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The Labyrinth of Blameworthiness

By Bailey Kuklin*

BLAMEWORTHINESS, OR CULPABILITY, IS CENTRAL TO THE LAW, to morality, and, generally, to many social norms. Other than for consensual obligations, such as contracts, a common intuition is that a person should not be liable for harms caused to another person or to the state if she has not engaged in blameworthy conduct. Furthermore, if a person does harm another through blameworthy conduct, the intuition often extends to the belief that the degree of culpability should be a factor in gauging a just requital.[1] Malicious homicide, for instance, deserves greater punishment than negligent homicide does, and an intentional battery should occasion a more extensive liability than a comparable negligent injury. While there may be proper arenas for strict liability, typically it is applied only for substantial reasons that trump the common urge to free a person from responsibility to others for the consequences of her conduct that was reasonable and not culpable.[2]

Even utilitarians, who champion norms that advance social welfare irrespective of direct consideration of the culpability of the relevant actors, may balk at unfettered strict liability independent of blameworthiness. The famous utilitarian, J.S. Mill, favored a strong re-

* The author thanks his colleagues at Brooklyn Law School for very useful comments and guidance at a faculty workshop.

1. That this intuition does not drive the usual rule for tort damages, as in negligence, see *infra* note 57.

2. Strict products liability, for example, may be justified on economic, welfare grounds. For one, the strict liability induces producers to internalize the costs of their goods, thereby telegraphing to potential consumers more accurate information about their true social costs and facilitating efficient markets. For a brief introduction, see Gregory C. Keating, *Strict Liability Wrongs*, *in* Philosophical Foundations of the Law of Torts 292, 292–93 (John Oberdiek ed., 2014). For "most contemporary moral theorists of tort[,] [s]trict liability is an embarrassment to their theories." *Id.* at 294. Keating defends strict torts liability. I believe the notion of dignitary harm discussed here would effectively get to a similar place as does strict liability in many cases. Keating does not see such invasive harms as wrongful in themselves. *See id.* at 300–05.

gime of individual rights on the grounds that such a regime increases overall social utility.[3] Likewise, we may argue that a regime in which the sword of Damocles hangs over us in the form of strict liability is not as satisfying as one in which we have the comfort of knowing that we are responsible only for consequences of our conduct that can be fairly ascribed to our free, informed, and considered choices and actions. This greater control over our lives and destinies provides us a sense of wellbeing.[4]

The laws of most legal regimes are largely a mixture of utilitarian, consequentialist considerations and Kantian, deontic considerations.[5] Deontic principles, centered on individual rights, dominate the current jurisprudential and political debates.[6] In embracing, delineating, and applying deontic maxims of behavior, or, to some extent, utilitarian rules and standards as well, the conflicting liberty and security interests of all affected parties are balanced.[7] The reach of one person's liberty to do as she wishes ends when it becomes unacceptably invasive of another person's security: "Keep your fist well away from my nose." These two facets of freedom—liberty and security—are inevitably in conflict. They require tradeoffs that primarily focus on the risk of harms that may occur as a result of a person's conduct. The exercise of one person's liberty must not unduly interfere with another person's security by risking unwarranted physical, economic, or psychic harm to her. Under Kantian principles in particular, whereby every moral agent is entitled to equal respect and owes other agents like respect,[8] one also may not impose another type of harm, called a dignitary harm, on another. One must respect others as moral equals

3. *See* JOHN STUART MILL, *On Liberty*, *in* UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 81, 176–200 (4th ed., London 1869).

4. The other side of the coin complicates this issue. A potential victim of a nonblameworthy harm would feel more comfort knowing she will be compensated if harmed despite the actor's blamelessness. Thus a utilitarian, being a consequentialist, would weigh the relative welfarist pros and cons of strict liability. A deep analysis of these would doubtlessly involve many twists and turns.

5. The detritus of historical and political developments, often unprincipled, interferes with any overarching coherence or consistent common threads in legal systems.

6. Two modern classics of political theory reflect this orientation. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JOHN RAWLS, A THEORY OF JUSTICE (1971).

7. *See, e.g.*, MORRIS R. COHEN, *Freedom: Its Meaning*, *in* THE FAITH OF A LIBERAL 161, 163 (1946); WILLIAM LUCY, PHILOSOPHY OF PRIVATE LAW 407–08 (2007); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 6 (1999); Jules L. Coleman, *Second Thoughts and Other First Impressions*, *in* ANALYZING LAW 257, 304 (Brian Bix ed., 1998); Gerald J. Postema, *Introduction to* PHILOSOPHY AND THE LAW OF TORTS 1, 6 (Gerald J. Postema ed., 2001).

8. *See* IMMANUEL KANT, *The Metaphysics of Morals*, *in* PRACTICAL PHILOSOPHY 353, 557 (Mary J. Gregor trans., 1996) (1797).

and treat them accordingly.[9] Thus, four types of harm are gauged when balancing liberty and security interests.

When the law is abridged and a person (or the state) is injured, corrective justice in the private realm, and retribution or distributive justice in the public one are predominant guides for requitals in modern legal systems. Blameworthiness is central to conceptions of principled punishment and is usually invoked in conceptions of corrective justice, as in the standard of negligence based upon reasonableness. If an actor is not sufficiently blameworthy, her harmful conduct is typically excused or justified.[10] It is hard to imagine a viable and fair legal regime that does not place blameworthiness in a starring role.[11]

While the concept of blameworthiness is often summoned, there remains much controversy over its meaning and measure.[12] This article elaborates on two understandings ascribable to the concept. The most established conception derives from Aristotle. He argues that a person is not fairly responsible, and hence not blameworthy (or creditworthy),[13] for the consequences of her conduct that ensue from her unavoidable ignorance or coercion.[14] I call this "Responsibility Blameworthiness." A second conception receives less attention from commentators. As suggested above, it derives from Kant's deontic

9. *See id.* Dignitary harm differs from psychic harm. A stoic, her psyche well mastered, may suffer no psychic discomfort from an outrageous insult.

10. For brief introductions to excuses and justifications, see, *e.g.*, LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 88–91 (2009); MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 186–94, 247–51 (2002); H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY 1, 13–14 (1968).

11. Even contract law, which is often said to be strict, has room for blameworthiness. *See infra* note 21.

12. *See, e.g.*, Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 LAW & PHIL. 193, 214–15 (1993); Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 54–55; Arthur Ripstein, *Justice and Responsibility*, 17 CAN. J.L. & JURISPRUDENCE 361, 361–62 (2004) (describing current theories of "moral accountability"). For versions of blameworthiness, see, *e.g.*, GEORGE SHER, IN PRAISE OF BLAME 9 (2006); George P. Fletcher, *The Recidivist Premium*, 1(2) CRIM. JUST. ETHICS 54, 56–57 (1982).

13. In the Oxford English (US) Dictionary, the definitions of "responsible" include: "Being the primary cause of something and so able to be blamed or credited for it . . . . Morally accountable for one's behavior . . . ." [online version]. Blameworthiness draws most of the attention in this article. *Responsible*, OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/ us/responsible (last visited Sept. 24, 2016) [https://perma.cc/TZ4W-L74N].

14. *See* ARISTOTLE, *Nichomachean Ethics* bk. III, ch. 1 *(Ethica Nicomachea)*, *in* THE BASIC WORKS OF ARISTOTLE 935, 964–67 (Richard McKeon ed., 1941). *See generally* PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 65 (2002); R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 128 (1994).

principles. Under his categorical imperative, every moral agent has a priceless dignity that commands equal respect.[15] Violation of this duty of respect generates a dignitary harm and involves, what I call, "Disrespect Blameworthiness."

Each of these two primary conceptions of blameworthiness has two aspects. First, as even the brief description above makes evident, under Aristotle's conception of Responsibility Blameworthiness, B_r, one of its aspects is diminished blameworthiness attributable to a person's conduct owing to her unavoidable ignorance, B_{ri},[16] while another one spotlights any coercion she was operating under, B_{rc}. Second, under Kant's elaboration of the duty to respect others, one aspect of the notion of Disrespect Blameworthiness, B_d, stems from the actor's disrespectful attitude towards another person, B_{da}, while the second one issues from her disrespectful treatment of another person, B_{dt}.

All four of these aspects of blameworthiness have scalar qualities. They are matters of degree. Consequently, when we speak of a person as being blameworthy, we can further unpack this assertion into constituent parts with separate gradations. Two people, therefore, may be equally blameworthy overall, but in different ways. For example, one agent may treat another person with substantial disrespect while considering her an equal, such as where the actor beneficently paternalizes a loved and admired one against her will.[17] Another actor may treat another person with respect while considering her an inferior, such as where the actor helps the other person undergo a beneficial, voluntary, painful medical procedure because she enjoys seeing that other, "inferior" person suffer.[18] Even if we judge these forms of blameworthiness as equal overall in some sense, we may still decide that the requitals for the ensuing harms should differ in various ways. We may, for instance, protect against a different range or extent of harms for one form of blameworthiness than for another. One aim of this paper is to unpack some of the difficulties we face in attempting to make these distinctions.

15. *See* KANT, *supra* note 8, at 557.

16. Thus, B_{ri} stands for Responsibility Blameworthiness (B_r) with respect to ignorance ($_i$). Immediately below, B_{da} stands for Disrespect Blameworthiness (B_d) with respect to attitude ($_a$).

17. The agent may be respectful despite the paternalism because, for instance, she would wish to be equally paternalized if the roles were reversed.

18. This example derives from Graham. *See* Peter A. Graham, *In Defense of Objectivism about Moral Obligation*, 121 ETHICS 88, 94 n.14 (2010).

I. Responsibility Blameworthiness, B_r

The first aspect of Aristotle's conception of Responsibility Blameworthiness implies that an actor's accountability for her conduct diminishes to the extent that it constitutes an acceptable response to coercive forces. These forces may stem from external sources, such as physical compulsion or economic duress, or internal ones, including irresistible impulse or akrasia, or some combination of these two sources. The second prong of Aristotle's conception, unavoidable ignorance, has similar origins. It may come from external causes, such as fraud or deception, or internal ones, including self-deception or naturally disposed cognitive distortions, or a combination of them.[19]

When an actor's accountability is diminished by shortfalls in these two facets of Responsibility Blameworthiness, the law typically establishes a threshold above which the actor is held responsible. This level may effectively vary depending on the legal duty at issue. As applied, different torts,[20] contracts,[21] or crimes may have different thresholds.[22] The reasonable person is often invoked as the standard: If a reasonable person in the actor's position would have resisted the forces of coercion and sufficiently addressed any initial ignorance, then the actor is held legally responsible for the injurious consequences of the failure to do so.[23] In deciding whether to act in the face of her impaired conditions for full responsibility, the reasonable

19. Aristotle is wary of finding that internal sources of coercion or ignorance undermine voluntariness. For one, this may undermine the ascription of beneficial acts as praiseworthy. *See* ARISTOTLE, *supra* note 14, bk. III, ch. 1, at 967. Current cognitive science makes it difficult to set aside our inner workings.

20. For example, compare the differing "intent" requirements for tortious trespass and malicious prosecution. *See* DAN B. DOBBS, THE LAW OF TORTS 47–49, 1223–25 (2000); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 33–39, 882–84 (5th ed. 1984). That "intent" requires knowledge, see *id.* at 34–36.

21. Responsibility for breach of contract is often said to be strict. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 235 (1981); E. ALLAN FARNSWORTH, CONTRACTS § 8.8 (4th ed. 2004). Nonetheless, many commentators have found the actual law of contracts to include substantial room for notions of fault. *See, e.g.*, Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, *in* FAULT IN AMERICAN CONTRACT LAW 82, 82 (Omri Ben-Shahar & Ariel Porat eds., 2010) ("fault is a basic building block of contract law, and pervades the field"); TONY WEIR, *The Staggering March of Negligence*, *in* THE LAW OF OBLIGATION 97, 122 (Peter Cane & Jane Stapleton eds., 1998); George M. Cohen, *The Fault that Lies Within Our Contract Law*, 107 MICH. L. REV. 1445, 1445 (2009).

22. "[T]here is no single conception [of 'legal responsibility']." JOHN KLEINIG, PUNISHMENT AND DESERT 106 (1973).

23. That legal responsibility turns on what we may reasonably expect of one another, see GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 108 (1996); Ripstein, *supra* note 12, at 361 ("reciprocity conception of responsibility").

person considers the nature of her legal duties and the known risks to others. More caution is called for when egregious physical injury to another is in the offing than when an innocuous touching may ensue.

Once the responsibility threshold is surpassed, the degree of the actor's responsibility is normally not taken into account in gauging private law requitals. Negligence law reflects this.[24] The general rule is that once the actor is found to be sufficiently responsible for her conduct, however close to the threshold, the victim is entitled to full recovery for her injuries. This is one justification that often applies: Though the actor may not be fully blameworthy for her conduct, the victim is entirely blameless. Perhaps in a world free of the critical epistemic difficulties in judging the relative responsibility of the actor and victim for particular harms, blameworthiness would play a role in measuring requitals. Comparative negligence is a substantial step in this direction.[25] Unlike usual tort and contract doctrine,[26] criminal law, which puts blameworthiness on center stage, often takes into account the actor's relative responsibility or culpability for her conduct when meting punishment.[27]

Though relative degrees of coercion and ignorance are usually considered factors that affect the extent of responsibility of an actor and, for that matter, the victim, all persons are not the same when it comes to facing these hindering constraints. A particular person's constitution may significantly surpass the threshold standard of the ordinary reasonable person in specific circumstances. She may be unusually resistant to particular forces of coercion or she may be knowledgeable about the risks of her contemplated choice much beyond the average person. For example, as an adept in martial arts, she may not be the least bit intimidated by a specific physical threat, or as a psychologist she may be especially sensitive to the internal impulses that bedevil untrained people. With respect to ignorance, she may be a sophisticated expert who is not taken in by the deceptive claims of

24. *See, e.g.,* DOBBS, *supra* note 20, at 349; Postema, *supra* note 7, at 3; James Goudkamp, *The Spurious Relationship Between Blameworthiness and Liability for Negligence*, 28 MELB. U. L. REV. 343, 343 (2004). *But see* John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2042 (1997) ("[C]ourts . . . have demonstrated sensitivity to the distorting effects of the full compensation principle by varying the scope and stringency of proximate cause doctrine in accordance with the nature of the defendant's wrongdoing.").

25. *See generally, e.g.*, DOBBS, *supra* note 20, at 503–06; KEETON ET AL., *supra* note 20, at 468–79.

26. Punitive damages, having quasi-criminal law overtones, are the most notable exception to this generalization. *See infra* note 52.

27. *See infra* note 57.

the other party, or she may have studied and mastered some of the cognitive distortions that plague humans. Indeed, the common law takes into account some of the unusual strengths of the parties. Thus, in judging whether a party's conduct meets the legal standard for an excuse, the law ascribes to the reasonable person surrogate some of the actual person's superior qualities, such as whether she is, or holds herself out as, a relevant expert.[28] Furthermore, under a causation requirement, legal doctrine demands that a claimant's conduct actually results from the effects of ignorance or coercion.[29]

When the law accommodates the reduced degree of an actor's Responsibility Blameworthiness, B_r, it may separate out the elements of ignorance, B_{ri}, and coercion, B_{rc}. Each of the two factors could be independently gauged on a scale from, say, 0.0 to 1.0, with 1.0 being total freedom from ignorance or coercion. Each aspect could be weighted differently for particular types of conduct. For battery, as an instance, foreseeability (ignorance) of likely harm may be weightier than freedom from coercion. This would mean that the agent's foreseeability of possible harms must be greater and closer to ideal (1.0), than must be her freedom from coercion. In other words, to avoid being held responsible and liable, we are more sympathetic to the claim, "I didn't realize the victim was put at risk by my conduct," than we are to the claim, "I couldn't help myself." In sum, weighing relates to the ontological question regarding the extent to which there is ignorance or coercion, whereas weighting relates to the normative issue of how much (dis)value society ought to ascribe to a particular ignorance or coercion.[30] Hence, say, for a wrongful harm from a battery to be sufficiently blameworthy and thereby inexcusable, it must be that $B_{ri} = 0.5$ and $B_{rc} = 0.3$. Since the lack of ignorance is weightier here, more important than the absence of coercion, we require it to weigh more, be more present, for the actor to be declared responsible.

The two factors of ignorance and coercion may be weighted differently depending on whether they stem from external or internal sources, or the nature of the external or internal sources. For in-

28. *See, e.g.*, DOBBS, *supra* note 20, at 290; KEETON ET AL., *supra* note 20, at 185–86.

29. Regarding ignorance, see, *e.g.*, RESTATEMENT (SECOND) OF TORTS § 537 (1977) (discussing fraudulent misrepresentation); RESTATEMENT (SECOND) OF CONTRACTS § 167 (1981) (discussing misrepresentation). For coercion, see, *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 174–75, 177 (1981) (discussing duress and undue influence).

30. For more on the distinction between weighting and weighing, see ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 294 (1981); Bailey Kuklin, *Constructing Autonomy*, 9 N.Y.U. J.L. & LIBERTY 375, 428 n.181 (2015); Andrei Marmor, *On the Limits of Rights*, 16 LAW & PHIL. 1, 13 (1997).

stance, regarding coercion, B_{rc}, responsibility for conduct may have a threshold of, say, $B_{rc} = 0.3$ for external coercion such as physical duress and, say, $B_{rc} = 0.1$ for internal coercion such as impulse. To suffice as excuses, external coercion must be quite substantial while internal impulse must be nearly irresistible.[31] As another example, excusing a contractual commitment may have a threshold of, for example, $B_{ri} = 0.5$ for externally induced ignorance such as from misrepresentation, and $B_{ri} = 0.2$ for internally centered ignorance, such as from mental inability and cognitive biases. This methodology becomes further complicated when the ignorance springs from a combination of external and internal factors. A merchant, for instance, may knowingly exploit human foibles by selling a flashy, shoddy product in a plush showroom with flattering, attractive salespersons. The nature of external or internal sources may also be relevant, as where physical duress is considered weightier than economic duress. The possible permutations are manifold. Of the two excusing factors, ignorance and coercion, it seems that existing law primarily emphasizes the need for foreseeability (lack of ignorance).[32] In torts and criminal law, issues regarding freedom from coercion receive little judicial attention until

31. "Put most generally, a central behavioral morality question for law would be 'Can internal causes ever exculpate?' The predominant answer in both law and legal philosophy has been 'no' . . . ." Amanda C. Pustilnik, *Rethinking Unreasonableness: A Comment on Nita Farahany's "Law and Behavioral Morality"*, *in* EVOLUTION AND MORALITY 166, 167 (James E. Fleming & Sanford Levinson eds., 2012. For exceptions, see Walter Sinnott-Armstrong, *A Case Study in Neuroscience and Responsibility*, *in* EVOLUTION AND MORALITY, 194, 205–06 (2012).

32. "Perhaps the most important of the capacities that is requisite to tort liability is the capacity for foresight." RIPSTEIN, *supra* note 7, at 94. "On the view I will defend, foresight is not required because it is a general condition of agency. Instead, it is implicit in the idea of fair terms of interaction." *Id.* at 105. *See also* Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts*, 50 UCLA L. REV. 585, 602 (2002) ("It is widely agreed that one cannot really be blamed for harming someone when, at the time one acted, one did not anticipate and could not reasonably have anticipated, that acting in the way one did risked harm to another."). In these situations, "it seems unfair to say the defendant should have acted differently." *Id.* While Scanlon questions the moral connection between intention and foresight, *see* T.M. Scanlon & Jonathan Dancy, *Intention and Permissibility*, 74 PROC. ARISTOTELIAN SOC'Y 301, 305–06 (2000), Dancy disagrees with him, *see id.* at 333–34.

it gets rather extreme.[33] In contract law, the modern trend is to be more attentive to the victim's claim of duress.[34]

The two excusing factors in Responsibility Blameworthiness, ignorance and coercion, occasion many more intricacies. Each factor may be weighted differently depending on whether the claim is civil or criminal, or the nature of the claim or remedy sought, such as battery versus wrongful death or homicide. First, for criminal battery, Responsibility Blameworthiness for ignorance and coercion may be $B_{ri} = 0.5$ and $B_{rc} = 0.3$, respectively, while for civil battery, $B_{ri} = 0.4$ and $B_{rc} = 0.2$. In other words, for battery one must be more responsibility blameworthy for criminal liability than for civil liability. Excuses and justifications are more readily available in the public law context. A warrant for this difference stems from the varied deontic aims of civil and criminal liability. Civil liability primarily seeks to compensate the victim pursuant to corrective justice,[35] whereas criminal liability means to punish the actor pursuant to retribution or distributive justice.[36] Sec-

33. "Relatively few [tort] cases have dealt with the problem of consent given under duress. . . . [T]here has been no discussion of its place in the law of torts." KEETON ET AL., *supra* note 20, at 121. "The [tort] cases to date in which duress has been found to render the consent ineffective have involved those forms of duress that are quite drastic in their nature and that clearly and immediately amount to an overpowering of the will." RESTATEMENT (SECOND) OF TORTS § 892B cmt. j (1977).

For the Model Penal Code's approach to coercion (duress), see DUBBER, *supra* note 10, at 251–59. "[D]uress is limited to coercion caused by persons (personal duress), and not to compulsion by natural causes or circumstances (circumstantial duress)." *Id.* at 253. "[C]oercion is broader . . . than duress . . . ." Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 591. "Apart from duress, English and American courts have been loathed to recognize excuses based on external coercion, in particular, external coercion generated by natural circumstances." FLETCHER, *supra* note 23, at 106. "The law is . . . much more cautious in admitting 'defects of the will' than 'defect in knowledge' as qualifying or excluding criminal responsibility." H.L.A. HART, *Legal Responsibility and Excuses*, *in* PUNISHMENT AND RESPONSIBILITY, *supra* note 10, at 28, 33.

34. "Courts originally restricted duress to threats involving loss of life, mayhem or imprisonment, but these restrictions have been greatly relaxed and, in order to constitute duress, the threat need only be improper with the rule stated in [the next section]." RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. a (1981). For the twisty lines drawn by modern courts, see *id.* §§ 175, 176; FARNSWORTH, *supra* note 21, §§ 4.16–4.18. This greater generosity in contracts as compared to torts and criminal law may be due to the weaker available requitals: avoidance, rescission, and restitution. *See id.* § 4.19.

35. "[C]orrective justice has usually been thought of as comprising those principles that directly govern private transactions between individuals. In developed legal systems, these principles are generally embodied in the law of contract, torts, and unjust enrichment." Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 515 (1992). *See generally* Jules Coleman et al., *Theories of the Common Law of Torts*, STAN. ENCYCLOPEDIA PHIL., *available at* http://plato.stanford.edu/archives/ win2015/ entries/tort-theories/ (last visited Mar. 7, 2016) [https://perma.cc/6DJF-SBVD].

36. *See generally* Hugo Adam Bedau & Erin Kelly, *Punishment*, STAN. ENCYCLOPEDIA PHIL., *available at* http://plato.stanford.edu/archives/fall2015/entries/punishment/ (last

ond, for homicide, the threshold for coercion, B_{rc}, may be nearly 0.0. Here, in other words, coercion, however great, almost never excuses homicide, while foreseeability (ignorance) remains as a higher threshold factor at, say, $B_{ri} = 0.3$. Yet, as above, we may distinguish external coercion (e.g., physical duress) from internal coercion (e.g., insanity, irresistible impulse), establishing a lower threshold of responsibility for one than for the other, or for one type of external or internal coercion than for another type. Provocation by the victim, when seen as a form of coercion,[37] raises the threshold for B_{rc}. Looking at (nearly) absolute liability, such as possession of contraband, the threshold for ignorance may be, say, $B_{ri} = 0.0$, while the threshold for coercion remains, say, $B_{rc} = 0.3$.

The excusing factors in Responsibility Blameworthiness may be weighted differently depending on the type of harm at issue. For dignitary harm from an assault or defamation, Responsibility Blameworthiness may be set at $B_{ri} = 0.5$ and $B_{rc} = 0.3$, while for psychic harm from the same conduct, Responsibility Blameworthiness is set at $B_{ri} = 0.6$ and $B_{rc} = 0.3$. In this instance, the foreseeability of the psychic harm must be greater than the foreseeability of the dignitary harm.

Under existing law, courts have struggled with four distinctions among foreseeable harms.[38] First, the courts have considered the type of harm (i.e., physical, economic, psychic, or dignitary). If some type of harm is foreseeable, is the actor responsible for other types of

visited Mar. 7, 2016) [https://perma.cc/8U4P-8XUJ]. The distinctions among corrective, retributive, and distributive justice are controversial. *See, e.g.*, IZHAK ENGLARD, CORRECTIVE AND DISTRIBUTIVE JUSTICE FROM ARISTOTLE TO MODERN TIMES 9–10 (2009); WOJCIECH SADURSKI, GIVING DESERT ITS DUE 25–36 (1985); C.L. TEN, CRIME, GUILT, AND PUNISHMENT 5 (1987); George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 57–59 (1999); John Gardner, *Corrective Justice, Corrected*, 12 DIRITTO & QUESTIONI PUBBLICHE 9, 13–15 (2012); Ronen Perry, *The Third Form of Justice*, 23 CAN. L.J. & JURISPRUDENCE 233, 242–47 (2010). Consequentialist aims of civil and criminal liability, such as deterrence, are here set aside.

37. "It is proposed both that provocation justifies retaliatory action and that it causes such action. Moreover, the causal imputation commonly carries an implication of compulsion, an implication that can be made to account (at least in part) for the justificatory element in provocation . . . ." MARTIN DALY & MARGO WILSON, HOMICIDE 257–58 (1988). Some commentators see provocation as a partial excuse, others as a partial justification. Both views have been criticized. *See* Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1212 (1994) (with citations).

38. To put the issues more generally, "it is difficult to see how the principle of reasonable foreseeability ensures that liability only arises in respect of avoidable risks." Goudkamp, *supra* note 24, at 347. *See id.* at 347–50.

harms that are not (as) foreseeable?[39] To draw even finer lines: If recovery for freestanding harms requires, say, $B_{ri} = 0.5$, when a specific type of harm meets this threshold, should the threshold for other types of ensuing harms decrease, or the threshold for other types of harms decrease to different levels for each respective type of harm?[40] Second, the courts have considered the manner of harm. If a particular type of harm is foreseeable (e.g., physical), is the actor responsible for that type of harm when it occurs in an unforeseeable manner? Third, the courts have considered the extent of harm. Is the actor responsible for a particular type of harm that is more extensive than was foreseeable?[41] Fourth, the person harmed. If harm is foreseeable to one person, does responsibility extend to a similar harm to an unforeseeable person?[42] Under a wide range of circumstances, these permutations could play out in very complex interplays of B_{ri} and B_{rc}.[43]

39. "A person should not be liable for the unforeseen consequences of all unlawful acts. He should be responsible for the unforeseen consequences of acts that are unlawful because they are unjust to others because they harm or appropriate what belongs to them." JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 195 (2006).

40. Goldberg and Zipursky relatedly assert that psychic harm for defamation is parasitic on dignitary harm. *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, TORTS 311 n.4 (2010). There may be another way to get to this idea. Perhaps the threshold in defamation for responsibility (and disrespect) for dignitary harm is lower than for psychic harm. If so, without meeting the threshold for dignitary harm, the threshold for psychic harm will not be met.

41. The problem with making defendants liable for unusual injuries is . . . that it would encumber liberty too much, as people seeking to avoid wronging others would need to moderate their activity to too great an extent. By contrast, liability for the full *extent* of injury, no matter how surprising, places no burden on liberty. For no extra precautions are required to avoid severe injuries than are required to avoid less severe ones.

Ripstein, *supra* note 7, at 90. But once a defendant is found liable for an unexpected extent of injury, any ensuing reduction in her resources diminishes her future range of choices.

42. The leading case addressing this issue is Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928). For the related problem of transferred intent, see DOBBS, *supra* note 20, at 75–79; KEETON ET. AL., *supra* note 20, at 37–39. "[T]he best explanation of why the intent to shoot the desired victim should be 'transferred' to the actual victim is that both intentions are equally culpable." Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 620 (1984). "[I]t is not really that intent is 'transferred.' Where the doctrine applies, the defendant's intent was sufficient all along." Lawrence Crocker, *A Retributive Theory of Criminal Causation*, 5 J. CONTEMP. LEGAL ISSUES 65, 81 (1994) (footnote omitted). Discussing *Palsgraf*, Hurd and Moore opine, "[t]he best thing to do with the doctrine of transferred intent is thus to get rid of it entirely." Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQ. L. 333, 390 (2002) (footnote omitted).

43. Weinrib offers a guideline. "[W]hen the plaintiff's loss, although caused by the defendant's wrongdoing, is not within the ambit of what makes it wrongful, the defendant's conduct cannot be said to be wrongful with respect to that plaintiff's loss." Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQ. L. 1, 10 (2000).

More generally, we could further conjure up extraordinarily entangled interrelations among various combinations of external and internal coercion which are interconnected to intricately entangled interrelations among external and internal ignorance.

Setting aside practical problems and insuperable epistemic issues, if the level of the actor's Responsibility Blameworthiness, B_r, is exactly discernable, then a case might be made for reducing the requital in some proportion to the extent that B_r falls short of ideal.[44] For an example that lumps together B_{ri} and B_{rc} into $B_{r,}$ to trim complications, say that the threshold for a requital is $B_r = 0.5$, and, in a particular case, $B_r = 0.9$. One might then consider reducing the requital by, perhaps, 10% per 0.1 increment to roughly account for the shortfall from the ideal conditions for responsible choice. For each 0.1 drop of B_r below 1.0, the requital would decrease by 10% until at $B_r = 0.5$ (the minimum threshold for responsibility) the requital would be based on 50% of the harm. The reductions need not be linear. Of course, as suggested by some of the analysis above, this could lead to untold complexities from combinations of factors. Further labyrinthine convolutions could be added by the permutations from overlaying the variations in Disrespect Blameworthiness, B_d, discussed below.

Reducing requitals in proportion to an actor's shortfall from the ideal conditions for Responsibility Blameworthiness strongly protects the actor's liberty interest. In a real, if somewhat crude, sense she will be held liable only for wrongful harm to the extent that she could anticipate and avoid it. She is in significant control of her exposure to

Moore suggests that one could deal with the "vagaries in the meaning of 'foreseeable' [by] . . . creat[ing] a sliding scale foreseeability test, less probability being required for more serious harms, more probability for less serious harms." MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 364 (1997). We might also vary the standard of foreseeability in light of the purpose of the agent's conduct. Where her activity is socially beneficial and her minimization of risks is costly, "the probability with which harm to the claimant must be foreseeable before his rights can be said to have been violated will be higher than where the defendant's activity is pointless or unlawful." ROBERT STEVENS, TORTS AND RIGHTS 207 (2007) (footnote omitted). "Reasonable foresight, in relation to culpability, is therefore a practical notion and we may term the harm, the risk of which is sufficient to influence the conduct of a prudent man, 'foreseeable in the practical sense.'" H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 263 (2d ed. 1985) (footnote omitted). The "prudent man" is, of course, a society-created person reflecting society's values.

44. Kolber questions the all-or-nothing liability responses of the law. *See* Adam Kolber, *Smooth and Bumpy Laws*, 102 CAL. L. REV. 655, 656-57 (2014). In proposing a culpability-based criminal code, Alexander and Ferzan state, "After a jury determines which legally protected interests the actor believed himself to be risking, the jury will need to discount these interests by the actor's belief as to the magnitudes of the various risks he was imposing." ALEXANDER & FERZAN, *supra* note 10, at 282.

the risk of requitals. She is free to act without the fear of liability for harms or their extent; as such, we cannot truly say, "You are *entirely* blameworthy for causing that injury," or would say, "You are not *that* blameworthy for it." On the other hand, let us turn our attention to the security interests of the wrongfully harmed party. She, most often, is not blameworthy in the least.[45] We must then decide whether to sacrifice some of the blameless victim's security interest for the sake of the moderately blameless actor's liberty interest.[46] Who has the stronger claim? What are the consequences? What types of considerations count?

If we consider requital principles that do not curtail any of the victim's security interest that is at risk because of the harming actor's shortfall from full Responsibility Blameworthiness, how might the remedial standards address this? One possibility is to allow the victim a full, undiminished recovery for wrongful harms once the threshold for requital is reached. This is the usual rule under the common law conception of corrective justice.[47] The element of blameworthiness usually plays no role in the gauge of compensation.[48] Then, if we choose to account for the actor's Responsibility Blameworthiness beyond the threshold minimum, we could do so by increasing the victim's award. We could add a surplus to the victim's recovery, granting her more than the measure of her actual, wrongful harms. This step goes beyond our ordinary understanding of corrective justice and, rather, suggests the idea of distributive justice.[49] As an example, to implement this step when the threshold for Responsibility Blameworthiness is $B_r = 0.5$, and the particular actor's blameworthiness is $B_r = 0.9$, we might add an extra proportionate amount to the victim's recovery. Though the actor would object to the enhanced award with, "But the victim wasn't hurt *that* much," we (sometimes) may respond,

45. When the victim is somewhat blameworthy as well, the tort doctrines of contributory and comparative negligence apply. *See generally, e.g.*, DOBBS, *supra* note 20, at 494–98, 503–06; KEETON ET AL., *supra* note 20, at 451–62, 468–79.

46. *See* NEIL MACCORMICK, *The Obligation of Reparation*, *in* LEGAL RIGHT AND SOCIAL DEMOCRACY 212, 214 (1982).

47. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 903 (1977); DOBBS, *supra* note 20, at 1047–48.

48. *See infra* note 57.

49. Distributive justice, under Aristotle, "is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution . . . ." ARISTOTLE, *supra* note 14, bk. III, ch. 2, at 1005–06. Today it often reaches the distributive effects of all norms. *See generally, e.g.,* Julian Lamont & Christi Favor, *Distributive Justice*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/archives/fall2014/entries/justice-distributive/ (last visited Mar. 7, 2016) [https://perma.cc/AXM4-S8AZ].

"Yes, but that was a matter of moral luck,[50] and, in this particular case, the degree of your blameworthiness is not adequately reflected by the victim's actual injuries."[51] How much should the recovery be heightened under this approach? This is a tough question. Should we add, say, 10% to the victim's recovery for every 0.1 increment above the threshold of B_r of the actor's blameworthiness? If so, and if the threshold is $B_r = 0.5$, and the actor's $B_r = 0.7$, then we would add 20% to the victim's recovery. Instead of simply adding increments, should there be a multiplier? Should the extra amount be nonlinear? Progressive? Regressive? Even tougher than the calculation above is of how much we might reduce the victim's recovery for Responsibility Blameworthiness that falls below the ideal, $B_r = 1.0$.

The exploration of the possibility of adding a surplus to requitals for heightened Responsibility Blameworthiness is rather academic and, under existing social norms, unrealistic. Epistemic problems still aside, why should a victim recover for more than her actual harms? We apparently allow this for punitive damages, but this doctrine is distinguishable. While not generally acknowledged by the courts, punitive damages arguably provide a means to requite the victim's dignitary, psychic, and other harms in extreme cases of disrespectfulness when the standard causes of action do not fully protect against these types of harms, such as for a malicious prosecution.[52] Malice, of sorts, is usually an element of the claim for punitive damages.[53] Sometimes, however, punitive damages are greater than a just requital for the victim's own dignitary, psychic, and other harms. In these cases, we grant the victim the privilege of recovering punitive damages as a private attorney general for, arguably, wrongful harms to the general pub-

50. "Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck. Such luck can be good or bad." Thomas Nagel, *Moral Luck*, *in* MORTAL QUESTIONS 24, 26 (1979). *See generally, e.g.*, CANE, *supra* note 14, at 65–78; BERNARD WILLIAMS, *Moral Luck, in* MORAL LUCK 20 (1981); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007); Stephen J. Morse, *Reasons, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363; Norvin Richards, *Luck and Desert*, 95 MIND 198 (1986).

51. Sometimes, of course, moral luck will cut against the actor. The ordinary requital standard will lead to legal relief beyond the degree of the actor's blameworthiness. Accounting for these varied circumstances adds yet another level of complexity.

52. *See, e.g.*, KEETON ET AL., *supra* note 20, at 9; Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1, 3–5 (1989).

53. "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." RESTATEMENT (SECOND) OF TORTS § 908 (1977). *See, e.g.*, DOBBS, *supra* note 20, at 1062–66; KEETON ET AL., *supra* note 20, at 9–10.

lic.[54] These also are actual harms, the problem being that they may be so dispersed among a wide public that, as with the law of public nuisance, we decline for practical reasons to grant standing to sue to everyone who has been similarly harmed.[55] Considering instances when an actor produces remediable, wrongful harms with a level of responsibility above the minimum threshold, what is the actual harm to the direct victim or public? Some ensuing harms may be readily identifiable. The victim or public, knowing of the actor's heightened responsibility for her manifested willingness to put them at risk, may react with expenditures for increased security measures and, if bad enough, suffer from physical illness or psychic distress. A society may aptly adopt principles that protect individuals from these and other physical, economic, psychic,[56] and dignitary harms. Here, however, we have been addressing whether to increase a victim's recovery for the actor's heightened responsibility irrespective of whether, or the extent to which, any of these other ensuing harms have been shown. Realistically calculating any such other consequential harms seems to be a largely futile endeavor that is crude at best. Once again, these concerns do not appear within the usual reach of corrective justice but, rather, more as matters for distributive justice or retribution.[57]

This exhausting, microscopic examination of the role of Responsibility Blameworthiness demonstrates that there are many intricate ways to account, in principle, for this moral consideration. This wide range allows for innumerable choices in the adoption of substantive and requital principles that strike a fair, reasonable balance between one's liberty and security interests. There are many plausible bound-

54. I pursue the argument that punishment is to requite wrongful harms to the general public in my manuscript "Public Requitals: Corrective Justice, Retribution, and Distributive Justice" (on file with author).

55. "No better definition of a public nuisance has been suggested than that of an act or omission 'which obstructs or causes inconvenience or damages to the public in the exercise of rights common to all Her Majesty's subjects.' " KEETON ET AL., *supra* note 20, at 643 (footnote omitted). For the practical reasons supporting the rule that public nuisances can be redressed only by public officials, see *id.* at 646.

56. Nozick and Rawls, among others, identify a "fright" theory of criminality, justifying punishment for the psychic harm to the public. *See* NOZICK, *supra* note 6, at 65–71; John Rawls, *Two Concepts of Rules*, *in* THE PHILOSOPHY OF PUNISHMENT 105, 107 (H.B. Acton ed., 1969).

57. *See supra* note 36. "Another important difference between tort and criminal law is that tort generally provides the same sanction (compensatory damages) regardless of the defendant's culpability, while criminal law provides a sanction (punishment) that is proportional to the defendant's culpability." Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 296–97 (1996). Simons goes on to offer a deontological justification for this difference, but expresses caution about the award of punitive damages. *See id.* at 297.

ary lines between one person's freedom and another's, between one person's autonomy, or "autonomy space",[58] and another's that can satisfy the duty to equally respect one another. But there are certainly limits. At the pole where freedom from ignorance and coercion do not matter for responsibility ($B_{ri} = 0.0$, $B_{rc} = 0.0$), the actor is absolutely liable. When applicable, her liberty in this regard is severely truncated while the victim's security is greatly expanded. In being liable for harms she could neither anticipate nor control, the actor's autonomy is essentially disrespected. At the opposite pole, where freedom from ignorance and coercion must be ideal for responsibility ($B_{ri} = 1.0$, $B_{rc} = 1.0$), the actor is virtually never liable. At the very least, everyone suffers some human quirks that foreclose fully informed choices and freedom to act. Freed from liability, the actor's liberty is greatly expanded while the victim's security is severely constricted. Unable to recover for harms produced by even grossly blameworthy conduct, the victim's autonomy is essentially disrespected. Somewhere between these extreme poles, thresholds for Responsibility Blameworthiness must be drawn. Doubtlessly, the standards will consider principles, consequences, and practical matters. The line-drawing debate has been going on for a long time.

II. Disrespect Blameworthiness, B_d

Disrespect Blameworthiness, like Responsibility Blameworthiness, has two aspects. Pursuant to Kant's categorical imperative, a person by virtue of her rational capability is a moral agent entitled to respect as an equal to all other moral agents, and to be so treated.[59] Hence, moral agents are blameworthy for failure to maintain a respectful attitude towards others, B_{da},[60] or to treat others with respect, B_{dt}. Such failures constitute dignitary harms. They may also produce other types of harms. From the insult and defamation implied by disrespectful conduct or attitude, a distressed victim may suffer physical and psychic

58. I develop this "autonomy space" metaphor at length in *Constructing Autonomy*, *supra* note 30, at 393–416.

59. *See supra* note 8.

60. Kant emphasizes a criminal's "inner wickedness." KANT, *supra* note 8, at 474. *See* DAVID BOONIN, THE PROBLEM OF PUNISHMENT 96 (2008) (discussing motive); T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 128 (2008) (discussing an "agent's attitudes toward others"); Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 66 (1999) (discussing "inner thoughts"); Japa Pallikkathayil, *Deriving Morality from Politics: Rethinking the Formula of Humanity*, 121 ETHICS 116, 131–32 (2010) (discussing "duties not to pose as morally superior to others").

harms.[61] Economic harms may also follow. She may be induced to make expenditures for protective measures or may lose economic and social opportunities owing to the negative reactive responses of onlookers.

The standard three types of harms—physical, economic, and psychic—may occur without the actor being responsibility blameworthy at all. She may be justifiably ignorant of the potential consequences of her choice to act, which ultimately harms a victim.[62] No one in her position would have foreseen the risk to others, except, perhaps, Rube Goldberg. Conversely, her negligibly risky conduct might be a reasonable response to a credible, dire, inescapable threat. Hence, under these situations Aristotelian principles would find her not responsible, not blameworthy, for her conduct. $B_r = \sim 0.0$. On the other hand, when it comes to a dignitary harm produced by disrespect (B_d), the actor's ignorance or coercion is less exculpating. This is especially apparent with respect to a disrespectful attitude (B_{da}). As a state of mind, an attitude cannot be simply a product of vindicating coercion. Nor can an attitude of disrespect be a product of acceptable ignorance of the moral equality of all rational beings. The categorical imperative is unconditional. It is, after all, categorical, and therefore independent of a person's inclination, motive, or desire. Ignorance or coercion cannot be fully excusing. We might partially pardon one's disrespectful attitude, as where a morally uneducated person is nurtured in a classist or racist society, but perhaps short of brainwashing, we would still hold the person blameworthy to some extent for disrespecting another. The apt requital may account for her understandable ignorance or attitude stemming from skewed circumstances, but she will not be let off the hook entirely.

A similar case, though perhaps less straightforward, can be made for disrespectful treatment (B_{dt}). "Treatment" refers to "[t]he manner in which someone behaves toward or deals with someone or something."[63] Likewise, "manner" refers to "[a] person's outward bearing

61. *See* Kenneth W. Simons, *Rethinking Mental States,* 72 B.U. L. REV. 463, 512 (1992). On the other hand, a dignitary harm may be protected independently of whether the victim suffers associated psychic or other harms. A tortious assault, for instance, does not require the victim to experience fright or fear. *See* RESTATEMENT (SECOND) OF TORTS § 24 cmt. b (1977).

62. I ignore the de minimis "foreseeability" that stems from the knowledge that totally unforeseeably occurrences sometimes happen. *See* David G. Owen, *Figuring Foreseeability,* 44 WAKE FOREST L. REV. 1277, 1288 (2009) (discussing "foreseeing" the unexpected).

63. *Treatment*, OXFORD ENGLISH (US) DICTIONARY (2016), https://en.oxforddictionaries.com/definition/treatment (last visited Nov. 19, 2016) [https://perma.cc/2WAY-SLYM].

or way of behaving toward others."[64] These two notions, like the notion of "categorical" itself, are independent from the actor's inclination, motive, or desire. Irrespective of why one acts in a disrespectful manner towards another, it remains disrespectful to the victim.[65] The treatment is gauged from the victim's perspective, not the actor's mental state. Even an extreme coercive threat to the actor does not refute the conclusion that her reactive conduct is disrespectful. In succumbing to the coercive threat, she uses the victim as a means only, not as an end in herself.[66] Because of the dire threat, again, we may account for the coercion (or ignorance) in formulating an apt requital, but requital there must be. In sum, virtually all forms of, and reasons for, disrespectful attitudes and treatments retain measures of blameworthiness.

Disrespectful treatment, B_{dt}, and disrespectful attitudes, B_{da}, both have scalar qualities. Uncivil treatment has many depths. At the deepest end are vicious slavery and torture. At the shallower end, a crude brushoff and a careless failure to reciprocate a greeting. Likewise, disrespectful attitudes are matters of degree. At one pole is total contempt and condescension, and at the other there is mild stereotypic prejudice and nurtured deference to biased social norms. In some circumstances, disrespectful treatment and disrespectful attitude may greatly diverge. For example, an actor may brutally torture another person who she believes is her moral superior on the rationale that the victim has information that must be revealed for community welfare, as where an uncooperative, principled victim is a priest who obtained privileged information about a terrorist threat from a penitent confessor.

Once we perceive the scalar qualities of the two facets of Disrespect Blameworthiness, we face difficult issues relating to degrees. Thresholds are again suggested for plausible requitals. Different thresholds for different requitals are reflected in social norms. For disrespectful treatment, B_{dt}, a standard legal remedy for criminal as-

64. *Manner*, OXFORD ENGLISH (US) DICTIONARY (2016), https://en.oxforddictionaries.com/definition/manner (last visited Nov. 19, 2016) [https://perma.cc/74NW-NKSX].

65. This differs from the case, taken up below, in which the actor is ignorant that she is "treating" the victim at all. That is, if the actor, as a reasonable person, cannot foresee that another person is at risk from her conduct, then we would not say that the actor is "treating" the victim in any manner whatsoever. *See infra* note 83.

66. This violates one of the forms of Kant's categorical imperative. *See* IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 41, 80 (Mary J. Gregor trans., 1996) (1785) ("So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.").

sault has a higher threshold requirement than does tortious assault. For example, the mens rea of criminal assault could be $B_{dt} = 0.4$, while the intentional act necessary for tortious assault could be $B_{dt} = 0.2$. In other words, to be subject to sanctions, one's treatment of another person must be more disrespectful for criminal liability than for civil liability. Mens rea is a more demanding standard than is the standard for tortious intentional conduct.[67] On the other hand, some requital may be appropriate for disrespectful treatment that falls below the thresholds for legal relief. In these instances, social norms may call for the disrespectful actor to respond in some extralegal manner. For minimal disrespect, say, $B_{dt} = 0.05$, a quick apology may suffice. As the rude treatment moves up the scale, more sincere apologies are called for, ranging from a casual "mea culpa" to earnest, tearful contrition. A gift or a public expression of remorse may be appropriate under cultural norms as a way to expiate one's particular disrespectful conduct. These extralegal requitals may substitute for, or supplement, legal remedies.

Finally, disrespectful attitude, B_{da}, also varies up and down a scale from 0.0 to 1.0, as do the other forms of blameworthiness. Since attitude is a subjective mental state, formidable epistemic problems interfere with fine-grained measurements.[68] For that matter, rough-grained gauges are also challenging in most cases. As a crude aid, we may estimate an actor's subjective disrespectful attitude on the basis of her objective conduct. Based on the manifested conduct, a reasonable person standard may be invoked to infer the accompanying attitude. This may often be a fair surrogate, yet, as seen in the example above of the reluctant torturer of a principled priest, the disrespectfulness of conduct and attitude may not align at all. At times there may be reliable evidence of an actor's attitude. She may make a record of her mental state, report it to an acquaintance, or admit to it after the fact. Nonetheless, the epistemic hurdles, since they relate entirely to privileged mental states, are substantially greater here than for other forms of blameworthiness.

The epistemic obstacles aside, sometimes the law does seemingly take into account disrespectful attitudes. Some torts or private reme-

67. *See, e.g.*, KEETON ET AL., *supra* note 20, at 33–37.

68. Kant recognizes these epistemic hurdles. In judging legal guilt, he relies on "considerations of a person's external behavior and that person's empirical or psychological personality and history." ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 243 (1989).

dies (may) require malice.[69] Examples include the intentional infliction of emotional distress,[70] malicious prosecution,[71] defamation or libel of a public figure,[72] and punitive damages.[73] These legal doctrines may require different threshold levels of malice or disrespect, varying, say, from $B_{da} = 0.5$ for punitive damages and $B_{da} = 0.4$ for malicious prosecution.[74] Even for conduct short of the reach of the law, some social norms evaluate and vary according to the degree of a wrongdoer's apparent disrespectful attitude. Derisive ridicule calls for a much greater apology or other remorseful response than does a mild slight from misfired humor.

To reconnoiter, immediately above we have seen that the two aspects of Disrespect Blameworthiness, B_d, may vary from totally absent, 0.0, to maximally present, 1.0. Moreover, the degree of these two aspects (B_{da}, B_{dt}) may be quite independent of one another in particular cases. All combinations are possible. Hence, as seen when discussing the two aspects of Responsibility Blameworthiness, ignorance (B_{ri}) and coercion (B_{rc}), all of the labyrinthine interconnectedness of these two facets of disrespectfulness, including the complications from distinguishing types of harms and requitals, epistemic hurdles, etc., are back on the table. Indeed, the difficulties are further compounded, for now we should consider whether or how these four aspects of blameworthiness are to be linked with one another in our social and legal norms. Frankly, I believe refined gauges of blameworthiness are just not possible in this world; far from it. As a practical matter, if distinctions are to be drawn, we must adopt second-best methods. We might leave the evaluations without explicit direction to the judgment of our reasonable observers (e.g., juries and judges) who, as represent-

69. Hume identifies "malice" as "a joy in the sufferings and miseries of others, without any offence or injury on their part." DAVID HUME, A TREATISE OF HUMAN NATURE 372 (L.A. Selby-Bigge ed., 1975) (1739 & 1740). It "is the unprovok'd desire of producing evil to another, in order to reap a pleasure from the comparison." *Id.* at 377.

70. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1977).

71. *See* RESTATEMENT (SECOND) OF TORTS § 653 (1977).

72. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

73. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1977).

74. By way of personal anecdote, several years ago I sat on a federal jury in a case seeking ordinary and punitive damages for malicious prosecution. After we found the defendants liable for malicious prosecution, the jury later reconvened to consider punitive damages. During deliberations the foreman included my (anonymous) query in questions to the judge: why is it necessary for us to find malice for the recovery of punitive damages when we have already found malice for the underlying claim? The judge, clearly annoyed, responded with double talk. A fellow juror reported to me that, as the judge left the jury room, he was mumbling something about "law professors".

atives of the community,[75] are to evaluate blameworthiness as best as they can. But there is more to consider before doing so.

Let us see how we might cash out Disrespect Blameworthiness with a requital principle that focuses primarily on fairness to the actor who harms another's dignity. Recall that in cashing out Responsibility Blameworthiness with this focus on the actor, it seemed plausible to use shortfalls from ideal responsibility ($B_r = 1.0$) as a gauge for reducing the actor's liability for harms up to the point where the shortfall reaches the minimum threshold for responsibility (say, $B_r = 0.5$). Beyond this point, the victim cannot recover at all because the actor is not sufficiently responsible. Thus, a victim who suffered a $10,000 injury from an actor whose measure of responsibility, B_r, was 0.8 would possibly recover $8,000. This orientation favoring the partially responsible actor rejects coming at the problem from the other direction of granting the victim a full recovery once the minimum threshold of responsibility is reached and adding extra to that recovery amount as the actor's Responsibility Blameworthiness exceeded the minimum. Under this second approach, the victim would recover her full loss of $10,000 once the actor's Responsibility Blameworthiness reaches the minimum threshold of, say, 0.5, and the victim would recover an additional amount in proportion to the extent that B_r exceeds 0.5. This proposal, while (more than) fair to the victim, seems to push standard remedial principles too far unless, perhaps, we invoke distributive justice rather than corrective justice. Distributive justice is mainly a community concern to see that the actor reaps her just deserts, positive or negative.[76] Corrective justice, on the other hand, is more of a private matter to reestablish the ex-ante balance between the actor and her victim.[77] Under either standard of justice, the victim has no persuasive deontic claim to recover more than her actual harms.

In discussing the two aspects of Responsibility Blameworthiness, ignorance (B_{ri}) and coercion (B_{rc}), I have largely glossed over the epistemic difficulties of discerning the extent to which the actor's conduct is the product of shortfalls from full responsibility. It is not so easy to gloss over the epistemic hurdles to gauging both facets of Disrespect Blameworthiness. Yet one aspect of it, disrespectful treatment

75. In this context, Adam Smith refers to the "impartial spectator". *See, e.g.*, ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 82–85 (D.D. Raphael & A.L. Macfie eds., 1976) (1759). Hume, Smith's friend, refers to the "judicious spectator". *See* HUME, *supra* note 69, at 581. For comparison of Smith's and Hume's understandings, see Jon Rick, *Hume's and Smith's Partial Sympathies and Impartial Stances*, 5 J. SCOTTISH PHIL. 135 (2007).

76. *See supra* note 49 and accompanying text.

77. *See supra* note 35.

(B_{dt}), while difficult to measure, may be the easiest of the four factors to discern. It is judged by the actor's manifested conduct with respect to the victim. A reasonable person in the victim's shoes can evaluate the degree of implicit insult and defamation displayed by the actor's conduct. This is a community standard. Our fact-finding representative of the community, a jury or judge perhaps, can gauge this. But when we turn to disrespectful attitude (B_{da}), the epistemic obstacles reign supreme. Attitude is an entirely subjective matter. Can it be objectified to any extent? One possibility is to declare that disrespectful attitude is to be preliminarily gauged by the disrespectful conduct itself. Based on the actor's conduct alone, a reasonable onlooker would surmise that the actor's choice to act in a way that puts the victim at such risk reflects a certain degree of disrespectful attitude toward the victim. This establishes the prima facie baseline. Then, insofar as the actor's actual attitude was truly less disrespectful than supposed, as in the priest-torturer hypothetical above, it is incumbent on the actor to so demonstrate. Inversely, if the actual attitude was more disrespectful than supposed, the burden of proof is on the victim. Second-best solutions such as this may be the best we can do for these types of issues.

Above, we examined cases in which the actor's Responsibility Blameworthiness surpasses the threshold for recovery. When we turned our primary attention to the harmed victim, attempting to be protective of her security interest irrespective of the consequences to the actor's liberty interest, we contemplated whether one might add more to the victim's recovery or subtract less from it in proportion to how much the actor exceeded the threshold or fell short of the ideal. These complications are not present in the context of Disrespect Blameworthiness. The actor's heightened disrespect beyond the threshold increases the victim's dignitary harm. It may also exacerbate the victim's other types of harms, especially her psychic harm. Insofar as the relevant substantive or requital principles fully protect the victim's dignitary interest, the actor has no complaint that she is liable for more than the victim's actual harm. A dignitary harm is real.

III. Connections Between Responsibility Blameworthiness, B_r, and Disrespect Blameworthiness, B_d

The discussion of the four aspects of blameworthiness has thus far treated each one of them as primarily univocal and independent of the others. Regarding Responsibility Blameworthiness, the facets of ignorance, B_{ri}, and coercion, B_{rc} may seem to have an unconditional significance and stand quite apart from one another. Yet there are

situations where they are subject to diverse perspectives and interrelationships. Some hypotheticals will help develop these ideas.

Suppose that Jan is driving alone late at night in an unfamiliar, sparsely populated area when she notices that a stranger, Bob, is trailing her suspiciously. When she picks up her speed and uses other evasive tactics, so does Bob in his car. As this action and reaction continues to escalate, Jan feels increasing coercive duress inducing her to attempt evasive tactics.[78] Let us say it has reached the level where $B_{rc} = 0.6$. At this point she guns her engine, speeds around a blind corner, and runs into an unanticipated car in the oncoming lane. While Jan had reason to know that there were some cars around, it was not very foreseeable to her that she might cause this accident, say, $B_{ri} = 0.2$. She was largely ignorant of the risk she created by her manner of driving. Under these circumstances, we may judge that her blameworthiness was not very substantial. Her coercive duress, after all, measured 0.6. Still, however, the blameworthiness of the party Jan ran into was, presumably, 0.0. Thus, even though we may declare Jan sufficiently blameworthy to hold her liable for tort damages under corrective justice, possible criminal charges pursuant to retributive or distributive justice seem to be inappropriate because of her level of duress and ignorance.[79] However, on closer examination of the corrective justice overtones, the coercive duress that Jan experienced in this hypothetical has another dimension. Because Bob was threatening Jan's person, we may look at these events as a matter of self-defense that led to Jan's unintentional harming of a third person. Put this way, we may be more generous to Jan by permitting her to escape liability in tort to the third party in circumstances where the level of duress alone, without the self-defense implications, would not free her

78. This hypothetical has aspects of both coercive duress and self-defense. In the criminal context, "[w]hereas self-defense justifies the commission of a crime, coercion affirmatively excuses allegations of criminal conduct." Monique M. Gousie, *From Self-Defense to Coercion: McMaugh v. State Use of Battered Woman's Syndrome to Defend Wife's Involvement in Third-Party Murder*, 28 NEW ENG. L. REV. 453, 461 (1993) (footnotes omitted). "A presumption of coercion exists when the defendant demonstrates that he or she was in imminent danger, with no opportunity to escape, and had a well-grounded fear of death or serious bodily injury unless he or she complied with the captor's commands." *Id.* (footnote omitted). For my purposes here, the distinction is not important to consideration of the underlying diminishment of free, autonomous choice by Jan. But Bob's blameworthy conduct giving rise to Jan's privilege of self-defense distinguishes his potential claims against her from those of any blameless person harmed by Jan's evasive tactics.

