co., 617 N.W.2d 401, 406 (Minn. 2000)).

144. *See* Brief for Emp. Law. Assoc. Upper Midwest, et al. as Amici Curiae Supporting Appellant, Kenneh v. Homeward Bound, Inc., No. A18-0174, 2018 WL 5111128, at *9 (Minn. Ct. App. May 17, 2018) ("The public policy underlying the MHRA sexual harassment prohibition has been highlighted on a national scale in recent months. Sexual harassment remains prevalent in the American workplace and remains a substantial hurdle for working women. Minnesota Department of Human Rights Commissioner Kevin Lindsey recently . . . cited a 2016 Equal Employment Opportunity Commission report stating that 85% of women report having suffered sexual harassment on the job. Sexual harassment is not isolated or rare but has rather been a hidden epidemic. The public policy underlying the MHRA's prohibition of sexual harassment has not been served by the Court's insertion of the 'severe or pervasive' standard into its definition." (internal citations omitted)). *Contra Kenneh*, 944 N.W.2d at 230 ("Homeward Bound argues that, because the Legislature has recently shown an interest in redefining sexual harassment, we must exercise judicial restraint.").

145. *See supra* Part I.C.1; N.Y. Sess. A8421 (N.Y. 2019).

provide the needed support for the state legislature to pass associated legislation amending the MHRA to incorporate the new standard.

Conclusion

The Minnesota Supreme Court took an initial step to increase the opportunity for justice for victims of workplace sexual harassment in *Kenneh v. Homeward Bound Inc.*, specifically in its warning to lower courts about granting summary judgment to defendant employers and depriving plaintiffs of a jury trial. However, this step is ultimately insufficient for Minnesotans seeking protection under the MHRA. In order to truly break free from the current sexual harassment precedent, which has disproportionately burdened plaintiffs, the Minnesota legislature or Minnesota Supreme Court should adopt a new standard for hostile work environment sexual harassment claims. Combined with *Kenneh*'s summary judgment holdings, this new standard can set Minnesota apart from the federal law that has harmed victims, and better fulfill the MHRA's policy goals of protecting the civil right of discrimination-free employment for all Minnesotans.[146]

146. Minnesota Human Rights Act, MINN. STAT. § 363A.02 (2020).

"We Do Not Live Single-Issue Lives":[1] *Bostock v. Clayton County* Mainstreaming Title VII Intersectional Discrimination Claims

Sharon Beck†

Introduction

"I need to do this for myself and for my own peace of mind and to end the agony in my soul."

-Aimee Stephens[2]

In late 2017, Monique Hicks, known by her stage name "Mo'Nique," was recruited by Netflix to join the ranks of other comedians[3] to perform a stand up special.[4] Mo'Nique, a Black woman, is an Oscar-winning actress[5] with an incredibly successful entertainment and comedy career.[6] Yet Netflix's initial offer for her performance was only $500,000, while Amy Schumer, a White female comedian, was paid $13 million for her special.[7] Mo'Nique's

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1. Audre Lorde, *Learning from the 60s*, *Sister Outsider*, *in* ZAMI, SISTER OUTSIDER, UNDERSONG 138 (Book-of-the-Month-Club, Inc., 1993) (1984) ("There is no such thing as a single-issue struggle because we do not live single-issue lives.").

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2. Brief for Respondent Aimee Stephens at 8, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, 139 S. Ct. 1599 (2019) (No. 18-107), https://www.aclu.org/sites/default/files/field_document/075_aimee_stephens_brief.pdf [https://perma.cc/7YA4-CDVL].

3. Hicks v. Netflix, Inc., 472 F. Supp. 3d 763, 767 (C.D. Cal. 2020) (listing other comedians who have performed Netflix stand-up programs, including Jerry Seinfeld, Eddie Murphy, Dave Chapelle, Chris Rock, Ellen DeGeneres, Jeff Dunham, Ricky Gervais, and Amy Schumer).

4. *Id.*

5. *Id.* (elaborating that Mo'Nique has also won, among other awards, the Screen Actors Guild, Sundance Film Festival, BET, and NAACP awards).

6. *Id.* at 768.

7. *Id.* (noting that Mo'Nique's offer was an initial negotiation starting point

Black male counterparts, such as Dave Chapelle, were paid close to $20 million for their programs.[8] After negotiation talks broke down between Mo'Nique's and Netflix's representatives, Mo'Nique sued Netflix for discriminating against her in their negotiations.[9] Mo'Nique specifically alleged that Netflix discriminated against her because she is a Black woman.[10]

In July 2020, a California district court rejected Netflix's motion to dismiss Mo'Nique's retaliation claims.[11] While the court discussed in detail the facts Mo'Nique plead regarding both her discrimination and retaliation claims, it was bound only to rule on the challenged retaliation counts.[12] It remains to be seen whether the court will take the path less followed by analyzing Mo'Nique's discrimination claims as a Black woman, rather than the traditional analysis which would bifurcate Mo'Nique's suit into separate race and gender claims.[13] As this Note explains, the strength of Mo'Nique's claims will likely hinge on an intersectional analysis: she has a much stronger case if she can show the comedians who are not Black women, such as Schumer or Chapelle, were paid substantially more than Netflix was willing to pay Mo'Nique.

The success of Mo'Nique's claims may be impacted by a summer 2020 decision from the U.S. Supreme Court. In the landmark case *Bostock v. Clayton County, Georgia*, the Court held that Title VII's definition of "sex" includes discrimination based on sexual orientation and gender identity.[14] By holding that LBGTQ+ plaintiffs have standing for Title VII claims, *Bostock* creates a new opportunity for intersectional claims brought by LGBTQ+ individuals with multiple identities protected by Title VII. In addition to *Bostock*'s holding, the opinion's textualist approach to

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while the other comedians' pay were final, post-negotiation payments).

8. *Id.*

9. *Id.* at 769.

10. *Id.* at 767–68 ("Overall, [Mo'Nique] alleges that Netflix made offers to other comedic talent to perform in similar stand-up shows, but, when the talent was not a Black woman, Netflix paid astronomically more than it did to Black women like her.").

11. *Id.* at 779.

12. *Cf. id.* at 771 ("Netflix moves to dismiss all of Mo'Nique's retaliation-based claims, specifically her Fifth Claim asserting retaliation under FEHA, the portion of the Sixth Claim asserting failure to prevent retaliation under FEHA, and the Eighth Claim asserting retaliation under 42 U.S.C. § 1981." (footnote omitted)).

13. *See* Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)history,* 95 B.U. L. REV. 713, 727 (2015) ("Despite the integral role of intersectional experiences in informing the origins and early development of Title VII, court opinions that acknowledged, much less discussed, intersectionality were few and far between.").

14. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

Title VII may be used to advance intersectional discrimination claims, as further discussed in this Note. This broader, more robust interpretation of Title VII has the potential to revolutionize how courts manage discrimination claims based on multiple protected characteristics.[15]

Part I of this Note explains that intersectional discrimination claims are consistent with existing Title VII interpretation. Part II asserts that modern mainstreaming of intersectionality and *Bostock* have created a new opportunity for intersectional analysis to be used in discrimination suits. This Note concludes with the recommendation that plaintiffs should continue to pursue intersectional discrimination claims and that courts should adopt a more progressive and accurate analysis of the ways in which discrimination operates.

Background

A. Intersectionality has developed beyond the boundaries of legal academia.

In the late 1980s, Kimberlé Crenshaw penned a groundbreaking article that critiqued the very foundations of discrimination legal theory.[16] Crenshaw argued that legal analysis marginalizes the unique forms of discrimination faced by people—especially Black women—with intersecting identities.[17] Crenshaw explained that Black women are discriminated against because they are Black, because they are women, *and* because they are Black women.[18] Crenshaw described this discrimination as traffic in an intersection:

> Consider an analogy to traffic in an intersection, coming and

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15. This Note uses "intersectional discrimination" and its variants in the same ways as "multiple protected characteristics" and its variants. The latter distinguishes from "single protected characteristics," or those suits in which a plaintiff alleges discrimination on the basis of one protected characteristic (*e.g.*, national origin discrimination).

16. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

17. *See id.*

18. *Id.* at 149 ("Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men."); Jane Coaston, *The Intersectionality Wars*, VOX (May 28, 2019), https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination [https://perma.cc/2MU4-DCM8] ("[T]he law seemed to forget that black women are both black and female, and thus subject to discrimination on the basis of both race, gender, and often, a combination of the two.").

> going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.[19]

Before it became a well-known term, intersectionality was a framework that many scholars employed in their interdisciplinary work.[20] Black feminists such as bell hooks,[21] Barbara Smith,[22] Patricia Hill Collins,[23] Audre Lorde,[24] and others added to the growing body of intersectional literature. Importantly, intersectionality as a theory owes a significant amount to Black LGBTQ+ people, who were among the first to question how racism and heterosexism are interconnected.[25] As Hill Collins notes, "assuming that all Black people are heterosexual and that all LGBT people are White distorts the experiences of LGBT Black people."[26] The work of these scholars and activists has paved the way for the mainstreaming of intersectionality as a way of discussing lived experiences, even outside of academic confines.[27]

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19. Crenshaw, *supra* note 16, at 149.

20. *Word We're Watching: Intersectionality*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/intersectionality-meaning [https://perma.cc/AYR5-AN9M].

21. BELL HOOKS, AIN'T I A WOMAN 13 (Routledge, 2015) (1981) ("To both groups I voiced my conviction that the struggle to end racism and the struggle to end sexism were naturally intertwined, that to make them separate was to deny a basic truth of our existence, that race and sex are both immutable facets of human identity.").

