// TEXAS JOURNAL

ON CIVIL LIBERTIES & CIVIL RIGHTS

VOL. 23 NO. 1 FALL 2017 PAGES 1 TO 102

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Socially-Driven Class Actions: The Legacy of *Briggs*
Barak Atiram

The Legal "Rights" of LGBT Educators in Public and Private Schools
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NOTES

Remedying Police Brutality in America's Public Schools Through Private Structural Reform Under 42 U.S.C. § 1983
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Microaggressions and Sexual Harassment: How the Severe or Pervasive Standard Fails Women of Color
Katherine E. Leung

A Journal Publication of The University of Texas School of Law and the Individual Rights and Responsibilities Section of the State Bar of Texas

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Texas Journal on Civil Liberties & Civil Rights
Letter from the Editor

Dear Reader,

Thank you for your subscription to the Texas Journal on Civil Liberties & Civil Rights. Hardly a day goes by without a major civil rights issue headlining the news, and this issue of the Journal includes pieces covering a wide array of relevant civil rights topics, ranging from police brutality and desegregation to sexual harassment and the rights of LGBT teachers.

Despite recent victories in the courts, many LGBT individuals still live with the fear that they could be fired because of their sexual orientation. Professor Suzanne Eckes's Article assesses the reality that LGBT teachers face in keeping their jobs in various educational settings, and the laws available to protect them.

While a number of police shootings have received significant media coverage in recent years, excessive force by police officers in schools is often shielded from public view. Colette Billings's Note reviews recent instances of police brutality in K–12 schools, and argues that seeking injunctive relief will achieve true reform of police practices in elementary and secondary schools.

As the long legacy of school segregation persists today, Professor Barak Atiram's Article chronicles the little-known story of *Briggs v. Elliott*, one of the cases ultimately consolidated into *Brown v. Board of Education*. Professor Atiram reveals how, in *Briggs*, the NAACP strategically employed what would develop into the modern class action to engage the community and generate the support that helped to propel the consolidated cases to victory at the Supreme Court.

Sexual harassment issues have also been at the forefront of the national conversation recently, thanks to the #MeToo movement. Katherine Leung's Note addresses the unique barriers faced by women of color in fighting sexual harassment, and argues that the current standard under Title VII of the Civil Rights Act fails to effectively protect them.

I hope you enjoy this issue of the Texas Journal on Civil Liberties & Civil Rights, and I am grateful for your continued support.

Sincerely,

Marissa Latta
Editor in Chief

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Volume 23 | Fall 2017 | Number 1

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Cite as TEX. J. C.L. & C.R.

TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

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Judge Waring's dissent in *Briggs v. Elliott* was the first judicial opinion to reject *Plessy v. Ferguson* and declare that racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment.[1] The reasoning behind Waring's dissent clearly had an ef-

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*Assistant Professor, Sapir and Ono Academic Colleges. I am fortunate to have had helpful discus-

fect on the court's decisions in *Brown*, and in that sense, it played an active part in opening the floodgates for class actions dealing with racial segregation and human rights violations. From a procedural standpoint, *Briggs*, just like the cases consolidated into *Brown*, was filed as a class action, and treated by the court as preclusive, despite falling into the 1938 category of "spurious class actions."[2]

The success of civil rights class actions in the 1950s led to growing attacks on their legal validity, and the role of the National Association for the Advancement of Colored People (NAACP) as their leading initiator. Both the success of civil rights class actions and the threats against that success had a profound impact on the deliberations of the 1966 advisory committee, which drafted Federal Rule of Civil Procedure 23(b)(2) regarding mandatory class actions.[3] Hoping to protect civil rights class actions, the committee moved away from James Moore's old categories, and guided by its legendary reporter, Benjamin Kaplan, decided that civil rights class actions like *Briggs*, asking for declaratory relief, would bind absent parties without notice, and without giving class members an opportunity to opt out.[4]

This presents a perplexing socio-legal dilemma. Human rights violations can be constitutionally challenged by an individual lawsuit, which can eventually affect every person similarly situated. It is therefore unclear what advantages a representative suit filed on behalf of a large, and mostly passive, crowd offers—this seems to render class actions redundant. Yet *Briggs*, and the cases consolidated into *Brown*, were quite different in both form and function from the typical modern class action.[5] At their core, the civil rights class actions of the 1950s successfully found a way to integrate the ideas, thoughts, feelings, and active participation of the community with the legal proceedings.[6]

While existing accounts regarding the evolution of class actions in civil rights litigation focus on the legal advantages of class actions in overcoming various legal obstacles, like mootness claims, this article shines a new light on class actions, by exploring the path of civil rights litigation leading to *Brown*. Focusing on the social-sciences strategy which shaped both the legal ideas and legal reasoning in *Briggs* and *Brown*, this article maintains that the desire to bridge the gap between "Law in Books" and "Law in Action" inevitably influenced and molded

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sions and extensive comments on various drafts of this paper. Thanks are due to Kenneth W. Mack, David Marcus, Yuval Elbashan, Avner Ben Zaken, Moshe Karif, Henry E. Smith, and Sagy Zwirn.

[1] Briggs v. Elliott, 98 F. Supp. 529, 538–48 (D.S.C. 1951) (Waring, J., dissenting).

[2] *See* James W. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 Geo. L.J. 551, 570–76 (1937) (characterizing Rule 23(a)(3) as defining "spurious class actions").

[3] Federal Civil Rules Advisory Committee Meeting, November 1, 1963; Transcript of Session on Class Actions 10 (Oct. 31, 1963 – Nov. 2, 1963), microformed on CIS-7104-53 (Jud. Conf. Records, Cong. Info. Serv.).

[4] *Id.*

[5] *See Briggs*, 98 F. Supp. at 529; Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[6] *See id.*

civil procedure. The NAACP went to great lengths in order to bring together social realities and judicial rule making. With the help of testimonies, research, and interviews with leading social sciences experts like David Krech, Horace McNally, and Kenneth Clark, the NAACP challenged the "Separate but Equal" doctrine, presenting the court with the far-reaching repercussions of racial segregation. The innovative ways in which class actions were supported and made richer by communal participation stemmed from the same drive that motivated the inclusion of the social sciences in the proceedings—an interest in bringing social realities into the courtroom—and weakened communities into law making.

This article opens with a description of the history of class actions prior to the 1966 amendment to Rule 23, and goes on to explain how desegregation class actions, like *Briggs* and *Brown*, influenced the deliberations of the Federal Civil Rules Advisory Committee. Since the Committee did not say much about the characteristics and advantages of desegregation class actions, this article goes back to examine the constitutional challenges to the "Separate but Equal" doctrine prior to *Brown*.

Lastly, the article examines the substantive and procedural strategies that shaped *Briggs*, and ultimately *Brown*, focusing on the use of the social sciences in illustrating the social ramifications of racial segregation. The NAACP, which turned to these resources that eventually became part of the court decisions, also realized that a single plaintiff was not the right vehicle to influence and shape the lives of millions. Instead of one person carrying the whole process, a suit on another scale was necessary, part of a protracted socio-legal struggle, relying heavily on the support of the African-American community.

I. THE EARLY DEVELOPMENT OF CLASS ACTIONS

Filing multiple suits, all grounded in the same facts and questions of law, aside from being impractical, may also lead to conflicting judgments and overtaxed courts. The solution adopted by Rule 23(b)(3) of the Federal Rules of Civil Procedure (FRCP),[7] was to broaden the doctrine of *res judicata* and allow the collectivization of individual rights into a single representative suit, which would bind absent class members.[8]

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[7] According to Rule 23(b)(3), a class action may be maintained, if it satisfies the requirements of Rule 23(a) and "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3) (1966).

[8] "Although class actions always have been recognized as an exception to the general rule that only named parties to an action are bound, Rule 23, as amended in 1966, moved further yet—establishing that even in class actions in which members of the class are united in interest only by the presence of common questions in their claims, they are bound unless they affirmatively opt out of the suit. And courts appear ready to uphold this principle." Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 763 (1976).

Thus, instead of several suits with the same factual and legal basis, there would be one class action, and the dispositions of the court would bind the entire group.

While this may seem like a strictly procedural response to the impracticability of multiple individual suits, the truth is quite different. The decision to bind individuals through a collective process, in which they take no active part, is based on a substantive understanding of what makes an individual part of a class, and how his interests within the class can be protected—especially since the individual's consent to becoming part of the group is, more often than not, passive.[9] Yet, despite all good intentions, without necessary safeguards, class actions run the risk of infringing on liberal models of democracy and the moral precept of individual autonomy, as well as the rights of litigants for their "day in court."[10]

Group litigation is nothing new—it goes back to the equity courts of mid-seventeenth century England. In pioneering cases like *How v. Tenants of Bromsgrove*[11] and *Brown v. Vermuden*,[12] a single chancery suit settled the rights and duties of the parties of polygonal controversies.[13] Scholars like Zechariah Chafee, looking to the past for guidance, maintained that these cases were historical precedents of a natural process, in which group litigation evolved into representative suits.[14] According to Chafee, the Chancery allowed what are now called class actions because of economic concerns.[15]

Stephen C. Yeazell's historical analysis took a more critical perspective, which emphasized the social and political circumstances surrounding the Chancery's decisions.[16] Yeazell maintained that when considering the social context of seventeenth century England, the all too tidy patterns suggested by efficiency readings like Chafee's, simply do not hold up.[17] For one, placing the spotlight on the legal rights of individuals, like Chafee did, misses the central role that status played in agricultural communities with a non-market economy.[18] In other words, the

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[9] Being part of a class action is the result of not opting out of the class. *Id.*

[10] "[C]lass action procedure . . . permit[s] . . . the group adjudication of purely individually held rights, the stakes for both the political theory of liberal democracy and the constitutional theory of procedural due process were correspondingly altered in fundamental ways." MARTIN H. REDISH, WHOLESALE JUSTICE, CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 9 (2009).

[11] 23 Eng. Rep. 277 (Ch. 1681).

[12] 22 Eng. Rep. 802 (Ch. 1676).

[13] ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY 200–01 (1950).

[14] *Id.* at 149–51.

[15] "In such situations each member of the multitude had the same interests at stake as every other member, so that it was an obvious waste of time to try the common question of law and fact over and over in separate actions . . . [i]t was much more economical to get everybody into a single chancery suit and settle the common questions once and for all." *Id.* (discussing whether hearing multiple suits with a similar factual and legal basis was wasteful).

[16] Stephen C. Yeazell, *Group Litigation and Social Context: Toward A History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

[17] *Id.*

[18] "Seventeenth-century group litigation is not about the legal rights of aggregated individuals but

claim that class actions are based on the group litigation of the seventeenth century lacks a thorough understanding of the social structure of the time and its effects on the function of equity courts, and is therefore anachronistic.[19]

It is quite possible that the reason for the rise of group litigation was the need, created by the agricultural revolution, to facilitate the modernization of the village or parish communities, which were founded on rural agriculture.[20] This kind of adjudication is fundamentally different from that of today—class certification in modern class actions, unlike the group suits of the seventeenth century, transforms a mass of individuals into a legal entity seeking, by aggregating their claims, to increase their socioeconomic power. Thus, the aggregation of a multitude of low-expectancy suits ensures an investment in legal proceedings that would otherwise be neglected.[21] In this way, modern class actions can act as a remedy to socioeconomic inequalities. The group litigation in English courts, on the other hand, never catered to disparate individuals, but rather relied on existing social groups and categories.[22] In a world where the rights and liberties of the individual stemmed from their sociocultural status, [23] the binding effects of group litigation did not produce a new group with greater socioeconomic strength.[24]

One cannot, therefore, ignore the great disparity between the collective litigation of modern class actions, which binds together countless individuals of varying backgrounds,[25] and that of the English equity courts, which did not employ any procedural device to collectivize individual rights; back then, it was status that allocated individual rights, based on sociocultural categories.[26] These early representation suits were not based on association and empowerment of disparate parties,[27] but on

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about the incidents of status flowing from membership in an agricultural community not yet part of a market economy." *Id.* at 871.

19 *Id.* at 873.

20 *Id.* at 875.

21 David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 848 (2002).

22 Yeazell, *supra* note 16, at 877.

23 *See id.* at 871 (on the importance of status in group litigation).

24 *Id.* at 878.

25 Accordingly, the case of *How v. Tenants of Bromsgrove*, involving a dispute between manorial tenants and the lord of the manor of Bromsgrove, was not perceived as dealing with legal rights of aggregated individuals, or with the empowerment of manorial tenants. It rather dealt with the proper limits of the lord's right to appropriate common lands at the expense of manorial tenants. In other words, the rights in this case stemmed from the status of the tenants. *See* How v. Tenants of Bromsgrove, 23 Eng. Rep. 277 (Ch. 1681); Yeazell, *supra* note 16, at 872, 874. Similarly, the case of *Brown v. Vermuden,* dealt with the entitlement of the priest of a parish of lead miners, to set the price and buy a tenth of the ore mined. *See* Brown v. Vermuden, 22 Eng. Rep. 802 (Ch. 1676). Both cases, despite what Chafee claims, cannot serve, at least at face value, as examples for the attributes of modern class actions, which tie together individuals that are in no way connected, but through the suit. *See* CHAFEE, *supra* note 13, at 202.

26 Analyzing the history of the Chancery's jurisdiction over landowners, Yeazell explains that "equity had entered this field as an instrument of royal political and social policy rather than as a strictly 'adjudicative' tribunal." Yeazell, *supra* note 16, at 893.

27 In "a typical case . . . 'tenants . . . exhibit a bill in the names of themselves and of five hundred

preexisting social groups and fixed social categories that have little to do with modern society.[28]

II. The Main Changes to Rule 23 between 1938 and 1966

Even though Rule 23, promulgated in 1938, was the first significant step in the development of representative suits[29] disparate individuals who did not belong to any pre-organized group could not be part of a binding class action suit without their active involvement before the 1966 Amendment.[30] Under the Rules Enabling Act of 1934, the U.S. Supreme Court appointed an advisory committee for drafting the Federal Rules of Civil Procedure.[31] Professor Moore, the chief draftsman of Rule 23,[32] divided class actions into three types of representative suits[33] based on the nature of the right asserted.[34] These included: "true" class actions;[35] "hybrid" class actions;[36] and "spurious" class actions.[37]

The judicial classification of class suits determined their binding effects.[38] "True" class actions were mandatory because they bound all ab-

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more.'" *Id.* at 872–73.

[28] In seventeenth century England, *status* played the dominant role in determining whether a person belonged to a pre-organized group, and consequently it demarcated the boundaries of group litigation. *Id.* at 870–71.

[29] The 1938 version of Rule 23(a) of the Federal Rules of Civil Procedure provided: "[r]epresentation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued . . . ." Fed. R. Civ. P. 23(a) (1938).

[30] *See* REDISH, *supra* note 10, at 8.

[31] The Rules Enabling Act authorized the court to set procedural rules that did not "abridge, enlarge or modify any substantive right." Act of June 19, 1934, ch. 651, § 1, 42 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072(a), (b) (1990)).

[32] Moore was influenced by the work of Joseph Story. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 377 (1968).

[33] On the division of class action categories set by Moore, who took an active role in drafting Rule 23 of 1938, *see* 3A JAMES MOORE, FEDERAL PRACTICE 23.08–.10 (2d ed. 1968).

[34] On the classification of these categories and the jural relations they represent, *see* James Wm. Moore & Marcus Cohn, *Federal Class Action,* 32 ILL. L. REV. 307, 309–10 (1937).

[35] In "true" class suits, the rights in question, held by members of a particular group, are joint, common, or secondary rights—such as the rights of the members of an unincorporated association. According to Rule 23(a)(1), a class action can be filed "when the character of the right sought to be enforced for or against the class is (1) Joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." Fed. R. Civ. P. 23(a)(1) (1938).

[36] Hybrid class suits dealt primarily with individually held rights towards the same property—such as the claims of creditors in a receivership process. In the words of Rule 23(a)(2) (1938) "hybrid" class actions dealt with rights that were "[s]everal, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." Fed. R. Civ. P. 23(a)(2) (1938).

[37] Spurious class suits were based on several rights held by individuals with the same factual or legal claims. Rule 23(a)(3) created the "spurious" class action, which was based on rights that are "[s]everal and there is a common question of law or fact affecting the several rights and a common relief is sought." Fed. R. Civ. P. 23(a)(3) (1938).

[38] Prof. Moore intended for the binding effects of judgments to be based on the nature of the right

sent parties, and class members could not exclude themselves from the proceedings.[39] "Hybrid" class actions bound only "privies" (parties) to the proceedings and were conclusive in regards to claims against specific property.[40] "Spurious" class actions did not possess a *res judicata* effect on absent parties.[41] Moore's view regarding binding effects was not embodied in Rule 23,[42] but it affected legal practice as though it had been.[43] According to Rule 23 of 1938, the binding effects on absent parties of judgments that did not relate to a specific property[44] were limited to "true" class suits, which dealt with the enforcement of rights held by a pre-organized group.[45]

Then, some thirty years later, came a radical shift in the evolution of group litigation in the form of the 1966 Amendment to Rule 23. In it, the Federal Rules Advisory Committee decided to relinquish the old distinctions between "joint rights" and "several rights,"[46] which stood at the core of the division into different class action categories and dictated the suit's binding effects. The committee also relinquished the informal prerequisite for pre-litigation relations in an organized group as a condition for the suit's preclusive effect.[47] Instead, the major concerns of the committee, and in turn those of class action law, included such issues as the impracticability of individual joinder when the class is numerous,[48] the existence of common questions of law and fact,[49] fairness in the employment of a class action,[50] and the remedy sought by the plaintiffs.[51]

According to the 1966 Amendment, in order for a class action to be certified, it must satisfy the requirements of Rule 23(a) and at least one of the three criteria of Rule 23(b). This was a radical departure from the class action requirements of 1938. Rule 23(b)(2) allows for class certifi-

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sought to be enforced. See Kaplan, *supra* note 32, at 377–379.

[39] *See* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 673 (2011).

[40] Accordingly, Rule 23(a)(2) was "conclusive upon all parties and privies to the proceeding, and upon all claims, whether presented in the proceeding or not, insofar as they do or may affect specific property, unless such property is transferred to or retained by the debtor affected by the proceeding." Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 705 (1941) (quoting 2 JAMES W. MOORE, FEDERAL PRACTICE 2294–95 (1938)).

[41] *See* REDISH, *supra* note 10, at 8.

[42] *See* Kaplan, *supra* note 32, at 377–379.

[43] Chafee explains that "so great is the deserved respect of his treatise, that his scheme about binding outsiders has had almost as much influence as if it had been embodied in Rule 23." CHAFEE, *supra* note 13, at 251.

[44] This is the limited binding effect of "hybrid" class actions.

[45] Namely, the rights adjudicated in "true" suits were impersonal, since they belonged to a class member "solely because of his undifferentiated status or membership in a particular group." Marcus, *supra* note 39, at 671.

[46] *See* Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 8–9 (1991) (on the makeup of the Advisory Committee).

[47] *See* REDISH, *supra* note 10, at 10.

[48] See the numerosity requirement in Rule 23(a)(1). Fed. R. Civ. P. 23(a)(1) (1938).

[49] *See* Fed. R. Civ. P. 23(a)(2) (1966) (the commonality requirement); FED. R. CIV. P. 23(b)(3) (1966) (the predominance requirement).

[50] Protected by the adequacy of representation requirement. Fed. R. Civ. P. 23(a)(4) (1966).

[51] *See* Fed. R. Civ. P. 23(b)(2) (1966).

cation when the party opposing the class acted or refused to act in a manner that affected the class as a whole, making declaratory or injunctive relief appropriate remedies.[52] Rule 23(b)(3) allows for class action certification when common questions of law and fact are shared by the class members and predominate over other legal or factual issues, and the class action is superior to other methods, as far as fair and efficient adjudication of the dispute is concerned.[53]

While one may claim that class actions submitted under Rule 23(b)(1) are concerned with pre-litigation groups and their binding effects on absent parties therefore precede the 1966 Amendment,[54] class actions submitted under Rule 23(b)(2) and (3) clearly represent a departure from the 1938 Rule,[55] if not a radical move away from the history of group litigation that came before it.[56] This change, however, did not appear out of thin air, and relied heavily on revolutionary desegregation class actions, most famous among them being *Brown v. Board of Education*,[57] and the following desegregation cases that sought to compel compliance with *Brown*.[58]

III. SOCIAL MOTIVATIONS: THE MAIN GOALS OF THE 1966 COMMITTEE

Benjamin Kaplan, the Reporter to the 1966 Advisory Committee,[59]

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[52] Class actions in which injunctive or declaratory relief are sought under Rule 23(b)(2) are also called mandatory class actions, since they bind absent parties and do not demand notifying class members or giving them a chance to opt out. *See* Fed. R. Civ. P. 23(b)(2), (c)(3) (1966).

[53] Rule 23(b)(3) is preclusive, but at the same time it bolsters the notice requirement, by demanding that class members be given the best possible notice, and when reasonable even an individual notice. It also grants class members the right to explicitly ask for their exclusion from the collective suit. *See* Fed. R. Civ. P. 23(b)(3), (c)(2) (1966).

[54] In a meeting of the 1966 committee, John Frank maintained that: "[i]f I may say so, I think we've got it in parts
(b)(1)(A) and (B), that is to say if we reviewed the great bulk of the cases – and I'm now speaking of 95% of the cases which have been true class actions in the past, i.e. have been regarded as binding – they fall into those categories." *See* Advisory Committee Meeting, *supra* note 3.

[55] *See* REDISH, *supra* note 10, at 10.

[56] Historically, group litigation in English equity courts generated dispositions that bound absent parties only when class representatives came from groups with established social relations. *Id.* at 6–7.

[57] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[58] Despite *Brown*, local school district boards in Kent and Sussex Counties, Delaware, operated a segregated school system. Consequently, children who were not admitted to schools because of their race submitted seven class actions on their own behalf, and "on behalf of all children similarly situated." *See* Evans v. Buchanan, 256 F.2d 688, 689–90 (3d Cir. 1958).

[59] Among the members of the Advisory Committee were: the chair of the Committee, Dean Acheson (a lawyer at the law firm Covington and Burling); Benjamin Kaplan of Harvard Law School (the Reporter); Albert M. Sacks of Harvard Law School (Associate Reporter); Shelden Elliot of New York University; Charles Joiner of the University of Michigan; David Louisell of the University of California—Berkeley; George Doub (Assistant Attorney General); John Frank (practicing lawyer from Phoenix, Arizona); Albert Jenner (practicing lawyer from Chicago); Judge Charles Wyzanski (of the District of Massachusetts); and Chief Judge Roszel Thomsen (of the District of Maryland). *See* Resnik, *supra* note 46, at 8.

argued that one of the main reasons for the reworking of Rule 23 was the need to provide a procedural means for the vindication of the rights of groups that would otherwise have no viable recourse.[60] Though the plaintiffs in modern class actions are typically tort claimants, in 1966 Benjamin Kaplan explicitly excluded such suits from Rule 23. He had desegregation class actions in mind and believed that individual desegregation suits would not end well. For example, in a public school case, a suit might lead to the admission of a single plaintiff without a general order to desegregate the school.[61]

During the deliberations of the Advisory Committee, Kaplan declared that if judges did not entertain desegregation cases as class actions, "we would of course be in a very, very bad way."[62] Similarly, John P. Frank, a member of the committee, emphasized the vital importance of segregation cases to the reworking of Rule 23, stating that "the energizing force which motivated the whole rule . . . was the firm determination to create a class action system which could deal with civil rights."[63] The committee designed Rule 23(b)(2) for civil rights class actions in which injunctive or declaratory relief was sought,[64] hoping to encourage the use of class actions in civil rights cases. This is why the rule did not require notice and denied class members the right to opt out of the class.[65]

While today most class actions are submitted through the flexible category of Rule 23(b)(3), the committee perceived this bracket as negligible.[66] Benjamin Kaplan explained that "[m]ass torts would and should be typically excluded from class suits,"[67] and his plan was that Rule 23(b)(3) be used in rare cases, when the definition of the class and the remedy sought are relatively clear—for example, in private antitrust cases or those of trust beneficiaries who claim against a common fraud.[68]

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[60] *See* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. L. REV. 497 (1969) (adding that the other reason was "to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions").

[61] Kaplan explained that "If a school desegregation case, for example, is maintained by an individual on his own behalf, rather than as a class action, very likely the relief will be confined to admission of the individual to the school and will not encompass broad corrective measures – desegregation of the school. This would be unfortunate. . . . I may add that if the action is not maintained as a class action, the contempt remedy would presumably not be available to anyone but the individual plaintiff, and others in similar position could be put to separate proceedings with ensuing delay." Letter from Benjamin Kaplan to John P. Frank (Feb. 7, 1963) (cited in Marcus, *supra* note 39, at 700–01).

[62] Kaplan then said: "So if there be any question about it, (2) ought to remain in." *See* Advisory Committee Meeting, *supra* note 3.

[63] *See* Patricia A. Seith, *Civil Rights, Labor, And the Politics of Class Action Jurisdiction*, 7 STAN. J. C. R. & C. L. 83, 89–90 (2011).

[64] Class actions under Rule 23(b)(2) are also known as mandatory class actions. Interestingly, in Kaplan's first draft of Rule 23, he did not distinguish between injunctive and monetary reliefs—clearly civil rights litigation had a great effect on his Rule 23. Marcus, *supra* note 39, at 704.

[65] *See* Fed. R. Civ. P. 23(c)(3) (1966).

[66] Benjamin Kaplan asserted that Rule 23(b)(3) "would rarely be used for mass torts." *See* Advisory Committee Meeting, *supra* note 3.

[67] Indeed, Kaplan, the author of the 1966 amendment to Rule 23, asserted in the advisory meeting that "Mass torts would and should be typically excluded from class suits." *Id.*

[68] In the words of Kaplan, Rule 23(b)(3) was expected to include: "cases . . . like . . . Common

There were, however, serious objections to Rule 23(b)(3), which were based on the fear that down the line, courts and lawyers would take advantage of its flexible language to broaden its use, and ultimately rewrite it altogether.[69] Committee member John Frank, for example, feared that lawyers and even defendants would file class actions under Rule 23(b)(3) in hope of pursuing quick and lucrative settlements.[70]

Albert M. Sacks had made it clear that the main objective of the Advisory Committee was to adopt a progressive judicial interpretation of Rule 23.[71] Though there had been considerable confusion in determining the scope of Moore's 1938 categories,[72] desegregation cases clearly should have fallen under the category of a non-binding, "spurious" class action,[73] to which class members could join. Only "true" class actions, which dealt with rights held in common, could bind absent parties.[74] Since constitutional rights were enforced on an individual basis, desegregation cases, which were mostly based on the Equal Protection Clause of the Fourteenth Amendment, should not have bound absent parties.[75] Nevertheless, some courts considered antidiscrimination cases as "true" class actions,[76] and therefore binding, while other courts decided the actions were binding without giving any regard whatsoever to legal categories.[77]

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fraud cases claimed by beneficiaries of a trust . . . or . . . private antitrust claims arising from a corporate dealing." *Id.*

[69] Mr. George Doub believed that Rule 23(b)(3) left "an open door, and [it is] not clear where that door is going to take us." *Id.*

[70] In Frank's words, "I think ever to allow a mass accident . . . just plain bribery on counsel to go a little soft and take it a little easy is just too frightening to contemplate. It's just not necessary." *Id.* Moore supported these observations, and Judge Roszel Thomsen maintained that judges might overuse the instrument of class actions due to local pride. *Id.*

[71] Albert M. Sacks, who later became Dean of Harvard Law School, stressed that "there [have] been some . . which have been classified . . . as spurious . . . and yet judges have suggested that they be binding, so that . . . you have a developing law in the field." *See* Marcus, *supra* note 39, at 696.