79. For consequentialist support, see LEO KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 43 (1987). On the other hand, existing criminal law doctrine is not generous to an actor who negligently or recklessly places herself in a necessitous situation. *See* MODEL PENAL CODE §§ 2.09(2), 3.02(2) (1962).

of responsibility.[80] The law may account for the deep instinct for self-preservation.

Now let us change one of the facts of the Jan-Bob interaction. Jan is consciously aware that there is much current traffic on the local roads. Therefore, regarding the risk of running into another car by her hazardous driving, $B_{ri} = 0.4$. Even though her level of coercive duress remains the same ($B_{rc} = 0.6$), because of her reduced ignorance of the risky circumstances, we may not excuse her behavior very much, or at all. We might say to her,

> Whether we see this issue as a matter of duress alone or as self-defense, we require you to forcefully resist this particular level of coercion when your chosen means of responding to it is to engage in conduct that you have so much reason to know to be substantially risky to others. You are responsible and blameworthy.

Similarly, there are instances in which the level of ignorance remains fixed, say, $B_{ri} = 0.4$, but where the level of duress varies, say, from $B_{rc} = 0.2$ to 0.6. This occurs as Jan's justified fear of Bob's escalating, threatening conduct increases. Depending on the specific risk involved, when the coercion is significant enough, we may (partially) excuse the conduct, but when low, we may not excuse it at all. Although the Jan-Bob hypothetical dwells on external sources of coercion and ignorance, to some extent a similar analysis would apply to internal sources, such as impulses and cognitive dissonance. In sum, when setting the substantive and requital principles for harms from conduct in which Responsibility Blameworthiness is impaired, we often examine each one of its two aspects separately and from different viewpoints, while keeping one eye on the other.

Setting aside other considerations for the moment, it may seem when discussing these hypotheticals that our intuitions about the sufficiency of Responsibility Blameworthiness mainly turn on the total extent of its two factors. That is, for a particular risk of harm to others, the actor is liable when, say, the two factors add up to 0.9. This would occur when $B_{rc} = 0.4$, $B_{ri} = 0.5$, when $B_{rc} = 0.2$, $B_{ri} = 0.7$, and so forth. But it may not be so simple. It may be that one of the factors is weightier than the other. Ignorance, for example, may be more important than coercion. We might demand progressively greater resistance to coercive pressure than we require of knowledge acquisition. For instance, an increase of ignorance (B_{ri}) from 0.3 to 0.4 may be normatively equivalent to an increase of duress (B_{rc}) from 0.3 to 0.5. In other

80. *See* RESTATEMENT (SECOND) OF TORTS §§ 73, 75 (1977); DOBBS, *supra* note 20, at 169–70; KEETON ET AL., *supra* note 20, at 147–48.

words, we are more sympathetic to a person's plea of ignorance than to her plea of proportionate coercion. These differing weights may also occur regarding increments within each factor. An increase of ignorance (B_{ri}) from 0.2 to 0.4 may be weighted the same as an increase from 0.7 to 0.8. This is likewise for coercion (B_{rc}). To further complicate matters, these varying weights may cut across the two factors. Thus, as above, an increase of ignorance (B_{ri}) from 0.3 to 0.4 may be weighted the same as an increase of duress (B_{rc}) from 0.3 to 0.5, but as the duress increases it may become relatively more weighty, as where an increase of B_{rc} from 0.7 to 0.8 is as weighty as an increase of B_{ri} from 0.3 to 0.4. For another complication, as seen in the Jan-Bob hypotheticals, we may consider comparable levels of coercion to be weightier when seen from one perspective (e.g., self-defense) than when seen from another (e.g., physical duress). These identified twists and turns are just the tip of the iceberg. When we add the many other factors on top, such as the types and extents of harms or the relief being sought, the matrix of blameworthiness potentially grows even more labyrinthine.[81]

Unlike common cases for Responsibility Blameworthiness, the two aspects of Disrespect Blameworthiness, treatment (B_{dt}) and attitude (B_{da}), may be quite independent of one another. As in beneficent paternalism, one may treat another person disrespectfully by denying her the freedom to make a choice for herself while, at the same time, thinking of her as one's moral equal. This occurs occasionally within family and other close relationships where one is particularly protective of others. On the other side of the coin, one may treat a person respectfully while having a contemptuous opinion of her, as where an actor dutifully performs a contract with a member of a disdained group. Since a disrespectful attitude is a mental state and a disrespectful treatment is a manifested conduct, they center in essentially different realms of human experience.

The issues relating to the hypotheticals involving Jan and Bob put into focus some of the complications of Responsibility Blameworthiness. A central facet was Jan's relative ignorance, that is, her limited ability to foresee the potential consequences of her possible choices in response to Bob's threatening conduct. When discussing Responsibility Blameworthiness, the focus on knowledge is obviously to be expected since ignorance, B_{ri}, is one of its two aspects. When, however,

81. For an excellent example of the complexities of valuing and weighting competing norms, see SHELLY KAGAN, THE GEOMETRY OF DESERT 591–626 (2012) (matching comparative and noncomparative desert).

we turn to Disrespect Blameworthiness, B_d, we also see ignorance, in the form of foreseeability, playing a valorizing role for one of the factors, disrespectful treatment, B_{dt}. If an actor has no reason to foresee that her conduct puts another person at risk, the act does not constitute disrespectful treatment of that other person even when such conduct, it turns out, is indeed risky to her.[82] One is hardly treating a person disrespectfully (or at all) when one reasonably does not know that her choice of conduct might affect the other person.[83] The more the unjustifiable risk to another is foreseeable, the more disrespectful it is, all else equal. A similar conclusion does not follow from coercive forces (B_{rc}). Even when one's harmful conduct is entirely the product of duress, one is still treating the victim disrespectfully. The victim is used as a means only to the actor's ends, that is, to escape the coercive threat.[84] This relationship of knowledge, foreseeability, to disrespectful treatment (B_{dt}) is brought out in the Jan-Bob driving hypotheticals. Disrespectful attitude (B_{da}), on the other hand, remains free of this relationship to knowledge. A person's disrespectful mental state, while it may well influence her chosen conduct, is ultimately independent of foreseeability. An attitude obtains whether or not it is manifested in conduct.

The concept of blameworthiness is clearly one of the most important desiderata in our legal and moral norms. Conceptions of it may play a prominent role in both substantive and requital principles. For example, an overarching substantive principle might be: "Do not

82. The type of ignorance in issue here relates to the actor's foreseeability of the possible consequences of her conduct. This is to be distinguished from ignorance that results from the lack of moral education, in particular, the knowledge that other persons are moral equals. This latter ignorance is not fully exculpating. Under the categorical imperative, all persons are held to the absolute duty to respect others as equals and so treat them. *See supra* note 8.

83. *See* ALEXANDER & FERZAN, *supra note* 10, at 63; Alan Brudner, *Agency and Welfare in the Penal Law, in* ACTION AND VALUE IN CRIMINAL LAW 21, 34 (Stephen Shute et al. eds., 1993). For cautionary observations, see Susan A. Bandes, *Is it Immoral to Punish the Heedless and Clueless? A Comment on Alexander, Ferzan and Morse: Crime and Culpability*, 29 LAW & PHIL. 433, 434 (2010) (explaining that Alexander, Ferzan, and Morse do not consider the public policy debate).

84. That the coercive threat entails a self-defensive risk to a third party, as where Jan evasively runs into another car, does not avoid this difficult moral quandary. Drawing a nebulous line, the Restatement does not privilege an intentional harm to a third person when "the harm threatened to the actor is not disproportionately greater than the harm to the other." RESTATEMENT (SECOND) OF TORTS § 73 (1977). The self-defense privilege for unintentional harm to a third person is unavailable when "the actor realizes or should realize that his act creates an unreasonable risk of causing such harm." *Id.* § 75.

harm another person through blameworthy conduct."[85] If one violates this principle, the harmed victim may bring an action in tort based on this requital standard: "If one harms another person through blameworthy conduct, she is to compensate the harmed person to the extent of the harms." Here blameworthiness is crucial to the substantive principle, but plays an incidental role in the related requital standard. Accordingly, we could drop blameworthiness out of the requital standard altogether by substituting, "If one violates a duty not to harm another person, she is to compensate the harmed person to the extent of the harms." This diminished role for blameworthiness in the requital standard may be otherwise. Suppose this is the associated requital principle: "If one harms another person through blameworthy conduct, she is to compensate that person to the extent of the blameworthiness of the harms."[86] Some criminal punishment suggests a version of this principle. When blameworthiness is a central element in both the substantive and the associated requital principle, the question arises whether both principles rely on the same conceptions of blameworthiness, with all their complicating twists. Depending on the terms and meanings of the principles, we could have one or more thresholds for each of the four aspects of the blameworthiness in the substantive principle grounding a claim for relief, and other thresholds for the requital measure. Each of these could vary depending on the many factors raised already, including the types or extents of the particular harms, the relief being sought, or whether the action is private or criminal. I will not pursue these complications further. It has been sufficiently shown that this line of inquiry triggers a whole new set of intricacies that possibly open a broad range of blameworthiness fractals.

IV. Conclusion

In a society that values personal autonomy, conceptions of blameworthiness play a central role. First, by grounding liability largely on blameworthy conduct, everyone's liberty and security interests are bal-

85. Here is a substantive principle that unpacks some of the inner workings of blameworthiness: "Do not voluntarily choose (say, $B_{rc} = 0.4$) to foreseeably (say, $B_{ri} = 0.5$) impose on another person a nonreciprocal risk of harm."

86. Related requital standards with more detail include: "When one wrongfully harms another person through blameworthy conduct, she is to compensate that person to the extent of the [wrongful] harm and [responsibility, disrespect] blameworthiness." The bracketed terms are possible additions to the underlying standard. It seems implausible, but possible, for one or both prongs of blameworthiness to do double duty in a substantive standard and an applicable requital.

anced by principles that establish rights and duties in ways that fairly allow a person to reasonably control her fate. The potential impacts on an actor of her possible choices and conduct are passably predictable. She is, therefore, in a position to make and pursue her considered choices. In these circumstances, society holds the actor responsible for the consequences of her conduct that invade another person's autonomy space. In such cases, we declare the actor responsibility blameworthy for harming the victim. She was neither sufficiently ignorant of the possible harm to the victim nor substantially coerced into her conduct.

Second, pursuant to the primary foundational justification for protecting personal autonomy, every person is entitled to the equal respect owed to all moral beings. By virtue of her equal moral status, everyone has the right to be respected by others and the parallel right to be treated with respect. Respectful attitude and treatment are both mandated. When this overarching dual mandate is not satisfied, the breaching party is disrespect blameworthy. We hold her liable for the dignitary and other harms that ensue.

Blameworthiness, then, comes in two forms, each form having two aspects. All four aspects of blameworthiness have scalar qualities. An actor may be more or less culpable based on four separate standards. These four aspects of blameworthiness, often tortuously interconnected, typically play two roles. First, the various aspects of blameworthiness may establish a minimum threshold for triggering a legal, moral, or social principle establishing a substantive right, such as the right not to be assaulted. Second, these four aspects of blameworthiness may also serve in differing ways as a minimum threshold or (partial) gauge for determining the appropriate requital for breach of the associated substantive right.

The intricacies in our notions of blameworthiness are further exacerbated by additional considerations. Particularly noteworthy are twists and turns within each of the four types of harms that are protected against: physical, economic, psychic, and dignitary. The extent of the substantive protections for each of these harms varies widely, as do their requitals. A greater source of intricacies stems from considerations of comparative negligence, a concept that was mentioned merely in passing. The liability of the actor is to be (partially) offset by the relative blameworthiness of the victim. Depending on the relevant substantive and requital maxims, a subtle regime may be required to gauge the blameworthiness of the victim with the same detailed attention to the four aspects of blameworthiness and types of harms that

was mainly focused above on the actor. Then the blameworthiness of the two parties must be somehow compared and balanced. There is no reason in logic alone to imply that the same weights and weighing of factors must be applied to the victim's conduct as to the actor's conduct. For one reason, the victim's conduct is typically putting herself at risk, while the actor's conduct is putting another person at risk.[87] An entirely separate dimension of complexity is thereby introduced.

Exacerbating these complexities are many other norms deeply woven into our social and political fabric. Utilitarian and, arguably, virtue principles stand out, but are not alone. Historical quirks and political tides have also left much in our narratives.[88] Some of these doubtlessly include conceptions of blameworthiness with various permutations. All of these threads generate claims for accommodation in one way or another. Hanging over all of this are enormous epistemic problems. How can we gauge the four (or more) aspects of blameworthiness, the four types of harms, or the consequences of our principles? We must often bring a machete to an operation needing a scalpel. This article elaborates on part of what awaits us in the operating room: A bloody mess.

87. Of course, depending on the circumstances, the conduct of either the victim or the actor may simultaneously put at risk the other party, herself, and third parties, as where the agent drives negligently.

88. *See generally, e.g.*, GORDLEY, *supra* note 39.

No Queer Child Left Behind

By ORLY RACHMILOVITZ*

SINCE MARRIAGE EQUALITY WAS WON in the Supreme Court's June 2015 decision of *Obergefell v. Hodges*,[1] the lesbian, gay, bisexual,[2] and trans[3] ("LGBT") movement has been in search for the next great cause for LGBT rights. Arguably, marriage has been the movement's most important goal (or at least the most visible one). Often relying upon a rhetoric of sameness and commonality to emphasize the legiti-

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1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2. Sexual orientation is defined as a person's predisposition or inclination toward a particular type of romantic or sexual partner, activity or behavior. BLACK'S LAW DICTIONARY, 1407 (8th ed. 2004).

3. Gender identity refers to one's psychological understanding and expression of one's gender as male, female, both, in between, or neither. The Sylvia Rivera Law Project (SRLP), a NYC based non-profit organization that provides legal services to the transgender community, defines gender identity as "how we see ourselves. Some of us see ourselves as women, some as men, some as a combination of both, some as neither. Some of us have complex identities that may even be fluid and change over time." Jody Marksamer & Dylan Vade, *Trans 101*, SYLVIA RIVERA LAW PROJECT (Feb. 17, 2016, 1:19 PM), http://srlp.org/trans-101 [https://perma.cc/Z4PX-XT7A]. SRLP describes "transgender" (or "trans") as "people (very broadly conceived) . . . whose gender identity and/or expression . . . does not or is perceived to not match stereotypical gender norms associated with our assigned gender at birth." *Id.* This article will mostly use the terms "trans" or "gender non-conforming" to refer to people who do not conform to "traditional" or "expected" gender presentation. Those who are gender non-conforming may or may not identify as part of the trans community or as part of any sexual minority group, such as the lesbian and gay communities. Jody L. Herman, Gender Regulation in the Built Environment: Gender-Segregated Public Facilities and the Movement for Change in Washington, DC, A Case Study Approach, 4–5 (May 2010) (unpublished Ph.D. dissertation, University of Michigan) (on file with author).

macy of same-sex relationships, the fight for marriage could be seen as a fight for the legitimacy of sexual minority identity itself. In turn, the *Obergefell* decision could then be viewed as a paradigm shift from sexual minorities challenging a politics of immutability, which offered rights and protections so long as sexual minorities could be seen as "trapped" in their identities and thus blameless for their divergence from heteronormativity, to sexual minorities advancing a politics of legitimacy which finds the source of sexual minority rights in that such identities were just as acceptable and valued as their heterosexual, cisgender counterparts.

Within this new paradigm several leading advocates have suggested the issues faced by LGBT youth in schools as one important focus.[4] As they point out and as this article demonstrates, LGBT students are highly marginalized, struggling through discrimination, harassment, limits to free speech, exclusionary curricula and school activities, unwanted outing, and other infringements on their rights and threats to their wellbeing. LGBT students have been the subjects of derogatory name-calling and mock rapes. Their belongings have been urinated upon. They have been prohibited from bringing same-sex dates to their school proms. They face barriers using school facilities that respond to their gender identity or are prohibited from dressing according to their identities.[5] The process of identity development in the psychological sense—a central task at this stage of emotional and mental development—is compromised by assimilation demands because these demands hinder the achievement of a coherent sense-of-self,[6] and thus undermine the legitimacy of a sexual minority identity that should be free from such attacks. Social science research has shown that LGBT youth who face homophobia or transphobia through discrimination or harassment in schools are at higher risk of drug use, risky sexual behavior, suicidality, and other mental health risks than straight youth.[7] They are also more likely to slip in their

4. James Esseks, *After Obergefell, What the LGBT Movement Still Needs to Achieve*, Am. Civil Liberties Union [hereinafter ACLU] (Feb. 16, 2016, 11:54 AM), https://www.aclu.org/blog/speak-freely/after-obergefell-what-lgbt-movement-still-needs-achieve [https://perma.cc/LNX6-U52R]; Lana Birbrair, *Beyond Obergefell: Alumni Advocates for LGBT Rights Reflect on the Challenges that Remain*, Harvard Law Bulletin, 32, 34 (2015) (Feb. 16, 2016, 11:59 AM), https://today.law.harvard.edu/wp-content/uploads/2015/10/WEB-HLB-f15-NCN.pdf [https://perma.cc/Z73V-CNDY]; *see also* Jon W. Davidson, *What Happened Today at the Supreme Court*, Lambda Legal (Feb. 16, 2016, 12:01 PM), http://www.lambdalegal.org/blog/20150626_victory-analysis [https://perma.cc/B9GM-M9QD].

5. *See infra* Part II.2 and the case law discussed therein.

6. *See infra* Part I. B.

7. *See infra* Part I.C.2.

academic achievements and less likely to graduate high school or go to college.[8]

This article explores how the law so far has addressed heteronormative victimization,[9] and compares the protections available to LGBT students through courts to those available to their adult counterparts suffering such mistreatment in the workplace.[10] It then maps out courts' policies of extending stronger protections to children, organizing them along five categories of protection: (1) courts have not required that students demonstrate suffering a double bind when applying the sex stereotyping theory in their favor; (2) courts have more readily restricted same-sex sexual harassment; (3) courts have been more willing to interpret "sex" to include sexual orientation or gender identity; (4) even before *Lawrence v. Texas*[11] was decided, criminalization of sodomy was not accepted as a justification for discrimination or harassment of students; and (5) courts offer a hybrid model of free speech protection by rolling back children's rights so that their speech not undermine the educational setting while removing important obstacles common in first amendment cases. By extending stronger protections to students, courts effectively recognize children's identity interests in the educational environment, their heightened vulnerability to assimilation demands, and their greater need for legal protections from such demands. This categorization then drives the explanation (that is perhaps a partial explanation, but one that has been largely overlooked so far) that the policy of stronger protection for students fits onto children's emotional development needs.

8. SURVEY 2013, *infra* note 102 at xviii.

9. I use "victimization" as an umbrella term for abuse, neglect, harassment, discrimination or other forms of mistreatment youth experience, whether at school or other spaces.

10. As demonstrated below, in Part II.2, there have been efforts put into legislation, whether through explicit protections from discrimination or harassment of LGBT students, or general anti-bullying litigation. However, these statutes have not been passed in every state, and indeed some states have either backtracked on previously protective statutes, or have legislated altogether new statutes, that exclude LGBT students from any specific or specific statutory protection against school victimization. Moreover, in February 2016, South Dakota became the first state to prohibit trans students' use of sex-segregated school facilities, such as restrooms and locker rooms, that correspond to their gender identity, but rather require them to use the facilities corresponding with their sex as assigned at birth. Aimée Lutkin, *South Dakota Just Become the First State to Pass an Anti-Transgender Student Bathroom Bill*, JEZEBEL (Feb. 17, 11:06 PM), http://jezebel.com/south-dakota-just-become-the-first-state-to-pass-an-ant-1759556487?utm_campaign=socialflow_jezebel_facebook&utm_source=jezebel_facebook&utm_medium=socialflow [https://perma.cc/HVE3-AJE5].

11. Lawrence v. Texas, 539 U.S. 558 (2003).

This Article also demonstrates how relying on litigation is a partial strategy to fend off school-based victimization. It closes with some proposals for how the LGBT movement may expand its efforts to take on additional non-litigation strategies to achieve an end to LGBT students' victimization. The purpose of this comparison is not to suggest that protections for adults should necessarily fall in line with those of children, or vice versa. Instead it is intended to ventilate the potential reasons behind the different legal protections so that strategic use could be made of them in the future. When we understand the motivation for different legal protections, we can identify when adverse legal protections are reasonable and when they are not, allowing us to be more persuasive and deliberate about how we work to advance such protections where they lack.

The LGBT movement continually devotes energy and resources to sexual minority students' issues because education plays a highly significant role in shaping children's identities.[12] Education also plays an instrumental role in preparing young people for life as contributing adult members of society. It instills in us the norms that come with citizenship, and it has an impact on the way we see ourselves and others. As such, the school environment is a primary source of assimilation demands[13]—pressures to assimilate into the mainstream that are coerced by others and motivated by animus[14] toward a particular group or identity category—on many aspects of identity, including citizenship and religion.[15] Sexuality is no exception. As children and

12. Psychology defines identity as a sense of who we are, what we value, and where we are headed. *See* CHARLOTTE J. PATTERSON, CHILD DEVELOPMENT 543 (2008). Our identity is related to those biological traits or social background that "involve[ ] learning about, relating to, and committing to, socially constructed meanings associated with [those] biological [or social] status[es]." Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 331 (2007). *See* Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1374, 1377 (2014) (hereinafter: "Rachmilovitz, *Assimilation Demands*").

13. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 26–27 (2006).

14. Yoshino explains that assimilation demands are those socialization efforts that are not motivated by a legitimate reason, and highlights animus as one such illegitimate reason. *Id.* at 26–27. However, as it seems Yoshino's concern about assimilation demands actually hinges on the negative motivation at their root, in my previous writing I have also considered it a central, indeed necessary, component in identifying harmful assimilation demands which merit legal protection of identity rights. I do so in this Article as well. In this sense, it is possible that school efforts at socialization, which are not based in animus but would have a legitimate reason, would not be considered objectionable assimilation demands.

15. Schools' role in effecting children's national or religious identity has been at the root of the school prayer cases: Wallace v. Jaffree, 472 U.S. 38 (1985); Lee v. Weisman, 505

youth begin exploring and practicing their sexuality earlier than ever before, sexuality is no longer invisible in schools.[16] With an emphasis on instilling gender roles or preventing teen-pregnancy, sexually transmitted infections, and teen dating violence, schools tend to struggle with students' diverse sexual identities and conduct. Society's investment in ensuring young people's heteronormative sexuality makes schools the primary site for policing their sexuality. As a result, students face pressures to conform to heteronormative standards from a variety of sources: faculty and staff, other students, and parents.

Conflicts around how sexuality is addressed at school take two forms. First, a dispute can occur between the child and the school as a state actor. Here, students usually contest assimilation demands by faculty or staff (for instance, when a student is not permitted to take a date of the same-sex to the prom), or students will bring claims against the school for failing to protect them from assimilation demands imposed by fellow students (for example, when a student is called derogatory names referring to her sexual orientation or is physically assaulted). Courts balance the child's rights against those of other students or the obligations of school faculty and staff. Courts apply doctrines similar to those governing employment law, but use them to protect children more forcefully than they do their adult counterparts.[17]

This policy of heightened protections for children's identity development free from assimilation demands also extends to the second context of school based-disputes: conflicts between schools and parents. In this line of cases, parents themselves—generally motivated by concerns for their children's heteronormative development[18]—contest school curriculum or activities, arguing that they violate parental rights to the inculcation of their children. Although it is the child's identity that is compromised by schools' assimilation demands, parents are bringing claims against the schools following the premise that as parents they are the rights holders in directing children's identities. Resolving these suits, courts will generally examine parental rights in light of the state interest in a public, pluralistic education for future

U.S. 577 (1992); cases addressing school children's recitation of "The Pledge of Allegiance": *e.g.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); as well as some parental rights cases: Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

16. William N. Eskridge, Jr. & Nan Hunter, Sexuality, Gender, and the Law 900 (2004).

17. *See infra* Part II.

18. *See infra* Part III.B.

citizens as a way to resolve the tension between what is essentially a dispute over who—parents or the state—holds the right to demand assimilation from children and thus construct their identity.[19] Parents are usually unsuccessful in these cases, as courts find most school programs merely expose children to different perspectives and ideas in a non-coercive manner.[20]

While touching on the latter set of cases for context, this article focuses on the former—where students are explicit parties (rather than having their interests purportedly represented by others, be it their parents or the state). Specifically, this article focuses on the comparison between the discrimination and harassment cases brought by students and those brought by adult employees.

Part I presents an overview of the theories on identity development and assimilation demands to show how such demands are harmful to children broadly and to LGBT youth, specifically.

Part II analyzes the case law on adults' claims against assimilation demands in the workplace and students' claims against assimilation demands in schools to show the gains made so far: how courts extend greater protections to schoolchildren than to adult employees.[21]

Part III hypothesizes why courts may be more willing to protect LGBT students from assimilation demands. It theorizes that protection extended to children is rooted both in their psychological developmental processes advancing from dependence on adults to agency and autonomy,[22] as well as in children's right to an open future.[23] This right is closely tied to a public interest in education as a space where children are inducted into democracy and their roles as functioning, informed adults.

Lastly, I end with looking into the future. Through problematizing the focus on litigation, successful as it may be, I aim to suggest that going forward, the LGBT rights movement ride the momentum of the recent victory regarding marriage equality to achieve a more compre-

19. Orly Rachel Rachmilovitz, Masters of Their Own Destiny: Children's Identities, Parents' Assimilation Demands and State Intervention 24–25 (May 2012) (unpublished S.J.D. dissertation, University of Virginia School of Law) (on file with author) (hereinafter: "Rachmilovitz, Masters"), Chapter Three Part II. Also *see generally* Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation,* 32 Harv. J.L. & Gender 303 (2009).

20. Rachmilovitz, Masters, *supra* note 19.

21. It should be noted at the outset that this comparison focuses on Title IX public education cases (*infra* note 173) and Title VII government employment cases (*infra* note 115). As such, in a sense, it is a comparison of apples and apples.

22. See *infra* Part III.A.

23. See *infra* Part III.B.

hensive end to school-based assimilation demands. In addition to making brief suggestions for strategies focused on K-12 education to complement the litigation efforts, I briefly consider how the enhanced protection for LGBT students may inform protection from assimilation demands in another, related context—specifically for LGBT students in higher education.

I. From Melting Pot to Melt Downs

One may be born with physical traits, such as a racial phenotype or female genitalia, or a social background, such as religious heritage or national origin, associated with identity. Yet identity in its psychological meaning refers to the process of developing a sense of who we are, what we value and where we are headed.[24] Our identity is related to those biological traits or social background that "involve learning about, relating to, and committing to socially constructed meaning associated with those biological [or social] status[es]."[25] One's identity is well-developed (termed by developmental psychologists "identity achievement")[26] once a coherent sense-of-self has emerged—that is, a person's behavior is not random but informed by specific, well thought-out principles and values—that her sense-of-self is stable over time, and that she presents and behaves outwardly in ways that are consistent with her identity and sense-of-self.[27] Social scientists have studied the identity formation process extensively. Here, I outline some general, well-accepted principles of identity formation, followed by an overview of the theory of assimilation demands. I then connect the two in showing how assimilation demands burden children and youth in their identity development and emotional adjustment.

A. Before the Schoolhouse: Identity Development

The foundation to psychology's investigation into identity is the work of Erik Erikson. Though the field has progressed since Erikson's writing, a look into identity research would be incomplete without attention to his contribution. To Erikson, identity, as any other aspect of development,[28] is a result of crisis that the child must solve in order to progress to more advanced developmental tasks.[29] Identity is what

24. PATTERSON, *supra* note 12, at 543.
25. Lau, *supra* note 12.
26. Rachmilovitz, Masters, *supra* note 19, Chapter Two, Part I.A.
27. *Id.* at 330.
28. Rachmilovitz, Masters, *supra* note 19.
29. ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS 92 (1968).

emerges from the conflicts we face throughout development. Each crisis resolution brings a new crisis, challenging our identity to grow in "unity, . . . good judgment, and . . . the capacity 'to do well' . . . ."[30]

Though identity development is most central in adolescence, it builds on foundations laid earlier in life. In early childhood, with increasing motor and language skills, the child's ability to explore and question grows.[31] She can study and prepare for the social roles her identity will come to encompass. The adults around the child become role models.[32] By following their example, the child learns the tasks tied to her future role and gains a sense of initiative and worth through their practice alongside mentoring adults.[33]

With time, children are exposed to various social roles. The sense of worth the child previously achieved from adapting to roles she saw at home is now challenged by a sense of inferiority when these social roles are not similarly valued in the greater community outside the home.[34] Children become aware of how social groups, such as race or economic background, influence identity and of the value society may place on identities and roles of those associated with those groups.[35] Exploring different talents and skills facilitates industry in place of inferiority. The child regains her sense of worth as well as adds another layer to her identity. Beyond her belonging to a social group, her identity is now also a result of her own interests and capabilities.

During adolescence, identity development is at the forefront of children's emotional growth. Teens consider the impacts of political ideologies and values on their identities. They utilize different sources of information and create various influential social ties to integrate ideal principles and values into a coherent philosophy according to which they choose to live their lives.[36] Though, for the most part, this political identity is consistent with those of peers and teachers, adoles-

30. *Id.*

31. *Id.* at 115. Erikson is primarily concerned with children's emerging sense of sexual differences and sexual roles that they adopt from their parents.

32. *Id.* at 120.

33. *Id.* at 121–22. At this early age, Erikson explains the child's identity as "I am what I imagine I will be."

34. *See id.* at 124.

35. Though attaching value to certain identity groups over others has become highly questionable, Erikson's link between different groups and social value can be helpful as we move on to examine how assimilation demands on children may cause internalized trans/homophobia, thus creating the sense of inferiority Erikson warns about in his writing. *Id.*

36. Norman T. Feather, *Values in Adolescence*, *in* HANDBOOK OF ADOLESCENT PSYCHOLOGY 247, 254 (Joseph Adelson ed., 1980).

cents' identity formation is furthered by challenges to it.[37] A young person, who is prepared to protect her identity from others who threaten to change, disapprove of, or silence it, will emerge with a more resilient and stable identity. Stability and coherence will serve to maintain that identity further as the world around the teen changes. Identity stability and coherence also promotes self-regulation and a sense of direction necessary to meet future challenges.[38]

Going through identity development, teens experiment with different roles and identities, and may adopt identities as a form of rebellion against parents or others in their social environment. After taking the time to sort between alternative identities, a person's commitment to identity, traits and roles is more enduring.[39] All the different aspects of development—physical changes, cognitive skills, and social engagement—contribute to the process of morphing childhood roles into a more mature adult identity.[40] Without evaluation of different aspects and alternatives, a commitment to certain identities or identity traits, or lack of commitment altogether, could result in failure to sustain relationships or occupations.[41] Identity confusion then involves doubts regarding early forms of identity that may continue to hinder identity formation.[42]

Once the period of exploration is over, and the adolescent's task of identity formation is complete, a person is able to commit to values and life tasks.[43] She is also now able to accomplish what Erikson viewed as true intimacy: the merging of identities.[44] Where a coherent and stable identity has been achieved, adults enjoy higher levels of mental health than adults who have committed to identity without exploration or who have yet to achieve identity commitment.[45]

37. ERIKSON, IDENTITY, *supra* note 29, at 130.

38. Feather, *supra* note 36, at 317.

39. PATTERSON, *supra* note 12, at 544.

40. James E. Marcia, *Identity in Adolescence*, *in* HANDBOOK OF ADOLESCENT PSYCHOLOGY 159, 161 (Joseph Adelson ed., 1980).

41. PATTERSON, *supra* note 12, at 544.

42. ERIKSON, IDENTITY, *supra* note 29, at 131–132. Erikson eloquently explains the harm of identity confusion: "Youth after youth, bewildered by the incapacity to assume a role forced on him by the inexorable standardization of American adolescence, runs away in one form or another, dropping out of school, leaving jobs, staying out all night, or withdrawing into bizarre and inaccessible moods."

43. PATTERSON, *supra* note 12, at 544.

44. ERIKSON, IDENTITY, *supra* note 29, at 135. Intimacy, according to Erikson, need not be only sexual. Instead, he focuses on "a true and mutual psychological intimacy with another person." *Id.*

45. PATTERSON, *supra* note 12, at 544.

Erikson dedicated portions of his work to the development of sexuality in children through adulthood. His account of this development is highly heteronormative and reflects a binary under which sex aligns with gender and sexual orientation.[46] Writing in the 1960s, Erikson did not even consider the possibility of sex or gender fluidity or the transitioning between sexes to better accommodate gender identity.[47] He was bewildered by the ability of people with same-sex sexual orientation to function well,[48] and believed that female sexuality is defined by non-maleness,[49] rather than being independent and equally valuable. Although Erikson's work provides a platform for understanding identity formation, his work on sexuality development is of lesser help when examining the development of non-heterosexual orientation or gender nonconforming identities.

Some psychologists suggest that in order to reach full identity achievement one must also come to self-acceptance and pride regarding sexual orientation and that mere commitment is insufficient to

46. *See* ERIKSON, IDENTITY, *supra* note 29, at 285. Biological sex, according to Erikson, dictates gender identity development that is socially understood as attached to that anatomy; that is that females develop feminine gender identities. As Erikson puts it:

> Am I saying then, that "anatomy is destiny"? Yes, it is destiny, insofar as it determines not only the range and configuration of physiological functioning and its limitation but also, to an extent, personality configurations. The basic modalities of woman's commitment and involvement naturally also reflect the ground plan of her body.

Id.

47. *Id.* at 285–86. Erikson considers variations to be possible only within gender/sex but not between genders/sexes. Women may move from heightened femininity to decreased femininity and even a degree of masculinity. Men, too, may contribute to "motherliness" as much as society permits. However, this is not a shift in gender identity — men taking up care duties maintain the understanding of their male/masculine gender identity rather than adopt a female/feminine gender identity. *Id.*

48. *Id.* at 53. After grouping "latent homosexuality" and "psychopathic tendencies," Erikson comments that,

> it is true that individuals suspected of overt homosexuality have on occasion been treated with utmost derision and cruelty . . . if we ask why men choose such a life, why they stick to it. . . and above all why they function in good health, in high spirits, and with occasional heroism, we do not have a satisfactory dynamic answer.

Id.

49. *Id.* at 116–17 (describing differences between girls' and boys' development in early childhood, rooting such differences in penis envy and the oedipal complex. "While the boy has this visible, erectable, and comprehensible organ to which he can attach dreams of adult bigness, the girl's clitoris only poorly sustains dreams of sexual equality . . . .").

establish an identity well prepared for intimacy.[50] This process of adopting a sexual minority identity and coming out as such to others is an ongoing process that occurs and evolves throughout life.[51]

While the question of gender identity and sexual orientation's causes may bear significance in certain legal matters that turn on whether these identities are immutable,[52] the normative question that occupies this article is whether, once these identities begin to emerge in children, the attempt to prevent their development or to manipulate and alter them is within the contours of schools' authorities (as a state actor) or other students' rights, particularly given the potential harm to children whose sexuality is contested by others.[53] The following parts provide a brief overview of assimilation demands on identity and their harms to children.

B. Assimilation Demands: The Basics

The ideal of assimilation—conforming to the mainstream—is embodied in the metaphor of American society as a melting pot. According to this metaphor, minorities are encouraged to assimilate into a neutral, American identity, which incorporates traits from different identity groups.[54] Law Professor Kenji Yoshino criticizes assimilation as costly to one's authentic self—denying one's freedom to develop an identity independent of pressures to conform.[55] Yoshino distinguishes between assimilation that is necessary for citizenship, socialization,

50. Mary Jane Rotheram-Borus & Kris A. Langabeer, *Developmental Trajectories of Gay, Lesbian, and Bisexual Youths*, *in* LESBIAN, GAY, AND BISEXUAL IDENTITIES AND YOUTH 97, 99, 101 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 2001).

51. *Id.* at 102.

52. It should be noted here that the traditional approach to immutability—that an identity or trait are fixed and cannot be changed, thus garnering constitutional protection—has evolved to encompass identities and traits whose conversion is so highly burdensome that it would abhorrent for the state to demand its change. *See generally* Watkins v. U.S Army, 875 F.2d 699 (9th Cir. 1989); Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495 (2009). Generally speaking, and without going into nuance that is outside the scope of this paper, race and gender are possible examples of the "old" immutability, whereas religion or appearance can be considered possible examples of "new" immutability.

53. Of course, attempts to change or police normative gender identities are similarly motivated by heteronormative animus and can be oppressive as well. However because the empirical and statistical data as presented below reveal that LGBT students are more negatively affected by assimilation demands. Thus assimilation demands on normative identities are out of the scope of this paper. *Cf.* Luke A. Boso, Symposium: *Policing Masculinity in Small-Town America*, 23 TEMP. POL. & CIV. RTS. L. REV. 345, 346 (2014); *cf.* Luke A. Boso, *Real Men*, 37 HAWAII L. REV. 107, 108–09 (2015).

54. YOSHINO, *supra* note 13, at 140–41, 179.

55. *See generally,* YOSHINO, *supra* note 13.

and peaceful social order, such as speaking a language or obeying the law, from assimilation that is coerced by others and may be motivated by animus toward a particular group or identity category.[56] These distinctions are not always clear and straightforward. Additionally, they may shift along context, place, and time.

Yoshino articulates three types of coerced assimilation (or "assimilation demands"): conversion, passing, and covering.[57] Conversion is the demand that one assimilate by changing an unfavorable identity or identity trait into a more acceptable one.[58] Passing is defined as the demand to assimilate by concealing one's unfavorable identity and leading others to believe that the individual identifies with the mainstream.[59] Lastly, covering is the demand to assimilate by muting or downplaying the unfavorable identity that one has *made known* to others.[60] While conversion and passing target one's status as a member of a minority group, covering, on the other hand, is a demand that focuses on conduct that expresses a minority identity.[61] Another aspect of covering, reverse-covering, is the demand that the individual perform according to stereotypes associated with her identity group.[62] It equally compromises one's authentic identity and conduct. Because assimilation demands and their pressures conflict with an individual's sense-of-self and her expression of that self, and undermine the consistency between the authentic self and the outwardly expressed self, all assimilation demands are harmful to identity and to the authentic self. Therefore assimilation demands create psychological burdens, such as feelings of inferiority or self-hatred.[63]

Yoshino's work illustrates the unique obstacles that minorities face when confronting assimilation demands. He focuses extensively

56. *Id.* at 26–27. Yoshino gives examples of racial minorities required to "act white" due to white supremacy; women instructed to downplay their family responsibilities at work because of patriarchy and LGBT persons asked not to "flaunt" because of homophobia. *Id.* at xi.

57. Yoshino is inspired by Erving Goffman's work on stigma. Goffman describes how different socially unfavorable groups navigate the performance of their "spoiled identities" to escape social burdens such as stigmatization and discrimination. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITIES 41–102 (1963).

58. YOSHINO, *supra* note 13, at 46.

59. *Id.* at 17–18.

60. *Id.* at 18.

61. *Id.* at 22 ("[D]iscrimination directs itself not against the entire group, but against the subset of the group that fails to assimilate to mainstream norms. This new form of discrimination targets minority cultures rather than minority persons.").

62. *Id.* at 23. Yoshino elaborates on reverse-covering with the example of women in the workplace. *Id.* at 143–52.

63. Lau, *supra* note 12, at 324–25.

on the divide assimilation demands create within one's sense-of-self—a dichotomy between the authentic self, true self, and a false self whose purpose is to mediate between the true self and the world.[64] When assimilation demands deny an authentic identity one cannot achieve full emotional health by appreciating and expressing her identity. Thus, identity development in the psychological sense, the development of understanding who we are, what we value, and where we are headed, is compromised by assimilation demands because these demands undermine the achievement of a coherent sense-of-self.[65]

C. Assimilation Demands' Impact on Children

Assimilation demands on children are highly troubling as multiple factors increase children's vulnerability to such demands. Factors such as children's stage of identity and emotional development, their attachment and dependence on adults, and the power structure within their environments, leave children vulnerable to harmful assimilation demands. Children are then more dependent on protection from outside sources such as the legal system. To conclude that assimilation's harms should be mitigated by the law first requires examining the premise that children are in fact harmed, and severely so, by assimilation demands. The extreme level and quality of harm children suffer warrants state intervention.

Though Yoshino couches his arguments about assimilation's harms to identity in the idea of the authentic self,[66] Erikson's work adds to the understanding of assimilation's harms to identity, and particularly children's identity development. Erikson suggested that experimentation is pivotal for a healthy identity. If one is unable to

64. YOSHINO, *supra* note 13, at 184–85 (presenting D.W. Winnicott's theory regarding true and false selves and the relationship among them as measures of psychological health). Both Winnicott's work and Yoshino's use of it have been subject to criticism by legal scholars. Paul Horwitz suggested that: "There is reason to be skeptical of Winnicott's simple schema of the true and false selves. [These vague terms are] not much help in identifying precisely what, if anything, the True Self means." Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283, 1289–90 (2007) (book review). Marc Poirier questions Yoshino's assertion that authenticity is a universal goal, and therefore assimilation is a universal harm. Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. C.R. & SOC. JUST. 3, 37–39 (2008). I mention Winnicott's theory here because it is the psychological foundation for Yoshino's argument. As my own project continues, I make better use of Erikson's analysis of harms to identity because of identity foreclosure, confusion, and assimilation demands' general challenge to identity achievement and intimacy.

65. PATTERSON, *supra* note 12, at 543.

66. YOSHINO, *supra* note 13, at 184–85.

develop her identity through exploration she is at risk of identity confusion and foreclosure.[67] Thus, achieving a coherent and stable identity is necessary for adults to enjoy higher levels of mental health than adults who have committed to identity without exploration or who have yet to achieve identity commitment. Erikson touches on what, in effect, are assimilation demands on youth's identities. While adolescents struggle to forge a coherent identity that is natural and authentic to them, outside pressures to assimilate into an expected, more desirable identity may result in a range of harms to that teen. Put differently, assimilation demands threaten identity achievement because they discourage the exploration and experimentation necessary before committing to an authentic identity and thus may lead to the harms of identity confusion against which Erikson warns.[68] Without exploring the authentic self, identity foreclosure occurs, and with it the inability to accomplish intimacy as well as overall weakened emotional health.

Though, under Yoshino's and Erikson's theories, we are all harmed by assimilation demands that foreclose our identity exploration and compromise our healthy identity development, children are exceptionally vulnerable to assimilation demands because of their incomplete development.[69] Where adults who have completed their identity development are vulnerable to identity harms, certainly children who are still forming their identity are increasingly vulnerable to those harms. A legal framework that would aspire to end assimilation demands must deflect the particular and exacerbated harm assimilation demands create for children. Though Yoshino makes a compelling case for protecting adults from assimilation demands that violate their civil rights, the case for children's protection might be more challenging to make. That there are harms to children that are different and worse than harms to adults may not be an argument persuasive enough to overcome the state's strong interest in creating a productive and informed citizenry through education and its authority to do so. However, the state's power to educate should not justify a blanket rule against protection but rather require the development of more refined legal tools that can identify where protection is needed

67. According to Erikson, identity confusion involves doubts regarding early forms of identity that may continue to hinder identity formation. ERIKSON, *supra* note 29, at 131. Identity foreclosure is the result of inability to explore identity options, roles or otherwise develop a sense-of-self. This hinders reaching identity achievement and the intimacy and overall emotional health. *Id.* at 135.

68. ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 131–132 (1964).

69. Lau, *supra* note 12, at 327.

and the form said protection should take. I illustrate immediately below the two primary reasons for legal intervention to protect children from assimilation demands: ensuring children's optimal development and the distinctive harms to LGBT youth.

1. Children's Optimal Development

The distinct and elevated harms children's identities suffer when subject to assimilation demands are a result of their developmental stage.[70] The law should take it upon itself to compensate for children's inability to deflect harmful assimilation demands since children have yet to fully develop coping skills and lack the resources that allow them to handle assimilation demands and their harms. More importantly, this leaves children particularly prone to assimilation demands that impose an identity that may not ring true.[71] Yoshino is primarily concerned with the individual's opportunity to develop her authentic self,[72] not with how she actually would accomplish doing so. Nowhere is the denial of exploration in identity development more critical than to children in a developmental stage that centers around this task. Yoshino's concern about assimilation demands restricting opportunities for exploration and experimentation with identity and authenticity is perhaps most relevant to children.

Because their identity has not yet formed, adults consider children waverers who must be protected from developing an unfavorable identity and converted to comply with expectation of what their identity should be.[73] Accordingly, schools may wish to indoctrinate or expose students only to values and goals the state sees appropriate. To preserve heteronormative social standards (a public interest whose validity is at least questionable under the Supreme Court jurisprudence

70. *Id. See also*, Rotheram-Borus & Langabeer, *supra* note 50, at 105.

71. Lau, *supra* note 12, at 327.

72. Yoshino terms this "self-elaboration," which is "the most important work we can do." YOSHINO, *supra* note 13, at 184.

73. *Id.* at 44. It is also important to consider how the content of assimilation demands on may vary depending on context and may be colored by how they implicate multi-faceted identities. Rachmilovitz, Masters, *supra* note 19, at 64. For example, the meaning of a "desirable" identity that the child develops will be different in a conservative versus a liberal community or family (*see generally* Boso, *Real Men*, *supra* note 53) or in transracial adoptions where the child's racial identity may be different than the parents (*see* Kim H. Pearson, *Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption*, 19 MICH. J. GENDER & L. 149 (2012); Kim H. Pearson, *Legal Solutions for APA Transracial Adoptees*, UC IRVINE L. REV. 1179 (2013)). Further on the issue of context, assimilation demands may be imposed by minority groups on their own members as well, *see* Russell K. Robinson, Uncovering Covering, 101 NW. U. L. REV. 1809 (2007); Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping* (forthcoming).

on LGBT cases in recent decades)[74] schools may utilize variously aggressive tactics in the context of sexuality such as discrimination or restrictions on speech or failure to prevent or end harassment of LGBT students by school staff or fellow students, all of which, sends students a message that same-sex sexual orientation or gender nonconformity are undesirable and punishable. Thus, schools often make students vulnerable to assimilation demands in their most severe forms (conversion and passing). And indeed LGBT students, as a whole, tend to be better protected by the law in this context from assimilation demands than adult employees, university students, or children experiencing assimilation demands at home.

Conformity to assimilation demands causes children and youth to abandon their sense-of-self and commit to goals and values they are expected to adopt even when these are inconsistent with their identity.[75] As teens struggle with developing their identity, assimilation demands jeopardize a strong sense-of-self and psychological health, resulting in a young person's reduced productivity, depression, and difficulty forming and sustaining intimate relationships.[76] Other unfortunate consequences of victimization are high rates of suicidality,[77] substance abuse,[78] and homelessness due to either running away from home or being cast out by parents.[79] Faced with assimilation demands, children realize they cannot depend on their close contacts for support in their identity explorations.[80]

74. *Lawrence*, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996); *Obergefell*, 135 S. Ct. 2584 (2015). See *infra* Part III.B.

75. Lau, *supra* note 12, at 332.

76. *Id.* at 329–30.

77. Rotheram-Borus & Langabeer, *supra* note 50, at 111–13. *See also* Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay and Bisexual Young Adults*, 123 PEDIATRICS 346, 229 (2009), (Feb. 7, 2016, 10:56 AM) http://pediatrics.aappublications.org/content/123/1/346.full?ijkey=NrncY0H897lAU&keytype=ref&sitevid=aapjournals [https://perma.cc/GY74-L9YX] (presenting data regarding depression, suicidality and the link between them). Additional studies show that youth at the intersection of sexual orientation and race/ethnicity are at even greater risk for depression and suicidality.

78. Rotheram-Borus & Langabeer, *supra* note 50, at 97–98.

79. PATTERSON, *supra* note 12, at 491–92. *See also* Rotheram-Borus & Langabeer, *supra* note 50, at 104 (reporting high rates of negative reactions from parents upon children's disclosure of same-sex sexual orientation, including high rates of children being expelled from home pursuant coming out).

80. Rotheram-Borus & Langabeer, *supra* note 50, at 105, mainly referring to parents and friends, but the same may apply to teachers, school staff or fellow students. *See also* SURVEY 2013, and SURVEY 2009, *infra* note 102.

2. Assimilation's Harms on LGBT Youth

While Yoshino centers his theory primarily on sexual minorities because he believes some assimilation demands apply to this group more than others, I concentrate on sexual minority youth because they are more vulnerable to assimilation demands than other groups are. Indeed, the younger children who come out as LGBT are more likely to experience victimization at school, as younger children and teens tend to be less accepting of LGBT peers.[81]

Research in psychology has identified several specific negative outcomes linked to victimization of LGBT students in schools, both in the short term and later in life,[82] such as depression, compromised life satisfaction,[83] and lower self-esteem.[84] Other outcomes are harmful behavior such as suicide attempts, illegal drug use, risky sexual behavior[85] (including higher risk of HIV or sexually transmitted infections and diagnoses),[86] delinquency, and aggression.[87] One study found that severe victimization almost doubled the rates of these negative health outcomes, across the board, compared to mild or low victimization.[88] Another study found that adults who have experienced victimization in school because they were gender nonconforming regardless of sexual orientation are at higher risk of developing posttraumatic stress disorder later in life than those who were not gender nonconforming.[89]

81. Stephen T. Russell, Russell B. Toomey, Caitlin Ryan & Rafael M. Diaz, *Being Out at School: The Implications for School Victimization and Young Adult Adjustment*, AM J. OF ORTHOPSYCHIATRY 84(6) 635, 636–37 (2014) [hereinafter *Out at School*]. The argument may, however, be made that coming out earlier can be beneficial, as younger children may have a more fluid concept of difference, especially on gender identity and expression lines. I am only aware of anecdotal, rather than research-based, evidence in support of this proposition.

82. *Id.* at 636.

83. Russell B. Toomey, Caitlin Ryan, Rafael M. Diaz, Noel A. Card & Stephen T. Russell, *Gender-Nonconforming Lesbian, Gay, Bisexual and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 1(s) PSYCHOLOGY OF SEXUAL ORIENTATION AND GENDER DIVERSITY 71, 75 (2013).

84. Russell et al., *Out at School*, *supra* note 81, at 640.

85. *Id.* at 641.

86. Stephen T. Russell, Caitlin Ryan, Russell B. Toomey, Rafael M. Diaz, Jorge Sanchez, *Lesbian, Gay, Bisexual and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment*, 81(5) J. OF SCHOOL HEALTH 223, 229 (2011) [hereinafter *School Victimization*].

87. *Id.* at 224, 228. Tying these outcomes to physical victimization, and finding them in greater incidence in boys than in girls.

88. *Id.* Fig. 1, at 228.

89. Toomey et al., *supra* note 83, at 73.

Unfortunately, many sexual minority children are not raised in supportive environments (i.e. families and/or schools) that stand by them regardless of their sexual orientation or gender identity and which can temper the effects of victimization. Coupled with family rejection, school-based mistreatment leads to a lack of educational opportunities, and thus lower income potential.[90] Studies on the state of LGBT youth in additional contexts, such as homelessness or the criminal juvenile system,[91] reflect the pervasive and egregious consequences that LGBT youth suffer because of assimilation demands. Thus the negative outcomes of assimilation demands are compounded with the impact of several sources of victimization, for instance families, peers, and other life circumstances, such as socioeconomic status, quality of relationships, and personality factors.[92] On the bright side, being out at school (that is, being better able to resist assimilation demands in some way) has been linked to better emotional adjustment.[93] These findings together illustrate the urgency of systemic change to end the disempowerment and vulnerability of LGBT youth.[94]

But what is it about sexual orientation or gender identity that makes LGBT youth so vulnerable to harmful environments? Sexual orientation and gender identity, as identity categories, are independent of the sexual orientation or gender identity of family members. As opposed to racial or religious minority youth whose community may typically share their racial or religious identity and can therefore provide guidance, support, and encouragement during the stages of identity development, LGBT youth usually have no such inherent support system.[95] LGBT youth are faced with exploring, forming, disclos-

90. Considering the harms to education rights and equity and the negative education outcomes described throughout this piece, it is only a logical conclusion that such compromised education would lead to lower earning potential.

91. For a study on the vulnerability of LGBT youth for over-involvement in and higher penalties from the juvenile system, *see* Kathryn Himmelstein & Hannah Bruckner, *Criminal Justice and School Sanctions Against Nonheterosexual Adolescents: A National Longitudinal Study*, 127 Pediatrics 49, 52 (2011), (Feb. 7, 2016, 11:05AM) http://pediatrics.aappublications.org/ content/127/1/49.full.pdffml [https://perma.cc/LH3X-5Z8Q]; Nicholas Ray, National Gay and Lesbian Task Force, Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness 21–22, 59, 71 (2006), (Feb. 7, 2016, 11:09AM) http://www.thetaskforce.org/static_html/downloads/HomelessYouth.pdf [https://perma.cc/R47X-PTJA].

92. Toomey et. al, *supra* note 83, at 78.

93. Russell et al., *Out at School*, *supra* note 81, at 635.

94. *See also* suggestions regarding institutional change, *id.* at 641.

95. Stuart Biegel, The Right to be Out: Sexual Orientation & Gender Identity in American Public Education 124 (2010) ("[A]n LGBT identity often emerges quietly

ing, and performing their sexuality without assistance, and often with hostility.

Heteronormative culture translates into LGBT youth often suffering the most extreme type of assimilation demands, which in turn, renders them prone to the most severe harms as a result of such demands. American society and its legal system tend to be uncomfortable with the sexuality of children and youth, and particularly with the prospect of young people developing non-heteronormative identities. This "moral panic"[96] guides courts deciding custody disputes involving lesbian or gay parents,[97] informs education policies such as "No Promo Homo" laws,[98] and ultimately motivates mistreatment of non-heteronormative children, whether they identify as LGBT or not.

Although all children may be vulnerable to assimilation demands, sexual minority children are at higher risk because they are left to develop their sexual orientation or gender identity often without community support.[99] Moreover, developing and asserting sexual minority identities comes at a higher cost to emotional health due to social heteronormativity—whether internalized or from outside sources—and pursuant isolation.

Sexual minority youth may find themselves required to defend their sexuality. To the extent that same-sex sexual orientation or gender nonconforming identities are becoming more acceptable for adults, these identities should be respected as valid for youth, as well. Presumably, LGBT adults used to be LGBT youth.[100] Assimilation demands designed to prevent or mitigate non-heteronormative sexual orientation and gender identity should be considered equally as unac-

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and secretly within a young person. It may be the case that the young person has no one to turn to—no friends to talk with about it, no family or community members to open up to."). *But see* Pearson, *APA Transracial Adoptees, supra* note 73, at 1189; Pearson, *LGBT Transracial Adoption, supra* note 73.

96. *See* GILBERT HERDT, INTERSECTIONS: MORAL PANIC, SEX PANICS: FEAR AND THE FIGHT OVER SEXUAL RIGHTS 5 (2009). Moral panic involves "[l]arge social events occurring in troubled times when a serious threat by evil-doers incites societal reaction." *Id.* at 5.

97. *See* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J. L. & FEMINISM 257, 285 (2009).

98. *See* William N. Eskridge Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000) (discussing policies and laws prohibiting positive discussion of homosexuality in school programs and curricula, or any such discussion at all).

99. YOSHINO, *supra* note 13, at 184.

100. This, of course, does not discount LGBT adults who have arrived at their sexual identity later in life, or the fluidity in sexual orientation or gender expression some may experience throughout life, for example of exceptions to this statement. This is why it is qualifies with "presumably."

ceptable because they, too, reflect homophobia and are motivated by it. Still, one could argue that although possessing these identities as adults is value-neutral, it is important to prevent or mitigate them in children because avoiding early queer identities might reduce the discrimination or harassment children would grow to encounter as adults. This argument is unpersuasive. If LGBT identities were truly value-neutral, as they should be and are becoming under cases such as *Lawrence*, *Romer*, and *Obergefell*, these potential rights infringements (themselves assimilation demands) or other forms of mistreatment adults experience would not be a concern—they would no longer exist as acceptable or tolerated behavior toward sexual minorities.