22. The Combahee River Collective, *The Combahee River Collective Statement* (Apr. 1977), https://americanstudies.yale.edu/sites/default/files/files/Keyword%20Coalition_Readings.pdf [https://perma.cc/2YXD-H5N2] ("[W]e are actively committed to struggling against racial, sexual, heterosexual, and class oppression, and see as our particular task the development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking.").

23. PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM 11 (Routledge, 2004) ("Intersectional paradigms view race, class, gender, sexuality, ethnicity, and age, among others, as mutually constructing systems of power. Because these systems permeate all social relations, untangling their effects in any given situation or for any given population remains difficult.").

24. Audre Lorde, *Sexism: An American Disease in Blackface*, *Sister Outsider*, *in* ZAMI, SISTER OUTSIDER, UNDERSONG 60 (Book-of-the-Month-Club, Inc., 1993) (1984) ("Black feminism is not white feminism in blackface. Black women have particular and legitimate issues which affect our lives as Black women, and addressing those issues does not make us any less Black.").

25. HILL COLLINS, *supra* note 23, at 88.

26. *Id.*

27. *E.g.*, ADP, *What is Intersectionality and Why is it Important?*, YOUTUBE (Feb. 5, 2020), https://www.youtube.com/watch?v=3qhadch9oDo [https://perma.cc/TRV5-Y5RS] (explaining intersectionality in the workplace for a general employment

The use of "intersectionality" has grown far beyond its origins. As Crenshaw puts it, "'the thing that's kind of ironic about intersectionality is that it had to leave town' — the world of the law — 'in order to get famous.'"[28] After years of use by academics, the mainstream zeitgeist caught on to the term. The word "intersectionality" was added to Merriam Webster Dictionary in 2017,[29] nearly 30 years after Crenshaw published her article. It has inspired a generation of activists, as well as sparked debate and controversy.[30]

While Crenshaw's argument has received mainstream attention outside the legal field, it cannot be forgotten in discrimination analysis. Antidiscrimination law is fundamentally less potent when it fails to assess claims intersectionally.[31] Judicial reluctance or outright refusal to incorporate intersectional analysis is "analogous to a doctor's decision at the scene of an accident to treat an accident victim only if the injury is recognized by medical insurance."[32] The ethical underpinnings behind treating all injured patients, regardless of their insurance coverage, are the same that support remedying all injured plaintiffs, regardless of their discriminated identity. The social implications of ignoring intersectional claims impact real lives.[33] When courts fail to analyze discrimination claims through an intersectional lens, marginalized people's "issues 'slip through the cracks' of legal protection, and the

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audience); Arica L. Coleman, *What's Intersectionality? Let These Scholars Explain the Theory and Its History*, TIME (Mar. 29, 2019), https://time.com/5560575/intersectionality-theory/ [https://perma.cc/4B7M-TK3A].

28. Coaston, *supra* note 18 (internal quotes omitted) (quoting Kimberlé Crenshaw).

29. *Word We're Watching: Intersectionality*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/intersectionality-meaning [https://perma.cc/9BFV-YR3P].

30. *Id.*

31. Crenshaw, *supra* note 16, at 145 ("*Moore* [*v. Hughes Helicopters, Inc.*, 708 F.2d. 475, 480 (9th Cir. 1983)] illustrates one of the limitations of antidiscrimination law's remedial scope and normative vision. The refusal to allow a multiply-disadvantaged class to represent others who may be singularly-disadvantaged defeats efforts to restructure the distribution of opportunity and limits remedial relief to minor adjustments within an established hierarchy.").

32. *Id.* at 149.

33. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 374 (1991) ("Problems arise in the development of legal theory and social policy when the possibility of other relationships between race and gender, such as intersection, are not considered."); *e.g.*, HILL COLLINS, *supra* note 23, at 10 (explaining, as an example, that cancer rates between African American men and women are different because of their genders, and thus, any organizing around medical rights must acknowledge gender in order to be successful).

gender components of racism and the race components of sexism remain hidden."[34]

B. Title VII has multiple frameworks to analyze employment discrimination claims.

Crenshaw's article fundamentally challenged the traditional analysis that courts apply to Title VII of the Civil Rights Act.[35] Title VII prohibits employers from taking adverse employment actions against its employees because of their "race, color, religion, sex, or national origin."[36] Title VII's purpose was to create a cause of action for employment discrimination based on race.[37] Specifically, the statute was "intended to address blatant forms of excluding African Americans from the workplace."[38]

To provide the protection granted by Title VII, courts have developed two main types of claims: disparate impact and disparate treatment.[39] Under the disparate treatment model, plaintiffs may offer circumstantial evidence to show discrimination.[40] Alternatively, in disparate impact cases, plaintiffs allege that an employer's facially neutral policy, in practice, discriminatorily affects a protected group of employees. [41] This Note focuses only on

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34. Caldwell, *supra* note 33, at 374 (footnote omitted) (quoting MARGARET SIMMS, SLIPPING THROUGH THE CRACKS: THE STATUS OF BLACK WOMEN (J. Malveaux & M. Simms eds., 1987)).

35. *See, e.g.*, Crenshaw, *supra* note 16, at 141 ("I . . . believe that the way courts interpret claims made by Black women is itself part of Black women's experience and, consequently, a cursory review of cases involving Black female plaintiffs is quite revealing. To illustrate the difficulties inherent in judicial treatment of intersectionality, I will consider three Title VII cases . . . ." (footnote omitted)).

36. 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

37. Emma Reece Denny, *Mo' Claims Mo' Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 LAW & INEQ. 339, 341 (2012) (referencing United Steelworkers of Am. v. Weber, 443 U.S. 193, 202 (1979)).

38. *Id.*

39. *Id.* at 342.

40. *Id.*

41. See generally Griggs v. Duke Power Co., 401 U.S. 424 (1971) (discussing disparate impact claim related to employment requirements); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII,* 98 GEO. L.J. 1079, 1120 (2010) ("In applying disparate impact theory, 'statistical significance establishes that the challenged practice likely caused the disparity, and the four-fifths rule establishes that the disparity is large enough to matter.' Under the four-fifths rule, a disparity is actionable when one group's pass (non-impacted) rate is less than four-fifths (80%) of another group's pass (non-impacted) rate.") (footnote omitted); Denny, *supra* note 37, at 342 (noting that disparate impact claims

disparate treatment for two reasons: disparate treatment claims are more common than disparate impact claims, and circumstantial evidence is more applicable in intersectional discrimination cases than disparate impact claims, which rely on direct evidence.

At the time Title VII was enacted, it was far more common for employers to refuse to hire groups of individuals from the same class.[42] It was also common for employers not to promote whole categories of a protected class, such as women, or to only promote members of that class in small numbers.[43] Today, however, the primary method of proving disparate treatment claims is through circumstantial, rather than direct, [44] evidence.[45] Very few employers categorically refuse to hire entire groups of people based on a shared protected characteristic.[46] Instead, employers' hiring practices—conscious or subconscious—often more covertly favor or disfavor certain classes.[47] As overt discrimination has diminished and covert bias has increased, circumstantial evidence has become even more important for Title VII cases.[48]

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require a showing of intentional discrimination), for information on disparate impact cases.

42. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011) ("Some decades ago, when identity-based differentiation was relatively open and notorious . . . individuals claiming discrimination could often point to counterparts who were treated better. Courts could then deduce, with some confidence, that the protected trait was the reason for the adverse treatment at issue." (footnote omitted)); *e.g.*, *Griggs*, 401 U.S. at 426–27 ("The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant."). See generally *Sex, Discrimination, and the Constitution*, 2 STAN. L. REV. 691, 718 (1950) ("[D]espite the great progress that has been made toward narrowing the common-law gap between the sexes, there is no full legal equality for women in present-day America."), for an overview of the state of women's rights, including worker rights, in 1950.

43. *E.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 233 (1989) ("Of the 662 partners at the firm at that time, 7 were women.").

44. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 751 (2005) (explaining that direct evidence claims are rare).

45. *Id.*

46. *See generally* Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1490 (2004) ("Unconscious racism is today's enemy.").

47. *See* Ashleigh Shelby Rosette, Modupe Akinola & Anyi Ma, *Subtle Discrimination in the Workplace: Individual Level Factors and Processes*, *in* THE OXFORD HANDBOOK OF WORKPLACE DISCRIMINATION 14 (Adrienne J. Colella & Eden B. King eds., 2016), https://static1.squarespace.com/static/596665f6099c01d2441c897c/t/59b92659be42d6051941b451/1505306201931/subtle-discrimination-in-the-workplace.pdf [https://perma.cc/V7SK-DXAM].

48. Hart, *supra* note 44 ("It is an exceedingly rare case in which a plaintiff has true direct evidence of discriminatory intent, such as a statement from the employer that 'we don't hire Mexicans, so you can't have this job.' Most Title VII cases are therefore proved through circumstantial evidence.").

To meet their *prima facie* burden in circumstantial cases, the plaintiff must prove that they 1) are a member of a protected class, 2) are qualified for their position, 3) suffered an adverse employment action, and 4) were treated differently than similarly-situated employees/applicants who are not part of their protected class.[49] The burden then shifts to the employer to provide a "legitimate, nondiscriminatory reason" for the adverse action.[50] If the employer provides such a reason, the burden shifts back to the plaintiff to show that the employer's reason is actually pretext for discrimination.[51]

If the plaintiff proves pretext, the court may require the employer to pay the plaintiff monetary damages.[52] Courts may award backpay,[53] which is intended to both make the plaintiff "whole" *and* penalize the employer.[54] Thus, Title VII uses financial damage both to remedy specific instances of discrimination and to deter future discriminatory practices.[55]

C. American courts have not robustly developed intersectional cases.

Courts applying Title VII have failed to adequately address the claims of plaintiffs with multiple intersecting identities.[56]

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49. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) ("[Plaintiff showed] (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man.").