[72] Due to the confusion around determining the boundaries of the old categories, some courts relaxed the conditions of the "true" suit, deciding that the mere existence of common legal questions met its requirements. *See* Sys. Fed'n No. 91 v. Reed, 180 F.2d 991, 996–97 (6th Cir. 1950) (in which the court entertained a civil right class action by simply determining that under the circumstances the right was joint or common). On courts' confusion in implementing Rule 23's categories, *see* Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV, 629, 630–36 (1965); Kaplan, *supra* note 32, at 380–86.

[73] Indeed, the court explained that in the case of a class action based on the deprivation of civil rights, "If a class action at all, it is what Professor Moore in his Federal Practice calls a Spurious Class Suit, which is a permissive joinder device. This is based on Rule 23(a)(3)." Jinks v. Hodge, 11 F.R.D. 346, 347 (D. Tenn. 1951).

[74] Accordingly, "Rule 23(a)(3) has become merely a permissive joinder device or a procedural means of intervention." Note, *Class Actions – Classifications under Rule 23 of the Federal Rules*, 2 HOWARD L.J. 111, 119 (1956).

[75] *See* Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577, 581, 589 (1952).

[76] *See* George M. Strickler, Jr., *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DEPAUL L. REV. 73, 111–12 (1985) ("In order to allow the class members to enforce judgments intended to prohibit further discrimination, it was generally agreed that the actions should be classified as true class suits.").

[77] *See* CHARLES ALAN WRIGHT, FEDERAL COURTS 271 (1963) (explaining that "[w]here the case is such that a class suit can be brought, some courts have thought it 'true,' others have thought it 'spurious,' while most have simply called it a class action without further identification.") (cited by

Legal scholars and federal courts took into account policy considerations in defining the boundaries of class actions,[78] and racial equality was an especially dominant factor in the progressive judicial interpretation of Rule 23.[79] As Kaplan explained, "right answers should not depend on the mere preservation of the categories or terminology of Rule 23, but rather on the play of the intrinsic policies."[80] Thus, what was in theory a non-binding, "spurious" class action gained a binding effect due to policy considerations, and the Advisory Committee adopted this innovative judicial application of Rule 23.[81] However, in order to fully grasp the policy concerns and their impact, it is necessary to go back to the constitutional cases leading to *Briggs*, the first class action in which a judge rejected *Plessy*'s separate but equal rule.

IV. Status and the Struggle Against Racial Segregation

Never was the gap between "law in books" and "law in action" as great or as noticeable as in the case of the "separate but equal" doctrine, which shaped the racial reality of the time and was promulgated in *Plessy v. Ferguson*.[82] In the real world, Jim Crow laws never stood for equal separation between the races,[83] but rather for hierarchy and subordination. Blacks and whites could live together, as long as it was not on equal footing. Racially restrictive covenants were employed to enforce racial separation in housing, but an exception allowed for residence of domestic servants and butlers.[84] Similarly, black nannies raised, fed, and took care of white children, while they could not visit all-white restaurants, or walk through segregated parks with their own children.[85] Even the name

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Kaplan, *supra* note 24, at 380–83).

78 See Comment, *supra* note 67, at 577–78.

79 *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 243 (1987) ("The Supreme Court seemed willing to reverse a half-century of Constitutional Law in the name of racial equality.").

80 *See* Kaplan, *supra* note 32, at 384.

81 *See* Marcus, *supra* note 39, at 697.

82 State laws and constitutions, and even court decisions of the time, did not reflect racial reality. A famous example is the disenfranchisement of African-Americans' right to vote. Despite written laws and court decisions against grandfather clauses, like in Guinn v. United States, 238 U.S. 347 (1915), the right of African-Americans to vote was prevented through other devices, like poll taxes and literacy tests.

83 In his dissent in *Plessy*, Justice Harlan explained what was clearly true, that "the statute in question had its origin in the purpose . . . to exclude colored people from coaches occupied by . . . white persons . . . under the guise of giving equal accommodation for whites and blacks." 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).

84 Typical restrictive covenants provided that "No person of . . . African or Negro blood . . . be permitted to occupy a portion of said property, or any building thereon except a domestic servant or servants who may actually and in good faith be employed by white occupants of such premises." *See* Robin Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1557 (2010).

85 This exception to racial segregation was explained as "paradoxically helpful for refining segregation. What was prohibited in public was often permitted in private, especially in whites' homes

Jim Crow, associated with segregation laws, originated in an offensive show character of a minstrel, which captured the way whites thought of slaves—as dim-witted, lazy, and perennially jovial.[86]

The law created by *Plessy v. Ferguson* had little to do with the day-to-day reality of race relations in the states, and it undermined the faith of African-Americans in their ability to enforce their civil liberties and human rights using the law. After all, when the law is based on false assumptions regarding social reality, and misguided propositions that benefit the powerful at the expense of the weak, it falls short as a source for social reform. As a result, the NAACP, which took upon itself to challenge and tear down the Jim Crow laws' constitutionally in court, had only limited success before *Brown*.

In 1930, the NAACP decided to concentrate its attacks against Jim Crow segregation in public schools, using the Equal Protection Clause of the Fourteenth Amendment.[87] Thurgood Marshall, one of the NAACP's leading counselors, alongside his mentor, Charles Hamilton Houston,[88] were the first to constitutionally challenge racial segregation at the University of Maryland, after Donald Murray, who was African-American, applied to law school there and was rejected.[89] In *Murray v. Pearson,* Marshall accused the state of Maryland of violating the *Plessy* rule, for while some scholarships were given to blacks as part of an out-of-state program, the law school itself was all-white.[90] He argued in court that the case was about more than the rights of his client or the specific circumstances of the case.[91] On June 25, 1935, the Baltimore City Court ordered the admission of Donald Murray to the University of Maryland Law School.[92] The Court of Appeals affirmed this ruling, but mentioned that another possible remedy was to order the establishment of a separate school for blacks, as long as there had been "a legislative declaration of a purpose to establish one."[93] The decision to admit Murray was limited—it did not attack segregation head on,[94] and the University of Maryland Law School remained segregated for many years.[95] It did, however, pave

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and especially when it came to black maids." *See* MARK M. SMITH, HOW RACE IS MADE: SLAVERY, SEGREGATION AND THE SENSES 91–92 (2006).

[86] The term Jim Crow had a dual meaning: "[f]or whites Jim Crow meant fun, laughter, and amusement. In African American homes the name meant humiliation, degradation, and cowardice." *See* LESLIE V. TISCHAUSER, JIM CROW LAWS 2 (2012).

[87] Daniel T. Kelleher, *The Case of Lloyd Lionel Gaines: The Demise of the Separate but Equal Doctrine*, 56 THE J. OF NEGRO HIST. 262 (1971).

[88] Charles Hamilton Houston was the Dean of Howard Law School and the NAACP litigation director. *See* Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* 83, 89–90 (1983) (discussing his contribution to the struggle against Jim Crow).

[89] Pearson v. Murray, 169 Md. 478, 480 (1936).

[90] *Id.*

[91] LISA ALDRED, THURGOOD MARSHALL: SUPREME COURT JUSTICE 44-45 (2005).

[92] *Pearson,* 169 Md. 478, at 480.

[93] ALDRED, *supra* note 91.

[94] *Id.* Marshall argued that "What's at stake here is more than the rights of my client."

[95] *See* John K. Pierre, *History of De Jure Segregation in Public Higher Education in America and the State of Maryland Prior to 1954 and Equalization Strategy*, 8 Fla. A&M U. L. Rev. 81, 90–92 (2012).

the way strategically for the next desegregation suits.

The NAACP used the Maryland victory to increase public awareness and participation in the efforts to dismantle Jim Crow, and called for potential plaintiffs of similar lawsuits to come forward and take part in actions financed by the NAACP.[96] Many approached the NAACP, asking for legal aid, but Lloyd Gaines, who had an excellent scholastic record, was ultimately selected.[97] The state of Missouri practiced racial segregation in education, but it did not provide a law school for blacks.[98] When Gaines submitted his application, S.W. Canada, the law school's registrar, directed him to the all-black Lincoln University, which offered out-of-state scholarships for African-Americans.[99] When the NAACP petitioned for a writ of mandamus, the university's formal response was that it would not admit a student of African descent to a white school.[100] The Missouri state courts rejected the NAACP's constitutional challenge, emphasizing that there were liberal scholarships for out-of-state studies, and a legislative authority to establish separate schools for blacks, neither of which existed in the Maryland case.[101]

When the case reached the U.S. Supreme Court, the Court determined that the out-of-state scholarships did not meet the requirement of "separate but equal," since it was the responsibility of the state to provide equal privileges within its borders.[102] This decision forced the courts to consider whether separate facilities were really congruous with equality.[103] The Court reversed the Missouri Supreme Court's decision and instructed the University of Missouri to admit Gaines, while leaving open the possibility of admitting him to a new, segregated school within the state.[104] When Missouri established an all-black law school that had only nineteen students, an academic staff of four, and poor learning conditions, the case returned to court to determine whether this met the demand of "separate but equal."[105]

Oklahoma adopted a similar tactic for preserving racial separation in *Sipuel v. Board of Regents*.[106] The U.S. Supreme Court, citing *Gaines*, ordered the state to meet its constitutional obligation by providing Ada Sipuel with a legal education equal to that offered to whites.[107] The state responded by establishing Langston Law School, which Professor Henry

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[96] Kelleher, *supra* note 87, at 263.

[97] Sarah Riva, *The Coldest Case of All? Lloyd Gaines and the African American Struggle for Higher Education in Missouri*, WESTERN LEGAL HISTORY 1, 6–7 (2010).

[98] *Id.* at 5.

[99] *Id.* at 7.

[100] Kelleher, *supra* note 87, at 264.

[101] *Id.* at 266.

[102] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 350 (1938).

[103] MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 77 (1987).

[104] *Canada*, 305 U.S. at 352; Kelleher, *supra* note 87, at 267.

[105] Riva, *supra* note 97, at 14.

[106] 332 U.S. 631 (1948).

[107] *Id.* at 633.

H. Foster of the University of Oklahoma characterized as "a fake, fraud, and deception."[108]

In Gaines's case, the NAACP could potentially challenge the adequacy of the new, hastily established all-black school. However, in October 1939, NAACP lawyers had to inform the court that despite advertisements and a nationwide search, Gaines had gone missing under mysterious circumstances. Therefore, the case ended by January 1940.[109]

Charles Houston decided to follow the Gaines case with another Missouri admission case.[110] Lucile Bluford, a journalist who knew Gaines personally,[111] agreed to file a lawsuit after her application to the Missouri School of Journalism was rejected for the eleventh time because of her race.[112] The Missouri Supreme Court ordered the state to either admit Bluford to the University of Missouri or open a journalism school in Lincoln University within a reasonable time.[113] Missouri chose the latter, but Bluford, despite having wanted to go to the University of Missouri, refused to attend the new school, because her basic motivation had been not education, but desegregation.[114] The Journalism School at Lincoln University eventually closed its gates in February of 1944.[115]

V. Between Law-in-Books and Law-in-Action: Strategic Use of the Social Sciences

Trying to achieve social reform through legal action is hard, time consuming, and expensive work. A years-long legal process challenging racial segregation in state schools could very well end with the admission of a single plaintiff, and have very little influence over the law or day-to-day social reality. In the meantime, defendants had time to find innovative ways to circumvent the court's decisions and maintain racial segregation. They opened new schools, closed public schools, exerted socioeconomic pressure on plaintiffs or their communities, and focused on individuals rather than the collective character of race. In such a setting, it was hard to be sure whether legal action was the right path for bringing about social change, and some indeed argued that this miscalculation led to the reinforcement of social inequalities, and, like in *Gaines*, exposed plaintiffs to socioeconomic backlashes and even mortal danger.

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[108] Jonathan L. Entin, *Sweatt v. Painter, the End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3, 22 (1986).

[109] Kelleher, *supra* note 87, at 268.

[110] Riva, *supra* note 97, at 19.

[111] *Id.* at 15.

[112] *Lucile Bluford Blazed Trail in Civil Rights; Former Editor of Newspaper Dead at 91*, COLUM. DAILY TRIB., June 15, 2003, at 1; Bluford v. Canada, 153 S.W.2d 12 (Mo. 1941).

[113] Riva, *supra* note 97, at 20.

[114] Kelleher, *supra* note 87, at 270.

[115] Riva, *supra* note 97, at 21.

And yet, in *Sweatt v. Painter*,[116] the NAACP successfully employed an innovative strategy, which incorporated social sciences studies into substantive law and mitigated the gap between the "law in books" and the "law in action." Heman Marion Sweatt's application to the University of Texas Law School was rejected solely on racial grounds,[117] even though at the time, Texas, much like Missouri, did not have a comparable law school for blacks.[118] As in *Gaines*, the trial court allowed Texas to establish an all-black law school, while denying the plaintiff any relief for a period of more than six months.[119] When Sweatt refused to attend the new, all-black law school,[120] which occupied a couple of rented rooms and had only two part-time instructors, the trial court examined the curriculum, the courses, and other tangible features of the new school, and determined that it reasonably met the constitutional requirement of "separate but equal."[121]

Though Sweatt's constitutional right to equal protection of the laws had clearly been infringed, the decision of the trial court was affirmed by the court of appeals, and Sweatt's application for a writ of error was denied by the Texas Supreme Court.[122] It did not matter that the newly established and smaller law school, with only twenty-three students, could not compare to the renowned University of Texas Law School, with its superior prestige, learning conditions, and longtime experience. This pattern of legal evasion soon became all the rage, with other states engaging in numerous strategies to resist integration of their higher education institutions.[123]

The U.S. Supreme Court eventually reversed the ruling of the Texas Supreme Court, and declared that Sweatt's constitutional rights under the Equal Protection Clause had indeed been violated.[124] The court did not focus on technical issues such as the facilities and resources offered by the new law school, but instead opened the door to social sciences experts, like Robert Redfield, who shined a light on the social repercus-

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[116] 339 U.S. 629 (1950).

[117] According to the Constitution of the State of Texas of the time, "[s]eparate schools shall be provided for the white and colored children, and impartial provision shall be made for both." TEX. CONST. of 1876, art. 7, § 7 (repealed 1969).

[118] The Texas Constitution authorized the establishment of a comparable "branch university" for blacks. However, the provision was not implemented. Alton Hornbsby, Jr., *The "Colored Branch University" Issue in Texas—Prelude to Sweatt vs. Painter*, 61 THE J. OF NEGRO HIST. 51, 55–58 (1976).

[119] *Sweatt*, 339 U.S. at 632.

[120] The new school, which was part of Prairie View University, consisted of two rented rooms in Houston, and two part-time instructors. Entin, *supra* note 108, at 9.

[121] Sweatt v. Painter, No. 74,945 (126th Dist. Ct., Travis County, Tex., Dec. 17, 1946).

[122] The legal proceedings, however, exerted pressure on the legislature to establish the Texas State University for Negroes, and repeal the statute that authorized the establishment of Prairie View Law School. Entin, *supra* note 108, at 9 (what was then the Negro School of Texas is now known as Thurgood Marshall Law School).

[123] Entin, *supra* note 108, at 66–67.

[124] The court ruled in favor of Sweatt, but decided not to reexamine *Plessy*. *Sweatt*, 339 U.S at 636–37.

sions of racial segregation.[125] The court realized that dwelling on such details as the size of the school, its geographic location, or the number of available courses, would lead to endless and unhelpful comparisons. As the vast majority of lawyers, judges, and officials were white, segregation could never bring about equality. The court explained that the newly established school existed in an academic vacuum, and that its students were not instructed by the best minds in the legal profession. Such a scholastic environment, cut off from the dialogue and exchange of ideas of the field in question, could not compete with the setting provided by the University of Texas School of Law.[126]

The NAACP, in its interpretation and application of substantive law, turned to the social sciences in order to expose the reality of racial dehumanization.[127] After *Plessy v. Ferguson*, it was quite clear that "separate but equal" had little to do with either separation or equality.[128] The struggle that waged in the courts regarding proper out-of-state scholarships, the existence of comparable facilities, the size of classrooms, and types of courses taught enabled judicial analysis to disengage and distance itself from the reality of racial subordination and dehumanization. The role of the social sciences in this regard was to shine a light on the complex façade created by "objective" legal terminology, and to show how it allowed the judiciary, thus far, to dodge the reality of race relations in America.[129] This helped the court diminish *Plessy*'s scope and declare that segregation was inherently unequal.[130] And yet, the court did not overrule *Plessy* altogether, and its decision remained limited to the specific circumstances of Sweatt's case.[131]

On the same day the U.S. Supreme Court issued its decision in

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[125] Robert Redfield was the chairman of the Anthropology Department at the University of Chicago. In his testimony, he explained that segregation prevented students from meeting and learning directly from other group members. Furthermore, segregation left suspicion and prejudice-based distrust unchallenged. The NAACP also presented the testimony of Donald G. Murray, who completed his studies at the all-white University of Maryland following the court's ruling in his case. These testimonies were meant to move beyond technicalities, and shed light on the social repercussions of racial segregation. *See* Entin, *supra* note 108, at 36–38.

[126] *Sweatt*, 339 U.S. at 633–35.

[127] Marshall also submitted an amicus brief against segregation, signed by 188 people, among them seven distinguished professors from leading universities. Entin, *supra* note 108, at 46.

[128] This was especially evident in Justice Harlan's dissent. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

[129] Entin, *supra* note 108, at 38. Regarding the NAACP's strategy, it was maintained that "this novel approach harkened back to the point of Justice Harlan's dissent . . . whites had imposed segregation because they regard blacks as subhuman beings who were unfit to participate in civilized society. The equality of the separate facilities was entirely irrelevant to this overriding precept."

[130] *Id.* at 39. The testimony of social sciences experts "on the harmful effects of separate schools likewise addressed the wisdom rather than the constitutionality of the state's policy of segregation."

[131] Limiting the scope of his decision, Justice Vinson explained that "[b]roader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the case before the Court. We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible." Because of this traditional reluctance to apply constitutional interpretations to situations or facts which were not before the Court, a great deal of the research and detailed arguments presented by the plaintiffs was not strictly relevant to these specific cases, and was meant to confront the court's reluctance. *Sweatt*, 339 U.S. at 636.

Sweatt, it issued another closely related decision, which was also shaped by the NAACP's use of the social sciences. In *McLaurin v. Oklahoma State Regents*, an African-American student pursuing a Doctorate in Education was instructed to use separate facilities, which effectively excluded him from any interaction with the rest of the student body.[132] He had a separate desk in the anteroom outside the classroom, designated by a rail and a sign reading "Reserved for Colored," and a separate table in the school cafeteria, which he was to use at a different time than the rest of the students.[133] Much like in the *Sweatt* case, the Supreme Court held that a dialogue with other students—being able to exchange views and learn from other students—was an essential part of an effective academic experience, and therefore the restrictions imposed by the state hampered McLaurin's education and violated his Fourteenth Amendment right to equal protection.[134] And yet, once again, the ruling remained limited to the facts of McLaurin's case.

Justice Marshall said in *Murray* that there was more at stake than merely the rights of a single plaintiff—this was equally true in *Gaines*, *Bluford*, *Sweatt*, and *McLaurin*. State-imposed segregation inevitably limited the ability of individuals to grow by voicing their thoughts, learning from others, and exchanging ideas, views, and experiences. In this regard, segregation was a way to subjugate and control minds and perceptions, excluding weakened communities from access to knowledge, experience, and dominant traditions of the profession they wished to join. Nevertheless, the Supreme Court adhered to the principle that constitutional interpretation should be limited to the specific context and circumstances of the case before it.[135] Though inequality was part of the daily life of African-Americans, and their human rights were violated as a matter of course, the Supreme Court did not reexamine *Plessy*, and in so doing preserved the offensive exclusion it criticized in its decisions.

These rulings had a minimal, if not detrimental, impact on the lives of African-Americans. This fact, together with the social risks involved, the financial costs, and the lengthy proceedings—which in many cases ended with the admission of a single person into an institution where he was met with hostility—were all factors that could have deterred individuals from trying to enforce their rights in court.[136] The legal avenue for constitutional challenges against racial inequalities had therefore become ineffective, or at least insufficient as a single path for achieving social reform. Social and legal activists needed a different strategy that would be able to convince the courts to move beyond the boundaries of a specific case. It was the class action that was about to present the most

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[132] McLaurin v. Okla. St. Regents for Higher Educ., 339 U.S. 637, 640 (1950).

[133] *Id.* Following his lawsuit, the requirements were altered and he could eat at the same time as the rest of the students, though in a different, designated table.

[134] *Id.* at 640–41.

[135] *Sweatt*, 339 U.S. at 632 (citing *McLaurin*, 339 U.S. 637 at 642) (referring to its ruling in *Sweatt* in describing McLaurin's rights as personal).

[136] Sweatt left the university because of social pressures at the school.

suitable legal mechanism for this kind of massive social and legal reform. While many other factors shaped history at the end of War World II, the NAACP's class suits of the time were certainly of great historical significance. Therefore, examining the theories underlying those suits can present a new and important angle on how civil rights were defended in cases like *Briggs*.

VI. ACKNOWLEDGING SOCIAL REALITIES: THE HISTORICAL CONTEXT OF *BRIGGS*

Though in Clarendon County, South Carolina, seventy percent of the population was African-American, strict racial separation was observed, and whites dominated the social, economic, and political scene. Thus, thirty school buses were provided for white children, and none for blacks.[137] A petition regarding bus transportation, signed by more than a hundred African-Americans, was sent to R.W. Elliott, the school board chairman, and was rejected.[138] As a result of this protest, African-Americans were excluded from many businesses, and their children, many of whom were illiterate, were left with only two options: stay home and receive no education, or walk nine miles every day to get to school.[139] Moreover, the conditions in black schools were very different from those in the all-white schools, as the outhouses in the former had no running water, and the drinking water was kept outside in germ-infested buckets.[140]

Despite these obvious human rights violations, African-Americans were afraid to openly challenge the status quo, let alone file a lawsuit and enforce their constitutional rights in court.[141] A third of the African-American community was illiterate, and most of the property in Clarendon County was owned by whites.[142] African-Americans also knew from experience that challenging racial separation did not go unpunished—socioeconomic reprisals as well as death threats against plaintiffs and

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[137] Wade Kolb III, Briggs v. Elliott *Revisited: A Study in Grassroots Activism and Trial Advocacy from the Early Civil Rights Era*, 19 J. S. LEGAL HIST. 123, 124 (2011).

[138] Elliott's response was: "[w]e ain't got no money to buy a bus for your nigger children." Darlene Clark Hine, *The* Briggs v. Elliott *Legacy: Black Culture, Consciousness, and Community Before Brown*, 2004 U. ILL. L. REV. 1059, 1062 (2004). The petitioners suffered from various socioeconomic backlashes, including the realization of debts and mortgages. Kolb, *supra* note 137.

[139] On their way to school, pupils also had to cross a treacherous lake, where a young person had lost his life. Kolb, *supra* note 137.

[140] *Id.* at 152–53. Many believed that black schools were a disgrace. Buildings in white schools were made of bricks and mortar, while black schools were little more than shacks. The state invested ten times more in the education of white children than black children, and in more than ninety percent of black schools not a single library book could be found. *See* Steven J. Crossland, *Brown's Companions: Briggs, Belton, and Davis*, 43 WASHBURN L.J. 381, 385 (2004); Mark Tushnet, *Lawyer Thurgood Marshall*, 44 STAN. L. REV. 1277, 1282 (1992); Hine, *supra* note 138, at 1062.

[141] *See* Kolb, *supra* note 137, at 129.

[142] *Id.* at 126.

their families and friends were to be expected.[143] And the problem was only made worse by the growing distrust of African-Americans in the judicial system, which sustained and protected dehumanizing racial segregation for over half a century. This excluded African-Americans, along with their experiences and perceptions, from the process of judicial decision-making.[144]

As a rule, legal actions do not require public awareness or participation, but the NAACP did things differently when it tried to reshape substantive and procedural law through desegregation lawsuits. Reverend J. A. DeLaine, a pastor, teacher, civil rights activist, and the Secretary of the NAACP branch in Clarendon County, was determined to spur victims into action, with minimal socioeconomic backlashes. Therefore, he selected Levi Pearson, whom he believed could endure potential reprisals. The lawsuit, in which Pearson asked for a school bus to be provided for African-American children, was rejected on procedural grounds, but retaliation against him followed anyway.[145] DeLaine lost his teaching position, and Pearson was isolated both socially and financially. Shots were fired at DeLaine's home,[146] and Pearson lost his credit at white-owned institutions and could not obtain the equipment necessary for harvesting his crops.[147] Many of Clarendon County's business owners, who did not appreciate what they perceived as an awakening of the African-American community, placed signs in front of their businesses, forbidding entry to blacks.[148]

These socioeconomic circumstances, and the need to confront them in court, led to the development of a legal mechanism first introduced by the NAACP in *Briggs*.[149] The NAACP, which since the time of Charles Houston pushed for community awareness and participation,[150] asked DeLaine to find twenty people courageous enough to serve as plaintiffs.[151] As a result, several community meetings were held concerning the legal process, its purposes, and its risks, which helped rally support

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[143] After a petition signed by 107 people was sent to the school board, many of the petitioners were fired and their credit was cancelled. *Id.* at 138.

[144] There were not any black judges at the time, and very few black lawyers. African-Americans also had little influence on the legislative process due to their disenfranchisement.

[145] Kolb, *supra* note 137, at 131 (discussing *Pearson v. Clarendon County* in which Pearson lacked standing because the suit dealt with bus transportation in District 26, while he paid taxes in District 5).

[146] Stephen E. Gottlieb, *Brown v. Board of Education and the Application of American Tradition to Racial Division*, 34 SUFFOLK U. L. REV. 281, 282 (2001).

[147] Kolb, *supra* note 137, at 131.

[148] *Id.* at 138.

[149] Erica Frankenberg, *The Authority of Race in Legal Decisions: The District Court Opinions of Brown v. Board of Education*, 15 U. PA. J. L. & SOC. CHANGE 67 (2012); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 400 (1975).

[150] *See* Ogletree, Jr., *From Dred Scott to Barack Obama*, 25 HARV. BLACKLETTER L.J. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 347–48 (2005).

[151] Kolb, *supra* note 137, at 133.

for social reform litigation.[152] The support of the African-American community complemented the efforts of the NAACP to find a place for the social repercussions of racial segregation within relevant constitutional doctrines by turning to the social sciences.

In *Briggs v. Elliott*, the NAACP brought forth a class suit with sixty-six plaintiffs, on behalf of the entire African-American community.[153] A cadre of social scientists were invited to present to the court evidence of the social reality of racial segregation.[154] Among them was Matthew Whitehead,[155] who examined school facilities, and described to the court the fundamental differences between the educational opportunities enjoyed by black and white pupils because of the difference in facilities.[156] Kenneth Clark,[157] who together with his wife Mamie, created the famous "doll tests," tested sixteen students from Clarendon County a few days before the trial[158] and presented his findings in court. The results showed the detrimental effects of racial segregation on the psychological development of black children.[159] David Krech maintained that racial segregation communicated the message that race was a relevant, if not dominant, factor in education, and this, he argued,[160] programmed people to believe that blacks were inferior.[161] Finally there was James Hupp,[162] who testified regarding the success of racial integration in his school.[163]

Realizing that these social scientists were planning to testify, Robert Figg, the defendants' attorney, conceded at the beginning of the trial that there were inequalities between whites and African-Americans.[164] The purpose of this admission was to prevent some of these testimonies from being heard in court, as Figg feared they might adversely affect the position of the judges regarding racial segregation.[165] In other words, Figg wished to conceal the dehumanization, which was part and parcel of

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[152] *Id.* at 135.