II. Behind the Schoolhouse Gate: Enhanced Protections for Sexual Minority Students

Two main areas of jurisprudence govern problems of state-based assimilation demands in educational settings.[101] The first is discrimination and harassment law, where sexual minority youth suffer unequal or hostile treatment at school because their sexuality does not conform to heteronormativity. The second relevant area of jurisprudence is free speech, where students dispute the limitations of whether and how they are allowed to express their sexuality in the educational setting.

Beyond the fact that mistreatment of LGBT students infringes upon their legal rights, such mistreatment has the effect of compromising children's educational interests. Mistreatment at school impacts LGBT students' access to education and their ability to have a meaningful and beneficial education. About a third of students participating in a school climate survey[102] reported missing at least one day

101. Other contexts, while state-based, reflect a conflict between parents' rights and state authority in forming children's identities and directing their education. These contexts may include religious education, sexual education, or LGBT-related issues woven into the general curriculum. Because this paper examines primarily state-based education as conflicting with students' rights, rather than parents' rights, and because adults (whose rights do not depend on a third party in the way children's rights do on parents,) rendering the comparison between children and adults generally lacking in any meaningful utility, aside from their discussion below, those contexts of school-based assimilation are generally beyond the scope of this paper.

102. *See* Joseph G. Kosciw, et al., The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools 13 (2013) [hereinafter SURVEY 2013] (The survey sample consisted of over 7,898 LGBT students between the ages 13–21 from all 50 states and the District of Columbia.); *cf.* Joseph G. Kosciw, et al., The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools 13 (2010) [hereinafter SUR-

of school a month because they feel unsafe. Sixty-one percent of students who have been severely or frequently victimized based on their sexual orientation missed school, compared to 18.2% of students who experienced lower victimization because of their sexual orientation.[103] Similar rates are reported regarding gender expression: 58.6% of students who experienced higher victimization on this basis missed school, compared to only 17.3% of students experiencing lower victimization.[104] The mean grade point average for students who have been frequently harassed because of their sexual orientation or gender identity is over half a grade lower than that of students who were harassed less often (2.8 for sexual orientation and 2.9 for gender identity versus 3.3).[105] Also, LGBT students who experienced higher levels of victimization were far less likely to pursue higher education than LGBT students who experienced lower levels of victimization.[106]

The import of education is reflected in a system of legislative protections for education access and equity, both at the federal and state levels. At the federal level, statutes such as No Child Left Behind,[107] the Education Equal Access Act,[108] and Title IX of the Education Amendments Act of 1972[109] are all designed to ensure children in the United States receive an education that prepares them for adult life, as well as offer some protection to LGBT students. The Education Equal Access Act, for example, ensures that a school that permits student groups to operate at school, must extend the same to LGBT student groups such Gay-Straight Alliances. Title IX has been interpreted to extend protection mainly to trans and gender non-conforming students, guaranteeing them access to the bathrooms and locker rooms consistent with their gender identity or ensuring that they may dress according to their gender identity.

California is an apt example for protections on the state level, as a state with strong protections for equity in education both generally and for LGBT youth specifically. California prioritized education so

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VEY 2009] (Just over a quarter reported missing at least one day of school a month because they felt unsafe in the 2009 survey, consisting of over 7,200 LGBT students between the ages 13–20 from all 50 states.).

103. SURVEY 2013, *supra* note 102, at xviii.

104. SURVEY 2013, *supra* note 102, at 49.

105. *Id.* at 47, at xvii (compared to 2.7 versus 3.1 SURVEY 2009, *supra* note 102).

106. *Id.*, at xviii (8.7% of LGBT students who experienced higher levels of victimization, compared to 4.2% of LGBT students who experienced lower levels of victimization). *See also id.*, n. 29 and accompanying text.

107. No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2002).

108. 20 U.S.C. § 4071 (2011).

109. 20 U.S.C. § 1681(a) (2011).

much that it has enshrined the right to education in its Constitution.[110] Establishing a Constitutional right to education, the CA Constitution highlights the significance of: "[a] general diffusion of knowledge and intelligence [as] being essential to the preservation of the rights and liberties of the people."[111] California's Constitution and laws require the State to provide basic education opportunities to every child. The public education system must be open and equal for all students so that no student is denied the necessary conditions to learn. California's Student Safety and Violence Prevention Act guarantees equal rights and opportunities in education to all students, regardless of their actual or perceived sexual orientation or gender identity.[112] In the summer of 2011, California became the first state in the nation to require school curriculum and textbooks to incorporate instruction about the contribution of LGBT people in history and social science classes.[113] Additionally, children in California are obligated by law to attend school, as they may face sanctions for truancy otherwise.[114]

Against this background of the alarming data and legislative response, this Part more deeply examines the legal protections available for LGBT employees and those available for LGBT students. It analyzes the seminal case law relevant to the two contexts in order to show that indeed courts tend to better protect children than adults from assimilation demands targeting sexual orientation or gender identity. It then offers a taxonomy for the ways in which courts protect children where they do not extend the same to adults.

The purpose of this comparison and the taxonomy that follows is not to suggest that protections for adults should necessarily fall in line with those of children, or vice versa. Instead it is to ventilate the potential reasons behind the different legal protections, so that strategic use could be made of them in the future. When we understand the motivation for different legal protection, we can identify when adverse legal protections are reasonable and when they are not, and thus more persuasive and deliberate about how we work to advance such protections where they are lacking.

110. CAL. CONST. art. IX, §§ 1, 5.

111. CAL. CONST. art. IX, § 1.

112. CAL. EDUC. CODE § 200.

113. 2011 Cal. Stat. 1914; Patrick McGreevy, *Gov. Brown Signs Bill Requiring Teaching of Gay Accomplishments*, POLITICAL: L.A. TIMES BLOG (Feb. 7, 2016, 11:28 AM), http://latimesblogs.latimes.com/california-politics/2011/07/governor-signs-bill-requiring-textbooks-to-include-gay-accomplishments.html [https://perma.cc/U3SR-K6J3].

114. 2010 Cal Stat. 3447.

A. Discrimination and Harassment

Below I examine assimilation demands on adults in the workplace, first to explain discrimination and harassment as assimilation demands but also to lay the foundation for the claim that students experiencing this type of assimilation demands are better off than adults.

1. Sex Discrimination and Sexual Harassment in Employment: Limited Protection for Adult Employees

Discrimination and harassment jurisprudence under Title IX draws from its employment counterpart, Title VII of the Civil Rights Act of 1964. Like Title IX in the education context, Title VII prohibits discrimination in employment opportunities and conditions because of sex,[115] whether in the form of disparate treatment or disparate impact.[116] An employer can defend its adverse decision by showing that sex is a *bona fide* occupational qualification ("BFOQ") reasonably necessary to the normal operation of that particular employer.[117] As Title VII does not mention sexual orientation or gender identity as grounds for protection from discrimination in employment, as a result claimants facing such discrimination have brought their cases under sex discrimination theories, arguing that sexual orientation or gender identity are considered problematic only when they do not align with expectations as to what it means to be of a particular sex. Our understanding of "sexual orientation" or "gender identity" are then a function of our understanding of "sex." As the argument goes, same-sex sexual orientation is a basis for discrimination because had one been of the opposite sex, her sexual orientation would have been acceptable (i.e., it is acceptable for a man to be sexually attracted to or to partner with women, but it is not acceptable for a woman to be attracted to or to partner with women. Put differently, but for one's sex, her choice of partner would be a legitimate choice). Therefore, the discrimination does not turn on sexual orientation but rather on the sex of the persons involved. Hence, sexual orientation discrimination is to be considered within the contours of sex discrimination. How-

115. 42 U.S.C. § 2000e–2(a)(1).

116. WILLIAM B. RUBENSTEIN ET AL., CASES AND MATERIALS ON SEXUAL ORIENTATION LAW 449 (3d ed., 2008) (explaining disparate treatment as the differential treatment of employees, whereas disparate impact refers to instituted policies that "while neutral on their face have a negative and disproportionate effect on a protected class").

117. Price Waterhouse v. Hopkins, 490 U.S. 228, 242–43 (1989). The BFOQ is also understood as the business necessity test. One example of when the test could be satisfied is when discrimination based on sex is imperative to the employer's efficiency.

ever, courts have rejected this argument, finding that the basis for discrimination (i.e., disapproval of a same-sex relationship, applied equally both to men (gays) and women (lesbians) and therefore did not constitute sex discrimination).[118] With this framing by courts, sexual orientation discrimination as sex discrimination claims have been generally unsuccessful,[119] with the exception of the "sex stereotyping" theory which has at times generated positive results for LGBT claimants.[120]

The Supreme Court first recognized the "sex stereotypes" theory in *Price Waterhouse v. Hopkins*.[121] Ann Hopkins, a senior manager at Price Waterhouse, sued the firm for denying her partnership because of her sex. Hopkins argued that despite her accomplishments and contributions to the firm,[122] she was denied partnership because she did not conform to stereotypes regarding femininity in her demeanor and presentation.[123] Based on the partners' comments about Hopkins, the Court found that the firm's decision not to promote Hopkins to partner was based on sex stereotypes,[124] and that evaluating employees based on their conformity with stereotypes associated with

118. DeSantis v. Pacific Telephone & Telegraph, Co., Inc., 608 F.2d 327, 331 (9th Cir. 1979). *But see* the latest moves by the Equal Employment Opportunity Commission ("EEOC"), going in the opposite direction, as discussed below in Part III.D. *See also* Boso, *Acting Gay*, *supra* note 73.

119. *DeSantis*, 608 F.2d at 329–30 ("Giving the statute its plain meaning . . . Congress had only the traditional notions of "sex" in mind . . . . [I]n passing Title VII Congress did not intend to protect sexual orientation and has repeatedly refused to extend such protection.").

120. *But see* Omar Gonzalez-Pagan & Ria Tobacco Mar, *Laws Barring Sex Discrimination Also Protect Sexual Orientation*, N.Y. L. J., (Feb. 7, 2016, 11:45 AM), http://www.newyorklawjournal.com/id=1202747483046/?slreturn=20160021130214 (a review of the 2015 decision of the EEOC that sexual orientation is in fact a form of "sex" for purposes of Title VII) [https://perma.cc/LRF2-A8BC].

121. *Price Waterhouse*, 490 U.S. 228. Under the "sex stereotypes" theory, employers expected employees to perform at their jobs while still conducting themselves according to stereotypes associated with their sex. Employers who penalized employees for failing to conform to sex stereotypes could be held liable for sex discrimination. Ann Hopkins, therefore, was expected to be an effective professional (presumably, perform as well as a man) but do so while maintaining her femininity.

122. *Id.* at 233–34. Hopkins was considered to perform at "partner level," worked long hours, was a "highly competent project leader" and landed a $25 million contract for the firm.

123. *Id.* at 235. Partners found her too aggressive and abrasive for a woman, recommended she take a "course in charm school" and that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

124. *Id.* at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

their group was an impermissible measure of evaluation under Title VII.[125]

Since *Price Waterhouse*, LGBT plaintiffs have tried, with mixed results, to utilize the sex stereotypes theory to pave the way for inclusion of sexual orientation discrimination under the sex discrimination protections of Title VII.[126] Success has been more notable in cases of sexual harassment, a subset of sex discrimination. At the time *Price Waterhouse* was decided, in order to make the case that one had suffered sexual harassment she would have to show, in addition to having been discriminated against because of sex, that she endured one of two types of sexual harassment: *quid pro quo* or hostile environment. *Quid pro quo* cases are those where the employer conditions employment, firing, demoting or promoting upon engaging in a sexual relationship with the employee,[127] or that her work conditions or continued employment status are such because the employee would not acquiesce to her supervisor's unwanted sexual advances.[128] A hostile environment case concerns work conditions that are sufficiently hostile to members of one sex so as to make it difficult for the harassed parties to perform at work. The harassment must be severe or pervasive, must be objectively hostile according to a reasonable person standard as well as subjectively hostile to the specific victim.[129]

125. *Id.* at 251 ("[A] number of the partners' comments showed sex stereotyping at work. As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . . Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

126. An example of successful application of the sex stereotyping theory to sexual orientation is Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (explaining that the sex stereotypes theory "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes."). However, an example of the rejection of the sex stereotypes theory as protecting from sexual orientation discrimination is *Dawson v. Bumble & Bumble*, where the employee, a hair assistant sued her employer, a hair salon, claiming she was discriminated against because she was a lesbian whose overall appearance was masculine. 398 F.3d 211 (2d Cir. 2005). The court held that to the extent that the employee was alleging discrimination based on her sexual orientation, she could not satisfy the first element of a *prima facie* case under Title VII because it did not recognize LGBT persons as a protected class. *Id. See also* Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015); *see* discussion below in Part III.D.; *and, see also* Boso, *Acting Gay*, *supra* note 73.

127. RUBENSTEIN ET AL., *supra* note 116, at 450.

128. The Court moved toward this doctrine, the "tangible employment action" doctrine, in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

129. RUBENSTEIN ET AL., *supra* note 116, at 450.

In *Rene v. MGM Grand*,[130] the court considered the same-sex sexual harassment of a gay employee who was harassed by fellow employees for over two years.[131] The court found that the victim's sexual orientation was irrelevant in sexual harassment claims,[132] and that demonstrating that the harassment was of a sexual nature was sufficient to establish a sexual harassment claim.[133] The concurring opinion adopted the sex stereotypes theory, finding that Rene's co-workers treated him as they would a woman and that the abusive treatment related to Rene's gender.[134] The dissent, however, rejected both options and maintained that Rene's harassment was not protected under Title VII because according to Rene's own testimony it was harassment because of sexual orientation.[135] The feminine conduct that Rene exhibited was rooted in his sexual orientation and therefore the dissent viewed his sexual orientation as the real motive behind the harassment.[136] The dissent also rejected Rene's sexual harassment claim because it was inconsistent with the options of prohibited same-sex sexual harassment that the Supreme Court had articulated in *Oncale v. Sundowner*.[137]

In *Oncale*, the Supreme Court considered whether same-sex sexual harassment, in addition to opposite-sex sexual harassment, could be protected under Title VII. There, the employee sued his employer for failing to protect him from sexual harassment and sexual assaults he endured while working on an all-male oil platform.[138] The Court

130. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002).

131. *Id.* at 1064 ("The harassers' conduct included whistling and blowing kisses at Rene, calling him 'sweetheart' and 'muneca' (Spanish for 'doll'), telling crude jokes and giving sexually oriented 'joke' gifts, and forcing Rene to look at pictures of naked men having sex. On 'more times than [Rene said he] could possibly count,' the harassment involved offensive physical conduct of a sexual nature. Rene gave deposition testimony that he was caressed and hugged and that his coworkers would 'touch [his] body like they would to a woman.' On numerous occasions, he said, they grabbed him in the crotch and poked their fingers in his anus through his clothing. When asked what he believed was the motivation behind this harassing behavior, Rene responded that the behavior occurred because he is gay.").

132. *Id.* at 1066.

133. *Id.* at 1068.

134. *Id.* at 1068–69 (Preggerson, J., concurring).

135. *Id.* at 1077 (Hug, J., dissenting).

136. *Id.*

137. *Id.* at 1072–73 (discussing Oncale v. Sundowner Offshore Serv., Inc., 523 U.S 75 (1998)).

138. *Oncale*, 523 U.S. at 77 ("On several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him . . . in the presence of the rest of the crew. [Two co-workers] also physically assaulted Oncale in a sexual manner, and [one of them] threatened him with rape.").

ruled that nothing in Title VII bars anti-discrimination protection simply because the harasser and victim are of the same sex.[139] However, the Court limited the scope of this protection to three possible scenarios. The first scenario for possible same-sex sexual harassment, acting under the basic assumption that sexual harassment is motivated by sexual desire, would require the harasser to have a same-sex sexual orientation.[140] However, conceding that not all sexual harassment is motivated by desire alone, the second scenario considers that animus to the presence of members of one sex as a group in the workplace may motivate harassment. Therefore, hostile or derogatory treatment that is sex-specific toward an employee of the same-sex could constitute sexual harassment.[141] In the third scenario, harassment is directed only to members of one sex in a mixed-sex workplace.[142] The Court then remanded the case for factual findings on whether the circumstances at hand fit into any of these three scenarios.

Yoshino offers an assimilation demands perspective to these cases that further illuminates the difficulty in relying on sex discrimination claims to protect sexual orientation. Yoshino observes that Hopkins was, in essence, caught in a double bind—or as he puts it, reverse-covering. Reverse-covering is Yoshino's term for situations where the dominant group imposes assimilation demands on the minority, pressuring one to *flaunt* her minority status, traits and characteristics and to conform to stereotypes associated with that minority group.[143]

At the same time, Hopkins was experiencing pressures at her workplace both to cover her femininity (by being an aggressive, go-getting business woman) and to flaunt it (wear make-up and jewelry, and attend charm-school).[144] Her superiors expected her to bring the

139. *Id.* at 79.

140. *Id.* at 80 ("Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.").

141. *Id.* ("But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

142. *Id.* at 80–81 ("A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.").

143. YOSHINO, *supra* note 13, at 143–44.

144. *Id.* at 155.

results any man would, but to go about accomplishing those results as an attractive woman would.[145] When she failed to walk the fine line between covering and reverse-covering, the partners penalized her by denying her partnership. Finding that this form of discrimination—the double bind—falls under Title VII, the Court implied that Hopkins could not have balanced differently the assimilation demands she faced. Yet, Yoshino asserts that Hopkins' ability to cover and reverse-cover simultaneously should be immaterial. Suggesting that the demands Hopkins' encountered were motivated by an attempt to preserve stereotypical gender roles, Yoshino maintains that protection from covering and reverse covering demands that are contingent on the existence of a double bind (i.e., that both types of demands must co-exist) leaves subjects of assimilation demands vulnerable.[146] In support, he notes that his research yielded "no federal Title VII case after *Hopkins* in which a 'feminine' woman prevailed against an affect-based covering demand on sex-stereotyping grounds."[147] The law, therefore, continues to condone the requirement that women and gay men perform their minority identities, as a way to maintain male dominance in the workplace. When the standard for professional success is still the straight man, but the expected methods to gain success are measured against one's minority identity, the result is both a personal and social harm. Women and gay people must still conduct themselves in ways that are pleasing, or at least non-threatening, to straight men and their masculinity. Female and gay identities are thus devalued and objectified so that power imbalances and hierarchical relationships, dominated by straight men, can remain the prevalent social order.

The dissenting opinion in *Rene*, which generally falls in line with most other cases addressing the possibility of Title VII protection for sexual orientation discrimination,[148] suggests an additional reason to

145. *Id.* at 145, 149 ("In many workplaces, women are pressured to be 'masculine' enough to be respected as workers, but also to be 'feminine' enough to be respected as women . . . . If women are not 'masculine' enough to be respected as workers, they will be asked to cover. If they are not 'feminine' enough to be respected as women, they will be asked to reverse cover.").

146. *Id.* at 161.

147. *Id.* at 161 ("I could find no federal Title VII case . . . in which a 'feminine' woman prevailed against an affect-based covering demand on sex-stereotyping ground. This finding suggests what women have in common with gays and racial minorities: a profound legal vulnerability to the demand that they cover the behaviors stereotypically associated with their group.").

148. For cases reaching similar conclusions regarding sexual orientation harassment as unprotected under Title VII, *see* Higgins v. New Balance Athletic Shoe, 194 F.3d 252 (1st Cir. 1999); Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000); Bibby v. Philadelphia Coca-Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001). *But see* Centola v. Potter, 183 F.Supp.2d 403

exercise care when relying on sex discrimination claims to protect sexual orientation discrimination. The dissent rejects the argument that sexual orientation is encompassed in sex, and maintains that Title VII precludes protection to employees harassed because of their sexual orientation.[149] In rejecting the possibility that Rene had been harassed because of his effeminacy—his nonconformity to male sex stereotypes—the dissent opines that Rene was performing his gender in feminine ways because of his sexual orientation.[150] In assimilation demands terms, the dissent saw the harassment as if Rene's co-workers' demanded he cover his sexual orientation, not reverse-cover his masculinity—a covering demand that the dissent finds permissible under Title VII. Interestingly, by failing to protect Rene from this covering demand the dissent effectively imposes on Rene (and through him, on other potential gay or lesbian litigants) a passing demand; that Rene's sexual orientation was known to his co-workers and to the court seemed material for the dissent's conclusion that Title VII was not applicable. Perhaps if neither knew of Rene's sexual orientation, the dissent would have entertained the covering demand as sexual harassment prohibited by Title VII and would have found in favor of Rene. Perhaps not. Still this possibility creates a passing demand as it discourages gays and lesbians from coming out in the workplace, and then later, in court.

2. Sex Discrimination and Sexual Harassment in Education: Greater Protections for Schoolchildren

Courts heavily borrow from the adult employment context to resolve sex discrimination and harassment cases in school. LGBT students have generally been more successful in court than adults; this reflects a policy to extend greater protection to children, even when parallel claims by adults fail. Undoubtedly, the success of litigation efforts is an important feat for the LGBT rights movement. Despite these important accomplishments, however, the statistics on school climate for LGBT youth—which have gone down in recent years[151]—remain alarming; statutory protections are not in place in many states (some have even rolled back on protections), and cases continue to

(D.Mass. 2002) (finding that sexual orientation discrimination, alongside sex discrimination, should not be held against the plaintiff).

149. *Rene*, 305 F.3d at 1075–76 (Hug, J., dissenting).

150. *Id.* at 1077–78.

151. See and compare the data below, e.g. *infra* notes.

be brought to courts.[152] So, although courts crack down on schools and educators more aggressively than on employers, the LGBT movement's litigation strategy has only served as a partial cure for school-based assimilation demands. Still, in order to design future strategies, it is worth considering the achievements so far.

Below are four examples for how courts better protect LGBT students from discrimination and harassment (a fifth example, in regard to speech will be discussed in the next part): (1) courts have not required that students demonstrate suffering a double bind when applying the sex stereotyping theory in their favor;[153] (2) courts have more readily restricted same-sex sexual harassment;[154] (3) courts have been more willing to interpret "sex" to include sexual orientation or gender identity;[155] and (4) even before *Lawrence v. Texas*[156] was decided, criminalization of sodomy was not accepted as a justification for discrimination or harassment of students.[157] However, there is one way in which courts put obstacles in the way of students raising discrimination or harassment claims that is not present in adult cases: students must demonstrate that their academic achievement has been affected by the mistreatment.[158] Adults, on the other hand, need not show any adverse impact to their performance at work. Still, by extending stronger protections to students, courts effectively recognize children's identity interests in the educational environment, their heightened vulnerability to assimilation demands, and their greater need for legal protections from such demands.

Social science findings on the effects of bias against lesbian, gay, bisexual, or transgender persons, or others who have relationships with LGBT persons,[159] expressed through discrimination or harassment, reveal the particularly harmful effect on those experiencing it. Schools that have committed to combating homophobia mitigate its

152. Consider recent litigation around HB-2, as well as G.G. v. Gloucester County School Board, 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3202 (U.S. Oct. 28, 2016) (No. 16–273), pending at the United State Supreme Court (as of February 2017), *see* https://www.aclu.org/cases/gg-v-gloucester-county-school-board [https://perma.cc/T2WY-U5V2].

153. See *infra* Part II.A.2.i.

154. See *infra* Part II.A.2.ii.

155. See *infra* Part II.A.2.iii.

156. Lawrence v. Texas, 539 U.S. 558 (2003).

157. See *infra* Part II.A.2.iv.

158. See *infra* Part II.A.2.

159. Homophobia negatively affects students who have relationships with LGBT persons as well. For instance the pervasive use of the term "gay" or the phrase "you're/that's so gay" as an insult or negative reference, can be emotionally detrimental and an infringement of educational rights of students whose parents, friends or relatives are LGBT.

harms and facilitate safer school environments. At 64.5%, a majority of students participating in school climate surveys[160] reported hearing homophobic remarks, with 51.5% hearing them from school staff.[161] A majority of students also reported that they experienced incidents of harassment and assault at school.[162] The findings show school personnel intervening at strikingly low rates. Overall, over a half (55.5%) of participating students reported they felt unsafe in school because of their sexual orientation, and 38.7% reported feeling unsafe because of their gender expression.[163] Almost half (43.3%) of students have reported these incidents to school staff,[164] yet about two thirds of reporting students (61.6%) said school staff had taken no effective action or no action at all.[165] About a third (32.5%) of students explained they do not report incidents because they doubt any effective intervention would be made, or because they feared making the situation worse (23.7%).[166] When schools adopted comprehensive policies addressing issues relating specifically to sexual orientation and gender identity, incidences of discrimination and harassment decreased and school staff effectively intervened at higher rates.[167]

Anti-LGBT verbal and physical harassment are alarmingly widespread in American schools. Of participating students, 64.5% in the national school climate survey reported hearing derogatory remarks referencing sexual orientation or gender identity often, including more than half (51.4%) who reported hearing remarks made by school staff.[168] Over half (56.4%) of participating students also heard transphobic remarks, and a similar number (55.5%) reported hearing such remarks from school staff.[169] Seventy-four point one percent report having been harassed at school because of their actual or perceived sexual orientation, and 55.2% report the same regarding

160. SURVEY 2013, *supra* note 102, at 16 (Compare to 88.9% in 2009. SURVEY 2009, *supra* note 102, at XVI.).

161. SURVEY 2013, *supra* note 102, at 16 (Compare to about two-thirds in 2009. SURVEY 2009, *supra* note 102.).

162. SURVEY 2013, *supra* note 1052, at xvi–xvii.

163. *Id.* at 12 (Compare to 61.1% and 39.9%, respectively in 2009. SURVEY 2009, *supra* note 102.).

164. SURVEY 2013, *supra* note 102, at 28 (Compare to 63.7% in 2009. SURVEY 2009, *supra* note 102.).

165. SURVEY 2013, *supra* note 102, at 34 (Compare to 38.8% in 2009. SURVEY 2009, *supra* note 102.).

166. SURVEY 2013, *supra* note 102, at 29.

167. *Id.* at 61, 76.

168. SURVEY 2013, *supra* note 102, at 16.

169. *Id.* at 18, 19.

gender identity.[170] Sixteen and one-half percent were physically assaulted because of their actual or perceived sexual orientation and 11.4% assaulted because of their gender identity or expression.[171]

There are two main forms of discrimination relevant to LGBT students. The first is sexual orientation discrimination: the differential treatment of students because of actual or perceived sexual orientation or gender identity compared to other straight or perceived to be straight students. The second is sex discrimination because of their sex: when students or school staff treat male students differently than female students in similar situations, or the other way around. Discrimination, whether on the basis of sexual orientation or sex, refers also to unequal enforcement. Schools that are subject to state anti-discrimination laws or regulations (mandated by the state or the school board) must enforce them on an equal basis.[172]

Title IX of the Education Amendments Act[173] prohibits public, federally-funded schools from discriminating in access or conditions of education on the basis of sex.[174] In addition to this federal prohibition on sex discrimination, some states have opted to protect against sexual orientation or gender identity discrimination and harassment in their state laws. Fifteen states and the District of Columbia prohibit discrimination or harassment in education on the basis of sexual orientation or gender identity,[175] and one additional state enumerated only sexual orientation as prohibited grounds for discrimination or harassment in schools.[176] Other states have enacted anti-bullying and safe schools statutes that protect students from violence regardless of

170. *Id.* at 22.

171. *Id.* at 23. Compared to 18.8% and 12.5%, respectively in 2009. SCHOOL CLIMATE SURVEY 2009, *supra* note 102, at 27.

172. *See* Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1137–38 (9th Cir. 2003).

173. Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a).

174. *Id.* (Stating the general prohibition against discrimination: "No 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.").

175. States that protect students from discrimination and harassment because of their sexual orientation or gender identity include: California, Colorado, Connecticut, District of Columbia, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Jersey, New York, Vermont, Washington, and Oregon. *Human Rights Campaign, Maps of State Laws and Policies: Statewide School Non-Discrimination Laws & Policies*, HUMAN RIGHTS CAMPAIGN (Feb. 7, 2016, 11:58 AM), http://www.hrc.org/state_maps (providing details of state statutes that protect LGBT students against discrimination, harassment or bullying, and those states that do not offer such protections) [https://perma.cc/T9D3-4MMV].

176. Wisconsin has a statute protecting students from discrimination and harassment because of sexual orientation alone. Wis. Stat. § 118.13 (2008).

its reason, though some may cover sexual orientation and gender identity, while others explicitly prevent protection on these bases.[177] Where such laws are not in place students have only Title IX to rely on for protection, and the question of whether "sex" includes sexual orientation or gender identity bares even more significance.[178]

Title IX prohibits discrimination and harassment in educational environments on the basis of sex.[179] For discrimination to fall under Title IX, it must be motivated by the student's gender or their nonconformity to stereotypical behavior associated with their sex, as was the case in *Price Waterhouse*. Another way discrimination can come under Title IX, where sexual orientation is concerned, is through sexual harassment. Harassment in this context takes place when students are mistreated or bullied by other students or by school faculty or staff because of their sexual orientation or gender identity. Research suggests that school faculty or staff fail to intervene and even blame the harassed students for bringing it on themselves.[180] In doing so, school faculty or staff violate their obligation to supervise and act reasonably toward students. When students are injured while in school care and the injury is related to school employees' acts or failures to act, both the employees and the school district are exposed to liability under Title IX.[181]

Sexual harassment is harassment that involves sexual references or behavior meant to humiliate a student, regardless of their actual or perceived sexual orientation or gender identity.[182] The harassment must be severe and pervasive enough to effectively deny a student ac-

177. States with general anti-bullying laws and policies that cover LGBT students are: Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Massachusetts, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington. States with general anti-bullying laws and policy that prevent school districts from specifically protecting LGBT students are Missouri and South Dakota. *Maps of State Laws and Policies: Statewide School Anti-Bullying Laws & Policies*, HUMAN RIGHTS CAMPAIGN (Feb. 7, 2016, 12:00 PM), http://www.hrc.org/state_maps [https://perma.cc/T9D3-4MMV].

178. Notably, however, this issue of the meaning of "sex" in Title IX protection is relevant in all states, as it is a federal statute and claims against all federally-funded schools can rest on its provisions, sometimes in addition to those embodied in state anti-discrimination laws. *See* 20 U.S.C. § 1681(a).

179. *Id.*

180. BIEGEL, *supra* note 95, at 17, 52 n.31 (discussing lawsuits brought by students against school personnel that were either won or settled in favor of the students).

181. *Id.* at 26 (reviewing generally Glaser v. Emporia Unified Sch. Dist. No. 253, 21 P.3d 573 (Kan. 2001); Carny v. Cedar Bluffs Junior/Senior Pub. Sch., 679 N.W.2d 198 (Neb. 2004)).

182. Rachmilovitz, Masters, *supra* note 19, at 90–91.

cess to education.[183] Over half (59.3%) of students participating in the national school climate survey reported having been sexually harassed.[184] The harasser and victim do not have to be of different sexes for such harassment to constitute sexual harassment.[185] A school district is liable for the sexual harassment of one student by others if the school knew about the harassment and was deliberately indifferent to the harassment that was severe and pervasive enough to deprive the victim access to education.[186]

Yet this outcome requirement effectively hinders students' protection and no parallel requirement exists for adults regarding their performance at work. Protecting only severe and pervasive harassment means that harassment that is limited to one incident, however severe, may not lead to the school being found liable for failure to protect the student.[187] Conversely, repeated harassment that the court might find innocuous could also result in a school escaping liability.[188] Moreover, a particularly bright or poor student, who suffers harassment without it hindering her academics (namely, that her grades had not dropped) would then also be left unprotected under this test. Lastly, arguably the greatest obstacle for protection is the requirement that a school be found "deliberately indifferent" to the harassment.[189] This might not be easily demonstrated to a court unless the abuse has happened during class, or when there is a record of reporting to school

183. Theno v. Tonganoxie Unified Sch. Dist. No. 464, 394 F.Supp.2d 1299, 1308–309 (D. Kan. 2005).

184. SURVEY 2013, *supra* note 102, at 24 (compared to 68.2% of the survey participants reporting experiencing sexual harassment in 2009. SURVEY 2009, *supra* note 102, at 27).

185. Oona R.-S. . v. McCaffrey, 143 F.3d 473, 476 (9th Cir. 1998); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996); Torres v. Nat'l Precision Blanking, 943 F.Supp. 952, 956 (N.D. Ill. 1996); Rodkey v. Trans World Airlines, Inc., 1997 WL 823568, at *22–26 (W.D. Mo. Oct. 7, 1997).

186. Murell v. Sch. Dist. No. 1, 186 F.3d 1238, 1246 (10th Cir. 1999).

187. A California student was expelled from school for giving a hickey to another female student. The school maintains it has a duty to expel the student for sexual harassment of another student. The student argues that this is not sufficient grounds for expulsion because—in addition to her belief that the sexual activity between the two students was in fact consensual – it was an isolated incident and therefore does not rise to the level of harassment under the Title IX "pervasive" standard. Interview with Asaf Orr, former staff attorney, Learning Rights Law Center, in Los Angeles, Cal. (Oct. 12, 2010) (Orr served as the student's attorney representative).

188. A suit by a female student who was repeatedly addressed in derogatory terms by fellow students ("slut," "whore") failed because the court believed this was not "severe" harassment for the purposes of Title IX. *Id.*

189. *See generally*, Asaf Orr, *Harassment and Hostility: Determining the Proper Standard of Liability for Discriminatory Peer-to-Peer Harassment of Youth in Schools*, 29 WOMEN'S RTS. L. REP. 117 (2008).

personnel.[190] Such a requirement, too, is not in place for employment discrimination or harassment cases.

i. No Double Bind Requirement

Despite the limits of Title IX, students have prevailed in their claims against schools. One case where a student won a harassment suit against his school based on the sex stereotype theory was *Theno v. Tonganoxie*.[191] Dylan Theno suffered harassment from fellow students that was centered around name calling, derogatory remarks about his sexual orientation, and mimicking same-sex sexual activities.[192] The harassment went on for four years, often in class in the presence of teachers, and escalated to physical violence on at least one occasion.[193] The school argued that the harassment was not motivated by Theno's sex, or by his atypical gender performance, but rather that his behavior, style, and interests were socially atypical and therefore unacceptable to his peers.[194] Additionally, the harassment was not motivated by sex, but rather was the other students' attempt to be funny by focusing on a socially awkward subject matter.[195] At trial, Theno expressed his belief that he was harassed because he "wasn't an alpha male" and that the other boys saw him as a "girly girl."[196] The court agreed that the harassment was motivated by the students' disapproval of Theno's gender performance.[197] They harassed him, the court found, because he did not conform to expectations regarding how a teenage boy should act.[198] Consequently, the harassment was meant to undermine Theno's masculinity. Using in effect the sex stereotyping

190. However, when the harassment takes place outside the classroom (perhaps in the hallway, restrooms, or school bus) where faculty and staff might not be present, when the harassed student does not report the harassment to school officials, or when the school takes limited and futile action, the standard proves itself too high to properly motivate vigilant action and protection by the schools. *Id.*

191. 394 F.Supp.2d 1299 (D. Kan. 2005).

192. *Id.* at 1305–06 (Other students called Theno "fag," "flamer," "sissy," "queer," "masturbator," etc. They started a rumor that he was caught masturbating in the restrooms, often made remarks in reference and peeked over the restroom stalls to "make sure you're not masturbating in there." On one occasion, at lunchtime, one student handed Theno a banana, saying: "Here you stupid faggot. Why don't you shove this up your ass? I'm sure you'll like it." On a different occasion, another student put a piece of string cheese in his mouth and said, "Look at this. I'm Dylan sucking cock.").

193. *Id.* at 1305–06.

194. *Id.* at 1304 (Theno had an unusual hair style, wore earrings and took an interest in martial arts. He also dropped out of the school's football team.).

195. *Id.*

196. *Id.* at 1306–07.

197. *Id.* at 1307.

198. *Id.*

theory, the court ruled that this was sexual harassment prohibited under Title IX and held the school liable for not protecting Theno.

Similar to the plaintiff in *Price Waterhouse*, Theno was harassed as an assimilation demand; the other boys found his gender performance non-conforming and therefore pressured him, through harassment, to assimilate to their expectations. Theno's actual sexual orientation or whether he identified as gender non-conforming is not explicitly mentioned in the opinion. If in fact he was gay or gender non-conforming, the harassment could be viewed as a demand to cover his sexual orientation (or, if he was gay, but his sexual orientation was unknown to his fellow students, this was a passing demand) as the harassment communicated to Theno that being gay was a basis for ridicule and shaming. On the other hand, if Theno was straight, the demands he faced were reverse-covering demands—the demand that he present his masculinity to a heightened degree. Notably, however, Theno was pressured toward one *or* the other. Unlike Ann Hopkins, Theno did not suffer a double bind. Yet the court still applied the sex stereotyping theory to protect him where adults would likely remain unprotected under current case law. This suggests that Yoshino's hypothesis that absent a double bind, subjects of covering or reverse-covering are left vulnerable might be limited to adults because courts have found assimilation demands and sex stereotyping harmful to children even when only one form of them exists. Perhaps courts are more willing to protect children from assimilation demands that constitute sex stereotyping due to their general vulnerability at this stage of identity development and their dependence on adults.[199] Allowing students to recover without being subjected to a double bind may reflect courts' acknowledgment that children who are still forming their identity have a greater interest in legal protection of their identity formation in an environment free from assimilation demands, and that such demands are overly burdensome in and of themselves and that subjecting students—whose coping mechanisms and resilience skills

199. For another case where the court considered a sex stereotyping claim as a basis for Title IX protection absent a double bind, *see* Doe v. Southeastern Greene Sch. Dist., 2006 U.S. Dist. LEXIS 12790 (W.D. Pa. Mar. 24, 2006). There, the court denied the school's motion for summary judgment as the court found that evidence of derogatory name-calling related to the student's sexual orientation, stabbing his behind with a pencil, masturbating in front of him and requesting he perform oral sex on the other student was sufficient for "a jury [to] find that his harassment was 'so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school.'" *Id.* at *22. The court allowed the student to proceed with his Title IX sex discrimination claim. *Id.*; *see also* Montgomery v. Indep. Sch. Dist. No. 709, 109 F.Supp.2d 1081 (D.Minn. 2000).

are still developing—to the requirement to rebuff conflicting demands may be far beyond their capabilities.

ii. Same-Sex Sexual Harassment

The courts' greater willingness to advance protections against sex discrimination for children above and beyond those for LGBT adults is evident again in the case of *Nabozny v. Podlesny*.[200] Despite rejecting similar claims in adult contexts, the formal sex discrimination argument led to findings in favor of the harassed student.[201] After coming out in seventh grade, Nabozny began experiencing harassment from his fellow students, both verbally and physically.[202] Over time, the harassment grew worse, culminating in two students pushing Nabozny to the floor and performing a mock rape on him in class in front of about 20 other students.[203] During the mock rape the two harassers expressed that Nobozny "should enjoy it."[204] When Nabozny reported the incident to the principal (who was also in charge of school discipline) she replied that "boys will be boys" and that if Nabozny was to be out as a gay student, he should expect this sort of treatment.[205] The harassment continued throughout middle school and into high school with more beatings, students throwing dangerous objects at him, and forcing him into a urinal.[206] The school continued to overlook the harassment, which drove Nabozny to attempt suicide on at least two separate occasions.[207] School officials repeatedly told Nabozny that being an openly gay student, he should expect the harass-

200. Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

201. As the argument goes, but for the victim's sex, she would not have suffered the disparate treatment. In *Rene*, the argument was that had Rene been a woman his harassers would not have mistreated him for his effeminacy. The majority and concurrence found in favor of Rene on other grounds. The dissent, as discussed above, refused to see the case as sex discrimination, but rather sexual orientation discrimination that is not prohibited by Title VII. On the other hand, in *Nabozny*, a similar argument held up in court. 92 F.3d 446 (7th Cir. 1996). In another case, *Flores*, the court again found that schools have a duty to protect LGB students from harassment in the same manner that they must protect straight students. Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003). Further, schools have a duty to enforce any school policy in regards to LGB students as much as that duty exists in regards to straight students. *Id.* at 1137.

202. *Nabozny*, 92 F.3d at 451 ("Nabozny's classmates regularly referred to him as 'faggot,' and subjected him to various forms of physical abuse, including striking and spitting on him.").

203. *Id.* at 451.

204. *Id.*

205. *Id.*

206. *Id.* at 451–52.

207. *Id.* at 451–52.

ment and they suggested he take time off from school.[208] They later altered his schedule so that he would have limited contact with his harassers and eventually placed him in a special education class.[209] Finally, Nabozny dropped out of school in the eleventh grade.

Nabozny made a constitutional Equal Protection claim and argued that had he been a female student, the school would have addressed the harassment.[210] He submitted evidence that when boys physically assaulted girls, or addressed them in derogatory ways that invoked their gender, the school acted aggressively to stop that harassment.[211] The court took particular issue with the school's response to the mock rape, opining that the comment "boys will be boys" demonstrates that the school did not consider that act to be serious because the students involved, and Nabozny, were male.[212] This indicated to the court that had the victim been a female student, the school would not have reacted with such indifference. This finding differs from protections grounded in sex stereotyping theory. It emphasizes formal equality (i.e., a male student compared to a female student) as opposed to substantive protections for differential identity protections (i.e., an effeminate boy compared to masculine boys).

Applying intermediate scrutiny, the court found that absent an important governmental interest, the school indeed was required to treat the harassment the same as if it targeted a female student.[213] Though this is not explicit in the opinion, effectively, the court applied the *Oncale* rule regarding same-sex harassment. One of the categories for impermissible same-sex harassment under *Oncale* is that members of one sex are suffering harassment that is not imposed on

208. *Id.* at 452. After one occasion when Nabozny was kicked in the stomach repeatedly for 10 minutes, a school staffer to whom Nabozny complained laughed and told Nabozny that Nabozny deserved such treatment because he was gay. *Id.*

209. *Id.*

210. Nabozny also made a due process claim. However, in the interest of focusing on discrimination/harassment jurisprudence, I only discuss the equal protection claim here. In short, Nabozny's claim, that the school created or exacerbated his risk of harm by failing to act against his harassers, was rejected by the court for lack of persuasive evidence. *Id.* at 459–60.

211. *Id.* at 454 ("Nabozny contends that a male student that struck his girlfriend was immediately expelled, that males were reprimanded for striking girls, and that when pregnant girls were called 'slut' or 'whore,' the school took action.").

212. *Id.* at 454–55 ("[W]hen he was subjected to a mock rape [the principal] responded by saying 'boys will be boys,' apparently dismissing the incident because both the perpetrators and the victim were males. We find it impossible to believe that a female lodging a similar complaint would have received the same response.").

213. *Id.* at 456.

members of the other sex.[214] When the court accepts Nabozny's argument that the school would have taken action were the harassed students girls, it essentially applies *Oncale*. However, that *Oncale* is not referenced in the case, and although there is no discussion of the categories under which same-sex harassment may be impermissible, suggests that the *Nabozny* court perhaps is more lenient with the child than it may have been with an adult, who presumably would have been required to explicitly take the step of demonstrating how being harassed by people of the same-sex is consistent with the *Oncale* precedent.

iii. "Sex" Means "Sexual Orientation"

The *Nabozny* court addressed the possibility of sexual orientation discrimination as well. Here, the court applied rational basis review, as it declined to determine whether sexual orientation is a suspect or quasi-suspect classification, and relied on precedents applying rational basis review to sexual orientation discrimination.[215] Even with this lower standard, the court found no rational basis for allowing one student to harass another because of sexual orientation.[216] Further, the court rejects the possibility that the Supreme Court ruling in *Bowers v. Hardwick*[217] provides a rational basis for the discrimination in *Nabozny*. Under *Bowers*, criminalization of sodomy could render gay students dissimilarly situated to straight students and the school's discrimination permissible.[218] However, the court did not substantively examine this suggestion. Instead, it admonished the school for relying on *Bowers* as authority for the appropriate standard of review, without suggesting *Bowers*, or any other precedent, as the rational basis to justify their disparate treatment of Nabozny.[219] The court ruled in the student's favor and found school staff accountable for failing to protect him from harassment.[220]

The *Nabozny* court is primarily concerned with two forms of assimilation demands: passing and conversion. School personnel to whom Nabozny reported the abuse dismissed his complaints by telling him that being an out gay student meant being harassed and that violent

214. *Oncale*, 523 U.S. at 80–81.
215. *Id.* at 458.
216. *Id.* at 458.
217. *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding the constitutionality of state criminal anti-sodomy laws).
218. *See Nabozny*, 92 F.3d at 458.
219. *Id.*
220. *Id.* at 455–56.

responses from peers were to be expected. Such an argument attempts to excuse any failure to act against the harasser. It delegitimizes LGBT students' right to express and reveal their sexuality and violates students' right to be safe at school—regardless of identity. It uses the justification of violence as a valid response to one's openness about a seemingly inferior, undesirable identity—a highly threatening passing demand. And as a passing demand, the school's response is in and of itself a discriminatory action. The court, though not explicitly, seems to see that. The court reiterates that Nabozny got this response from several school staff, though this pattern was not necessarily material for a holding based on sex stereotyping discrimination.[221] Unlike the dissenting opinion in *Rene*, the court did not see Nabozny's openness about his sexual orientation as reason to reject his sex discrimination claim. The court did not insist that this was actually sexual orientation discrimination and therefore outside the contours of Title IX. This is another example of how courts protect children more fully than adults in similar circumstances.

iv. Criminalization of Sodomy Not a Defense

The Nabozny court also offered protection to LGBT students where it is denied to adults in its discussion of *Bowers* as a potential rational basis for the school's failure to act against Nabozny's harassment. Anti-sodomy criminalization has served society as a legal tool to convert LGBT persons into heterosexuality.[222] Yoshino argues that while conversion demands have subsided over the years for adults, they are often still in full force when children's sexuality is concerned.[223] And while *Lawrence v. Texas* has indeed eliminated the criminalization of adult same-sex sodomy, it has not—at least not explicitly—done the same for same-sex sexual conduct involving (or between) teens. Though the conversion rationale might still hold in

221. The response the court did see as determinative was the principal's statement that "boys will be boys," insinuating that had girls been involved there would be cause for concern and action by the school. *Id.* at 454–55. The court expressly relies on this statement, rather than those indicating that harassment of an openly gay student is to be expected, to find in favor of Nabozny's sex discrimination claim. *Id.*

222. Like marriage, bars on same-sex sexual activity "substantially burden the right to choose homosexual relations and relationships" and are a means for the law to channel one into heteronormative behavior. In this sense they are a legal tool of conversion. *See generally*, Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012); YOSHINO, *supra* note 13, at 41 (discussing immigration law as another example for legal strategies of "gay conversion.").

223. YOSHINO, *supra* note 13, at 44–45.

other contexts[224] the Nabozny court eliminates the potential argument that conversion is a rational basis for harassment of LGBT students. Notably, it does so in a time when conversion demands on adults (i.e. the criminalization of sodomy) were still upheld by the Supreme Court. Regardless of whether the Nabozny court assumed LGBT students were not involved in same-sex sexual activity due to their age or saw them merely as potential violators of anti-sodomy statutes needing to be deterred from such activity (in Yoshino terms, children are "classic sexual waverers"),[225] the court would not entertain the merits of sodomy criminalization as a rational basis for harassment. The message is that students must be protected from their peers' abusive behavior even if that behavior would be acceptable against adults because the state is entitled to criminalize that adult's conduct. Once more, children are afforded more legal protection than adults.

So far, we have seen four ways in which courts better protect students from discrimination and harassment in education than their LGBT adult counterparts in employment. Before exploring more in depth why this may be—that is, what it is about children and education that inspires courts to extend protection where adults may not enjoy it—it is worth exploring another context, that of free speech, in which courts both roll back children's rights compared to adults in that their speech must not undermine the educational setting, but also remove important obstacles common in first amendment cases from schoolchildren's way: the community standards test.

B. Sexual Minority Students' Free Speech: Hybrid Protections

A common area of discrimination against LGBT students concerns freedom of speech and expression. Although students are not stripped of their freedom of speech while at school, there are limits on children's free expression rights that seem more far-reaching than restrictions on adults' speech. Primarily, students' free expression must not conflict with the characteristic of the educational setting.[226] Students, therefore, have the right to discuss and express their sexuality,[227] as long as such speech does not interfere substantially and mate-

224. *See infra* Part III.B regarding "No Promo Homo" laws and policies.

225. YOSHINO, *supra* note 13, at 44.

226. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 509 (1969) (stating that First Amendment rights are limited in school if "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school[ ]'").

227. Henkle v. Gregory, 150 F.Supp.2d 1067, 1076 (D. Nev. 2001).

rially with schoolwork, discipline, and the rights of other students.[228] As demonstrated by *Nabozny* and additional cases discussed below, courts have held school districts and school personnel accountable for preventing students from coming out, as well as for failing to protect students from harassment and discrimination after they express their sexuality.[229]

The Supreme Court established school children's free expression rights in *Tinker v. Des Moines*.[230] In that case, several high school and junior high school students were suspended for wearing black armbands in protest of the Vietnam War.[231] The students brought a First Amendment claim against the school's disciplinary action. The Court found that as long as the expression at question is appropriate in a school environment, neither students nor teachers surrender their free expression rights "at the schoolhouse gate."[232] Indeed, students' freedom of expression extends beyond the classroom and is to be upheld at all school activities, as the school environment is to be viewed in its broader meaning.[233] Therefore, restrictions on students' speech, then, can only be limited when there is a substantial disruption to school function, and cannot be motivated by disagreement or discomfort with the views expressed by the student(s) or the unpopularity of such views.[234] The Court based its strong protection for students' free expression in the notion that the classroom was the quintessential free market of ideas, where students should be allowed to engage, test, or reject different opinions, as long as they do so in a manner that is consistent with a school's educational purpose and does not undermine school functions.[235] Put differently, the Court aspired for pluralism in diverse educational settings. This pluralism in turn facilitated protection of children's rights to explore and express their identities, views and values free of the school's assimilation demands.[236]

228. *Tinker*, 393 U.S. at 509. Interference does not mean a school is not obligated to take reasonable measures to protect and foster free speech and to prevent violence by attempting to create such interference. *See* Fricke v. Lynch, 491 F.Supp. 381, 388–89 (D.R.I. 1980).

229. *Henkle*, 150 F.Supp.2d 1067; *Nabozny*, 92 F.3d 446.

230. *Tinker*, 393 U.S. at 511.

231. *Id.* at 504.

232. *Id.* at 506 ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

233. *Id.* at 512–13.

234. *Id.* at 509.

235. *Id.* at 512.

236. *See* Lau, *supra* note 12.

Tinker established students' rights to quietly and passively display political symbols. The right to free expression under *Tinker* includes students' rights to reveal their sexual orientation or express support for LGBT students at school, by displaying LGBT supportive symbols, such as a rainbow or pink triangle, on their clothes or other personal belongings.[237]

Protections for passive expression have been extended to expressive conduct in the case of *Fricke v. Lynch*.[238] Aaron Fricke was a high school student who requested the school's permission to attend the prom with a same-sex date. Only students who had dates were allowed to participate in the event. In a conversation with the principal, Mr. Lynch, the two discussed the possibility that Fricke was bisexual or that he would date girls, but he expressed a "commitment to homosexuality."[239] The principal then refused to allow Fricke to be accompanied by a same-sex date to the prom. The principal cited two reasons for his decision: first, an increased threat of violence directed at the two boys, and possibly other attendants, and second, that allowing same-sex dates at school events would send a message that the school condones homosexuality.[240] Fricke brought a First Amendment claim that the school's decision violated his rights to free association and free expression. He argued that bringing a same-sex date to school activities has an expressive and educational function, as their

237. Others, including teachers and administrators, are prevented from discouraging or forbidding any behavior that limits students' right to be out. As we've seen in the previous section, discrimination or harassment cannot be justified or blamed on the students themselves because of their actual or perceived sexual orientation or gender identity or because they have chosen to reveal their sexual orientation or gender identity to others (i.e. "come out"). Discrimination or other forms of mistreatment should not be expected or accepted simply because of a student's sexual orientation or gender identity. Furthermore, since free expression is not limited to the classroom, free expression cannot result in limited participation in school activities, such as the prom even when active speech or expressive conduct is involved. Nonetheless, since schools are to foster tolerance and diversity among all students, other students may express their disapproval of same-sex sexual orientation or gender non-conformity. They too are allowed to display messages such as "straight pride" on their clothing, for example. So there are ways students may acceptably express their views that homosexuality is immoral, but there are also limits, including hate speech, inciting violence, and behavior that impinges on another student's ability to receive an education or if the speech disturbs the educational environment. *See* Chambers v. Babbitt, 145 F.Supp.2d 1068 (D.Minn. 2001). Other t-shirts, the messages on which were found by the court to be "verbal assaults," and therefore unacceptable and unprotected under the First Amendment, read "I will not accept what God has condemned" and "homosexuality is shameful." See discussion of Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), in Lau, *supra* note 12, at 365–66.

238. *Fricke*, 491 F.Supp. 381.

239. *Id.* at 383.

240. *Id.* at 383–84 n.2.

attendance carries the political message of equality and human rights for sexual minorities.[241] The court relied on *Tinker* to find that attending a function with a same-sex date is political speech that is protected, and rejected the possibility that safety concerns can constitute a substantial interference with school function under *Tinker*.[242] Allowing objections from the audience to excuse limits on speech would be tantamount to a "heckler's veto," which is inconsistent with free expression protections. The school, therefore, could not suppress speech because of concerns for the reaction it may engender.[243] A substantial interference cannot be solely from the audience, but from the speaker herself.[244] The *Fricke* court protected the student's identity expression right because it was not harmful to others. Community standards expressed by a heckler's veto, are not such a harm under the court's definition because they are neither caused by the speaker herself nor infringe on another's identity expression. Additionally, the court believed that the school should have explored a less restrictive approach; allowing the boys to attend the prom while increasing security to ensure students' safety.[245] The court recognizes that to truly protect Fricke's free speech, it must consider practical and logistical ways in order to ensure Fricke's rights. It therefore looks for a compromise between Fricke's rights and the school's legitimate interest in guaranteeing the safety of students attending the prom. Ultimately, the court required the school to provide additional security so that the boys could attend the prom as a same-sex couple.

Although the *Fricke* decision was favorable to the student and his right to express his sexual orientation at school, it is also somewhat concerning. The court emphasizes Fricke's "commitment to homosex-

241. *Id.* at 385.

242. *Id.* at 387.

243. *Id.* at 385, 387 ("It is certainly clear that outside of the classroom the fear however justified of a violent reaction is not sufficient reason to restrain such speech in advance, and an actual hostile reaction is rarely an adequate basis for curtailing free speech. [E]ven a legitimate interest in school discipline does not outweigh a student's right to peacefully express his views in an appropriate time, place, and manner. To rule otherwise would completely subvert free speech in the schools by granting other students a 'heckler's veto,' allowing them to decide through prohibited and violent methods what speech will be heard. The first amendment does not tolerate mob rule by unruly school children.").

244. *Id.* at 387 ("[The school has] failed to make a 'showing' that Aaron's conduct would 'materially and substantially interfere' with school discipline."); *see, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (where a school prohibited a student from delivering a speech riddled with profanity and offensive language, the Court found that the school did not violate the student's freedom of expression as the speech was disruptive to school functioning).

245. *Fricke*, 491 F.Supp. at 385–86.

uality" as material to its decision to allow him to bring a same-sex date to the prom.[246] The conversation between Fricke and Lynch about bisexuality (i.e. Lynch imposing a conversion demand on Fricke) is only troubling to the court because of the strength of Fricke's conviction regarding his sexuality. To the court, the significance of bringing a same-sex date to the prom as expressive conduct does not lie, as Fricke argued, in a message of equality and LGBT rights, nor in rejecting the school's concern for condoning homosexuality, but rather, it lies in the view that Fricke's homosexuality is immutable. The court's reliance on immutability as a determinative factor for identity protection highly burdens children as perceived "sexual waverers" whose "true" sexuality is second-guessed by adults who assume they have yet to fully form their sexual orientation or gender identity. But what of children who are "sexual waverers"? Bisexuals are similarly burdened and in need of the law's protection. Caught between the myth of bisexuality as a transient identity on the way to same-sex sexual orientation and the demand that bisexuals "choose" heterosexuality simply because they "can,"[247] bisexuals lack the protections for identity rights that hinge on immutability, which are not entirely meaningful. Yoshino's argument that protection from conversion demands must be based on the legitimacy of the identity at stake and not its immutability comes to life in *Fricke*,[248] where reliance upon "commitment to homosexuality" rather than the legitimacy of homosexuality (or bisexuality) as ground for protection leaves those still questioning and exploring their sexuality vulnerable to restrictions on their freedom to express that still developing identity.

Assimilation demands on children in school are inconsistent with ideals of pluralism and diversity that prepare children for life as citizens in a democratic society because pluralism ensures children's identity exploration and expression.[249] *Tinker*, *Fricke* and other cases[250] all follow from courts understanding that children's identities ought

246. *Id.* at 384–85 (the court describing Fricke's testimony as to why he is interested in bringing a same-sex date to the prom and finding it to have "significant expressive content").