50. *McDonnell*, 411 U.S. at 802.

51. Denny, s*upra* note 37, at 344.

52. U.S. EQUAL EMP. OPPORTUNITY COMM'N, REMEDIES FOR EMPLOYMENT DISCRIMINATION, https://www.eeoc.gov/remedies-employment-discrimination [https://perma.cc/8H2J-EZK8].

53. *See* Denny, *supra* note 37, at 341 n.13 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975)) (explaining that backpay, or the amount the plaintiff would have made absent the adverse action, is routinely awarded).

54. Hannah Nicholes, *Making the Case for Interns: How the Federal Courts' Refusal to Protect Interns Means the Failure of Title VII*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 81, 85 (2014) ("The 'make whole' purpose of Title VII, done in part through the award of back-pay, serves two purposes: (1) to make the victim a whole; and (2) to penalize the employer in such a way as to deter further discriminatory actions.").

55. *Id.* ("In passing Title VII, Congress intended to both eliminate discrimination on a case-by-case basis, and deter employers who may discriminate in the future.").

56. Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 992 (2011) ("Using a representative sample of judicial opinions over 35 years of federal employment discrimination litigation, we show that non-white women are less likely to win their cases than is any other demographic group.").

Plaintiffs alleging intersectional discrimination claims succeed in court only half as often as those making claims of discrimination based on only one characteristic.[57] Professor Serena Mayeri uses the term "intersectionality anti-canon" to describe the body of Title VII case law that does not recognize multiple-characteristic discrimination claims.[58] Some decisions within the anti-canon, such as *Rogers v. Am. Airlines, Inc.*, blatantly refused to recognize Black women's cultural identities and practices.[59] Other cases, such as *DeGraffenreid v. General Motors Assembly Division*[60] and *Moore v. Hughes Helicopters, Inc.*,[61] denied plaintiff's claims on grounds that there was not a group against which to compare the Black women plaintiffs: neither white women employees nor Black men employees had faced discrimination.[62]

Moreover, even opinions that seem to signal approval of intersectional analysis cabined the effectiveness or power of this framework.[63] One Fifth Circuit decision employed an "awkward sex-plus analysis" to a race/sex discrimination claim, dampening its otherwise encouraging dictum.[64] An Eighth Circuit opinion

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57. *Id.*

58. Mayeri, *supra* note 13, at 727.

59. *Id.* at 728–29 (referencing Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981)).

60. DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976), *aff'd in part*, *rev'd in part*, 558 F.2d 480 (8th Cir. 1977) (rejecting plaintiffs' analysis as Black women and only analyzing their claims as either Black employees or as women employees). *But see* DeGraffenreid v. Gen. Motors Assembly Div., St. Louis, 558 F.2d 480, 484 (8th Cir. 1977) ("We do not subscribe entirely to the district court's reasoning in rejecting appellants' claims of race and sex discrimination under Title VII. However, . . . we must sustain the district court's judgment on the appellants' Title VII claims, because [of recent Supreme Court holdings on seniority systems].").

61. Moore v. Hughes Helicopters, Inc., 708 F.2d. 475, 480 (9th Cir. 1983) (denying a Black female plaintiff's representation of a class that contained white women).

62. *Id.*

63. *See* Mayeri, *supra* note 13, at 729.

64. *Id.* (referencing Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1032–34 (5th Cir. 1980) ("Recognition of black females as a distinct protected subgroup for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward black females. Therefore, we hold that when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff.")); *see also Jefferies*, 615 F.2d at 1033 (describing "sex plus" cases as those dealing with discrimination against a subcategory of women, such as women with children); *see also* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1046 (10th Cir. 2020) (quoting Chadwick v. WellPoint, Inc., 561 F.3d 38, 43 (1st Cir. 2009)) ("[T]he 'plus' does not mean that more than simple sex discrimination must be alleged; rather, it describes the case where not all members of a disfavored class are

recognized that a Black pregnant plaintiff had standing to bring her claim, but ultimately found her termination was permissible because of the employer's preference for nonpregnant employees as "role models" for their young clientele, calling this a "business necessity."[65] This decision frustrated intersectional claims by allowing employers to argue that placating their customers' perceptions of employees with intersecting identities could be considered fundamental to business operations. Finally, the Tenth Circuit permitted Black women plaintiffs to "aggregate" sexual and racial harassment evidence but suggested that such discrimination was "'additive' rather than inextricably intertwined, mutually reinforcing, and manifest in particular stereotypes, epithets, and abuses directed toward female employees of color."[66]

Intersectional legal scholars have consistently praised a few Title VII opinions. *Lam v. Univ. of Hawai'i*[67] represents the "high water mark" of intersectionality cases.[68] The court in *Lam* reasoned, "where two bases for discrimination exist, they cannot be neatly reduced to distinct components."[69] In *Jeffers v. Thompson*, the District Court for the District of Maryland reached similar conclusions on the role of intersectionality in discrimination claims, noting that "[s]ome characteristics, such as race, color, and national origin, often fuse inextricably."[70] The *Jeffers* court noted that Title VII undoubtedly protects against intersectional discrimination; because it prohibits each type of discrimination separately, it must prohibit any combination or intersectional discrimination as well.[71]

While *Bostock v. Clayton County*'s issue did not relate to intersectional discrimination, it touches on employment discrimination more broadly. In *Bostock*, the Supreme Court

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discriminated against.").

65. *Id.* (describing the decision in Chambers v. Omaha Girls Club, 834 F.2d 697, 703 (8th Cir. 1987)).

66. *Id.* (critiquing Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416–17 (10th Cir. 1987)).

67. *See* Lam v. Univ. of Hawai'i, 40 F.3d 1551 (9th Cir. 1994), *as amended* (Nov. 21, 1994), *as amended* (Dec. 14, 1994).

68. Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1475 (2009).

69. *Lam*, 40 F.3d at 1562 (9th Cir. 1994).

70. Jeffers v. Thompson, 264 F. Supp. 2d 314, 326 (D. Md. 2003) (citing *Lam*, 40 F.3d at 1562 (9th Cir. 1994)) ("Made flesh in a person, [these characteristics] indivisibly intermingle. The meaning of the statute is plain and unambiguous. Title VII prohibits employment discrimination based on any of the named characteristics, whether individually or in combination.").

71. *Id.* ("Discrimination against African–American women necessarily combines (even if it cannot be dichotomized into) discrimination against African–Americans and discrimination against women—neither of which Title VII permits.").

recently clarified that discrimination on the basis of "sex" in Title VII includes sexual orientation or transgender status discrimination.[72] The majority opinion, written by Justice Gorsuch,[73] is grounded in strict textualism.[74] Gorsuch held that in sexual orientation and transgender discrimination cases, a plaintiff succeeds if they prove their employer took an adverse action against them because of their sexual orientation or transgender status.[75] He applied the "but-for causation" test[76] to expand Title VII's "sex" protected characteristic to include sexual orientation and transgender status.[77] Furthermore, the decision incorporates Title VII mixed-motive analysis, in which an employer is still liable for violating the statute even if it had additional, nondiscriminatory reasons for taking the adverse action at issue.[78] As this Note further explains, *Bostock*'s modernizing of Title VII analysis to more accurately reflect patterns of discrimination in employment is an encouraging sign for intersectional claims.

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72. *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

73. Michael D. Shear, *Gorsuch, Conservative Favorite Appointed by Trump, Leads Way on Landmark Decision*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/06/15/us/politics/gorsuch-supreme-court-gay-transgender-rights.html [https://perma.cc/9C4R-967M] (noting that Gorsuch is a conservative justice and appointed by a Republican president, Donald Trump).

74. Hunter Poindexter, *A Textualist's Dream: Reviewing Justice Gorsuch's Opinion in Bostock v. Clayton County*, UNIV. OF CIN. L.R. (June 23, 2020), https://uclawreview.org/2020/06/23/a-textualists-dream-reviewing-justice-gorsuchs-opinion-in-bostock-v-clayton-county/ [https://perma.cc/8AVF-ECF8].

75. *Id.*

76. *Bostock*, 140 S. Ct. at 1739 ("[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.").

77. *Id.* at 9 ("[H]omosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.").

78. *Id.* ("Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.").

Part I: Intersectional Analysis is Consistent with Title VII Precedent

In 2022, thirty-three years after Crenshaw introduced intersectionality, the analysis is no longer a radical framework.[79] By definition, it fits into existing discrimination law because intersectional discrimination *is* discrimination.[80] This section addresses some of the most significant hurdles that intersectional claims face, concluding that intersectional discrimination claims are entirely consistent with Title VII doctrine. It explains that *Bostock* refreshed the mandate that courts focus on individual circumstances in Title VII cases, which is especially important when analyzing the nuances of intersectional discrimination. This section also argues that plaintiffs may still overcome the comparator *prima facie* element for Title VII claims. Finally, this section explains how intersectional discrimination claims accord with the broader theory and policy in Title VII case law.

A. Intersectional analysis is consistent with the mandate of an individual focus.

Title VII prohibits employers from discriminating against "individual" employees.[81] In Title VII discrimination cases, a general statute is being applied to specific, unique facts, including the manner and mode of reported discrimination, as well as the employee's situation and other relevant factors.[82] For that reason, it is imperative that courts focus on the circumstances of the individual plaintiffs before it.[83]

In *Connecticut v. Teal*, the Supreme Court explained that "[Title VII] prohibits practices that would deprive or tend to deprive

79. *See* Crenshaw, *supra* note 16, at 139.