[153] *Briggs v. Elliott*, 98 F. Supp. 529, 538 (E.D.S.C. 1951). The plaintiffs included twenty parents and forty-six students. The action was brought by the plaintiffs "and on behalf of many others . . . and the suit is denominated a class suit . . . ." *Id.* at 538. The initial action was brought to court in order to equalize educational opportunities. However, Judge Waring, who appreciated the magnitude of this lawsuit, suggested that the NAACP dismiss the case, and file a new one that directly attacked the separate but equal doctrine. Kolb, *supra* note 137, at 137.

[154] Among these experts were: Matthew Whitehead, Kenneth Clark, Harold McNalley (a Professor of education at Columbia University), Ellis Knox (a professor of education at Howard University), James Hupp, David Krech, Helen Trager (a lecturer and educational consultant), and Robert Redfield. *Id.* at 145–60.

[155] Assistant Professor at Howard University. *Id.* at 145.

[156] *Id.* at 145.

[157] Assistant Professor of Social Psychology at the City College of New York. *Id.* at 145.

[158] Kolb, *supra* note 137, at 146, 155.

[159] His tests concluded that black children suffered from low self-esteem, and feelings of rejection and inferiority. *Id.* at 146, 155.

[160] Professor of Psychology at the University of California. *Id.* at 145.

[161] Kolb, *supra* note 137, at 159.

[162] Dean of Students and Professor of Education at West Virginia Wesleyan College. *Id.* at 145.

[163] Kolb, *supra* note 137, at 156.

[164] *Id.* at 150.

[165] *Id.*

the legal system of racial separation.[166] Both Judge Parker's majority opinion in *Briggs*, which upheld the *Plessy* ruling, and Judge Waring's dissent, which declared that racial segregation was per se unequal, were strongly affected by these testimonies. Judge Parker emphasized the "overwhelming authority" of *Plessy* and minimized the "theories advanced by a few educators and sociologists."[167] Judge Waring, on the other hand, maintained that many of these educators had a national reputation and that their studies and tests showed beyond any doubt that racial separation was humiliating and that it ineradicably influenced the minds of black and white children alike.[168]

When *Briggs* was later consolidated with four other cases into *Brown*,[169] there were distinct echoes of Judge Waring's dissent.[170] The dissent first declared that racial segregation in education, which was supported for more than half a century by the United States Congress and approved by the Supreme Court,[171] violated the Equal Protection Clause of the Fourteenth Amendment.[172] Eventually, the NAACP's attempt to bridge the gap between socio-economic realities and legal doctrines played an important role in the transformation of substantive law and in the realization that legal procedure could serve as a platform for political and social empowerment.

VII. ACKNOWLEDGING STATUS: PROCEDURAL LAW IN *BRIGGS*

As mentioned above, status was the driving force behind group litigation in seventeenth century English courts. Many years later, in desegregation class suits, the court was compelled once again to acknowledge, in overcoming individual differences, that the status of race demanded class treatment. While constitutional rights are personal, hundreds of African-Americans congregated outside the courtroom, and a great many

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[166] His attempt was partially successful, as it shortened the proceedings and caught the plaintiffs by surprise. There were other experts scheduled to appear in court, who could not do so prior to closing arguments. *See Briggs v. Elliott*, 98 F. Supp. 529, 535–36 (E.D.S.C. 1951); Frankenberg, *supra* note 149, at 76.

[167] *Briggs*, 98 F. Supp. at 537.

[168] *See id.* at 547.

[169] The consolidated cases of Brown, commonly known as the "school segregation cases" included *Bolling v. Sharpe*, from Washington, DC; *Gebhart v. Belton* and *Gebhart v. Bulah*, from Delaware; *Briggs v. Elliott*, from South Carolina; *Davis v. County School Board*, from Virginia; and *Brown v. Board of Education*, from Kansas. All of these constitutionally challenged the racial segregation in public schools. Brown v. Bd. of Educ., 347 U.S. 483; 486 n.1 (1954).

[170] On the substantial impact of Judge Waring's dissent in *Brown*, *see* Harold R. Washington, *History and Role of Black Law Schools*, 18 HOWARD L.J. 385, 413 (1975).

[171] Judge Parker emphasized the wide support enjoyed by racial segregation: "the Congress of the United States have for more than three-quarters of a century required segregation . . . . [when] this has received the approval of . . . Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights." *Briggs*, 98 F. Supp. at 537 (Parker, J.).

[172] *Id.* at 548 (Waring, J., dissenting).

people participated in the legal proceedings of *Briggs*. The African-American community realized that this suit was about more than the specific circumstances of the individual plaintiff—status still defined their destiny. The need, formerly discussed, to face and bring to light the socioeconomic reality in desegregation cases, affected procedural law as much as it did substantial legal doctrines. There was an underlying theory behind the procedural decision to file all five cases that were consolidated into *Brown* as class actions. The NAACP had years of experience with constitutional cases challenging state-ordained racial segregation. Its decision to employ class actions and testimonies by social scientists was the result of an evolution in civil rights litigation—an inevitable response to the difficulties that arose during individual suits.

A. Grassroots Empowerment: Moving the Victim into Action

Though the suits were expected to bring about backlashes against the African-American community, the plaintiffs had to face a deeper problem that went to the heart of their status in society. They were born, raised, and educated in a country that separated the races as a matter of law. Plaintiffs had to defy their way of life, and the age-old social and legal system that perpetuated racial segregation. African-Americans belonged to a weakened community. The daily reality of racial separation, which shaped their lives, was meant to make them understand that they were inferior and could not participate in the judicial, political, and academic spheres. This caused many African-Americans to embrace passivity and internalize their subordinate role. And so, the first step to enforcing their constitutional rights had to be through social and psychological empowerment.[173] Court rulings alone could not break down old stereotypes and prejudices—not unless local African-American communities organized against ongoing discriminatory practices.[174] An important part of the process was training and mentoring African-American lawyers, who then litigated desegregation cases as equals with white lawyers. In fact, twenty-eight out of the thirty lawyers who represented the plaintiffs in the *Brown* cases, including Thurgood Marshall,[175] were taught and mentored by Charles Hamilton Houston.[176]

The NAACP realized that if the community remained mobilized and active throughout the legal process and after its completion, it could

[173] Charles Houston believed that "lawsuits mean little unless supported by public opinion.'" The purpose of litigation was therefore to "arouse and strengthen the will of the local communities to demand and fight for their rights." Courts were used by civil rights lawyers as a "medium of public discussion [attempting] to activate the public into organized forms of protest and support behind these cases." Mack, *supra* note 150, at 347–48.

[174] Ogletree, *supra* note 150, at 16.

[175] *Id.* at 6.

[176] *Id.* at 16.

better cope with the social and economic turmoil that was bound to accompany desegregation suits, as well as the groundbreaking decision that might come. After all, it was one thing to make a single plaintiff like Lloyd Gaines vanish without a trace, and in so doing bring an end to his suit, but that simply was not practical with sixty-six plaintiffs and thousands of people who took part in the class action suits. Eventually, the struggle against racial segregation could not be boiled down to a single court decision, and a continued concentrated effort, both social and legal, was necessary to achieve success.

The participation of many African-Americans in the class suit—in community meetings and gatherings of hundreds of people outside the federal courtroom[177]—emboldened and empowered the weak in their legal struggle against state law,[178] and the social norms and practices that separated the races.[179] Even the extreme backlashes to *Briggs*, like the shooting and arson committed against J.A. DeLaine,[180] did not deter the community, nor the legal proceedings, which would eventually change American race relations.

B. Inner Conflicts, Gradual Changes, and Compromises

The limited influence of decisions like *Sweatt* and *McLaurin*, as well as the fact that constitutional rights were, early on, thought of as personal, reflect the view that declaratory and injunctive relief can produce different results in different circumstances. At the other end of the spectrum are modern class actions, in which a single plaintiff can represent millions of individuals. The NAACP, in the desegregation class actions, encouraged thousands to participate in the suit—though this was not strictly necessary—because it understood the importance of that participation. In *Briggs*, community meetings emboldened sixty-six plaintiffs to lead the class suit, and hundreds to gather outside the courthouse. This strategy was crucial to the success of *Briggs*, since there were inner conflicts within the African-American community, and overall support of the collective goal was essential.[181]

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[177] Kolb, *supra* note 137, at 148.

[178] On the empowerment of weakened communities through their involvement and active participation in legal proceedings, *see* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1064 (1989).

[179] Kolb, *supra* note 137, at 163 (emphasizing the importance of community involvement, explaining that "[a]t the grassroots level the change of the Clarendon County plaintiffs looms large. They were the great actors in this drama, not the lawyers in the courtroom or the experts that came to testify.").

[180] These violent acts were supported by state officials. When DeLaine's home was set on fire, the fire department decided not to extinguish it, and when his house was shot at and he fired back in self-defense, a warrant was issued for his arrest. DeLaine had to leave South Carolina and settle in New York. *Id.* at 147, 163; *see also* Gottlieb, *supra* note 146, at 282.

[181] *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 437 (2000) (discussing the importance of giving

Neither declaratory nor injunctive relief could resolve these inner conflicts. There are many examples of this: investment in integrated schools in all-white neighborhoods often times came at the expense of schools in black neighborhoods; black teachers in previously all-black schools feared for their jobs;[167] and many African-Americans were worried that complete integration would mean sending their children into a hostile environment.[182] But the participation of the community was helpful in setting priorities and reaching a consensus regarding the purpose of the class suit and the necessary compromises, which were an inevitable part of the piecemeal process of equalizing the socioeconomic status of African-Americans. As such compromises sometimes adversely affected certain groups in the community, the process had to be gradual—the community's involvement in the process helped legitimize it and alleviate its negative repercussions.[183] This process was especially important in *Briggs*, when defendants tried to expose these inner conflicts, but as a result of community participation, they could not find a single black leader to defend segregation in court.[184]

C. Adversarial Equality and Class Suits

In his dissent, Judge Waring emphasized the efforts and financial expenditures of the plaintiffs.[185] After all, an individual who challenges social norms and practices in court, which have been supported for years by laws and state officials, is at an extreme disadvantage. The state possesses virtually unlimited funds, which it can invest in research as well as the judicial proceedings, while in most cases, the individual plaintiff does not have much money, or access to the information or manpower necessary to conduct serious research and examine state acts and their repercussions. The class suit was meant to rectify this imbalance between the individual and the state—that was the role of the sixty-six plaintiffs, the community meetings, and the gatherings outside the courtroom. One person alone could likely not gather public support, raise the funds for bringing forth witnesses with national reputations, or conduct legal research and analysis. The class action leveled the playing field in that it allowed for the aggregation of investments and efforts. This proved vital

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voice to inner conflicts within the class in desegregation cases).

[182] *See* Ronald R. Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176, 177 (1973); Jessica Davis, *The Historical Convergence in the Desegregation Policy of Education in the United States*, 7 J. RACE GENDER & POVERTY 37, 50 (2016).

[183] *See* Edmonds, *supra* note 180, at 177, 178–81 (stating "[m]ore than any other category of litigation, the fashioning of relief in desegregation litigation goes to the core of community . . . . Effective community requires the power to make choices . . . .").

[184] Kolb, *supra* note 137, at 142.

[185] Briggs v. Elliott, 98 F. Supp. 529, 540 (E.D.S.C. 1951).

for the success of desegregation suits.[186]

D. Courts' Legitimacy

Social reform litigation made things difficult for both the court and the plaintiffs, as upsetting the status quo of race relations and challenging state laws and practices inevitably provoked anger and resistance. The class suit in *Briggs* gave the plaintiffs tools to cope with possible white retaliation, as a part of a cohesive African-American community. Judges also suffered from this socioeconomic turmoil, though they did not necessarily enjoy the benefits of this communal support.[187] The important thing was that the African-American community let the court understand that it supported the litigation and would do what was necessary to enforce and implement its ruling after the proceedings ended. That made this legal procedure suitable for groundbreaking decisions.[188]

Judge Waring was aware of the effect his liberal rulings would have on his judicial career, and in time, he became gradually isolated as he predicted.[189] He realized that if he were about to undergo such hardships, the case should be a deserving one. The civil rights class action served this purpose. Judge Waring was the only judge who stated that *Briggs* was a class suit. In his decision, he discussed the magnitude of this class suit, the large number of plaintiffs and witnesses, and the energy and resources spent on research, conducting interviews, and gathering data. He also expressed his belief that a case of this magnitude was the only viable opportunity to overcome judicial evasion and provide the plaintiffs with an adequate remedy.[190]

While the Court in *Sweatt* and *McLaurin* limited its ruling to the circumstances before it, Waring believed that such a restrictive view overlooked the collective repercussions of racial segregation and would force the plaintiffs to take part in endless court battles.[191] The procedure

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[186] Collective collaboration in desegregation cases made raising necessary funds for the legal proceedings possible. *See* David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 393–94 (2000) (explaining the economics of scale in class action litigation).

[187] Crossland, *supra* note 140, at 389 n.80 (detailing the substantial pressures Judge Waring faced following his dissent in *Briggs*, and that "[l]ess than a year later, socially ostracized from the Charleston Community, Judge Waring abruptly retired from the federal bench and left for New York, never again to live in his native state.").

[188] "Individual plaintiffs asking relief from discriminatory practices might be viewed by the court and by the community as malcontents or eccentrics. The reception given to the commencement of such an action would probably be much better if it were brought in the name of and on behalf of the entire group affected by the segregation. Class representatives would appear not so much as a few plaintiffs with a grudge, but as part of a group with a justifiable claim." Comment, *supra* note 67, at 581.

[189] *See* Gottlieb, *supra* note 146, at 282 (discussing Judge Waring's social isolation); *see also* Kolb, *supra* note 137, at 136; Frankenberg, *supra* note 149, at 85.

[190] *Briggs*, 98 F. Supp. at 540.

[191] *Id.* at 540.

of a class action allowed him to step away from the specific circumstances and address the societal suffering caused by racial segregation, but this was only made possible by the magnitude of the class suit, and by its commitment to the community it represented.

VIII. CONCLUDING INSIGHTS

The civil rights class actions of the 1950s and '60s, which called for a progressive judicial expansion of the boundaries of Rule 23, and inspired the 1966 Advisory Committee, presented a unique model of representation. Since the time of Charles Houston and the lead-up to *Brown*, the NAACP showed a strong commitment towards class members, and worked towards creating community awareness and participation. This took many forms: arranging community meetings, preparing petitions, and gathering hundreds of signatures; maintaining contact with dozens of plaintiffs, orchestrating public demonstrations, and getting hundreds of people to attend trials. In other words, the civil rights class actions of the 1950s gave weakened communities a voice, let them share their knowledge and experiences, and allowed them to entertain the possibility of gradual change and compromise.

One person alone cannot challenge socially accepted norms and state power, especially when that individual belongs to a weakened community in which members have learned through painful experience to keep their heads down and accept the social reality. In much the same way, a court decision by itself cannot change social perceptions, beliefs, and prejudices.[192] The need for a procedural answer like that of the class actions of the 1950s arose from this realization as well as from the difficulties raised by individual suits. It integrated social activism and legal action, allowing one to complement the other. The greatest struggles of the civil rights movement—the Montgomery bus boycott and the march from Selma to Montgomery, both headed by civil rights activist Martin Luther King, Jr.—were based on a synergy between legal class actions and social participation and empowerment.[193]

The purpose of mass protests and demonstrations against the segregation in municipal buses or the violation of the voting rights of African-Americans was to serve as "a tool for reaching out and activating the victim and challenging the victimizer."[194] In reality, the socio-legal actions did not eliminate racial segregation, and in certain cases they even made things worse for African-American pupils. The states involved adopted

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[192] *See* Mack, *supra* note 150, at 348–49 (quoting Charles Houston, "a court demonstration unrelated to supporting popular action is usually futile and a mere show.").

[193] *See* Browder v. Gayle, 352 U.S. 903 (1956); Williams v. Wallace, 240 F. Supp. 100 (1965).

[194] Winston P. Nagan, *Struggle for Justice in the Civil Rights March from Selma to Montgomery: The Legacy of the Magna Carta and the Common Law Tradition*, 6 FAULKNER L. REV. 1, 14 (2014).

varied strategies for evading *Brown*,[195] some of which were so effective they managed to prevent its implementation for decades. Moreover, the use of class actions was not the only reason for *Brown's* admittedly limited success. Yet, these proceedings did live up to Martin Luther King Jr.'s words: they empowered the weak, broke old stereotypes of passivity, and gave birth to a collective struggle against human rights violations.[196] *Brown* may have had limited impact, but because of it the weak had gained active collaborators in their fight for racial equality.[197]

In the English courts of the seventeenth century, status stood at the heart of group litigation. Yet in a democracy grounded on equality and liberal rights, basing litigation on status goes against the very nature of the constitutional rights of the individual. In 1950s America, there existed a fundamental clash between constitutional rights and racial segregation. In response to this discord, class actions like *Briggs* and *Brown* sought reform by moving away from individual circumstances and technicalities to emphasize the dehumanizing collective wrong of racial segregation. Putting the collective purpose of racial equality above the individual context helped mobilize African-Americans and transform class actions into a platform for political empowerment that went on to make a real change in people's lives.

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[195] *See* Washington, *supra* note 170 (stating that one form of states' resistance was legal attacks against the NAACP).

[196] Mack, *supra* note 150, at 347–48 (clarifying that courts were used by civil rights lawyers as a "medium of public discussion [attempting] to activate the public into organized forms of protest and support behind these cases.").

[197] See Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152, 1158–59 (2004) (stating that in human rights class actions, "[t]he ties among class members are more likely to predate the litigation and to be lasting and deep . . . victims can be expected to form tight bonds to one another and to the persecuted group . . . .").

The Legal "Rights" of LGBT Educators in Public and Private Schools

Suzanne E. Eckes, J.D., Ph.D.*

"[Y]ou can't have equality if you can get married on Saturday and fired on Monday."[1]

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INTRODUCTION

While educators can no longer be fired simply because of their gender, race, religion, or disability, it is not entirely settled whether educators can be dismissed because of their sexual orientation. As President Obama noted in 2014, "[I]n too many states and in too many workplaces, simply being gay, lesbian, bisexual, or transgender can still be a fireable

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[1] Denise LaVoie, *Judge Rules Against Catholic School in Gay-Hiring Retraction,* ASSOCIATED PRESS (Dec. 17, 2015), http://www.apnewsarchive.com/2015/Judge_rules_against_Catholic_school_in_gay-hiring_retraction/id-e1e1905ca1774bdb827cabba30528a77 [https://perma.cc/4YGD-U8Q9] (quoting Ben Klein, non-profit attorney, regarding marriage equality).

offense."[2] Even after the Supreme Court held it unconstitutional for states to deny same-sex couples the right to marry in *Obergefell v. Hodges*,[3] workplace discrimination on the basis of sexual orientation still occurs.[4]

After *Obergefell*, lesbian, gay, bisexual, and transgender (LGBT)[5] educators who marry their same-sex partners may mistakenly believe that, because they have the constitutional right to marry, they are now free from discrimination based on their sexual orientation in public and private school employment. This article examines the legal issues involved when LGBT educators are dismissed from school employment. It first gives an overview and provides context regarding the current landscape of LGBT rights. It then explores some possible legal and policy avenues that might be available as recourse for those who experience this form of discrimination. It concludes by discussing the different legal barriers that LGBT educators will likely confront, especially in private schools, if they allege that school officials engaged in discriminatory practices when dismissing them.

OVERVIEW AND CONTEXT

Within educational-policy and leadership research, there is extensive focus on LGBT educators' identities[6] and school politics around sexual orientation.[7] Vast literature focuses on LGBT employment discrimination issues,[8] but relatively little specifically addresses LGBT edu-

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[2] David Hudson, *President Obama Signs a New Executive Order to Protect LGBT Workers*, WHITE HOUSE BLOG (Jul. 21, 2014, 3:00 PM ET), https://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers [https://perma.cc/48DZ-ZZ9T].

[3] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[4] *See infra* notes 58–82 and accompanying text.

[5] This article focuses on teachers who have been dismissed because of their *sexual orientation*. LGBT is a term used in the literature that often encompasses a broader population than what is included when the acronym is used in this article. Specifically, it is important to recognize that transgender persons vary in their sexual orientation; they may be straight, lesbian, gay or bisexual. Thus they might also experience discrimination because of their sexual orientation. Transgender persons, however, are often discriminated against based on their *gender identity*, which is beyond the scope of this paper. Sexual orientation and gender identity, though often discussed together, are not synonymous.

[6] *See, e.g.*, Brent L. Bilodeau & Kristen A. Renn, *Analysis of LGBT Identity Development: Models and Implications for Practice*, 111 NEW DIRECTIONS FOR STUDENT SERVS. 25 (2005) (discussing LGBT identity development in various settings); Catherine Lugg & Autumn Tooms, *A Shadow of Ourselves: Identity Erasure and Politics of Queer Leadership*, 30 SCH. LEADERSHIP & MGMT. 77 (2010) (discussing the norms involved in professional education and its impact on identity).

[7] *See, e.g.*, Catherine Lugg, *Sissies, Faggots, Lezzies, and Dykes: Gender, Sexual Orientation, and a New Politics of Education*, 39 EDUC. ADMIN. Q. 95 (2003) (discussing how gender identity and sexual orientation shape educational practice and administration); Kenneth D. Wald et al., *Sexual Orientation and Education Politics: Gay and Lesbian Representation in American Schools*, 42 J. OF HOMOSEXUALITY 145, 145 (2002) (discussing how gay representation on school boards, in school administration, and in teaching positions relates to policies regarding sexual orientation education).

[8] *See, e.g.*, WILLIAMS INSTITUTE, *Employment Discrimination Against LGBT Workers*,

cators' *legal rights* in public[9] or private[10] schools. A discussion of these legal rights is especially timely in light of the Supreme Court's *Obergefell* decision on the equality of rights to marry and because media reports show that LGBT educators are still being fired because of their sexual orientation—oftentimes after speaking publicly of their relationships.[11] In addition, the Department of Justice, under the Trump Administration, recently posited that the Civil Rights Act of 1964 provides employees no protection from discriminatory firing on the basis of sexual orientation.[12]

CONTEXT OF LGBT EMPLOYMENT RIGHTS

Within the last sixty years, the rights of LGBT employees have continued to evolve. From the 1950s through the 1970s, some states proposed or enacted legislation that permitted the firing of openly gay teachers. In Florida, a group of legislators known as the "Johns Committee" pushed through legislation in 1956 that permitted the investigation of alleged communism and homosexuality.[13] This committee investigat-

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https://williamsinstitute.law.ucla.edu/headlines/research-on-lgbt-workplace-protections/ [https://perma.cc/YHN4-FSKY] (noting that the institute's "significant body of research . . . consistently shows that LGBT people continue to face high rates of discrimination in the workplace"); Christy Mallory & Brad Sears, *Discrimination Against State and Local Government LGBT Employees: An Analysis of Administrative Complaints*, 4 LGBTQ POL'Y J. 37 (2014) (presenting information about 589 complaints of discrimation by public sector workers on the basis of sexual orientation and gender identity).

[9] *See, e.g.*, Stuart Biegel, *Unfinished Business: The Employment Non-Discrimination Act (ENDA) and the K-12 Education Community*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 357 (2011) (discussing experiences of LGBT educators in American public schools as support for anti-discrimination legislation); Joshua Dressler, *Survey of School Principals Regarding Alleged Homosexual Teachers in the Classroom: How Likely (Really) is Discharge?*, 10 U. DAYTON L. REV. 599 (1985) (discussing survey results regarding opinions and perspectives of secondary school principals on gay educators); *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1584 (1989) (discussing sexual orientation in the school context and different treatment of students and educators); Suzanne Eckes & Martha McCarthy, *GLBT Teachers: The Evolving Legal Protections*, 45 AM. EDUC. RESEARCH J. 530 (2008) (discussing litigation involving LGBT educators and anti-discrimination statutes); Suzanne Eckes, *The U.S. Supreme Court Rules in Favor of Marriage Equality: Can Gay Teachers Who Marry Still be Fired?*, TEACHERS COLLEGE RECORD (2016) (discussing legal protections for LGBT teachers in public and private schools).

[10] *See, e.g.*, Karen Lim, *Freedom to Exclude After* Boy Scouts of America v. Dale*: Do Private Schools Have a Right to Discriminate Against Homosexual Teachers?*, 71 FORDHAM L. REV. 2599 (2003); Charles J. Russo, *Religious Freedom in a Brave New World: How Leaders in Faith-Based Schools Can Follow Their Beliefs in Hiring*, 45 U. TOL. L. REV. 457 (2014).

[11] *See, e.g.*, Dominique Fong, *Beaverton School District Will Pay $75,000 to Settle Discrimination Claim by Gay Student Teacher*, OREGONIAN (Feb. 12, 2011), http://www.oregonlive.com/beaverton/index.ssf/2011/02/beaverton_school_district_will_pay_75000_to_settle_discrimination_claim_by_gay_student_teacher.html [https://perma.cc/H78Q-G9RG]; Scott Eric Kaufman, *Students Rally Around Gay Teacher Who Says Catholic School Gave Him Two Choices: Leave Your Fianc. . . or Lose Your Job*, SALON (May 1, 2015), http://www.salon.com/2015/05/01/students_rally_around_gay_teacher_who_says_catholic_school_gave_him_two_choices_leave_your_fiance_or_lose_your_job/ [https://perma.cc/AAN7-WDVW].

[12] Chris Riotta, *Trump Administration Says Employers Can Fire People for Being Gay*, NEWSWEEK (Sept. 28, 2017), http://www.newsweek.com/trump-doj-fired-being-gay-lgbt-issues-jeff-sessions-673398 [https://perma.cc/5YVC-CFSH].

[13] Gerard Sullivan, *Political Opportunism and the Harassment of Homosexuals in Florida 1952–*

ed a large number of "subversive" activities led by civil rights groups, scholars, and alleged communist organizations; the committee tried to eliminate gay and lesbian teachers from public education and state government.[14] Likewise in 1978, California voters proposed a state ballot initiative called the "Briggs Initiative," which would have forbidden openly LGBT teachers from working in public schools.[15] The ballot initiative never passed, but 41.6% of California voters supported the measure.[16] Some federal legislators or candidates have expressed ongoing interest in these kinds of measures; for example, then-Senator Jim DeMint said in 2010 that gays should not be teachers in public schools,[17] and 2017 Senate candidate Roy Moore said in 2005 that "[h]omosexual conduct should be illegal."[18] Commentators have also highlighted more recent claims of hostility toward LGBT educators in schools.[19]

Prior studies and early court decisions suggested that when public school teachers were discriminatorily fired because of their sexual orientation, it may have been legal under state teacher-dismissal statutes that forbade teacher immorality.[20] In some of these cases, there was no evidence of any disruption in the school related to a teacher's sexual orientation; mere knowledge that a teacher was gay could result in that teacher's termination.[21] Even as recently as twenty years ago, public school teachers were dismissed or their contracts were not renewed because of their sexual orientation.[22] In 1996, an award-winning California teacher sued under state law alleging that she was harassed and denied promo-

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1965, 37 J. OF HOMOSEXUALITY 57, 63–67 (1999).

[14] *Id.*; *see also* Clifford Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 632 (2013) (noting that the John's Committee "launched a campaign to rid the state's public schools of homosexual teachers in 1958").