247. Boucai, *supra* note 222.

248. YOSHINO, *supra* note 13, at 47–49.

249. *See* Lau, *supra* note 12.

250. *See also* Doe v. Yunits, No. 00-1060-A, 2000 Mass. Super. LEXIS 491 (Oct. 11, 2000). Finding that prohibiting a trans student from expressing her gender identity through her clothing was tantamount to discrimination because of sex under the sex stereotyping theory, because by dressing as a girl the student, who was assigned a male sex at birth, was not conforming to stereotypes about how males should dress. Thus students have a right to dress according to their gender identity. *Id.*

to be protected so that children can continue to develop a healthy sense-of-self. However, courts cannot be relied upon as the only, or even primary, port of call for protecting LGBT students from assimilation demands. Courts cannot prevent the injuries that have already happened to plaintiff students. Nor has the focus on litigation strategies been able to fully eradicate school-based assimilation demands. But before elaborating on this point, it is worth exploring why LGBT youth have been more successful in courts than LGBT adults. Identifying which of children's needs have fallen on sympathetic ears and designing future strategies around them or around the reasonable differences in outcomes might advance other accomplishments, for teens and for adults, through and outside of litigation.

III. Beyond The Schoolhouse Gate: Rationales and Implications

Now that we have seen that LGBT students are better protected by the legal system than their adult counterparts are in the workplace, we must consider why this may be and whether this is sufficient in fending off the harms assimilation demands at school cause to LGBT students. Below I theorize that there may be two explanations for why children are better protected, and that both can be attributed to the overarching concern regarding children's development. The first considers that students are still forming their identity, and that the law reflects the knowledge produced by social science that children require enhanced protections in order to ensure healthy identity development. The second considers children as future adults and citizens who may need adults to guard their opportunities—their open future—while they are still in the process of determining how to live their adult lives. Whereas the first argument centers on psychological reasoning, the second employs social science and liberal theory to produce a policy argument.

A. Child Development: From Dependence to Autonomy

Erikson established his child development theory around fundamental concepts such as basic trust, basic mistrust, autonomy, shame, and doubt.[251] These concepts are opposites of each other, one of two possible resolutions to conflicts between the child and her environment. The way in which conflicts are resolved in each stage of development directs the child's development in the following stages. Trust

251. PATTERSON, *supra*, note 12, at 216.

results from a combination of sensitive care for a child's needs along with fostering a strong sense that the child can depend on her parent.[252] This way, children learn the world is safe to explore and are confident about their social interactions.[253]

As they grow older, children wish to be more independent. Still, caregivers must establish limits to ensure safety. Allowing maximum freedom within reasonable limits lets children become confident and proud of their actions, whereas instituting overly restrictive boundaries leaves children ashamed and doubtful about their competence.[254] Parents must balance fostering their child's autonomy with placing limits regarding safety, because children are still incapable of distinguishing between activities that are productive and those that are dangerous.[255] Striking this balance is a constant task in childrearing. Much of how the child-parent relationship is shaped and maintained over time and its impact on the child's wellbeing and relationships later in life is a result of how parents succeed in striking this balance between fostering their child's autonomy and ensuring her physical and emotional safety.

Parenting that balances autonomy with limits allows children to negotiate behavior, daily tasks, and rules and to increase their responsibilities and control.[256] Many conflicts stem from teens' increasing desire for autonomy and following their personal choices and their parents' ongoing enforcement of rules and boundaries of right and wrong.[257] Conflicts become less frequent as children become more independent[258] and learn to achieve autonomy in ways that fulfill both their own needs and those of others in a socially accepted manner.[259] When a balance (or imbalance) between autonomy and closeness in the parent-child relationship emerges, it becomes a prototype

252. ERIKSON, CHILDHOOD AND SOCIETY, *supra* note 68, at 249.

253. PATTERSON, *supra* note 12, at 216.

254. *Id.*

255. ERIKSON, CHILDHOOD AND SOCIETY, *supra* note 68, at 252–53 (defining shame as self-consciousness and warning about shame turning into feelings of self-rage and self-hatred causing the child (and later, adult) to rid herself of that within herself which causes such shame).

256. *Id.* at 441.

257. PATTERSON, *supra* note 12, at 548–49.

258. *Id.*

259. Joseph P. Allen, J. Lawrence Aber, & Bonnie J. Leadbeater, *Adolescent Problem Behavior: The Influence of Attachment and Autonomy*, 13 PSYCHIATRIC CLINICS N. AM. 455, 460 (1990); Joseph P. Allen, Maryfrances Porter, & Christy McFarland, & Kathleen Boykin McElhaney, *The Relation of Attachment Security to Adolescents' Parental and Peer Relationships, Depression, and Externalizing Behavior*, 78 CHILD DEV. 1222, 1222 (2007).

for future relationships and the balance between autonomy and closeness in those future relationships.[260]

Courts have granted children heightened protections, where similar claims from adults have failed, in order to adjust to the particular needs of children who are still developing their identity and therefore tend to be more and uniquely vulnerable to assimilation demands. We see this, for instance, in the *Nabozny* court's willingness to protect same-sex sexual orientation as "sex" or prohibiting same-sex sexual harassment. Both these moves demonstrate perhaps how courts understand there is something different about children and teens—that, as Erikson's theory suggests, their identities need the safe space to form through experiment, role modeling, expression, and other methods, and that adolescents still require the protection of adults in order to achieve healthy identity development.

The understanding of youth as an ongoing developmental process in terms of emotional and mental capacities was also integrated into the law, in a non LGBT-related context. In *Roper v. Simmons*,[261] the Supreme Court eliminated the death penalty for offenders under eighteen years of age for similar reasons. The opinion there is perhaps the go-to example of how the law acknowledges the differences in psychological development between minors and adults and relies on these differences to justify greater legal protections for minors. In addition to pointing out that children's identity is more fluid and flexible and not yet fully formed (and in doing so, relying on Erikson's work),[262] the Court details two more rationales to treat children differently than adults: first, teens' lower ability to foresee or care about consequences[263] make them less mature and more reckless than adults, and second, teens are more vulnerable to negative influences and external pressures, including peer pressure, and have a decreased measure of control over their environments.[264] Applied to other contexts such as schools, it may flow from the idea of children's vulnerability that *children and teens are less able to negotiate their worlds and navigate the assimilation demands they face in order to emerge from them unscathed.* As a result, even more resilient children, still require the assistance of adults and institutions such as schools and courts to protect

260. Robert J. Waldinger et al., *Attachment and Core Relationship Themes: Wishes for Autonomy and Closeness in the Narratives of Securely and Insecurely Attached Adults*, 13 PSYCHOTHERAPY RES. 77, 81 (2003).

261. Roper v. Simmons, 543 U.S. 551 (2005).

262. *Id.* at 570.

263. *Id.* at 569.

264. *Id.* at 569.

them from assimilation demands compromising their identity development and emotional strength.

Vulnerability to assimilation demands does not only lead to the general (though necessary) protections such as *Nabozny*'s inclusion of sexual orientation and same-sex harassment under the umbrella prohibitions on sex discrimination, but may have also motivated the removal of the *Price Waterhouse* double-bind requirement for a prevailing sex stereotypes argument. Recall that the *Theno* court ruled the student experienced sexual harassment because he did not conform to male stereotypes, a reverse-covering demand (assuming Theno was not gay, this remains unclear) without any additional assimilation demand. This is unlike Ann Hopkins who prevailed because she suffered both a covering demand—perform like men in your professional achievements—and a reverse-covering demand—present yourself in a feminine and appealing manner, as is associated with and expected from women.[265] This also reflects the court's understanding that at this stage of development, when it is so difficult to weather assimilation demands at all, it might be too burdensome and harmful for teens to be expected to have experienced the set of assimilation demands that create the double binds that merit protection in the case of adults. One type of assimilation demand might be injurious enough without a young person having to navigate the inconsistencies of more.

As an ongoing process, identity development creates tensions between dependence on the protection of adults and vulnerability to assimilation on one hand, and control and autonomy over one's environment and identity formation or expression on the other. These tensions are highlighted when *Fricke* and *Nguon v. Wolf*[266] are analyzed together to explore privacy and the coming out process as more gradual and sensitive for children than for adults.

Charlene Nguon was suspended from her high school for engaging in inappropriate public displays of affection (PDAs) with another female student.[267] When notifying Charlene's mother about the disciplinary measures against her daughter, the principal told the mother that Charlene was kissing another girl. Charlene and her mother filed suit against the school,[268] arguing that the suspension constituted sex-

265. *See Price Waterhouse*, 490 U.S. 228.

266. Nguon v. Wolf, 517 F.Supp.2d 1177 (C.D. Cali. 2007).

267. *Id.* at 1179–80.

268. One could infer from the fact that Charlene Nguon's mother was a party to the suit that the disclosure of Charlene's sexual orientation to her mother was not detrimental

ual orientation discrimination and that the principal's detailing of Charlene's same-sex conduct amounted to a disclosure of her sexual orientation to her mother and therefore violated Charlene's privacy rights.[269] The court analyzed the behavior of the two girls in light of the school's policy regarding public displays of affection and concluded that the girls' conduct was sufficiently inappropriate and extreme to justify disciplinary measures.[270] Additionally, the court found that students engaged in similar different-sex PDAs were and would be equally disciplined for their comparable behavior.[271]

Recognizing that Charlene had a right to keep her sexual orientation private from her parents, the court exhibits an understanding of the complexities of coming out during adolescence, but by placing significant discretion with the disclosing party the court missed the opportunity to fully ensure that the child's privacy is safe from unwarranted invasion by adults. The court began its privacy analysis by defining the scope of Charlene's privacy expectations and found that because the PDAs were limited to school grounds, and because her parents were not involved in Charlene's school life, Charlene could reasonably expect that her parents would not be aware of occurrences at school.[272] For her, home and school were separate environments. Therefore, although the PDAs negated Charlene's reasonable expec-

to their relationship, and thus caused no harm to Charlene. However, Charlene's mother's participation as a plaintiff was a procedural requirement under California law because of Charlene's status as a minor. Email from Christine Sun, plaintiff's representing attorney, to author (Nov. 17, 2011, 5:32 PST) (on file with author). But even if Charlene's mother was not named as a plaintiff strictly for procedural reasons, the point of privacy rights is to protect the information itself, not only the result of disclosure. Thus privacy rights for children protect them from the *potential* for parental mistreatment, not only the mistreatment itself. To make privacy rights contingent upon the harmful result of disclosure would empty these rights because the protection will be only post-fact when harm has already occurred, rather than preemptive of an undesirable disclosure. *Id.*

269. *Nguon*, 517 F.Supp.2d at 1179, 1192. The principal argued that disclosing the sex of Charlene's partner was not a disclosure of Charlene's sexual orientation. The court rejected that defense:

> by telling [Charlene's mother] that Charlene had been kissing another girl, [the principal] conveyed Charlene's sexual orientation to her mother. His statement was unvarnished, and it was far more likely that [the mother] would infer that Charlene was gay rather than merely acting out or mimicking a rockstar. That is the inference which [the mother] drew from the conversation.

Id. at 1192.

270. *Id.* at 1186–87.

271. *Id.* at 1184–87.

272. *Id.* at 1191.

tation of privacy regarding her sexual orientation at school, her expectation of privacy regarding her home remained intact.[273]

In separating the spaces of privacy, the court recognizes that the coming out process, particularly for youth, can be gradual with one choosing to pass as straight in certain environments while being out as LGBT in others.[274] This is particularly true for many teens that come out in social circles or at school before they come out to their parents. Teens come out to parents later than to peers partly because the dependence of children upon their parents and their enhanced vulnerability at the intersection of age and sexual orientation render that disclosure highly threatening to adolescents.[275] Moreover, separating the spaces of privacy and recognizing that openness about sexual orientation in one spatial or social context does not negate privacy expectations regarding another is a departure from how sexual orientation privacy is applied to adults. When a news story about the man who had prevented the assassination of President Ford included details of his sexual orientation, it became the subject of a privacy suit.[276] The court ruled that since the plaintiff was a known activist in the gay rights movement, his sexual orientation was already public knowledge and that he could no longer have an expectation that such information would be kept private.[277]

At first blush, Charlene Nguon's case seems inapposite to that of Fricke, the boy who sought permission to bring a same-sex date to his school prom. Charlene wanted to keep her sexual orientation under wraps, whereas Fricke fought for the right to make it exceptionally public. But digging deeper, we can see how in effect both students wished to take control of the disclosure and expressions of their identities, and both wished to do so free and protected from assimilation demands. Colored in this light, the opinions in both cases teach us

273. *Id.* at 1191 ("Charlene ha[s] a constitutionally protected privacy right with respect to disclosure of her sexual orientation. . . . At school [the girls] were open in their expressions of affection for one another. . . . Charlene had no reasonable expectation that her sexual orientation would not be disclosed in the context of her school. Her conduct at school was inconsistent with any right to keep her sexual orientation private. . . . It does not follow that disclosure in one context necessarily relinquishes the privacy right in all contexts. . . . Charlene's home was an insular environment, and . . . her activities . . . at school were unlikely to be known to her parents unless they were expressly informed. Thus, . . . Charlene had a reasonable expectation of privacy concerning her sexual orientation at home.").

274. YOSHINO, *supra* note 13, at 64–65.

275. Lau, *supra* note 12, at 370–71.

276. Sipple v. Chronicle Pub'g Co., 154 Cal.App.3d 1040 (1984).

277. *Id.* at 1047 ("[T]here can be no privacy with respect to a matter which is already public or which has previously become part of the 'public domain.'").

how important it is for young people to have autonomy over their coming out process and to control—without fear of harm from others—whether, when, how, and to whom they come out. These cases remind us that indeed, coming out is a process, which is closely interwoven with the broader process of identity development.

This process, like discrimination or harassment generally, and the tensions between heightened vulnerability and growing autonomy, have—and should—warrant greater protections for students experiencing assimilation demands because this heightened protection preserves children's ability to continue on the developmental task of identity achievement. In this sense, the case law has developed, based on the law that applies to adults, to meet children's unique psychological needs.

By "greater protection," I mean both greater than current protections to students, and greater than the protections available to adults. Charlene Nguon's case also demonstrates how courts could be more vigilant in protecting children. The court rejected her discrimination claim because it found that her sexual orientation—or the sex of her partner—were irrelevant to the decision to suspend her. Yet it also found that the school was within its authority to notify her mother of her partner's sex so that Charlene Ngoun and her parents could mount a defense. This is internally inconsistent—if the sex of her partner was indeed irrelevant, how would it have been helpful in objecting to the suspension? In this regard, the court could have been more forceful in insisting that disclosure by the school must be exceedingly limited. Perhaps a rebuttable presumption is in place. This is not like the current structure of such claims where a student must first demonstrate that her rights have been infringed and then the burden shifts to the school that the infringement had an educational purpose—similarly to how discrimination claims for adults require first a showing of discrimination and then a failure of the employer to demonstrate a BFOQ. The idea of a rebuttable presumption would increase students' protection both compared to where they are now and compared to adults. However, the details of this are beyond the scope of this paper.

B. Policy Considerations: Open Future

In addition to allowing children to reach identity achievement and to protect them from the emotional wounds of assimilation demands, I would suggest that courts in the cases discussed above were motivated by a related concern for the foreclosure of children's iden-

tity interests in the legal and social policy sense as well. Most rules established in those cases can be seen as protecting the foundations of LGBT identities and validating them as acceptable so that children grow up able to pursue and express their identities safely and fully the closer they come to adulthood. Those rules also demonstrate that their wellbeing and autonomy is protected in order for them to grow up to be productive and informed members of society.

In contrast to other scholars who advocate children's autonomy rights but struggle with the issue of a child's actual capacity to make autonomous decisions, Joel Feinberg would have these rights protected as anticipatory rights for children.[278] Feinberg categorizes children's rights as belonging to one of two groups. Dependency rights are rights that are based in children's dependence on adults for their basic needs and survival.[279] Rights-in-trust are those rights that adults hold but whose exercise is contingent upon a child's capacity and development. Rights-in-trust should be "saved" for children until they are able to enjoy them. Violation of rights-in-trust is conduct that denies the child of future options.[280] Therefore, conceptually, children's self-determination and autonomous decision-making rights are not their own, but rather they are the adult's that the child is to become.[281] These rights are protected in advance so that the potential adult will later be able to make meaningful decisions.

Feinberg uses the example of education of Amish children in cases such as *Wisconsin v. Yoder*[282] to further explain the concept of children's open future. For Feinberg, these were not cases about parents' rights, but about children's rights, which the state as *parens patriae* must protect.[283] However, the Amish children were disserted by courts that allowed parents to pull them out of school early. This costs them the opportunity to benefit from a well-rounded education. The Amish children were limited to an education that prepared them only for one way of life. Their upbringing, as condoned by courts, irreversibly revoked any real possibility for these children to later opt for any-

278. Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD?: CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 125 (William Aken & Hugh LaFollette eds., 1980).

279. *Id.* at 125.

280. *Id.* at 125–26 ("[The child's] right while he is still a child is to have these future options kept open until he is a fully formed self- determining adult capable of deciding among them.").

281. *Id.* at 127.

282. 406 U.S. 205 (1972).

283. Feinberg, *supra* note 279, at 132.

thing other than life as part of the Amish community. Feinberg argues that in such conflicts, options that keep as many possible choices available to the child for when she is able to make her own decisions, and therefore privilege her open future, are to prevail.[284] Accordingly, childrearing and education should be motivated by the maximization of children's opportunities for self-fulfillment.[285] The goal is to keep as many open possibilities as would best equip the child with knowledge and skills to enable her to determine which way of life best fits her sense-of-self.[286] A child is denied an open future when her autonomy is violated in advance in ways that vital and determinative decisions are made by others before she herself has the capacity to make such decisions.[287]

The same policy of preserving the child's open future can be found in cases regarding LGBT students. While educators, fellow students and parents may try to steer LGBT students into heteronormativity, courts have refused to accept that avoiding homosexuality is a legitimate public interest. As a matter of law, then, heteronormativity is not an assimilation demand that the government may validly pursue. Recall, that in *Nabozny* the court rejected the school's arguments that, relying on *Bowers* and the criminalization of sodomy, there was a rational basis for the school's discrimination of Nabozny and its failure to protect him from harassment.[288] In doing so, the court can be understood to reject the idea that the state has the power to impose conversion demands on LGBT children, whether it be through school-based discrimination, harassment, or through the criminalization of sodomy.[289] Similarly, the *Theno* court would not accept that the school there was within its rights not to protect him from the harassment he suffered for being a "girly-girl," for example.[290] In other words, the court there also rejected the idea that it would be permissi-

284. *Id.* at 13–33.

285. Feinberg defines self-fulfillment as "the development of one's chief aptitudes into genuine talents in a life that gives them scope, an unfolding of all basic tendencies and inclinations." *Id.* at 143. Autonomy, according to Feinberg, is the right of self-determination and is instrumental for self-fulfillment. *Id.*

286. *See id.* at 135.

287. *Id.* at 143.

288. *Nabozny*, 92 F.3d at 458.

289. It is possible, however, that the court's rejection of criminalization of sodomy as a rational basis regarding the mistreatment of students is the assumption that, perhaps, because of age of consent and statutory rape laws, the court wished to avoid the considering the relationship between sodomy and adolescence. Perhaps the court was willing to de-link sodomy laws as a rational basis by assuming that LGBT students would not, due to their age, be engaging in sodomy.

290. *Theno*, 394 F.Supp.2d 1306–1307.

ble for a school and fellow students to violently impose assimilation demands in order to compel a student to conform to stereotypically gendered behavior or a heteronormative identity and expression. These two cases demonstrate how courts that penalize schools for imposing assimilation demands (or being silent when fellow students do) protect LGBT students from having to abandon the path toward developing their authentic self for fear for their safety. By doing so, courts preserve LGBT students' ability to continue to explore their identities and preserve their future rights vis-à-vis those identities.

There are, however, examples of cases where courts, even wanting to protect children from assimilation demands, go about it in ways that restrict children's rights-in-trust and limit their open future. *Fricke*, insofar that the court relied on Fricke's "commitment to homosexuality," can be seen as an example. One of the factors that seemed material for the court's decision to protect Fricke's right to bring a same-sex date to the school prom was the conversation he had with Mr. Lynch about the possibility of dating girls.[291] Fricke insisted that he was interested in boys, perhaps indicating he had reached identity achievement in his sexual orientation. The court can be understood as respecting this. However, the fact that this was even an issue that came up is troubling. Straight children are not similarly expected to consider dating partners of the same-sex before being allowed to bring their date of choice to a school function (though perhaps Erikson, who supported identity exploration and experimentation, would today approve of such expectations). And courts would presumably not base their holdings regarding the rights of straight students on them meeting a burden of demonstrating exploration and then conviction as to their sexual orientation. But the reason this is most concerning is that the demand to demonstrate "conviction," which is not expected of his straight counterparts, may have led Fricke into identity foreclosure—denying him the opportunities of true explorations. Put differently, Mr. Lynch and the court, together and separately, may have pushed Fricke to make a decision about his sexual orientation earlier than he otherwise would have, thus making him commit to an identity too early and without meaningful opportunity to preserve his future rights, for instance, taking a girl to the prom the following year as expressive conduct of a potentially fluid identity, experimentation, or once more as part of the process toward identity achievement.

291. *See supra* Part II.B.

In addition to the traditional discrimination, harassment, and free speech cases discussed above, perhaps another compelling example for the theory that a concern for children's open future has motivated courts to protect LGBT students from assimilation demands more strongly than they do adults, is discrimination in school curricula—also referred to as "No Promo Homo"[292] statutes and policies. These are education policies discouraging the "promotion" of homosexuality in schools that have been adopted in several states by statute and/or at the school board level.[293] Some such policies avoid any mention of homosexuality within the curriculum, as a purported means to achieve neutrality on the matter. However, commentators have asserted that the invisibility of sexuality, particularly homosexuality, denies its place in school culture—leaving LGBT teens vulnerable and isolated.[294] A more severe approach is acknowledging homosexuality solely through its denunciation and providing no other acknowledgement of sexual diversity. These policies aim to teach children heteronormativity and the superiority of heterosexuality in an attempt to construct their sexuality in ways society considers productive and desirable. Thus, they reflect an assumption that children are not yet fixed in their sexuality and that adults around them are responsible for preventing their conversion to an inferior and undesirable same-sex sexual orientation.

"No Promo Homo" policies, prevalent in a significant number of states,[295] prohibit any exposure, and often explicitly prohibit any positive exposure, of students to sexual orientation or gender identity matters. They may also be used to oppose LGBT-positive student groups, such as Gay-Straight Alliances, from operating at school, despite the fact that under certain circumstances federal law protects these groups' activities.[296]

292. Eskridge, *supra* note 98.

293. ESKRIDGE & HUNTER, *supra* note 16, at 1010.

294. *Id.* at 1011.

295. According to GLSEN, these states currently include Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah. *No Promo Homo*, GLSEN (Oct. 19, 2016, 1:15pm), http://www.glsen.org/learn/policy/issues/nopromohomo [https://perma.cc/BS3X-YV53].

296. The Equal Access Act of 1984 provides that federally funded public schools that allow non-curricular student groups access to school facilities and services, may not discriminate between those groups, and may not discriminate based on sexual orientation or gender identity. 20 U.S.C. § 4071 (2011). Therefore, as long as a school has groups meeting on school grounds that are allowed to use school services such as bulletin boards or public address systems it must allow all groups the same access regardless of the content or subject-matter of the group. A non-curricular student group is a group whose subject-matter does not directly relate to classes offered by the school, where participation is neither

These policies and other educational strategies designed to marginalize LGBT people (such as abstinence only sexual education, which teaches abstinence or marital sex as the only means to avoid unwanted pregnancies and sexually transmitted infections) result in the exacerbated isolation and exclusion of LGBT youth from school life through invisibility, lack of resources and support systems within the school,[297] and the subtle dissemination of homophobia and transphobia through ignorance, silence, and de-legitimization. Another troubling consequence is that LGBT children do not receive a beneficial education that will prepare them for the life they are likely to lead, a right that courts have continually protected. In the case of LGBT children, who do not ordinarily share the sexual aspects of their identities with parents or other family members, an education that is value neutral (or preferably positive) toward sexual diversity is all the more necessary. School curriculum that is silent or negative on sexual diversity does not engage children in education that is respectful to sexual minorities. This assimilation indoctrinates children to idealize an exclusionary and restrictive construct of sexuality that revolves around marital heteronormative sexuality. Substitution of parental control over school's educational authority impacts a larger number of children's sexual identities and sexual health, and is reason for concern over public health as well.

"No Promo Homo" policies were tested in court, for example, in *Parker v. Hurley*,[298] where parents sought to essentially force a school

required for classes nor results in academic credit. *See* Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 241–42 (1990); Boyd Gay Straight Alliance v. Bd. of Educ., 258 F.Supp.2d 667 (E.D. Ky. 2003).

297. Examples of such resources and support systems can be identifying a school staffer who is supportive to LGBT students, or creating "safe zones"—designated times and places at school where a student is welcome to approach teachers and discuss personal or other concerns in private. Having teachers and administrators out or supportive increases students' sense of safety and belonging at school, lowers numbers of missed schooldays and leads to higher rates of students planning to go to college. As sexual orientation and gender identity are a sensitive issue for most LGBT students, particularly when they are still associated with concerns of exclusion, discrimination and harassment, many will avoid turning to others to discuss what they may be going through. Resources that will allow students to intellectually explore sexual orientation or gender identity issues can complement other support systems to which students may hesitate to reach out. Resources such as books, videos or computers should be available for exploratory research. Also, resources should be accessible in a manner that is private and discrete.

298. Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008). For similar parental challenges to curriculum that discuss LGBT content, see Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2005) (parental positive rights to excuse children from classes their parents find objectionable would make administering public education impossible); Brown v. Hot, Sexy, & Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995) (ruling that granting parents rights to direct

to adopt such polices. The parents there attempted to persuade the court to exempt their children from programs they feared would expose the children to homosexuality that may encourage them to develop non-heteronormative identities.[299] The parents requested to excuse their children from certain school classes ("opt out") that discuss homosexuality and same-sex marriage as part of the school's nondiscrimination and diversity education based on their free exercise and parental rights.[300] Because these classes were limited to diversity education,[301] the court found these classes to be squarely within the policy to promote engagement pluralism in schools. The court rejected the parents' opt out demands as it saw the references to homosexuality, which focused on tolerance and did not engage discussions on physical or sexual implications of homosexuality, as outside the scope of sexual education.[302] Moreover, the curriculum had no coercive component. While the First Amendment protects an individual from coercion to adopt or disavow beliefs forbidden or required by one's religion,[303] the school did not require any such action. The students, found the court, were not compelled to embrace the views presented in the diversity classes or reject their religion in any way.[304]

public education would be unworkable and create impossible burdens on schools to design specific curriculums for many students); Morrison v. Bd. of Educ. of Boyd County, 419 F.Supp.2d 937 (E.D. Ky. 2006) (rejecting parents' request to excuse children from diversity training because it did not include an anti-LGBT perspective, finding that such instruction did not constitute one-sided indoctrination).

299. *Parker*, 514 F.3d at 90. These classes, for example, included readings about families with same-sex parents.

300. *Id.* The parents sought to opt their children out of these classes until the children reached, at the very least, the seventh grade.

301. Sexual education is generally understood to include lessons on human sexual health issues such as reproduction, sexually transmitted infections (STIs) and the prevention thereof. Instruction of materials that discuss gender, sexuality or families without discussing reproductive organs and their functions generally does not constitute sexual education. Rachmilovitz, *Assimilation Demands, supra* note 12, at 188–89.

302. *Parker*, 514 F.3d at 92. For a discussion of the statutory sources of opt out rights, and the different forms they may take across states, *see* Kevin Rogers & Richard Fossey, *Same-Sex Marriage and the Public School Curriculum: Can Parents Opt Their Children Out of Curricular Discussions about Sexual Orientation and Same-Sex Marriage?*, 2011 BYU EDUC. & L.J. 423, 438–60 (2011) ("[A]lthough federal courts do not allow curriculum opt-outs on constitutional grounds, most states have statutes or administrative regulations that grant curricular exemptions in varying situations for public schools. . . . [S]tatutes or administrative regulations in all fifty states and the District of Columbia [ ]grant parents a specific right to excuse their children from some part of the public school curriculum. These statutes and regulations were then categorized into three groups: states with opt-out laws that are 'restrictive,' states with opt-out laws that are 'permissive,' and states that are categorized as 'non-existent' (meaning that these states have no curriculum opt-out law.").

303. *Parker*, 514 F.3d at 104–05.

304. *Id.* at 105–06.

They were not even required to actively participate in the discussion of tolerance for homosexuality.[305] Therefore, because the school's action was not, strictly speaking, an assimilation *demand*, the court found it to be permissible.

The court relied on Massachusetts policy to facilitate engagement pluralism in schools by teaching respect and diversity in order to eliminate sex and race stereotypes and found that goal to also eliminate stereotypes about homosexuality.[306] Because of the legislatures' and courts' policy to ensure engagement pluralism, free exercise rights do not create freedom from any reference to non-traditional families or to same-sex relationships.[307]

In addition to reinforcing pluralism as preparing children for adult civic life and reiterating exposure and non-coercion as the markers of engagement, the *Parker* opinion can be seen as incorporating an "open future" concept as a limiting principle to parental rights, and in turn school powers. The *Parker* court does what the *Yoder* court failed to do. In *Parker*, the court saw that an education that would best prepare children to become adults in mainstream American society requires knowledge and intellectual tools additional to those their parents might provide.[308] In *Parker*, the differences in views to which children are exposed are meant to supplement each other; neither parents nor schools are restricted from exposing children to values they see appropriate to teach. The decision sees the benefit of exposing children to both worlds, rather than closing off any potential values sets. The court in *Parker* truly facilitates an open future for children who are engaged in several different perspectives and are trusted to test these perspectives before adopting or rejecting them. By allowing the children to have an open future, maintaining a full range of opportunities to explore the values and principles that will come to construct their identity—religious, sexual, or otherwise—the court also fostered the children's opportunity to reach a well-formed identity in the manner that Erikson believed necessary for emotional health and well-being. It also keeps students' potential political involvement, their rights, and their decision-making open to critical thinking and fuller participation in the democratic process while be-

305. *Id.* at 106.

306. *Id.* at 91.

307. *Id.* at 106. Further, free exercise does not grant parents the power to control the substance of school curriculum, as the First Amendment does not include positive rights. *Id.* at 102–103.

308. *Id.*; *see also* Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987); *see generally* Davis v. Page, 385 F.Supp. 395 (D.N.H. 1974).

ing more informed, having a healthier sense of self, and less influenced by messaging that devalues diverse identities and groups, whether they identify with those or not.

This is not only better for their emotional adjustment or function as contributing, thoughtful adults in a democracy, but also a fundamental right. After *Lawrence*,[309] *Romer*,[310] and *Obergefell*,[311] in which the Supreme Court held that the state could not constitutionally bar same-sex sexual conduct, could not target lesbian, gay, or bisexual people for discrimination based on animus, or prohibit marriage equality, respectively, an LGBT identity can no longer be sanctioned by the state as less desirable. The state, including schools as state-actors, must at least remain neutral[312] on the value of sexual minority identity thus eliminating assimilation demands in state controlled environments as they can no longer be justified in putting forth a heteronormative social, political and legal landscape.

C. LGBT Youth Vulnerability: Plethora of Risks; Dearth of Responses

The argument made in this article, that courts tend to protect LGBT children from school-based assimilation demands better than LGBT adults in the workplace must not lead us to misguided notions that LGBT youth are safe in schools or that the law no longer need be concerned with their wellbeing. It is undoubtedly positive—indeed necessary—that courts are stepping up and protecting LGBT students, but relying solely on courts to ensure their equitable education, physical safety, and emotional health is insufficient.

As the social science data presented throughout demonstrate, LGBT youth who suffer assimilation demands remain overrepresented among at-risk youth[313] but are under-protected by the legal system as a whole, possibly in part because of the focus on protecting children

309. *Lawrence*, 539 U.S. 558 (2003).

310. Romer v. Evans, 517 U.S. 620 (1996).

311. *Obergefell*, 135 S.Ct. 2584 (2015).

312. Perhaps, as analogous to religion, the State should not be directing or expressing a preference in regard to sexual identities. However, an opposite view is possible whereby in light of past practices, like sodomy laws or marriage inequality, and ongoing ones like "No Promo Homo" laws and the failure to enact the Employment Non-Discrimination Act to cover sexual orientation and gender identity, the state has already inflicted significant damage and must now correct the strong heteronormative messaging it puts forth. This debate, however, is beyond the scope of this paper.

313. Russell et al., *Out at School*, *supra* note 81; Toomey et al., *supra* note 83; Russell et al., *School Victimization*, *supra* note 86; Himmelstein & Bruckner, *supra* note 91; Ray, *supra* note 91; SURVEY 2009, *supra* note 102; SURVEY 2013, *supra* note 102.

through litigation rather than effective prevention. Consider, for example, the recent legislation prohibiting the explicit protection of LGBT students in anti-bullying legislation.[314] These are statutes that specifically and explicitly decline to protect a segment of the student population that data and case law have identified as particularly vulnerable to bullying. Instead, they lump them together with other bullied students as if there is nothing uniquely troubling about assimilation demands that target a student for her sexual minority identity, thus devaluing and mistreating a student for who she is. Perhaps courts are prepared to protect students better than they do adults because they see themselves as the only real line of defense. The ongoing prevalence of school harassment and discrimination, perhaps, indicates that students' only meaningful recourse is through the courts. Yet, students have already suffered emotional distress and educational harms by the time they prevail in court. In fact, they must be able to demonstrate that they already suffered harm in order to prevail in their claims,[315] which shows that the litigation route might be considered too little, too late for these specific children.

Social science research has identified a variety of increased negative outcomes and risks for LGBT youth and has tied those outcomes to troubled relationships. Because LGBT youth are so disempowered by assimilation demands they may be unable to access the legal system. Children and teens who experience assimilation demands—particularly when they experience rejection from parents, too—are less likely to have access to the financial resources often required for securing legal representation or initiating court proceedings. They may also fear that waging legal battles against schools or other students would further victimize them by worsening their relationships with teachers or fellow students. As the reluctance to report[316] and the reason for this reluctance (i.e., the doubt that effective action would be taken, or that they would suffer retaliation[317]) indicate, LGBT youth who are subjected to homophobia and mistreatment from a range of sources might distrust the courts and doubt that judges will protect them.

Getting past such obstacles opens the door to a whole host of other challenges. Children and teens may not yet be resourceful enough to identify and locate services that can help them. They may

314. *See* HUMAN RIGHTS CAMPAIGN, *supra* note 175 and accompanying text.
315. *See* Orr, *Harassment and Hostility, supra* note 189.
316. SURVEY 2013, *supra* note 102, at 28, 34.
317. *Id.* at 29.

not be aware nor have the tools to learn about advocacy organizations able to help them. Many school libraries program computer filters to block any website using terms such as "gay," "lesbian," "transgender," and the like as a way to prevent children's access to pornography.[318] As a result, youth are unable to use these computers, which may be the only computers to which some students have access, or have somewhat private access to, to look online for legal assistance that fits their needs as LGBT students. Without access to this information, it is difficult for youth to recognize that they have rights against their schools, school staff, or fellow students, or for schools to understand and follow their duties to protect students. Thus, even in states where there is legislation in place prohibiting discrimination and harassment based on sexual orientation and/or gender identity, schools may not understand what type of behavior these statutes target and students may not know when and how to assert their rights. Put differently, the many obstacles standing in LGBT students' way to empower themselves and gain protections against their school-based assimilation demands are compounded by barriers put up by the educational system itself. Consequently, the victimization and disempowerment of LGBT children and adolescents continue.

To best complement the work done by courts, and ultimately to reduce reliance on litigation, greater efforts toward preventing assimilation demands must be made. As argued, efforts at the school level to implement statutory policies and case law are not enough because assimilation demands remain prevalent and courts seem to remain the primary effective port of call. It appears not enough is being done at the school level to implement statutory policies and the case law.[319] Changes on the ground, such as school policies and changes in curricula, have been found effective in reducing the discrimination and harassment of LGBT students.[320] Social scientists studying the adjustment of LGBT students in later life have also suggested strategies such as adopting and enforcing non-discrimination and harassment policies that are understandable to students and staff and that include protections for LGBT students; developing mechanisms disseminating infor-

318. *Anti-LGBT Web Filtering*, AM. CIVIL LIBERTIES UNION (Feb. 8, 2016, 10:40 AM), https://www.aclu.org/issues/lgbt-rights/lgbt-youth/anti-lgbt-web-filtering [https://perma.cc/D6ST-VMRQ]. For cases on online filtering litigated by the ACLU, leading to the removal of such LGBT-related page blockers, see ACLU (Feb. 8, 2016, 10:43AM) https://www.aclu.org/search/%20?f%5B0%5D=field_issues%3A226&f%5B1%5D=type%3Acase [https://perma.cc/S4EA-PPL2].

319. Russell et al., *School Victimization*, *supra* note 86, at 229.

320. SURVEY 2013, *supra* note 102, at 61, 76.

mation about sexual minority identities and providing support for students with related concerns; training school staff to regularly and effectively intervene when assimilation demands take place; establishing student support groups and activities, such as gay-straight alliances.[321] As one study concludes:

> School administrators and educators must continue to advocate for and to implement LGBT inclusive policies and programs to promote safe and supportive learning environments where all students are protected from bias-motivated victimization and harassment and are free to learn and flourish in schools. For too many LGBT [. . .] students, school victimization has resulted in. . . restricted life chances. . . and undermine their human potential.[322]

D. After the Schoolhouse Gate: Higher Education

Now that we know that better protections exist in education than in employment, we might ask ourselves: Could this trend extend beyond K-12 education and into institutions of higher education? On one hand, college and university students are young people who may still be developing their identities and are still working through dependence on adults toward autonomy and agency. It therefore seems that similar rationales for protecting schoolchildren would apply to them too, and therefore, courts might be persuaded to extend stronger protections to them also. On the other hand, college students are mostly legal adults who have reached the age of majority. This means, in the eyes of the law, that their rights and obligations vis-à-vis that state and others are different than those of minors. Generally, their age means that the state, including courts, would be less inclined to intervene in their lives, even if this is for their own protection. The tension between autonomy and paternalism in their relationship with the state is heightened for LGBT students in higher education.

Still, to truly tackle the issues of LGBT youth and young adults struggling with assimilation demands in their educational settings, and to continue to entrench a politics of LGBT identity legitimacy, LGBT rights advocates should not overlook this group. Protection would remain necessary as students in higher education continue to experience the assimilation demands that their younger counterparts experience. In a study published in 2008, social scientists found that as many as 58% of participating LGBT college students experienced

321. Russell et al., *School Victimization*, *supra* note 86, at 229; Russell et al., *Out at School*, *supra* note 83, at 641.

322. Russell et al., *School Victimization*, *supra* note 86, at 229.

some form of homophobic mistreatment on campus, and as many as 39% of their straight counterparts reported homophobic experiences as well.[323] College and university students seem similarly vulnerable to victimization as K-12 students, but by virtue of their adulthood are at risk of losing whatever protections they may have enjoyed before.

It seems the development of a hybrid model between employment and high schools is most likely. Title IX and the special characteristics and goals of education would lead to greater protections for college students than for employees in the workplace, but because college students are mostly adults rather than minor children, they may be seen as less vulnerable, and so the protections they receive would be less extensive. Arguably, as opposed to young schoolchildren, college students are adults who need to learn to cope with pressures and even aggression from others. However, the Supreme Court has found that young adults have certain vulnerabilities in their psychological development, and that the age of 18 is an arbitrary line that may not represent accurately the rate of development in all cases.[324] So perhaps the rationale of protecting identity development should extend from high school students to college students as well.

A recent indication that this may indeed be the direction of the case law is the motion to dismiss decision in *Videckis v. Pepperdine University*.[325] There, two college students filed a Title IX suit against their university for discrimination and harassment they experienced as members of the school's women's basketball team because they were perceived to be lesbians dating each other.[326] The discrimination and harassment was designed to get the two students to quit the team.[327]

323. Perry Silvershanz et al., *Slurs, Snubs, and Queer Jokes: Incidence and Impact of Heterosexist Harassment in Academia*, 58 Sex Roles 179, 187 (2008).

324. *Roper*, 543 U.S. at 601–02. But consider doctrines like "mature minor" or "rule of seven" which evaluate a child's maturity to make medical decisions or designate criminal responsibility according to age in seven-year intervals, respectively, as well as the case law on abortions or emancipation. These areas of the law are all based on the assumption that maturity and autonomy move on a spectrum, and may be understood to support moving the age of majority, decision-making rights, and thus possibly rights, obligations or other protections granted to younger people earlier rather than later, usually around age 14. Rachmilovitz, *Assimilation Demands, supra* note 12, at 63–65 (mature minor), 65–71 (abortion), 71–75 (emancipation), 337 (rule of seven).

325. Amended Order Denying Defendant Pepperdine University's Motion to Dismiss Third, Fourth, & Fifth Causes of Action of the Third Amended Complaint, Videckis v. Pepperdine Univ., 100 F.Supp.3d 927 (2015) (No. 15–00298), available at https://assets.documentcloud.org/documents/2648492/Pepperdine-Title-IX-Ruling.pdf. [https://perma.cc/SNX4-AC3G].

326. *Id.* at 2.

327. *Id.*

For example, in meetings with staff they were repeatedly asked personal questions about their sleeping arrangements and their dates.[328] In a team meeting, the coach stated he was greatly concerned about same-sex relationships as they were the reason teams lose, and that they would therefore not be tolerated.[329] He later told other team members that the two were bad influences.[330] Among other claims, the students claimed they suffered sexual orientation discrimination under Title IX.[331] The university moved to dismiss these claims arguing that sexual orientation is not protected under Title IX.[332] In response, the students argued that Title IX does protect sexual orientation discrimination or, alternatively, the discriminatory behavior constituted sex stereotype discrimination.[333]

The court found in favor of the students, and ruled that Title IX does indeed protect against sexual orientation discrimination.[334] The court explained that because the distinction between "sex" in Title IX and in Title VII and sexual orientation or sex stereotypes is unclear, at best, these two provisions prohibit sexual orientation discrimination, though not independently.[335] The court applied this new rule, that sex, sexual orientation, and sex stereotypes are inextricable, to the specific case of the Pepperdine students thus: "If the women's basketball staff in this case had a negative view of lesbians based on lesbians' perceived failure to conform to the staff's views of acceptable female behavior, actions taken on the basis of these negative biases would constitute gender stereotype discrimination."[336]

The court also considered how this case would fit into the formal sex discrimination argument (had one been of the other sex, their same behavior would not have been unacceptable). It found that had the students been men dating women, rather than women dating women, they would not have been subjected to the treatment they suffered.[337] The court denied Pepperdine's motion to dismiss in December 2015.[338]

328. *Id.* at 3
329. *Id.* at 4.
330. *Id.* at 5.
331. *Id.* at 9.
332. *Id.* at 10.
333. *Id.* at 12.
334. *Id.* at 12, 13.
335. *Id.* at 12.
336. *Id.* at 17.
337. *Id.* at 18.
338. *Id.* at 22.

This decision is consistent with the case law on LGBT K-12 students in two important ways: it includes sexual orientation in the category of "sex" as a prohibited motivation for discrimination and harassment and it applies the sex stereotypes theory without requiring the student to have experienced a double bind. The *Videckis* court presents two rationales for finding that Title IX covers sexual orientation in the categories of impermissible discrimination and harassment. First, it finds the distinction between "sex" and "sexual orientation" incoherent, artificial, confusing, and misguided, almost indicating that in this case, and possibly in others, one's sexual orientation is the cause of their perceived transgressions against the stereotypes associated with their sex. In other words, one's sexual orientation *is* the very way in which one does not meet the stereotypes of one's sex. This reasoning leads the court to the second rationale, which is reminiscent of *Theno*. It is the formal approach to sex discrimination—that had the students been men dating women, rather than women dating women—they would not have been subjected to the mistreatment of their coaches and the team staff. Similarly, the *Theno* court found Theno's argument that had he been a girl suffering the same harassment from male students, the school would have taken action persuasive. By finding so, both the *Theno* and the *Videckis* courts followed the logic that the same treatment would garner a different response from the school had the students involved been of the different sex.

As for the *Videckis* court, too, dropping the double bind requirement, consider that the students there were pressured to conform to their presumably straight teammates in their dating, sleep habits, and other personal matters. However, they were not expected to perform a certain way on the team or in games (whether the comparator being straight female or male basketball players). They only faced the single pressure to conform to heteronormativity and there is no other identifiable set of assimilation demands. Thus, the *Videckis* case is unlike *Price Waterhouse* where the employee was expected to perform like a man but look and act like a woman—i.e. expected to navigate a double bind—and thus prevailed in court. It is, however, like the *Nabozny* decision, where the student was only expected to conform to the stereotypes associated with teenage masculinity, but still prevailed—without demonstrating a double bind—under the sex stereotypes theory.

While this decision seems to bring higher education students closer to the level of protection enjoyed by K-12 students, it is unclear

whether this trend will stick. It is only the first decision in this context to hold as such, and the holding of the decision may be unstable because of its procedural posture as a motion to dismiss. At the end of the litigation, the court may expand or narrow this initial decision. Notably, the decision states that sexual orientation can garner Title IX protections only as a sub-set of sex discrimination. However, at this point the court has yet to develop this qualifier with any further detail. It remains to be seen what this means and whether it chips away at or cements higher education students' ability to harness Title IX protections when experiencing discrimination or harassment based on their sexual orientation. In any event, one would hope that all the education-based interests that motivate courts' protection in the high school context would persist at the university level, too. Both levels of education hold similar educational missions—such as allowing free and safe market of ideas or preparing students for life in a diverse and pluralistic democracy. Courts would do well to be guided by these principles when deciding higher education harassment, discrimination, or curriculum cases.

Conclusion

Marriage equality was probably the greatest goal of the LGBT movement in recent years. Now that the Supreme Court has declared restrictions on same-sex marriage unconstitutional, the LGBT rights movement is open to new and exciting possibilities as to the goals that remain. This article joins the voices in the movement that have long advocated for LGBT youth and students and that now suggest their concerns come closer to center stage. The article also fits into the rich body of scholarship addressing the issues of LGBT students. However, the article is unique in that it maps where and how the struggle to protect LGBT students has been more successful than that addressing the needs of the LGBT adults.

These successes have so far been limited primarily to litigation, where courts hearing cases on discrimination and harassment of LGBT students have come to their aid. Courts have done so by removing some important obstacles to protection in these cases, such as removing the requirement of a double-bind in sex stereotyping cases or by finding that sex discrimination includes sexual orientation as well. Two possible rationales have been presented here to explain why courts have opted to better protect schoolchildren: first, the need to allow children to develop healthy identities free of assimilation demands and their harms, and second, the public interest in protecting

children's open future and anticipatory rights so that they can grow up to become productive, contributing, and informed citizens.

Still, that the struggles of LGBT youth in educational settings persist indicates that the successes of litigation have been insufficient. Improving the lives of LGBT youth and ending their struggles is to be fought on many fronts—schools, out of home care, the criminal system, and homes—with a range of strategies in addition to litigation, some of which have been mentioned above. Perhaps now that marriage equality has been achieved, the LGBT rights movement would be willing and able to devote more effort and resources to fight the battle for LGBT students on multiple fronts, building on the considerable accomplishments made in courts and continuing to cement them at the statutory, policy, and implementation levels, so that the right to be free of assimilation demands becomes the lived experience of all LGBT students.

Why and How the Supreme Court Should End the Death Penalty

By KENNETH WILLIAMS*

Introduction

IN A RECENT OPINION dissenting from the Court's holding that a certain drug used in Oklahoma and other states to carry out lethal injections was constitutional, Justice Breyer called for full briefing on the issue of the constitutionality of the death penalty itself.[1] The decades-long litigation over the constitutionality of execution methods obscured many of the important issues associated with the death penalty. Now that the Supreme Court has brought an end to this litigation, this is an appropriate time to have an honest conversation about whether the United States should continue to employ the death penalty. The time is now ripe to have this conversation because of the declining public support for the death penalty and the difficulty the courts have had in administering it. The purpose of this article is to contribute to the conversation about the constitutionality of the death penalty.

This article will begin with a discussion of the declining public support for the death penalty and some of the reasons behind the decline in Part I. Part II pertains to how the legislature and the Supreme Court have attempted to rectify the problems that have plagued the death penalty and why these attempts have largely failed. Given the difficulties the Supreme Court has encountered in trying to fix the death penalty, Part II also assesses the available options moving forward: either continue the attempt to reform and regulate the death penalty or abolish it. The article concludes that abolition is the best option moving forward. Part II, lastly, lays out the doctrinal framework that the Supreme Court has created that would enable the Court to abolish the death penalty. Finally, Part III lists some of the anticipated

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1. *See* Glossip v. Gross, 135 S. Ct. 2716, 2755 (2015) (Breyer, J., dissenting).

objections to the Court abolishing the death penalty, the Court's previous failed attempt to do so, and why abolition is likely to achieve greater public acceptance this time.

I. Declining Public Support

Public support for the death penalty has drastically declined during the last twenty years. According to a Gallup survey, in 1994, 80% of Americans supported the death penalty.[2] In 2014, support for the death penalty was at 60%.[3] There are other strong indicia of the public's declining support for the ultimate punishment. First, the number of individuals sentenced to death by juries and judges has also declined significantly during the past twenty years. In 1994, 311 death sentences were meted out by juries and judges.[4] In 2014, only seventy-three death sentences were imposed.[5] In 2015, forty-nine individuals received death sentences, a 33% decline from the previous year and the fewest since 1973.[6] Even in Texas, the leader among the states in carrying out the death penalty since 1976, far fewer death sentences are being imposed.[7] Juries sentenced forty-eight individuals to death in 1999, but only eleven individuals in 2014 and an astoundingly low total of two individuals in 2015.[8]

Second, there has been a steady, nationwide decline in executions in the last twenty years. Executions have fallen from a high of ninety-eight executions in 1999, to thirty-five in 2014, and twenty-eight

2. *See* Jeffrey M. Jones, *Americans' Support for Death Penalty Stable,* GALLUP (Oct. 23, 2014), http://www.gallup.com/poll/178790/americans-support-death-penalty-stable.aspx?utm_source=death%20penalty&utm_medium=search&utm_campaign=tiles [https://perma.cc/QH9T-KFZ8]; *see also,* Baxter Oliphant, *Support for death penalty lowest in more than four decades*, PEW RESEARCH CTR. (Sep. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/ [https://perma.cc/2L7Q-V7A5] (reporting poll results finding that 49% of public supported the death penalty while 42% were opposed).

3. *See* Jones, *supra* note 2.

4. *Death Sentences in the United States From 1977 By State and By Year,* DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008, (last visited Dec. 15, 2016) [https://perma.cc/CC5W-VNE3] [hereinafter *By Year*, DEATH PENALTY INFO. CTR.].

5. *Id.*

6. Timothy Williams, *Executions by States Fell in 2015, Report Says,* N.Y. TIMES, (Dec. 16, 2015), http://www.nytimes.com/2015/12/16/us/executions-by-states-fell-in-2015-report-says.htmlhpw&rref=us&action=click&pgtype=Homepage&module=well-region&region=bottom-well&WT.nav=bottom-well&_r=0 [https://perma.cc/M5XS-MRBC].

7. *By Year,* DEATH PENALTY INFO. CTR., *supra* note 4.

8. *Id.*

in 2015, the lowest number of executions since 1991.[9] Third, during the last twenty years, Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York have abolished the death penalty and the Governors of four other states have imposed moratoriums.[10] Finally, fewer Americans believe the death penalty to be morally acceptable. Gallup began to measure public sentiment regarding the morality of the death penalty in 2001. The number of Americans who believe the death penalty to be morally acceptable during this time period has gone from a high of 71% in 2006 down to 60% in 2014.[11] Most surprisingly, this decline in public support for the death penalty has occurred despite the public's rising anxiety over terrorism.[12]

As discussed below, there are many reasons for the decline in the public's confidence in the death penalty.

A. Innocence

No issue has had a bigger impact on the public's attitude towards the death penalty than the possibility of an innocent person being executed. Since 1973, there have been approximately 156 actual exonerations of death row inmates.[13] There are currently approximately 3,000 individuals on death rows throughout the United States.[14] Researchers estimate that about 4% of those sentenced to death are actu-

9. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Dec. 15, 2016) [https://perma.cc/NLY3-C7DW] [hereinafter *Facts*, DEATH PENALTY INFO. CTR.].

10. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Dec. 15, 2016) [https://perma.cc/5ZQ2-9DPT] [hereinafter *States*, DEATH PENALTY INFO. CTR.]. However, California voters did vote to retain its death penalty in the November 2016 elections. *See* Mike McPhate, *California Today: Why Californians Kept the Death Penalty*, N.Y. TIMES (Nov. 11, 2016), http://www.nytimes.com/2016/11/11/us/california-today-death-penalty-vote.html?_r=0 [https://perma.cc/U9TZ-98XY].

11. *See* Art Swift, *Most Americans Continue to Say Death Penalty Morally Ok*, GALLUP (June 4, 2015), http://www.gallup.com/poll/183503/americans-continue-say-death-penalty-morally.aspx?utm_source=&utm_medium=&utm_campaign=tiles [https://perma.cc/59Q7-FUQF].

12. *See, e.g.*, Rebecca Riffkin, *Americans Name Terrorism as No. 1 U.S. Problem*, GALLUP (Dec. 14, 2015) http://www.gallup.com/poll/187655/americans-name-terrorism-no-problem.aspx [https://perma.cc/B6QY-CWZW].

13. *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO CTR., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Oct. 27, 2016) [https://perma.cc/Y7JS-UH4C].

14. Deborah Fins, *Death Row U.S.A.*, NAACP LEGAL DEFENSE FUND, INC. (Apr. 1, 2015), http://www.deathpenaltyinfo.org/documents/DRUSASpring2015.pdf [https://perma.cc/UC5Q-NZ59].

ally innocent,[15] which would mean that there are currently about 120 individuals on death row who may be executed for crimes that they did not commit. Unfortunately, not every death row inmate with strong innocence claims has been exonerated. There have been credible reports indicating that there is a strong possibility that innocent individuals have been executed.[16] One such individual is Cameron Todd Willingham, who was convicted and sentenced to death as a result of a fire that killed his three young daughters.[17] The state's case against Willingham consisted primarily of an expert's conclusion that the fire was deliberately set and that because he was the only adult in the home at the time of the fire, Willingham deliberately started the fire.[18] Shortly before Willingham's scheduled execution, a report by an acclaimed scientist and fire investigator indicated that the fire that killed Willingham's three daughters was not deliberately set, but was accidental.[19] This information failed to convince either the Texas governor or the Board of Pardons and Parole to grant clemency—or even delay Willingham's execution—and he was put to death.[20] Since Willingham's execution, additional fire investigators have reviewed the case and have determined that the methods used by the state's trial expert were flawed and that the fire was not the result of arson.[21] Nothing can be done to rectify what appears to have been the wrongful execution of Willingham and others. Cases like Willingham's, combined with the irrevocability of the death penalty and the other problems that plague the death penalty that are discussed later in this

15. Glossip v. Gross, 576 U.S. 2726, 2758 (2015) (Breyer, J., dissenting).

16. *See e.g.*, James S. Liebman, *You Can't Fix the Death Penalty: Carlos DeLuna's Execution Shows That a Faster, Cheaper Death Penalty is a Dangerous Idea*, L.A. Times (June 1, 2012), http://articles.latimes.com/2012/jun/01/opinion/la-oe-liebman-death-penalty-deluna-20120601 [https://perma.cc/6CGF-4XLG] (after a thorough investigation, the authors concluded that Carlos DeLuna was sentenced to death and executed for a crime that he did not commit); Press Release, *Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s*, Jan. 7, 2011), http://www.deathpenaltyinfo.org/documents/ArridyPardon.pdf [https://perma.cc/5GXS-5C9M] (discussing the Colorado Governor's decision to grant a posthumous pardon because, according to the Governor, "an overwhelming body of evidence indicates the 23-year-old was innocent, including false and coerced confessions, the likelihood that Arridy was not in Pueblo at the time of the killing, and an admission of guilt by someone else.").

17. *See* David Gran, *Trial by Fire, Did Texas Execute an Innocent Man?*, The New Yorker (Sep. 7, 2009), http://www.newyorker.com/magazine /2009/09/07/trial-by-fire [https://perma.cc/S2EB-4E64].

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

article, have played a large role in shaking public confidence in the system.