80. *Cf.* Caldwell, *supra* note 33, at 372 ("Progress against racism and sexism requires in addition, therefore, not only an eradication of negative stereotypes about black womanhood and their associated behavioral consequences, but also a recognition that theories of legal protection that affect the material circumstances of black women are not marginal to theories regarding race or gender, but rather are central to both."). *See also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 342 (2013) ("Title VII is central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces and in all sectors of economic endeavor.").

81. 42 U.S.C. § 2000e-(f) ("The term 'employee' means an individual employed by an employer . . . .").

82. *E.g.*, City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 716 (1978) (holding that the employer violated Title VII by requiring women to pay more into a pension fund because while women, as a class, on average live longer than men, each individual woman would be discriminated against if she did not reach the average life expectancy).

83. Connecticut v. Teal, 457 U.S. 440, 453–54 (1982).

'any individual of employment opportunities.'"[84] The Court further explained that "[t]he principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."[85] *Teal* laid the groundwork for courts to analyze plaintiffs' experiences as individuals. Furthermore, as societal and scholarly understanding of identity develops, so does the legal view of how to apply discrimination analysis.[86] Courts are recognizing that it is more accurate to analyze plaintiffs' experiences individually than by comparing groups of employees or applicants with different identities.[87]

Justice Gorsuch's majority opinion in *Bostock* includes notable language supporting an intersectional approach to Title VII cases.[88] He emphasized the need for an individualized approach to the plaintiff's situation in discrimination cases.[89] In fact, Gorsuch points out that Title VII contains three different mandates to focus on "individuals, not groups."[90] Employers may not "fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex."[91]

Similarly, a court should consider a plaintiff's position by analyzing the specific and unique forms of discrimination they may experience as a result of intersecting identities.[92] Thus, the type of analysis done in intersectional discrimination cases—which requires the court to assess whether the plaintiff experienced

84. *Id.*

85. *Id.*

86. Goldberg, *supra* note 42, at 731–32 ("[I]n a mobile, knowledge-based economy, actual comparators are hard to come by, even for run-of-the-mill discrimination claims. For the complex forms of discrimination made legible by second-generation theories, the difficulties in locating a comparator amplify exponentially.").

87. *E.g.*, Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1047 (10th Cir. 2020) ("In light of *Bostock*, we conclude that a sex-plus plaintiff does not need to show discrimination against a subclass of men or women . . . . She need not show her employer discriminated against her entire subclass.").

88. *See generally* Bostock, 140 S. Ct. 1731 (2020). This Note does not argue that there is any indication that Gorsuch wrote *Bostock* to approve of intersectional discrimination claims; instead, the decision has language that can be used to support such claims.

89. *Bostock*, 140 S. Ct. at 1740–41.

90. *Id.*

91. *Id.* (emphasis in original).

92. Lam v. Univ. of Hawai'i, 40 F.3d 1551, 1562 (9th Cir. 1994), *as amended* (Nov. 21, 1994), *as amended* (Dec. 14, 1994) ("[An] attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.").

discrimination because of their specific identity—reinforces the more general requirement that courts only focus on "individuals, not groups" when considering discrimination.

Consider the following situation: an employee sues his employer for not promoting him based on the fact that he is a gay immigrant. Perhaps the employer believes that having a gay person with an accent or other noticeable markers of immigrant status would not be the "best face" of their management team. The company then promotes someone else who is not a gay immigrant. *Bostock* instructs the courts that it need not decide whether the company discriminates against gay people or immigrants more generally or even whether it discriminates against gay immigrants as a group.[93] Rather, *Teal* and *Bostock* inform us that the court only has to decide whether the employer discriminated against the *individual* plaintiff *because* he is a gay immigrant.

Decisions embracing the "intersectionality anti-canon"[94] fail to see the plaintiffs as individuals. For example, the *DeGraffenreid* court feared that an intersectional approach would open a "hackneyed Pandora's box" of different classes of protected individual, "governed only by the mathematical principles of permutation and combination."[95] *DeGraffenreid*'s fears are misplaced, however, because when a court analyzes a plaintiff's claim on an individual level, it need not worry about creating a multitude of classes based on combinations of traits that are not connected to the plaintiff.

The individual analysis dictum in the *Bostock* majority opinion has already influenced lower level courts. In *Frappied v. Affinity Gaming Black Hawk, LLC*, the Tenth Circuit considered the plaintiffs' claim that they were terminated because of their sex and age.[96] The court overturned precedent that would have required the plaintiffs to prove that they were treated worse than their male counterparts over forty.[97] Based on *Bostock*, the court held that a plaintiff with multiple identities is not required to prove that their employer discriminated against either their entire class or

93. If there were evidence of systemic discrimination against gay immigrants, that would certainly bolster the plaintiff's case.

94. *See* Mayeri, *supra* note 13, at 727.

95. DeGraffenreid v. Gen. Motors Assembly Div., St. Louis, 413 F. Supp. 142, 145 (E.D. Mo. 1976), *aff'd in part, rev'd in part,* 558 F.2d 480 (8th Cir. 1977).

96. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1044–45 (10th Cir. 2020) (noting that age discrimination is covered by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634, not Title VII).

97. *Id.* at 1046 (citing Coleman v. B-G Maint. Mgmt. of Colorado, Inc., 108 F.3d 1199, 1204 (10th Cir. 1997)).

subclass.[98] Instead, such a plaintiff is only required to show that "but for" their protected identity or identities, they would not have been terminated.[99]

Under *Frappied*, for example, a Black transgender man alleging unlawful termination on the basis of his identity as a Black transgender man would not have to prove that Black cisgender men as a group were treated better than Black transgender men as a group. Similarly, he would not have to show that white transgender men as a class were treated more favorably than Black transgender men as a class. Instead, he would have to show that but for being a Black transgender man, he would still be employed.

Frappied underscores *Bostock*'s importance. In the changing arena of Title VII interpretation, more courts may clarify case law to ensure compliance with *Bostock*'s emphasis on individualized analysis. Such analysis can provide an avenue for intersectional discrimination plaintiffs, such as the women in *Frappied*, who report disparate treatment because of their identity.

B. Intersectional analysis still allows plaintiffs to meet their prima facie burden.

To meet their *prima facie* burden, the plaintiff must show, among other elements,[100] that the employer treated them differently than another similarly-situated employee of a different class.[101] Appropriate comparators must be similarly situated to the plaintiff in all "material respects."[102] For example, the plaintiff can compare their treatment with the treatment of someone who had "similar job responsibilities, the same supervisor, [or] similar performance."[103] The comparator element sometimes inhibits plaintiffs arguing multi-characteristic discrimination. Some courts have been reluctant to find that the plaintiff's proposed comparator

98. *Id.* at 1047.

99. *Id.* (noting that its holding broadened the class of claims that may be brought under Title VII).

100. *See infra* note 49 for other elements.

101. Barron v. Univ. of Notre Dame Du Lac, 93 F. Supp. 3d 906, 912 (N.D. Ind. 2015) ("Under the *McDonnell Douglas* indirect method of proof, a plaintiff always bears the burden of persuasion, but the burden of production shifts to the defendant if plaintiff establishes a *prima facie* case of discrimination. Plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for tenure; (3) she was denied tenure; and (4) a similarly situated applicant not in the protected class was granted tenure.").

102. Kimble v. Wisconsin Dep't of Workforce Dev., 690 F. Supp. 2d 765, 771 (E.D. Wis. 2010).

103. *Id.*

is appropriate if they share one, but not all, of the plaintiff's protected characteristics.[104]

Other courts, however, have had no problem finding that the plaintiff provided evidence that an appropriate comparator was differently treated.[105] The *Kimble* court simply agreed with the plaintiff that the three proffered comparators were similarly situated.[106] The court did not even mention what the three comparators' racial or gender identities were, meaning we must assume that the plaintiff's three coworkers were simply *not* Black men like the plaintiff.[107] *Kimble* illustrates that other courts do not have to feel as constrained as *DeGraffenreid*. Instead, intersectional discrimination plaintiffs may successfully argue the same standard as plaintiffs with only one protected characteristic: that a coworker serves as a comparator as long as they are similarly situated and *not* a member of the same identity.

Plaintiffs may also have success in meeting their prima facie burden by providing evidence of the employer's discrimination against other employees with the same or similar identities.[108] The *Jeffers* plaintiff alleged sex and race discrimination, separately and in the alternative, as a combined claim.[109] *Jeffers* notes that while "not dispositive," evidence of a "race-and-gender" claim "includes evidence of discrimination against African–Americans (regardless of gender) and evidence of discrimination against females (regardless of race)."[110] The plaintiff met her prima facie burden by showing that the employer selected a white man and a white woman

104. Goldberg, *supra* note 42, at 764–66; *see, e.g.*, DeGraffenreid v. Gen. Motors Assembly Div., St. Louis, 413 F. Supp. 142, 144 (E.D. Mo. 1976), *aff'd in part*, *rev'd in part*, 558 F.2d 480 (8th Cir. 1977) (finding that no discrimination occurred against Black women because the employer had hired women and Black men); Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) (explaining that the lower court rejected the plaintiff's claim of race and sex discrimination because the employer had promoted members of her same racial class and had promoted women).

105. *See Jefferies*, 615 F.2d at 1032 ("The essence of Jefferies' argument is that an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females. We agree that discrimination against black females can exist even in the absence of discrimination against black men or white women."); *Kimble*, 690 F. Supp. 2d at 771–72.