[15] California Secretary of State, *California Voter Information Guide for 1978, General Election* 28, (1978).

[16] *California Proposition 6, the Briggs Initiative (1978)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_6,_the_Briggs_Initiative_(1978) [https://perma.cc/RGX6-AAEF].

[17] Brian Montopoli, *Jim DeMint Criticized Over Comments on Gay and Sexually Active Teachers*, CBS NEWS (Oct. 5, 2010), http://www.cbsnews.com/news/jim-demint-criticized-over-comments-on-gay-and-sexually-active-teachers [https://perma.cc/7AGG-HWD7].

[18] Nathan McDermott & Andrew Kaczynski, *Senate Candidate Roy Moore in 2005: Homosexual Conduct Should be Illegal*, CNN (Sept. 22, 2017), http://www.cnn.com/2017/09/21/politics/kfile-roy-moore-homosexuality-illegal/index.html [https://perma.cc/F5MX-4VJW].

[19] *See, e.g.*, Vineeta Sawkar, *Gay Teacher Speaks Out About Being Fired from Totino-Grace*, STAR TRIBUNE (Sept. 23, 2015), http://www.startribune.com/gay-teacher-speaks-out-about-being-fired-from-totino-grace/328834761 [https://perma.cc/7J7R-XPUJ].

[20] *See, e.g.*, Gaylord v. Tacoma, 559 P.2d 1340, 1345–46 (Wash. 1977) ("[I]t is a disorder for those who wish to change their homosexuality which is acquired after birth. In the instant case plaintiff desired no change and has sought no psychiatric help because he feels comfortable with his homosexuality. He has made a voluntary choice for which he must be held morally responsible."); Eckes & McCarthy, *supra* note 9, at 532; Eckes, *supra* note 9.

[21] *See, e.g.*, Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 454 (6th Cir. 1984) ("The jury had heard ample evidence to find that, but for the fact that [the plaintiff] revealed her sexual preference, she would not have been either transferred, or suspended [by school officials], or 'nonrenewed' by the Board.").

[22] *See, e.g.*, Glover v. Williamsburg Local Sch. Dist., 20 F. Supp. 2d 1160, 1171 (S.D. Ohio 1998) (holding that the school board did not renew teacher's contract due to his sexual orientation).

tions because of her sexual orientation.[23] The case eventually settled for more than $140,000.[24] Similarly, a Utah teacher and volleyball coach was removed from her coaching position when school officials learned that she was gay.[25] The federal district court, in its equal protection analysis, found that there was no rational job-related basis for her removal.[26] Likewise, an Ohio teacher whose contract was not renewed prevailed in his equal protection claim alleging sexual orientation discrimination because the court found that there was no rational reason under the Equal Protection Clause not to renew his contract and that the district was hostile in making its decision.[27] These court decisions and others sent a message to school officials nationwide that courts were beginning to favor LGBT plaintiffs on equal protection grounds.[28]

Indeed, there has been a major shift in attitudes regarding LGBT employees. As of 2015, 75% of the U.S. Fortune 500 companies had policies specifically prohibiting discrimination on the basis of sexual orientation.[29] Furthermore, polls cited by Congress in 2013 show that between sixty-five and seventy percent of Christians favor extending employment protections to LGBT persons.[30]

As attitudes have shifted, the Supreme Court's approach has continued to evolve as well. In the past few years, recognition of LGBT rights has greatly expanded. In the 2013 *United States v. Windsor* decision, the Court struck down the federal Defense of Marriage Act, which had denied employment benefits to married same-sex couples.[31] Justice Kennedy wrote for the majority that the Act "violates basic due process and equal protection principles applicable to the Federal Government."[32] He also noted that the Constitution's "guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[33]

In 2015, the U.S. Supreme Court held in *Obergefell*, consistent with *Windsor*, that denial of the right to marry to same-sex couples was unconstitutional.[34] Justice Kennedy wrote for the majority that "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union,

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[23] Murray v. Oceanside Unified Sch. Dist., 79 Cal. App. 4th 1338, 1345–46 (Cal. App. 2000).

[24] Lambda Legal, *California Teacher Settles Sexual Orientation Discrimination Suit with School District* (May 23, 2002), https://www.lambdalegal.org/news/ca_20020523_ca-teacher-settles-discrimination-suit [https://perma.cc/QHR4-4XV2].

[25] Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1281 (D. Utah 1998).

[26] *Id.* at 1289.

[27] *Glover*, 20 F. Supp. 2d at 1174.

[28] Eckes & McCarthy, *supra* note 9, at 538–40.

[29] Hayley Miller, *Best of 2015: Corporate Equality Index Expands to Rate Global LGBT Workplace Inclusion*, HUMAN RIGHTS CAMPAIGN (2015), http://www.hrc.org/blog/best-of-2015-corporate-equality-index-expands-to-rate-global-lgbt-workplace [https://perma.cc/9QAY-NWRK].

[30] 159 CONG. REC. S7,783-02 (2013) (quoting Senator Tom Harkin).

[31] U.S. v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[32] *Id.* at 2693.

[33] *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)).

[34] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

two people become something greater than once they were."[35] Commenting on *Obergefell*, legal scholar Kenji Yoshino wrote that the holding is "a game changer for substantive due process jurisprudence" and will likely have implications beyond marriage equality.[36] In particular, some commentators have noted how the *Obergefell* opinion raises questions related to educational employment.[37]

The *Obergefell* opinion relied in part on the 1967 *Loving v. Virginia* decision, where the Supreme Court addressed the issue of interracial marriage.[38] In *Loving*, an African-American woman and a white man were indicted for violating Virginia's ban on interracial marriage after they married in the District of Columbia and then returned to Virginia.[39] The Supreme Court held that Virginia's anti-miscegenation laws violated the Fourteenth Amendment.[40] The Court continued to uphold the fundamental right to marry in subsequent decisions.[41] The recent *Windsor* and *Obergefell* decisions both noted the similar constitutional questions addressed in *Loving*,[42] and also cited *Lawrence v. Texas*, in which the Supreme Court in 2003 struck down a state law prohibiting sodomy.[43] In *Lawrence*, two men sued after they were arrested for acts they committed in their own home in violation of state law.[44] The Court ruled that the law resulted in state denial of the right to privacy under the Due Process Clause of the Fourteenth Amendment.[45] Significantly, the Court also

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[35] *Id.* at 2608.

[36] Kenji Yoshino, *Comment, A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 145, 148 (2015).

[37] *See, e.g.*, National School Boards Association, *Same-Sex Marriage: What the Obergefell Decision Means for School Districts* (July 2015), https://www.nsba.org/sites/default/files/reports/NSBA_Same_Sex_Marriage%20Guide-Obergefell-Decision.pdf [https://perma.cc/ND52-H4SP]; Maria Lewis et al., *The Impact of the Marriage Equality Decision on Schools*, PRINCIPAL LEADERSHIP (2016); Mark Walsh, *In Case Watched by Educators, Supreme Court Backs Right to Same-Sex Marriage*, EDUC. WEEK (2015), http://blogs.edweek.org/edweek/school_law/2015/06/supreme_court_backs_right_to_s.html [https://perma.cc/R5ND-UMDZ].

[38] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[39] *Id.* at 1. For context, note that when the Supreme Court struck down Virginia's Act to Preserve Racial Integrity in *Loving* in 1967, only 20% of the U.S. population approved of interracial marriage. Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP NEWS (July 25, 2013), http://www.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx. Many rejected interracial marriage based on their sincerely held religious beliefs. *See* Mike Tolson, *In Resistance to Same-Sex Marriage, Echoes of 1967*, HOUST. CHRON. (July 5, 2015), http://www.houstonchronicle.com/local/gray-matters/article/In-resistance-to-same-sex-marriage-echoes-of-1967-6365105.php [https://perma.cc/9TK8-SPNQ] (recounting President Truman's statement that he opposed interracial marriage and supported only intraracial marriage because "the Lord created it that way").

[40] *Loving*, 388 U.S. at 12.

[41] *See* Turner v. Safley, 482 U.S. 78, 83 (1987) (holding that there is "a constitutionally protected marital relationship in the prison context"); Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (reasoning that it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society").

[42] Obergefell v. Hodges, 135 U.S. 2584, 2620 (2015); U.S. v. Windsor, 133 S. Ct. 2675, 2709 (2013).

[43] Lawrence v. Texas, 539 U.S. 558, 579 (2003).

[44] *Id.* at 563–64.

[45] *Id.* at 478; *see* U.S. CONST. amend. XIV, § 1.

overturned its 1986 decision in *Bowers v. Hardwick*, which had upheld the constitutionality of a Georgia law making it a crime to engage in certain consensual acts of sexual intimacy.[46] The focus on a right to privacy in *Lawrence* might result in more protections to LGBT public school teachers' private lives.[47]

Obergefell is consistent with the earlier decisions that found that the Fourteenth Amendment was designed to protect minority groups who were unable to protect themselves through other means. Thus, the four dissenting judges' reasoning in *Obergefell* may not have been supported by these precedents. For example, in his dissenting opinion, Chief Justice John Roberts wrote that the U.S. Constitution did not address same-sex marriage and therefore he could not find a constitutional right to hold in favor of it.[48] Applying this reasoning, then, one might wonder why the Chief Justice has felt comfortable weighing in on the merits of other cases that have involved unenumerated constitutional rights.[49] Furthermore, one might also wonder whether, had the Chief Justice been on the Court when *Loving* was decided, he would have also found no unenumerated constitutional right to freely choose whom to marry from any race. Appropriately, the majority in *Obergefell* observed that

> [t]he nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[50]

The dissenting justices in *Obergefell* were also concerned with changing the definition of marriage, which was not at issue in earlier marriage cases.[51] If the current Court had decided *Loving* today, would these dissenting justices have upheld the Virginia law if marriage had been defined as an institution between people of the same race?[52] Constitutional scholar Michael Dorf of Cornell Law School contends that the dissenting justices in *Obergefell* would likely not have been caught up in the definition of marriage if they decided the fundamental rights portion

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[46] *See Lawrence*, 539 U.S. at 575; Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding a Georgia law criminalizing sodomy).

[47] Eckes & McCarthy, *supra* note 9, at 536.

[48] Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (Roberts, C.J., dissenting).

[49] *See* Michael Dorf, *Symposium: In Defense of Justice Kennedy's Soaring Language*, SCOTUSBLOG (June 27, 2015), http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language [https://perma.cc/5WH8-V3XT] ("Nearly all of what the Chief Justice says [in *Obergefell*] would work equally well as an argument against all unenumerated rights, indeed, against all judicial decisions that draw inferences from vague language contained in enumerated rights as well.").

[50] *Obergefell*, 135 S. Ct. at 2598.

[51] *Id.* at 2613–40.

[52] *See* Dorf, *supra* note 49 ("Would the eight Justices who signed onto the fundamental rights portion of *Loving v. Virginia* have reached a different conclusion if the Virginia statute *defined* marriage as an institution between a man and a woman of the same race?" (emphasis in original)).

of *Loving*, and he questions why it was so heavily focused upon in *Obergefell*.[53]

Finally, the dissenters in *Obergefell* asserted that states should decide the issue of whether the right to marry extends to same-sex couples. Paul Smith of the Georgetown University Law Center posits that democratic considerations were apparently not a problem for the Court when it recently invalidated Section 5 of the Voting Rights Act in *Shelby County v. Holder* in 2013.[54] If the dissenters in *Obergefell* applied a states' rights argument to marriage, one must ask whether they therefore believed such issues should be allowed to play out democratically and whether this same approach then should have also applied to the *Brown v. Board of Education* decision[55] and other civil rights cases. Moreover, some of the dissenting justices appeared concerned about what the *Obergefell* decision would mean for religious freedom.[56] This issue and others will be examined in greater depth later in this article.

LGBT EDUCATORS DISMISSED BASED ON SEXUAL ORIENTATION

There is no reported litigation in the last decade related to public school teachers being fired for their sexual orientation.[57] News reports in 2013, however, suggested that a principal planned to file a lawsuit after administrators learned he was gay and his contract was not renewed.[58] Of course, lack of litigation does not mean that LGBT educators employed by public schools are not being discriminatorily fired; LGBT employees sometimes do not file complaints in order to avoid "outing" themselves further.[59] Public school educators also may not have the resources to engage in costly litigation. But unlike LGBT educators employed by public schools, LGBT educators in religious private schools appear to have experienced firings with much more prevalence; according to media reports, several educators in private religious schools were recently dismissed because they decided to marry their same-sex partners.[60]

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[53] *Id.*

[54] Paul Smith, *Symposium: A Fair and Proper Application of the Fourteenth Amendment*, SCOTUSBLOG (June 27, 2015, 10:17 AM), http://www.scotusblog.com/2015/06/symposium-a-fair-and-proper-application-of-the-fourteenth-amendment/ [https://perma.cc/PX42-R4NP] (discussing Shelby County v. Holder, 133 S. Ct. 2612 (2013)).

[55] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[56] Dorf, *supra* note 49.

[57] This includes the LexisNexis and WestLaw legal databases.

[58] Sunnivie Brydum, *Oregon Principal Claims He Was Let Go for Being Gay*, ADVOCATE (Mar. 8, 2013), http://www.advocate.com/society/education/2013/03/08/oregon-principal-claims-he-was-fired-being-gay [https://perma.cc/4QPU-A67C].

[59] Mallory & Sears, *supra* note 8, at 38.

[60] Maryclaire Dale, *Archbishop: School That Fired Gay Teacher Showed 'Character'*, SEATTLE TIMES (July 13, 2015), https://www.seattletimes.com/nation-world/archbishop-school-that-fired-gay-teacher-showed-character; Sasha Goldstein, *Ohio Catholic School Teacher Fired after 'Appalled' Parent Learned that She was Gay*, N.Y. DAILY NEWS (Apr. 18, 2013)

To illustrate, a teacher was fired from a private Catholic school in Ohio after school officials read her mother's obituary, which mentioned the teacher's same-sex partner.[61] In another case, a gay teacher in Pennsylvania was dismissed from a Catholic school after school officials learned that he planned to marry his partner.[62] A Catholic school official wrote that "[u]nfortunately, this decision contradicts the terms of his teaching contract at our school, which requires all faculty and staff to follow the teachings of the Church as a condition of their employment."[63] Similarly, gay educators in Arkansas, North Carolina, California, Minnesota, Nebraska, and Georgia have been reportedly fired or had their contracts not renewed at Catholic schools when school officials learned of the teachers' marriage plans or the fact that they were involved in a same-sex relationship.[64]

In fact, since 2010 there have reportedly been over fifteen cases—many resulting in employment lawsuits—of private school educators, administrators, or staff being dismissed or reluctantly resigning for supporting same-sex marriage or going public with their relationships with their same-sex partners.[65] Related legal challenges have continued.[66] Some of these cases proceeded to trial, and others settled for undisclosed amounts.[67]

In Washington, a vice principal was fired from a Catholic school when school officials learned that he married his same-sex partner.[68] The

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http://www.nydailynews.com/life-style/ohio-catholic-school-teacher-fired-outed-gay-article-1.1321258; Michael Gordon, *Posted Wedding Plans Cost Charlotte Teacher His Job*, CHARLOTTE OBSERVER (Jan. 13, 2015), http://www.charlotteobserver.com/news/local/crime/article9258446.html [https://perma.cc/A7CF-A58W]; Kaufman, *supra* note 11; Michael McGough, *Gay Teacher Fired: Does Discrimination Law Trump Theological Conviction?*, L.A. TIMES (Aug. 5, 2015), http://articles.latimes.com/2013/aug/05/news/la-ol-gay-teacher-fired-20130805 [https://perma.cc/3XDQ-WCFA]; Gillian Mohney, *Gay Catholic School Teacher Fired for Wedding Plans*, ABC NEWS (Dec. 8, 2013), http://abcnews.go.com/US/gay-catholic-school-teacher-fired-married/story?id=21141075 [https://perma.cc/89ZW-X54W]; Adam Raguesea, *Gay Teacher Files Sex Discrimination Claim Against Georgia School*, NAT'L PUBLIC RADIO (July 9, 2014), http://www.npr.org/2014/07/09/329235789/gay-teacher-files-sex-discrimination-claim-against-georgia-school.

[61] Goldstein, *supra* note 60.

[62] Mohney, *supra* note 60.

[63] *Id.*

[64] Neal Broverman & Michelle Garcia, *Fired for Being LGBT*, THE ADVOCATE (Nov. 17, 2015), http://www.advocate.com/politics/2013/05/08/fired-being-lgbt [https://perma.cc/K6V8-YMZ3] (Arkansas, California); Gordon, *supra* note 60 (North Carolina); Kaufman, *supra* note 11 (Nebraska); Raguesea, *supra* note 60 (Georgia); Sawkar, *supra* note 19 (Minnesota).

[65] Rachel Zoll, *Lesbian Files Suit for Firing by Kansas City Diocese* (July 17, 2014), BOS. GLOBE, https://www.bostonglobe.com/news/nation/2014/07/17/lesbian-sues-kansas-city-diocese-over-firing/GjJndHJbRTMrLLrbKnlylN/story.html (citing case findings by New Ways Ministry, a Catholic gay rights group).

[66] *Fired Gay Glendora Catholic Schoolteacher Sues St. Lucy's Priory*, SAN GABRIEL VALLEY TRIBUNE (Mar. 13, 2014), http://www.sgvtribune.com/social-affairs/20140313/fired-gay-glendora-catholic-schoolteacher-sues-st-lucys-priory [https://perma.cc/QC2J-PJEU] (discussing an ongoing case); *see also* Laura Crimaldi, *Milton Catholic School Loses Gay Bias Case*, BOS. GLOBE (Dec. 17, 2015), https://www.bostonglobe.com/metro/2015/12/17/fontbonne/ANcFqZ2bns2r6Et7GSEI7H/story.html (discussing a case that concluded in 2016).

[67] *See supra* note 24 and accompanying text; *infra* notes 68–82 and accompanying text.

[68] Dan Morris-Young, *Court Greenlights Fired Gay Teacher's Lawsuit Against Catholic School*,

vice principal filed a lawsuit alleging that school officials violated state anti-discrimination laws.[69] School officials claimed that this complaint would "impermissably [sic] entangle the Court in Catholic doctrine" and violate the school's First Amendment rights.[70] The judge denied the school district's initial motion to dismiss,[71] and the case was dismissed by mutual stipulation in November 2014 after the plaintiff secured alternative employment.[72] The judge initially denied the motion to dismiss because it did not appear that the case would interfere with the school's First Amendment rights, but it did appear that the vice principal's allegations could be proven.[73]

In Massachusetts, a gay man who was offered the position of director of food services at a Catholic school had his offer rescinded when school officials learned from his emergency contact information that he was married to another man.[74] In the lawsuit he then filed, he alleged that school officials violated state anti-discrimination laws.[75] The private school contended that it fell within a statutory exemption for religious entities, and as a result the state could not interfere with its employment matters.[76] The school also argued that the teacher's claims infringed upon its rights to expressive association and free exercise under both the state and federal constitutions.[77] The state superior court judge rejected the school's argument that hiring the plaintiff infringed on its religious liberties and denied its motion for summary judgment.[78]

The Massachusetts court ultimately found that the plaintiff experienced remediable discrimination on the bases of both sexual orientation and gender (*i.e.*, if a female was hired for this position, she could have been married to a man without any consequences).[79] With regard to the expressive association argument, the judge noted that the school could

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NAT'L CATHOLIC REP. (Mar. 7, 2014), http://ncronline.org/news/faith-parish/court-green-lights-fired-gay-teachers-law-suit-against-catholic-school [https://perma.cc/Z65M-T484].

[69] *Id.*

[70] Lornet Turnbull, *Court Battle Next in Ouster of Eastside Catholic Educator*, SEATTLE TIMES (Mar. 6, 2014), http://www.seattletimes.com/seattle-news/court-battle-next-in-ouster-of-eastside-catholic-educator.

[71] Order Denying Defendant's Motion to Dismiss Pursuant to CR 12(b)(6), Zmuda v. Corp. of Catholic Archbishop of Seattle, No. 14-2-07007-1 SEA, 2014 WL 10381241, at *1 (Wash. Sup. Ct. May 23, 2014).

[72] Stipulation and Order of Dismissal, Zmuda v. Corp. of Catholic Archbishop of Seattle, No. 14-2-07007-1 SEA, 2014 WL 10381240, at *1 (Wash. Sup. Ct. Nov. 17, 2014); Mark Pulkkinen, *Eastside Catholic Vice Principal Ousted After Gay Marriage Drops Lawsuit*, SEATTLE POST-INTELLIGENCER (Nov. 28, 2014), http://www.seattlepi.com/local/article/Vice-principal-ousted-for-Eastside-Catholic-after-5919802.php (noting the plaintiff secured alternative employment).

[73] Morris-Young, *supra* note 68.

[74] Barrett v. Fontbonne Acad., No. CV2014-751, 2015 WL 9682042, at *3 (Mass. Super. Dec. 16, 2015).

[75] *Id.* at *1.

[76] *Id.* at *8.

[77] *Id.* at *29.

[78] *See id.* at *31 ("[T]he relatively narrow scope of the ministerial exception may shed light on the scope of expressive association rights regarding employees whose job does not include instruction.").

[79] *Id.* at *7–8.

retain control over its mission and message, but was not allowed to discriminate against the employee.[80] The judge stressed that the employee was not offered a position that required him to be Catholic, and he never publicly advocated for same-sex marriage.[81] The court thus reasoned that the state had a compelling and overriding interest in prohibiting discrimination in this instance.[82]

LEGAL & POLICY AVENUES

As highlighted above, LGBT educators still provoke considerable controversy in some public schools and in many private, religious schools. While there are more legal avenues for relief for educators in the public school setting, there may be limited protections in private schools. This section briefly reviews some of the legal avenues that LGBT educators may have available to them.

LGBT educators may have recourse under federal laws. Title VII of the Civil Rights Act of 1964 protects against discrimination based on race, color, national origin, sex, and religion in both public and private employment.[83] There is no federal law, however, that *explicitly* prohibits discrimination based on sexual orientation in the workplace. A proposed federal law, the Employment Non-Discrimination Act (ENDA), was designed to prohibit discrimination in employment on the basis of sexual orientation and gender identity[84] but has never passed in Congress.[85] Several prominent LGBT advocacy organizations withdrew their support for ENDA in 2014 because of their concerns that the bill's religious exemption was too broad.[86] The recent *Obergefell* decision may create a renewed push for ENDA; several iterations have been introduced in the past twenty years.[87]

In a few recent instances, Title VII has been used to address discrimination based on sexual orientation. A federal district court found in 2014 that an employer discriminated against a gay employee based on the employee's non-conformity with sex stereotypes, which was sufficient to establish a viable sex discrimination claim under Title VII.[88] In addition, the Equal Employment Opportunity Commission (EEOC) in-

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[80] *Id.* at *29.

[81] *Id.* at *24.

[82] *Id.* at *29.

[83] Civil Rights Act of 1964 § 7, 42 U.S.C. §§ 2000e–2000e-2 (2012).

[84] Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 2 (2013).

[85] *See* Chris Johnson, *Support for ENDA Crumbles*, WASH. BLADE (July 9, 2014), http://www.washingtonblade.com/2014/07/09/endas-fate-dismal-religious-exemption-splits-lgbt-advocates/ [https://perma.cc/3HG8-79M2] (noting political opposition).

[86] *Id.*

[87] Alex Reed, *Redressing LGBT Employment Discrimination Via Executive Order*, 29 N.D. J. L. ETHICS & PUBL. POL'Y 133, 134–35 (2015).

[88] Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014).

terpreted Title VII to cover discrimination based on sexual orientation in the workplace.[89] It is important to note, however, that the EEOC's interpretation is not binding on courts. Finally, the Seventh Circuit Court of Appeals, in a 2017 en banc decision, affirmed a lower court decision finding that discrimination on the basis of sexual orientation is covered under Title VII's prohibition of sex discrimination.[90] This decision contradicts an Eleventh Circuit opinion decided earlier that year that did not recognize sexual orientation discrimination claims under Title VII.[91] The Seventh Circuit opinion marks the first time a federal circuit court has found that Title VII covers discrimination based on sexual orientation.

LGBT educators may also have recourse under some state laws.[92] In some states, however, LGBT teachers can be legally fired by an employer for being gay[93] despite being legally able to marry. Eighteen states currently have no protections for public school employees from discrimination based on their sexual orientation, and twenty-nine states have no such protections for private school employees.[94] Public and private school teachers in those states thus do not have any specific state protections. Some cities, however, have enacted some additional local ordinances to offer LGBT individuals protection from discrimination, and individual school districts might offer specific protections as well. Nonetheless, it is still the case that if an LGBT teacher is teaching in a state, municipality, or school district with no protections, the teacher could be discriminatorily fired from a public school based on sexual orientation without legal recourse under state law.

Additionally, LGBT public school teachers could argue, as some have successfully,[95] that discrimination on the basis of sexual orientation

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[89] Baldwin v. Foxx, EEOC Decision No. 0120133080 (July 15, 2015), http://www.eeoc.gov/decisions/0120133080.pdf [https://perma.cc/H84M-QHKK] ("In the case before us, we conclude that Complainant's claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent [Front Line Manager] position. Complainant, therefore, has stated a claim of sex discrimination."). Macy v. Holder, EEOC Decision No. 0120120821 (Apr. 20, 2012), https://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt [https://perma.cc/W7TS-8DAX] (finding Title VII prohibits discrimination related to gender identity).

[90] Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339, 341 (7th Cir. 2017).

[91] *See* Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017) ("[The plaintiff] next argues that she has stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation. She has not. Our binding precedent forecloses such an action.").

[92] *Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN (2017), http://www.hrc.org/state_maps/employment (noting that twenty-one states have some protections for private school employees and thirty-two have protections for public school employees).

[93] Amanda Machado, *The Plight of Being a Gay Teacher*, THE ATLANTIC (Dec. 16, 2014), http://www.theatlantic.com/education/archive/2014/12/the-plight-of-being-a-lgbt-teacher/383619/ [https://perma.cc/FH6E-NU7C] (citing Patrick J. Egan, *More Gay People Can Now Get Legally Married. They Can Still Be Legally Fired.*, WASH. POST (Oct. 6, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/10/06/more-gay-people-can-now-get-legally-married-they-can-still-be-legally-fired/?utm_term=.adb0e2d3973f [https://perma.cc/CPQ2-9BXJ]).

[94] *Statewide Employment Laws and Policies*, *supra* note 92.

[95] *See, e.g.*, Glover v. Williamsburg Local Sch. Dist., 20 F. Supp. 2d at 1160, 1169 (S.D. Ohio

is prohibited under the Equal Protection Clause of the Fourteenth Amendment of the Constitution because there is no rational reason to treat LGBT teachers differently than heterosexual teachers. Although the Fourteenth Amendment was ratified in the wake of the Civil War, it does not only apply to racial discrimination. To be certain, the Supreme Court has applied this clause to other types of governmental classifications that exclude individuals from equal participation in society.[96] The Equal Protection Clause requires that similarly situated public educators be treated the same regardless of sexual orientation.[97]

When analyzing an Equal Protection Clause claim, the Supreme Court has created three levels of judicial scrutiny that apply depending upon the classification that forms the basis of the discrimination: strict scrutiny, intermediate scrutiny, and rational basis review. Discrimination based on racial classification is subject to strict scrutiny, "which requires both a compelling governmental objective and a demonstration that the classification is necessary to serve that interest."[98] If a school board wanted to adopt a policy that prohibited African-American teachers from teaching in schools that predominantly enrolled white students, it would thus need a compelling governmental interest to do so, and further would need to demonstrate that this racial classification was necessary to serve that compelling interest. Courts have not found any interest sufficiently compelling to justify such a policy.