In *Herrera v. Collins,*[22] a majority of the justices of the Unites States Supreme Court agreed that "the execution of a legally and factually innocent person would be a constitutionally intolerable event."[23] The Court, however, has done little to ensure that this is prevented. It has failed to recognize the right of death row inmates to make a stand-alone, actual innocence claim.[24] The Court has also held that inmates have no constitutional right to post-conviction DNA testing.[25] The Court has also refused to police the states' clemency process.[26]

B. Race

Another reason for the declining support is the concern over the continued racial disparities in the administration of the death penalty. Racism in the implementation of the death penalty does not appear to be a relic of the past.[27] African-Americans continue to be sentenced to death and executed disproportionately. African-Americans constitute roughly 13% of the U.S. population,[28] yet they account for about 42% of the death row population[29] and approximately 35% of all executions in the U.S. since 1976.[30] It is also troubling that the vast majority

22. Herrera v. Collins, 506 U.S. 390 (1993).

23. *Id.* at 419 (O'Connor, J., concurring).

24. *See id.* at 416 (justifying the refusal to recognize an actual innocence claim because "the trial is the paramount event for determining the guilt or innocence of the defendant."); *see also* In re Davis, 557 U.S. 952, 955 (2009) (Scalia, J., dissenting) ("This court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent." (emphasis in original)).

25. *See* District Attorney's Office for the Third Jud. Dist. v. Osborne, 557 U.S. 52 (2009) (holding that state inmate had no right under the due process clause to postconviction access to DNA evidence).

26. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1997).

27. *See generally* Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)visibility of Race,* 82 U. CHI. L. REV. 243, 245–253 (2015) (reviewing the history of the racially disproportionate use of the death penalty in the United States).

28. *QuickFacts,* U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045215/00 (last visited Nov. 10, 2016) (go to "TABLE," "PEOPLE," and "*Race and Hispanic Origin*" subheading) [https://perma.cc/B7SB-8CNM].

29. *Facts*, DEATH PENALTY INFO. CTR., *supra* note 9 (table labeled "Death Row Inmates by Race").

30. *Race of Death Row Inmates Executed Since 1976*, DEATH PENALTY INFO. CTR., (Dec. 9, 2016), http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976 [https://perma.cc/VB2Y-S3ML] [hereinafter *Race*, DEATH PENALTY INFO. CTR.].

of those who have been executed killed white victims,[31] despite the fact that approximately 44% of murder victims in the United States are African-American.[32] Since 1976, 76% of people who have been executed killed white victims.[33] Thus, because African-Americans are almost one half of all homicide victims, this means that their killers are, for the most part, not being sentenced to death and executed. Numerous studies have concluded that these disparities are the result of racial discrimination in the administration of the death penalty.[34] The most prominent study to reach such a conclusion was the Baldus study, which purports to show a disparity in the imposition of the death penalty in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant.[35] The Baldus study took into account 230 variables "that could have explained the [racial] disparities" in capital sentencing "on non-racial grounds."[36] Even after taking account of these variables, the Baldus study found that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing blacks and others.[37] The study also found that black defendants were 1.1 times as likely to receive a death sentence as other defendants.[38] The study concluded that black defendants who kill white victims have a greater likelihood of receiving the death penalty than any other defendant-victim combination.[39]

31. *See id.*

32. *See Uniform Crime Report; Expanded Homicide Data Table 6: Murder Race, Ethnicity, and Sex of Victim by Race, Ethnicity, and Sex of Offender*, FED. BUREAU OF INVESTIGATION, (2013), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_6_murder_race_and_sex _of_vicitm_by_race_and_sex_of_offender_2013.xls [https://perma.cc/323C-8EZ9] (in 2013 there were a total of 5,723 murder victims and 2,491, or approximately 44% were African-American).

33. *Race*, DEATH PENALTY INFO. CTR., *supra* note 30.

34. *See, e.g.*, D. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings From Philadelphia,* 83 CORNELL L. REV. 1638, 1738 (1998) (based on its study of Philadelphia's administration of its death penalty, finding "that the problem of arbitrariness and discrimination in the administration of the death penalty is a matter of continuing concern and is not confined to southern jurisdictions."); S. Phillips, *Racial Disparities in the Capital of Capital Punishment,* 45 HOUS. L. REV. 807, 833–834 (2008) (finding that the Harris County District Attorney was considerably more likely to pursue death against black defendants even when their crimes are less serious).

35. McCleskey v. Kemp, 481 U.S. 279, 287 (1987).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

The Supreme Court had largely ignored the issue of racial disparities in capital sentencing, but the strength of the Baldus findings forced it to finally confront the issue in 1987. In *McCleskey v. Kemp*, although the Court accepted the legitimacy of the Baldus study,[40] it did not allow the inmate to use the statistics as proof of racial discrimination.[41] Rather, the Court held that in order to prevail on a claim of racial discrimination in capital sentencing, a death row inmate would have to prove that the decisionmakers in his specific case acted with discriminatory purpose or that a capital sentencing statute was enacted by the legislature with a discriminatory purpose.[42] Not surprisingly, given this onerous standard, no death row inmate has been able to prove racial discrimination in capital sentencing.[43]

A major reason racial disparities in capital sentencing persist is because those who decide whether the defendant lives or dies are overwhelmingly white:

> [T]he criminal justice system is the part of American society that has been least affected by the Civil Rights Movement. Many courthouses throughout the country look about the same today as they did in the 1940s and 1950s. The judges are white, the prosecutors are white, and the court-appointed lawyers are white. Even in communities with fairly substantial African American populations, all of the jurors at a trial may be white.[44]

According to a recent study, 95% of elected state and local prosecutors are white.[45] These overwhelmingly white prosecutors make the decision whether to seek death in a particular case. They also have a big influence over who sits on the jury in a capital case. Prosecutors are obviously aware of the fact that many African-Americans perceive the criminal justice system to be biased. As a result, a jury composed of African-Americans is significantly less likely to return a death verdict.[46] Therefore, prosecutors have an incentive to remove as many African-

40. *Id.* at 291 n.7.

41. *McCleskey*, 481 U.S. at 291–92.

42. *Id.* at 297–98.

43. KENNETH WILLIAMS, MOST DESERVING OF DEATH? AN ANALYSIS OF THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE 45 (2012) (finding that no death row inmate alleging racial discrimination has prevailed on a *McCleskey* claim).

44. Stephen B. Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 U. PA. J. CONST L. 23, 27 (2008).

45. *See* Nicholas Fandos, A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States, N.Y. TIMES (July 7, 2015), http://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html?_r=0 [https://perma.cc/L9GD-3FUA].

46. See William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Juror's Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 195 (2001).

Americans from a capital jury as they possibly can, and they often do so through the use of peremptory challenges.[47] Several studies have documented the continuing use of peremptory challenges to strike African-Americans from the jury in capital cases.[48]

In *Batson v. Kentucky,*[49] the Supreme Court outlawed the use of race in the exercise of peremptory challenges. Despite *Batson,* courts have tended to uphold the prosecutors' use of peremptory challenges against African-American members of the jury pool because "[r]ace-based peremptory strikes are almost always invisible, or at least, as *Batson* has shown, hard to prove."[50] As long as the prosecutor can articulate a race neutral reason for the strike, the courts will usually reject the defense's *Batson* challenge.[51] This is so even when the prosecutor offers an absurd reason for striking black jurors, such as the fact that a juror agrees with the verdict in the O.J. Simpson case,[52] or that the potential juror has facial hair.[53] Despite the continued use of peremptory challenges to remove black jurors from capital cases, the Supreme Court has refused to strengthen *Batson.*

C. Arbitrariness

In 1972, the Court struck down the death penalty—despite no prior attempts to regulate it[54]—primarily because of the arbitrary manner in which the death penalty was imposed at the time.[55] The Court began to regulate the death penalty in 1976 with its decision in *Gregg v. Georgia.*[56] Its foremost goal in doing so was to minimize the arbitrary application of the death penalty. The Justices were troubled by the fact that, in their view, the death penalty "smacks of little more than a lottery system."[57] However, in *Gregg,* a substantial majority of

47. *See* Miller-El v. Dretke, 545 U.S. 231, 268–271 (2005) (Breyer, J., concurring) (citing evidence and studies that despite Batson, the use of peremptory challenges based on race remains a problem).

48. *See* Bright *supra* note 44 at 27 n.15 (discussing the racially-motivated practices of the Philadelphia and Houston District Attorneys).

49. Batson v. Kentucky, 476 U.S. 79 (1986).

50. *See* Gilad Edelman, Why Is It So Easy For Prosecutors To Strike Black Jurors?, THE NEW YORKER (June 5, 2015), http://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors (italics added) [https://perma.cc/5LBT-PBUK].

51. *Id.*

52. *See* Shelling v. State, 52 S.W.3d 213 (Tex. App. 2001).

53. *See* Purkett v. Elem, 514 U.S. 765, 768 (1995).

54. *See* WILLIAMS, *supra* note 43, at 7–10 (2012).

55. *See* Furman v. Georgia, 408 U.S. 238 (1972).

56. Gregg v. Georgia, 428 U.S. 153 (1976); *see* Callins v. Collins, 510 U.S. 1141, 1145–47 (1994) (Blackmun, J., dissenting).

57. *Id.* at 293.

the Court believed that the death penalty could be imposed less arbitrarily.[58] In particular, the Court approved of three safeguards that it believed would minimize arbitrariness: (1) require the jury to consider the circumstances of the crime and the defendant's background at a separate sentencing hearing;[59] (2) limit the sentencer's discretion by providing guidance as to which aggravating circumstances could warrant the death penalty;[60] and (3) an automatic appeals process as a check on arbitrary decision making.[61] The decision in *Gregg* began the modern era of capital punishment in the United States. During this modern era, the Court would closely regulate the death penalty by restricting its use to certain categories of defendants[62] and certain crimes and by mandating that the defendant be allowed to present mitigating evidence.[63]

Despite this effort, the Court's attempt to restrict the death penalty to those most deserving of death has failed. The death penalty today is as arbitrary as it was when the Court decided *Furman*. Several Justices who have had to administer the death penalty over the years have acknowledged that the Court's attempt to regulate the death penalty has been a failure.[64]

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58. *Id.* at 188—89.

59. *Id.* at 191–92.

60. *Id.* at 192–94.

61. *Id.* at 195.

62. *See* Roper v. Simmons, 543 U.S. 551, 571–75 (2005) (holding that the death penalty could not be imposed on juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 319 (2002) (holding that the death penalty could not be imposed on those defendants who are intellectually disabled); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (holding that the death penalty could not be imposed on those inmates who became insane while incarcerated); Coker v. Georgia, 433 U.S. 584, 598 (1977) (holding that death could not be the punishment for the crime of rape); Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (prohibiting the death penalty for child rapists who do not kill).

63. *See* Lockett v. Ohio, 438 U.S. 586, 608 (1978).

64. In Callins v. Collins, Justice Blackmun announced:

> From this day forward, I no longer shall tinker with the machinery of death . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed . . . The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative.

510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). In Baze v. Rees, Justice Stevens wrote that "[f]ull recognition of the diminishing force of the principal rationales for retaining the death penalty should lead this Court and legislatures to reexamine the question recently posed by Professor Salinas, a former Texas prosecutor and judge: 'Is it time to Kill the Death Penalty?'" 553 U.S. 35, 81 (2008) (Stevens, J., concurring). Justice Lewis Powell told his biographer that "I have come to think that capital punishment should be abolished." JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (1994).

Why does the death penalty continue to be imposed arbitrarily despite almost forty years of regulation by the Supreme Court? There are several reasons. First, as pointed out earlier,[65] the racial disparities in every jurisdiction that administers the death penalty[66] strongly suggest that it is being imposed in a racially discriminatory manner. Second, only a small fraction of murderers are actually sentenced to death.[67] The murders they commit are often less egregious than many defendants who did not receive death sentences.[68] Third, gender plays a role in that women are rarely sentenced to death.[69] Fourth, geography plays a huge role: Where a defendant killed his victim is extremely important.[70] A killer in Indiana is much less likely to be sentenced to death than a similar killer in Texas.[71] Even within an active death penalty state, the imposition of the death penalty is heavily dependent on where the killing occurred within a state.[72] For instance, a killer in Houston is much more likely to be sentenced to

65. *Supra* Part I.B.

66. *See* Steiker & Steiker, *supra* note 27.

67. According to the FBI, in 2013 there were 5,723 murder victims. *See Uniform Crime Report, supra* note 32. Yet in 2013 only 83 individuals were sentenced to death. *See By Year*, DEATH PENALTY INFO. CTR., *supra* note 4.

68. *See* Glossip v. Gross, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) (discussing a study conducted in Connecticut that found only one of every nine defendants sentenced to death were the "worst of the worst").

69. Women constitute less than 2% of the death row population. *Facts*, DEATH PENALTY INFO. CTR., *supra* note 9. In light of this reality, defendants in this article are often referred to in the abstract as male.

70. *See Glossip*, 135 S. Ct. at 2761 (Breyer, J., dissenting).

71. *See Number of Executions by State and Region*, DEATH PENALTY INFO. CTR. (Dec. 9, 2016), http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 [https://perma.cc/UJ9R-98FV] [hereinafter *Number*, DEATH PENALTY INFO. CTR.] (Texas has executed a total of 538 defendants, whereas Indiana has executed 20); Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty,* 49 U. RICH. L. REV. 671, 673 (2015) (pointing out that 20% of U.S. counties are responsible for the entire death row population).

72. *See* Robert J. Smith, *The Geography of the Death Penalty and its Ramifications,* 92 B.U. L. REV. 227, 231–32 (2012); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are there Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUDIES 637, 673 (2014) ("[T]he single most important influence from 1973-2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]."); Campbell Robertson, *The Prosecutor Who Says Louisiana Should 'Kill More People'*, N.Y. TIMES (July 7, 2015), http://www.nytimes.com/2015/07/08/us/louisiana-prosecutor-becomes-blunt-spokesman-for-death-penalty.html [https://perma.cc/9K7N-R775] ("Within Louisiana, where capital punishment has declined steeply, Caddo [Parish county] has become an outlier, accounting for fewer than 5% of the state's death sentences in the early 1980s but nearly half over the past five years.").

death than a similar killer in Austin.[73] Finally, the availability of resources are a crucial factor in whether the death penalty is imposed,[74] as some jurisdictions provide more resources for indigent defense than others.[75] This is important because defendants who are represented by competent trial counsel are significantly less likely to receive a death sentence.[76]

In determining who is sentenced to death, the egregiousness of the crime is a much less important factor than the race of the victim and defendant, the gender of the defendant, where the crime occurred, and the quality of defense counsel.

D. Incompetent Lawyers

The public has learned that it is usually not the heinousness of the crime that causes a defendant to end up on death row. Rather, it is often the quality of the legal representation received that is dispositive.[77] Defendants have ended up on death row because their lawyers slept during the trial,[78] were drunk and disoriented at trial,[79] failed to present important evidence,[80] failed to understand the law,[81] and because their lawyers simply failed to vigorously defend their clients.[82] It is difficult for the public to have any confidence in a system that determines who should live or die when one of the key players in that system, the defense counsel, is incompetent.

There are several terrible consequences for capital defendants who receive substandard legal representation. The most serious conse-

73. *See* Donohue, *supra* note 72 at 680–81 (pointing out that Harris County [Houston] is responsible for more executions than all states other than Texas itself).

74. *See Glossip*, 135 S. Ct. at 2761 (Breyer, J., dissenting) (pointing to scholars that suggest that such disparities in resources could also account for the aforementioned geographical discrepancies).

75. *See Gideon's Broken Promise: America's Quest for Equal Justice*, Am. Bar Assn. Standing Committee on Legal Aid and Indigent Defendants 7–9 (Dec. 2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [https://perma.cc/CX62-J2VR].

76. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1837–41 (1994).

77. *Id.* at 1836 ("Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters.").

78. *See, e.g.*, Burdine, v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001).

79. *See* Bright, *supra* note 76, at 1835.

80. *Id.* at 1837.

81. *See* Hinton v. Alabama, 134 S. Ct. 1081, 1085 (2014) (trial attorney failed to seek funding for expert because he was not aware that the law authorized such funding).

82. *See* Bright, *supra* note 76, at 1835–36.

quence is that they may be wrongly convicted. Another consequence of bad lawyering in capital cases is the possibility that the defendant will be sentenced to death even though he should not be. There have been numerous defendants who have been sentenced to death because their lawyers failed to present important mitigating evidence to the jury.[83] Incompetent trial lawyers also make it difficult for defendants to receive appellate relief because they may fail to make timely objections at trial, thereby relinquishing the ability to preserve error for appeal.[84]

The Supreme Court attempted to address the problem of incompetent counsel in its decision in *Strickland v. Washington*.[85] In *Strickland,* the Court held that in order to prevail on a claim that counsel provided ineffective representation, the defendant must prove (1) the counsel's performance was deficient, and (2) that the defendant was prejudiced as a result of counsel's deficient performance.[86] It is very difficult for a defendant to prevail on a claim of ineffective assistance of counsel. Even if the defendant can prove that counsel's performance was deficient—which is no easy task—courts often reject claims of ineffective assistance of counsel on grounds that the defendant did not suffer prejudice.[87]

E. Other Factors

Several other factors have contributed to the loss of public confidence in the administration of the death penalty.

i. Delay in Implementation

The few who are sentenced to death are not likely to be executed. They are more likely to have their sentences overturned or die from

83. *See e.g.*, Neal v. Puckett, 286 F.3d 230, 233 (5th Cir. 2002) (trial counsel failed to present evidence during punishment phase of petitioner's background—including his horrid childhood of rejection, abandonment, and mental institutions, plus his tortuous prison experience).

84. *See e.g.*, Henson v. State, 407 S.W.3d 764, 767 (Tex. Crim. App. 2013) ("In order to preserve error for appellate review a defendant must make a timely request, objection or motion in the trial court (regardless of whether or not the error complained of is constitutional).").

85. Strickland v. Washington, 466 U.S. 668 (1984).

86. *Id.* at 687.

87. *See e.g.*, Kenneth Williams, *Does Strickland Prejudice Defendants on Death Row?,* 43 U. RICH. L. REV. 1459, 1481-1485 (2009) (discussing the case of Johnny Ray Conner); Wesley v. Johnson, 83 F.3d 714, 721 (5th Cir. 1996) (holding that although trial counsel was deficient for failing to review transcript of co-defendant's trial, this failure did not prejudice petitioner).

natural causes than to be executed.[88] "In a word, executions are *rare*."[89] For the unlucky few who are executed, it takes on average of approximately eighteen years to carry out.[90] This delay is attributable to a lengthy appellate process,[91] which seeks to ensure reliability and fairness before the ultimate punishment is meted out.[92] However, the lengthy delay in carrying out the death penalty undermines the penological justifications for the death penalty, specifically the deterrence rationale.[93] The question whether the death penalty actually deters is uncertain.[94] There are studies that both support and undermine the deterrence rationale of the death penalty.[95] Most would agree that, to be an effective deterrent, executions have to be carried out swiftly.[96] Public support has diminished as a result of the lengthy delays. There is also no solution to the problem of lengthy delays as long as we are committed to reliability and fairness. As Justice Breyer explained, "[i]n this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both."[97]

ii. Life Without Parole

In the past, jurors often voted for death in order to ensure that dangerous defendants remained in jail and were never released on

88. Glossip v. Gross, 135 S. Ct. 2726, 2768 (2015) (Breyer, J., dissenting).

89. *Id.* (emphasis in original).

90. *Id.* at 2770.

91. An inmate sentenced to death has a right to have his conviction and sentence reviewed on direct appeal. Once his direct appeal has been concluded, he or she can file a writ of habeas corpus in state court. If the state courts deny relief, the inmate can file a writ of habeas corpus in federal court. *See* KENNETH WILLIAMS, MOST DESERVING OF DEATH? AN ANALYSIS OF THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE 111 (2012).

92. *See generally* Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong With It and How to Fix It*, 33 CONN. L. REV. 919, 921 (2001) (discussing the basics of the writ of habeas corpus and direct review). Whether the appellate process actually accomplishes these objectives is certainly subject to debate because appellate courts are often constrained in their ability to review the merits of an inmate's appeals by doctrines such as procedural default, harmless error, exhaustion, and—most importantly in the federal courts—by the Anti-Terrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214. *Id.* at 924–927.

93. The Supreme Court has identified two penological justifications for the death penalty: deterrence of capital crimes by prospective offenders and retribution. Gregg v. Georgia, 428 U.S. 153, 183 (1976).

94. *Glossip,* 135 S. Ct. at 2767–69 (2015) (Breyer, J., dissenting).

95. *Id.*

96. *See e.g.*, Furman v. Georgia, 408 U.S. 238, 302 (1972) (Brennan, J., concurring).

97. Glossip, 135 S. Ct. at 2772 (Breyer, J., dissenting) (emphasis in original).

parole.[98] Now that most states provide jurors with the option of sentencing the defendant to life without parole ("LWOP"), this concern is eliminated. As a result, jurors are meting out fewer death sentences[99] and the public seems to agree with those decisions. In a recent poll, 52% of the public preferred LWOP, whereas 42% preferred the death penalty.[100] Even among those who support the death penalty, 29% preferred LWOP. The public is increasingly unwilling to accept the risk of executing an innocent person now that they are assured that the perpetrator will never be released from prison.

iii. Religion

There was a time when practically every organized religious denomination supported capital punishment.[101] That is no longer the case. In fact, most major Christian denominations have announced their opposition to capital punishment.[102] Many non-Christian denominations, such as reform Jews and Unitarian Universalists, have also announced their opposition to capital punishment.[103] The religious denomination that opposes the death penalty most aggressively has been the Catholic Church. The Catholic Church's opposition is based on its belief in the sanctity of human life.[104] Pope John Paul II has stated that all human life deserves respect, "even [the lives] of

98. *See* Amanda Dowlen, *An Analysis of Texas Capital Sentencing Procedure: Is Texas Denying Its Capital Defendants Due Process By Keeping Judges Uninformed of Parole Eligibility?*, 29 TEX. TECH L. REV. 1111, 1134–1138 (1998).

99. *By Year*, DEATH PENALTY INFO. CTR., *supra* note 4.

100. Damla Ergun, *New Low in Preference for the Death Penalty*, ABC NEWS (June 5, 2014), http://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty/ [https://perma.cc/5CAQ-8BHD].

101. *See generally* Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 142–61 (2000) (providing a history of organized religious denominations and their attitudes toward capital punishment).

102. For information on religious denominations and their position on the death penalty, *see Religion and the Death Penalty*, DEATH PENALTY INFO. CTR. http://www.deathpenaltyinfo.org/article.php%3Fdid%3D2249 (last visited Nov. 20, 2016) [https://perma.cc/NG3A-JCEC]. Notable exceptions to the majority include the Church of Jesus Christ of Latter Day Saints, which leaves the question up to "civil law;" The National Association of Evangelicals, which supports both proponents and opponents of the death penalty; and The Southern Baptist Association, which supports "fair and equitable use of" the death penalty. *Id.*

103. *Id. See also*, Religious Groups Official Positions on Capital Punishment, PEW RESEARCH CTR. (Nov. 4, 2009), http://www.pewforum.org/2009/11/04/religious-groups-official-positions-on-capital-punishment/ [https://perma.cc/B4S3-65KK].

104. Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 31, 42 (2000).

criminals and unjust aggressors."[105] According to the Pope, since human life "from the beginning . . . involved the 'creative action of God' and remains forever in a special relationship with the Creator, only God is the master of life."[106] Therefore, the government

> ought not go to the extreme of executing the offender except in cases of absolute necessity; in other words, when it would not be possible otherwise to defend society. Today, however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.[107]

These religious objections, especially the Catholic Church's work against the death penalty, have likely had an impact on the declining support for the death penalty in the United States.[108]

II. Reform or Abolition?

A longtime federal judge, Alex Kozinski, recently wrote that there are "reasons to doubt that our criminal justice system is fundamentally just."[109] As some of the problems discussed in the previous section illustrate, nowhere is his conclusion more evident than in the administration of the death penalty. There is a consensus emerging across ideological and political lines that the death penalty is seriously flawed.[110] This section discusses the option of continued reform and why that option is likely to fail.

A. Reform

There have been numerous proposals to "fix" the death penalty. Reform proposals have been made by academics,[111] state commis-

105. *Id.*

106. *Id.*

107. *Id.*

108. *See, e.g.*, E.J. Dionne, Jr., Religious Reflections on the Death Penalty, PEW RESEARCH CTR. (June 5, 2001), http://www.pewforum.org/2001/06/05/religious-reflections-on-the-death-penalty/ [https://perma.cc/4ZHW-3FE9] ("I think the religious community has played an enormous role in having people question their consciences' about where they stand on the death penalty. . . The pope's visit to the United States had a powerful influence on the Catholic community . . . in reconsidering their view.").

109. Hon. Alex Kozinski, Criminal Law 2.0, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xiii (2015).

110. *See, e.g.*, CONSERVATIVES CONCERNED ABOUT THE DEATH PENALTY, http://conservativesconcerned.org (last visited Nov. 20, 2016) [https://perma.cc/YXT6-QBK4].

111. *See, e.g.*, Kenneth Williams, *The Death Penalty: Can It be Fixed?*, 51 CATH. U.L. REV. 1177, 1180–1203 (2002) (discussing various potential reforms to the death penalty, but subsequently critiquing them).

sions,[112] and others to address many of the areas of concern outlined in the previous section. Below is a review and assessment of some of these proposals.

i. Race

An attempt to eliminate racial disparity in capital sentencing failed at the Supreme Court in *McCleskey v. Kemp*.[113] Since then, two major legislative proposals have been advanced in the attempt to eliminate racial disparities in capital sentencing.

First, in federal cases, a federal statute was enacted in 2013 that attempts to eliminate racism in the jury deliberation process.[114] This statute requires that the judge instruct the jury at the end of the sentencing phase of a capital case that they may not in any way consider race, national origin, sex, or the religious beliefs of the defendant or the victim in reaching its verdict.[115] The same statute also requires that after a verdict has been rendered, all jurors must certify that they did not, in fact, consider the race, national origin, sex, or religious beliefs of the defendant or the victim in reaching their determinations and that their determinations would have been the same regardless of these factors.[116] Despite this statute, there continue to be racial disparities in the administration of the federal death penalty.[117]

112. *See, e.g.*, Report of the Governor's Commission on Capital Punishment (April 15, 2002), http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf [https://perma.cc/6KY8-KXDJ] (presenting various recommendations to reform the death penalty to Governor George Ryan of Illinois after a moratorium on executions was declared).

113. McCleskey v. Kemp, 481 U.S. 279 (1987).

114. *See* 18 U.S.C. § 3593(f) (2013).

115. *Id.*

116. *Id.*

117. About 44% of federal death row inmates are black, 39% are white and 13% are Latino. *See* Federal Death Row Inmates, DEATH PENALTY INFO. CTR. (Mar. 24, 2016), http://www.deathpenaltyinfo.org/federal-death-row-prisoners [https://perma.cc/DW4S-VTGL]. In addition, the U.S. Department of Justice studied the federal death penalty system and found that, from 1988 to 2000, approximately 80% of the cases submitted by federal prosecutors for death penalty review involved racial minorities as defendants. *See* Report on the Federal Death Penalty System: A Statistical Survey 1988-2000, OFFICE OF THE DEPUTY ATTORNEY GEN. http://www.justice.gov/dag/survey-federal-death-penalty-system [https://perma.cc/L9FS-D26C] (go to link titled "Table Set I: Statistical Overview"). About 73% of cases approved for death penalty prosecution involved minority defendants. *Id.* The study also found that U.S. Attorneys were almost twice as likely to recommend the death penalty for a black defendant when the victim was non-black as when the victim was black. *Id.* (go to link titled "Victims: Explanatory Notes For Table Set III.C"). The study further found that white defendants were almost twice as likely as black, Hispanic, or other defendants to be offered a plea agreement reducing the penalty from death to life imprisonment or less. *See* Statement of David C. Baldus to Hon. Russell D. Feingold, Comm. on the Judiciary, U.S. Senate

The second legislative proposal to eliminate racial disparities in the administration of the death penalty was the Racial Justice Act.[118] Had the Racial Justice Act passed, it would have allowed defendants who had been sentenced to death to use statistical evidence to demonstrate a prima facie case of racial bias,[119] something that the Supreme Court did not permit in *McCleskey*.[120] The burden then would have shifted to the prosecution to explain the reason for the statistical disparity.[121] The reviewing court would then decide whether race was a factor, and if it found that it was, the defendant's death sentence would be overturned.[122] The Racial Justice Act would have required an explanation from prosecutors when racial disparities existed.

Requiring an explanation from prosecutors is important:

> It is not unreasonable to require publicly elected prosecutors to justify racial disparities in capital prosecutions. If there is an underrepresentation of black citizens in a jury pool, jury commissioners are required to explain the disparity. A prosecutor who strikes a disproportionate number of black citizens in selecting a jury is required to rebut the inference of discrimination by showing race neutral reasons for his or her strikes. If there are valid, race neutral explanations for the disparities in capital prosecutions, they should be presented to the courts and public. Prosecutors, like other public officials, should be held accountable for their actions. The bases for critical decisions about whether to seek the death penalty and whether to agree to a sentence less than death in exchange for a guilty plea should not be shrouded in secrecy, but should be openly set out, defended, and evaluated.[123]

Ultimately, the Racial Justice Act passed the U.S. House of Representatives but failed to be acted upon by the U.S. Senate.[124] Two states, North Carolina and Kentucky, enacted versions of the Act.[125] However, after a state judge overturned an inmate's death sentence based

(June 11, 2001), http://www.deathpenaltyinfo.org/node/86 [https://perma.cc/TW24-ZAGG] ("48% of white defendants avoid the risk of a death penalty by entering a plea agreement to a non-capital charge, while the rates that blacks and Hispanics enter such agreements are 25% and 28% respectively.").

118. Racial Justice Act, H.R. 4017, 103d Cong. § 2921 (2d Sess. 1994).

119. Williams, *supra* note 111, at 1182–83.

120. See McCleskey v. Kemp, 481 U.S. 279, 297 (1987).

121. Williams, *supra* note 111, at 1183.

122. *Id.*

123. Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty,* 35 SANTA CLARA L. REV. 433, 465–66 (1995).

124. *See* Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 530 (1995).

125. Williams, *supra* note 43, at 49.

on the statute, the North Carolina legislature repealed its Racial Justice Act.[126]

Given these practical and political difficulties faced by Congress, the prospects for any legislative reforms designed to address the problem of racial disparities in capital sentencing are bleak. Furthermore, the Supreme Court has always been unwilling to address the issue of race and capital punishment.[127] Even in the unlikely event that either the Supreme Court or the legislature addressed the issue, it is questionable how much can be achieved in ending these disparities. The United States has been grappling with the issue of race since its inception. Racism, however, is not a relic of the past. A federal appellate court recently acknowledged "the sad truth that racism continues to exist in our modern American society despite years of laws designed to eradicate it."[128] As long as there continues to be significant racial prejudice in society, it is difficult to imagine any reform capable of eliminating the racial disparities that have always infected the highly-charged decision whether to sentence an individual to death. Even the Racial Justice Act, although well intended, would not have done so. The Act was modeled after Batson and as discussed earlier, judges have largely ignored obvious racism in jury selection.[129] Therefore, there is no reason to believe that the courts would do a better job enforcing the Racial Justice Act, even if it were to be enacted.

ii. Innocence

There are several causes of wrongful convictions. Wrongful convictions often occur because of erroneous eyewitness testimony, which has been described as "the single greatest cause of wrongful convic-

126. *See* Lane Florsheim, *Four Inmates Might Return to Death Row Because North Carolina Republicans Repealed a Racial Justice Law,* New Republic (May 9, 2014), http://www.newrepublic.com/article/117699/repeal-racial-justice-act-north-carolina-gop-takeover [https://perma.cc/WK5C-8HBY]; *North Carolina Racial Justice Act Repealed Shortly After First Use,* American Bar Ass'n: Death Penalty Representation Project, http://www.americanbar.org/publications/project_press/2012/year-end/RJA_update_2012.html [https://perma.cc/KH9F-34VL].

127. *See* Steiker & Steiker, *supra* note 27.

128. Veasey v. Abbott, 796 F.3d 487, 499 (5th Cir. 2015); The recent questionable shootings of numerous unarmed African-American men by police officers is another example of the continued racism in American society despite the enactment of laws such as 18 U.S.C § 242 (1996) to prevent such shootings. For a discussion of police shootings of unarmed African-American men, see Manny Fernandez, North Charleston Police Shooting Not Justified, Experts Say, N.Y. Times (Apr. 9, 2015), http://www.nytimes.com/2015/04/10/us/north-charleston-police-shooting-not-justified-experts-say.html?_r=0 [https://perma.cc/9AAA-FRXT].

129. *See* Edelman, *supra* note 50.

tions in the U.S. criminal justice system."[130] Several factors cause witnesses to misidentify suspects. First, the stress of witnessing a traumatic event like murder may affect a witness' perception.[131] Second, witnesses often make misidentifications when identifying persons of a different race.[132] Third, the procedure used by law enforcement officers may cause a witness to identify the wrong person.[133] For instance, a suggestive lineup could cause a misidentification.[134] A lineup administered by a police officer who is familiar with the suspect can also cause misidentifications.[135]

Several proposals have been made to minimize the possibility of a misidentification. One such proposal is that lineups be administered by officers who are not involved in the investigation and who are not familiar with the suspect.[136] To address the problem of suggestive lineups, some have proposed that individuals in a lineup be presented sequentially so that witnesses would not be able to compare and contrast the individuals in the lineup and pick the individual who most resembles the suspect.[137] Another potential source of misidentification comes from the fact that witnesses often believe that the suspect is part of the lineup and therefore feel pressure to pick someone in the lineup as the perpetrator.[138] Some have proposed informing witnesses that the suspect may not be in the lineup to reduce this pressure.[139]

Another cause of wrongful convictions is misconduct by prosecutors and police. In Brady v. Maryland,[140] the Supreme Court held that prosecutors were constitutionally required to disclose exculpatory evidence to the defense, but they often fail to fulfill this duty. According to federal appeals court Judge Alex Kozinski, there is an "epidemic of Brady violations abroad in the land."[141] To deal with the problem of prosecutorial misconduct, Judge Kozinski believes that open file dis-

130. Rob Warden, *How Mistaken Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row* (May 2, 2001), http://www.deathpenaltyinfo.org/StudyCWC2001.pdf [https://perma.cc/CMQ2-V25T].

131. Williams, *supra* note 43, at 64.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See e.g.*, N.C. Gen. Stat. § 15A-284-52(b).

137. Williams, *supra* note 43, at 91.

138. *See* Williams, *supra* note 43, at 64.

139. *See, e.g.*, N.C. Gen. Stat. § 15A-284-52(b)(3)(A) (2007).

140. Brady v. Maryland, 373 U.S. 83 (1963).

141. Kozinski, *supra* note 109, at viii.

covery[142] should be required.[143] Thus, if open file discovery is required, prosecutors would be obligated to disclose any evidence bearing on the crime with which a defendant is being charged, not just exculpatory evidence.[144] Others have proposed that prosecutors should be disciplined more frequently and harshly when they engage in misconduct.[145] Separately, but related, police sometimes extract false confessions from suspects. To address that problem, some have opined that police interrogations should be videotaped.[146]

A major impediment to preventing prosecutorial and police misconduct is that there are no incentives for either prosecutors or police officers to play by the rules. Prosecutors and police are rarely prosecuted even when they have been found to have engaged in misconduct.[147] Although prosecutors can be disciplined by the state bar association, this rarely occurs.[148] Furthermore, the standard for overturning a conviction based on prosecutorial misconduct or police overreaching is extremely high. The defendant not only has to prove that the violation occurred but also must prove that the evidence resulting from prosecutorial or police misconduct was not harmless.[149] Most defendants are unable to prove that the misconduct affected the outcome of their case.[150] Barring a complete overhaul of the disciplinary system governing prosecutors, small reforms are unlikely to curtail these problems.

142. Open file discovery allows defendants to review the prosecution's case files. *See, e.g.*, N.C. GEN. STAT. § 15A-903 (1973).

143. Kozinski, *supra* note 109, at xxvi–xxvii.

144. *Id.*

145. *See* Williams, *supra* note 111, at 1200–01.

146. *Id.* at 1202.

147. For a discussion of the difficulty of holding prosecutor's accountable for misconduct, including a rare instance in Texas in which a prosecutor was prosecuted for misconduct, *see* Matt Ferner, Prosecutors Are Almost Never Disciplined For Misconduct, HUFFINGTON POST (Feb. 11, 2016), http://www.huffingtonpost.com/entry/prosecutor-misconduct-justice_us_56bce00fe4b0c3c55050748a [https://perma.cc/Z5X8-2DR9].

148. *See e.g.*, Martha Bellisle, Despite misconduct, prosecutors rarely face discipline, WASH. TIMES (Aug. 3, 2015), http://www.washingtontimes.com/news/2015/aug/3/despite-misconduct-prosecutors-rarely-face-discipl/ [https://perma.cc/3JJT-LG39] (according to a study, "The California Bar Association disciplined 1 percent of the prosecutors in 600 cases where misconduct was found.").

149. *See* United States v. Bagley, 437 U.S. 667, 682 (1985).

150. The Center for Public Integrity found that "in thousands [of] cases, judges labeled prosecutorial behavior inappropriate but allowed the trial to continue or upheld convictions using a doctrine called 'harmless error.'" Steve Weinberg, Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct? CTR. FOR PUBLIC INTEGRITY (June 26, 2003), http://www.publicintegrity.org/2003/06/26/5517/breaking-rules [https://perma.cc/VW3D-Z9K9].

iii. Bad Defense Lawyers

Wrongful convictions in capital cases also occur because of ineffective defense counsel. Defendants who should not be sentenced to death often end up on death row because they were not competently represented.[151] The obvious remedy would be for jurisdictions to provide greater resources for defense counsel. As Justice Hugo Black observed, "[t]here can be no equal justice where the kind of trial a [person] gets depends on the amount of money he has."[152] If more resources were provided for defense counsel, better lawyers would get involved and handle the cases. However, this is unlikely to happen. During a time in which many jurisdictions are strapped for cash and have difficulties providing adequate funding for basic services, such as education and infrastructure repairs, how likely is it that they will have the political courage to propose and defend increases in spending for indigent criminal defendants?

The courts, including the Supreme Court, have been unwilling to heavily regulate the problem of ineffective defense counsel in capital cases. They give great deference to any decision that defense counsel makes no matter how nonsensical it may have been as long as defense counsel can frame it as a strategic decision.[153] Furthermore, even when defense counsel fails to present obviously mitigating evidence that could have saved a defendant's life, the courts will often refuse to grant relief on the grounds that the defendant suffered no prejudice from the failure of defense counsel to utilize the evidence.[154]

iv. Arbitrariness

The Supreme Court has labored unsuccessfully to rid the death penalty of arbitrariness through various reforms. In 1972, the Supreme Court invalidated the death penalty because of concerns that it was too arbitrarily imposed.[155] After reinstating the death penalty in

151. *See* Bright, *supra* note 76 (emphasizing that this phenomenon particularly harms poorer defendants).

152. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

153. *See, e.g.*, Cullen v. Pinholster, 131 S. Ct. 1388, 1407 (2011) (explaining that a court is "required not simply to give [the] attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [the petitioner's] counsel may have had for proceeding as they did.")

154. *See, e.g.*, Stephen Henderson, Bad Defense Often Slides in Death Cases, News & Observer, Jan. 21, 2007, at A1 (describing a study of eighty death penalty cases from Alabama, Georgia, Mississippi, and Virginia regarding the poor quality of legal representation in death penalty cases and the failure of appellate courts to reverse convictions in most of those cases).

155. *See* Furman v. Georgia, 408 U.S. 238 (1972).

1976,[156] the Court has regulated it in an attempt to minimize arbitrariness and limit the penalty to the "worst of the worst."[157] In attempting to limit the arbitrary application of the death penalty, death sentences are automatically appealed. In addition, trials are bifurcated into two separate phases: (1) guilt-innocence and (2) punishment.[158] In the second phase, the Court has mandated a broad right to individualized sentencing to permit capital defendants to invoke any relevant grounds supporting a non-death sentence.[159] The Court has also limited the offenses punishable by death by exempting non-homicidal crimes.[160] Further, the Court has categorically excluded certain vulnerable groups, such as juveniles[161] and intellectually disabled offenders,[162]from the penalty's reach. Notwithstanding these changes, the death penalty continues to be fraught with arbitrariness. Factors such as geography, race, resources, and quality of defense counsel continue to matter more than the heinousness of the crime in determining whether an inmate is sentenced to death.[163]

The Court can continue its current attempt to regulate the death penalty instead of abolishing it outright. As discussed earlier,[164] the Supreme Court has attempted to reform the death penalty on multiple occasions. But, these reforms have not produced a fairer death penalty. There are still serious racial disparities despite Batson;[165] the death penalty is still not confined to the worst offenders despite the Supreme Court's attempts to do so;[166] and capital defendants are still frequently represented by incompetent defense counsel despite the Court's decision in Strickland.[167]

156. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

157. *See, e.g.*, Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting); Godfrey v. Georgia, 446 U.S. 420, 432–33 (1980) ("[I]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (inner quotations omitted)).

158. *See, e.g.*, Tennard v. Dretke, 542 U.S. 274, 276–77 (2004) (referring to the second phase as the "penalty phase" after a jury conviction).

159. *See id.* at 284–85 (2004).

160. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (prohibiting the death penalty for the rape of a child); Coker v. Georgia, 433 U.S. 584 (1977) (prohibiting the death penalty for the rape of an adult woman).

161. *See* Roper v. Simmons, 543 U.S. 551 (2005).

162. *See* Atkins v. Virginia, 536 U.S. 304 (2002).

163. *See* Glossip v. Gross, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting).

164. *See supra* Part II.

165. Batson v. Kentucky, 476 U.S. 79 (1986). *See supra* Part I.B.

166. *See* Glossip, 135 S. Ct. at 2760 (Breyer, J., dissenting).

167. *Id.* at 2761.

Any future effort to reform the death penalty is similarly unlikely to succeed. The failure of the aforementioned reforms will likely lead to a continued marginalization of the death penalty. Although death penalty statutes may remain on the books in several states, death sentences will rarely be imposed in the vast majority of states.[168] In these states, despite the dwindling number of executions, the death penalty will continue to be "fraught with arbitrariness, discrimination, caprice, and mistake."[169] Individuals who do not deserve to die will continue to be sentenced to death and executed. There is also the possibility that an individual who is completely innocent will be executed.

Taking these pervasive structural problems of the criminal justice system into consideration, the Supreme Court should finally admit that Justice Blackmun was right in 1994 when he said that "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies"[170] and abolish the death penalty.

B. Abolition

There are several grounds upon which the Supreme Court could declare the death penalty unconstitutional. The Court would not have to create new constitutional doctrines in order to do so. The Court could rely upon existing death penalty jurisprudence that it has developed since 1976.

i. Equal Protection

The strongest—but least likely—way the Court could invalidate the death penalty is by using the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause generally prohibits the government from discriminating against its citizens without a legitimate reason for doing so. In the event that a law discriminates on the basis of race, the government must put forth a compelling reason to

168. For instance, despite having the death penalty on the books, New Hampshire has carried out zero executions since 1976; Colorado has carried out one; Wyoming, one; United States Military, zero. Pennsylvania, which has 175 death row inmates, has carried out three executions. California, which has the largest death row population, 741, has executed only thirteen inmates since 1976 and none since 2006. State by State Database, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state_by_state (last visited Dec. 16, 2016) [https://perma.cc/3EH8-PEWV].

169. Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting).

170. *Id.* at 1145.

justify the discrimination.[171] If the government fails to do so, the law violates equal protection and will be struck down.[172] To prove an equal protection violation, it is not necessary that a law discriminate explicitly on the basis of race.[173] An equal protection violation also occurs if the law is applied in a discriminatory manner.[174] However, in order to trigger this "strict scrutiny," proof of a racially discriminatory purpose is usually required.[175] The Supreme Court has not allowed equal protection violations to be proven only with evidence that a law disproportionately burdens members of a particular racial group.[176]

For much of the nation's history, death penalty statutes were explicitly racist and were applied in a racially discriminatory manner.[177] Blacks could be—and were—executed for crimes that whites could not be.[178] Blacks often were also executed more gruesomely than whites.[179] During the modern era of capital punishment, death penalty statutes are no longer explicitly discriminatory. In fact, as discussed earlier, there have been measures implemented to ensure that racial discrimination does not infect the decision-making process in death penalty cases.[180] However, racial disparities in the administration of the death penalty persist. African-Americans are sentenced to death at a higher ratio than warranted given their percentage of the population.[181] In addition, killers of whites are significantly more likely to be sentenced to death than killers of African-Americans.[182] Furthermore, discriminatory jury selection continues to occur in capital cases despite the Supreme Court's attempt to remedy the problem.[183] Because African-Americans are not treated equally when the death penalty is sought and carried out, a claim could be made that

171. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

172. *Id.*

173. *See* Washington v. Davis, 426 U.S. 229, 241 (1976).

174. *Id.*

175. *Id.* at 240 ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

176. *Id.* at 239 ("But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." (emphasis in original)).

177. *See* Steiker & Steiker, *supra* note 27, at 248–253.

178. *Id.* at 248.

179. *Id.*

180. *See, e.g.*, 18 U.S.C. § 3593(f) (2013).

181. *See* U.S. CENSUS BUREAU, *supra* note 28; *Race*, DEATH PENALTY INFO. CTR., *supra* note 30.

182. *See Race*, DEATH PENALTY INFO. CTR., *supra* note 30; *Uniform Crime Report, supra* note 32.

183. *See* Edeleman, *supra* note 50.

the death penalty violates equal protection and is therefore unconstitutional.

The requirement of proving a discriminatory purpose would be one significant hurdle in declaring the death penalty unconstitutional on Fourteenth Amendment grounds. Warren McCleskey produced statistical evidence to support his claim that because he was a black man accused of killing a white victim, he was more likely to be sentenced to death and thus a violation of equal protection had occurred.[184] However, he was not able to produce evidence that when the Georgia legislature enacted its death penalty statute, it did so with a racially discriminatory purpose.[185] He also could not produce evidence that the decisionmakers in his case—either the judge, jury, or prosecutor—purposely discriminated against him.[186] The Court held that without such proof, his equal protection claim failed.[187]

Should the Supreme Court accept statistics of the racially discriminatory impact of capital punishment it would require the Court to overrule its previous decisions disallowing evidence of discriminatory impact as proof of an equal protection violation.[188] The Court is not likely to begin this practice because of the impact such a decision would have—not only on the death penalty and the criminal justice system—in other areas of American life.[189]

The Court, however, would not have to go this far in order to find that the current administration of the death penalty violates equal protection. Since 1976, the Court has said that "death is different,"[190] which justifies applying different standards in death penalty cases.[191]

184. McCleskey v. Kemp, 481 U.S. 279, 288 (1987).

185. *Id.* at 298–99.

186. *Id.* at 292–93.

187. *Id.* at 299.

188. *See e.g.,* Washington v. Davis, 426 U.S. 229 (1976).

189. For instance, in *McCleskey*, the Court expressed its concern that "if we accept McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty." McCleskey, 481 U. S. at 315 (1987).

190. *See* Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976) ("death is a punishment different from all other sanctions in kind rather than degree.") (citing Furman v. Georgia, 408 U.S. 238, 286–291 (1976)) (Brennan, J., concurring).

191. For instance, the Court requires that in capital cases, the sentencer be empowered to take into account all mitigating circumstances, *see* Lockett v. Ohio, 438 U.S. 586, 604 (1978); prohibits death as a mandatory punishment for murder, *see* Woodson, 428 U.S. 305; requires that the sentencer not be given unguided discretion, *see* Furman, 408 U.S. 238 (1972); that the accused receive a judicial evaluation of his claim of insanity before the sentence can be executed, *see* Ford v. Wainwright, 477 U.S. 399, 410–11 1986); that the accused receive a judicial evaluation of his claim of intellectual disability, *see* Hall v. Florida, 134 S. Ct. 1986, 2001 (2014); that the death penalty cannot be imposed for rape, *see* Coker

The Court has also allowed statistical evidence to prove a claim of discrimination in jury selection, a claim intertwined with capital punishment.[192] Thus, by applying its "death is different" jurisprudence, the Court could accept statistics as proof of discriminatory purpose in death penalty cases only, while leaving intact its previous decisions rejecting similar evidence as proof of equal protection violations in other cases.

Although the Court could use its current jurisprudence to find that the death penalty violates equal protection, it is unlikely to do so. Since at least the 1960's, litigants have sought to engage the court in issues concerning the racial application of the death penalty.[193] Despite these efforts, the Court has given the issue of race little attention.[194] For instance, the death penalty had always been imposed more frequently in cases involving black defendants accused of rape and especially when these defendants were accused of raping white women.[195] The NAACP Legal Defense Fund ("LDF") tried unsuccessfully to convince the Court to accept certiorari in cases where black defendants had been accused of raping white women.[196] The Court consistently declined to do so.[197]

The Court did eventually grant certiorari on the issue of whether the death penalty could be imposed for rape. The case it accepted involved a white defendant and white victim.[198] Briefs filed with the Court, including briefs by the LDF and the National Organization for Women, still urged the Court to strike down the practice because of the disproportionate use of the death penalty in rape cases against black men.[199] However, in its opinion finding the death penalty for rape unconstitutional, the Court did not address the issue of race.[200]

v. Georgia, 433 U.S. 584, 592 (1977); nor for ordinary murder, *see* Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

192. *See* Batson v. Kentucky, 476 U.S. 79, 93–94 (1986).

193. *See* Steiker & Steiker, *supra* note 27, at 253–77 (detailing attempts from litigants such as the NAACP Legal Defense Fund to convince the Court to accept certiorari and address some of the racial issues surrounding the death penalty. The Court avoided the issue of race and decided the cases on other grounds).

194. *Id.* at 253.

195. *Id.* at 273–77.

196. *Id.* at 276.

197. *Id.*

198. *Id.* at 280.

199. *See* Steiker & Steiker, *supra* note 27 at 274.

200. *See* Coker v. Georgia, 433 U.S. 584 (1977). Even Justice Marshall avoided the issue of race in his concurring opinion. Id. at 600–01 (Marshall, J., concurring).

The Court instead relied on the Eighth Amendment in striking down the death penalty for rape.[201]

Similarly, briefs filed with the Court in *Furman v. Georgia*[202] urged it to strike down the death penalty because of its racially discriminatory application.[203] The Court did strike down the death penalty in *Furman*, however, the decision was not based on race.[204] The Court also ignored the issue of race when it re-imposed the death penalty in *Gregg v. Georgia*[205] despite the fact that the briefs filed with the Court had discussed the issue at length.[206]

More recently, Justice Sotomayor has urged the Court to have an honest discussion about race when she wrote:

> The refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.[207]

However, there is no evidence to suggest that the Court is willing to acknowledge the role that race plays in the imposition of the death penalty. Justice Breyer, for instance, did not specifically list race as a reason for the Court to revisit the death penalty and he only briefly mentioned the racial disparities in his *Glossip* dissent.[208] Based on the Court's longstanding reluctance to discuss the issue of race and capital punishment, there is no reason to be optimistic that will change in the near future. If the Court decides to strike down the death penalty it is likely to do so as the Constitutional Court of South Africa did, not on explicit racial grounds, but with race in the backdrop of its decision.[209]

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201. *Id.* at 592.

202. Furman v. Georgia, 408 U.S. 238 (1972).

203. *See* Steiker & Steiker, *supra* note 27, at 263–65.

204. *Id.* at 265–67.

205. Gregg v. Georgia, 428 U.S. 153.

206. Steiker & Steiker, *supra* note 27, at 269–72.

207. Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623, 1676 (2014).

208. Justice Breyer stated that the Court should reconsider its holding in *Gregg* for three reasons: (1) serious unreliability of the death penalty; (2) arbitrariness in application; and (3) unconscionably long delays that undermine the death penalty's penological purpose. *See* Glossip v. Gross, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting). In one paragraph of his dissent, he cites studies indicating that individuals accused of murdering whites are more likely to receive the death penalty as proof of the arbitrary application of the death penalty. *Id.* at 2760–61.

209. Although the South African Constitutional Court based its ruling abolishing the death penalty on the right to life provision of its new constitution, the fact

> [t]hat the Constitutional Court chose the death penalty issue for its first major ruling underscored the importance of the issue in a country where for decades

ii. Cruel and Unusual Punishment

If the Court is to strike down the death penalty, the Eighth Amendment's prohibition on cruel and unusual punishment provides the best vehicle. In its past decisions, the Court has acknowledged that the death penalty would be unconstitutional if "inflicted in an arbitrary and capricious manner."[210] To strike down the death penalty, the Court could rely upon research that strongly "suggests that the death penalty is imposed arbitrarily."[211] The first indication of an arbitrary death penalty lies in the high number of death row inmates whom have been wrongly sentenced to death.[212] Second, as discussed earlier, there is an abundance of evidence that the factors such as race, geography, gender, and resources play a big role in determining who is sentenced to death.[213] Finally, in accepting that the egregiousness of the crime largely does not correlate with a death sentence,[214] the Court would have to acknowledge that its attempts to limit the death penalty to the "worst of the worst" have failed and there is nothing that it can do going forward to succeed in this endeavor.

The Court has also held that the death penalty would be cruel and unusual punishment in the event that it failed to serve a penological purpose.[215] A strong argument can be made that the current administration of the death penalty fails to serve a penological purpose. The argument that the death penalty serves as a deterrent has been long debated.[216] Scholars generally agree that the deterrent value of the death penalty is dependent upon sentencing that is frequent, swift, and provides some level of certainty as to which offenders will

> execution was used not just as a weapon against common crime, but as a means of terror in enforcing the system of racial separation known as apartheid.

Howard W. French, South Africa's Supreme Court Abolishes Death Penalty, N.Y. TIMES (June 7, 1995), http://www.nytimes.com/1995/06/07/world/south-africa-s-supreme-court-abolishes-death-penalty.html [https://perma.cc/N6XF-WF54].

210. *Gregg*, 428 U.S. at 188.

211. *Glossip*, 135 S. Ct. at 2762 (Breyer, J., dissenting).

212. *Id.* at 2758.

213. *Id.* at 2760.

214. *Id.* at 2762.

215. The Court has said that if the death penalty doesn't serve the goals of either deterrence or retribution, "It is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment." Edmund v. Florida, 458 U.S. 782, 798 (1982) (inner quotations omitted). *See also Gregg*, 428 U.S. at 183 ("[S]anction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

216. *See, e.g.*, Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. OF CRIM. L. 255–62 (2006).

receive the punishment.[217] The deterrence rationale, however, is undermined by the fact that only a small number of murderers are actually sentenced to death.[218] The deterrence rationale is further undermined by the long delays in carrying out the death penalty. An individual contemplating whether to commit a capital crime is not likely to be deterred by the prospect of being executed many years later.

Retribution is another acceptable penological purpose that the death penalty could serve.[219] Many argue that the death penalty should be retained as a punishment for the "worst of the worst." However, the retributive justification is undermined by the fact that death sentences are frequently not meted out to the most egregious killers.[220] The retribution theory does not comport with evidence indicating that the individuals frequently sentenced to death are not the worst killers in society and, therefore, are not as deserving of death. The long delays[221] in carrying out the death penalty further undermine the retributive rationale for the death penalty.

The death penalty does, however, serve one penological purpose—incapacitation. A killer who is executed can no longer kill again. However, it is not necessary to execute the offender in order to prevent him from killing again. A sentence of life without parole is adequate if the goal is to protect society. As the Catholic Church acknowledges, the execution of a killer is not necessary for public safety: "As a result of steady improvements in the organization of the penal system, such cases [executions to protect society] are very rare, if prac-

217. *See* Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 783–84 (2010).

218. *See Arbitrariness*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/arbitrariness (last visited Jan. 17, 2017) [https://perma.cc/265G-2QQG] ("[L]ess than 2% of known murderers are sentenced to death.").

219. *See Gregg*, 428 U.S. at 183.

220. For example, Justice Breyer questioned the randomness of death penalty sentences meted out for various crimes in his *Glossip* dissent:

> I see discrepancies for which I can find no rational explanations . . . Why does one defendant who committed a single-victim murder receive the death penalty . . . while another defendant does not, despite having kidnapped, raped, and murdered a young mother while leaving her infant baby to die at the scene of the crime . . . For that matter, why does one defendant who participated in a single-victim murder-for-hire scheme (plus an after-the-fact robbery) receive the death penalty, while another defendant does not, despite having stabbed his wife 60 times and killed his 6-year-old daughter and 3-year-old son while they slept?

Glossip, 135 S. Ct. at 2763 (Breyer, J., dissenting).

221. *Id.* at 2769 ("[E]xecutions occur, on average, after nearly two decades on death row.").

tically nonexistent."[222] In light of this reality, the death penalty is the type of gratuitous punishment that the Eighth Amendment does not allow. The Court could use the fact that the death penalty fails to serve any penological purpose as grounds for holding the death penalty unconstitutional. The Court did just that in both *Roper v. Simmons*[223] (holding that the Eighth Amendment prohibited the execution of juveniles) and in *Atkins v. Virginia*[224] (holding that the Eighth Amendment prohibited the execution of intellectually disabled inmates).