106. *Kimble*, 690 F. Supp. 2d at 771–72.

107. *Id.* at 770. The court considered the plaintiff's claim to be intersectional, although he was only asserting one protected characteristic, because there are specific stereotypes about Black men.

108. Jeffers v. Thompson, 264 F. Supp. 2d 314, 326 (D. Md. 2003).

109. *Id.* at 322.

110. *Id.* at 327.

instead of her, a Black woman.[111] Interestingly, the court noted that the plaintiff failed her gender-only claim because a woman was selected for the position;[112] thus, it appears that some plaintiffs may actually have *more* success with an intersectional claim.

Therefore, the *Hicks v. Netflix* court may be willing to compare Mo'Nique to other comedians, as long as the comparators are not Black women.[113] At the prima facie stage, Mo'Nique can show that she is a member of protected classes, who was qualified to be a Netflix comedian, suffered an adverse employment action when Netflix did not engage in its normal negotiation practice,[114] and was treated differently than similarly situated comedians who are not Black women.[115] At that point, Netflix would assert any nondiscriminatory reasons for its decisions in negotiation. Mo'Nique would then have to prove that Netflix's reasons were pretext for unlawful discrimination on the basis of her being a Black woman.[116]

Because not all plaintiffs have comparator options like Mo'Nique, there are a few catch-all arguments that allow plaintiffs in this situation to succeed. Some courts have noted that the plaintiff can meet their prima facie burden even if there are no potential comparators.[117] For example, the *Westmoreland* court asked "whether a reasonable juror could conclude that the [employer] filled [the plaintiff]'s position with similarly qualified applicants outside her protected class."[118] The plaintiff in *Westmoreland* succeeded by presenting evidence that after she was transferred, her position was filled by two white men.[119]

Another avenue is to persuade a court that the prima facie case has been met, even if a comparator cannot be provided. Courts

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111. *Id.*

112. *Id.*

113. *See* Hicks v. Netflix Inc., 472 F. Supp. 3d 763, 767 (listing other well-known comedians who contracted with Netflix for a comedy program, including Jerry Seinfeld, Eddie Murphy, Dave Chapelle, Chris Rock, Ellen DeGeneres, Jeff Dunham, Ricky Gervais, and Amy Schumer).

114. *See id.* at 777 ("Accordingly, Plaintiff has sufficiently alleged that Netflix's alleged failure to negotiate and increase her opening offer by straying from its standard practice are employment actions that are *reasonably likely* to adversely and materially affect an employee's . . . opportunity for advancement in . . . her career." (internal quotes omitted)).

115. *See infra* note 49.

116. *See infra* p. 8.

117. Westmoreland v. Prince George's Cnty., Md., 876 F. Supp. 2d 594, 606 (D. Md. 2012) ("[T]here is no strict requirement that plaintiffs prove the existence of one or more similarly situated comparators to satisfy the fourth element.").

118. *Id.*

119. *Id.*

wrestling with the issue of how to apply the prima facie elements to intersectional discrimination cases often note that prima facie cases should not be an unmanageable hurdle for the plaintiff.[120] The tradeoff for this lower burden on the plaintiff proving their prima facie case is that the ultimate burden of the case still rests on the plaintiff to show their employer's proffered legitimate reason was actually pretext.[121] Therefore, plaintiffs' prima facie burden can be met even when they cannot proffer an appropriate comparator, which may be more difficult due to the nature of intersecting claims.[122]

C. Intersectional analysis is consistent with Title VII's themes and policy.

Title VII offers multiple tools to hold employers broadly accountable. The statute proscribes against firing an employee for membership to a protected class, even if the employer had other legitimate reasons to terminate them.[123] Under Title VII, if an employer fires an employee for many reasons, including both legitimate and discriminatory reasons, it has still violated Title VII.[124] These types of "mixed-motive" cases and the statute's treatment of them indicate Title VII's broader, not narrower, scope. Plaintiffs arguing intersectional discrimination cases may be more successful reminding the court that Title VII has several mechanisms, including its treatment of mixed-motive cases, that evidence its proscription of *all* discrimination based on the listed characteristics, not just *some* types of such treatment.

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120. Jeffers v. Thompson, 264 F. Supp. 2d 314, 326 (D. Md. 2003) (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253) ("A *prima facie* case is not supposed to be difficult to establish."); *see also* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous.").

121. *Id.* (citing Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000) ("The ultimate burden of persuasion remains always on the plaintiff.").

122. *See generally* Goldberg, *supra* note 42, at 731 (explaining that the comparator model is becoming less adaptable to modern day understandings of identity and qualification).

123. 42 U.S.C. § 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (explaining Title VII was amended to include § 2000e-2(m) to set forth the standards in mixed-motive cases). *See generally* Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1236–37 (11th Cir. 2016) (highlighting the legal developments in mixed-motive case law).

124. *Bostock*, 140 S. Ct. 1731, 1739 (2020).

Bostock explains that an employment decision is unlawful when a protected characteristic is the but-for factor for the decision.[125] The Court has employed the but-for analysis to hold that employers violated Title VII in a wide variety of situations. For example, the Court found that sex discrimination includes making employment decisions based on sex stereotypes,[126] requiring women to pay more into the pension fund (rejecting the employer's defense that the policy could not be discriminatory because it was based on the statistical evidence that, on average, women live longer than men),[127] and now, terminating an employee because they are LGBTQ+.[128]

But-for analysis illustrates Title VII's breadth.[129] All possible discrimination claims should be considered, not just those that exclusively adhere to *only* sex, *only* race, or *only* other protected characteristics. Rather, this analysis supports that an individual discriminated against because of their status as a queer person of color should also be able to assert this discrimination in court. Justice Gorsuch's opinion incidentally echoes Crenshaw's analogy of an intersection when explaining but-for causation: "Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision."[130]

Bostock's framing of but-for causation applies to intersectional claims. For example, to prevail on her argument that Netflix discriminated against her in their initial offer, Mo'Nique would

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125. *Id.* at 1742 ("If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach."); *see also* Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013) (explaining that the "but-for" framework originated in the common law of torts).

126. Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989) ("It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'").

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

128. *Bostock*, 140 S. Ct. at 1737 ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.").

129. *Contra* Crenshaw, *supra* note 16, at 151 ("[T]he dominant message of antidiscrimination law is that it will regulate only the limited extent to which race or sex interferes with the process of determining outcomes. This narrow objective is facilitated by the top-down strategy of using a singular "but for" analysis to ascertain the effects of race or sex. Because the scope of antidiscrimination law is so limited, sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics.").

130. *Bostock*, 140 S. Ct. at 1739; *see* Crenshaw analogy, *supra* note 19.

need to show that but-for her status as a Black woman, Netflix would have offered her more money at the start of their negotiations.[131] Under *Bostock*, Mo'Nique could show that there may have been multiple but-for causes (*e.g.*, racism and sexism), the combination of which resulted in Netflix's discrimination.

Similarly, *Bostock*'s but-for causation test extends to people with other intersecting identities. Imagine instead that another comedian reports that she was discriminated against in negotiations because she is a transgender Latina woman.[132] Her but-for argument is just as straightforward as any plaintiff claiming single-identity discrimination (*e.g.*, a woman suing because of sex discrimination): she argues that but-for being a transgender Latina woman, she would not have been terminated. On its face, it may be difficult to see a court understanding this application of the but-for causation test. There may not be the same stereotypes or other sociological views of transgender Latina women as of cisgender Latina women,[133] Latino men,[134] or transgender women.[135] However, the hypothetical plaintiff can assert that her employer discriminated against her because it held the same stereotypes against her as against cisgender Latina women (after all, both categories of individuals are still Latina women, regardless of their gender identity).[136] Furthermore, the hypothetical plaintiff could argue that it is precisely because of the overlapping and

131. Considering there is public access to how much non-Black female comedians were compensated, this is not an unreasonable pathway to success.

132. *Cf.* Dani Heffernan, *New Report on Discrimination Against Latina Transgender Women by Law Enforcement*, GLAAD (Apr. 18, 2012), https://www.glaad.org/blog/new-report-discrimination-against-latina-transgender-women-law-enforcement [https://perma.cc/3W5W-VEGZ] (acknowledging, anecdotally, that transgender Latina women experience much higher rates of discrimination in another area of life, with interactions with law enforcement).

133. *See generally* Waleska Suero, "*We Don't Think of It as Sexual Harassment": The Intersection of Gender & Ethnicity on Latinas' Workplace Sexual Harassment Claims*, 33 CHICANA/O-LATINA/O L. REV. 129 (2015) (describing in depth the nature and nuances of sexual harassment reported by Latina women in their workplaces).

134. *See generally* Christina Iturralde, *Rhetoric and Violence: Understanding Incidents of Hate Against Latinos*, 12 N.Y.C. L. REV. 417 (2009) (explaining that there has been a rise in attacks against Latinos due to racial or ethnic bias and antimigration sentiments stemming from negative depictions of Latinos in the media).

135. Robyn B. Gigl, *Gender Identity and the Law*, 2018 N.J. LAW. 16, 17 ("In other words, a transgender woman does not conform to the stereotype of how someone who was assigned male at birth should behave.").

136. *See* Suero, *supra* note 133, at 129–30 ("Challenging the pervasive stereotype of the overly sexual, desirable, and hot-blooded Latina, this paper seeks to analyze how widely held beliefs about Latina sexuality influence Latinas' definition of what constitutes workplace sexual harassment and, in turn, how those beliefs influence how others view the harassment of Latinas.").

interlocking facets of her identities that she is discriminated against, when a cisgender Latina woman or a Latino man or a transgender person would not have been.