The next level of judicial scrutiny is intermediate scrutiny, which is the level used when the government makes sex-based classifications.[99] "[T]he government must demonstrate that the classification based on sex serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[100] Thus, if a school board wanted to adopt a policy that prohibited women from serving as superintendents, it would need to ensure there was an important objective in adopting such a policy and to further demonstrate that this sex-based classification was substantially related to serving that important interest. Any school board would have difficulty enforcing such a policy because no court has found a sufficiently important state interest involved in prohibiting women from serving in school leadership positions. It is not entirely clear within the judicial system whether discrimination based on sexual orientation would receive

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1998) ("Homosexuals, while not a 'suspect class' for equal protection analysis, are entitled to at least the same protection as any other identifiable group which is subject to disparate treatment by the state.").

[96] Brief of NAACP Legal Defense & Education Fund, Inc. and NAACP as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1048441, at *10–11 (citing cases).

[97] *Glover*, 20 F. Supp. 2d at 1174.

[98] Suzanne Eckes & Stephanie McCall, *The Potential Impact of Social Science Research on Legal Issues Surrounding Single-Sex Classrooms and Schools*, 50 EDUC. ADMIN. Q. 195, 199 (2014) (citing Grutter v. Bollinger, 539 U.S. 306 (2003)).

[99] *Id.* (citing Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)).

[100] *Id.*

intermediate scrutiny review, although many argue that discrimination based on sexual orientation is also discrimination based on sex.[101]

The lowest level of judicial scrutiny is known as rational basis, which "requires a legitimate government objective with a minimally rational relation between the means and the ends."[102] Classifications based on sexual orientation, for example, have oftentimes fallen under this level of scrutiny.[103] Rational basis review is the lowest level of judicial scrutiny used when applying the Equal Protection Clause, and as a result it is much easier to justify a government policy that would treat LGBT educators differently from other educators under this level of review. Nevertheless, it is difficult to imagine such a policy with a legitimate government objective.

Former Supreme Court Justice Antonin Scalia, however, provided a stark example of the kind of reasoning that might pass judicial muster under the rational basis test—despite that reasoning being grounded in an outdated understanding of sexual orientation. When former Chief Justice William Rehnquist asked an attorney during oral arguments in *Lawrence v. Texas* if it would be unconstitutional to deny gay people an equal right to teach kindergarten, Justice Scalia interjected that one reason the denial might be justified would be that "children . . . might [otherwise] be induced to . . . follow the path of homosexuality."[104] In Justice Scalia's dissenting opinion in *Lawrence*, he further noted that "[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools or as boarders in their home."[105] Justice Scalia further suggested that citizens may prefer to "protect[] themselves and their families from a lifestyle that they believe to be immoral and destructive."[106]

As noted above, however, lower courts have not often found a rational reason to treat LGBT teachers differently.[107] Although some misinformed individuals and groups may mistakenly believe that gay teachers are a threat to children in the classroom, the American Psychological Association and others have concluded that there is no scientific support for a correlation between homosexuality and sexual abuse of children.[108]

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[101] *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) ("[W]e conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination.").

[102] Eckes & McCall, *supra* note 98, at 199.

[103] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 777–78 (2011).

[104] Transcript of Oral Argument at 21, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2002/02-102.pdf [https://perma.cc/U7QM-YMDM].

[105] Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

[106] *Id.*

[107] *See, e.g.*, Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1289 (D. Utah 1998) ("If the community's perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity, it is necessarily irrational and under . . . Supreme Court precedent, it provides no legitimate support for the School District's decisions.").

[108] *See generally* Ruth U. Paige, *Proceedings of the American Psychological Association for the*

Similarly outlandish arguments regarding harms to children were made during the historic debate on interracial marriage; in upholding an anti-miscegenation law, for example, the Louisiana Supreme Court wrote that interracial marriage creates "half-breed children" who "have difficulty in being accepted by society."[109]

In 2014, President Obama signed an executive order to protect LGBT employees of federal contractors from being discriminating against based on their sexual orientation or gender identity.[110] At the order's signing, President Obama said, "It doesn't make much sense, but today in America, millions of our fellow citizens wake up and go to work with the awareness that they could lose their job, not because of anything they do or fail to do, but because of who they are—lesbian, gay, bisexual, transgender. And that's wrong."[111] This executive order was a positive step but limited in application; it did not apply to the vast majority of teachers in the U.S. because they are not employees of federal contractors.[112] Further, an executive order by its nature merely states administrative policy and does not create any new enforcement rights. Such enforcement rights can only be granted by laws passed by Congress. As discussed above, ENDA could grant enforcement rights, but it has not yet been passed into law by Congress. Finally, executive orders are easier to change than congressional laws; subsequent presidential administrations have the authority to rescind them, including those implemented by previous administrations.

LEGAL BARRIERS

The discussion above demonstrates, among other things, that there are more legal avenues available to address discrimination on the basis of sexual orientation for those who teach in public schools than for those who teach in private schools. There are also additional barriers that private school teachers face. One barrier is the lack of clarity about when anti-discrimination laws apply to private, non-profit organizations and religious schools. Another barrier stems from disagreement about whether private, non-profit organizations should be able to control their mem-

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Legislative Year 2004: Minutes of the Annual Meeting of the Council of Representatives, February 20–22, 2004, Washington, DC, and July 28 and 30, 2004 Honolulu, Hawaii, and Minutes of the February, April, June, August, October, and December 2004 Meetings of the Board of Directors, 60 AM. PSYCHOL. 463 (2005) (compiling multiple findings supporting the author's assertion that there is no correlation between homosexuality and child abuse).

[109] State v. Brown, 108 So.2d 233, 234 (La. 1959).

[110] Exec. Order No. 13,672, 3 C.F.R. § 282 (2014), *reprinted in* 42 U.S.C. § 2000e app. at 998 (Supp. II 2014) (amending, to add protections for gender identity, both Exec. Order No. 11,478, 3 C.F.R. § 803 (1966–1970), *reprinted* in 42 U.S.C. § 2000e app. at 10,297 (1976), and Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965), *reprinted in* 42 U.S.C. 2000e app. at 28–31 (1982)).

[111] Hudson, *supra* note 2.

[112] *See* 3 C.F.R. § 282 (protecting only employees of federal contractors).

bership and employment without any governmental intervention. These disagreements highlight the tension between anti-discrimination laws and religious institutions' rights to freely exercise religion.[113] This section will examine some of the legal tensions related to free exercise claims and freedom of association arguments. It will also provide an overview of some of the legal and policy issues related to private schools' tax-exempt status.

The Free Exercise Clause of the First Amendment states that Congress may not pass laws that prohibit the free exercise of religion.[114] This proscription is qualified; in general, the government can only substantially burden free religious exercise with a compelling justification.[115] The governmental interest of pursuing non-discriminatory practices in the workplace must be weighed against a regligious school's interest in free exercise.[116] In some cases, a private religious school's interest in freely practicing its religion might be outweighed when it discriminates against a teacher in conflict with federal anti-discrimination employment law. As will be discussed, the Supreme Court has already found the interest in free exercise outweighed in the case of racial discrimination.[117]

The Supreme Court has observed a religious ministerial exemption to employment discrimination laws in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.[118] This exemption permits religious organizations to choose and dismiss their leaders without government interference and is rooted in the First Amendment's Free Exercise and Establishment Clauses.[119] Although this exemption could permit religious organizations extensive leeway in the hiring and firing of their employees, the exemption does not extend to employees performing work in non-ministerial capacities. Religious organizations can thus only exclude a gay teacher if his or her duties fall inside the "ministerial" designation; a chemistry or algebra teacher arguably does not qualify under the ministerial exemption. But who is considered a "minister" continues to be addressed and clarified by the courts;[120] the Court of Appeals for the Fifth Circuit, for example, found that an organ player was a "minister" for purposes of the exemption, and his age discrimination lawsuit was barred.[121]

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[113] *See generally* Martha Minow, *Should Religious Groups be Exempt from Civil Rights Laws?*, 48 B. C. L. REV. 781, 782 (2007) (discussing the tension between a pluralistic society committed to equality but tolerating of religious differences).

[114] U.S. CONST. amend. I.

[115] *See, e.g.*, Korte v. Sebelius, 735 F.3d 654, 673 (7th Cir. 2013) (citing to the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997)).

[116] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

[117] Bob Jones Univ. v. U.S., 461 U.S. 574, 592 (1983).

[118] Hosanna-Tabor, 565 U.S. at 188.

[119] *Id.* at 188.

[120] *See id.* at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.").

[121] Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 180 (5th Cir. 2012).

It is possible, of course, that religious freedom arguments may gain additional traction and more extensively trump the federal anti-discrimination rights of LGBT employees. Some of these religious freedom arguments were also commonly espoused during the desegregation movement in the 1950s; many Southern schools relied on religious beliefs to keep black students and black teachers segregated from white students.[122] For example, Goldsboro Christian, a private religious school providing education from kindergarten through the twelfth grade, argued when attempting to exclude black students that God "separated mankind into various nations and races," and that this separation "should be preserved in the fear of the Lord."[123] As will be discussed further below, the Supreme Court did not find this explanation for segregation to be a legitimate assertion of conflicting religious belief in matters involving racial equality.[124] It remains unclear whether courts will consider similar explanations for exclusion to be a legitimate assertion of conflicting religious belief in matters related to sexual orientation.

If the law does permit such extensive religious exemptions, legal scholar Katherine Franke of Columbia University suggests that it could open the door to an array of discriminatory employment practices cloaked as religious practice that could violate social norms.[125] For example, she contends that perhaps:

> An employer could refuse to include HIV-related treatment in its health plan because HIV is God's vengeance for a sinful lifestyle, or refuse to cover alcohol or drug treatment because the use of alcohol or drugs is sinful, or refuse to cover blood transfusions because of the employer's commitment to the tenets of Christian Science, or refuse to employ women because it is God's plan that they stay home and care for their children, or fire an employee who marries a person of a different race because doing so offends the employer's religious beliefs.[126]

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[122] *See generally* William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657 (2011) (explaining how religious beliefs were used to justify slavery and racial segregation); *see also Bob Jones Univ.*, 461 U.S. at 574 (upholding decision to deny tax exempt status to K–12 private school and university that discriminated against black students in admissions based upon religious beliefs); *see also* STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 92–93 (2000) (outlining Biblical arguments used to maintain racial inequality).

[123] Complaint at 12, Goldsboro Christian Sch., Inc. v. U.S., 436 F. Supp. 1314 (E.D.N.C. 1977), reproduced in Joint Appendix at 3–11, *Bob Jones Univ.*, 461 U.S. at 574 (Nos. 81-1, 81-3).

[124] *See Bob Jones Univ.*, 461 U.S. at 604–05 ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets. The governmental interest [in eradicating racial discrimination in education] at stake here is compelling.").

[125] *See* Nina Martin, *"To Say 'My Religious Law Trumps Your Secular Law' is a Radical Idea"*, SALON (May 19, 2015), http://www.salon.com/2014/03/19/to_say_my_religious_law_trumps_your_secular_law_is_a_radical_idea_partner/ [https://perma.cc/ECX9-6WEU] (questioning why it is acceptable to discriminate for religious reasons, but not secular ones).

[126] *Id.* (internal citations omitted).

Justice Scalia, in a case involving religious exemptions, similarly wrote that:

> The rule respondents favor would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage law, child labor laws, animal cruelty laws, environmental protection laws, and laws providing the equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.[127]

The Supreme Court's 2014 decision in *Burwell v. Hobby Lobby* offers additional insight into the extent to which religious freedom arguments may justify discrimination at odds with federal anti-discrimination law.[128] The Court's decision suggests that the Patient Protection and Affordable Care Act regulations requiring employer healthcare plans to cover certain forms of birth control created a substantial burden on closely held corporations' rights to freely exercise religion because the corporations' owners held sincere religious beliefs about certain forms of contraception.[129] Even though the *Hobby Lobby* decision focused on contraception, it sparked much debate about the balance between religious liberty and sexual orientation discrimination.[130] Specifically, some feared that religious exemptions in healthcare benefits would allow cultural conservatives to impose other discriminatory policies against LGBT employees.[131]

Separate from arguments related to the right to free exercise, private schools could argue that the First Amendment right of free association justifies discrimination against LGBT teachers. This right of free association is not explicitly stated in the First Amendment; rather, it is implied.[132] The Supreme Court has found that rights to intimate associa-

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[127] Employment Div. v. Smith, 494 U.S. 872, 888–89 (1990).

[128] *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that the operation of a business in a manner required by religious belief is protected under the Religious Freedom Restoration Act (RFRA), *supra* note 115, regardless of whether the business is a for-profit corporation).

[129] *See id.* at 2775 (noting the owners' sincere religious beliefs).

[130] Molly Ball, *How Hobby Lobby Split the Left and Set Back Gay Rights*, THE ATLANTIC (July 20, 2014), http://www.theatlantic.com/politics/archive/2014/07/how-hobby-lobby-split-the-left-and-set-back-gay-rights/374721/ [https://perma.cc/5AYG-URCA].

[131] *See, e.g., id.* ("To many liberals, however, *Hobby Lobby* sent the opposite message: that religious exemptions were a potentially dangerous new wedge for cultural conservatives seeking to impose discriminatory policies.").

[132] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984) ("[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other

tion, related to the right of privacy, and expressive association, related to the First Amendment's protection of free speech, are constitutionally protected.[133] Both states and the federal government must protect the right of free association.[134] Some cases unrelated to education have addressed whether the government can force private organizations to accept members whom they do not want.[135] The discussion of the court decisions below provides an examination of their reasoning and their potential applicability to the issue of discrimination in private schools.

When the Minneapolis and St. Paul chapters of the United States Junior Chamber, known as "the Jaycees," admitted women as full members, the national organization considered revoking the chapters' charters.[136] Both of the chapters filed claims against the national Jaycees organization, arguing that the membership restrictions imposed by the national organization violated the Minnesota Humans Rights Act, which prohibits discrimination based on sex in public accommodations.[137] In a unanimous decision, the Supreme Court held in favor of the Minnesota and St. Paul chapters, finding that the national organization's right to free association, and therefore its ability to control the membership of its local chapters, could be limited by law because the Human Rights Act served "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[138] Here the state had a compelling interest in eradicating discrimination against women, and it promoted the state's interest through the least restrictive method.[139] By allowing women to join the Jaycees, the women gained professional networking opportunities and leadership training, and the Jaycees did not need to change their overall mission.[140]

A few years later, the Supreme Court addressed a similar issue in a case involving the Rotary Club. California's Unruh Civil Rights Act prohibited sex discrimination in public accommodation.[141] After the Rotary Club chapter in Duarte, California, permitted women to join, the international organization objected.[142] In another unanimous opinion, the Court ruled that admitting women to the Rotary Club chapter was not a consti-

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individual liberties.").

[133] *See id.* at 618 ("We therefore find it useful to consider separately the effect of applying the Minnesota statute to the Jaycees on what could be called its members' freedom of intimate association and their freedom of expressive association.").

[134] NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

[135] *See infra* notes 136–151 and accompanying text.

[136] *Jaycees*, 468 U.S. at 614.

[137] *Id.* at 614–15 (citing MINN. STAT. § 363.03(3) (1982)).

[138] *Id.* at 623.

[139] *Id.* at 626.

[140] *Id.* at 627.

[141] Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (2016).

[142] Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 541 (1987).

tutional violation of the Club's freedom to associate.[143] The Court noted that the Rotarians were not forced to change any of their activities as a result of this decision.[144]

Shortly after *Duarte*, a concurring opinion to another Supreme Court case yet again suggested that a private club's right to association can be limited under certain circumstances.[145] In that case, New York City had recently amended its human rights law to modify how certain clubs were exempted from discrimination prohibitions.[146] The amendment permitted the city to determine which clubs were "distinctly private" and thus exempted, and which were "sufficiently public" to be subject to the prohibitions.[147] The goal behind the amendment was to target those clubs wherein business deals were made so that minorities and women would not be excluded from conducting such transactions.[148] An association of New York State clubs filed a lawsuit alleging a violation of their members' rights to expressive association[149] in part because the city made the exemption narrower.[150] The Supreme Court upheld the amendment to New York City's law, finding that the law did not require any changes to the clubs' protected First Amendment activities.[151]

After these three decisions, it was apparent that a private organization's right to freely associate was not absolute. In *Boy Scouts of America v. Dale* in 2000, however, the Court found that a private organization's right to freely associate could in fact exclude it from the scope of applicability of certain anti-discrimination laws.[152] Unlike the previous three cases discussed, this opinion focused on discrimination on the basis of sexual orientation rather than gender.[153] In this case, the Supreme Court addressed whether the Boy Scouts' decision to terminate the adult membership of an openly gay assistant scoutmaster and former Eagle Scout, James Dale, on the grounds that the organization "specifically forbid membership to homosexuals," was protected by the Boy Scouts' right to associate for expressive purposes.[154]

In *Dale*, the Boy Scouts had appealed from a New Jersey Supreme Court decision upholding the state anti-discrimination law; that court cited *Duarte* in reasoning that "Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not

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[143] *Id.* at 550.

[144] *Id.* at 548.

[145] N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 20 (1988) (O'Connor, J., concurring) ("Predominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law.").

[146] *Id.* at 4–5.

[147] *Id.* (citing N.Y.C. Local Law No. 63 of 1984).

[148] *Id.* at 5–6.

[149] *Id.* at 13.

[150] *Id.* at 6 (citing N.Y.C. ADMIN. CODE § 8-102(9) (1986)).

[151] *Id.* at 18.

[152] Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000).

[153] *Id.*

[154] *Id.* at 643–45.

'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.'"[155] Specifically, the state supreme court found that there was no violation of the First Amendment because Dale's presence in the organization did not mean that the Boy Scouts endorsed homosexuality.[156] In a narrow 5–4 decision, the U.S. Supreme Court reversed, finding that the Boy Scouts were exempt from New Jersey's anti-discrimination law.[157] The Court ruled that the right to free association allowed the Boy Scouts of America to prohibit membership of openly gay scoutmasters.[158]

Other legal and policy arguments bear on the extent to which private organizations should or can be exempt from federal or state anti-discrimination laws. In a 2015 letter to Congressional leaders, more than seventy private religious school leaders expressed worry that the *Obergefell* decision would raise concerns about schools "adhering to traditional religious and moral values."[159] Along these lines, recent articles have raised the question of whether religious private schools could lose their tax-exempt status as a non-profit if they discriminate against individuals based on sexual orientation.[160] An amicus brief submitted during the *Obergefell* case by the United States Conference of Catholic Bishops similarly said that "it would seem a short step" from a decision in favor of same-sex marriage to a decision to revoke tax-exempt status for religious institutions that opposed same-sex marriage.[161] These concerns likely stem from a 1983 Supreme Court decision that denied tax-exempt status to a private K–12 school and a private university that engaged in racial discrimination.[162]

In *Bob Jones University v. United States*, the Court examined whether a non-profit private university and K–12 private school, which both admitted students using racially discriminatory standards ostensibly based on school officials' religious beliefs, could still qualify as a tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code of 1954.[163] The K–12 private school only accepted white students and occa-

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[155] Dale v. Boy Scouts of Am., 160 N.J. 562, 615 (N.J. 1999) (quoting Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 538 (1987)).

[156] *Id.* at 623.

[157] *Boy Scouts of Am.*, 530 U.S. at 661.

[158] *Id.*

[159] Letter from Daniel L. Akin et al., President, Southeastern Baptist Theological Seminary, to Mitch McConnell, Sen. Majority Leader, U.S. Senate, and John Boehner, Speaker of the House, U.S. House of Representatives (June 3, 2015), *available at* http://downloads.frc.org/EF/EF15F04.pdf [https://perma.cc/4F4Y-CLFJ].

[160] *See, e.g.*, Laurie Goodstein & Adam Liptak, *Schools Fear Gay Marriage Ruling Could End Tax Exemptions*, N.Y. TIMES (June 24, 2015), http://www.nytimes.com/2015/06/25/us/schools-fear-impact-of-gay-marriage-ruling-on-tax-status.html.

[161] Brief of Amicus Curiae of U.S. Conference of Catholic Bishops in Support of Respondents and Supporting Affirmance, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519042 at *26.

[162] Bob Jones Univ. v. U.S., 461 U.S. 574, 578 (1983).

[163] *Id.* at 574.

sionally students of mixed race.[164] The K–12 school argued that God "separated mankind into various nations and races," and that such separation "should be preserved in the fear of the Lord."[165] The private university, on the other hand, had reduced its exclusionary and restrictive policies over time. The university fully excluded black students until 1971.[166] From 1971 through 1975, the university accepted only married black students; from 1975 to the time of the suit, it accepted both married and unmarried black students but strictly prohibited interracial dating.[167] In 1970, the IRS adopted a new policy that withheld tax-exempt status from private schools that engaged in racially discriminatory practices because, under the IRS's interpretation of the code, such practices meant the institution did not qualify as charitable.[168]

The IRS subsequently revoked the tax-exempt status of the two private schools; the schools then filed suit in two different federal district courts.[169] The cases were combined when they reached the U.S. Supreme Court.[170] The Court ultimately ruled that racial discrimination was contrary to public policy, and private schools engaging in such conduct could not be considered charitable organizations under the tax code.[171] Moreover, the Court held that the actions of the IRS did not violate the Free Exercise Clause because the government has a fundamental overriding interest to eradicate racial discrimination, which outweighed the schools' ability to practice their religious beliefs.[172]

Bob Jones suggests that the government can have interests that effectively outweigh private religious beliefs. Religious beliefs were cited in other cases involving racial discrimination. For example, when sentencing a couple for violating Virginia's anti-miscegenation laws in 1959, the trial court judge in *Loving* wrote that "[a]lmighty God created the races white, black, yellow, malay and red, and he placed them on separate continents," and also wrote that "[t]he fact that he separated the races shows that he did not intend for the races to mix."[173] Similar to the arguments in *Bob Jones*, these religious-based arguments in *Loving* did not sway the Court.

The Court discussed the bearing of the *Bob Jones* decision on discrimination based on sexual orientation during oral argument in *Obergefell*:

JUSTICE ALITO: Well, in the *Bob Jones* case, the Court held

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164 *Id.* at 583.
165 Complaint, *supra* note 123, at 12.
166 *Bob Jones Univ.*, 461 U.S. at 580.
167 *Id.*
168 *Id.* at 578, 585.
169 *Id.* at 582, 584.
170 *Id.* at 585.
171 *Id.* at 595.
172 *Id.* at 603–04.
173 Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting the trial court judge).

> that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?
>
> SOLICITOR GENERAL VERRILLI: You know, I—I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I—I don't deny that. I don't deny that, Justice Alito. It is—it is going to be an issue.[174]

The Court also discussed competing interests regarding the effects of public opinion on the party exercising its religion and the party experiencing discrimination on the basis of sexual orientation. Dissenting in *Obergefell*, Justice Samuel Alito warned that society should not "vilify Americans who are unwilling to assent to the new orthodoxy" because "those who cling to old beliefs" and "repeat those views in public . . . will risk being labeled as bigots and treated as such by governments, employers, and schools."[175] But Justice Kennedy's concurrence in *Hobby Lobby*, however, asserts that, though "no person may be restricted or *demeaned* by government in exercising his or her religion," religious exercise may not "unduly restrict other persons . . . in protecting their own interests."[176] Similarly, the *Obergefell* majority appeared to stress that:

> The First Amendment must protect the rights of [religious] individuals, even when they are agents of government, to *voice* their personal objections—this, too, is an essential part of the conversation—but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals[.][177]

These concerns and competing interests ultimately give rise to questions as to what discriminatory actions private non-profit religious schools and universities can take against LGBT teachers. Should these institutions have a religious right to exclude faculty or teachers based on sexual orientation? Is the discriminatory firing of LGBT teachers in private schools a violation of fundamental public policy? The IRS would likely need to initiate such an action against private schools that discrim-

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[174] Transcript of Oral Argument at 38, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-556q1_l5gm.pdf [https://perma.cc/7P5J-FEV9].

[175] *Id.*

[176] Burwell v. Hobby Lobby Stores, 134 S. Ct. 2571, 2786–87 (2014) (Kennedy, J., concurring) (emphasis added).

[177] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 30 (2015) (emphasis in original).

inatorily fire LGBT teachers; it is unlikely that a taxpayer would have standing to bring such a lawsuit.[178] Legal scholars have offered competing views about whether the *Bob Jones* decision will threaten private institutions that discriminate against LGBT persons.[179] Michael McConnell, a professor at Stanford University Law School, posits that "[p]rivate institutions that dissent from today's reformulation of marriage must be prepared for aggressive legal attacks on all fronts[.]"[180]

In addition to *Bob Jones*, earlier cases involving racial discrimination in private schools could provide some guidance in this area. A private school's acceptance of public voucher money or public funding for textbooks or bussing services might allow LGBT teachers to bring legal claims if the school discriminates against them. In *Norwood v. Harrison*, for example, the Supreme Court found state action when a private school racially discriminated in admissions because the private school accepted free textbooks from the government.[181] The Supreme Court held in a unanimous decision that Mississippi could not provide aid to a private school that racially discriminates.[182]

The only time the Court applied anti-discrimination laws to a racially discriminatory non-sectarian private school that did not accept public money was in *Runyon v. McCrary*.[183] In this case, parents filed a lawsuit against private schools that denied admission to their children and other black students.[184] The parents claimed that the private school's policy violated 42 U.S.C. § 1981.[185] Section 1981 guarantees "[e]qual rights under the law."[186] Upholding the Fourth Circuit's decision, the Supreme Court found the private school's policy violated Section 1981.[187] The Court also ruled that Section 1981 did not infringe upon any parental right to direct their children's education.[188] The Court held that "invidious[] private discrimination" had "never been accorded affirmative constitutional protections."[189] The Court further observed that the Civil Rights Act of 1866 "prohibits racial discrimination in the making and enforcement of private contracts," including those for the private education of parents' chil-

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[178] *See* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 125 (2011) ("[T]he mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court.").

[179] Scott Jaschik, *The Supreme Court Ruling and Christian Colleges*, INSIDE HIGHER ED. (June 29, 2015), https://www.insidehighered.com/news/2015/06/29/will-supreme-court-decision-same-sex-marriage-challenge-or-change-christian-colleges [https://perma.cc/J7M5-SNH7] (noting that "[l]egal experts are divided" and discussing the opinions of some on the implications of *Obergefell* for private Christian colleges).

[180] *Id.*

[181] Norwood v. Harrison, 413 U.S. 455, 463–64 (1973).

[182] *Id.* at 465–66.

[183] *See* Runyon v. McCrary, 427 U.S. 160, 188 (1976) (noting that schools are "managed by private persons and they are not direct recipients of public funds") (internal citations omitted).

[184] *Id.* at 163–64.

[185] *Id.* at 163.

[186] 42 U.S.C. § 1981 (2012).

[187] *Runyon*, 427 U.S. at 161.

[188] *Id.*

[189] *Id.* at 176.

dren.[190] Perhaps a similar argument could be made regarding private school discrimination in employment contracts with LGBT teachers.