The Eighth Amendment also prohibits excessive punishments. The Court has used its "evolving standards of decency" doctrine to determine whether certain punishments are excessive.[225] The "evolving standards of decency" doctrine is a recognition "that the words of the [Eighth] Amendment are not precise and their scope is not static."[226] According to the Court, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[227] In determining whether a particular punishment is in conflict with evolving standards of decency, the Court looks to whether there is objective evidence of a national consensus condemning the punishment.[228] In *Roper v. Simmons,*[229] the Court applied its evolving standards of decency doctrine and determined there was a national consensus against executing juveniles.[230] The Court pointed to several objective indicia of a national consensus against executing juveniles. First, the Court considered the fact that, at the time of its decision, thirty states prohibited the execution of juveniles.[231] Second, even in the twenty states that allowed juveniles to be executed, the practice was infrequent.[232] The Court also indicated that, in determining whether a national consensus existed, "[i]t is not so much the number of these States [that prohibit juvenile executions] that is significant, but the consistency of the direction of

222. Berg, *supra* note 104, at 42 (quoting Pope John Paul II).
223. Roper v Simmons, 543 U.S. 551 (2005).
224. Atkins v. Virginia, 536 U.S. 304 (2002).
225. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958).
226. *Id.* at 100–01.
227. *Id.* at 101.
228. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 592–93 (1977).
229. *Roper*, 543 U.S. 551.
230. *Id.* at 568.
231. *Id.* at 564.
232. *Id.* at 564–65.

change."[233] In this regard, the Court found significant the fact that no state had reinstated the death penalty for juveniles.[234]

The Court in *Roper* pointed to other evidence of the consensus against executing juveniles. The Court has long considered the opinions of the civilized nations of the world in determining whether a punishment comports with the evolving standards of decency.[235] In *Roper,* the Court pointed out "the stark reality that the United States is the only country in the world that continues to give official sanction of the juvenile death penalty."[236] The Court emphasized that the United Nations Convention on the Rights of the Child contained an express prohibition on capital punishment for crimes committed by juveniles under eighteen and that this Convention was further evidence of a broad international consensus against executing juveniles.[237]

The Court used similar evidence of a national consensus in holding that the Eighth Amendment prohibited the death penalty for intellectually disabled inmates.[238] At the time of its *Atkins* decision, there were also over thirty states that prohibited the death penalty for intellectually disabled inmates;[239] the movement was strongly in the direction away from allowing such executions;[240] the practice was rare;[241] and there was a consensus among professional and religious organizations that intellectually disabled inmates should not be executed.[242]

The Court's evolving standards of decency test could lead to the conclusion that the death penalty violates the Eighth Amendment. Although thirty-one states, the federal government, and the U.S. military still authorize the death penalty,[243] this figure is misleading. Four of these states have Governor-imposed moratoriums on executions.[244] Two other states and the U.S. military have not executed anyone dur-

233. *Id.* at 566.

234. *Id.*

235. *See e.g.*, Trop v. Dulles, 356 U.S. 86, 102–103 (1958) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.").

236. Roper v. Simmons, 543 U.S. 551, 575 (2005).

237. *Id.* at 576.

238. *See* Atkins v. Virginia, 536 U.S. 304, 313–16 (2002).

239. *See id.* at 313–315.

240. *Id.*

241. *Id.* at 316 ("Moreover, even in those States that allow the execution of [intellectually disabled] offenders, the practice is uncommon.").

242. *Id.* at 316, n. 21.

243. *See* States, DEATH PENALTY INFO. CTR., *supra* note 10.

244. *Id.*

ing the modern era of capital punishment.[245] Nine other states and the federal government have not carried out an execution in at least ten years.[246] Several other states have small death rows and the death penalty is rarely sought in these states.[247] Therefore, more than half of the states have either formally abolished the death penalty or have done so in practice.

Only a small number of states continue to sentence inmates to death and carry out executions.[248] However, even in these states, the use of the death penalty is in decline.[249] Furthermore, even in the small number of active death penalty states, death sentences are typically meted out in only a few counties within the state.[250] Most importantly, the Court in its recent Eighth Amendment decisions has deemphasized the sheer number of states that authorize a challenged practice and instead emphasized the direction of change.[251] The movement is clearly in the direction of abolition. Numerous states have abolished the death penalty during the last ten years.[252] Voters in California, however, refused to abolish the death penalty in the November 2016 election.[253] Despite this setback, the Court's criteria still definitively points toward abolition.

245. Kansas and New Hampshire have not executed a defendant since before 1976, despite having the death penalty available. *See* Jurisdictions with no recent executions, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions (last visited Jan. 17, 2017) [https://perma.cc/A3BE-SLJJ].

246. *Id.* (listing Arkansas, California, Colorado, Montana, Nevada, North Carolina, Oregon, Pennsylvania, and Wyoming).

247. Idaho, for example, currently has only nine death row inmates. Death Row Inmates by State, DEATH PENALTY INFO. CTR. (July 1, 2016), http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188 [https://perma.cc/R3V2-77XN].

248. The more active death penalty states include Texas, Florida, Missouri, Georgia, Oklahoma, Virginia, and California. While California continues to sentence a large number of inmates to death, it has not carried out an execution in more than ten years. For information on death sentences, *see By Year*, DEATH PENALTY INFORMATION CTR., *supra* note 4. For information on executions, see Executions by State, DEATH PENALTY INFORMATION CTR., *supra* note 71.

249. *See* Williams, *supra* note 6.

250. *See* Executions by County, DEATH PENALTY INFO. CTR. (Jan. 1, 2011) http://www.deathpenaltyinfo.org/executions-county [https://perma.cc/TZ6R-K99U] ("[Fifteen] counties accounted for 30% of the executions in the U.S. between 1976 and January 1, 2013.").

251. *See* Atkins v. Virginia, 536 U.S. 304, 315 (2002) ("It is not so much the number of these states that is significant, but the consistency of the direction of change.").

252. For information on states that have abolished the death penalty, *see* States, DEATH PENALTY INFO. CTR., *supra* note 10.

253. For analysis of the vote, *see* McPhate, *supra* note 10.

Additional objective evidence of the movement away from the death penalty is abundant. First, in striking down the death penalty for juveniles and intellectually disabled inmates, the Court emphasized the fact that the practices had become so rare.[254] As discussed earlier,[255] there has been a significant decline in death sentences over the last fifteen years.[256] Second, several respected professional and religious organizations support the abolition of the death penalty or imposing a moratorium on executions. Most notably, the American Law Institute has withdrawn the death penalty provision of the Model Penal Code.[257] Third, several former and present Justices have publicly called attention to the problems in the administration of the death penalty.[258] Fourth, in its Eighth Amendment decisions, the Court has considered the opinions of the international community with respect to a particular practice.[259] In this regard, most nations in the world community have abolished the death penalty either by law or in practice.[260] The United States' use of the death penalty has isolated it from the international community. For instance, many nations will not extradite criminal suspects to the United States without an assurance that the suspect will not be sentenced to death.[261] In addition, several nations have challenged the United States' attempt to execute their citizens.[262]

The Court has also indicated that although evidence of a national consensus is important, it does not wholly determine whether a particular practice violates the Eighth Amendment. Rather, the Court has stated that

254. *Atkins*, 536 U.S. at 316.

255. *See supra Part I.*

256. *See* By Year, DEATH PENALTY INFO. CTR., supra note 4.

257. *See* Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 359–360 (2010).

258. *See* Jeffries, *supra* note 64; Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting); Baze v. Rees, 553 U.S. 35, 81 (2008) (Stevens, J., concurring).

259. *See e.g.*, Roper v. Simmons, 543 U.S. 551, 575–76 (2005).

260. According to Amnesty International, approximately two thirds of the countries around the world have abolished the death penalty. *See* Death Sentences and Executions Report 2015, AMNESTY INT'L (Apr. 6, 2016), https://www.amnesty.org/en/what-we-do/death-penalty/ [https://perma.cc/SW5G-JEKX].

261. *See, e.g.*, Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (holding that United Kingdom could not extradite murder suspect to the United States because of death row phenomenon).

262. *See* Avena and Other Mexican Nationals (Mex. v. U. S.), Judgment, 2004 I.C.J. 1 (Mar. 31) (holding that United States violated international law by sentencing fifty-four Mexican nationals to death without providing them with notification of their rights to communicate with their consulates prior to trial).

> the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment . . . . Thus, in cases involving a consensus, our own judgment is 'brought to bear,' [citation omitted] by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.[263]

Given the risk of wrongful convictions and executions, the Court would have no reason to disagree with the public's movement away from capital punishment.

III. Objections to Abolition

Three major objections are likely to be made to the Supreme Court invalidating the death penalty. The first, and probably strongest, objection will be that the text of the Constitution allows the death penalty to be imposed.[264] As Justice Scalia argues, "[i]t is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*."[265] In support of his position, Justice Scalia specifically refers to the Fifth Amendment which provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury," and which also provides that no person shall be "deprived of life . . . without due process of law."[266] These two provisions in the Constitution, it will be argued, make it clear that the Framers did not intend to prohibit capital punishment when it enacted the Eighth Amendment. In Scalia's view of the Eighth Amendment, it was enacted only to prohibit those punishments that added "terror, pain, or disgrace" to an otherwise permissible capital sentence.[267]

There are a couple of major flaws in the argument that the death penalty is constitutional because of the Fifth Amendment. First, the Fifth Amendment does not confer power onto the state. Rather it limits the power of the state by requiring certain procedural safeguards. As Justice Brennan explained, the "amendment does not, after all, declare the right of the Congress to punish capitally shall be inviolable; it merely requires that when and if death is a possible punishment, the defendant shall enjoy certain procedural safeguards, such as indict-

263. Atkins v. Virginia, 536 U.S. 304, 312–13 (2002).

264. *See* Gregg v. Georgia, 428 U.S. 153, 177 (1976) ("It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.").

265. Glossip v. Gross, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., dissenting) (emphasis in original).

266. *Id.*

267. *Id.*

ment by grand jury and, of course, due process."[268] Second, those who use the Fifth Amendment to argue that the death penalty is constitutional fail to explain why it should trump the Eighth Amendment. For instance, the double jeopardy provision of the Fifth Amendment seems to contemplate the taking of limbs as punishment: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[269] Wouldn't the Eighth Amendment prohibit the taking of limbs even though it is contemplated in the Fifth Amendment?

How the Court resolves the issue of whether the text of the Constitution constrains it from abolishing the death penalty will also depend on whether a majority of the Court views the Constitution as a "living document" or whether a majority believes that strict adherence to the text of the Constitution is required.[270] Proponents of a "living constitution" believe that it "evolves, changes over time, and adapts to new circumstances, without being formally amended."[271] They believe that the world has changed in ways that the Framers could not have foreseen and therefore the Constitution cannot be restricted to the world that the Framers faced.[272] On the other hand, those who believe in strict adherence to the text of the Constitution, "originalists," believe that the text of the Constitution should be given the meaning that it bore when it was adopted.[273] According to originalists, the Constitution is supposed to be an embodiment of our most fundamental principles.[274] Public opinion, they say, will change but our basic constitutional principles must remain constant.[275] Otherwise, an originalist would ask, why have a Constitution at all?[276] An originalist believes that if the Constitution changes at all, it should be through the people by way of a constitutional amendment as the Constitution provides.[277]

The Supreme Court has confronted the issue of whether the Constitution is an evolving document and a majority of the Supreme

268. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 Harv. L. Rev. 313, 323–24 (1986).

269. U.S. Const. amend. V.

270. *See, e.g.*, David A. Strauss, The Living Constitution (2010), http://www.law.uchicago.edu/alumni/magazine/fall10/strauss [https://perma.cc/M4RZ-4L26].

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *See* Strauss, *supra* note 270.

277. *See* Justice Antonin Scalia, Remarks at Woodrow Wilson Int'l Ctr. for Scholars (Mar. 14, 2005), http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf [https://perma.cc/7MR7-ZXND].

Court has come down squarely on the "living constitution" side. The Court in *N.L.R.B. v. Noel Canning*,[278] in deciding the limits to the President's recess appointments power under the Constitution, declared that:

> The Founders knew they were writing a document designed to apply to ever-changing circumstances over centuries. After all, a Constitution is 'intended to endure for ages to come' and must adapt itself to a future that can only be 'seen dimly,' if at all. [citation omitted] We therefore think the Framers likely did intend the Clause to apply to a new circumstance that so clearly falls within its essential purposes, where doing so is consistent with the Clause's language.[279]

In other decisions, the Court has made clear that it believes that the interpretation of the Constitution should evolve over time.[280] For instance, the text of the Constitution does not address discrimination based on sexual orientation—an uncontemplated issue when the Fourteenth Amendment was enacted—yet the Court has decided that the Constitution protects the right of gays and lesbians to marry.[281]

There are other reasons for rejecting the Framers' view of the constitutionality of the death penalty. How the death penalty is administered today is very different from the death penalty that the Framers administered. There is no evidence to suggest that the Framers were aware that mistakes were being made in sentencing defendants to death. Today, we have been made well aware of the flaws in the administration of the death penalty. The Framers were also likely not aware of the arbitrary application of the death penalty. At common law, for instance, all felonies were punishable by death.[282] Today we are well aware that receiving the death penalty is about as arbitrary as being struck by lightning.[283] Furthermore, the Framers did not have to deal with the long delays in carrying out executions that typically

278. N.L.R.B. v. Noel Canning, 134 S. Ct. 2550 (2014).

279. *Id.* at 2564–65.

280. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (in deciding whether the Fourteenth Amendment requires states to permit same sex couples to marry the Court stated "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.").

281. *See id.* at 2628 (Scalia, J., dissenting) ("[I]t is unquestionable that the people who ratified [the Fourteenth Amendment] did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.").

282. *See* Woodson v. North Carolina, 428 U.S. 280, 289 (1976).

283. *See* Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual.").

occur today and the suffering that accompanies these long delays.[284] Finally, the death penalty was a widely acceptable practice around the world when the Constitution was enacted.[285] Presently, a majority of the international community no longer views the death penalty as an acceptable punishment.[286] Therefore, these changing circumstances warrant a different interpretation of the Eighth Amendment from that of the Framers. An interpretation by the Court that the Eighth Amendment now prohibits capital punishment would be consistent with the Amendment's essential purposes and text.

Justice Scalia articulated the second objection to the Supreme Court abolishing capital punishment. The death penalty is an issue that should be left to the American people to decide:

> The American people have determined that the good to be derived from capital punishment—in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes—outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.[287]

Thus, according to Justice Scalia, individual states should be free to decide whether to retain or abolish capital punishment and they should even have autonomy in carrying it out with almost no interference from the Court.

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284. *See* Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) ("Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades.").

285. *See, e.g.*, Stuart Banner, Death Penalty: An American History 5 (2002).

286. The vast majority of nations have abolished the death penalty. For a list of nations that have abolished the death penalty, see Abolitionist and Retentionist Countries, Death Penalty Info. Ctr. (Dec. 31, 2015), http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140 [https://perma.cc/F7LD-MT67] [hereinafter *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR.]. In addition, the death penalty is excluded from the punishments that the International Criminal Court may impose. (The International Criminal Court was established by a treaty in 1998). *See* Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 Or. L. Rev. 131, 143–144 (2002). Likewise, the International Criminal Tribunals for the former Yugoslavia and Rwanda, established by the United Nations Security Council, also excluded the death penalty. *Id.*

287. Kansas. v. Marsh, 548 U.S. 163, 199 (2006). *See also* Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (In discussing whether the Court should intervene in the debate over same sex marriage, Chief Justice Roberts stated in language that many would apply to a decision of the Court invalidating the death penalty "[i]t seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question.").

Justice Scalia's argument is flawed in that it is difficult to imagine any issue that needs to be regulated by the Supreme Court more than the death penalty. First, there is the long history of racial discrimination in capital sentencing that continues to this day.[288] Second, capital cases are often extremely emotional and may motivate vengeance-seeking behavior. It is often only the Court that is able to prevent mob rule and ensure a fair process in these emotionally-charged and often racially-tinged cases. Third, the defendants are an extremely unpopular minority who are not able to vindicate their rights through the political process, as the November 2016 vote in California rejecting abolition and supporting the "speeding up" of executions demonstrates.[289] Finally, according to Chief Justice Marshall, the Court has a "virtually unflagging obligation" to exercise the jurisdiction bestowed upon them by Congress and the Constitution.[290] The Eighth Amendment clearly mandates that the Court limit the types of punishment that the state can inflict upon individuals.

The final objection to the Court striking down the death penalty is to avoid a similar reaction when it found the death penalty as then applied to be unconstitutional in *Furman*. The *Furman* decision—striking down the death penalty—generated an enormous public backlash that unintentionally reinvigorated the death penalty, which had previously been on the decline.[291] The decision mobilized the pro-death penalty movement into a political force for the first time.[292] Within a few months of the decision, pro-death penalty activists campaigned in every state for reinstatement of the death penalty and were joined by police chiefs, state attorney generals, local district attorneys, and assorted politicians.[293] Within two years of the decision, thirty-five states had enacted new capital statutes.[294] The Supreme Court responded to the backlash by reinstating the death penalty four years later.[295]

288. *See generally* Steiker & Steiker, *supra* note 27.

289. *See* Jazmine Ulloa & Julie Westfall, California voters approve an effort to speed up the death penalty with Prop. 66, L.A. Times (Nov. 22, 2016), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-proposition-66-death-penalty-passes-1479869920-htmlstory.html [https://perma.cc/FRY9-72S7].

290. Stephen I. Vladeck, Why an aggressive Supreme Court is good for the separation of powers, Wash. Times (July 6, 2015) http://www.washingtontimes.com/news/2015/jul/6/celebrate-liberty-month-why-an-aggressive-supreme-/?page=all [https://perma.cc/435M-WMAP].

291. *See* David Garland, Peculiar Institution 230–34 (2010).

292. *Id.*

293. *Id.* at 232.

294. *Id.* at 233.

295. Gregg v. Georgia, 428 U.S. 153, 169 (1976).

Several factors suggest that the current Court would not face a similar backlash should it find the death penalty unconstitutional. First, prior to *Furman*, the Court had not issued any decisions regulating the death penalty. States had largely unfettered latitude in carrying out the death penalty. Since 1976, the Court has placed important limitations on capital punishment.[296] Therefore, the doctrinal framework is in place for the Court to strike down the death penalty. Furthermore, several members of the Court, both past and present, have been publicly critical of the death penalty[297] and alerted the public to the problems in the administration of the death penalty. Thus, a decision invalidating capital punishment would not be totally unexpected as it had been when the Court issued its holding in Furman.

Second, the politics of the death penalty have substantially changed. During the 1988 presidential campaign, Michael Dukakis' opposition to the death penalty was a major campaign issue.[298] By 2004, the politics of the issue had changed enough that the democratic nominee, John Kerry, was opposed to the death penalty, but his opposition did not make the death penalty a major issue in that campaign.[299] A good example of the reaction the Court may anticipate if it invalidated the death penalty occurred during the 2008 presidential campaign. In the summer of 2008, during the heart of the presidential campaign, the Court issued its decision invalidating the death pen-

296. For instance, the Court has held that juveniles and the intellectually disabled cannot be executed, *see* Roper v. Simmons, 543 U.S. 551 (2005) and Atkins v. Virginia, 536 U.S. 304, 321 (2002); that the death penalty cannot be meted out for crimes do not involve the taking of human life, *see* Coker v. Georgia, 433 U.S. 584, 600 (1977) and Kennedy v. Louisiana, 554 U.S. 407, 413 (2008); that capital defendants have a right to be sentenced by juries, *see* Ring v. Arizona, 536 U.S. 584, 609 (2002); and that the defendant has wide latitude in offering mitigating evidence to save his life, *see* Tennard v. Dretke, 542 U.S. 274, 285 (2004).

297. *See, e.g.*, Ring, 536 U.S. at 614–19 (Breyer, J., concurring) (discussing defects in prevailing capital practice); Kansas v. Marsh, 548 U.S. 163, 207–10 (2006) (Souter, J., dissenting) (arguing for a new capital jurisprudence in light of evidence of wrongful convictions); Baze v. Rees, 553 U.S. 35, 71 (2008) (Stevens, J., concurring) (questioning whether death penalty serves any useful social purpose); Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting) (announcing that he would no longer vote to allow an execution as a result of the Court's failed attempts to rectify problems in the administration of the death penalty).

298. *See* Samuel R. Gross & Phoebe C. Ellsworth, Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century, in Beyond Repair? America's Death Penalty 7, 42–43 (Stephen P. Garvey ed., 2003).

299. *See* Robert Moran, Kerry's Death Penalty Dance, Nat'l Review (March 9, 2004), http://www.nationalreview.com/article/209815/kerry-s-death-penalty-dance-robert-moran [https://perma.cc/7UXW-ZM4J].

alty for rape of a child.[300] Although both major presidential candidates disagreed with the decision, neither candidate made the decision an issue in the campaign.[301] The reaction of opponents to the decision was brief and the discussion quickly moved on to other issues. In recent years, even candidates running for office in states that have abolished the death penalty have not made capital punishment a major campaign issue.

Third, the international community is significantly more interconnected than it was at the time of the *Furman* decision in 1972. The international reaction to a Supreme Court decision striking down the death penalty would likely be well received. Given the fact that most countries in the world have outlawed the death penalty,[302] this decision would enhance the United States' international standing, and the favorable international reaction would likely have a similar downstream effect on American public opinion. Therefore, there is considerably less risk of public outcry today than there was in 1972 should the death penalty be struck down on constitutional grounds.

Conclusion

In 1963, Justice Goldberg wrote a dissent urging the Court to grant certiorari in order to decide whether the death penalty violated the Eighth Amendment.[303] He started a conversation which, nine years later, led to the Court determining that it did in fact violate the Constitution. Hopefully Justice Breyer's dissent has similarly started the much-needed conversation about whether the death penalty remains a constitutional practice. As this article has discussed, many of the problems that the Court believed would be eliminated—or at least minimized—when it began to regulate the death penalty have remained and, in some instances, been exacerbated: disparate racial application, arbitrariness, the risk of executing innocent individuals, the problem of ineffective assistance of counsel. The Court should allow these serious deficiencies to continue no longer. Almost every attempt to reform the death penalty has failed. Rather than continue the failed attempt to reform the death penalty, the Court needs to seri-

300. *See* Kennedy, 554 U.S. at 412–413.

301. *See* Linda Greenhouse, Justices Bar Death Penalty for the Rape of a Child, N.Y. TIMES (June 26, 2008), http://www.nytimes.com/2008/06/26/washington/26scotus.html?pagewanted=all [https://perma.cc/L9MD-9HP5].

302. See *Abolitionist and Retentionist Countries*, Death Penalty Info. Ctr., *supra* note 284.

303. *See* Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari).

ously consider abolition as the only logical alternative. This article provides the doctrinal basis for doing so.

Comments

Executive Orders, Title VII & LGBT Employees: Making The Case for Further Unilateral Action

By Ryan J. Blackney*

EXECUTIVE ORDERS are a historically rich phenomenon and extend as far back as George Washington.[1] While executive orders are not expressly enumerated under the Constitution, the chief executive has traditionally relied on them for a variety of purposes.[2] Since 1789, American presidents have used executive orders in some form to implement foreign policy and to aid federal administrative agencies in discharging their inherent duties.[3] Perhaps the most well known executive order was President Abraham Lincoln's Emancipation Proclamation, which effectively outlawed slavery on September 22, 1862.[4]

Over time, presidents have contributed to the transformative and flexible nature of executive orders. In the burgeoning years of the United States, executive orders were merely interpretive in purpose. However, such narrow use did not last for long. American Presidents from Abraham Lincoln to Franklin Roosevelt vastly transformed the nature of executive orders.[5] Their presidencies were critically unique because they occurred during times of great social inequality. During these periods, executive orders began to take on many legislative characteristics because of the wider prevalence of social inequities.[6] In

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1. John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 Vt. L. Rev. 333, 338 (2011).
2. *Id.* at 334–36.
3. *Id.* at 338.
4. *Id.* at 340.
5. *Id.* at 339–40.
6. *Id.*

fact, in the nation's most challenging times, executive orders have been an indispensable tool to effectuate social change during times of economic and racial strife.[7] For example, President Franklin Roosevelt guided our country through the Great Depression and World War II. During his presidency he issued an astonishing 3,723 executive orders.[8] Moreover, some of President Franklin's executive orders even created critically important governmental agencies such as the National Labor Board and War Powers Board.[9] In the first half of the Twentieth Century, presidents started to view executive orders as potential change agents to bring about sweeping social reforms.[10]

Indeed, the political mechanism known as the "executive order" has been used throughout American history to implement policy changes and clarify law in many contexts. Executive actions have historically been used in the context of civil rights and, specifically, in the area of employment rights. In carrying on this tradition, in July 2014, President Barack Obama extended public sector employment protections to prohibit discrimination based on sexual orientation and gender identity.[11] However, while advocacy groups perceived this executive action as a victory for LGBT employees,[12] President Obama's Executive Order 13672 merely maintains discrimination against LGBT employees in much of the private sector and thereby allows much of the LGBT-based employment discrimination to continue unabated. In any event, a historical and constitutional analysis suggests that political leadership and executive enforcement powers can lawfully converge, in order to use the president's inherent unilateral powers to issue an executive order that extends Title VII liability to include sexual orientation and gender identity protections in the private sector. Such an order would serve Title VII's larger goals of smoking out employment discrimination and ensuring equal employment opportunities regardless of an employee's immutable characteristics.

In offering a protective and effective solution for all LGBT employees, this Comment proceeds in four parts. Part I will provide a comprehensive introduction to the reasons why the LGBT community

7. *Id.* at 344.
8. *Id.* at 339–40.
9. *Id.*
10. *Id.* at 343.
11. *With Executive Order, Obama Takes His Place in History*, HUMAN RIGHTS CAMPAIGN (July 21, 2014), http://www.hrc.org/blog/with-executive-order-obama-takes-his-place-in-history [https://perma.cc/8W6V-AZPX].
12. *Id.*

continues to suffer private sector employment discrimination. Part II of this essay will provide a detailed constitutional background to executive orders. As such, Part II will explore what an executive order is, how the president derives such unilateral power to exercise this executive authority, and how executive orders have shaped civil rights in the employment context starting in the 1940s. Part III proposes a commonsense solution for the president to use an executive order to provide equal employment protections to LGBT employees in the private sector. This Comment will conclude in Part IV by highlighting the reasons why an executive order is the best way to solve the inequity problem and why this common sense solution is the most effective, rational, and quickest way to render Title VII equality to all LGBT employees.

I. The Problem

To understand the critical importance of extending LGBT-based protections to all employees under Title VII, one must first understand the three approaches that have failed to provide these protections and how together these failures have created employment discrimination problems for LGBT employees in the private sector. Specifically, these three distinctly identifiable causes operate at the federal level and have undoubtedly contributed to the problem in their own unique fashion. These three causes need to be unpacked and examined in order to illustrate the legal and political underpinnings of the problem.[13]

13. Additionally, the current patchwork of state non-discrimination laws undoubtedly exacerbates the problem discussed in Part I. However, Part I of this essay focuses solely on the federal causes that created the current levels of LGBT-based discrimination in the private sector. There should also be awareness that the political and legal ambivalence towards LGBT-based employment protections has emboldened conservative states to pass anti-gay legislative measures. *Compare Non-Discrimination Laws: State-by-State Information—Map*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/non-discrimination-laws-state-state-information-map (last visited Feb., 2017) [https://perma.cc/LJZ9-KGFX], *with Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Feb., 2017) [https://perma.cc/2B3N-U3W7], *and* Jeff Guo, *That anti-gay bill in Arkansas actually became law today. Why couldn't activists stop it?*, WASH. POST (Feb. 23, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/02/23/that-anti-gay-bill-in-arkansas-actually-became-law-today-why-couldnt-activists-stop-it/ (illustrating Arkansas anti-gay law passed in February 2015) [https://perma.cc/C8JD-8PKQ].

A. Title VII Fails to Expressly Provide LGBT Protections

The first cause that can be attributed to the absence of full employment discrimination protections for the LGBT community is evidenced by the fact that federal courts have been reluctant to extend full protection to suits involving claims of sexual orientation or gender identity discrimination. This judicial phenomenon can be directly traced to the plain language of Title VII.[14] The statute expressly provides that any discrimination "because of such individual's race, color, religion, sex, or national origin" is prohibited.[15] Thus, because the statute does not explicitly provide for sexual orientation or gender identity protections on its face, judges are hesitant to find broader interpretations. Because the plain language of Title VII merely bars "sex discrimination," a majority of courts hold that it does not prohibit employment discrimination on account of sexual orientation or gender identity. As such, this phenomenon is the main reason why most federal courts are reluctant to engage in progressive statute reading to assist LGBT plaintiffs.

While Title VII's prohibitions do not explicitly encompass gender identity or sexual orientation, the Supreme Court disregarded that notion in its landmark decision in *Price Waterhouse v. Hopkins*.[16] In *Price Waterhouse*, the respondent Ann Hopkins was a senior manager at the petitioner's accounting firm.[17] In 1982 she was proposed for partner.[18] Initially, while Hopkins was not denied nor granted partner, her partnership decision was put on hold for reconsideration the following year. Ultimately, the firm denied her the position.[19] Hopkins brought suit under Title VII alleging sex discrimination because during her tenure she was subject to numerous forms of gender stereotyping.[20] She also alleged that comments made on account of her gender motivated the firm's decision to deny her partnership promotion.[21]

In affirming the lower courts' findings in favor of Ann Hopkins, the plurality held that "for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with

14. *See* The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2015).
15. *Id.*
16. Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989).
17. *Id.* at 231.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 235.

their group."[22] Whether one considers Ann Hopkins's sex as the "but-for" cause of her denial is irrelevant. The Court held that whenever employers consider sex as a factor in employment decisions, those decisions violate the plain language of Title VII.[23] Reasonable logic would conclude that gender stereotyping is just another way to describe discrimination based on someone's sexual orientation, gender identity, or maybe both.

Furthermore, lower court readings of Title VII post-*Price Waterhouse* suggest hesitancy and confusion in application of the proper legal standard involving claims of gender stereotypes. To be clear, federal courts post-*Price Waterhouse* still rely on very narrow statutory interpretations to act as the gatekeeper to exclude the majority of LGBT-type claims.[24] Professor Brian Soucek has written extensively on this LGBT-based phenomenon under Title VII.[25] Soucek notes that, "[o]n the one hand, beliefs about sexuality often, if not always, involve gender stereotypes regarding who men and women should be attracted to."[26] Yet, federal courts are often wary of being regarded as judicial legislators and therefore discharge their duties quite cautiously. For those claims that lie outside traditional notions of sex stereotyping, federal courts usually deny Title VII protections to litigants seeking to prevail on claims of sexual orientation or gender discrimination.[27]

Many cases illustrate the hesitancy and tension on the part of federal courts to apply broader interpretations of Title VII's "sex" prong. One case that illustrates such judicial refusal is *Dawson v. Bumble & Bumble*.[28] In *Dawson*, the plaintiff tried to adhere to a theory of Title VII protection due to her failure to "comply with socially accepted gender roles" and as such she argued that she was a member of a protected class under the statutory scheme.[29] The Second Circuit expressly rejected such a broad reading of *Price Waterhouse*[30] and held

22. *Id.* at 251.

23. *Id.* at 240.

24. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough For Title VII*, 63 AM. U. L. REV. 715, 717 (2014).

25. *Id.*

26. *Id.* at 731.

27. *Id.*

28. Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005).

29. *Id.*

30. *See generally id.* (reinforcing the notion of the unwillingness of courts to extend Title VII past its statutory text); *but see, e.g.*, *Price Waterhouse*, 490 U.S. at 251 (Justice Brennan writing for the Court noted that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

that homosexual plaintiffs cannot "bootstrap" coverage for sexual orientation into Title VII.[31] Thus, such narrow readings of Title VII often leave LGBT-based employment discrimination claims without legal redress.

Nonetheless, a few brave federal judges have been courageous enough to extend full Title VII protections to the LGBT community. In a case where the EEOC brought a Title VII action on behalf of a gay ironworker, the traditionally conservative Fifth Circuit expressly followed the Supreme Court's precedent in *Price Waterhouse*.[32] In *EEOC v. Boh Bros. Construction Co.*, the employer hired the plaintiff Woods to work on bridge reconstruction after Hurricane Katrina in late 2005.[33] The EEOC decided to bring a hostile workplace claim on behalf of Woods. The Commission alleged that the plaintiff was subjected to severe and pejorative treatment at the hands of fellow construction workers that included vulgar language and same-sex harassment.[34] Co-workers mocked Woods for his alleged use of WetOnes instead of toilet paper, perceiving this behavior as undeniably feminine.[35] One of his harassers even approached the plaintiff from behind and simulated intercourse with him.[36]

Affirming the district court's findings in favor of Woods, the Fifth Circuit held that "a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping."[37] Thus, the Fifth Circuit held that the EEOC may rely on evidence that Woods' supervisor viewed him "as insufficiently masculine to prove its Title VII claim."[38] However, the outcome reached in *Boh Bros.* is unfortunately an outlier and uncommon in Title VII jurisprudence. As previously noted, most federal courts adhere to a rather restrictive and straightforward interpretation of Title VII. However, society's current perceptions of homosexuals and workplace discrimination tend to suggest that the application of Title VII in *Boh Bros.* was the correct outcome.

In determining the legal underpinnings for broader social justice, it is imperative that the federal trial courts and appellate courts take doctrinal hints from the Supreme Court. Yet, that philosophy has not been legally or politically prescient. Even the liberal Ninth Circuit

31. *Id.*
32. EEOC v. Boh Bros. Constr. Co., L.L.C., 731 F.3d 444, 456 (5th Cir. 2013).
33. *Id.* at 449.
34. *Id.*
35. *Id.* at 450.
36. *Id.* at 449.
37. *Id.* at 456.
38. *Id.*

has refused such broad readings of Title VII. In *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, three gay men filed a suit alleging workplace discrimination based on their homosexuality; the court applied a narrow reading of Title VII and held that "Congress had only the traditional notions of 'sex' in mind" when it codified the law.[39] Therefore, because gay and lesbian plaintiffs suffering anti-gay discrimination in the workplace based on their effeminacy, homosexuality, or trans-sexuality do not comport with traditional notions of sex stereotyping, their claims do not "fall within the purview of Title VII."[40]

Thus, many deserving LGBT plaintiffs who are victims of sex discrimination are barred from Title VII protections in federal court. This narrow judicial approach is inherently unfair because courts that deny such coverage refuse to step outside the box and consider alternative theories to ensure equal Title VII protections for both genders regardless of sexual orientation. In essence, such a narrow reading of Title VII by federal courts does nothing more than indirectly promote deeply entrenched homophobia and bare animus against members of the LGBT community in private workplaces.

B. Congressional Inaction With Their Failure to Pass Comprehensive Non-Discrimination Legislation

The second contributing factor to unequal LGBT-based employment protections is Congress' failure to progressively amend Title VII. By 2007, Congress considered two versions of the Employment Non-Discrimination Act ("ENDA").[41] The original ENDA bill would have prohibited employment discrimination based on sexual orientation and gender identity under Title VII.[42] After House leaders felt that there would not be enough bipartisan support to pass the original version that covered transgender persons, a second version of ENDA was introduced that extended coverage to sexual orientation.[43] Since 2007, several variations of ENDA managed to pass only through one house of Congress. In November 2013, the Senate passed a version of ENDA (S. 815) but the House failed to pass the measure.[44] The federal legislature, which is often idealized throughout primary school

39. DeSantis v. Pacific Telephone & Telegraph Co., Inc., 608 F.2d 327, 329-30 (9th Cir. 1979).

40. *Id.* at 332.

41. Stephanie Rotondo, *Employment Discrimination Against LGBT Persons*, 16 GEO. J. GENDER & L. 103, 137 (2015).

42. *Id.*

43. *Id.*

44. *Id.* at 138.

curricula as voices for the people, continuously fails to heed the voices of their constituents that ask for equal LGBT-based employment protections on the federal level.

Various advocacy groups continue to call for strategic bipartisan legislation to afford equal employment protections for all LGBT employees under federal law.[45] However, the current state of congressional ambivalence surrounding LGBT rights highlights the struggle and tension the LGBT community must face until an effective solution is reached. It is imperative during this time of congressional uncertainty that the Executive Branch exercise its inherent leadership powers in order to focus the national conversation on the plight of LGBT employees in America's workspaces.

C. President Obama's Executive Order Excludes Most LGBT Employees From Discrimination Protections

A third cause of insufficient LGBT employee protections is Executive Order 13672. On July 21, 2014, President Obama issued this order, which extended public sector and government contract employment discrimination protections to include both sexual orientation and gender identity.[46] Although this order was perceived as a victory for the LGBT community, it provides private sector LGBT protections insofar as LGBT employees may become subject to federal government contracts. Thus, even though Executive Order 13672 helped to shed light on the need for employment discrimination protections across the board under Title VII, many members of the LGBT community continue to face discrimination in private sector workplaces.[47]

This shortcoming certainly leaves much to be desired, especially considering that almost five percent of the national workforce consists of people who identify as gay, lesbian, transgender, or bisexual.[48] Because it only narrowly amended Executive Order 11246 as to federal

45. *Id.*

46. Exec. Order No. 13672, 79 Fed.Reg. 141, 42971 (July 23, 2014).

47. Ian Johnson, *America's 10 Worst LGBT Work Insults*, HUFFINGTONPOST.COM (Oct. 28, 2014), http://www.huffingtonpost.com/ianjohnson/americas-ten-worst-lgbt-w_b_6054808.html [https://perma.cc/CL6X-77DG].

48. Christy Mallory & Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Kansas*, UCLA WILLIAMS INSTITUTE (Sept. 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Kansas-ND-September-2015.pdf [https://perma.cc/PJH6-LPQ5].

contractors,[49] Executive Order 13672 is another critical reason why the LGBT community continues to suffer from widespread employment discrimination in the private sector. Such limited executive orders also tend to complicate matters for lawmakers because they fail to send the right political signals to precipitate further legislative protections, and they further entrench political divisiveness.[50]

II. Background to Executive Orders: Historical, Constitutional, & Case Law Perspectives

To understand the ability of the President to issue executive orders that ensure equal LGBT employment protections under existing statutory framework, one must first examine the constitutional underpinnings that allow the President to issue such executive orders. Many scholars disagree as to the precise constitutional provision that provides the executive with the express authority to announce policy changes that wield the full force and effect of legislative actions. Executive orders are quasi-legislative in nature and cover a vast array of topics such as public lands, mineral reserves, civil rights, emergency economic situations, and removal of federal employees.[51] Presidents and litigators often look to the Constitution to locate the exact provision that provides the power for executive orders.[52]

A. What Is An Executive Order and Where Does This Power Come From?

The president in part derives the power to issue executive orders from several places in the Constitution.[53] Because many executive orders deal with military matters, scholars also look to the constitutional power assigned to the president as Commander-in-Chief as the authority for executive orders issued during war.[54] Other clauses in the Constitution that arguably support "executive legislation" during

49. David Hudson, *President Obama Signs a New Executive Order to Protect LGBT Workers*, WHITEHOUSE.GOV (July 21, 2014), https://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers [https://perma.cc/7W8Y-5KX8].

50. Chris Johnson, *Rubio pledges to reverse Obama's LGBT executive order*, WASHINGTON-BLADE, (Dec. 6, 2015), http://www.washingtonblade.com/2015/12/06/rubio-pledges-to-reverse-obamas-lgbt-executive-order/ [https://perma.cc/WS3T-9T7D].

51. Duncan, *supra* note 1, at 343, 345–49.

52. *Id.* at 366–67.

53. John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 841 (1981).

54. *Id.* at 839–40.

peacetime are quite vague in regard to providing the president with explicit unilateral legislative power. This ambiguity results in disputes about the permissible scope and nature of unilateral executive actions.[55]

Generally speaking, Article II of the Constitution sets forth the contours and fundamental responsibilities of the president within the Executive Branch.[56] A logical starting point in understanding the constitutional source for executive orders begins with Article II, section three of the Constitution.[57] Here, the Constitution expressly provides that the executive "shall take Care that the Laws be faithfully executed."[58] While the Constitution delegates to Congress the inherent responsibility to make laws, the separation of powers doctrine assures laws are properly interpreted by the Judiciary and enforced by the Executive Branch.[59] Within this framework, the president acting as the chief administrator is charged by the Constitution to effectuate equal governance and execution of the laws passed by Congress.[60] Another key inquiry surrounding executive orders is the Supreme Court's interpretation of the executive's inherent constitutional and statutory powers to make unilateral policy decisions. The Supreme Court's answer to the aforementioned query has produced two co-existent rules that are used to interpret the legality of executive orders.

B. Supreme Court Precedent Defines Constitutionality of Executive Orders

To help interpret the constitutional boundaries of executive orders, the Supreme Court articulated two guideposts — the doctrine of congressional acquiescence and the theory of statutory outer limits — that help define the scope and limitations on unilateral presidential actions. As the use of executive orders expanded over time, it was inevitable that the Supreme Court needed to interpret the constitutional limits of the Executive Branch.

55. *See id.*; *see also* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 2 (2002) (arguing that the increased use of executive orders and other presidential directives is a fundamental problem in modern-day America).

56. Noyes, *supra* note 53, at 842.

57. *Id.*

58. U.S. CONST. art. II, § 3.

59. Noyes, *supra* note 53, at 841–46.

60. *Id.* at 841–42.

1. The Doctrine of Congressional Acquiescence

Over many decades the doctrine of congressional acquiescence has become an important foundational pillar for executive authority.[61] In *United States v. Midwest Oil Co.*, the Supreme Court expressly found in favor of the government under the congressional acquiescence doctrine.[62] In *Midwest Oil Co.*, the challenged provision was an executive order that reserved oil-rich lands for public use and preservation, which previously were set aside for private purchase by an act of Congress.[63] These lands were highly attractive for private exploitation because they contained oil and other precious minerals.[64] Before the challenged executive order was issued, congressionally earmarked lands were purchased and exploited so quickly in locations such as California that the Director of the Geological Survey informed the Secretary of the Interior that the public would soon cease to own any petroleum-laden lands.[65] Upon recommendation from the Secretary of the Interior, President Taft issued an "executive proclamation."[66] On September 27, 1909 President Taft issued an order that aimed to prevent further private exploitation of public lands.[67] President Taft's proclamation was entitled "Temporary Petroleum Withdrawal No. 5," and it expressly directed a list of publicly owned lands to be withdrawn from the 1897 legislation.[68]

Six months after the proclamation, the predecessors in interest to the respondents moved onto public land in Wyoming with the purpose of oil exploration.[69] In response to the land grab, the United States Attorney in Wyoming filed a complaint in district court that asked for the return of the land deed to the United States and requested damages worth 50,000 barrels of oil that were unlawfully exploited after President Taft's order.[70] The district court granted the oil company's motion to dismiss and the Government appealed the

61. Duncan, *supra* note 1, at 374.

62. United States v. Midwest Oil Co., 236 U.S. 459, 465 (1915).

63. *Id.*

64. *Id.* at 467.

65. Here, this executive order is referred to as a "proclamation" because it predates the point at which the government numbered and published executive orders in the Federal Register.

66. *Midwest Oil*, 236 U.S. at 468.

67. *Id.*

68. *Id.*

69. *Id.* at 467.

70. *Id.* at 467–68.

case to the Eighth Circuit, which certified the questions to the Supreme Court.[71]

The oil company challenged the validity of President Taft's withdrawal order before the Supreme Court.[72] The Government argued that the President was well within his constitutional power to "withdraw, in the public interest, any public land from entry or location by private parties."[73] In opposition, the oil company argued that "there is no dispensing power in the Executive, and that he could not suspend a statute or withdraw from entry or location any land which Congress had affirmatively declared should be free and open to acquisition by citizens of the United States."[74]

The Supreme Court did not make a legal determination as to whether "the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase" but only felt compelled to consider the legal consequences that flowed "from a long-continued practice to make orders like the one here involved."[75] The Court focused on the fact that before 1910 there were over 200 executive orders issued by American presidents that reserved government owned lands for public use.[76] The Court also focused on the fact that these orders were issued without any express or implied approval by Congress.[77]

Most importantly, the Court acknowledged that Congress had quietly "acquiesced" to 252 executive orders regarding land use prior to 1910.[78] The most salient portion of the Court's opinion stipulated that "[b]oth officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice."[79] The Court recognized that because the oft-repeated use of executive orders to effectuate change that touched third parties was persistent for so long, these executive orders were to be treated as *de facto* legislation able to withstand legal challenges at the highest level.

71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 469.
76. *Id.*
77. *Id.* at 470–71.
78. *Id.* at 471.
79. *Id.* at 472–73.

While the Ninth Circuit questioned the central holding of *Midwest Oil Co.*,[80] no federal court decision has overturned the notion that unchecked executive orders are presumed to have the full force and effect of the law absent a determination to the contrary. The decision in *Midwest Oil Co.* indicates that executive orders are to be presumed lawful, even though such power may be subject to investigation.[81] Executive orders supported by statute or the Constitution that are unscathed by the legislature and the courts should be treated as law.[82] Therefore, by executive order, the President has inherent unilateral power to use the executive's role to set national policies as long as these policies adhere to the separation of powers doctrine.

2. Statutory Limits On Executive Power

Although the Constitution affords the President and the Executive Branch tremendous latitude in the enforcement decisions of legislative actions, the Supreme Court has overturned executive orders that run afoul of established statutory parameters.[83] In fact, the Supreme Court has overturned executive orders only twice.[84] In *Youngstown Sheet & Tube Co. v. Sawyer*,[85] the Supreme Court considered the constitutionality of Executive Order No. 10340 which directed the Secretary of Commerce to seize the nation's steel mills in order to ensure that a national labor strike would not impede the flow of armaments for the Korean War effort.[86] The government argued that President Truman used his combined constitutional powers as Chief Executive and Commander-in-Chief to avoid a national disaster due to an inevitable stop in steel production.[87] In opposition, the steel mills argued that President Truman's directive was actually executive lawmaking, and this type of conduct undoubtedly exceeded his constitutional bounds.[88]

In *Youngstown*, the Court acknowledged that President's Truman's power to issue such a sweeping directive must "stem either from

80. United States v. Woodley, 726 F.2d 1328, 1338 (9th Cir. 1983) (calling into question the central holding of *Midwest Oil*, that historical acceptance and governmental efficiency will not save a practice if it is contrary to the Constitution).

81. *Midwest Oil*, 236 U.S. at 473 (if the Constitution leaves a question of power in doubt, "contemporaneous and continuous subsequent practical construction" is decisive).

82. Noyes, *supra* note 53, at 841–42.

83. Duncan, *supra* note 1, at 337.

84. *Id.*

85. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

86. *Id.* at 582–84.

87. *Id.* at 582.

88. *Id.*

an act of Congress or from the Constitution itself."[89] President Truman had two statutory provisions to order government takings under certain conditions, but the government conceded that these conditions were not satisfied before President Truman directed the seizures.[90] Furthermore, with the passage of the Taft-Hartley Act[91] (Labor-Management Relations Act) in 1947, Congress explicitly preempted governmental seizures as a lawful method to resolve labor-based disputes.[92] Thus, President Truman not only lacked explicit authorization from Congress to direct seizure of the nation's steel mills, but his decision undoubtedly acted in direct contradiction to federal labor law.[93]

Because President Truman's action was constitutionally and statutorily perverse, the Supreme Court had no other choice but to strike down the order. The steel mills clearly had the superior arguments and the superior position in the litigation surrounding President Truman's executive order. Not only did his decision run afoul of laws enacted by Congress, his decision also directly undermined his inherent duty expressly charged by the Constitution to ensure that the laws be "faithfully executed."[94] Thus, any executive order that attempts to usurp the executive's power to overstep the traditional statutory boundaries established by Congress is unconstitutional.[95] The *Youngstown* decision certainly helped to define the executive's role within the separation of powers framework and signaled that zealously issued presidential directives that exceed established statutory and constitutionally assigned duties may be ripe for *vacatur* when challenged.[96]

The second case in Supreme Court jurisprudence to overturn an executive order involved a dispute between employer associations and the government in regard to a replacement worker and strike provision contained within the National Labor Relations Act ("NLRA").[97] In *Chamber of Commerce v. Reich*, several employer associations challenged President Clinton's Executive Order No. 12954, which precluded the government from contracting with third-parties who hired

89. *Id.* at 585.
90. *Id.* at 585–86.
91. *See generally*, 29 U.S.C. § 141 (2015).
92. *Youngstown,* 343 U.S. at 586.
93. *Id.* at 585–86.
94. U.S. CONST. art. II, § 3.
95. *See* Duncan, *supra* note 1, at 376.
96. *Youngstown*, 343 U.S. at 586–89.
97. Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) [hereinafter "Reich"].

full-time replacement workers during lawful labor strikes.[98] The associations argued that President Clinton's executive order not only exceeded his constitutional powers, but it also expressly contradicted provisions of the NLRA.[99] The government argued that despite the strong NLRA arguments on the merits, federal courts did not have jurisdiction to review President Clinton's executive order.[100]

In reaching its decision, the Supreme Court focused on the undeniable tension between the President's executive order and the NLRA.[101] The Court expressly held that the President may make broad policy determinations that fall within his inherent powers under the Procurement Act[102] that "deal with government contractors' employment practices—policy views that are directed beyond the immediate quality and price of goods and services purchased."[103] Yet, the Court held that the President does not have authority to issue executive orders that are expressly pre-empted by the NLRA and would effectively supplant Congress' express power to legislate laws that impact organized labor and related employment considerations.[104]

The *Youngstown* and *Reich* cases were exceptional decisions because federal courts traditionally interpret executive orders under a strong presumption of validity.[105] Federal courts, including the Supreme Court, have traditionally given deference to a president's authority to issue executive orders.[106] As such, the Supreme Court has only been willing to overturn remarkably few executive orders that run contrary to legislative schemes or that upset traditional limits on executive's power as outlined in the Constitution.[107] Thus, federal courts operate under a separation of powers assumption that the president's actions are inherently aligned with congressional intent unless contradicted by express statutory language brought under a legal challenge.[108]

When combined with the doctrinal rules from the above-discussed cases, the separation of powers rubric held by the Supreme Court suggests that the president wields a maximum amount of execu-

98. *Id.* at 1324.
99. *Id.* at 1325; *see also* 29 U.S.C. § 151 et seq. (2015).
100. *Id.* at 1325–26.
101. *Id.* at 1333.
102. *See* 40 U.S.C. § 486(a) (2015).
103. *Reich*, 74 F.3d at 1337.
104. *Id.* at 1337–39.
105. *See* Duncan, *supra* note 1, at 365.
106. *Id.* at 376.
107. *Id.* at 337.
108. *Id.* at 364–65, 376.

tive order authority when Congress delegates the Executive Branch a quasi-explicit framework within which to issue "presidential legislation." The Supreme Court affords the broadest deference to executive orders that complement existing legislative provisions.[109] At other times, the President's executive order power is most restricted when it only stands on constitutional authority without statutory support or congressionally delegated approval.[110] In any event, the President's political leadership and executive enforcement powers may lawfully converge in order to use the executive's inherent unilateral powers to issue executive orders that clarify legal protections and announce enforcement decisions that fall within the "zone of interests" of already existent federal statutory schemes.[111] As the relevant case law suggests, as long as the questioned executive order does not run afoul of established statutory provisions, Congress always has an opportunity to rebut the presumption of legality by legislative action.[112] Otherwise, congressional acquiescence suggests that the executive's decision is implicitly ratified through temporal legislative inaction.[113]

Challenges to presidential orders may only be upheld if it is unreasonable and illogical to construct a reasonable interpretation of the relevant statute that complements the executive order in question.[114] The notion of reasonableness often aggregates with the doctrine of non-justiciability[115] to guide judicial interpretations of executive orders. Such deferential interpretive practices by federal courts produce a distinct legal phenomenon, which may be correctly characterized as a judicial "hands-off" approach towards executive order scrutiny.[116] Additionally, congressional acquiescence further affords broad deference to questionable executive orders.[117] In contrast to the executive orders challenged in *Youngstown* and *Reich*, executive orders that seemingly contradict legislative decisions have been upheld under the doctrine of congressional acquiescence.[118] Similar to

109. *See generally id.* at 348.

110. *Id.* at 348–49, 363.

111. *Id.* at 334.

112. *Id.* at 369.

113. *Id.* at 367, 375.

114. *Id.* at 376.

115. Simply, a doctrine of judicial restraint that the limited jurisdictional powers of federal courts should not be wasted on adjudicating "political" questions that should be left to the political branches of government to decide.

116. *See* Duncan, *supra* note 1, at 376; *cf.* Justice Frankfurter's concurrence in *Youngstown*, 343 U.S. at 589.

117. *See* Duncan, *supra* note 1, at 363.

118. *Id.* at 374.

the affirmative defense of laches,[119] congressional acquiescence acts as a type of tacit approval that gives legal effect to executive orders that otherwise may be challenged in a court of law. In the employment context, a long history of executive orders that extended equal employment rights to private employees harkens back to President Franklin Roosevelt.[120]

C. Executive Orders Covering Civil Rights in "Employment" & Notable Legal Challenges

In the 1930s and 1940s, a socio-political and activist leadership coalition headed by President Roosevelt put in place an effective prototype to Title VII.[121] During this time, African-American groups protested the segregated defense industries.[122] In response to these demonstrations, federal personnel agencies sent letters to defense contractors that asked them to eliminate discriminatory employment practices.[123] Additionally, civil rights activists planned a march on Washington, D.C., to bring public attention to the employment plight of African-Americans involved in the war effort.[124] President Roosevelt gave in to their demands and issued Executive Order 8802.[125] Supporters remarked that it was the most significant document since the Emancipation Proclamation.[126] Executive Order 8802 created the Fair Employment Practices Committee ("FEPC").[127]

As a civil rights effort initiated by President Roosevelt and Executive Order 8802, the FEPC attempted to smoke out employment discrimination in the private sector by holding hearings on the status of discrimination in each major geographical region throughout the nation.[128] However, the FEPC came under political opposition, lacked financial resources, and suffered numerous key leadership resigna-

119. Deirdre R. Wheatley-Liss, *Doctrine of Laches means you are "Out of Time"*, LexisNexis, (Jan. 26, 2012), http://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/archive/2012/01/26/doctrine-of-laches-means-you-are-quot-out-of-time-quot.aspx [https://perma.cc/CK8E-WNKA].

120. Maria L. Ontiveros, *The Fundamental Nature of Title VII*, 75 Ohio St. L.J. 1165, 1178 (2014).

121. *Id.*

122. *Id.*

123. *Id.* at 1178–79.

124. *Id.* at 1179.

125. *Id.*

126. *Id.*

127. *Id.* at 1179; *see also* Exec. Order No. 8802, 6 Fed. Reg. 3109 (2015).

128. Ontiveros, *supra* note 120, at 1180.

tions.[129] Fearing that the FEPC was ineffective due to the political climate, President Roosevelt issued Executive Order No. 9346 that reinvigorated the FEPC by reestablishing it as an independent agency that reported directly to him.[130]

The reinvigorated FEPC performed exceedingly well in the mid-1940s by protecting African-American employees from the harms of employment discrimination in the Alabama shipyards.[131] Although less than ideal for the progressives of the time, the FEPC directly conferred employment benefits in private employment by ordering the promotion of African-Americans into welder positions.[132] The FEPC also effectively provided equal opportunities to African-American employees who were eligible for promotions and subsequently integrated them into their respective trades after decades of discriminatory treatment.[133]

1. James v. Marinship Corporation

Prominent NAACP lawyer Charles Houston litigated civil rights-based employment discrimination cases before the FEPC and federal courts.[134] Despite the successes of the FEPC in the south, employers and labor unions such as the American Federation of Labor ("AFL")[135] openly chose to ignore its orders.[136] Labor unions and employers openly resisted the consequences that flowed directly from the decisions of the FEPC.[137] There are two cases of critical importance in regard to legal challenges to executive orders that conferred civil rights in the employment context.