Transgender women of color can and do face higher rates of discrimination compared to all of their counterparts. Moreover, this discrimination is especially violent.[137] There are many reasons for this higher rate of violence (which is still underreported),[138] but a looming theme is clear: people with intersecting identities are more vulnerable to discrimination than others.[139] The law needs to be part of their remedy, if not also perpetrators' deterrent.[140]

Those decisions that make up the "intersectionality anti-canon"[141] do not interpret Title VII as protecting classes of people with multiple protected identities.[142] The court in *DeGraffenreid* found that Title VII's legislative history did not "indicate that the goal of the statute was to create a new classification of 'black women' who would have greater standing than, for example, a black male."[143] Part of *DeGraffenreid*'s error is assuming that a Black woman's standing would automatically be "greater" than a Black man's standing. Rather, a court allowing a Black female plaintiff to proceed with her discrimination case on the theory that she was

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137. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020 [https://perma.cc/R8PV-25XF] (explaining that people of color made up the majority of murders of transgender people in 2020); Kevin Jefferson, Torsten B. Neilands & Jae Sevelius, *Transgender Women of Color: Discrimination and Depression Symptoms*, 6 ETHNICITY & INEQUALITIES IN HEALTH & SOC. CARE 121, 122 (2013) ("Trans women of color for instance are killed in epidemic numbers.").

138. Jefferson, Neilands & Sevelius, *supra* note 137, at 121–22 ("This systematic discrimination is a product of transphobia, an irrational fear or hatred of trans people, as well as cisnormativity.").

139. *Id.* at 122 ("While trans women of color share experiences of transphobia and cisnormativity with other transgender people, experiences of sexism with other women, and experiences of racism with other people of color, these experiences interact and cannot be separated: trans women of color experience discrimination uniquely as trans women of color.").

140. *Cf.* Crenshaw, *supra* note 16, at 149 ("But it is not always easy to reconstruct an accident [Crenshaw's analogy to discrimination]: Sometimes the skid marks and the injuries simply indicate that they occurred simultaneously, frustrating efforts to determine which driver caused the harm. In these cases the tendency seems to be that no driver is held responsible, no treatment is administered, and the involved parties simply get back in their cars and zoom away.").

141. *See* Mayeri, *supra* note 13, at 727.

142. DeGraffenreid v. Gen. Motors Assembly Div., St. Louis, 413 F. Supp. 142, 145 (E.D. Mo. 1976), *aff'd in part, rev'd in part,* 558 F.2d 480 (8th Cir. 1977).

143. *Id. But see* Mayeri, *supra* note 13, at 728 (noting the "relative paucity" of legislative history regarding whether Title VII was intended to cover multiple characteristic discrimination claims).

discriminated against because of her race and her sex only grants her the *same* standing that a Black male plaintiff would have if he were to assert a race discrimination claim. An intersectional legal approach, thus, levels the field.

Further, a court's decision to *not* allow intersectional discrimination claims may result in plaintiff's feeling forced to "split" their claims into categories that are mutually exclusive within the Title VII list, which is not an accurate representation of identity or lived experience.[144] This traditional application of Title VII (the "anti-canon" model) is a product of all Title VII analyses being developed from the model of sex discrimination against white women or race discrimination against Black men.[145] Crenshaw points out that the but-for analysis adopts the same narrowness of this model: "If Black women cannot conclusively say that 'but for' their race or 'but for' their gender they would be treated differently," they cannot succeed on discrimination claims.[146] Crenshaw's analysis is clearly accurate under the but-for formula used by the anti-canon cases, but it appears that more contemporary courts such as *Westmorland* have been able to escape this mold. In the three decades since Crenshaw's *Demarginalizing the Intersection of Race and Sex* was published, the law has evolved to be slightly more reflective of actual lived experiences. These cases and *Bostock* pave the way for the mainstreaming of intersectional discrimination claims, which are consistent with Title VII and its traditional analytical framework.

Part II: *Bostock* Opens the Door for the Mainstreaming of Intersectional Discrimination

This section argues that with more plaintiffs who have standing to sue employers for Title VII discrimination, the mainstreaming of intersectionality in our culture, and the renewed excitement following the *Bostock* decision, there may be a similar revitalization of intersectional discrimination cases in court.

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144. Crenshaw, *supra* note 16, at 150 ("Unable to grasp the importance of Black women's intersectional experiences, not only courts, but feminist and civil rights thinkers as well have treated Black women in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks.").

145. *Id.* at 151 ("Put differently, the paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks.").

146. *Id.* at 152.

A. There is an increased number of plaintiffs with standing under Title VII.

As a result of the *Bostock* decision, millions of people gained standing to sue employers who may have discriminated against them on the basis of their sexual orientation or gender identity.[147] LGBTQ+ people also have other intersecting racial, ethnic, religious, gender, and national origin identities.[148] This group is more vulnerable to employment discrimination than its white counterparts: LGBTQ+ people of color are twice as likely to report discrimination in the workplace and general community than white LGBTQ+ people.[149] LBGTQ+ people of color experience lower employment opportunities than the rest of the population.[150] Compared to their peers, LGBTQ+ people, people of color, and women report higher rates of discrimination at work.[151] Moreover,

147. *See* Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx [https://perma.cc/M87H-LMSR] (reporting that more than 11 million people self-identify as LGBT); *see also Counting LGBT Communities: SAGE and the 2020 Census*, SAGE (Feb. 14, 2020), https://www.sageusa.org/counting-lgbt-communities-sage-and-the-2020-census/ [https://perma.cc/EZY5-P47W] (explaining that LGBT self-reporting is low, in part due to mistrust in the community about the consequences of disclosure).

148. *See People of Color*, FUNDERS FOR LGBTQ ISSUES, https://lgbtfunders.org/resources/issues/people-of-color/ [https://perma.cc/V3KW-59ZJ] ("Forty-two percent of LGBTQ adults identify as people of color, including 21 percent who identify as Latino/a, 12 percent as Black, two percent as Asian, and one percent as American Indian and Alaska Native."); *LGBT Demographic Data Interactive*, WILLIAMS INST., UCLA SCH. L. (Jan. 2019), https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&characteristic=white#density [https://perma.cc/DDE8-784W] (containing an interactive webpage with data representations of LGBTQ people's ethnic and racial makeups); *LGBT People in the Workplace: Demographics, Experiences and Pathways to Equity*, NAT'L LGBTQ WORKERS CTR, 1, https://www.lgbtmap.org/file/LGBT-Workers-3-Pager-FINAL.pdf [https://perma.cc/LC62-GLU9] ("There are approximately 1 million LGBT immigrants in the U.S.—and 30% are undocumented.").

149. NPR, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS, 1 (2017) ("LGBTQ people of color are at least twice as likely as white LGBTQ people [sic] say they have been personally discriminated against because they are LGBTQ when applying for jobs and when interacting with police, and six times more likely to say they have avoided calling the police (30%) due to concern for anti-LGBTQ discrimination, compared to white LGBTQ people (5%).").

150. FUNDERS FOR LGBTQ ISSUES, *supra* note 148 ("15 percent of African American LGBT adults are unemployed, as are 14 percent of Latinx LGBT adults and 11 percent of API LGBT adults—compared to 8 percent unemployment for the general population.").

151. NPR, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, DISCRIMINATION IN AMERICA: FINAL SUMMARY 5–7 (2018).

these groups report that workplace discrimination is the most prevalent type of discrimination they face.[152]

The data demonstrates the real need for legal protections for LGBTQ+ people, especially those with intersecting identities that can be an additional source of discrimination. At the time most of the data were published, *Bostock* had not been decided yet. While advocates argued that sex discrimination includes sexual orientation and gender identity discrimination, before June 2020, there was no federal policy enforcing this interpretation.[153] Now, *Bostock* and the new executive administration are paving a way forward for LGBTQ+ people to claim their federal protections.[154]

B. There has been a cultural shift regarding understanding identity.

1. There is more mainstream awareness of intersectionality as a theory and reality.

When I saw Kimberlé Crenshaw speak at my undergraduate university in 2019, it had been exactly 30 years since *Demarginalizing the Intersection of Race and Sex* had been published.[155] By then, Crenshaw had become a feminist scholar and cultural icon.[156] She has a podcast on Intersectionality.[157] On Google

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152. *Id.*

153. *See, e.g.*, NAT'L LGBTQ WORKERS CTR., *supra* note 148 (explaining that establishing federal protections against discrimination was an important step towards equality).

154. HRC Staff, *The Real-Life Implications of Biden's Bostock Executive Order*, HUM. RTS. CAMPAIGN (Jan. 21, 2021), https://www.hrc.org/press-releases/the-real-life-implications-of-bidens-bostock-executive-order [https://perma.cc/6QU7-B29U].

155. *See An Evening with Kimberlé Crenshaw*, GONZ. U. (Feb. 28, 2019), https://www.gonzaga.edu/news-events/events/2019/2/28/kimberle-crenshaw [https://perma.cc/472X-MNAS].

156. *See* Bim Adewunmi, *Kimberlé Crenshaw on Intersectionality*, NEW STATESMAN (Apr. 2, 2014), https://www.newstatesman.com/lifestyle/2014/04/kimberl-crenshaw-intersectionality-i-wanted-come-everyday-metaphor-anyone-could [https://perma.cc/FMW2-ZGH8] ("In recent times, intersectionality theory . . . has enjoyed a resurgence in popular and academic feminism. Her name and her work has become an introductory point for feminists of all stripes."); *e.g.*, Ilyse Liffreing, *Lady Gaga, Selena Gomez and Shawn Mendes Hand Over Instagram Accounts to Black Activists and Organizations*, ADAGE (June 8, 2020), https://adage.com/article/digital/lady-gaga-selena-gomez-and-shawn-mendes-hand-over-instagram-accounts-black-activists-and/2261116 [https://perma.cc/C7RN-TG2N] ("Selena Gomez [is] one of the most-followed people on Instagram with a following of 179 million . . . . [L]eaders such as . . . Kimberlé Crenshaw, co-founder of the African American Policy Forum, have taken over Gomez' account . . . .").