Bob Jones addressed race discrimination; *Jaycees*, *Duarte*, and *New York State Club* focused on gender discrimination; and *Boy Scouts of America* involved sexual orientation discrimination. As Martha Minow, the former Dean of Harvard Law School, noted, "religious groups largely receive no exemptions from laws prohibiting race discrimination, some exemptions from laws forbidding gender discrimination, and explicit and implicit exemptions from rules forbidding sexual orientation discrimination."[191] Katherine Franke likewise contends that Supreme Court jurisprudence suggests that "race is special" and that "[r]acial equality will almost always trump an assertion of free exercise of religion."[192] As such, equality claims related to sexual orientation do not have the same gravitas as racial justice claims when religious beliefs are involved. This should no longer be the case in a country that guarantees the equal protection of laws or, as Justice Kennedy wrote in *Obergefell*, subscribes to the doctrine of "equal dignity."[193]

CONCLUSION

Law continues to influence matters related to education policy,[194] and this is especially true in the context of the employment of LGBT teachers. It appears that some private school educators have been recently dismissed because of their sexual orientation—oftentimes after their same-sex relationship becomes public [195]—and there are few legal avenues available for them. Nevertheless, there have been at least three legal challenges to this type of dismissal in the private school context.[196] To effectively prevent discrimination on the basis of sexual orientation, the IRS could decide to revoke a private school's tax-exempt status if the school engages in discrimination. Similar to the decision in *Bob Jones*, such revocation should not violate the Free Exercise Clause because the

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[190] *Id.* at 168.

[191] Minow, *supra* note 113, at 782.

[192] Martin, *supra* note 125.

[193] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (holding that the Constitution grants the right of equal dignity).

[194] *See generally* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C.L. REV. 1597 (2003) (discussing the Supreme Court's impact on the limited success of desegregation efforts); Benjamin Superfine, *The Evolving Role of the Courts in Educational Policy: The Tension Between Judicial, Scientific, and Democratic Decision Making in* Kitzmiller v. Dover, 46 AM. EDUC. RESEARCH ASSOC. 898 (2009) (dealing with the constitutionality of the intelligent design policy); Lugg, *supra* note 6 (discussing how queer legal theory can be applied to educational policy).

[195] *See supra* note 11 and accompanying text.

[196] Barrett v. Fontbonne Acad., No. CV2014-751, 2015 WL 9682042, at *3 (Mass. Super. Dec. 16, 2015); SAN GABRIEL VALLEY TRIBUNE, *supra* note 66; Stipulation and Order of Dismissal, *supra* note 72.

government has a fundamental interest in eradicating discrimination based on sexual orientation, and that interest should outweigh and override schools' interests in practicing their religious beliefs to the exclusion of the employment of LGBT persons. Furthermore, as in *Norwood*, private schools that accept public funding in any form should be subject to closer judicial scrutiny if they choose to discriminate. Moreover, similar to the private organizations in *Roberts*, *Duarte*, and *New York State Club*, a private school should not have an unlimited right to freely associate if such association conflicts with state or federal anti-discrimination provisions. Finally, Congress and state legislatures should protect LGBT persons from employment discrimination; Congress should pass ENDA without any broad religious exemptions, and state legislatures should continue to pass legislation that protects LGBT employees from discrimination in the workplace.

In a case involving K–12 public schooling, the Court observed that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[197] It should also recognize that the way to stop discrimination on the basis of sexual orientation is to stop discriminating on the basis of sexual orientation. The Court has not found a legitimate assertion of conflicting religious belief in matters involving racial equality, and it should find none with regard to equality based on sexual orientation.

[197] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

Notes

Remedying Police Brutality in America's Public Schools Through Private Structural Reform Under 42 U.S.C. § 1983

Colette Billings*

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Civil rights litigation under 42 U.S.C. § 1983 is currently playing a pivotal role in challenging police practices and making police brutality an issue of national concern. Like the officers patrolling our streets, officers stationed in public schools—known as school resource officers—have also received media attention for a number of high-profile excessive force cases. In this paper, I explore the limitations of the § 1983 remedy for facilitating real change in policing institutions and argue, despite the limitations placed on the availability of injunctive relief in § 1983 actions by *City of Los Angeles v. Lyons*, recent efforts to use structural injunctions suggest the possibility of a more comprehensive approach toward challenging police brutality.

I. THE PROBLEM

A. Introduction

Reports of armed police officers' brutality against students in public schools are on the rise.[1] Police officers stationed in Birmingham, Alabama, schools have pepper-sprayed and maced hundreds of high school students.[2] In one particularly horrible instance, an officer allegedly sprayed a pregnant female student with chemical spray when she would not stop crying after an incident of sexual harassment.[3] In Columbia, South Carolina, a police officer was caught on camera slamming a teen-

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[1] *See, e.g.*, Jaeah Lee, *Chokeholds, Brain Injuries, Beatings: When School Cops Go Bad*, MOTHER JONES (Jul. 14, 2015), http://www.motherjones.com/politics/2015/07/police-school-resource-officers-k-12-misconduct-violence/ [https://perma.cc/9ZF6-RYSW].

[2] Rebecca Klein, *Lawsuit Alleges Officers in Birmingham Schools Sprayed Hundreds of Students with Chemical Weapons*, THE HUFFINGTON POST (Jan. 22, 2015), https://www.huffingtonpost.com/2015/01/22/birmingham-schools-pepper-spray_n_6526162.html [https://perma.cc/42ER-XE57].

[3] Third Amended Complaint at 45–46, J.W. v. A.C. Roper, No. CV-10-B-3314-S (N.D. Ala. 2011).

age student to the ground and dragging her out of the classroom.[4] In Louisville, Kentucky, a thirteen-year-old was punched in the face by an officer for cutting a lunch line; just one week later, the same officer held a different thirteen-year-old in a chokehold, which allegedly caused brain injury after the student was rendered unconscious.[5] In Houston, Texas, a police officer struck a sixteen-year-old student at least eighteen times with a police baton, causing injury to many parts of the student's body, including the head and neck, after a discussion about the student's confiscated cell phone.[6] In Bastrop County, Texas, a police officer, attempting to break up a fight, tased a seventeen-year-old boy.[7] The boy's subsequent fall to the ground led to a medically induced coma and surgery to repair a severe brain hemorrhage.[8] In San Antonio, Texas, a police officer who witnessed a student punch another student followed the youth to a shed located behind a nearby home, and fatally shot the unarmed boy.[9]

B. History and Structure of School Policing

Officers have been utilized in K–12 schools for decades. A police officer assigned to a K–12 school is known as a school resource officer ("SRO").[10] According to the National Association of School Resource Officers (NASRO), the best example of today's SRO program can be traced to 1963 when the Tucson, Arizona, Police Department "adopted the term of School Resource Officer and realized something had to be done for the school community and the relationship between youth and law enforcement."[11] Following Tucson's lead, school districts throughout the country secured special legislation that provided for police departments managed by school districts.[12] More recently, police presence on school campuses has sharply increased.[13] In the late 1990s, the U.S. Department of Justice (DOJ) funded nearly 7,000 SROs, costing an estimated $876 million, and the number of police officers patrolling K–12 campuses more than doubled, with 20,000 officers in schools by 2006.[14]

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[4] Jaeah Lee & Phil Stinson, *Cops in the Classroom: South Carolina Incident Highlights Growing Police Presence in Schools*, DEMOCRACY NOW! (Oct. 28, 2015), https://www.democracynow.org/2015/10/28/when_school_cops_go_bad_south [https://perma.cc/99DS-LEQK].

[5] Lee, *supra* note 1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See* NAT'L ASS'N OF SCH. RES. OFFICERS, SRO MANAGEMENT SYMPOSIUM COURSE MANUAL (2006).

[11] *Id.* at 12.

[12] *Id.* at 16.

[13] *See* Lee & Stinson, *supra* note 4.

[14] *Id.*

Since 2012, the DOJ has spent an additional $67 million to provide schools with 540 more officers.[15]

Today, SROs are the most rapidly growing division of law enforcement[16]: about half of all public schools have police officers assigned to their campuses, with 60% of teachers reporting armed police officers stationed on suburban school grounds.[17] According to NASRO's SRO Management Course Manual, SROs are placed within the educational environment in a "partnership between the school district and local law enforcement agency [that allows] the SRO to work closely with the school administration to provide a safe learning environment."[18] Yet, the recent series of incidents documenting inappropriate and excessive force by SROs has both undermined the notion that increased officer presence on school campuses helps improve campus safety and prompted a dialogue on what recourse is available to students and families hoping to dismantle and transform this destructive system.

SRO misconduct is widespread and systemic. The root of SRO brutality can be traced to failures in written and unwritten departmental policies and practices regarding SRO hiring, training, and oversight.[19] According to a February 2013 survey conducted by the advocacy group Strategies for Youth (SFY), despite the large volume of police officers who are stationed in schools immediately upon graduating from police academies, just one state provided specialized training focused on working in schools.[20] Additionally, the survey notes most academies fail to teach and train recruits how to identify and handle situations where the youth has mental health or trauma-related disorders or special education needs.[21] Because of the insufficient training officers receive and the resulting lack of understanding regarding youth development and behavior, SFY found departments were ignorant of "a host of promising practices and interventions."[22]

Because officers who lack youth-specific training may escalate noncriminal offenses to criminal behavior,[23] student behaviors that pre-

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[15] *See id.*

[16] David Snyder, *A New Generation of School Safety Patrol: Officers Boost Security, Community, Connection*, WASH. POST, Dec. 11, 2003, at T8 (quoting executive director of the National Association of School Resource Officers).

[17] BARBARA RAYMOND, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. POLICING SERVS., ASSIGNING POLICE OFFICERS TO SCHOOLS 1 (2010); Paul J. Hirschfield, *Preparing for Prison?: The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 82 (2008).

[18] NAT'L ASS'N OF SCH. RES. OFFICERS, *supra* note 10, at 21.

[19] *See generally* STRATEGIES FOR YOUTH, *If Not Now, When? A Survey of Juvenile Justice Training in America's Police Academies* (Feb. 2013), http://strategiesforyouth.org/sfysite/wp-content/uploads/2013/03/SFYReport_02-2013_rev.pdf [https://perma.cc/HHL8-B2DR] (explaining issues in SRO implementation).

[20] *Id.* at 4.

[21] *Id.*

[22] *Id.*

[23] FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 47 (Office of Community Oriented Policing Services, 2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/TM5N-D7MN].

viously resulted in a detention or a visit to the principal's office are now resulting in macing, tasing, and other instances of excessive force.[24] Furthermore, SROs responding to these minor infractions are often acting pursuant to some department policy or practice sanctioning their behavior.[25] For example, the complaint filed in the *Birmingham* case, mentioned above, alleged that SROs often forcefully intervened—pursuant to a long-standing agreement[26] requiring SRO assistance in enforcing the student code of conduct—in minor, noncriminal incidents involving cell phones, swear words, tardiness, and other misbehavior traditionally handled by school personnel.[27] In fact, almost 70% of SROs report that they are regularly occupied with disciplinary matters.[28] These and other failures in departmental policies and practices regarding SRO hiring, training, and oversight not only contribute to the increasing school-to-prison pipeline by criminalizing the behaviors of young children, but also are indicative of a system that condones officer brutality and fails to prioritize student wellbeing.

II. THE SOLUTION: PRIVATE CIVIL RIGHTS LITIGATION UNDER 42 U.S.C. § 1983

With the help of lawyers and advocates, students and families across the United States are turning to legal remedies in hope of resisting the injustices of SRO brutality. Through civil rights lawsuits brought under 42 U.S.C. § 1983, victims of SRO brutality can bring claims for damages and injunctive relief for Fourth Amendment violations arising from the use of excessive force.[29] In Part II of this paper, I explain how § 1983 functions as a legal remedy. Next, I demonstrate the limitations of using § 1983 damage suits to address the roots of SRO brutality and argue the damage remedy offers a weak link to facilitating real change in policing America's public schools. In Part III, I explain the limitations on the availability of injunctive relief in § 1983 actions and consider arguments that *Los Angeles v. Lyons* largely shut the door to restructuring police institutions.[30] Through examining the Birmingham schools pepper

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[24] *See id.; see also* Lee & Stinson, *supra* note 4; Klein, *supra* note 2.

[25] *See* FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY, *supra* note 23, at 11–12.

[26] *See* J.W. v. Birmingham Bd. of Edu., 143 F. Supp. 3d 1118, 1163 (N.D. Ala. 2015) (noting these agreements, or Memoranda of Understanding, are between law enforcement agencies and school districts, and govern the placement of SROs in schools).

[27] *Id.*

[28] David A. Tomar, *Cops in Schools: Have we build a school-to-prison pipeline?*, THE BEST SCHOOLS MAGAZINE, [https://perma.cc/5YPR-PX3Y].

[29] *See* Mark S. Bruder, *When Police Use Excessive Force: Choosing a Constitutional Threshold of Liability in Justice v. Dennis*, 62 ST. JOHN'S L. REV. 4 (2012).

[30] *See* Barbara E. Armacost, *Organizational Culture of Police Misconduct*, 72 GEO. WASH. L. REV. 453, 522 (2003–2004) (arguing the Supreme Court has eliminated the possibility of attacking dysfunctional features of police culture through ordinary civil rights litigation).

spray case, I explain in Part IV the possibility of attacking dysfunctional SRO policies and practices through private structural reform litigation. Further, certain features of the school policing context make it more amenable to structural reform litigation than in the civilian policing context. I explore approaches and limitations to this strategy in Part V. Finally, in Part VI, I acknowledge the limitations of solely utilizing structural reform litigation for dismantling and transforming school policing, and propose communities should work collaboratively to think beyond litigation, while retaining civil rights litigation as a vital tool for addressing systemic harms.

A. Section 1983 Litigation as a Legal Remedy, Generally

A civil rights lawsuit under 42 U.S.C. § 1983 is the primary legal remedy for those hoping to change policies and practices that encourage SROs to use unlawful and excessive force on schoolchildren. Through § 1983, victims of SRO brutality can bring claims for damages and injunctive relief for Fourth Amendment violations arising from the use of excessive force.[31]

Section 1983 provides a private right of action for damages or equitable relief in circumstances where state or local government officials deprive a person of rights otherwise secured by the United States Constitution or federal law.[32] The U.S. Supreme Court has held that a local government is a "person" subject to suit under § 1983, extending § 1983 liability so private litigants may directly sue municipalities for the actions of a local government official.[33] The municipality will be found liable "where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[34] Consequently, through § 1983 litigation, students can bring claims against individual police officers, police departments, and school districts for Fourth Amendment violations arising from an SRO's use of excessive force.

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[31] *See* 42 U.S.C. § 1983 (2012).

[32] *Id.*

[33] Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 690 (1978).

[34] *Id.* at 690–91 (holding a § 1983 claim against a municipality requires the plaintiff to: (1) identify a policy or custom that deprived him of a federally protected right; (2) demonstrate that the municipality, by its deliberate conduct, acted as the "moving force" behind the alleged deprivation; and (3) establish a direct causal link between the policy or custom and the plaintiff's injury).

B. Limitations of § 1983 Damage Suits

Section 1983 damage suits on their own offer a weak solution to facilitating real change in the policing of America's public schools. Because they are ineffective at deterring future misconduct or incentivizing proactive policy changes, these suits fail to address the systemic roots of SRO brutality.

As explained above in Part II–A, private litigants can use § 1983 to sue individual police officers and hold departments and municipalities financially liable for the actions of individual officers. Section 1983 plaintiffs are entitled to recover both compensatory and punitive damages.[35] When a student is the victim of SRO brutality, § 1983 damage suits work well as a remedy, because a successful plaintiff can recover for medical bills and psychological harm, and punitive damages may give a litigant the satisfaction of holding an individual officer responsible for his misconduct.

Section 1983 damage suits might also appear attractive to lawyers and advocates hoping to change departmental policies and practices regarding SRO hiring, training, and oversight, because § 1983 damage suits ostensibly deter future constitutional violations. According to Harmon, the logic of this deterrence is that "threatening liability for money damages leads officers to comply with the law, and it leads supervisors, chiefs, and cities to influence them to do so."[36] In other words, civil litigation should encourage police departments to make improvements to escape expensive judgments.[37] Yet, because of doctrinal and practical limitations, § 1983 damage suits on their own are an ineffective tool for combating the deeply ingrained organizational roots of SRO misconduct.

The doctrine of qualified immunity is a significant limitation on § 1983 damage remedies. Qualified immunity is a defense that protects an individual acting under color of state law from liability, even if he has violated a plaintiff's constitutional rights, so long as his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[38] This defense shields government officials performing discretionary functions from liability for civil damages. When a clearly established right is violated, the proper inquiry for the court is whether "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right."[39] Therefore, "if reasonable public officials could differ on the lawfulness of the defendant's actions," the officer is entitled to qualified

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[35] Smith v. Wade, 461 U.S. 30, 35 (1983) (stating plaintiffs in § 1983 cases are entitled to recover punitive damages in certain circumstances); Carey v. Piphus, 435 U.S. 247, 264 (1978) (stating the general rule in § 1983 cases is compensatory damages are recoverable where they are proved).

[36] Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 772 (2012).

[37] *Id.*

[38] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[39] Anderson v. Creighton, 483 U.S. 635, 640 (1987).

immunity.[40] According to the Supreme Court, the doctrine of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[41] In other words, even if a student establishes an SRO violated her Fourth Amendment rights through his use of excessive force, the officer may be able to avoid individual liability by asserting the defense of qualified immunity.

The § 1983 damage remedy is also limited by practical considerations. First, there are questions of whether § 1983 suits for damages deter unconstitutional behavior.[42] As mentioned above, the logic of § 1983 deterrence is officers, who fear financial liability, will comply with the law if threatened with money damages, and supervisors, chiefs, and cities will be incentivized to influence the officers to do so. By this logic, civil litigation should incentivize individual SROs to avoid violating students' constitutional rights, and encourage police departments to make proactive reforms to avoid costly judgments. However, empirical evidence regarding the success of private civil litigation in achieving these ends is mixed.[43] According to some scholars, civil litigation is an ineffective way to incentivize positive police behavior or reform because police departments consistently indemnify each officer.[44] Specifically,

> Widespread indemnification impacts the extent to which § 1983's goals of . . . deterrence are achieved. Indemnification . . . dampens the deterrent effect of lawsuits on officers. One might think that police misconduct lawsuits would nonetheless achieve § 1983 deterrence goals by placing financial pressure on government entities to implement systemic police reform. Yet the general consensus is that governments do not take decisive enough action to curb misconduct or manage their officers.[45]

In the end, the § 1983 damage remedy cannot force a police department to adopt costly reforms. Consequently, while § 1983 damage suits might be adequate for students and families hoping solely to recov-

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[40] Faire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992).

[41] Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 887 (2014) (citing Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[42] *See* Daryl J. Levinson, *Making the Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000) ("If the goal of making government pay compensation for a constitutional tort is to achieve optimal deterrence with respect to constitutionally problematic conduct, the results are likely to be disappointing and perhaps even perverse."); *see also* Peter H. Shuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 282 ("[A] remedy designed to compensate victims and deter official illegality might in fact defeat some important social objectives and ignore others. Such a remedy might spawn new injustices less visible and thus less tractable.").

[43] Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1354 (2015).

[44] *See* Schwartz, *supra* note 41, at 890 ("Police officers are virtually always indemnified."); *see generally* Rushin, *supra* note 43 (finding equitable relief can compel police departments to transform policies and procedures to minimize misconduct).

[45] Schwartz, *supra* note 41, at 961.

er financial losses, the widespread, systemic nature of SRO brutality calls for a more systemic remedy.

C. A Better Solution: Private Structural Reform Litigation

Different from § 1983 litigation for damages, § 1983 suits for injunctive relief address patterns and systemic harms in a form that is conducive to real change. Injunctive relief, as opposed to the damage remedy, "seeks to prevent harm instead of simply compensating for harm that has already occurred."[46] Also, it has the additional goal of changing the way the government does business by "reform[ing] institutional structures . . . to reduce the future threat to constitutional rights."[47] As Armacost states, "it is clear that structural injunctions are especially well adapted to dealing with systemic harms" in Chicago.[48]

Section 1983 expressly authorizes a "suit in equity" when any state agent deprives a person of rights secured by the United States Constitution or federal law.[49] Local governments may be sued directly for injunctive relief as "persons,"[50] and local or state officials may be sued for injunctive relief in their official capacities.[51] A § 1983 plaintiff seeking injunctive relief must meet the case-or-controversy requirement of Article III of the U.S. Constitution, which requires a plaintiff to establish his standing to sue.[52] In *Mitchum v. Foster*, the Supreme Court reinforced Congress's action by explicitly providing suits in equity as a remedy, and allowed federal courts to issue injunctions in § 1983 claims.[53] These "'structural injunctions' were designed to virtually restructure entire institutions that the courts viewed as systematically violating the law."[54] Importantly, the biggest threshold issue in § 1983 damage litigation—qualified immunity—is not present in § 1983 suits for injunctive relief.[55]

In the past, civil rights lawyers used structural injunctions to challenge systemic harms in school segregation[56] and prison[57] cases.[58] Yet,

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[46] Armacost, *supra* note 30, at 493.

[47] *Id.*

[48] *Id.*

[49] 42 U.S.C. § 1983.

[50] Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 690 (1978).

[51] *Id.*

[52] O'Shea v. Littleton, 414 U.S. 488, 493 (1974).

[53] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[54] Armacost, *supra* note 30, at 490 (citing DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 257 (1994)).

[55] *See, e.g.*, Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Pope v. Chew, 521 F.2d 400 (4th Cir. 1975); Ft. Eustis Books, Inc. v Beale, 478 F.Supp. 1170 (E.D. Va. 1979) (holding, while several defendants may enjoy immunity because of their office, this immunity applies only in an action for damages under § 1983).

[56] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Santamaria v. Dallas Indep. Sch. Dist., No. 3:06-CV-692-L, 2006 U.S. Dist. LEXIS 83417 (N.D. Tex. Nov. 16, 2006).

[57] A state prisoner may request injunctive relief in a constitutional challenge to the conditions of

since the Supreme Court's decision in *Los Angeles v. Lyons*,[59] legal scholars such as Armacost and Rushin have proposed private structural reform litigation is essentially unavailable as a remedy in police brutality cases. In Part III, I explore the doctrinal hurdles to § 1983 injunctive relief erected by *Lyons* and argue that, despite these limitations, *Lyons* does not foreclose the possibility of structural injunctions in school policing cases.

III. THE SUPREME COURT'S STANDING DOCTRINE AS ARTICULATED IN *CITY OF LOS ANGELES V. LYONS*, AND ITS IMPLICATIONS FOR THE AVAILABILITY OF INJUNCTIVE RELIEF IN § 1983 ACTIONS

Despite the text of § 1983 authorizing suits in equity, a litany of Supreme Court cases in the 1970s and 1980s limited the availability of injunctive relief in § 1983 litigation.[60] In holding that private litigants generally lack standing to seek equitable relief against local police departments,[61] these cases seemed to support the proposition that, like § 1983 actions for damages, private structural reform litigation was not a viable tool for combating deeply ingrained, organizational roots of SRO misconduct and changing inadequate department policies.

A. Standing in § 1983 Suits Pre-*Lyons*

As articulated by Brandon Garrett, "[t]ypically, to satisfy the standing requirements of an Article III 'case or controversy,' a party seeking federal jurisdiction must show: (1) an injury in fact that is both (a) concrete and particularized, and (b) actual or imminent; (2) that the injury is fairly traceable to the acts of the defendant; and (3) a likelihood that the injury would be redressed by a decision favorable to the plaintiff."[62]

The Supreme Court first limited standing in § 1983 suits for injunctive relief in *O'Shea v. Littleton*[63] and *Rizzo v. Goode*,[64] concluding

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his prison life. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (alleging inadequate medical care); Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975) (alleging guard brutality); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) (alleging racial discrimination).

[58] Armacost, *supra* note 30, at 490.

[59] Los Angeles v. Lyons, 461 U.S. 95 (1983).

[60] *See* Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

[61] *See, e.g.*, *Lyons*, 461 U.S. at 111 (concluding, since a § 1983 litigant was not likely to experience future harm, Lyons did not have standing to seek injunctive relief against the LAPD to prevent use of a chokehold).

[62] Brandon Garrett, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1819 (2008); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–62 (1992).

[63] 414 U.S. at 493 (holding "[t]he complaint failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege

plaintiffs could not receive relief against alleged patterns of police mistreatment of minority citizens because the threat of injury was not sufficiently real and immediate. Specifically, in *O'Shea*, although particular members of the plaintiff class claimed they had actually suffered from the defendants' alleged unconstitutional practices, the Court observed "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[65] The Court assumed, because the plaintiffs will "conduct their activities within the law and so avoid . . . exposure to the challenged course of conduct said to be followed by [the police officers]," the threat to plaintiffs was not "sufficiently real and immediate to show an existing controversy."[66] Similarly, in *Rizzo*, the Court concluded an officer's past wrongs do not in themselves amount to a real and immediate threat of injury necessary to make a case or controversy.[67] Relying on *O'Shea* and *Rizzo*, the Court elaborated its standing doctrine in *Los Angeles v. Lyons*.[68]

B. The City of Los Angeles v. Lyons Decision

To understand the implications of the *Lyons* decision on the availability of equitable relief in § 1983 suits against police departments, it is necessary to recount the facts and procedural history in some detail. Respondent Lyons filed a § 1983 lawsuit for damages, an injunction, and declaratory relief against the City of Los Angeles and four of its police officers.[69] The issue in *Lyons* was whether Lyons fulfilled the requirements to obtain injunctive relief in the federal district court.[70] According to Lyons' complaint, after the Los Angeles police officers stopped him for a traffic violation, without provocation or resistance on Lyons's part, the officers applied a chokehold to Lyons that rendered him unconscious and damaged his larynx.[71] Lyons sought preliminary and permanent injunctions against the City, barring the use of such chokeholds.[72] He alleged in support of his claim that, pursuant to an official policy or custom, Los Angeles police officers regularly and routinely utilized

> the application of the chokeholds, that Lyons and others similarly situated are threatened with irreparable injury in the form

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an actual case or controversy").

64 423 U.S. at 365–66.

65 *O'Shea*, 414 U.S. at 495–96.

66 *Id.* at 496–97.

67 *Rizzo*, 423 U.S. at 362.

68 Los Angeles v. Lyons, 461 U.S. 95, 102–03 (1983).

69 *Id.* at 97.

70 *Id.*

71 *Id.* at 97–98.

72 *Id.* at 98.

> of bodily injury and loss of life, and that Lyons "justifiably fears that any contact he has with Los Angeles police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse."[73]

Addressing the standing issue raised in *O'Shea* and *Rizzo*, the Ninth Circuit held there was a sufficient likelihood Lyons would again be stopped and subjected to the unlawful use of force to constitute a case or controversy and warrant the issuance of an injunction.[74]

On remand, the district court found Lyons's claim that the officers used a "department-authorized chokehold which resulted in injuries" without provocation or legal justification based on evidence including affidavits, depositions, and government records.[75] The district court further found the Los Angeles Police Department approved of the chokeholds even when there was no threat of death or serious bodily harm, officers were inadequately trained to use chokeholds, there was a high risk of serious injury or death when officers used chokeholds, and its sustained use in situations like *Lyons* was "unconscionable in a civilized society."[76] The district court entered a preliminary injunction enjoining the use of the chokehold, and it also ordered an improved training program and regular reporting and recordkeeping.[77] On appeal, the Ninth Circuit affirmed.[78]

The Supreme Court reversed the Ninth Circuit, concluding Lyons had failed to demonstrate a case or controversy with the City that would justify the equitable relief sought, and, therefore, the federal courts were without jurisdiction to entertain Lyons's claim.[79] "In a departure from previous decisions, the Court concluded that plaintiffs must satisfy these standing requirements[80] for each type of relief sought and, further, that plaintiffs seeking injunctive or declaratory relief must show an additional likelihood of future injury."[81] In other words, even where a plaintiff has personally suffered harm, the plaintiff does not have standing to seek injunctive relief where it is speculative he will be similarly injured in the future. The Court found Lyons failed to allege a policy or practice extending to his situation—where the victim did not resist or provoke police.[82] Because the City's policy only authorized chokeholds to counter a suspect's resistance to an arrest, even if Lyons were arrested again, there was no evidence the arresting officer would use an illegal chokehold.[83]

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73 *Id.*
74 *Id.* at 99.
75 *Id.*
76 *Id.*
77 *Id.* at 100.
78 *Id.*
79 *Id.* at 102.
80 *See supra* Part III–A.
81 Garrett, *supra* note 62, at 1819.
82 *Id.*
83 *Lyons*, 461 U.S. at 110.