First, the Supreme Court of California recognized the legal authority of President Roosevelt's Order 9346 in *James v. Marinship Corporation*.[138]In *Marinship*, plaintiff James and other similarly situated African-American workers brought an action to enjoin the defendants from discharging them because they were not members of a labor union that had a closed shop agreement.[139] The defendants appealed

129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 1180–81.
134. *Id.* at 1181.
135. American Federation of Labor, now part of the labor organization known as the AFL-CIO.
136. Ontiveros, *supra* note 20, at 1182.
137. *Id.* at 1181–82.
138. *See generally* James v. Marinship Corp., 25 Cal.2d 721 (Cal. 1944).
139. *Id.* at 724.

the trial court order awarding the employees a preliminary injunction.[140] The shipyards were owned by the United States and operated by the defendant shipbuilder under a contract that prohibited employment discrimination on account of race, color, creed, or national origin.[141] The unions at issue had closed shop agreements with the shipbuilder to exclusively fill its labor needs.[142] Moreover, these unions did not allow African-Americans to become fully carded members but required them to join other local auxiliary unions to become eligible for employment with the shipbuilder.[143] The plaintiffs refused to join these other unions for work clearances and the unions threatened them with termination for failure to comply with their demands.[144]

The workers argued that the unions' demands would result in a breach of the shipbuilder's non-discrimination contract with the Maritime Commission.[145] They further argued that it would be contrary to law and public policy for the court to condone such prejudicial treatment.[146] The defendants contended that a union may arbitrarily close its membership to otherwise qualified persons and at the same time may, by enforcing a closed shop contract, demand union membership as a condition of employment.[147] The defendants also argued that the plaintiffs were not subject to the non-discrimination clause in the contract because they were not members of the union that had the closed shop agreement with the shipbuilder.[148] The court found in favor of plaintiffs by looking to the Railway Labor Act, the National Labor Relations Act, and the implications that flowed from such statutes.[149] Specifically, the court held that each labor union that is selected to bargain on behalf of its employees has a duty to exercise fairly, impartially, and without discrimination because of race.[150] Further, in addition to running afoul of state and federal labor provisions, the court tried to square such discriminatory practices with President Roosevelt's Executive Order 9346 and its implications for the full par-

140. *Id.*
141. *Id.* at 725.
142. *Id.*
143. *Id.*
144. *Id.* at 726.
145. *Id.*
146. *Id.*
147. *Id.* at 730.
148. *Id.*
149. *Id.* at 735, 739.
150. *Id.* at 736.

ticipation of all persons in the war effort, regardless of race, color, creed, or national origin.[151]

In sum, the court held that the defendants' discriminatory policies not only ran afoul of state and federal labor laws, but the policies were directly contrary to President Franklin Roosevelt's national nondiscriminatory employment policies set out by Executive Order 9346.[152] Ultimately, the court affirmed the trial court's order enjoining defendants from discriminatory employment and labor practices.[153] *Marinship* is a seminal case because the legality of executive orders in the civil rights employment context was upheld as California's Supreme Court gave broad deference to President Roosevelt's directive. Most critically, *Marinship* signaled to both public and private employers that executive orders effectively set national policy initiatives that have real legal consequences against discriminatory behavior.[154]

In the subsequent decades following the decision in *Marinship*, the early to mid-1960s was a time of widespread social revolution. Children born in the years immediately following World War II were coming of age and challenging societal norms imposed by their elders. During this time many racial minorities remained subject to discrimination in employment. Like the FEPC era, the federal government continued help abolish patterns of social inequity because society demanded it.[155] The FEPC provided an important legal and practical framework to confer social equality by weeding out employment inequities in the private sector.[156] Similar to the successes of the FEPC, the Philadelphia Plan helped desegregate the skilled trade unions, allowing equal employment access to the drastically underrepresented African-American trade members.[157]

On September 24, 1965 President Lyndon B. Johnson signed Executive Order 11246, which charged federal agencies with establishing equal employment programs.[158] This order also established requirements for non-discriminatory hiring and employment practices by fed-

151. *Id.* at 741.

152. *Id.* at 742.

153. *Id.* at 744.

154. *Id.* at 742; *see also* Ontiveros, *supra* note 120, at 1182.

155. David F. Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071 (2011).

156. *Id.* at 1120–21.

157. David L. Rose, *Twenty-Five Years Later: Where Do We Stand On Equal Employment Opportunity Enforcement?*, 42 VAND. L. REV. 1121, 1141–43 (1989).

158. Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965).

eral government contractors.[159] Executive Order 11246 in conjunction with anti-discrimination efforts by the Department of Labor came to be known as the Philadelphia Plan.[160] The goal of Order 11246 was to desegregate the trade unions of five counties in the eastern Pennsylvania region.[161] Order 11246 expressly proscribed contractors from discriminating on the basis of race, creed, color, or national origin.[162] It also required contractors to take affirmative steps to implement in-house procedures to ensure equal employment opportunity free from racially motivated practices.[163]

2. Contractors Association of Eastern Pennsylvania v. Secretary of Labor

Similar to the unpopular effects of President Roosevelt's FEPC on private sector shipbuilders in Northern California highlighted in *James v. Marinship Corp.*, several labor associations brought a federal court challenge against Executive Order 11246. In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor* ("*Contractors*"),[164] several contractors and labor organizations challenged the regulations promulgated by the Secretary of Labor under the directives announced in Executive Order 11246.[165] The plaintiffs challenged the codified labor regulations that required "[f]ederal contracts and federally assisted construction contracts contain specified language obligating the contractor and his subcontractors not to discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin."[166] Executive Order 11246 also imputed consequences against third party employers because it imposed "various sanctions on the contractors which include the cancellation, suspension or termination of contracts and the debarment of a contractor from further Government contracts."[167]

159. *Id.*; *see also* Rose, *supra* note 157, at 1143 (discussing how Executive Order 11246 evolved in 1970, when the Secretary of Labor incorporated timetables and numerical goals in what became known as 'Order No. 4', which was subsequently codified into an official regulation issued by the Department of Labor. *See* 41 C.F.R. pt. 60-2 (1988)).

160. *See* Rose, *supra* note 157, at 1141–43.

161. *Id.* at 1141.

162. Exec. Order No. 11246, *supra* note 158, at section 202.

163. *Id.*

164. Contractors Ass'n of Eastern Pennsylvania. v. Secretary of Labor, 311 F.Supp. 1002, 1004. (E.D. Penn. 1970) [herein "Contractors"].

165. *Id.* at 1004–05.

166. *Id.* at 1005.

167. *Id.*

The labor organizations and contractors challenged Executive Order 11246 on the assumption that it violated both the Constitution and laws passed by Congress.[168] The main legal questions that surrounded the action was "whether or not the provisions of the Philadelphia Plan for commitment to specific goals for minority group participation is in conflict with Title VII of the Civil Rights Act of 1964."[169] Specifically, the plaintiffs contended that the Philadelphia Plan contradicted the express provisions of Title VII because Order 11246 required them to "hire and employ on the basis of and with regard to race, color and national origin."[170] The government argued that the contractors openly discriminated against minorities that were regarded as protected classes under Title VII.[171] In effect, Order 11246 simply required private contractors subject to government contracts to comply with Title VII.[172] In reaching its decision the court articulated the existence of "[t]hirty years of executive mandates [that] have been enunciated and their validity is established."[173] The court also looked "to the initial executive order relative to discriminatory practices first enunciated by President Franklin D. Roosevelt in 1941 and by his successors in office."[174] While relying on the underpinnings of the Equal Protection Clause and Title VII's prohibitions, the court implicitly reaffirmed the doctrine of congressional acquiescence because there was "no doubt that the authority to issue the applicable executive orders will withstand any assault."[175] Thus, the legality of using executive orders to confer private sector equal employment opportunities and protections was unequivocally reaffirmed in *Contractors*.[176]

Prior to the decision in *Contractors* that upheld Executive Order 11246, President Johnson took further executive action. He issued Executive Order 11375, which amended Order 11246, and provided that "[i]t is desirable that the equal employment opportunity programs provided for in Executive Order No. 11246 expressly embrace discrimination on account of *sex*."[177] Thus, via several executive orders it be-

168. *Id.* at 1010.
169. *Id.* at 1008.
170. *Id.*
171. *Id.*
172. *Id.* at 1009.
173. *Id.* at 1011.
174. *Id.* at 1011–12.
175. *Id.* at 1012–13.
176. *See* Rose, *supra* note 157, at 1143.
177. Exec. Order No. 11375, 32 Fed. Reg. 14,303 (Oct. 13, 1967).

came evident that the Executive Branch had an important responsibility to ensure equal employment opportunities, which eventually led to the creation of the President's Committee on Equal Employment Opportunity.[178] It carried out this duty by using the power of executive orders along with Title VII to topple the gender and race barriers that blocked access to private sector jobs and government contract work for many minorities.[179] Order No. 11246 was a major progressive victory for racial minorities because it spearheaded equal access to a category of private sector jobs free from society's pervasive racial stereotypes that underpinned employment opportunities for decades.

3. Title VII-Related Executive Orders Post-*Contractors*

The vast success of desegregating the trade unions is directly attributable to the unilateral executive actions taken to effectuate equal employment within private sector contract work, as well as the outcome in *Contractors*. After the Third Circuit upheld the legality of executive orders in the context of Title VII,[180] President Nixon continued to build on the legacies of Executive Order 11246 and *Contractors* by prohibiting federal civilian workforce discrimination with Executive Order 11478.[181] President Nixon signed Executive Order 11478 on August 8, 1969.[182] Order 11478 further extended federal non-discriminatory hiring and employment protections by mandating federal agencies to establish programs of equal employment opportunity.[183]

Specifically, Section Two of Executive Order 11478 mandated federal agencies to "assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability."[184] In addition, Order 11478 furthered the use of executive orders as a powerful tool to provide broader employment equality in federal jobs because it called for affirmative action programs for minority applicants to federal jobs.[185] As such, Order 11478 furthered the goals of Title

178. *See* Rose, *supra* note 157, at 1125.
179. *Id.* at 1125–26, 1141–43.
180. *Id.* at 1143.
181. Executive Order 11478, WIKIPEDIA.COM (last visited Jan. 6, 2016), https://en.wikipedia.org/wiki/Executive_Order_11478.
182. Exec. Order No. 11478, 34 F.R. 12985 (Aug. 8, 1969).
183. *Id.* at § 2.
184. *Id.*
185. *Id.*

VII by tasking the Civil Service Commission with the further weeding out of discrimination in federal employment.[186]

Continuing the legacy of executive orders in the Title VII employment context, on Monday, June 1, 1998 the White House announced President Clinton's Executive Order 13087,[187] which further amended Executive Order 11478.[188] Order 13087 added "sexual orientation" to the list of immutable characteristics protected within federal employment and government contract work.[189] President Clinton's directive made it unlawful for any federal agency to discriminate because of an employee's or job applicant's sexual orientation.[190] This executive action was a big step for the LGBT community in the federal workforce.

Most recently, President Obama's Executive Order 13672 amended Orders 11478 and 11246.[191] Specifically, President Obama's Order 13672 extended sexual orientation and gender identity protections for the federal civilian workforce as well as to those employees subject to government contract work.[192] While Order 13672 has been celebrated as a victory for the LGBT community, the current levels of private sector employment discrimination suffered by gays, lesbians, and transgender persons is directly analogous to the struggles of African-American skilled trade workers in the 1940s. The ever-evolving social-political climate that once demanded equal employment opportunities and desegregated war defense industries for African-Americans during World War II now demands similar outcomes for the LGBT community in private workspaces.

III. The Solution: How Issuance of an Executive Order Can Effectuate Equal Title VII Protections for All LGBT Employees

The current political atmosphere coupled with hesitancy by the federal courts suggests that a properly drafted executive order can

186. Captain Marilyn H. David, *A Title VII Cause of Action for the Sexually Harassed Federal Employee?*, 23 A.F. L. Rev. 254, 268 (1982) (discussing the availability of Title VII to federal employees in part due to President Nixon's signing of Executive Order 11478, which furthered the reliance on presidential actions in order to broaden the overall effectiveness of Title VII).

187. Exec. Order No. 13087, 63 Fed. Reg. 30097 (May 28, 1998).

188. *Id.*

189. *Id.*

190. L. Camille Hébert, *Prevalence of employment discrimination based on sexual orientation and gender identity*, 2 Empl. Privacy Law § 9:4 (2016).

191. Exec. Order No. 13672, *supra* note 46.

192. *Id.*; *see, also Sexual orientation or gender identity as basis for protection under federal discrimination laws*, 5 Emp. Coord. Employment Practices § 6:2 (updated Oct., 2016).

fully integrate LGBT employees under Title VII. There are several reasons why such an order would be both judicially and historically effective, and would send a critical political message to both public and private actors about LGBT rights. As with any other president, the executive has the inherent duty to lead the nation in times of social inequality in an attempt to satisfy full economic integration for all persons, which includes every minority group that yearns for equal protection under Title VII.

A. The Chief Executive Should Continue the Executive Order Tradition Sparked by President Roosevelt to Provide Full Civil Rights Employment Protections For All LGBT Workers

Simply by following the pattern of Executive Branch civil rights legislation first initiated by President Roosevelt in 1941, the chief executive has the inherent responsibility to "take care" that the nation's law be "faithfully executed."[193] Moreover, the chief executive also has the prerogative as the chief administrator to use the Executive Branch to lead the United States into a more perfect union. Thereby, the chief executive can lawfully exercise his aggregated powers to issue an executive order to prohibit further LGBT discrimination in private workplaces. Just as President Johnson followed President Roosevelt's lead and spearheaded the EEOC as the successor in interest to the FEPC under Order 11246,[194] the chief executive is surely supported by decades of executive orders in the civil rights employment context to effectuate the changes that LGBT employees in the private sector demand.

Currently, the LGBT community suffers from the same pervasive discriminatory impacts as the African-American trade workers suffered in the 1940s when President Roosevelt founded the FEPC.[195] From the decisions in *Midwest Oil Co.*[196] and *Contractors*[197] it is clear that the chief executive has inherent legislative power, separate from Congress' ability to pass laws, that enables the Executive Branch to set national policy goals through executive interpretation of laws codified by the legislature. Any such executive order would continue to fulfill the president's role as the chief political leader of our nation.

193. *See* Noyes, *supra* note 53.
194. *See* Duncan, *supra* note 1.
195. *See* Ontiveros, *supra* note 120, at 1178–79.
196. *See Midwest Oil*, 236 U.S. at 465.
197. *See Contractors*, 311 F.Supp. at 1009–11.

Within the chief executive's inherent ability to exercise such unique unilateral powers, the Executive Branch indeed plays a critical role in signaling society's demands for broader interpretations of progressive statutes like Title VII. Society now demands equal protection for the LGBT community under Title VII. In response, the chief executive is well within constitutional and statutory bounds to issue such an executive order to weed out private sector LGBT-based workplace discrimination as outlined in Part I. This proposed solution would reaffirm the chief executive's role in defining the law as understood by normative judicial and legislative traditions.

Undoubtedly, the president's inherent constitutional and political powers may lawfully converge under the relevant holdings outlined above to effectuate full private sector LGBT-based employment protections that include both sexual orientation and gender identity prohibitions under Title VII. Similar to the outcome in *Contractors*, federal courts would likely exercise judicial restraint and give broad deference to the Executive Branch because "the denial of equal employment opportunity must be eliminated from our society."[198] An executive order that clarifies Title VII's express prohibition on "sex" discrimination would likely withstand a legal challenge and be distinguishable from the decisions in *Youngstown* and *Reich*. Such a "hands-off" approach would not upset Congress's intent to smoke out all forms of invidious discrimination in both private and public workspaces.

B. The Doctrine of Congressional Acquiescence Provides the Chief Executive with a Presumption of Legality in Regard to Any Executive Order Affecting Private Employers

Furthermore, the doctrine of congressional acquiescence, otherwise simply known as congressional inaction, provides a presumption of legality that extends to any unchecked judicial or executive actions, especially actions within the civil rights context.[199] Congress's continued failure to pass sweeping legislation, such as ENDA, seems to confer an unofficial legislative intent in regard to gay rights issues under Title VII. Even so, the legal inquiry does not simply end there. Congressional acquiescence played a critical role in the Rehnquist Court

198. *See Contractors*, 311 F.Supp. at 1012.

199. *See* above-outlined discussion of the doctrine of congressional acquiescence in the civil rights area, *supra* Part II; *see also* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 670–72 (1991).

decisions because it influenced the Court's reading of plain statutory provisions.[200] Considering some recent Supreme Court decisions being hailed as progressive victories,[201] the modern Court seems that it would be even more inclined to grant broad deference to the Executive Branch when addressing any claims that executive orders that extend LGBT-based Title VII protections to private workspaces are unconstitutional.

More than fifty years have passed since President Johnson put Executive Order 11246 into action. That order was challenged in *Contractors* and held to be lawful.[202] In the forty-five years since, Congress has criticized but never overturned any chief executive's executive order affecting equal employment rights related to Title VII.[203] Legally speaking, this long-sustained period of unchecked executive orders in the Title VII arena makes such presidential actions almost indispensable. In any legal challenge to such executive action, as long as the executive order that addresses LGBT discrimination protections in private employment runs congruently with the larger legislative goals of Title VII, federal courts are likely to side with the Executive Branch. The most informative example of legislative acquiescence for this Comment is Congress' inaction to overturn through legislation the central holding in *Price Waterhouse.*[204] Thus, pro-LGBT cases like *Price Waterhouse* provide tacit approval for broader readings of Title VII. The EEOC's recent enforcement actions of LGBT-rights in the private employment sector[205] further buttress this assumption.

C. EEOC Enforces Title VII Actions Based on Sexual Orientation and Gender Identity: Proof That Title VII Complements Such an Executive Order

In addition to the doctrine of congressional acquiescence, other enforcement actions lend further support to the legality of an execu-

200. *Id.* at 670.

201. The recent Supreme Court decisions covering gay marriage, abortion, etc, *see e.g.*, Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

202. *See generally*, *Contractors*, 311 F.Supp, 1002.

203. Since the early 1940's Congress has not expressly overturned any such executive orders, even though it sharply criticized President Clinton's Executive Order 13087, *see supra* note 187.

204. *Price Waterhouse,* 490 U.S. at 245 (holding that Title VII covers gender stereotyping, which lends to a somewhat broader reading than traditional notions of sex).

205. *What You Should Know About the EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION http://www.eeoc.gov/eeoc /newsroom/wysk/enforcement_protections_lgbt_workers.cfm [https://perma.cc/UBX6-LTKX].

tive order solution. In recent years, the EEOC expressly held that private sector discrimination against an individual because of that person's gender identity is sex discrimination and therefore runs afoul of Title VII's express proscriptions against sex discrimination.[206] Part of the EEOC's current enforcement strategy identifies Title VII claims involving gays, lesbians, bisexuals, and transgender persons as a priority.[207] Thus, the EEOC recognized the strife of private sector LGBT's in the workforce and responded by committing its attorneys to enforce Title VII protections for affected LGBT employees. In fiscal year 2015, statistics show that 1,412 LGBT-based complaints were lodged with the EEOC.[208]

Because the EEOC has made a clear choice to pursue LGBT-based Title VII actions, this choice would further add to the legitimacy of an executive order solution that expressly extends private sector employment protections to cover sexual orientation and gender identity. As outlined above in *Boh Bros.*, even the traditionally conservative Fifth Circuit has been willing to allow broader readings of Title VII.[209] Such cases illustrate the judiciary's willingness to respond to normative interpretations of Title VII. This notion underpins the successes of the above-highlighted executive orders beginning in 1941 with President Roosevelt and the FEPC. The EEOC's success in prosecuting LGBT-based Title VII actions also serves to reaffirm the validity of legislative inaction. The latest EEOC strategic enforcement plan suggests that any executive order extending Title VII protections to all LGBT employees would have the full effect and force as a traditionally legislated law.

D. Why This Solution Is the Most Effective, Commonsense, and Quickest Way to Render Equality to All LGBT Employees Under Title VII

Not only does an executive order expressly covering private sector LGBT-based employment protection have legal and historical foundations, such an order would be the most effective, commonsense, and quickest path to render equality to all persons under Title VII. This proposed solution would be the most effective answer moving forward. It would create a bright-line rule for employers and federal courts to apply in regard to LGBT-based Title VII claims. The

206. *Id.*
207. *Id.*
208. *Id.*
209. *See supra* Part I.A.

current interpretations of sexual orientation and gender identity claims under Title VII highlight the tension between society's progressive demands and the often-restrictive judicial interpretations. Although cases like *Price Waterhouse*[210] and *Boh Bros.*[211] undoubtedly help to further Title VII's goal to eliminate all types of private discrimination by employers,[212] federal courts continue to struggle with broader statutory interpretations involving sex discrimination.[213] The proposed executive order is the most effective solution because it announces an easy to follow, bright-line rule that will afford greater justice and protections for all LGBT workers in America.

As the above-outlined analysis suggests, several legal and political precedents provide the chief executive with inherent constitutional power and political capital to extend full Title VII protections to the LGBT community. Furthermore, larger social-political underpinnings are critically important to the proper legal interpretation of the congressional intent behind Title VII. If the goal of Title VII is to weed out disparate employment decisions and their impact upon racial minorities, then courts should feel compelled to examine the current civil rights landscape when interpreting discrimination claims. Similar to the Constitution, which provides our most basic liberties and fundamental rights, Title VII was undoubtedly intended to wipe out society's widespread and pervasive discrimination from America's workspaces. As such, society and government must yield to Title VII and its inherent judicial flexibility to confer real benefits upon large sections of disparate populations. Thus, as society changes and discrimination evolves, so too will the ways in which Title VII will need to be applied by federal courts. Some legal scholars have coined Title VII as a "super" statute.[214] Fundamentally, the most critical feature of super statutes is their ability to adapt to society's needs over time. Of equal importance to super statute effectiveness is the president's use of executive orders to signal policy shifts to the legislature and judiciary. Cases such as *Contractors*[215] and *Boh Bros.*[216] reaffirm the notion

210. *Price Waterhouse*, 490 U.S. at 228.

211. *Boh Bros.*, 731 F.3d at 444.

212. David Michael McConnell, *Title VII at Twenty—The Unsettled Dilemma of 'Reverse' Discrimination*, 19 WAKE FOREST L. REV. 1073, 1075–76 (1983) (highlighting the enactment and development of Title VII by discussing its purpose and goals).

213. *See* general discussion *supra* Part I.A, (highlighting the struggles of lower courts in applying Title VII to gender stereotyping).

214. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231, 1237–42 (2001).

215. *Contractors*, 311 F.Supp. at 1011.

216. *Boh Bros.*, 731 F.3d 444.

that Title VII is a super statute that has been honed over time through a focused tripartite conversation among Congress, the Judiciary, and the Executive Branch. Arguably the most integral voice in this conversation has been the ability of presidents to signal societal demands and effectuate these changes by adapting Title VII through the inherent power of the executive. Just as the Constitution over time has given rise to new fundamental rights like marriage and abortion, Title VII was intended to be flexible enough to remedy evolving disparate impacts in the workplace over time.

The proposed executive order is the best commonsense solution given the current social-political situation. Amongst the national pleas for immigration reform and the call for American troops to help quash terrorism, most congressional representatives only have one goal: to propel their party to the next political victory. Under any post-Obama administration, congressional inaction on ENDA will likely continue to persist. Many of President Obama's legacies, such as LGBT rights, will likely come under heavy conservative scrutiny. Because many practical implications continue to block equal Title VII protection for many LGBT workers, the chief executive should act unilaterally and accordingly. It is unreasonable to assume that the EEOC and the federal courts will weed out all invidious discrimination against LGBT workers. Just as President Franklin Roosevelt responded to the calls from African-American trade workers in the South and shipbuilders in the West,[217] the chief executive needs to use the opportunity to reaffirm an inherently progressive legacy in the eyes of the American people and issue such an order.

Finally, if the LGBT populace is forced to wait for the judiciary to consider another seminal case like *Price Waterhouse* to receive needed workplace protections, thousands of LGBT employees will continue to suffer irreparable harms at the hands of private sector employers. With all practical considerations on the table, if the LGBT community is forced to wait another ten or twenty years for judicial action to effectuate full Title VII equality, LGBT-based discrimination in the private sector will eventually become unmanageable.

Conclusion

In sum, with the stroke of a pen, the chief executive has the quickest, most effective, and best commonsense solution to effectuate equal Title VII for LGBT employees across the nation. In our current

217. *See* Ontiveros, *supra* note 120, at 1178–82.

socio-political state, an executive order is the most obvious choice to weed out the continued strife of the LGBT community. Hopefully the chief executive heeds the call of equality that links back to the actions of President Franklin Roosevelt. Such continued preservation of executive orders to effectuate equal employment protections for the vulnerable LGBT workforce that continues to suffer discriminatory impacts in private sector would likely pass any legal challenge. Perhaps these orders will one day encourage Congress to pass much needed legislation like ENDA. Until then, the executive order is the best tool to smoke out LGBT-based discrimination in all of America's workspaces, both public and private.

Accent Discrimination Towards Bilingual Employees in the Workplace

By MARINA GARCIA*

Introduction

MANUEL FRAGANTE IMMIGRATED TO HAWAII AT THE AGE OF 60.[1] Upon arrival, he began searching for a job.[2] He applied for a clerk position at the City of Honolulu's Division of Motor Vehicles and Licensing.[3] The position required taking an exam that tested "among other things, word usage, grammar and spelling."[4] Fragante scored the highest out of 721 test-takers.[5] Shortly after, he was interviewed for the position.[6] During the interview, the interviewers had a difficult time understanding Fragante due to his accent.[7] The employer concluded that Fragante's accent "would interfere with his performance of certain aspects of the job."[8] As a result, Fragante dropped from the first to the third position on the list of applicants qualified and eligible for the position.[9] Fragante subsequently filed a Title VII claim alleging accent discrimination.[10] At the trial, two expert witnesses testified that, even though Fragante spoke with a heavy accent, his speech was comprehensible, however due to a history of discrimi-

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1. Fragante v. Honolulu, 888 F.2d 591, 593 (9th Cir. 1989).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 594.
9. *Id.*
10. *Id.*

nation against foreign accents like his, listeners may "turn off" and not understand him.[11]

Similarly, Sophia Poskocil, an immigrant from Colombia, interned as a student teacher for a high school while working on her teaching certification.[12] Her supervisor highly rated her teaching skills and wrote her a strong recommendation letter.[13] However, Poskocil was denied a regular full-time teaching position at the same high school.[14] Over six years, she applied nineteen times, and each time her application was denied.[15] Poskocil brought a claim alleging national origin discrimination.[16] During the trial, the high school claimed they based their decision not to hire Poskocil on poor student evaluations.[17] Students complained that Poskocil's accent created difficulty understanding her and that "she barely spoke English."[18] The Court agreed with the school's argument that Poskocil's accent interfered with her communication skills, even though Poskocil was applying for a position as a Spanish teacher.[19]

In contrast, Patricia Lee, born in China, obtained her medical degree from the National Taiwan University College of Medicine.[20] Lee moved to the United States and worked as a physician at the Veterans Administration Medical Center for fifteen years.[21] During that time, she was denied a promotion on several occasions.[22] Lee heard complaints about her accent from the superiors on a number of occasions.[23] On one occasion, a supervisor was angry with her when he was unable to understand her.[24] A different supervisor would not talk to her unless someone else was present and could interpret what she was saying.[25] Lee sued the Center alleging race and national origin dis-

11. *Id.* at 597–98.

12. Poskocil v. Roanoke County Sch. Div., 1999 WL 15938, at *2–3 (W.D. Va. Jan. 11, 1999).

13. *Id.* at 4.

14. *Id.* at 5–6.

15. *Id.* at 5.

16. *Id.*

17. *Id.* at 5, n.2 ("For example, some students wrote in their evaluations that 'the teacher's lack of English made it hard to ask questions,' or that the 'instructor barely spoke English, was hard to understand.'").

18. *Id.* at 3.

19. *Id.* at 17.

20. Lee v. Walters, 1988 WL 105887, at *1 (E.D. Pa. Oct. 7, 1988).

21. *Id.* at 2.

22. *Id.* at 4–5.

23. *Id.* at 12.

24. *Id.* at 12.

25. *Id.*

crimination.[26] The Center argued that Lee's credentials from the Taiwanese University were inadequate because she failed the board certification in internal medicine.[27] The court denied this argument, holding that it was pretext for discrimination.[28] The court explained that even though the accent was "quite noticeable," it did not hinder her ability to communicate and she should not have been denied a promotion for it.[29]

These are just a few stories that demonstrate the prevalence of accent discrimination in the workplace. President Franklin Roosevelt espoused to Americans that, "all of our people all over the country, all except the pure-blooded Indians, are immigrants, or descendants of immigrants, including even those who came over here on the Mayflower."[30] In this one statement, Roosevelt articulated that with the lone exception of Native Americans, every American initially came over with a non-indigenous accent.

The United States workforce is constantly changing due to the flow of immigrants. The increasingly visible Latino, African American, and Asian populations in the United States invites reexamination of Title VII of the Civil Rights Act of 1964.[31] Indeed, scholars discuss whether Title VII is an adequate legal tool for addressing the present and future forms of discrimination likely to be experienced in a more diverse workforce.[32] Today, the term "national origin" discrimination connotes discrimination based on a person's cultural traits. However, to provide a sound and comprehensive basis for protecting employees from discrimination because of ethnic traits, the term "national origin" and its framework must be reevaluated.

This Comment will show that while Title VII prohibits an employer from discriminating against any individual with respect to his or her compensation, terms, condition, or privileges of employment because of that individual's national origin, the linguistic characteristics, such as an individual's accent should be protected under national origin. Thus, this Comment will argue that accent discrimination should be considered per se prima facie national origin discrimination and that an employer's only defense is to prove a reevaluated

26. *Id.* at 1.
27. *Id.* at 10.
28. *Id.*
29. *Id.* at 19.
30. *Text of Roosevelt's Final Campaign Addressing Boston*, N.Y. TIMES, Nov. 5, 1944, at 38.
31. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination under Title VII*, 35 WM. & MARY L. REV. 805, 809 (1994).
32. *Id.*

Bona Fide Occupational Qualification ("BFOQ") defense with stricter requirements, including a rejection of the customer preference defense.

To illustrate the effect the current statute has on discriminated employees, Part I will discuss both the legislative history and the evolving jurisprudence surrounding accent discrimination. In the statute's current state, it does not address Title VII's prohibition of discrimination based on national origin. This Comment will also discuss how the jurisprudence surrounding accent discrimination fails to equate accent discrimination to national origin discrimination. Part II will explain the current framework courts use and the rules surrounding the determination of a significant discriminatory impact in passing an employee over for a job based on a foreign accent. Part III will discuss the Bona Fide Occupational Qualification ("BFOQ") defense. Part IV will provide suggestions on how courts should approach accent discrimination lawsuits.

I. Defining National Origin Discrimination: Accent Discrimination, To Be or Not To Be?

Generally, national origin discrimination suggests treating someone less favorably because the individual or their ancestors are from a certain place or belong to a particular national origin group.[33] Specifically, Title VII prohibits discrimination against a person because he or she is associated with a particular national origin.[34]

Facially, however, the language of Title VII does not prohibit accent discrimination.[35] The Equal Employment Opportunity Commission ("EEOC") Guidelines prohibit "employment discrimination against an individual because she has physical, linguistic, and/or cultural characteristics closely associated with a national origin group.[36] This Comment seeks to discuss how linguistic traits should be given heightened protection in the judicial system.

33. 29 C.F.R. § 1606.1 (defining "National Origin Discrimination").

34. U.S. Equal Emp. Opportunity Comm'n Compl. Man. § 13: NATIONAL ORIGIN DISCRIMINATION (2002).

35. 29 C.F.R. § 1606.1.

36. *See* U.S. Equal Emp. Opportunity Comm'n Compl. Man. § 13: NATIONAL ORIGIN DISCRIMINATION (2002) ("National origin discrimination includes discrimination because a person comes from a particular place."); 29 C.F.R. § 1606.1 ("The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin.").

A. Legislative History of National Origin Discrimination

Although Title VII prohibits discrimination based on national origin, the prohibition against "national origin" discrimination remains vague and ineffective. The legislative history of the term "national origin" consists of a few paragraphs during the House debate.[37]

Initially, Congress stated its understanding of what "national origin" meant.[38] Congressman Roosevelt made it clear that "national origin" meant the country from which a person came.[39] He also stated that the term has "nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person."[40]

Congressmen Rodino and Dent further discussed instances in which "a person of a certain national origin may be specifically required to meet the qualifications of a particular job."[41] The Congressmen discussed a hypothetical situation where restaurants served the food of a particular nation.[42] Within the context of a restaurant, they concluded that an individual's national origin in the operation of a specialty restaurant serving food like a "pizza pie" could properly be an occupational qualification that is reasonably necessary to the operation of the restaurant.[43] Additionally, Congressman Roosevelt linked language and national origin suggesting that the "national origin" definition of the statute encompassed language requirements.[44]

The debate continued in the Senate when Senator Humphrey mentioned the term "ethnic origin."[45] However, Senator Humphrey neither clarified the term nor differentiated it from national origin.[46] Senator Kuchel commented briefly on the problems faced by "a Negro or Puerto Rican or an Indian or a Japanese American or an American of Mexican descent."[47]

Although discussion over Title VII resulted in what some consider the longest debate in Senate history, the Supreme Court has characterized the legislative history of the statutory phrase "national origin"

37. Perea, *supra* note 31, at 821.
38. *Id.*
39. *Id.* at 818.
40. *Id.*
41. *Id.* at 818–19.
42. *Id.* at 819.
43. *Id.*
44. *Id.*
45. *Id.* at 820.
46. *Id.*
47. *Id.*

as "quite meager."[48] Not only has national origin ended up in Title VII as a part of the "boilerplate" statutory language of fair employment without any meaningful definition, but Congress has also ignored accent discrimination faced by ethnic minorities.[49]

B. EEOC Guidelines for National Origin Discrimination

As a federal agency, the Equal Employment Opportunity Commission enforces Title VII.[50] The EEOC defines national origin discrimination broadly to include discrimination based on an individual's physical, cultural, or linguistic characteristics.[51]

The EEOC has interpreted the phrase "national origin" to extend Title VII protection to bar discrimination against persons with characteristics closely correlated with national origin.[52] An example of discrimination based on cultural traits includes discrimination against someone wearing traditional African dress, even if that person is not African.[53] The EEOC explained that discrimination can be based on perception, such as an "employer's belief that an individual is a member of a particular national origin group—an employer may perceive someone as Arab based on his speech, mannerism, and appearance."[54]

Moreover, an accent is an important and fundamental aspect of a person's ethnicity and national origin. Ethnicity refers to physical and cultural characteristics that make a social group distinctive, either from the perspective of group members or the perspective of outsiders.[55] Ethnicity consists of a set of ethnic traits that are inherent to the culture the person grew up with. These traits may include, but are not limited to, race, history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group.[56]

In its Guidelines of National Origin Discrimination, the EEOC defines national origin discrimination to include the "denial of equal employment opportunity because . . . an individual has the . . . linguis-

48. *Id.* at 821.
49. *Id.* at 817.
50. *Id.* at 844.
51. U.S. Equal Emp. Opportunity Comm'n Compl. Man. § 13: NATIONAL ORIGIN DISCRIMINATION (2002).
52. *Id.*
53. § 13(II)(B): NATIONAL ORIGIN DISCRIMINATION (2002).
54. *Id.*
55. Perea, *supra* note 31, at 833.
56. *Id.*

tic characteristics of a national origin group."[57] The Ninth Circuit elaborated on linguistic characteristics as a component of national origin:

> Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communication skills demanded by the job.[58]

Although an accent is different from protected characteristics like race or sex, it is "practically immutable,"[59] and as a result, must be protected by Title VII.

C. National Origin Identity: Accent As an Immutable Characteristic

In a Due Process or Equal Protection Constitutional analysis, courts evaluate the concept of immutable characteristics to determine whether a group of people are considered part of a discrete and insular minority.[60] However, courts have paid insufficient attention to immutability in accent discrimination cases.[61]

The term "immutable characteristic" can be defined as an "accident of birth," a characteristic that cannot be changed, or a trait that is so fundamental to the identity of an individual.[62] Examples of traits that individuals have from the moment they are born are: "race, color, genetic makeup, many disabilities, and national origin."[63] These characteristics cannot be altered. Similarly, as explained below, after the age of nine, accents cannot be altered and thus should be considered an immutable characteristic, worthy of greater protection.[64]

A study of 109 speakers found that in cases of a new language acquired before the age of seven, there is no accent transferred past

57. U.S. Equal Emp. Opportunity Comm'n Compl. Man. § 13: NATIONAL ORIGIN DISCRIMINATION (2002).

58. *Fragante,* 888 F.2d at 596.

59. Juan Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L REF. 265, 265–74 (1990).

60. Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1508 (2011); *see also* United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938).

61. *See Fragante,* 888 F.2d at 596 (the Ninth Circuit upholding the rejection of an applicant whose heavy accent was likely to create communication difficulties without giving proper consideration to accent immutability).

62. Hoffman, *supra* note 60, at 1509.

63. *Id.* at 1515.

64. *See infra* Part 1.C.

the age of seven.[65] From the age of seven to the age of nine, the likelihood of having a speech accent in the child's second language is very likely.[66] After nine, the chance of accent-free speech is close to 50%.[67] As the child becomes older, the individual's chances of speaking without an accent becomes minuscule.[68] Therefore, when employers argue that plaintiffs can take accent reduction courses to improve the skill of the language, the employers are discriminating against an attribute of the plaintiff that is beyond their control, which is indicative of national origin.[69]

However, the framers of Title VII did not expand on the meaning of national origin to include accent discrimination, nor did they specify what traits were attributable to national origin.[70] As the study demonstrated, an individual's accent can become an immutable characteristic that cannot be altered. Thus, an individual's accent is a characteristic that warrants greater Title VII protection.

D. Accent Discrimination Issues and Policy Concerns: Society's Commitment to Diversity

Courts have been extremely unsympathetic to claims of discrimination by someone whose ethnicity differs from the majority.[71] As a result, an employee who speaks with a "foreign accent" may be fired or denied a promotion, in spite of excellent qualifications and skills, because of the "discomfort and displeasure" he has caused as a result of his accent.[72] Despite Title VII's prohibitions against national origin discrimination, situations involving accent discrimination are sometimes not included.[73]

As a result, courts interpret Title VII in a manner that, "encourages uniformity and the rejection of ethnic differences" rather than

65. Beatrice Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CALIF. L. REV. 1325, 1330–31 (1993) (explaining the experiment done in Sonia Tahta et al., *Foreign Accents: Factors Relating to Transfer of Accent From the First Language to a Second Language*, 24 LANGUAGE & SPEECH 265 (1981)).

66. *Id.*

67. *Id.*

68. *Id.* at 1331.

69. *Id.*

70. Joanna Carey Smith, *Emerging Issues: National Origin Discrimination in Employment*, POPULAR 'GOV'T (2002), at 17–18, *available at* http://www.sogpubs.unc.edu/electronicversions/pg/pgfal02/article2.pdf [https://perma.cc/3G2N-S82K].

71. Perea, *supra* note 31, at 807–08.

72. *Id.* at 808.

73. *Id.*

"encouraging equality and tolerance of difference."[74] Courts often defer to the employers' decision to deny employment because an applicant's accent is "too foreign" or "excessive."[75] A court's protection depends on a broad construction of "national origin" that finds no support in the statute's language or legislative history.[76]

In *Fragante*, based on one statement in the entire trial, the judge came to the conclusion that Fragante was too difficult to understand because he had a "difficult manner of pronunciation."[77] Not only do courts fail to consider all the evidence, they also fail to place meaningful value on accent discrimination cases, "underestimating the harm done to qualified employees when they are denied jobs because of their accents."[78] The most fundamental question is how current judicial reasoning in accent discrimination cases supports policies that are intended to incorporate immigrants who come from different countries and have different cultural backgrounds.

The Civil Rights Act was the first comprehensive legislation to address the problem of discrimination in American society.[79] With time, the Civil Rights Act became the foundation for equal employment opportunity laws.[80] In contrast to other countries that have been unable to accept the concept of equality and differences between ethnic groups, the United States offers political and economic freedom to immigrants and their descendants. Even though history points to the fact that protection for "national origin" is an afterthought—originally intended as a "boilerplate"[81]—the substantial growth in the national labor force of ethnic groups should force the judicial system to reevaluate the existing Title VII statute. The possibility of eliminating existing tension between employers and employees over linguistics differences is certainly feasible.

74. *Id.* at 809.

75. *Id.* at 830.

76. *Id.*

77. *Fragante,* 888 F.2d at 598.

78. Braden Beard, *No Mere "Matter of Choice": The Harm of Accent Preferences and English-Only Rules*, 91 Tex. L. Rev. 1495, 1506 (2013).

79. Perea, *supra* note 31, at 806.

80. *Id.* at 809.

81. *Id.* at 811.

II. Disparate Treatment Theory in Workplace Discrimination Cases

Under Title VII, a plaintiff may prove discrimination under a "disparate treatment theory" or a "disparate impact theory."[82] Typically, plaintiffs who allege accent discrimination are limited to claiming disparate treatment. In disparate treatment cases, the plaintiff must demonstrate the employer's intent to discriminate on the basis of race, color, religion, sex, or national origin.[83]

A. Lack of Clear Method for Accent Discrimination Cases

Typically courts adopt the *Burdine* analysis for evaluating disparate treatment cases.[84] Under *Burdine*, the plaintiff must prove by the preponderance of evidence a prima facie case of discrimination.[85] To meet the burden, the plaintiff must prove four elements established in *McDonnell Douglas* that: (1) he was a member of a protected class; (2) he was qualified for the position; (3) an adverse employment action was taken against him; and (4) that adverse employment action "occurred under circumstances giving rise to an inference of discrimination."[86] The burden of establishing a prima facie case is "not onerous."[87] Each case is decided on the facts.[88] Generally, a plaintiff who is not hired based on his accent can establish a prima facie case of national origin discrimination.[89]

After the plaintiff has met the prima facie case, the burden shifts to the employer.[90] The employer must establish that he actually took the adverse action because of some "legitimate, nondiscriminatory reason."[91] For an employer to have an acceptable business reason for discriminating against a plaintiff because of his accent, the employer must show that the accent "interferes materially with job performance."[92] Once the employer establishes a legitimate, nondiscrimina-

82. Nguyen, *supra* note 65, at 1331.
83. *Id.*
84. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).
85. *Id.* at 252–53.
86. *Id.* at 253–54.
87. *Id.* at 253.
88. *Id.* at 253 n.4.
89. Carino v. University of Oklahoma Board of Regents, 750 F 2d. 815, 819 (10th Cir. 1984).
90. *Id.*
91. *Id.*
92. *Fragante*, 888 F.2d at 596–97.

tory reason, the plaintiff can attempt to show that the stated reason was actually a pretext for a prohibited motivation.[93]

The plaintiff can also claim disparate treatment under a mixed-motive framework.[94] In *Price Waterhouse,* the court established that under this framework, the employee would have to show that even if the employer had legitimate reasons for taking an adverse action against the employee, the employee's protected trait was still impermissibly considered.[95] However, the plaintiff must prove that the employer discriminated intentionally.[96] Under the disparate treatment theory, the plaintiff can assert systematic or individual disparate treatment.[97]

Regardless of whether a court follows a *Burdine* or *Price Waterhouse* analysis, the plaintiff carries the ultimate burden of persuasion that he was discriminated against based on an illegitimate reason.[98] In mixed motive cases, the employer's burden is greater.[99] The employer must prove by a preponderance of the evidence that he would have discriminated absent illegitimate motives.[100]

The lack of a clear approach became evident in *Fragante*, where the court tried to follow the *Burdine* analysis.[101] First, the District Court ruled for the employer finding that the decision to deny Fragante the job was justified based on the BFOQ defense.[102] The Ninth Circuit, in its original decision, affirmed its reasoning based on the BFOQ defense.[103] In the amended opinion, the court disregarded its original decision based on the BFOQ defense, but nevertheless ruled in favor of the employer on the ground that the employer articulated a legitimate, nondiscriminatory reason for rejecting Fragante from the position.[104] Further, Fragante failed to show that the employer's explanation was pretextual.[105]

93. *Id.* at 595
94. Price Waterhouse v. Hopkins, 490 U.S. 228, 229 (1989).
95. *Id.* at 242.
96. *Id.* at 230–31.
97. *Id.* at 266.
98. *Id.* at 230.
99. *Id.* at 252.
100. *Id.* at 229.
101. *Fragante*, 888 F.2d at 595.
102. *Id.* at 593.
103. *Id.*
104. *Id.* at 599.
105. *Id.*

B. Judicial Interpretation of Accent Discrimination Cases

Perhaps, lack of a clear, direct definition for the phrase "national origin" is the reason for an insufficient judicial approach in evaluating employers' liability in accent discrimination cases.[106] Courts can freely shift their attention to different elements of the case; in some cases, courts have accepted employers' argument that a communication error was a legitimate nondiscriminatory reason, in other instances, courts concentrated on the burden of proving pretext.[107] As a result, there is a lack of focus on the standard that courts will find sufficient for a plaintiff to be successful. Thus, courts create a virtually impossible hurdle for employees to prove that discrimination was based on their accent.

1. Lack of Effective Communication as a Legitimate, Nondiscriminatory Reason

Typically, courts find that a person's accent serves as a surrogate for national origin discrimination if the accent is not related to a legitimate feature of the employment.[108] Courts concentrate on whether the defendants articulated a legitimate, nondiscriminatory reason for accent discrimination. In *Fragante*, the Court added a note of caution stating that accent and national origin are inextricably intertwined in many cases.[109] Therefore, employers that may feel protected to discriminate against national origin by falsely stating that it was not the person's national origin, but the employee's inability to measure up to positions demanding communication skills are not protected.[110] The *Fragante* court stated, "an adverse employment decision may be predi-

106. *See* 110 Cong. Rec. 2549 (1964) (The Congressmen argued on the definition of "national origin" throughout the record.).

107. *See generally Fragante* 888 F.2d 591 (1989). *See also* Carino v. University of Oklahoma Bd. Regents, 750 F.2d 815, 819 (10th Cir. 1984) ("The defendants assert that the plaintiff was 'demoted' because he was hired for his technical skills and was given the supervisor title in the first place only to increase his salary. Record, vol. 1, at 140. The court found this proffered reason to be a pretext.").

108. Kyriazi v. Western Elec. Co. 461 F. Supp. 894, 924 (D.N.J. 1978), vacated Kyriazi v. Western Elec. Co., 473 F.Supp. 786 (D.N.J. 1979) ("While it is clear that plaintiff does speak with an accent, and that at times she is difficult to understand, this is principally because she is extremely soft spoken. Nonetheless, none of this stood in the way of her obtaining two graduate degrees at Columbia, more than satisfactory ratings from at least some Western supervisors and literally glowing endorsements from subsequent employers.").

109. *Fragante*, 888 F.2d at 597.

110. *Id.* at 596.

cated upon an individual's accent when—but only when—it interferes materially with job performance."[111]

In *Carino*, the plaintiff had a noticeable Filipino accent and was improperly denied a position as a dental laboratory supervisor where his accent did not interfere with his ability to perform supervisory tasks.[112] *Carino* held that "a foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions."[113] A similar court's approach is found in *Berke*, where the court held that an employee's "pronounced" Polish accent whose command of English was "well above that of the average adult American" was improperly denied two positions because of her accent.[114]

However, courts are suspect about prejudicial comments regarding an employee's accent, thus making it difficult for a plaintiff to prove pretext.[115]

2. Evidence of Intent or Motive: Difficulty of Proving Pretext

After the prima facie case and the legitimate, nondiscriminatory reason have been established, the plaintiff has a chance of proving pretext.[116] The job requirement is one of the most significant factors in determining whether an accent is pretext for national origin discrimination.[117] For example, a job requirement that specifies effective communication with customers could be a pretext for accent discrimination.[118] Consequently, for professions such as teachers, employers may legitimately consider a person's ability to effectively communicate.[119]

111. *Id.*

112. *Carino*, 750 F.2d. at 819.

113. *Id.*

114. Berke v. Ohio Dep't of Public Welfare, 628 F.2d 980, 981 (6th Cir. 1980).

115. *See* Watt v. New York Botanical Garden, 2000 WL 193626, at *7 (S.D.N.Y. 2000) (A statement such as: "I can't understand the way you speak" regarding the plaintiff's accent does not suggest an underlying bias to Jamaicans when the manager hired a person in the protected class and therefore it would be unlikely for the manager to "suddenly develop an aversion to members of that class.").

116. *Price Waterhouse*, 490 U.S. at 229.

117. 45 Fed. Reg. 85,632, 85,633 (Dec. 29, 1980) (preamble to "Guidelines on Discrimination Because of National Origin") ("Many commentators strongly supported this revision of the Guidelines and indicated that these Guidelines would be beneficial in achieving equal job opportunities for all individuals regardless of their national origin, or their cultural or linguistic characteristics.").

118. *Poskocil*, 1999 U.S. Dist. Lexis 259 at *2–3.

119. *Id.* at 11

In *Poskocil*, the Court recognized that a professor's accent could be a "legitimate issue" for evaluation.[120] Thus, the court concluded, there was nothing improper about an employer making an honest assessment of the oral communication skills of a candidate for a job when such skills are reasonably related to job performance.[121] The court accepted the employer's argument that accent was a factor and a legitimate consideration in light of the importance of verbal communication in the classroom while hiring a teacher.[122]

Then, the burden shifted to Poskocil to establish pretext. The argument that "native speakers don't always make the best foreign language teachers" was not considered a discriminatory remark demonstrating bias against native speakers.[123] Rather, the court treated it as a neutral statement, insufficient to establish pretext.[124] The employer argued that plaintiff's termination was due to her "modeling" of language, pronunciation, and "idiomatic English."[125] The court found that the employer did not appear to have made any facially discriminatory remarks and as an English as a second language teacher, Poskocil's usage of proper English understandably bore some relationship to her job performance.[126]

Similarly, in *Fragante* the court found that a failure to hire a qualified Filipino based on his oral ability to effectively communicate in English was reasonably related to the normal operations of the clerk position.[127] Fragante tried to rebut the presumption by arguing that the selection and evaluation procedures used by the employer were deficient rendering the proffered reason for non-selection as a pretext for national origin discrimination.[128] The court disagreed, holding that, in spite of the process being imperfect, it was insufficient to establish intent.[129]

Again, a refusal to promote a Dominican immigrant for a hotel front desk position was not found to be discriminatory due to the "plaintiff's language barrier" and the alleged hotel requirement "for

120. *Id.* (citing Hou v. Com. of Pa., Dep't of Educ., Slippery Rock State College, 573 F. Supp 1539, 1547 (W.D. Pa. 1983)).

121. *Id.* at 11.

122. *Id.* at 14.

123. *Id.* at 16–18.

124. *Id.* at 18.

125. *Id.*

126. *Id.*

127. *Fragante*, 888 F.2d at 597.

128. *Id.* at 598.

129. *Id.*

greater English proficiency than the plaintiff can exhibit."[130] The court accepted the business necessity defense from the employer and stated that the employer showed, by clear and convincing evidence, that the employer believed in good faith that the plaintiff would not have been able to competently perform the duties of the position she sought.[131]

However, courts treat discriminatory remarks about an employee's accent not connected to business necessity or effective communication as pretext.[132] In *Xieng*, the court questioned the employer's reasons for failure to promote the plaintiff when the plaintiff received positive job performance evaluations and recommendations for promotions.[133] The court found the employer's explanation was pretextual and "not worthy of credence."[134]

In *Kyriazi*, the court found that in spite of the plaintiff speaking with an accent, the accent did not interfere with her ability to acquire three degrees, two of them from prestigious universities in the United States.[135] The court noted that the achievement of a "B average at Columbia by a recent immigrant cannot be so lightly brushed aside."[136] Finally, the court questioned how the plaintiff could be considered unable to communicate effectively while receiving "above expected" ratings for her work.[137] The court agreed that the plaintiff spoke with an accent, and at times it was difficult to understand her, but that was due to her being extremely soft spoken, and not her accent.[138]

III. The Bona Fide Occupational Qualification Defense in the Workplace

The existing framework in accent discrimination cases omit the importance of accent discrimination as per se national origin discrimination. As a result, the accepted framework for accent cases lack

130. Mejia v. New York Sheraton Hotel, 459 F. Supp. 375, 376–77 (S.D.N.Y. 1978).
131. *Id.* at 378
132. Akouri v. Fla. DOT, 408 F.3d 1338, 1348 (11th Cir. 2005) ("They are all white and they are not going to take orders from you, especially if you have an accent," was sufficient to establish discrimination.).
133. Xieng v. Peoples Nat'l Bank of Wash., 821 P.2d 520, 525 (Wash. 1991) (where the court also questioned the employer's allegation that the plaintiff was an unsatisfactory employee with a poor performance evaluation).
134. *Id.* at 525.
135. *Kyriazi*, 461 F. Supp. at 925.
136. *Id.*
137. *Id.*
138. *Id.* at 925.

mechanisms that address whether the decision to discriminate was based on conscious or unconscious bias. In cases where the decision was unconscious, it is impossible for the plaintiff to establish pretext. A better approach to these cases is to recognize accent discrimination is per se national origin discrimination, and that the only employer defense available should be the Bona Fide Occupational Qualification defense. However, the BFOQ needs to be amended to prohibit customer preference as a defense to accent discrimination cases.

A. Conscious and Unconscious Accent Discrimination

A complicating factor in applying the existing Title VII framework to accent discrimination cases is that a plaintiff must establish that the defendant had a discriminatory intent or motive for making a job-related action.[139] In *Fragante,* the court reasoned that there was no discriminatory intent or motive based on the connection between Fragante's "pronounced accent" and his job requirement as a clerk.[140]

Professor Matsuda criticized the court's acceptance of the "difficult to understand defense."[141] Matsuda argues that more often than not it is challenging to determine if the accent actually affects job performance or if it differs from the "some preferred norm imposed, whether consciously or subconsciously, by the employer."[142] Further, Matsuda explains that pretext by its very definition involves a conscious choice to discriminate.[143] Thus, the requirement for the plaintiff to establish pretext is pointless.[144]

However, the situation differs in cases where accent discrimination is unconscious. According to Donald Rubin, the speaker's accent and the lack of comprehension may not be the main problem.[145] In an experiment where a group of listeners heard audiotapes with the same words spoken in different accents, the study found that the level of comprehension was different depending on whom the listeners see at the time they are listening to the tapes.[146] In one experiment, sixty-

139. 42 U.S.C.A. §§ 2000(e)–(k)(1)(A)(i).

140. *Fragante*, 888 F.2d at 598.

141. Mari J. Matsuda, *Voices Of America: Accent Antidiscrimination Law and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1332 (1991) (citing Fragante v. City of Honolulu, 888 F.2d 593, 598 (9th Cir. 1989)).

142. *Id.*

143. *Id.* at 1352.

144. *Id.*

145. *Id.*

146. Donald L. Rubin, *Nonlanguage Factors Affecting Undergraduates' Judgments of Nonnative English-Speaking Teaching Assistants*, 33 RES. HIGHER EDUC. 511, 514–518 (1992).

two North American undergraduates listened to a four-minute recording.[147] As the students listened to the lecture presented by a university instructor, they saw a photograph of the speaker on the screen.[148] The speaker was either a Caucasian woman or an Asian woman.[149] The same speaker, a native English speaker from Ohio, spoke on all of the tapes.[150] At the end of the experiment, the comprehension test scores were lower for the group that observed an Asian speaker than for the group that observed the Caucasian speaker.[151] The experiment showed that when the students were presented with a photograph of the Asian speaker the accent was perceived as more foreign.[152] The study explained that, due to cultural stereotypes, listeners attach accepted norms to the speaker they are facing.[153] As a result, listeners may not even be aware that they are being discriminatory, thus creating an unconscious bias.[154]

Further, accents are sometimes equated to ineffective communication. However, people are capable of understanding each other by adjusting to different intonations and pronunciations.[155] Matsuda suggests that French and Italian accents are charming.[156] She further suggests that individuals tend to associate certain accents "with wealth and power."[157] While at other times, accents can be deterring and "low class."[158] When this is the case, courts must deal with the issue of pure prejudice.[159] Accents that are not charming are often considered "untrustworthy," even though accents have nothing to do with the honesty and sincerity of a person who has the accent.[160] Matsuda argues that listeners tend to attach cultural meaning to an accent that often creates negative impressions and associations.[161]

Regardless of the link between the accent and the job in question, the employer may discriminate due to the unconscious bias that is a result of stereotypical norms. The employer unconsciously as-

147. *Id.* at 514.
148. *Id.*
149. *Id.*
150. *Id.* at 515.
151. *Id.* at 518.
152. *Id.*
153. *Id.*
154. Matsuda, *supra* note 141, at 1355.
155. *Id.* at 1362.
156. *Id.* at 1352, 1364.
157. *Id.*
158. *Id.* at 1364.
159. *Id.*
160. *Id.* at 1377.
161. *Id.*

sumes that the plaintiff's accent will impair the job performance when in fact it will not.