157. Kimberlé Crenshaw, *Intersectionality Matters*, APPLE PODCASTS, https://podcasts.apple.com/us/podcast/intersectionality-matters/id1441348908 [https://perma.cc/G35V-7NY2].

Scholar, her groundbreaking article has been cited in 25,099 other publications.[158] Her scholarship has only grown more acknowledged, recognized, and desired.[159] The word "intersectionality" has never been more mainstream.[160]

Of course, the legal profession has never been quick to incorporate popular culture. At times, the Supreme Court has significantly resisted engaging in what it sees as controversial and partisan debates.[161] The Court's reluctance to use intersectional analysis is especially significant considering the robust and highly doctrinal legal scholarship that developed the framework.[162] Professor Mayeri notes, however, that there is hope to see intersectional discrimination acknowledged and incorporated in the mainstream legal doctrine; women of color are not giving up on engaging with law and with courts.[163] Furthermore, "Latinas, Asian-American women, LGBTQ individuals, and others have joined African American women at the forefront of intersectional advocacy as well as theory."[164]

Already, there have been recent lower-level court decisions that signal a broader acceptance of intersectional analysis in discrimination cases. The District Court for South Carolina recognized and applied what it called "intersectional discrimination theory" to its case.[165] The court's language clearly draws from the academic framework developed by Crenshaw and others: "[Title

158. *Demarginalizing the Intersection of Race and Sex* citation amount, https://scholar.google.com/ (search *Demarginalizing the Intersection of Race and Sex*; then locate Cited By indicator) (as of May 22, 2022).

159. *See* Kimberlé Crenshaw, *The Urgency of Intersectionality*, TED, https://www.youtube.com/watch?v=akOe5-UsQ2o [https://perma.cc/56JK-Z5KC].

160. *See generally* Kory Stamper, *A Brief, Convoluted History of the Word "Intersectionality"*, CUT (Mar. 9, 2018), https://www.thecut.com/2018/03/a-brief-convoluted-history-of-the-word-intersectionality.html [https://perma.cc/9RBF-EGHU] (explaining that Ashley Judd's 2018 Oscars speech, which included the use of "intersectionality," is likely the most high-profile use of the word).

161. Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (" . . . I think it no business of the courts (as opposed to the political branches) to take sides in this culture war."). *But see* Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 486 (1954) (entering the Court into an incredibly controversial and partisan topic: race relations).

162. *See* Mayeri, *supra* note 13, at 727–28 (explaining some of the foundational legal scholarship in intersectionality).

163. *Id.* at 730–31 ("The picture is not entirely bleak, however, especially if we look beyond doctrine. African American women and other women of color continue to play leading roles as plaintiffs, attorneys, policymakers, and legal strategists, and to sustain enduring and effective coalitions between civil rights and feminist organizations.").

164. *Id.* at 731.

165. Brown v. OMO Grp., Inc., No. 9:14-CV-02841-DCN, 2017 WL 1148743, at *5 (D.S.C. Mar. 28, 2017).

VII] also protects individuals against discrimination based on the combination or 'intersection' of two or more protected classifications, even in the absence of evidence showing the defendant discriminated solely on the basis of one protected classification."[166]

In a 2010 decision, the Eastern District of Wisconsin noted that like Black women, Black men can similarly face intersectional discrimination.[167] The court pointed out that it is a mistake to believe that Black men (or any person with membership to only one protected characteristic) only face a singular type of discrimination.[168] If courts are willing to recognize this reality of discrimination—that it does not manifest in the same ways for even members of the same class—that is an incredibly important development in the case law.

The *Kimble* court was impacted by EEOC guidance that allows plaintiffs to assert "Intersectional Discrimination" claims.[169] The guidance explicitly states Title VII "prohibits discrimination not just because of one protected trait (*e.g.*, race), but also because of the intersection of two or more protected bases (*e.g.*, race and sex)."[170] The nuances of intersectional theory recognized by the Eastern District of Wisconsin are profound considering the language in the anti-canon decisions of earlier decades.[171] Intersectional discrimination has also found its way into recent editions of Practice Series available to employment attorneys.[172]

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166. *Id.* (citing, without further explanation, 42 U.S.C. § 2000e-2).

167. Kimble v. Wisconsin Dep't of Workforce Dev., 690 F. Supp. 2d 765, 770 (E.D. Wis. 2010).

168. *Id.* (citing Jesse B. Semple, *Invisible Man: Black & Male Under Title VII*, 104 HARV. L. REV. 749, 751 (1990–91) ("Conceptualizing separate over-lapping black and male categories has sometimes interfered with the recognition that certain distinctive features of being black *and* male serve as the target for discrimination.").

169. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, SECTION 15: RACE AND COLOR DISCRIMINATION (Apr. 19, 2006) https://www.eeoc.gov/policy/docs/race-color.html [https://perma.cc/HWM7-KTZC].

170. *Id.*

171. *See, e.g.*, Renee Henson, *Are My Cornrows Unprofessional?: Title VII's Narrow Application of Grooming Policies, and Its Effect on Black Women's Natural Hair in the Workplace*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 521, 528–29 (2017) (referencing Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981)) ("Thus, the court adding this caveat [that Black women can easily add or remove their braids between shifts] is revealing because it shows that judges may not have a basic understanding of what is required for black women to change their hair from one style to the next.").

172. § 13:10. Race discrimination, 20 Minn. Prac., Business Law Deskbook § 13:10 (citing the EEOC guidance; Jeffers v. Thompson, 264 F. Supp. 2d 314, 326 (D. Md. 2003); Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1992); Kimble v. Wisconsin Dep't of Workforce Dev., 690 F. Supp. 2d at 770–71).

Indeed, even the Supreme Court has issued dictum[173] that has been seen as recognizing intersectional claims.[174] In true Supreme Court fashion, the language is vague, buried in a footnote, and only in response to the dissent's argument against an intersectional-like claim. Still, the footnote provides evidence that intersectional discrimination could be on the Court's radar. And of course, footnotes have been known to change legal doctrine.[175]

Despite the progress, courts are clearly still wrestling with how to apply intersectional discrimination theory. For example, in *Brown v. OMO Grp., Inc.*, the District Court acknowledged intersectional discrimination, referencing *Westmorland*, *Kimble*, and the EEOC guidance.[176] But *Brown* also declined to analyze the plaintiff's claims of intersectional discrimination on a more procedural matter.[177] The court reasoned that it would not be appropriate to discuss the plaintiff's intersectional discrimination objection because it was not specific enough: "Brown makes no reference to any portion of the R&R that misapplied the intersectionality theory, nor does she reference any portion of the R&R that should have applied the intersectionality theory and failed to do so."[178] With that, the *Brown* court dispensed with the plaintiff's intersectional claim.[179]

Based on the court's decision, it is hard to say what the plaintiff in *Brown* should have done instead. Perhaps the court would have considered her intersectional discrimination objection if only she had, as the court says, pointed to a place where the magistrate judge should have (but did not) consider whether she was discriminated against because she was a Black pregnant woman. It is also possible that the court, while willing to

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173. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 598 n.10 (1999) (providing evidence in opposition to the dissent's argument that the court has never recognized discrimination by members of the *same* protected class as the plaintiff).

174. Westmoreland v. Prince George's Cty., Md., 876 F. Supp. 2d 594, 604 (D. Md. 2012) (reading *Olmstead* as a favorable acknowledgement of plaintiffs' ability to be discriminated against on the basis of multiple intersecting identities).

175. *See, e.g.*, United States v. Carolene Prod. Co., 304 U.S. 144, 152–53 n.4 (1938); David Schultz, *Carolene Products Footnote Four*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/5/carolene-products-footnote-four [https://perma.cc/4UAW-S3QY] ("Footnote four . . . presages a shift in the Supreme Court from predominately protecting property rights to protecting other individual rights, such as those found in the First Amendment. It is arguably the most important footnote in U.S. constitutional law.").

176. Brown v. OMO Grp., Inc., No. 9:14-CV-02841-DCN, 2017 WL 1148743, at *5 (D.S.C. Mar. 28, 2017).

177. *Id.*

178. *Id.*

179. *Id.*

incorporate the general doctrine of intersectional discrimination into its decision, was not as willing to apply it.

The court's decision on Mo'Nique's claim did not address the intersectional discrimination question.[180] The *Hicks* decision discusses Mo'Nique's claim of being discriminated against because she is a Black woman, but it does not even use the word "intersectionality."[181] *Hicks*, similar to *Brown*, sets itself up to discuss the race and sex discrimination claim, but instead focuses on whether Mo'Nique suffered an adverse action.[182] Again, the court in *Hicks* is able to evade any discussion of Mo'Nique's discrimination claim because of a procedural matter; Netflix was only moving to dismiss on the argument that Mo'Nique had not shown she suffered an adverse action.[183] Thus, it remains to be seen what kind of treatment the court will give Mo'Nique's claim. Considering the high profile nature of this case and the implications it could have for Netflix's brand to be seen as discriminatory, the parties, their counsel, and the court will likely be sensitive of the optics involved in the decision.[184]

180. Hicks v. Netflix, Inc., 472 F. Supp. 3d 763, 767–68 (C.D. Cal. 2020) ("Overall, [Mo'Nique] alleges that Netflix made offers to other comedic talent to perform in similar stand-up shows, but, when the talent was not a Black woman, Netflix paid astronomically more than it did to Black women like her.").