Therefore, even though Lyons had been subjected to the chokehold in the past when arrested for a traffic violation, there was no evidence he would be arrested in the future, so his claim that he would again experience injury as a result of an LAPD officer's chokehold was "speculative."[84] The Court specifically stated:

> that Lyons may have been illegally choked by the police, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance of his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.[85]

The dissenters decried the decision and asserted, "The Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court."[86]

C. Standing to Pursue Injunctive Relief Post-*Lyons*: Credible Threat of Future Harm

Critics argued post-*Lyons* that the Court's new standard for injunctive relief, which necessitated plaintiffs show a "virtual certainty of future injury," was an insurmountable obstacle.[87] However, federal courts have since "afforded plaintiffs standing for injunctive relief against government officials in a wide range of factual circumstances."[88] According to Garrett, these cases indicate the *Lyons* standing requirement is satisfied when a plaintiff shows she faces a "credible threat" of future injury from the application of a specific policy.[89] Garrett further explains:

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[84] *Id.* at 109.

[85] *Id.* at 105.

[86] *Id.* at 137.

[87] Garrett, *supra* note 62, at 1817.

[88] *See id.* (arguing that, properly understood, *Lyons* should not pose a significant obstacle in racial profiling cases) (citing Hernandez v. Cremer, 913 F.2d 230, 237 (5th Cir. 1990) (requiring the INS to perform procedures before attempting to exclude those presenting documentary evidence of U.S. citizenship)); LaDuke v. Nelson, 762 F.2d 1318, 1331–32 (9th Cir. 1985) (enjoining the INS from conducting warrantless farm searches); Nat'l Cong. for P.R. Rights v. City of New York, 75 F. Supp. 2d. 154, 161 (S.D.N.Y. 1999) ("Courts have not been hesitant to grant standing to sue for injunctive relief where numerous constitutional violations have resulted from a policy of unconstitutional practices by law enforcement officers.").

[89] Garrett, *supra* note 62, at 1820.

> Determination of credible threat is a flexible, individualized inquiry that is left to the discretion of the court. Specifically, a court determines credible threat by analyzing examples of prior official conduct. Courts follow a highly fact-specific inquiry and proceed by assessing whether the police follow a practice of misconduct and whether police will continue to follow this practice.[90]

Since *Lyons*, courts focus on whether a plaintiff seeking injunctive relief faces a "credible threat" of future injury by considering two factors: "(1) whether government conduct was authorized by policy, practice, or custom of official misconduct;[91] and (2) whether plaintiff was law-abiding or instead precipitated the encounter by engaging in avoidable behavior."[92]

Garrett maintains that for plaintiffs to show a credible threat, "vigilant documentation" will likely be required.[93] Regarding the first factor, documentation of authorization includes a department's written or formal policy, an implied policy or a practice of conduct, a pattern of police behavior, or evidence of insufficient training or repeated failure to respond to complaints of abuse.[94] Regarding the second factor, Garrett explains that while *Lyons* emphasized "the slim chance that Lyons would again commit a traffic violation, again be stopped by police, and again be choked in violation of police policy," most courts since *Lyons* find standing where plaintiffs do not violate the law.[95] Courts have found patterns of police misconduct particularly troubling "where police injure law-abiding citizens engaging in routine daily activity."[96]

Using the framework articulated by Garrett, I argue *Lyons* should not pose a significant obstacle to standing in SRO brutality cases, and, in fact, certain features of the school policing context make it particularly amenable to structural reform litigation.

IV. BEYOND *LYONS*: STRUCTURAL REFORM LITIGATION IN THE SCHOOL POLICING SETTING

Structural injunctions are the legal remedy most favorably suited to dealing with the systemic and institutional roots of SRO brutality. By

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[90] *Id.* at 1822.

[91] *See supra* Part II–A (discussing how this factor is similar to the showing required by *Monell* for § 1983 liability on the merits. Under *Monell*, plaintiffs must show that government conduct was authorized by a final decision-maker or a pattern or practice of government conduct exists).

[92] Garrett, *supra* note 62, at 1817.

[93] *Id.* at 1825.

[94] *Id.*

[95] *Id.* at 1825–26.

[96] *Id.*

way of illustration, if Lyons's § 1983 claim for injunctive relief had been successful, an injunction would have required LAPD to formulate an adequate training plan for the use of chokeholds and provide the court with records of its use to remove a court imposed ban. This would have reduced the risk that chokeholds would be used in ways that violated constitutional limitations on the use of force. Because of the limitations inherent in the § 1983 damage remedy, and despite the limits *Lyons* placed on the availability of injunctive relief, some lawyers today are pursuing private structural reform litigation in the hopes of meaningfully changing departmental policies and practices regarding SRO hiring, training, and behavior. One such case, filed by the Southern Poverty Law Center on behalf of students in Birmingham, Alabama, particularly illustrates the features of the school policing setting, which make it amenable to § 1983 injunctive relief. Namely, student victims of SRO brutality experience a unique "credible threat" of future injury due to their distinct, involuntary status as public schoolchildren. Below, I look in detail at the *Birmingham* case, and expand upon how students seeking to challenge SRO policies and practices through § 1983 lawsuits should succeed in overcoming the obstacles of *Lyons*.

A. The Birmingham Schools Pepper Spray Case

After discovering police officers stationed in Birmingham, Alabama, public schools routinely pepper-sprayed and maced students as punishment for minor, noncriminal offenses, the Southern Poverty Law Center filed a § 1983 lawsuit "to challenge the written and unwritten policies, practices, and customs of the Birmingham Police Department ('BPD') regarding the use of mace against children in the Birmingham City Schools ('BCS') and to protect the Fourth . . . Amendment rights of these children."[97] Six named plaintiffs filed suit "on behalf of a class composed of all current and future students who are or will be enrolled in any high school in the BCS system."[98] The Third Amended Complaint alleged:

> School personnel frequently [call] upon SROs to forcefully intervene in minor incidents of childish misbehavior that schools would typically handle as internal matters without resorting to law enforcement. Instead of de-escalating these situations, SRO involvement often has the opposite effect. Officers are quick to resort to pepper spray, [and SROs fail to follow BPD decontamination procedures after each incident]. . . . As a result of the Defendants' conduct, all of which

[97] Third Amended Complaint, *supra* note 3, at 1–2.
[98] *Id.* at 4.

> is authorized by BPD policy, practices, and customs, the Plaintiffs have suffered severe physical and psychological harm. . . . Mace is used so frequently and so indiscriminately in Birmingham's public high schools that each Class Representative—all BCS students—faces a real and substantial risk of future and repeated injury.[99]

In addition to individual damage claims, the plaintiffs sought injunctive relief to compel the BPD police chief to abandon the use of chemical weapons against schoolchildren and revise BPD's unconstitutional policies.[100]

After a twelve-day bench trial, an Alabama federal district court concluded (1) Fourth Amendment violations had occurred pursuant to BPD policy or custom, and (2) plaintiffs had met their burden and were therefore entitled to injunctive relief.[101] On the subject of standing specifically, the defendant BPD police chief made two arguments.[102] First, he claimed, pursuant to *Lyons*, that the plaintiffs[103] had failed to show a sufficient risk an SRO would again spray them with pepper spray, so their future harm was merely speculative.[104] Second, the defendant claimed "courts must generally be unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury."[105] Regardless, the court concluded the plaintiff had "standing to pursue injunctive relief because . . . she had established a real and immediate threat of future injury."[106]

The court distinguished *Lyons* based on three factors.[107] First, "while *Lyons* involved a member of the general public who had an unfortunate encounter with a police officer,"[108] here, the plaintiffs were compulsory members of a specific group who had an inherently high risk of contact with the contested behavior. In support of this conclusion, the court pointed out that school attendance is compulsory under Alabama state law, SROs are stationed in all Birmingham public high schools, and SROs carry pepper spray and have "no qualms about using it."[109]

Second, while the *Lyons* Court found no evidence showing the officers' conduct was authorized by a municipal policy, the *Birmingham*

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[99] *Id.* at 3–4.
[100] *Id.* at 4.
[101] J.W. v. Birmingham Bd. Of Educ., 143 F. Supp. 3d 1118, 1126 (2015).
[102] *Id.* at 1163.
[103] Because of the number of plaintiffs, differences in the facts of their circumstances, and the variety of different legal avenues from which they sought relief, I simplify J.W. v. Roper in the explanation that follows by referencing plaintiffs generally, rather than discussing individual claims.
[104] *J.W.*, 143 F. Supp. 3d at 1126.
[105] *Id.* at 1165.
[106] *Id.* at 1163 (citing Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir. 1994)).
[107] *Id.* at 1164.
[108] *Id.*
[109] *Id.* at 1165.

Court found BPD's actions were the result of an official policy.[110] Specifically, the court heard the defendant "testify repeatedly that the SROs acted pursuant to BPD policy when they exposed plaintiffs" to chemical spray.[111] Consequently, "the challenged behavior . . . [was] the product of 'injurious policy, and different from the random act at issue in *Lyons*.'"[112] Since the officers acted pursuant to an official policy, it was significantly more likely that the plaintiffs' injuries would occur again.[113]

Finally, while the *Lyons* Court refused to assume Lyons would repeat the illegal conduct that would place him at risk of injury, the plaintiffs' behavior here was entirely lawful. According to the court, the plaintiffs' encounters with BPD officers demonstrated "a minor disturbance is the only thing necessary" to trigger the injuries feared by the students.[114] The court further found, "the circumstances under which the S.R.O.s sprayed the plaintiffs in this case . . . demonstrate that a variety of normal adolescent behavior is sufficient to result in S.R.O.s spraying students with [chemical spray.]"[115] The court concluded, based on the above factors, that the *Birmingham* plaintiffs had standing to pursue injunctive relief against the BPD police chief.[116]

B. Uniqueness of the School Policing Setting: Involuntariness and Increased Likelihood of Future Harm

The *Birmingham* Court's assessment of plaintiffs' likelihood of future harm parallels the "credible threat" framework articulated by Garrett—both emphasize official authorization of defendants' misconduct and law-abiding conduct on the part of plaintiffs.[117] But, the court in the *Birmingham* case also introduces a new factor to the *Lyons* analysis: the plaintiffs' status as involuntary members of a specific group who, by definition, had an increased risk of exposure to the challenged behavior.[118] This factor is unique to the school policing setting, because it is impracticable for students, given state compulsory attendance laws and the prevalence of SROs in public schools, to choose not to interact with the officers policing their schools.[119] Involuntariness distinguishes public school students from civilians in the wider population; while most civilians do not interact with police officers on a daily basis, students in

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[110] *Id.*
[111] *Id.*
[112] *Id.* (citing Foster Children v. Bush, 329 F.3d 1255, 1266 (11th Cir. 2003)).
[113] *Id.*
[114] *Id.* at 1166.
[115] *Id.*
[116] *Id.* at 1167.
[117] Garrett, *supra* note 62, at 1817.
[118] *J.W.*, 143 F. Supp. 3d at 1165.
[119] *Id.*

schools with SRO programs interact with police officers in hallways, classrooms, lunch lines, and play areas. Student who are victims of SRO brutality face the prospect of continuous interaction with the same SRO in the future. Accordingly, I argue it is the unique, involuntary status of public schoolchildren that makes the school policing setting particularly amenable to structural reform litigation. This factor, which significantly increases the likelihood of "future injury" for students injured by SROs, will translate to all SRO § 1983 litigation.

V. WHAT LIES AHEAD: THE NECESSITY AND DIFFICULTY OF VIGILANT DOCUMENTATION

Structural reform litigation is the legal remedy most suited to dealing with the widespread, systemic roots of SRO misconduct. Post-*Lyons*, plaintiffs seeking equitable relief must, besides meeting the Supreme Court's traditional standing requirements, show an additional likelihood of future harm.[120] This "likelihood of future harm requirement is satisfied when plaintiffs show a 'credible threat' of future harm."[121] "Specifically, a court determines a credible threat by analyzing examples of prior official conduct."[122] This inquiry is flexible and highly fact-specific: courts "proceed by assessing whether the police follow a practice of misconduct and whether police will continue to follow this practice."[123]

In the school policing setting, courts consider three factors to determine if a plaintiff requesting injunctive relief faces a credible threat of future injury: (1) whether plaintiffs were involuntary members of a specific group who, by definition, had an increased risk of exposure to the challenged behavior; (2) whether SRO conduct was authorized by government policy, practice, or custom; and (3) whether plaintiffs were law-abiding or instead precipitated the encounter by engaging in avoidable behavior.[124] Below, I will explore the documentation necessary to prove each factor, and assess difficulties plaintiffs might face in trying to do so.

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[120] Garrett, *supra* note 62, at 1817.

[121] *Id.* at 1820.

[122] *Id.*

[123] *Id.* at 1821.

[124] *See supra* Parts III–C and IV–A (stating factor one comes from the *Birmingham* case, and factors two and three come from the Garrett case).

A. Involuntariness and Increased Risk of Exposure to Challenged Behavior

The involuntary status of public schoolchildren is relevant to the future-harm inquiry, because students are inherently at increased risk of exposure to injuries resulting from SRO misconduct. Most states' compulsory attendance laws require children to attend school from ages six to seventeen, and courts are unlikely to find a plaintiff lacks standing because she could have avoided being injured in the future by dropping out of school.[125] For example, on the topic of the plaintiffs' status as members of an involuntary group, the *Birmingham* Court acknowledged "the obvious public policy grounds for encouraging teenagers to complete their high-school education."[126] Consequently, where SROs are prevalent in a district's schools, it is impracticable for students to choose not to interact with offending officers. Most SRO programs either require or authorize SROs to patrol common areas of the school,[127] increasing the prospect of repeated contact with the same SRO throughout the students' academic careers.

Strategically, class actions contribute to a finding that plaintiffs are involuntary members of a specific group. Class certification, generally speaking, "adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'"[128] But, in school policing cases, class certification lends credence to the fact SRO brutality affects large numbers of plaintiffs who regularly interact with these officers.

For example, the *Birmingham* case was brought on behalf of a class consisting of all current and former BCS high school students and contained two groups of class representatives—students intentionally sprayed with chemical spray, and students accidentally exposed to chemical spray.[129] In granting class certification, the court emphasized the importance of "the bystander students impacted indirectly by the use of chemical spray."[130] It stated that even where an SRO makes "an effort to restrict the chemical spray to the student in question, chemical spray is nonetheless an aerosol that knows no boundaries and makes no distinction between misbehaving and compliant students."[131] The court concluded, "[t]o the extent that Plaintiffs prevail, *all* students will benefit

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[125] *See J.W.*, 143 F. Supp. 3d at 1165 n.66.
[126] *Id.*
[127] Tomar, *supra* note 28.
[128] Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976).
[129] *J.W.*, 143 F. Supp. 3d at 1158.
[130] J.W. v. Birmingham Bd. of Educ., No. 2:10-cv-03314-AKK, 2012 U.S. Dist. LEXIS 124183, at *7 (N.D. Ala. Aug. 31, 2012).
[131] *Id.*

from the implementation of revised policies and more effective training."[132]

The *Lyons* Court added the future-harm element to its standing requirements "in part because [it] was reluctant to let the 'generalized grievance' of one individual harmed in one encounter permit city-wide injunctive relief."[133] But, the school context is unique, and instances of SRO brutality are not isolated. Students are involuntary members of a group of people who have an increased risk of being exposed to harmful police policies and practices compared to the population at large.

B. Authorization by Government Policy, Practice, or Custom

Authorization is relevant to proving future harm, because it is significantly more likely that a student's injury will occur again if the SRO's misconduct was authorized or part of an official policy. This factor "requires a showing similar to that for section 1983 liability on the merits to demonstrate that officials authorized misconduct."[134] *Monell* requires plaintiffs to demonstrate a final decision-maker approved the government conduct or the existence of a pattern of the government conduct.[135] Although courts have not made an overt connection between *Monell* and *Lyons*,[136] in *Lyons*, the Court also considered police testimony, past-injury statistics, and other "evidence showing a pattern of police behavior."[137]

In the *Birmingham* case, for example, plaintiffs provided extensive documentation showing the defendants' conduct was authorized by BPD policy, practices, and customs.[138] In their Third Amended Complaint, plaintiffs included copies of BPD's written Use of Force and Chemical Restraint policies and alleged:

> The expansive language contained in . . . BPD's policy on Chemical Spray Subject Restraint: Non-Deadly Use of Force permits and encourages BPD officers, including SROs, to recklessly deploy chemical weapons against individuals, including children, in inappropriate situations and allows officers to respond disproportionately to student misbehavior. . . . BPD, through [its police chief], has adopted and encouraged

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132 *Id.* at *11.

133 Garrett, *supra* note 62, at 1817–18.

134 *Id.* at 1823.

135 *Monell*, 436 U.S. 658, 694 (1978) (holding a municipal government liable under § 1983 when injuries are caused pursuant to a policy or custom, whether caused directly "by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.").

136 Garrett, *supra* note 62, at 1823 n.34.

137 *Id.* at 1823.

138 J.W. v. Birmingham Bd. Of Educ., 143 F. Supp. 3d 1118, 1126 (2015).

> widespread and persistent unconstitutional practices and customs that permit and encourage SROs to use chemical weapons against BCS students in inappropriate situations and in an abusive manner.[139]

Plaintiffs also included fact-specific sections demonstrating the SROs' conduct was consistent with BPD policy, practices, and customs, including instances where SROs used chemical spray

> (a) as a first resort, and without issuing a warning to students; (b) against students who posed no risk of injury to themselves or others; (c) against students who were restrained; (d) against students as a form of punishment; (e) without regard to others in close proximity to the intended target; and (f) as a way to intimidate and control peaceable students.[140]

Also helpful to plaintiffs was the fact that, at trial, BPD's police chief testified the SROs acted pursuant to BPD policy when they exposed plaintiffs to chemical spray.[141]

Unfortunately, it will often be the case that § 1983 plaintiffs are unable to provide the court with such comprehensive documentation. Like proving municipal liability under *Monell*, it may be difficult to prove authorization at the outset of a lawsuit, as police departments often do their best to conceal the necessary documentation until discovery. Yet, according to Garrett, showing authorization sufficient to support standing "should not be unduly burdensome."[142] To show authorization, plaintiffs can provide evidence of a department's written or formal policies, implied policies or practices of conduct, a pattern of police behavior, or proof the officers lacked adequate training or frequently failed to act following grievances of abuse.[143] Most school districts with an SRO program have a written agreement, or Memorandum of Understanding (MOU), between the district and the police department.[144] Through state open records statutes, plaintiffs should be able to request copies of MOUs, documentation of similar incidents between SROs and other students, written use of force and restraint policies, and documentation of discipline (or lack of discipline) for an SRO's past misconduct. Through this evidence, plaintiffs' counsel should be able to piece together sufficient documentation to show authorization of SRO misconduct.

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[139] Third Amended Complaint, *supra* note 3, at 22–23.

[140] *Id.*

[141] *J.W.*, 143 F. Supp. 3d at 1165.

[142] Garrett, *supra* note 62, at 1824.

[143] *Id.* at 1825.

[144] U.S. Dep't. of Justice, *Fact Sheet: Memorandum of Understanding for FY2013 School-Based Partnerships* (September 2013), https://cops.usdoj.gov/pdf/2013_MOU-FactSheet_v2_091613.pdf [https://perma.cc/R5KT-PL44].

C. Law-Abiding Plaintiffs

Most courts post-*Lyons* have found standing where police injure plaintiffs who did not violate the law, because law-abiding "plaintiffs do not have to induce a police encounter before the possibility of injury can occur."[145] This factor is relevant to determine future harm because courts have found a pattern or practice of "police misconduct is a serious threat where police injure law-abiding citizens engaging in routine daily activity."[146]

Plaintiffs in SRO brutality cases are frequently acting within the confines of the law. The incidents documented in Part I of this paper are evidence of this—in those instances, SROs responded with excessive and unnecessary levels of force to students who were, for example, merely crying in a hallway or cutting a cafeteria line. Because many SROs are charged with enforcing a school's Student Code of Conduct, ordinary adolescent misbehavior—such as cell phone use, cursing, and tardiness—often results in macing, tasing, and other instances of SRO brutality.[147]

In the *Birmingham* case, the court found the plaintiffs were acting lawfully when BPD officers sprayed them with chemical spray.[148] First, the incidents alleged in the complaint—for example, the macing of a female student who was standing outside a school building and sobbing—led the court to conclude "a minor disturbance is the only thing necessary to trigger" the injuries feared by the plaintiffs.[149] The court continued, "the circumstances under which SROs sprayed the plaintiffs in this case . . . demonstrate that a variety of normal adolescent behavior is sufficient to result in SROs spraying students with [chemical spray]."[150] Furthermore, the court noted none of the plaintiffs in the case ever faced legal ramifications for the behavior that caused BPD officers to spray them.[151] Finally, at trial, two officers "seemed to suggest that they always arrest students they spray with [chemical spray] as a post-hoc justification for their use of force."[152]

Nonetheless, potential § 1983 plaintiffs will face difficulties in proving they were law-abiding. Problematically, attorneys representing SROs in § 1983 litigation often attempt to justify their clients' behavior by claiming that plaintiffs failed to comply with SRO orders, and the offending officers merely responded in a way necessary to "maintain and

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[145] Garrett, *supra* note 62, at 1826 n.48 (citing LaDuke v. Nelson, 762 F.2d 1318, 1326 (9th Cir. 1985)).
[146] *Id.* at 1825–26.
[147] *See* J.W. v. Birmingham Bd. Of Educ., 143 F. Supp. 3d 1118, 1125 (2015).
[148] *Id.*
[149] *Id.* at 1166.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 1167.

control discipline at the school."[153] For example, in response to the Birmingham school's litigation, a press release from the Birmingham mayor's office asserted, "[d]efendants will prove at trial that if the plaintiff students were tending to their reading, writing and arithmetic and behaving in an orderly fashion, they would not have been maced."[154] While the evidence at trial proved none of the *Birmingham* plaintiffs faced legal ramifications for their behaviors, "noncriminal offenses can escalate to criminal charges when officers are not trained in child and adolescent development."[155] Furthermore, when officers lack additional training on how to recognize and respond to youth with mental health, trauma-related, and special-education-related disorders, ordinary behaviors can take on the appearance of resistance or aggression.

If a court finds that a plaintiff was not law-abiding at the time of the incident in question, it will likely be unwilling to assume the plaintiff "will repeat the type of misconduct that would once again place him or her at risk of injury."[156] Therefore, § 1983 plaintiffs should make sure not only to compile evidence such as video footage and witness testimony, but also to include additional documentation, such as the SFY report and other similar studies; information on childhood and adolescent development; national training standards and model training programs; and data on SRO stops, frisks, searches, and arrests—with separate data for school detentions. Through this evidence, plaintiffs should be able to document SROs are not responding to criminal conduct, but are rather injuring students engaging in normal adolescent behavior.

VI. CONCLUSION

As widespread opposition to police brutality increases, private plaintiffs aided by public interest groups are challenging SRO practices in federal court with the hopes of dismantling and transforming a destructive system. Obtaining injunctive relief is a critical goal, because the § 1983 damage remedy offers a weak link to facilitating real change in the policing of America's public schools. Despite critics' concern that *Lyons* largely shut the door to restructuring police institutions, I argue litigation in the school policing context has the potential to clear the doctrinal hurdles erected by *Lyons*. Namely, the unique and involuntary status of public schoolchildren distinguishes the school policing from the civilian context, and makes it particularly amenable to structural reform litigation.

I acknowledge an advocacy strategy focusing solely on structural

[153] *J.W.*, 143 F. Supp. 3d at 1165 (citing Honig v. Doe, 484 U.S. 305, 320 (1988)).
[154] Klein, *supra* note 2 (citing a press release from the Birmingham Mayor's Office).
[155] FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY, *supra* note 23, at 47.
[156] Honig v. Doe, 484 U.S. 305, 320 (1988).

reform litigation is incomplete. At bottom, structural reform litigation is tethered to a constitutional harm. Oftentimes, an SRO's behavior *will* be so egregious that it rises to the level of excessive force, but immoral or unethical behavior is not always unconstitutional. Many instances of SRO misconduct cannot be redressed by the Fourth Amendment, and the problem of policing is not limited to violations of constitutional rights. Accordingly, "the judiciary and the constitution can never successfully address the problem of policing without assistance."[157] Furthermore, even when plaintiffs prevail, truly successful structural reform requires continual support from school districts and municipalities, dedication by police department executives, and buy-in on the part of individual SROs. Open discussion and evaluation of progress is essential to transforming a system when its problems are so deeply rooted. In conclusion, I propose lawyers working with students and families on § 1983 cases should also work collaboratively with the various stakeholders because an engaged and organized community is central to achieving meaningful change. This is not to minimize the value in civil rights litigation—as Ebony Howard, the attorney for the plaintiffs in the *Birmingham* case, observed that § 1983 litigation "is a great way to force people to come to the table, it gives others courage, and you can't dismiss the impact of having kids and parents stand up against injustice."[158]

[157] Harmon, *supra* note 36, at 768.

[158] Telephone Interview with Ebony Howard, Associate Legal Director, The Southern Poverty Law Center (Oct. 19, 2016).

Microaggressions and Sexual Harassment: How the Severe or Pervasive Standard Fails Women of Color

Katherine E. Leung*

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INTRODUCTION

Fighting sexual harassment is a bit like fighting a mythological Hydra every morning when you walk out the door. For every head we manage to chop off through civil rights statutes or litigation, it grows several more, determined to come up with new ways to sexualize and humiliate women who are just trying to go about their lives in peace. Whether we're walking down the street, having drinks with friends, or sitting at a desk, women face the possibility of sexual harassment everywhere we go. Going out for drinks with my friends frequently presents the textbook example of how men sexualize women of color. From "sorry sweetheart I only date Asian chicks" to "who's your spicy little friend?" men's comments sometimes suggest that they think they're ordering takeout in a little black dress. As a biracial woman, I hear how exotic I look at least twice a week, almost as often as I am asked where I am from, because my eyes just have that special "oriental"[1] look about them. In fact, since starting college, I have endured unwelcome advances from passersby on the street, men sitting nearby on airplanes, in coffee shops, and at restaurants. In addition to being unwelcome, their comments consistently include the words "exotic" or "oriental," along with questions about where I am from and, if the speaker is a *How I Met Your Mother* fan, how half-Asian chicks are the hottest. Race is a key component of how these men attempt to sexually objectify me, making the two forms of harassment inextricably intertwined and lending a distinctly sexual undertone to the racist language they employ.

In the past year alone, workplace sexual harassment and gender discrimination have garnered a great deal of media attention, but very little of that attention focused on women of color. News outlets have covered a number of wealthy white women's sexual harassment complaints against senior male executives, including Gretchen Carlson's sexual harassment claim against Fox News, and the complaints filed by associates and partners at Chadbourne & Park.[2] But these cases are not representative of the average American woman's experience with workplace sexual harassment, nor are they demonstrative of the unique ways in which women of color experience sexual harassment. While there has also been minor media coverage of sexual harassment of young women of color by

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[1] The term "Oriental" has been used in the United States and other Western nations to describe Asian imports, particularly rugs, for centuries. *See e.g. Oriental*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, https://www.merriam-webster.com/dictionary/oriental [https://perma.cc/4PUK-64UT] (defining "oriental" to include "of, relating to or coming from Asia and especially eastern Asia").