B. A Redefined BFOQ as an Employer's Defense

The majority of accent discrimination cases are brought under the disparate treatment theory. This Comment argues that the BFOQ defense should be re-evaluated. The BFOQ exception applies when an employer can prove that an employment preference based on one of these protected class characteristics is reasonably necessary to the normal operation of its particular business or enterprise.[162] Employers attempting to use the BFOQ exception as a legal defense must be prepared to explain why its bias on the basis of sex, religion, national origin or age is truly necessary to the position in the context of the business or enterprise.[163] For example, in *Fragante,* the court concentrated on whether the employment decision based on accent was permissible because it was based on a legitimate business reason that linked the position with effective communication.[164]

1. History of the BFOQ Defense

Section 703 of Title VII of the Civil Rights Act encompasses the the Bona Fide Occupational Qualification defense. This defense is a Title VII exception, which allows intentional discrimination in some instances:

> Notwithstanding any provision of this subchapter . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fine occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[165]

However, "Congress provided sparse evidence of its intent when enacting the BFOQ exception to Title VII."[166] The Interpretative Memorandum of Title VII referred to the BFOQ as a "limited exception to the Act's prohibition against discrimination, conferring upon employers a 'limited right to discriminate on the basis of religion, sex,

162. Nguyen, *supra n*ote 65, at 1343.

163. *Id.* at 1333, n. 43.

164. *Fragante*, 888 F.2d at 596.

165. 42 U.S.C.A. § 2000e–2(e)(1).

166. Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 297 (N.D. Tex. 1981).

or national origin where the reason for the discrimination is a bona fide occupational qualification.' "[167]

Congressman Rodino stated, "[t]here may be some instances where a person of a certain national origin may be specifically required to meet qualifications of a particular job."[168] As examples of "legitimate discrimination," the memorandum refers to "the preference of a professional baseball team for male players, the preference of a French cook for a French restaurant, and the preference of a business, which seeks the patronage of members of particular religious groups for a salesman of that religion."[169]

Over time, the elements for establishing BFOQ have developed into a three-part test.[170] First, relying on the Interpretive Memorandum, *Dothard v. Rawlinson* concluded that Congress intended the BFOQ as an "extremely narrow exception" to Title VII.[171] Shortly thereafter, the EEOC pronounced that the BFOQ in claims based on sex and national origin should be "interpreted narrowly."[172]

2. Judicial Interpretation of the BFOQ Defense

The BFOQ defense is applicable in cases where the discrimination is "intentional and unintentional."[173] In determining whether a BFOQ defense will apply, courts established the "essence of the business test."[174] The standards for the test were proposed in *Diaz v. Pan American World Airways, Inc.*[175] There, the court stated that the first element of the BFOQ defense is a "necessary" reason for discrimination—the discrimination must be "necessary" for the business to continue to operate, mere business convenience is insufficient.[176] The second element requires the defendant to provide proof "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all" people being discriminated on "would be una-

167. *Id.* at 297.

168. Perea, *supra* note 31, at 818–19.

169. 110 CONG.REC. 7213 (Mar. 30, 1964) (April 8, 1964) (Interpretive Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senator Joseph S. Clark and Senator Clifford P. Case, Floor Managers).

170. Int'l Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Johnson Controls, 499 U.S. 187, 194 (1991).

171. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

172. 29 C.F.R. § 1604.2(a).

173. *Wilson,* 517 F. Supp. at 297.

174. Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971).

175. *Id.*

176. *Id.*

ble to efficiently perform the duties of the job involved."[177] The "all or substantially all" test has applied to a gender-based BFOQ defense, in which Pan American refused to hire a male for the cabin attendant position.[178] The final element in the BFOQ defense requires proof that a less discriminatory alternative does not exist.[179]

a. Customer Preference Defense in Title VII Actions

Notwithstanding Congress's initial intent to forbid the BFOQ defense based on customer preference, courts often accept this employer defense when applying the "essence of business" test.[180] The issue in *Diaz* was whether an airline's policy that discriminated against male applicants for the flight attendant position was within the scope of the BFOQ defense.[181] Diaz applied as a flight cabin attendant.[182] Pan American Airways did not hire him due to their admitted policy of only hiring females for the cabin attendant position.[183]

In *Diaz*, the District Court held that restricting the position to females was a BFOQ for the position of an airline attendant because it found that women were better than men at "providing reassurance to anxious passengers, giving courteous personalized service, and in general making flights as pleasurable as possible within the limitations imposed by the aircraft operations."[184]

However, the Fifth Circuit rejected this argument and declared that Pan American's policy was not a BFOQ because it was not "reasonably necessary to the normal operation" of business.[185] Further, the court stated "customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers."[186] The court acknowledged the "very narrow standard for weighing customer preference" adopted by courts following *Diaz*.[187]

Again in *Wilson,* the plaintiff challenged Southwest's female-only hiring policy.[188] The airline argued the BFOQ defense, explaining

177. Weeks v. Southern Bell Tel. & Tel.Co., 408 F.2d 228, 235 (5th Cir. 1969).
178. *Id.*
179. *Int'l Union*, 499 U.S. at 192.
180. 29 C.F.R. § 1604.2(a)(1)(iii) (1972).
181. *Diaz*, 442 F.2d at 386.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 387.
186. *Id.* at 388.
187. *Wilson*, 517 F. Supp. at 302, n.24.
188. *Id.* at 295.

that it was "crucial to the airline's continued financial success."[189] The court held that Southwest Airlines "was not a business where various sex entertainment was the primary service provided."[190] The court concentrated on causation to conclude that Southwest "had failed to establish by competent proof that revenue loss would result directly from hiring males."[191]

IV. Suggested Solutions to Address Accent Discrimination

Congress did not try to protect an employer's rights to make hiring decisions based on customer attitudes and preferences.[192] The BFOQ exception did not justify "the refusal to hire an individual because of the preferences of . . . the employer, clients or customers," except where "necessary for authenticity."[193] As Congress stated, according to the EEOC, the application of BFOQ exception in claims based on national origin should be applied narrowly.[194] "The BFOQ exception should be limited to situations only where individuals from different nations cannot perform the duties of the job in question."[195] National origin must also be an actual qualification for job performance.[196] Even though this defense is limited, courts have interpreted it in accent discrimination cases more generously by allowing employers to use customer preference arguments.[197]

A. Rejection of Customer Preference Defense

More often than not, plaintiffs in accent discrimination cases are unsuccessful.[198] In order to change this outcome, the current burden of proving accent discrimination should be reevaluated in order to deter employers from discriminating against employees with an accent based on an enigmatic "customer preference defense." One solution is to afford less weight to customer preference. This will allow courts

189. *Id.* at 293.
190. *Id.* at 302.
191. *Id.* at 304.
192. *Id.*
193. 29 C.F.R. § 1604.2(a)(1)(iii) (1972).
194. *Wilson*, 517 F.Supp. at 297.
195. U.S. Equal Emp. Opportunity Comm'n Compl. Man. § 604.10(c): THEORIES OF DISCRIMINATION: STATUTORY DEFENSES (2002).
196. *Id.*
197. *See e.g.*, *Diaz*, 442 F.2d at 389 (stating that customer preference is available when it is based on the "company's inability to perform the primary function or service it offers."); *see also* Jones v. Hinds Gen. Hosp., 666 F. Supp. 933, 937 (S.D. Miss. 1987) (allowing customer preference defense to justify a "bona fide occupational qualification.").
198. Perea, *supra* note 31, at 830.

to focus on the actual skills required for a position and whether it is proficiency in English or the accent that precludes an employee from successfully performing the job duties. Applying the *Matsuda* factors can help facilitate this analysis.[199]

The current framework of the BFOQ defense places the burden on the employers to prove that discrimination is "reasonably necessary to the normal operation of that particular business or enterprise."[200] Even though courts typically reject customer preference defenses, cases like *Fragante* and *Pokoscil* suggest that employers may use this defense rather broadly, such as when employees are dealing with the public or students.[201]

In *Fragante*, the court accepted "dealing with the public" as a customer preference defense.[202] There, the court held, and the defendant's argued, that Fragante's inability to "deal tactfully and effectively with the public" was sufficient to deny him employment.[203] Likewise in *Poskocil*, the court treated students' complaints regarding understanding the teacher due to her accent as a valid BFOQ defense.[204]

By accepting the customer preference defense, courts have neglected the plaintiff's ability to perform the job exceptionally.[205] By reevaluating the accepted BFOQ defense, plaintiffs must still prove that they can competently perform their job, and defendants must prove that the job necessarily requires an employee to speak without an accent. The reevaluation of the interpretation of the BFOQ defense may have given Poskocil or Fragante a fair chance in defending their arguments. Thus, courts should rely less on the customer preference defense.

A new judicial approach should ensure there is higher scrutiny of legitimate and valid reasons against accent discrimination. Finding a solution to this would not only enable employers to justify their decisions, but the clarification would help raise prospective employee awareness of the English proficiency required for a position. This ap-

199. Matsuda, *supra* note 141, at 1368.

200. 42 U.S.C. § 2000e–2(e) (1988).

201. *See e.g.*, *Fragante*, 888 F.2d at 597 (holding that customer preference is available when it is based on the "important skills required for the position" such as "their communication skills."). *See also Poskocil*, 1999 U.S. Dist. Lexis 259 at *5, n.2 (holding that students' evaluations regarding the "teacher's lack of English" was a sufficient defense to reject full time employment to Poskocil).

202. *Fragante*, 888 F.2d at 597.

203. *Id.*

204. *Poskocil*, 1999 U.S. Dist. Lexis 259 at *1.

205. *Id.* at 1.

proach would enable courts to evaluate claims that effective communication is necessary for the position while ensuring that the customer preference defense would no longer be accepted as a legitimate, nondiscriminatory reason without more valid reasons.

An employer should be required to present evidence that the employee had difficulty communicating. Special attention should be paid to the language used as distinguished from the accent in an attempt to ascertain which of the two is causing difficulties. If an employee is difficult to understand, the employer should be required to answer several questions before making any decision regarding the job or position. Questions such as: Why is it difficult to understand the employee? Is it due to a lack of proficiency in the English language? Is the employee soft spoken? Is the employee's accent impossible to understand? Finally, the employer should be required to provide prior evaluations and reviews. This will allow courts to analyze whether the communication problem is related to an accent or whether some other prejudice is affecting the employee's termination or demotion.

By placing a higher burden on the employer to demonstrate the reasons for their decisions, courts will be better equipped to distinguish between accent-based discrimination and English proficiency issues.

B. Expanding Elements of the BFOQ Test

As the workplace continues to expand, as will its diversity, courts will face more issues regarding communication and accent discrimination. Courts acknowledge that "there are some job positions for which the ability to communicate effectively is a legitimate consideration."[206] Therefore, in some cases, it is appropriate for an employer to make honest assessments of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance.[207]

When such issues arise, employers may present a model of communication in the workplace, which has three main elements: (1) effective communication skills are necessary for job X, (2) accent impedes effective communication, and (3) the applicant speaks with an accent. If all three elements are found then courts can conclude that the applicant or employee lacks the necessary skills for the job.[208]

206. Shieh v. Lyng, 710 F. Supp. 1024, 1032 (E.D. Pa. 1989).

207. *Fragante*, 888 F.2d at 596–97.

208. Rosina Lippi-Green, *Accent, Standard Language Ideology, and Discriminatory Pretext in the Courts*, 23 LANGUAGE IN SOC'Y 163, 178–80, 184 (1994).

However, this assessment must be fair to the plaintiff. A more thorough approach for the evaluation of the requirements should be in place. Professor Matsuda offers a number of factors that a court should take into consideration while evaluating whether there is a nexus between accent and job duties.[209] Matsuda suggests that the following factors will increase the objectivity of court's assessment of a plaintiff's claim: What level of communication is required for the job? Was the candidate's speech fairly evaluated? Is the candidate intelligible to the pool of relevant non-prejudiced listeners, such that job performance is not unreasonably impeded? What accommodations are reasonable given the job and any limitation in intelligibility.[210]

The use of these factors will allow courts to evaluate the nature of the job in question, whether it is primarily oral, and what the consequences of miscommunication are.[211] Matsuda emphasizes the importance of cohesively evaluating and analyzing the conditions, context, and the amount of contact at the job.[212] For example, a dispatcher speaking to the same truck driver many times a day, where the context is indirect, over the phone, yet not limited to one-time exchange, necessarily differs from a situation where communication is not distributed evenly such as a doctor-patient interaction.[213]

Applying the more extended BFOQ defense to *Fragante* and *Poskocil*, the courts may have held differently. In *Fragante*, the court could have reviewed Fragante's interviewing process differently to focus on whether the accent would impede job performance. The Court should have used the Matsuda factors to test Fragante's communications skills. Again, in *Poskocil*, the court might have paid less attention to the impressions of the students, and their possible bias towards their teacher.

Conclusion

The long history of discrimination against speakers with foreign accents in the United States suggests that people with accents deserve adequate protection under Title VII. Further, the strong link between accent and national origin justifies Title VII protection. Similar to national origin, accent is practically immutable thus requiring accurate protection for accent discrimination. Further, by eliminating the cus-

209. Matsuda, *supra* note 141, at 1367.
210. *Id.* at 1368.
211. *Id.*
212. *Id.* at 1370.
213. *Id.* at 1370–71.

tomer preference defense in accent discrimination cases, and implementing the Matsuda factors, courts will ensure fair treatment of prospective employees with accents.

Antitrust Implications of the Copyright Alert System

By BREANNA ROSE*

THE COPYRIGHT ALERT SYSTEM is a private copyright enforcement mechanism jointly adopted by numerous content owners and internet service providers to deter illegal peer-to-peer file sharing.[1] While many analysts have studied how the Copyright Alert System interacts with other areas of American jurisprudence, few commentators have analyzed its significant antitrust implications. This paper explores the history of online copyright infringement through peer-to-peer file sharing, an overview of the Copyright Alert System, and the antitrust ramifications resulting from private copyright enforcement through the Copyright Alert System.

Introduction

In July 2011, a conglomerate of content owners[2] and internet service providers[3] announced the formation of the Copyright Alert System, which is a graduated notification system aimed at educating, alerting, and punishing individual internet service subscribers who engage in online copyright infringement.[4] The Copyright Alert System,

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1. *See Memorandum of Understanding, Preamble*, CENTER FOR COPYRIGHT INFRINGEMENT (July 6, 2011), [hereinafter *Memo*] https://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf [https://perma.cc/WA78-4QBS].

2. *Memo, supra* note 1, at Section 1. Entertainment industry associations involved include the Independent Film and Television Alliance ("IFTA") and the American Association of Independent Musicians ("A2IM"); Recording Industry Association of American members Universal Music Group, Warner Music Group, Sony Music Entertainment, and EMI Music; and Motion Picture Association of America members Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox Film Corporation, Universal Studios, and Warner Brothers Entertainment. *Memo*, Section I (July 6, 2011).

3. *See Memo, supra* note 1, at Attachment A.

4. *See Memo, supra* note 1, at Part IV(G).

commonly referred to as the "six strikes" program,[5] requires signatory content owners to monitor peer-to-peer file sharing sites for downloaded copyrighted material. Once the content owner informs the internet service provider of a subscriber's alleged copyright infringement, the six strikes policy is enforced against the subscriber, which may culminate into a copyright infringement lawsuit if not resolved.[6]

After the Copyright Alert System's implementation in February 2013, legal analysts have evaluated the relationship between the Alert System and other areas of American law such as the First Amendment,[7] fair use,[8] and §512 of the Digital Millennium Copyright Act ("DMCA").[9] In addition to these concerns, private copyright enforcement through the Copyright Alert System may also produce negative antitrust implications. Section 1 of the Sherman Act prohibits any restraint of trade that may boycott individuals or companies from engaging in a free market industry.[10] By allowing companies that would be natural competitors to enter into both a horizontal and vertical agreement to privately enforce copyright protections, and effectively punish alleged infringers via ambiguous "mitigating measures"[11] without legal authority, these companies may be illegally restraining trade by purposefully blacklisting consumers who receive online media content from other sources.[12] The Copyright Alert System may also be considered an anti-competitive behavior under §1 of the Sherman Act under both a per se and rule of reason analysis.

Peer-to-Peer File Sharing—The Evil or the Excuse?

Peer-to-peer file sharing is the process of sharing online material, such as media files, music, books, movies, and games, directly from one end-user computer to another.[13] Early versions of file-sharing sites

5. Cyrus Farivar, *"Six Strikes" Program Could Affect Businesses Too, Even if Infringer is Unknown,* ARS TECHNICA (Jan. 14, 2013), http://arstechnica.com/business/2013/01/six-strikes-program-could-affect-businesses-too-even-if-infringer-is-unknown/ [https://perma.cc/366Q-9DVK].

6. *See Memo supra* note 1, at Part IV(G)(i) (July 6, 2011).

7. *E.g.*, Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1413–16 (2010).

8. *Id.* at 1417–18.

9. *Id.* at 1403–10.

10. 15 U.S.C. § 1 (2006).

11. *See Memo, supra* note 1, at Part IV(G)(iii).

12. *See generally id.* at Part IV (G)(iv).

13. *What You Need to Know About Peer-to-Peer File Sharing,* ZONEALARM BY CHECKPOINT (June 4, 2014), http://www.zonealarm.com/blog/2014/06/what-need-know-about-peer-to-peer-file-sharing/ [https://perma.cc/X2EZ-ZKCD].

simply connected end-user computers ("leechers") who wanted digital media to a network of "seeders," other end-users who distributed digital media content.[14]

Previous peer-to-peer networks employed a centralized communication model, a type of online network where all users connected to one central server. Currently, peer-to-peer networks use a non-centralized model. Multiple servers rather than one[15] now allow individuals to connect to other "seeders" who install peer-to-peer software on their own computer.[16] This decentralized approach has made identifying and catching peer-to-peer content sites, such as BitTorrent, significantly more challenging. BitTorrent is a peer-to-peer file sharing network that allows users to search, download and upload media files to popular torrent interface sites, such as The PirateBay, through the following process:

> [T]o download a file [. . .], you have to find and download a torrent file (which uses the .torrent file extension) and then open it with your BitTorrent client software. The torrent file does not contain your files. Instead, it contains information which tells your BitTorrent client where it can find peers who are also sharing and downloading the file.[17]

Peer-to-peer file sharing can be a high-speed and low bandwidth way to share large files between computers, allowing large amounts of data to be transmitted without spending thousands of dollars on bandwidth costs.[18] But, there are many critics that condemn peer-to-peer file sharing as illegal and morally wrong.

Although over 70 million people engage in peer-to-peer file sharing,[19] in most instances it is still considered copyright infringement. Under copyright law, a copyright owner has the exclusive right to copy, create derivative works of, distribute, perform, and display their

14. *Defining Peer-to-Peer File Sharing: How it Works,* THE LSE CYBERLAW STUDENT BLOG (Feb., 2016), http://lsecyberlaw.blogspot.com/2016/02/defining-peer-to-peer-file-sharing-how.html, [https://perma.cc/SL9X-YEVQ].

15. *Id.*

16. *See generally* Carman Carmack, *How BitTorrent Works*, HOW STUFF WORKS (March 26, 2005), http://computer.howstuffworks.com/bittorrent1.htm [https://perma.cc/V3A7-2BKA].

17. Adam Pash, *A beginner's guide to BitTorrent*, LIFE HACKER BLOG (Aug. 3, 2007, 24:00 EST), http://lifehacker.com/285489/a-beginners-guide-to-bittorrent [https://perma.cc/626D-UG2Q].

18. *Id.*

19. Ray Delgado, *Law professors examine ethical controversies of peer-to-peer file sharing,* STANFORD REPORT (Mar. 17, 2004), http://news.stanford.edu/news/2004/march17/fileshare-317.html [https://perma.cc/YGE2-HPKH].

work.[20] Any unauthorized person who violates one of these exclusive rights is liable for copyright infringement.[21] In order for an end-user to receive the digital material in peer-to-peer file sharing, the user must "download" the file to their computer, which results in an electronic "copy." The act of downloading copyrighted material without the copyright owner's permission is typically considered copyright infringement unless the material is being used for the purpose of criticism, education, news reporting, scholarship, or commentary.[22]

This poses a new and unique problem with copyright enforcement. With millions of people participating in peer-to-peer file sharing, enforcing online copyright protection is becoming very difficult. Currently, relief from online copyright infringement is only available in the form of individual lawsuits filed against each infringer, which results in considerable monetary and efficiency concerns.

American attitudes about peer-to-peer file sharing are also shifting. In the US alone, 80% of people who possess online music files and 73% of people who possess online TV and movie files believe that it is "perfectly appropriate" to share them with family members.[23] Additionally, younger Americans between 18–29 years old believe that uploading and linking unauthorized TV/movie files online is reasonable.[24] Historically, public opinion of peer-to-peer file sharing has been overwhelmingly negative.[25] This recent shift surrounding peer-to-peer file sharing may have longstanding jurisprudential effects on how courts view protecting online copyright protections.

A primary reason why peer-to-peer file sharing is still viewed so negatively is due to the supposed economic effects on the entertainment industry. Yet the large quantity of peer-to-peer shared files may not produce the profound economic impact that the entertainment industry claims. Although overall music sales declined with the introduction of peer-to-peer file sharing technology, beginning with Napster,[26] varying economic studies have linked the downturn of music

20. See 17 U.S.C. § 106 (1990).

21. See 17 U.S.C. § 501 (2006).

22. See 17 U.S.C. § 107 (1990).

23. Attitudes about Piracy, THE AMERICAN ASSEMBLY, http://piracy.americanassembly.org/copy-culture-report/attitudes/ (last visited May 11, 2016) [https://perma.cc/43PK-JFGQ].

24. *Id.*

25. Bootie Cosgrove-Mather, *CBS news poll: Young Say File Sharing OK*, CBS NEWS (Sept. 18, 2003), http://www.cbsnews.com/news/poll-young-say-file-sharing-ok/ [https://perma.cc/T4MW-C877].

26. *See* Sanjay Goel, Paul Miesing, & Uday Chandra, *The Impact of Illegal Peer-to-Peer File Sharing*, 52 CAL. MGMT. REV. NO. 3, 6 (2010), http://www.albany.edu/~pm157/research/

sales to a shift in how consumers enjoy music rather than "piracy" over peer-to-peer networks.[27] Yochai Benkler, a co-director of the Berkman Center for Internet & Society at Harvard University, goes so far as to suggest that peer-to-peer file sharing may actually be economically efficient in the long term.[28]

In the film industry, a study published by the Motion Picture Association of America stated that American studios lost $2.373 billion to internet piracy through peer-to-peer file sharing in 2005.[29] Yet commentators have doubted the study's legitimacy due to lack of statistical and scientific transparency.[30] Additionally, the study assumed that one lost movie sale amounted to one illegal download from a peer-to-peer network. This assumption fails to consider that a downloader may not have purchased, or even watched the movie unless it was available in a peer-to-peer network.[31]

Although peer-to-peer file sharing may be an efficient, profitable, and widespread solution to acquiring online content, it is still illegal. Conventional anti-piracy efforts have inadequately addressed the long-standing issue around file sharing—how to stop mass online copyright infringement by millions of Americans. The Copyright Alert System is the entertainment industry's attempt to develop a private solution.

The Copyright Alert System—An Overview

The Copyright Alert System was prescribed in a Memorandum of Understanding among some of the largest internet service providers such as Verizon, Comcast, and a conglomerate of large entertainment

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The%20Impact%20of%20Illegal%20Peer-to-Peer%20File-Sharing%20on%20the%20Media%20Industry.pdf [https://perma.cc/FYK2-4Y4M].

27. The NDP Group: Music File Sharing Declined Significantly in 2012, NDP Group (Feb. 12, 2016), https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-music-file-sharing-declined-significantly-in-2012/ [https://perma.cc/8QTT-CUST]. *See also* Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. of Political Economy 1, 1–42 (Feb. 2007).

28. Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom, 86 (2006).

29. *Swedish Authorities Sink Pirates Bay,* Eche. . .Blah. . .Blah (May 31, 2016), http://echeblahblah.blogspot.com/2006/06/swedish-authorities-sink-pirate-bay.html [https://perma.cc/PV8R-TC5M].

30. See generally *Ken Fisher,* The problem with MPAA's shocking piracy numbers, Ars Technica (May 5, 2006), http://arstechnica.com/uncategorized/2006/05/6761-2/ [https://perma.cc/7KMW-47KJ].

31. Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis,* UNC Chapel Hill (March, 2004) at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf [https://perma.cc/GK5U-WL4N].

content owners.[32] The Memorandum of Understanding outlines a uniform graduated response system that signatory internet service providers must implement against alleged copyright infringers.[33] A series of notices are sent to an internet subscriber's registered email account after a content owner notifies their internet service provider of a subscriber's infringing behavior.[34]

Content owners use "certain automated techniques" to identify subscribers who they think are engaged in peer-to-peer file sharing.[35] However, the validity and accuracy of these techniques are unsubstantiated, with weak legal footing when determining what constitutes copyright infringement. Once an internet service provider is notified of a subscriber's alleged copyright infringement, the Copyright Alert System is implemented.

The program is divided into a four-step procedure capable of distributing up to six alerts to a given subscriber.[36]

Step 1: Initial Education

Once the Copyright Alert System is activated, the internet service provider is required to notify their subscriber of the alerted infringement via an Initial Education notice.[37] Typical information contained in an educational notice states that: (1) online copyright infringement is an illegal act punishable under §512 of the Digital Millennium Copyright Act ("DMCA"), (2) the subscriber cannot engage in online copyright infringement, (3) online copyright infringement is also a violation of their internet service provider's terms of service, (4) subscribers can obtain copyrighted works lawfully through the internet service provider, and (5) continued infringing behavior will result in further actions by the internet service provider.[38] Internet service providers can send up to two educational notices to each alleged infringer.[39]

After the Copyright Alert System is triggered, signatory content owners face some repercussions. Content owners are removed from

32. *See Memo, supra* note 1, at Attachment A (July 6, 2011).
33. See generally *Memo, supra* note 1, at Part IV(G) (July 6, 2011).
34. *Id.*
35. *Copyrights and Verizon's Copyright Alert Program*, VERIZON, https://www.verizon.com/support/consumer/account-and-billing/copyright-alert-program-faqs (last visited Jan., 2017) [https://perma.cc/XPL5-J8PP].
36. See generally *id.*
37. See *id.*
38. *See Memo, supra* note 1, at Part IV(G)(i) (July 6, 2011).
39. *Id.*

the copyright enforcement process, leaving only internet service providers to implement the Copyright Alert System. Additionally, once the Copyright Alert System is activated, content owners cannot seek federal copyright remedies against an infringer until the last step of this system is completed. This bars content owners from receiving monetary remedies against an alleged infringer until after the sixth strike is implemented.[40] Content owners can also only report a limited number of alleged copyright infringements per month, thus requiring content owners to discriminate between infringing subscribers that they want to pursue.[41]

The Copyright Alert System may also have an impact on internet service providers. Signatory internet service providers may be precluded from copyright liability under DMCA section 512. Under the DMCA, online service providers are exempt from copyright liability if they respond to directed notices of copyright infringement with mitigating measures, such as taking down the illegal file.[42] It is unclear if DMCA remedies would be helpful in combating peer-to-peer sharing, or even that peer-to-peer sharing existed when the law was passed. If an internet service provider implements this system, they may be shielded from future copyright liability. Thus, content owners waive their right in advance to pursue financial remedies against internet service providers, which may or may not be a good trade.

Subscribers also face procedural effects beyond receiving an educational notice. At this stage, subscribers cannot combat any allegations of copyright infringement, even in cases of mistaken alerts. Subscribers must wait until the third stage of the Copyright Alert System to challenge any mistaken or alleged copyright infringement. Thus, the Copyright Alert System fails to provide adequate "due process" to subscribers, or any kind of process whatsoever, until the third stage of alerts and punishment.

Step 2: Acknowledgment

The Acknowledgment Step requires an internet service provider to send a third notice to the alleged infringer. The internet service provider requires the subscriber to acknowledge their receipt of the

40. See generally *Memo, supra* note 1, at Part IV(G)(iv) (July 6, 2011).

41. *See Memo, supra* note 1, at Part V(C) (July 6, 2011).

42. *See generally* Ashley Cullins, *Music Industry A-Listers Call on Congress to Reform Copyright Act*, HOLLYWOOD REPORTER (March 31, 2016, 13:48 EST) http://www.hollywoodreporter.com/thr-esq/music-industry-a-listers-call-879718 [https://perma.cc/JM5P-GFFS].

first two notices and agree to cease all infringing conduct.[43] This alert is supposed to be carefully worded to not require the subscriber to "acknowledge participation in any allegedly infringing activity."[44] This step also requires internet service providers to alert subscribers that their identity and information may be provided to third parties, such as content owners, if their conduct continues.[45]

In order for a subscriber to acknowledge the alert, the subscriber must go to either a temporary landing page or a "pop-up" notice will appear.[46] If infringing behavior continues, the internet service provider has the choice of sending another Educational Alert or sending up to two Acknowledgment Step Copyright Alerts.[47] It seems that this stage only prolongs the Educational Stage with an additional bite, requiring acknowledgement of copyright infringement regardless of culpability.

Step 3: Mitigation Measures

The Mitigation Measures stage escalates previous notification requirements. This stage requires:

> (a) [the subscriber] acknowledge . . . receipt of the Copyright Alert as described in the Acknowledgement Step, (b) [confirmation that]. . . the subscriber has received prior warning regarding alleged peer-to-peer online infringement, and (c) inform[s] the subscriber that, per the Participating Internet Service Provider's . . . Terms Of Service and as set forth in prior Copyright Alerts, additional consequences [shall] be applied upon the subscriber's account . . . .[48]

A subscriber is given an allotted grace period to dispute the notice.[49] If the subscriber does not dispute the notice within the grace period, the internet service provider must implement various mitigating measures against the subscriber. These mitigating measures in-

43. *See Memo, supra* note 1, at Part IV(G)(ii) (July 6, 2011).

44. *Id.*

45. "Participating ISP may provide relevant identifying information about the Subscriber and the Subscriber's infringing conduct to third parties, including Content Owner Representatives or their agents and law enforcement agencies." *See Memo, supra* note 1, at Part IV(G)(ii) (July 6, 2011).

46. *See Memo, supra* note 1, at Part IV(G)(ii) (July 6, 2011).

47. *Id.*

48. *See Memo, supra* note 1, at Part IV(G)(iii) (July 6, 2011).

49. A subscriber can dispute the notice through application to the Independent Review Program, which provides a binding decision within the confines of the Copyright Alert Program. *See Memo, supra* note 1, at Part IV(H)(i) (July 6, 2011). The Dispute period is calculated as ten business days or fourteen calendar days after receipt of the notice. *See Memo, supra* note 1, at Part IV(G)(iii) (July 6, 2011).

clude temporary reductions and restrictions of the subscriber's internet service for a "reasonable" period of time as determined at the discretion of the internet service provider.[50]

For a subscriber to dispute an alleged infringement,[51] they must challenge the allegation under one of six grounds:[52] (1) misidentification of the account, (2) authorization to download, (3) misidentification of the file, (4) work was published before 1923, (5) fair use, and (6) unauthorized use of the subscriber's account.[53] A subscriber must also pay a nonrefundable $35.00 fee[54] unless they qualify for a hardship waiver.[55] The subscriber's disputed copyright infringement claim then is resolved through the binding decision of an ad hoc Independent Review Board. This leaves all due process concerns to be resolved in a burdensome and scant proceeding. The Independent Review Board does not allow subscribers to challenge alleged copyright infringement under theories of copyright invalidity, de minimis copying, or any exception as outlined under 17 U.S.C. §§108-122, such as the "library exception."[56]

Additionally, if either the content owner or alleged copyright infringer seeks further legal review, any determination of the Independent Review Board is excluded from admission as evidence. This forces both content owners and subscribers to re-plead their case in court and submit evidence of copyright infringement that is difficult to ascertain without an internet service provider's assistance.[57]

Step 4: Post-Mitigation Measures

The final escalation is the Post Mitigation Measures step, which requires that the internet service provider give another notice of alleged infringement and requires the subscriber to seek review.[58] If the subscriber does not seek review, the internet service provider must implement one of the above mitigating measures and may take legal action under the repeat infringer policy as outlined under section 512

50. *Id.*
51. See generally *Memo, supra* note 1, at Part IV(H) (July 6, 2011).
52. *See Memo, supra* note 1, at Attachment C, Part I(i)–(iv) (July 6, 2011).
53. *Id.*
54. *See Memo, supra* note 1, at Attachment C, Part IV(vi)(i) (July 6, 2011).
55. See generally *id.*
56. *See Defenses to Copyright Infringement,* UNIVERSITY OF NORTH CAROLINA, http://www.unc.edu/~unclng/copyright-defenses.htm (last visited Jan, 2017) [https://perma.cc/XT9V-Y6RM].
57. *See Memo, supra* note 1, at Part IV(G)(i) (July 6, 2011).
58. *See Memo, supra* note 1, at Part IV(G)(iv) (July 6, 2011).

of the DMCA.[59] The repeat infringer policy under §512(i)(1)(A) of the DMCA requires that the internet service provider "(i) adopt a policy that provides for the termination of service access for repeat copyright infringers, (ii) inform users of the service policy, and (iii) implement the policy in a reasonable manner."[60] While it seems that the Copyright Alert System may fulfill this requirement, the DMCA provision requires the internet service provider to go one step further and complete termination of the subscriber's account.

Although the internet service provider does not need to continually send notices during this period, it must track the subscriber's online activity and report all infringement allegations to content owners who choose to initiate a lawsuit.[61] An internet service provider can waive this step if it directs its subscriber to a "final warning" notice.[62]

Antitrust Law

Overview—The Sherman Act and Antitrust Legal Standards Of Review

The Sherman Antitrust Act was a late nineteenth century legislative response to the rise and expansion of large companies such as the Standard Oil Company.[63] The Act aimed to help prevent the rise of monopolistic conglomerates. This gave the Attorney General authority to sue companies engaging in anticompetitive behavior.[64] Over the years, antitrust enforcement has evolved to enforce fairness and protectionism in the competitive process, maintaining that consumers should be entitled to have a high supply of goods at the lowest prices possible.[65] Thus, antitrust law protects a free marketplace rather than specific competitors.[66]

Section 1 of the Sherman Act states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,

59. *Id.*

60. See Capitol Records, *L.L.C. v. Escape Media Group, Inc.,* 114 U.S.P.Q.2d 1196 (S.D.N.Y. March 25, 2015).

61. *See Memo, supra* note 1, at Part IV(G)(iv) (July 6, 2011).

62. *Id.*

63. William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act*, 54–55 (1965).

64. *Id.* at 94.

65. Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* (2003) 40–42.

66. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

is declared to be illegal."[67] Any supposed violation of this section is adjudicated against either a "per se" or "rule of reason" standard.

"Per se" antitrust violations are practices that the Supreme Court has deemed prima facie evidence of illegal conduct such as horizontal price-fixing and group boycotts.[68] Per se violations provide a guidepost for public and private companies to know what business practices are blatantly illegal.[69] Per se illegal business practices offer no pro-competitive justifications to the market.

For business practices that may have arguable pro-competitive benefits, courts use a "rule of reason" standard.[70] In a rule of reason analysis, the court determines whether the company in question has sufficient market power[71] to have an impact on competition.[72] If the business has sufficient market power, then the court weighs if the challenged business practice has any justifiable pro-competitive benefits enough to outweigh its inherent anticompetitive effects.[73]

Tensions Between Antitrust Law and Copyright Law—The Copyright Alert System

Antitrust and copyright law are philosophically in tension with one another. Copyright law seeks to enjoin authors with monopolistic rights to their work,[74] whereas antitrust law attempts to limit the monopolistic power of individuals and corporations.[75] Yet both copyright law and antitrust law coexist within American law because, arguably,

67. 15 U.S.C. § 1 (2000).

68. Horizontal price fixing refers to competitors at the same level of the market distribution chain agreeing to sell items or services at a certain price, typically a price that is greater than the natural free market would allow. Roberta F. Howell, "*Price Fixing and Other Horizontal Requirements,*" DISQUS (March 2, 2011), https://www.inddist.com/article/2011/03/price-fixing-and-other-horizontal-requirements [https://perma.cc/8E9P-CGE5]. *See also* HYLTON, *supra* note 65, at 104–31 (2003).

69. *Id.* at 129–31.

70. *Id.* at 104–105.

71. Thomas G. Krattenmaker, Robert H. Lande, & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 27 J. REPRINTS ANTITRUST L. & ECON. 585 245 (1997) (discussing economic meaning of market power and monopoly power).

72. *California Dental Ass'n v. Fed. Trade Comm'n.,* 526 U.S. 756, 782 (1999) (Breyer, J., dissenting) ("I would break that question down into four, classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?").

73. *Id.*

74. Aaron Xavier Fellmeth, *Copyright Misuse and the Limits of the Intellectual Property Monopoly*, 6 J. INTELL. PROP. L. 1, 3 (1998).

75. See generally *Memo*, *supra* note 1, at, Part IV(C) and accompanying text (July 6, 2011).

they both have similar fundamental aims—to allow creativity and innovation to flourish within a free market system.

The Copyright Alert System requires internet service providers, whose aggregate market share approaches monopoly levels, to help content owners privately enforce their copyright monopolies. In exchange, the internet service providers acquire immunity from liability for the copyright infringements that occur on their networks. Although internet service providers and content owners have valid justifications, it is questionable whether they have the right to jointly encroach on the rights of subscribers.

Group Boycotts—Evolving Legal Standards

The Memorandum of Understanding, under which the Copyright Alert System was formed, may be considered a group boycott against individual internet subscribers. If the Memorandum of Understanding is considered a group boycott, then the Copyright Alert System is deemed a per se violation of antitrust law and is consequently illegal.

A group boycott is when natural competitors voluntarily agree to abstain from buying, using, or dealing with a particular party.[76] The Supreme Court prominently addressed the illegality of group boycotts in *Fashion Originators' Guild of America v. Federal Trade Commission*.[77] Similar to the Copyright Alert System's Memorandum of Understanding, in *Fashion Originators' Guild of America*, textile manufacturers banded together to form the Fashion Originators' Guild of America ("FOGA"), which was aimed to combat the appropriation of non-copyrightable designs by other manufacturers. After its formation, FOGA created and operated a complex private enforcement system for tracking participating retailers who sold pirated garments.[78] The Court found that the agreement between retailers and manufacturers to only sell original designs and consequently punish retailers who reneged on this arrangement to be a per se illegal violation of antitrust law. The Court stated that "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches

76. Christopher R. Leslie, Antitrust Law and Intellectual Property Rights 460–62 (2011).

77. See Fashion Originators' Guild of America v. Fed. Trade Comm'n., 312 U.S. 457 (1941).

78. *Id.* at 461–62.

upon the power of the national legislature and violates the [antitrust laws.]'"[79]

While the Supreme Court has never overruled using a per se standard of review when assessing group boycotts, in certain instances the Court has implemented a more lenient standard of review. In the Supreme Court case, *Federal Trade Commission v. Indiana Federation of Dentists*,[80] Indiana dentists who were involved in a professional organization "refused to submit x-rays to dental insurers for use in benefits determinations. . ."[81] The Court stated that the dentists did, in fact, engage in a group boycott.[82] Although historically group boycotts were deemed a per se violation of antitrust law,[83] the Court continued to analyze the case under an abridged rule of reason approach.[84] In this abridged approach, the Court looked at the type of restraint at issue and any pro-competitive justifications for the restraint.[85] The Court did not look extensively at market power, stating that:

> [S]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition . . . proof of actual detrimental effect, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effect."[86]

Although the Court did not look at market power in its abridged rule of reason analysis, the enormous aggregate market power of signatory content owners and internet service providers would provide further evidence against the antitrust legality of the Copyright Alert System under a comprehensive rule of reason or per se analysis.

Sherman Act Implications of the Copyright Alert System

The Copyright Alert System may not survive either a per se or rule of reason antitrust analysis. At its core, the Copyright Alert System is a concerted restraint of trade between content owners and internet service providers: it privately enforces copyright protections against

79. *Id.* at 465.
80. Fed. Trade Comm'n. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).
81. See *id.* at 449.
82. *Id.* at 458.
83. *Id.* at 458.
84. *Id.* at 459.
85. *Id.* at 460–61.
86. *Id.*

subscribers who use peer-to-peer file sharing to receive online content.

Type of Agreement and Restraint at Issue

The first steps in determining whether the Copyright Alert System violates §1 of the Sherman Act are to analyze whether: (1) the Memorandum of Understanding is a horizontal or vertical agreement between content owners and internet service providers; and (2) the Copyright Alert System restrains trade. If the Copyright Alert System is considered either a horizontal restraint of trade, group boycott, or vertical restraint of trade, the Copyright Alert System may violate antitrust law and the court should apply either a per se or rule of reason analysis to determine its validity.

Horizontal or Vertical Agreement

A horizontal agreement to restrain trade is "made between competing businesses to manipulate competition amongst all competitors in the marketplace."[87] Horizontal agreements require that all participating businesses within a horizontal restraint operate at the same level in the market.[88] Industry-wide conspiracies amongst businesses at the same level of the supply chain are often viewed as horizontal agreements.[89] A vertical agreement to restrain trade, in contrast, is "made between a seller and a buyer in where a retailer can buy products from one manufacturer but in the agreement is restricted from buying from a competing manufacturer."[90] In a vertical restraint, businesses at different levels of the supply chain cooperate.[91] Both vertical and horizontal agreements to restrain trade may violate antitrust law if the arrangements adversely affect the free market.[92] Typically, hori-

87. Horizontal and Vertical Agreements that Violate the Sherman Act, STUDY.COM, http://study.com/academy/lesson/horizontal-and-vertical-agreements-that-violate-the-sherman-act.html (last visited Feb., 2017) [https://perma.cc/QBH9-KVFZ].

88. See generally Executive Summary of Antitrust Laws, FINDLAW, http://corporate.findlaw.com/business-operations/executive-summary-of-the-antitrust-laws.html (last visited Feb., 2017) [https://perma.cc/EER6-39F4].

89. U. S. v. Nat'l Ass'n of Securities Dealers, Inc., 422 U.S. 694, 729–30 (1975).

90. *Id.*

91. *See generally Executive Summary of Antitrust Laws,* FINDLAW, http://corporate.findlaw.com/business-operations/executive-summary-of-the-antitrust-laws.html (last visited Feb., 2017) [https://perma.cc/DK5G-4XCG].

92. *Id.*

zontal restraints are per se violations of antitrust law.[93] The rule of reason analysis is always used to evaluate vertical restraints.[94]

To determine whether the Copyright Alert System is a horizontal or vertical arrangement, we must analyze the structure of the Memorandum of Understanding. In this case, numerous content owners and internet service providers have signed the Memorandum of Understanding. This makes the Memorandum of Understanding a horizontal agreement among content owners and a parallel horizontal agreement among internet service providers. Additionally, the Memorandum of Understanding brings together internet service providers and content owners, constituting a vertical agreement between the suppliers of internet services and the owners of the copyrighted material distributed via the internet.

The majority of the agreement details duties that are owed to content owners by internet service providers in a seemingly vertical arrangement. However, the agreement also incorporates horizontal aspects. According to §5(C) of the Memorandum of Understanding, content owners must collude to only submit a limited number of initial internet service provider notices per month.[95] This provision constitutes an expressed horizontal arrangement between content owners to limit the number of notices of infringement reported to participating internet service providers.

It can be argued that horizontal collusion also occurs among internet service providers who, through the Copyright Alert System, have laid out a precise mechanism for alerting, educating, and punishing subscribers for alleged copyright infringement.[96] Although specific technical implementation mechanisms are not outlined in the Memorandum of Understanding, the agreement outlines pointed and specific requirements and all signatory internet service providers must follow each step of the Copyright Alert System. A signatory internet service provider can only escape this arrangement and cease participation once the agreement is no longer effective.[97]

93. Thomas B. Leary, *A Structured Outline for the Analysis of Horizontal Agreements*, FED. TRADE COMM'N (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/structured-outline-analysis-horizontal-agreements/chairsshowcasetalk.pdf [https://perma.cc/CC73-KW7N].

94. *Id.*

95. *See Memo*, *supra* note 1, at Section V(C) (July 6, 2011).

96. *See Memo*, *supra* note 1, at Section IV (July 6, 2011).

97. *See Memo*, *supra* note 1, at Section VIII (July 6, 2011) (the effective term date of the Memorandum of Understanding is four (4) years upon execution).

The Memorandum of Understanding is not likely to be viewed as strictly as a vertical restraint, which is subject to a comprehensive rule of reason analysis, because of the parallelism of the agreement between two layers of competitors, content owners, and internet service providers. Additionally, the Memorandum of Understanding is not likely to be viewed as an isolated horizontal agreement subject to a strict per se analysis because of its collusive vertical elements. Since private copyright rights are involved, courts have several options when choosing a standard of review for the Copyright Alert System. Courts can analyze the Copyright Alert System under: (1) a group boycott standard of review similar to *Fashion Originators' Guild of America v. Federal Trade Commission*, subject to per se antitrust liability; (2) a general per se standard of review; (3) an abridged rule of reason standard of review; or (4) a comprehensive rule of reason standard of review.

Group Boycott Analysis

The restraint of trade at issue within the Memorandum of Understanding resembles a group boycott similar to *Fashion Originators' Guild of America v. Federal Trade Commission*.[98] The Copyright Alert System is a self-enforcement mechanism that allows content owners and internet service providers to deal, or refuse to deal, with alleged copyright infringers. Instead of targeting companies such as non-signatory content owners and internet service providers, the Copyright Alert System punishes subscribers directly.[99] The Copyright Alert System details multiple punitive measures to block consumers from receiving internet services including: (1) sending warning notices to subscribers;[100] (2) directing subscribers to a landing page without the consumer's consent;[101] and (3) temporarily stepping down the consumer's internet service,[102] which can be described as a blatant restriction of service. This refusal to provide internet service to alleged copyright infringers may constitute a group boycott of subscribers. However, a court may be hesitant to label the Copyright Alert System as a group boycott because subscribers can still receive internet services from their internet service providers, just not at the same caliber.

98. 312 U.S. 457 (1941).

99. *See Memo, supra* note 1, at Section VI(G) (July 6, 2011).

100. *See Memo, supra* note 1, at Section IV(G)(i) (July 6, 2011).

101. *See Memo, supra* note 1, at Section IV(G)(ii) (July 6, 2011).

102. *See Memo, supra* note 1, at Section IV(G)(iii) (July 6, 2011).

Per Se Analysis

Courts still may attach per se antitrust liability to the Copyright Alert System even if it is not considered a group boycott. The Memorandum of Understanding is an express agreement in which five powerful internet service providers and influential content owners have agreed horizontally within their prospective industries to adhere to the prescriptions of the Copyright Alert System. If a signatory party does not adhere to the Copyright Alert System, it is in violation of the Memorandum of Understanding and may be liable for breach of contract. Historically, it is this industry-wide restriction amongst content owners and internet service providers that constitutes a horizontal restriction on trade, which is deemed a per se violation of antitrust law.[103]

Nevertheless, if the Copyright Alert System is not deemed a per se violation, the Alert System would likely not survive a rule of reason analysis.

Comprehensive Rule of Reason Analysis

Under the Copyright Alert System, powerful internet service providers use their overwhelming market power to affect individual subscriber connections. Although a subscriber may have the ability to change internet service providers, this ability is hindered by enormous transfer costs and the Post Mitigation Measure Step, where the internet service provider is required to disclose identity information to other content owners.[104] In order to determine whether the Copyright Alert System could pass a comprehensive rule of reason analysis (and, in turn, an abridged rule of reason analysis), a court must look at the internet service providers' (1) market power and (2) the Copyright Alert System's anticompetitive effects.[105] Signatory parties may present pro-competitive justifications to validate their business practice.

103. Thomas B. Leary, *A Structured Way for the Analysis of Horizontal Agreements*, FED. TRADE COMM'N (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/structured-outline-analysis-horizontal-agreements/chairsshowcasetalk.pdf [https://perma.cc/6KN5-BTZ7].

104. *See Memo, supra* note 1, at Section IV(G)(iv) (July 6, 2011).

105. Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, The Civil Practice & Procedure Committee's Young Lawyers Advisory Panel: Perspectives in Antitrust (Jan 22, 2013), http://www.americanbar.org/content/dam/aba/publications /antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf [https://perma.cc/QX7S-XZB9].

Market Power

For the Copyright Alert System to pass a comprehensive rule of reason analysis, the parties to the Memorandum of Understanding must have sufficient market power. If a court decides to implement an abridged rule of reason analysis, no determination of market power is needed.[106] The product, in this case, is the broadband[107] internet service market. Subscriber participants are the share affected by the restraint. Market power is determined by analyzing the (1) relevant product market involved and (2) geographic market.

Product Market

Generally, a subscriber can receive broadband internet access through a fiber-optic service, satellite internet service, digital subscriber line ("DSL"), broadband over powerlines ("BPL"), cable modem, or through wireless options.[108] Of these six alternatives, it is safe to assume that the wireless versions (wireless and satellite internet services) are not comparable to the other four alternatives because of their increased restrictions on bandwidth usage[109] and signal latency.[110] Additionally, DSL may be eliminated as a comparable substitute because its speed and efficiency is physically limited by its proximity to the telephone company's office.[111] Thus, for a subscriber to receive relatively comparable internet access to the signatory in-

106. *See generally* Fed. Trade Comm'n. v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986).

107. The reason the relevant product at hand is broadband internet service access is because the five signatories to the Memorandum of Understanding provide broadband internet access. Dial-up access, which is the other alternative for internet access, is the traditional way to receive internet service but is much slower and much more outdated than broadband internet service.

108. *Types of Broadband Connections,* FED. COMM. COMM'N, https://www.fcc.gov/general/types-broadband-connections (last visited March 25, 2016) [https://perma.cc/UHC5-JUUS].

109. *Satellite Internet,* ISP REVIEWS, http://www.isp-reviews.org/satellite.htm (last visited Feb., 2017) [https://perma.cc/3EPK-KA55].

110. *Id.*

111. DSL modems follow the data rate multiples established by North American and European standards. In general, the maximum range for DSL without a repeater is 5.5 km (18,000 feet). As distance decreases toward the telephone company office, the data rate increases. Another factor is the gauge of the copper wire. The heavier 24-gauge wire carries the same data rate farther than 26-gauge wire. If you live beyond the 5.5 kilometer range, you may still be able to have DSL if your phone company has extended the local loop with optical fiber cable.

Fast Guide to DSL, WHATIS, http://whatis.techtarget.com/definition/0,,sid9_gci213915,00.html (last visited April 1, 2016) [https://perma.cc/9MLQ-2GBM].

ternet service providers, their options are to switch to fiber-optics, cable modem, or BPL.

Geographic Market

Conservatively, signatory internet service providers constitute over 60% of the relevant national market of internet service providers.[112] The lower limit to establish a sufficient presumption of market power is 55%.[113] Yet, even though the signatory internet service providers compose 60% of the national relevant market, a more accurate indicator of their market power can be seen through analyzing their relevant power on a localized basis.

In 2010, the Federal Communications Commission estimated that about 75% of the national population of internet subscribers could only have their local cable television company as a high-speed internet service provider.[114] In effect, if the local internet service provider happens to be Verizon, Cablevision, AT&T, or Time Warner Cable,[115] then subscribers have no other option but to adhere to their service in order to also receive television services. A deficiency of internet options has been a common problem across the country; even the Bay Area is mostly provided by either Comcast or AT&T.[116] Although some areas provide alternative high-speed internet access, their network and services may not be as advanced as the signatory internet service providers.

For example, Comcast provides multiple package options that may bundle telephone, internet, and cable services together, making it difficult, if not impossible, to delineate their internet service from the other two services together. Switching to another internet service provider may entail high switching costs and cancellation fees. These factors make transferring to a new high-speed internet service provider difficult, if not unfathomable, unless the subscriber is willing to

112. *ISP Usage and Market Share*, STATOWL, http://www.statowl.com/network_isp_market_share.php (last visited March 27, 2016) [https://perma.cc/Y4CV-AHRY].

113. United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005).

114. *Connecting America: National Broadband Plan*, FED. COMMC'NS COMM'N (2010), http://download.broadband.gov/plan/national-broadband-plan.pdf [https://perma.cc/N3EJ-9GXN].

115. *See Memo*, *supra* note 1, at Attachment A (July 6, 2011).

116. Troy Wolverton, *Hey Bay Area, your choices for broadband service are between bad and worse*, SILICONBEAT (March 28, 2013), http://www.siliconbeat.com/2013/03/28/hey-bay-area-your-choices-for-broadband-service-are-between-bad-and-worse/ [https://perma.cc/N4DW-7UTV].

forgo their television subscriptions. Courts should weigh these factors when evaluating the barriers to switching internet service providers.

Anticompetitive Effects

Consumer welfare is of great concern in antitrust law, yet the fundamental implementation of the Copyright Alert System may punish subscribers who are accused, but not guilty, of copyright infringement. If a subscriber does not engage in online copyright infringement, they cannot declare their innocence until the third step in the alert process. Additionally, if a subscriber succeeds in challenging the alleged infringement, they must jump through several financial and arbitrational hoops before receiving reprieve.

To challenge a claim of copyright infringement, a subscriber must: (1) pay an additional $35 fee above their monthly subscription price, (2) have their case heard at an ad-hoc extra-judicial tribunal, and (3) assert only one of six defenses to rebut a presumption of copyright infringement. Throughout this process, a subscriber's internet service will still be hampered. Additionally, a subscriber must challenge and win all prior accusations of infringement, with no time limitation on their duration, or they face continuing legal and service repercussions.

Under the Copyright Alert System, the subscriber is also presumed to be an infringer without any due process investigation. The alleged infringer, instead of the internet service provider or content owner, has the burden to prove their innocence and disprove copyright infringement. This is a burden shift from what is required to prove copyright infringement under §501 of the Copyright Act, which states that the content owner, not the alleged infringer, must establish that they are the holder of the copyright and prove that the defendant, the subscriber, infringed on this right.[117] Under the Copyright Alert System, subscribers are forced, without access to any evidence, to prove that they did not infringe. All evidence of copyright infringement is kept with the content owner and internet service provider, making incorrect accusations of copyright infringement more prevalent than under federal law proceedings to establish copyright infringement.

Lawful subscribers may also suffer from the misapplication of the Copyright Alert System. Although the Copyright Alert System and remedies provided by Congress aim to protect innovation and creativ-

117. 17 U.S.C. § 501 (2006).

ity among content creators, all consumers of online media may not be copyright infringers. Incorrect implementation of the Copyright Alert System against non-infringers may upset law-abiding subscribers and negatively shift public concern away from protecting copyright rights altogether.

The Copyright Alert System also restricts content owners from issuing their own notices of copyright infringement. Content owners must go through a quota-like system of reporting to internet service providers, who in turn administer the four-step alert system. Internet service providers are also restricted within the confines of the Copyright Alert System, thus removing their ability to engage in competition without fear of repercussions for violating the Memorandum of Understanding. This restriction of internet service providers and content owners reinforces the anticompetitive nature of the Memorandum of Understanding, and the lack of a clear abdication clause prevents a party from reneging on the Memorandum without facing contractual repercussions.

Furthermore, the Memorandum of Understanding requires signatory parties to share information about subscribers between internet service providers and content owners. The Supreme Court has deemed such collusive information sharing as anticompetitive violations of antitrust law.[118]

Pro-Competitive Justifications

The Copyright Alert System provides few pro-competitive benefits to subscribers. Online infringement may contribute to internet congestion, but if a subscriber is using high speed internet, the slowdown is negligible.[119] Although there are pre-existing federal protections for copyright, if the Copyright Alert System is implemented correctly, it may provide incentives to create new and innovative works.[120] Additionally, subscribers who engage in peer-to-peer file sharing may have increased risk for security breaches of important sensitive information.[121]

118. United States v. U.S. Gypsum Co., 438 U.S. 422, 444 (1978).

119. *Will sharing slow down my Internet connection?*, SpeedGuide, http://www.speedguide.net/faq/will-sharing-slow-down-my-internet-connection-186 (last visited May 13, 2016) [https://perma.cc/P7YV-CJRG].

120. *See Memo, supra* note 1, at Preamble (July 6, 2011).

121. *Peer-to-Peer File Sharing: A Guide for Business*, Fed. Trade Comm'n (2010), https://www.ftc.gov/tips-advice/business-center/guidance/peer-peer-file-sharing-guide-business [https://perma.cc/Z2KW-9L7J].

From a purely economic standpoint, the Memorandum of Understanding could create an incentive for internet service providers to implement only the least restrictive punishments allowed under the Copyright Alert System, thus enticing subscribers to choose their service over others. This would allow internet service providers to lure subscribers away from one another, resulting in increased competition among internet service providers.

Conclusion

The Copyright Alert System empowers content owners, internet service providers, and consumers to acknowledge and take accountability for widespread instances of online copyright infringement. If not challenged, however, the Copyright Alert System may create a safe-haven for legally-sanctioned monopolies in the internet and entertainment industries. This would allow them to flourish, extending beyond the boundaries of what federal copyright was meant to protect. The government has an obligation to protect both copyright owners and consumers, and it must balance the benefits of a private enforcement mechanism, such as the Copyright Alert System, against potential harms to consumers. Administratively, the Copyright Alert System seems convenient, but the government must remain active in regulating its breadth.