181. It should be noted that courts can perform intersectional analysis without using the phrase itself, but this may stand out as less common considering courts tend to use the name of a doctrine when applying it.

182. *E.g.*, *Hicks*, 472 F. Supp. 3d at 777 ("Again, the Court notes that Mo'Nique raises a novel theory here, namely that an employer's failure to negotiate an 'opening offer' in good faith, consistent with its alleged customary practice which typically leads to increased compensation, constitutes an 'adverse employment action' for purposes of a retaliation claim.").

183. *Id.* at 770.

184. *See* Maria Puente, *Mo'Nique's Discrimination 'Lowballing' Lawsuit Against Netflix Over Pay Can Go Forward, Court Rules*, USA TODAY (July 18, 2020), https://www.usatoday.com/story/entertainment/celebrities/2020/07/16/moniques-discrimination-lawsuit-against-netflix-can-go-forward/5455386002/ [https://perma.cc/Y8JQ-KCMZ]; Elizabeth Blair, *Mo'Nique's Netflix Discrimination Case Moves Forward*, NPR (July 17, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/17/892351564/monique-s-netflix-discrimination-case-moves-forward [https://perma.cc/HJ6T-MZ2S]; Cedric Thornton, *Federal Judge Sides with Mo'nique in Pending Discrimination Lawsuit Against Netflix*, BLACK ENTER. (July 20, 2020), https://www.blackenterprise.com/federal-judge-sides-with-monique-in-pending-discrimination-lawsuit-against-netflix/ [https://perma.cc/RYF4-B9RZ].

2. *Bostock* may ignite more willingness of plaintiffs to pursue intersectional discrimination claims.

Bostock was a highly anticipated decision, in part because it was unclear how the Court would rule,[185] and in part because of the dramatic impact it would have on those 11 million LGBTQ+ people in the United States.[186] It also had surprising partisan implications. While the plaintiffs had support from businesses who employ individuals,[187] the federal government under the Trump administration filed *amicus curie* arguing against the plaintiffs' interpretation of Title VII.[188] The Court's decision was similarly widely covered[189] and elicited reactions from a wide variety of high-profile figures.[190]

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185. Bill Rankin, *U.S. Supreme Court to Hear Georgia Case on Gay, Lesbian Workplace Bias*, ATLANTA J.-CONST. (Apr. 22, 2019), https://www.ajc.com/news/local/supreme-court-decide-workplace-bias-cases-against-gays-lesbians/bb7HjtWaZ4lIodzybv08UP/ [https://perma.cc/UKG7-LYZ7] ("In what could be a landmark ruling, the high court will decide whether Title VII of the Civil Rights Act of 1964 extends workplace protections to members of the LGBT community.").

186. *See* Newport, *supra* note 147.

187. Erin Mulvaney, *Major Companies Ask High Court to Support LGBT Worker Rights*, BLOOMBERG L. (July 2, 2019), https://news.bloomberglaw.com/daily-labor-report/major-companies-tell-supreme-court-to-support-lgbt-worker-rights [https://perma.cc/KZN5-R9ZT].

188. Brooke Sopelsa, *Gay Workers Not Covered by Civil Rights Law, Trump Admin Tells Supreme Court*, NBC NEWS (Aug. 23, 2019), https://www.nbcnews.com/feature/nbc-out/gay-workers-not-covered-civil-rights-law-trump-admin-tells-n1045971 [https://perma.cc/S3P9-D7HM] ("This latest brief, submitted by Solicitor General Noel J. Francisco and other Department of Justice attorneys, argues that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex and national origin, 'does not bar discrimination because of sexual orientation.'").

189. Nina Totenberg, *Supreme Court Delivers Major Victory To LGBTQ Employees*, NPR (June 15, 2020), https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees [https://perma.cc/GXC8-5Y7W]; Adam Liptak, *Civil Rights Law Protects L.G.B.T. Workers, Supreme Court Rules*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html [https://perma.cc/UU2D-SA7H]; Julie Moreau, *Supreme Court's LGBTQ Ruling Could Have 'Broad Implications,' Legal Experts Say*, NBC (June 23, 2020), https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779 [https://perma.cc/2WVD-H6EW].

190. Nancy Pelosi (@SpeakerPelosi), TWITTER (June 15, 2020, 8:09 PM), https://twitter.com/SpeakerPelosi/status/1272697746047336449 [https://perma.cc/YKZ4-GNHF] ("The Supreme Court's ruling today secures critical protections for LGBTQ Americans across the country . . . ."); Ted Barrett, Manu Raju & Lauren Fox, *Key GOP Senators Have No Qualms with Supreme Court's Decision to Ban LGBTQ Discrimination in the Workplace*, CNN (June 15, 2020), https://www.cnn.com/2020/06/15/politics/gop-senators-reaction-supreme-court-ruling/index.html [https://perma.cc/4CNN-FQMA]; Brett Samuels, *Trump Says 'We Live' with SCOTUS Decision On LGBTQ Worker Rights*, HILL (June 15, 2020), https://thehill.com/homenews/administration/502812-trump-says-we-live-with-

Since *Bostock* was published in June 2020, more than 500 subsequent cases have cited to it.[191] In January 2021, the Biden Administration took additional action to enforce *Bostock*, leading to the case dominating headlines yet again.[192] Not only are employment attorneys aware of the landmark decision,[193] but the whole country is as well. Most Court decisions do not receive this kind of attention, and plaintiffs should be prepared to use it to their advantage. Similarly, employers should be cognizant of discrimination pitfalls: sensitivity and bias training, diversity programing, and consulting with employment attorneys are all recommended to ensure compliance.[194] Furthermore, employers must also be compliant with Title VII in their employment decisions, taking care to terminate, hire, promote, and decide other matters based on the merits of an employee's qualifications and work, rather than their identity.

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scotus-decision-on-lgbtq-worker-rights [https://perma.cc/DFN4-SMA3] (quoting President Trump's remarks on *Bostock*, "I've read the decision, and some people were surprised . . . . But they've ruled and we live with their decision . . . .Very powerful. Very powerful decision actually.").

191. *Citing References*, Bostock v. Clayton County, WESTLAW EDGE, [https://perma.cc/GL5D-6TTA] (showing links to 557 cases on Westlaw which have cited *Bostock*) (as of May 13, 2022).

192. Mark Joseph Stern, *Biden Just Began the Biggest Expansion of LGBTQ Equality in American History*, SLATE (Jan. 21, 2021), https://slate.com/news-and-politics/2021/01/joe-biden-lgbtq-bostock-executive-order.html [https://perma.cc/44QA-WAUP]; HRC Staff, *The Real-Life Implications of Biden's Bostock Executive Order*, HUM. RTS. CAMPAIGN (Jan. 21, 2021), https://www.hrc.org/press-releases/the-real-life-implications-of-bidens-bostock-executive-order [https://perma.cc/9UDT-PFTB]; Jo Yurcaba, *Biden Issues Executive Order Expanding LGBTQ Nondiscrimination Protections*, NBC (Jan. 21, 2021), https://www.nbcnews.com/feature/nbc-out/biden-issues-executive-order-expanding-lgbtq-nondiscrimination-protections-n1255165 [https://perma.cc/2M49-UFRT].

193. *See, e.g.*, § 11:16. Title VII, 17 Minn. Prac., Employment Law & Practice § 11:16 (4th ed.).

194. *See generally* Ashley Dillon & Sara Welch, *U.S. Supreme Court Rules that Federal Law Forbidding Workplace Discrimination Protects LGBTQ+ Workers*, STINSON (June 15, 2020), https://www.stinson.com/newsroom-publications-Supreme-Court-Rules-that-Federal-Law-Forbidding-Workplace-Discrimination-Protects-LGBTQ-Workers [https://perma.cc/W8JA-PPXA] (encouraging all employers to review their discrimination policies to ensure that they provide protections for LGBTQ+ people); Laura Alaniz, Stephanie L. Holcombe & Kelly R. Ferrell, *Employment Alert: "U.S. Supreme Court Ruling in Favor of LGBTQ+ Workers Has Direct Implications for Workplace Guidelines and Policies"*, PORTER HEDGES (June 24, 2020), https://www.porterhedges.com/newsroom-publications-employment-alert-u-s-supreme-court-ruling [https://perma.cc/L56G-Q4PG] (explaining recommended actions that employers should take after *Bostock*).

Conclusion

This Note is undoubtedly optimistic. My optimism, however, is inspired by the ingenuity and passion this Note's authorities—the Black and brown feminists, the queer activists, the courageous transgender and gender nonconforming individuals simply living their lives, and the attorneys, parties, and judges changing our legal system. This Note's arguments are driven by those people who have found strength in their identities and have advocated on theirs and others' behalves.[195] We all have intersecting identities, but not all identities are seen equally. Title VII seeks to protect those most vulnerable to employment discrimination, even (perhaps especially) when the rest of society has not yet recognized this vulnerability. Even if *Bostock* is not the catalyst that brings intersectionality into case law, intersectionality as a framework is certainly here to stay, and as long as plaintiffs continue to integrate it into their advocacy, it will undoubtedly inform court opinions. Mo'Nique's suit against Netflix is likely to be another step towards this integration. All of us with intersecting identities are indebted to hers and others' advocacy both in and out of the courtroom.

195. *See* Mayeri, *supra* note 13, at 718–21 (discussing the intersectional origins of Title VII).

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