[2] Complaint and Jury Demand, Carlson v. Ailes, No. 2:16-CV-04138 (D.N.J. July 6, 2016), 2006 WL 4722340; Class Action Complaint, Campbell v. Chadbourne & Parke LLP, No. 1:16-CV-06832 (S.D.N.Y Aug. 31, 2016), 2016 WL 4547501.

their supervisors, it has been limited to smaller publications and has received virtually no television news coverage.[3] This heavy emphasis on the experiences of white women is typical of our legal system's approach to sexual harassment and sex discrimination claims.

DEFINING SEXUAL HARASSMENT

Like much of American employment discrimination law, sexual harassment law derives from Title VII of the Civil Rights Act of 1964, which reads, "It shall be . . . unlawful . . . for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[4] Sexual harassment is a form of discrimination with respect to the terms, conditions, and privileges of employment based on sex.[5] Under existing Title VII framework, sexual harassment can take one of two different forms: quid pro quo harassment and harassment resulting in a hostile work environment.[6] Quid pro quo harassment is generally defined as the demand of sexual favors in exchange for preferential treatment or protection from adverse employment actions.[7] This type of harassment generally involves supervisors' explicit demands of subordinates. These subordinates are in a precarious position should they rebuff their supervisor's advances, given the potential for adverse employment actions.[8] Consequently, modern sexual harassment jurisprudence provides a high degree of protection for employees facing quid pro quo harassment by limiting employers' affirmative defenses[9] and providing the highest degree of protection available for discrimination by a private party.

Hostile work environment claims, by contrast, are subject to the *Farragher/Ellerth* affirmative defense, discussed below.[10] Further, plain-

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[3] *See, e.g.*, Staci Zaretsky, *The Pink Ghetto: Reports of Biglaw Sexual Assault In The Days Following Donald Trump's Election*, ABOVE THE LAW (Nov. 11, 2016), http://abovethelaw.com/2016/11/the-pink-ghetto-biglaw-sexual-assault-in-the-days-following-donald-trumps-election/?rf=1 [https://perma.cc/FF3H-GKQE] (detailing a woman of color's experience with sexual assault at her law firm).

[4] Civil Rights Act of 1964, 42 U.S.C. § 2000e–2 (1991).

[5] *See generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 9–23 (1979).

[6] *Id.* at 32–47.

[7] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (defining sexual harassment under Title VII to include quid pro quo and hostile environment harassment). *See also* Burlington Inds., Inc. v. Ellerth, 524 U.S. 742, 752 (1998) (discussing *Vinson* and the development of the term "quid pro quo harassment").

[8] *See* MACKINNON, *supra* note 5, at 32 ("This [quid pro quo] category is defined by the more or less explicit exchange: the woman must comply sexually or forfeit an employment benefit.").

[9] *Ellerth*, 524 U.S. at 765 (prohibiting use of affirmative defense when harassment results in tangible employment action against the employee, such as "discharge, demotion, or undesirable reassignment").

[10] Farragher v. City of Boca Raton, 524 U.S. 775, 777–78 (1998) ("The defense comprises two

tiffs face the additional burden of proving to a fact finder that the harassment they experienced was severe or pervasive,[11] a subjective standard that is evaluated in comparison to an imagined neutral, non-hostile work environment. Hostile work environment claims can be premised on a variety of different types of conduct, from coworkers' overt sexual comments, to constant public discussion of coworkers' sexual affairs, to a string of small, consistent, sexually charged comments or actions.[12] That degree of variety gives fact finders a lot of room for interpretation when considering the severity or pervasiveness of the harassment in a particular workplace. In determining whether or not conduct was so severe or pervasive as to alter the terms or conditions of employment, fact finders essentially evaluate what norms apply in that workplace and how far the perpetrator or perpetrators can stray from those norms without altering the terms and conditions of employment. Because the laws governing our workplaces were created by men and are most often measured by men, the evaluation of whether or not conduct is severe or pervasive is often governed by male-centered norms, failing to account for how those norms themselves might alter the terms and conditions of employment for women because of their sex.[13]

The *Farragher/Ellerth* defense protects employers from hostile work environment claims so long as they have a sexual harassment policy and adequately publicize that policy to their employees.[14] The defense is only effective if the plaintiff unreasonably failed to avail herself of the company's sexual harassment policy.[15] The *Farragher/Ellerth* defense incentivizes employers to use best practices to prevent and address sexual harassment by giving them an additional liability shield when those practices are in place. The flip side is that the *Farragher/Ellerth* defense introduces subjective judgments about whether a plaintiff has reacted reasonably to sexual harassment, whether she was unreasonable not to trust her employer enough to report the harassment, and whether the harassment was sufficient to alter the terms and conditions of employment. This is due to the fact that, in evaluating whether or not the plaintiff behaved reasonably, the fact finder may draw upon his or her own experi-

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necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."); *Ellerth*, 524 U.S. at 765 (same).

[11] *Ellerth*, 524 U.S. at 752 (requiring demonstration of severe or pervasive harassment in hostile environment claims).

[12] *See* MACKINNON, *supra* note 5, at 32–47 (describing explicit exchanges in quid pro quo discrimination and unwanted sexual advances that make the work environment unbearable for women).

[13] *See* Maritza I. Reyes, *Professional Women Silenced by Men-Made Norms*, 47 AKRON L. REV. 897, 933–38 (2015) (arguing that male values and culture define workplace norms and can result in hidden sexual harassment).

[14] *See Farragher*, 524 U.S. at 778 (stating the elements of the affirmative defense and noting that anti-harassment policies may be addressed when litigating the first element).

[15] *Id.* (listing an element of the employer's affirmative defense as "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise").

ence as a frame of reference. Unfortunately, the fact finder's experience may not provide context for the reactions of a plaintiff who is a member of a marginalized class(es) and has a lifetime's worth of experience in dealing with oppression and discrimination coloring her reactions, unless the fact finder has had a similar life experience.

During the 2016 presidential campaign, we saw numerous examples of how the public reacts to women's stories of sexual harassment and sexual assault.[16] When men learn that their female colleagues have experienced sexual harassment in the workplace their reactions range from awkward embarrassment to outrage;[17] but as numerous reports from October and November of 2017 demonstrate, men and women tend to define sexual harassment in very different terms.[18] The reports also found that men struggle to define what crosses the line between flirtation or rudeness and sexual harassment, and their uncertainty about how to respond often leads to no response at all.[19] This is particularly striking in light of surveys that suggest as many as one in three American women has been sexually harassed at work.[20] Given significant underreporting of both sexual assault and domestic violence,[21] it is entirely possible that these surveys are under-representative of workplace sexual harassment in the United States. These statistics are far from the only indications that workplace sexual harassment is a significant problem in American employment law.

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[16] *See, e.g.*, David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eeed4_story.html?utm_term=.5c40331bc8bd [https://perma.cc/KUM2-D4BU] (discussing reactions to Donald Trump bragging "in vulgar terms about kissing, groping and trying to have sex with women during a 2005 conversation caught on a hot microphone").

[17] *See, e.g.*, Yuki Noguchi, *Workplace Sexual Harassment: A Threat to Victims, a Quandary for Bystanders*, NPR (Oct. 15, 2016), http://www.npr.org/2016/10/15/497944137/workplace-sexual-harassment-a-threat-to-victims-a-quandary-for-bystanders [https://perma.cc/95Y8-NRY3] (explaining workers' experiences with harassment in the workplace).

[18] *See* Eugene Scott, *Some Men Disagree on What Amounts to Sexual Harassment or Assault*, WASH. POST (Oct. 27, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/10/26/survey-shows-how-uninformed-men-are-about-sexual-harassment/?utm_term=.aa2dc36afc1d [https://perma.cc/6YAC-F3Z7] (discussing a survey that demonstrated many men are not sure what sexual harassment is); Hilary Lipps, *How Men's Words Affects Women in the Workplace*, FORBES (Oct. 25, 2016), https://www.forbes.com/sites/womensmedia/2016/10/25/mens-talk-womens-place/#7380f8916f3d [https://perma.cc/U2TG-FMW4] (explaining that women know "all too well" the male-male conversations that demean women and implicitly or explicitly exclude them); Susanna Schrobsdorff, *Men Are Finally Waking Up to Sexual Harassment. But They Still Have a Lot to Learn*, TIME (Nov. 7, 2017), http://time.com/5012697/men-waking-up/ [https://perma.cc/9AK9-8MDJ] (illustrating through examples how many men, even journalists who spent decades covering sexual harassment, have not understood what constitutes sexual harassment).

[19] *See* Scott, *supra* note 18 (A Washington Post–ABC News poll found that "[o]nly 1 in 3 men said they've directly confronted offenders after witnessing harassment or assault, and about a quarter say they regret not doing more").

[20] Lauren Ahn and Michelle Ruiz, *Survey: 1 in 3 Women Has Been Sexually Harassed at Work*, COSMOPOLITAN (Feb. 16, 2015), http://www.cosmopolitan.com/career/news/a36453/cosmopolitan-sexual-harassment-survey [https://perma.cc/VY9W-37FH].

[21] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NAT'L CRIME VICTIMIZATION SURVEY, 2010–2014 6 (2015), https://www.bjs.gov/content/pub/pdf/cv15.pdf [https://perma.cc/3QQG-V8SA] (noting that only 32.5 out of every 100 sexual assaults were reported to law enforcement in 2015).

In 2015, the Equal Employment Opportunity Commission dedicated its entire first board meeting to preventing and addressing workplace harassment, during which the commissioners heard testimony from four different women about their experiences with workplace harassment to better understand how women in the workforce actually experience harassment.[22] This commitment suggests a recognition within the EEOC that sexual harassment has not been eradicated in the American workplace and that perhaps women's experiences with sexual harassment have changed since Mechelle Vinson filed her EEOC complaint in the late 1980s.[23] These are the most recent in a long string of studies and popular culture indicators of women's experiences with harassment in the workplace.[24]

The #NotOkay movement launched in October 2016 highlights the broad impact sexual harassment and sexual assault have on American women.[25] Over one million women tweeted their experiences with sexual harassment and sexual assault using the hashtag #NotOkay, including thousands of stories involving assaults at the hands of coworkers.[26] These stories are indicative of a powerful undercurrent of sex discrimination in the American workplace, which thus far has not been quashed by modern sexual harassment jurisprudence.

THE HISTORICAL SEXUALIZATION OF WOMEN OF COLOR

Representations of women have been divided into stereotypes of Madonna and the whore for centuries.[27] The objectification of women

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[22] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, WOMEN IN THE AMERICAN WORKFORCE, https://www.eeoc.gov/eeoc/statistics/reports/american_experiences/women.cfm [https://perma.cc/DQ9T-H7G2].

[23] *See Vinson*, 477 U.S. at 57 ("Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964 . . . .").

[24] *See* Richard L. Wiener et al., *Eye of the Beholder: Effects of Perspective and Sexual Objectification on Harassment Judgment*, 19 PSYCHOL. PUB. POL'Y & L. 206, 206–08 (2013) (studying the impact of sexual objectification in a simulated job interview for women who experience, observed, or predicted objectification). *See generally* AWARE Sub-Committee on Workplace Sexual Harassment, *Research Study on Workplace Sexual Harassment 2008*, http://aware.org.sg/wp-content/uploads/AWARE_Research_Study_on_Workplace_Sexual_Harassment.pdf [https://perma.cc/ZJZ2-3ERJ].

[25] *See generally* Karina Bland, *#notokay: Women Relive the First Time They Were Assaulted, Touched, Groped. I Was 9.*, THE ARIZONA REPUBLIC (Oct. 9, 2016), http://www.azcentral.com/story/news/local/karinabland/2016/10/09/notokay-women-twitter-first-time-they-were-assaulted-touched-groped-i-was-9/91810758 [https://perma.cc/7GJJ-6H5H]; *#NotOkay: Trump Tape Prompts Outpouring of Sex Assault Stories*, BBC (Oct. 9, 2016), http://www.bbc.com/news/37603217 [https://perma.cc/WRT8-TPRT].

[26] Evette Dionne, *Over 1 Million Women Are Tweeting About Their Sexual Assaults, Thanks to Donald Trump*, REVELIST (Oct. 9, 2016), http://www.revelist.com/politics/not-okay-sexual-assault-trump/5165 [https://perma.cc/58S8-RVQ2].

[27] *See generally* CATHARINE A. MACKINNON, SEX EQUALITY 169–495 (3d ed. 2016).

has been a popular subject for think pieces and documentaries in recent years, but it is rare for these documentaries to address the experiences of women of color specifically.[28] While many aspects of objectification like body shaming or street harassment are common to all women, the failure to analyze the objectification and sexualization of women of color specifically throughout American history further marginalizes the experiences of women of color. This is the exact trap Kimberl. . . Crenshaw describes in her article "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," whereby the centering of men's experiences within movements to advance the rights of people of color and the centering of white women's experiences within feminist movements, doubly marginalizes women of color within these movements.[29]

Social movements or legislative attempts to remedy past discrimination that fail to consider the unique experiences of women of color, or any other group with multiple marginalized identities, fail to root out discrimination against those with multiple marginalized identities by failing to address discrimination that occurs where those two identities intersect. Discrimination at the intersection of two identities will necessarily look different from discrimination based solely on one protected characteristic. Stereotypes about women, people of a particular racial or ethnic background, or persons with disabilities shift when combined with stereotypes about a second marginalized group, making that stereotype or discrimination distinct from the experiences of those who possess one, but not both, of the marginalized identities in question.[30]

A. Stereotyping of Women of Color as Sexual Objects

The most commonly employed stereotypes about any racial group

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[28] *See generally* Noah Berlatsky, *Women's Magazines Objectify Women Just as Much as Men's Magazines Do*, THE ATLANTIC (Mar. 25, 2013), http://www.theatlantic.com/sexes/archive/2013/03/womens-magazines-objectify-women-just-as-much-as-mens-magazines-do/274330 [https://perma.cc/L7QD-XHGT]; Amber Jamieson, *'I Was Just Flesh with No Face, No Name': Five Women on Being Objectified*, THE GUARDIAN (June 3, 2016), https://www.theguardian.com/world/2016/jun/03/five-women-objectified-wendy-davis-jessica-valenti [http://perma.cc/WYS3-KJ4P]; Sam Polk, Opinion, *How Wall Street Bro Talk Keeps Women Down*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/10/opinion/sunday/how-wall-street-bro-talk-keeps-women-down.html [http://perma.cc/XQ3W-7BZQ]; Robin Tran, *4 Ways Men Are Taught to Objectify Women from Birth*, EVERYDAY FEMINISM (June 19, 2016), http://everydayfeminism.com/2016/06/men-taught-to-objectify-women [https://perma.cc/6BV8-6LHW]; HOT GIRLS WANTED (Netflix 2015); MISS REPRESENTATION (The Representation Project 2011).

[29] *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991) (articulating how centering the majority experience within movements leads to the marginalization of individuals with multiple marginalized identities, thereby neglecting the needs of those with intersectional identities).

[30] *See, e.g.*, Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 BERKELEY J. GENDER L. & JUST. 140, 148 (2014) (explaining external forces creating barriers to success for middle-class, educated, Asian-American women and using intersectionality as a framework to analyze the experiences of Asian-American women).

include stereotypes about the sexual habits or appetites of women belonging to that group.[31] Whether those stereotypes are more along the lines of the Jezebel[32] or the Chinese Prostitute,[33] these stereotypes have a direct impact on cultural perceptions of women. This article argues that these perceptions bleed through into the way we talk about women of color and, as a result, how we protect or fail to protect women of color under existing anti-discrimination laws.

Distinct from stereotypes about men of color, which are often motivated by white men's historical desire to prove their own superiority, stereotypes about women of color are often rooted in white men's historical sexualization and objectification of women of color.[34] Throughout American history, Asian-American women have been stereotyped as hypersexual.[35] This stereotype can be traced to the days of the Chinese Exclusion Act and the trafficking of Asian women into the United States.[36] These stereotypes are rooted in the historical treatment of Asian women as sex objects for wealthy white men's enjoyment and profit.[37] This narrative is not limited to Asian-American women; there are similar stereotypes about black women[38] and Latina women,[39] all derived from white men's desire to possess and oppress those women.

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31 *See generally* Danielle Elyce Hirsch, *Recognizing Race in Women's Programming: A Critique of a Women's Law Society*, 19 BERKELEY WOMEN'S L.J. 106 (2004); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999); Celine Parrenas Shimizu, *Queens of Anal, Double, Triple, and the Gang Bang: Producing Asian/American Feminism in Pornography*, 18 YALE J.L. & FEMINISM 235 (2006).

32 *See* David Pilgrim, *The Jezebel Stereotype*, JIM CROW MUSEUM OF RACIST MEMORABILIA (2012), https://ferris.edu/HTMLS/news/jimcrow/jezebel/index.htm [https://perma.cc/Y8W5-4UPD] (describing how the Jezebel is a stereotype of black women as lewd, beguiling, worldly seductresses, which dates to the pre-Civil War United States and was used to justify the rape of enslaved women by white men).

33 The Chinese Prostitute stereotype, along with other stereotypes about Asian-American women (as Geisha girls, for example), conjures up images of brothels in the 1800s and the Asian-American women who were trafficked and brought to the United States to work in them at a time when Asian women were not permitted to immigrate to the United States to join their husbands or to work in other industries. This stereotype and the China Doll stereotype presume that Asian-American women are exceptionally submissive. Popular culture examples include *Madame Butterfly*, *Miss Saigon*, and *Ally McBeal*'s development of Ling Woo, a character known for her mischievous and seductive manner. *See generally* JOHN D'EMILIO & ESTELLE FREEDMAN, INTIMATE MATTERS: THE HISTORY OF SEXUALITY IN AMERICA 85–108 (1988); Rachel Kuo, *5 Ways 'Asian Woman Fetishes' Put Asian Women in Serious Danger*, EVERYDAY FEMINISM (Dec. 25, 2015), https://everydayfeminism.com/2015/12/asian-woman-fetishes-hurtful [https://perma.cc/43F7-PCS9]; GEORGE ANTHONY PEFFER, IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION (1999).

34 *See generally* D'EMILIO & FREEDMAN, *supra* note 33, at 85–108.

35 *See generally* PEFFER, *supra* note 33, at 73–69, 101–03.

36 *Id.* at 6–11 (discussing anti-Chinese legislation that allowed government officials to label women as prostitutes and deny entry or deport them from the United States).

37 *See generally id.* at 102–06.

38 *See* Pilgrim, *supra* note 32 (describing the Jezebel stereotype).

39 Waleska Suero, *"We Don't Think of It as Sexual Harassment": The Intersection of Gender & Ethnicity on Latinas' Workplace Sexual Harassment Claims*, 33 CHICANA/O-LATINA/O L. REV. 129, 130 (2015) (analyzing "how widely held beliefs about Latina sexuality influence Latinas' definition of what constitutes workplace sexual harassment and, in turn, how those beliefs influence how others view the harassment of Latinas").

Despite the pervasive cultural sexualization of women of color, our approach to anti-discrimination law still falls far short of anything that could be called intersectional. For decades, anti-racist theory consistently failed to acknowledge any sexual or gendered component to racial oppression, a failure that continues in much of modern anti-discrimination jurisprudence.[40] Such a one-dimensional view of oppression is destined to fail marginalized groups within the protected classes that anti-discrimination laws are designed to protect.[41] This pattern extends to anti-sexist theory as well, leading to significant disparities in protection against domestic violence for women of color as compared with the protections afforded to white women.[42] These disparities in legal coverage reveal a siloed approach to fighting discrimination, which appears to extend to sexual harassment law as well, despite Title VII's comparatively broad coverage of protected classes.

Despite the ample popular culture and academic documentation of the sexualization of women of color,[43] Title VII's plain language does not acknowledge the variety of stereotypes at play in sex discrimination and their distinct impacts on the people subjected to them. But these stereotypes are not purely theoretical, and they do not exist in a vacuum. They are subject to influence by modern cultural and social factors,

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[40] Hutchison, *supra* note 31, at 7 ("[A]nti-racist scholars often exhibit a misunderstanding of (or a lack of concern for) the relationship between racial oppression and other forms of subordination, particularly heterosexism and patriarchy, and . . . often perpetuate heterosexism and marginalize gay, lesbian, bisexual and transgendered people of color in their work.").

[41] Crenshaw, *supra* note 29, at 1282 ("With respect to the rape of Black women, race and gender converge in ways that are only vaguely understood. Unfortunately, the analytical frameworks that have traditionally informed both anti-rape and anti-racist agendas tend to focus only on single issues. They are thus incapable of developing solutions to the compound marginalization of Black women victims, who, yet again, fall into the void between concerns about women's issues and concerns about racism.").

[42] *See generally* Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J. L. & GENDER 147, 169 (2012) (arguing that race stereotypes affect the way African-American women seek help from law enforcement and the courts).

[43] *See, e.g.*, *Ally McBeal: They Eat Horses, Don't They?* (FOX television broadcast Sept. 21, 1998) (introducing Ling Woo, a hyper-sexualized Asian-American attorney who is suing a Howard Stern-esque radio DJ for sexual harassment after he made sexually explicit comments about her. In the course of the episode Ling states that she would like to have sex with the DJ because she would kill him, while the DJ claims that Ling is only suing him because she has that "slutty little Asian thing" going on. Woo's relationship with Richard Fish throughout the series—including depictions of Oriental massages and her offer of sexual favors in exchange for a job with Fish's law firm—evokes stereotypes about Asian-American women as prostitutes, although Woo's character does defy stereotypes about Asian women as submissive). *See also* Jolie Lee, *Kardashian Photo Plays Off Controversial Black Imagery*, USA TODAY (Nov. 13, 2014), http://www.usatoday.com/story/news/nation-now/2014/11/13/kim-kardashian-photo-black-female-bodies-grio/18962603/ [https://perma.cc/LXW9-LP3J] (explaining that Kim Kardashian's Paper Magazine photo shoot in 2014 was a recreation of a nude photograph Jean-Paule Goude took as part of the 1982 book *Jungle Fever*, which has been widely criticized as a racist depiction of the black female body as always on display); Annie Nakao, *Asian "Ally" Character Puts Stereotypes to Test*," S.F. CHRONICLE (Mar. 3, 1999), http://www.sfgate.com/news/article/Asian-Ally-character-puts-stereotypes-to-test-3095093.php [https://perma.cc/Z5DL-Q9GG]; POCAHONTAS (Walt Disney Pictures 1995) (portraying Pocahontas as both a noble and subservient savage who helps the white settlers and is prepared to sacrifice her own life to save John Smith, and as a sexy Native American princess with whom John Smith falls in love). *See generally* Hutchinson, *supra* note 31.

which contribute to the hypersexualized nature of stereotypes about women of color.

B. Pornography and Its Perpetuation of Stereotypes Historically Applied to Women of Color

Our tolerance of depictions and treatment of women has a direct impact on the most prevalent stereotypes about that culture, including more subtle representations of those stereotypes through other mediums. With the ready accessibility of pornography online, it has become one of many cultural influences on what we consider acceptable treatment of women.[44] Much of the pornography available online is categorized by race, or in the case of white women, by hair color, age, and sex act.[45] Consumers can also select from categories of films depicting transwomen, interracial sex, and LGBT sex. This is the most recent iteration of white men's actualization of their fantasies and assumptions about women of color's sexual proclivities. The historical roots of sexualized racism and oppression directly impact both how we as a society respond to these depictions of the women in question and how women of color react to pornography from a philosophical, legal, and moral angle.[46] As a result, pornography and feminists' responses to how pornography depicts women from different racial and ethnic backgrounds can serve as an interesting entry point into examining how we sexualize different racial groups.

While there are several different feminist arguments about the merits and demerits of pornography as an art form or a form of speech, underlying all of those arguments is what pornography's very existence can tell us about how the men[47] creating and consuming it perceive women.[48] If the ability to narrow down the type of pornography someone wants to consume based on race, age, and gender identity seem to have infected the way that we approach choosing a date or a one-night stand, it does not seem like much of a stretch to believe that the content of pornogra-

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[44] Judith Kegan Gardiner, *What I Didn't Get to Say on TV About Pornography, Masculinity, and Representation*, 38 N.Y.L. SCH. L. REV. 319, 326–27 (1993) (suggesting that for heterosexual men, the "easiest road to a feeling of satisfying masculinity in contemporary U.S. society is a misogyny that is sexualized," and that this is the formula of much straight pornography).

[45] *See generally* Shimizu, *supra* note 31, at 251 (describing classification of pornography by race and other ethnic markers).

[46] *See generally id.* at 238 ("Racialized analyses of pornography demonstrate how the simplifications of sexuality, production, consumption, and fantasy, as well as the rhetoric of gender victimization, register within the context of the lives of women of color.").

[47] While women also consume pornography, the pornography created for women is generally confined to the singular category of "for women" and is still generally created by men.

[48] Some feminists have argued that pornography can help normalize women's desire for sexual pleasure, and can be a liberating experience for adult film actresses, celebrating their bodies and sexual desires. *See* Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1130–34 (1993) (discussing positive imagery about women in pornography and how even violent pornography "may convey liberating messages to feminist women").

phy featuring women from a particular racial or ethnic background might similarly seep into our cultural expectations and assumptions about women belonging to that racial or ethnic group. It is possible that pornography both reveals and reinforces the most invidious and hypersexualized stereotypes about women of color.

Forcing women to consume pornography would be the most blatant example of how pornography might be harmful to women or, in the workplace context, create a hostile work environment, but there are many more subtle ways pornography can harm women.[49] Pornography can harm women simply by forcing offensive or degrading constructions of sexuality and gender roles upon men and women, and by narrowly constructing how women and men can relate to one another.[50] In the event that pornography creates the framework within which men and women relate to one another, it may be creating a hostile work environment for employees who have never consumed pornography and are unaware of their coworkers' consumption or lack thereof by virtue of the stereotypes it helps create and enforce through its representations of women. In fact, there is evidence that the more pornography men consume, the more extreme and violent they want that pornography to be. In many cases consumption of a large volume of pornography is correlated with abusive, violent behavior toward women in the consumer's life.[51] The men who consume this pornography are often unaware of how it has impacted their behavior and deny that pornography is harmful, despite documented correlations with behavioral shifts.[52]

There are also lines of scholarship devoted to the harmful and hostile effect that pornography has on women specifically and how it impacts women's experiences in male-dominated fields.[53] These scholars argue that as women gain entrance into the workplace, men can no longer derive their sense of masculinity from acting as a breadwinner or even working in a male-dominated industry alone, and instead men are turning to highly sexualized misogyny to bolster their individual feeling of masculinity.[54] This sexualized misogyny often comes from consuming large amounts of pornography and imitating the misogyny found therein.[55] This imitation is not necessarily purely sexual. Instead, men might at-

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[49] *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 HARV. L. REV. 1075, 1077–79 (1993) [hereinafter *Comparative Perspective*].

[50] *Id.* at 1078. *See* Robin West, *Pornography as a Legal Text*, *in* FOR ADULT USERS ONLY: THE DILEMMA OF VIOLENT PORNOGRAPHY 108, 117 (Susan Gubar & Joan Huff eds., 1989) (arguing that the "extent to which women accept the descriptions of themselves and of the world generated by pornography is the extent to which they will believe that the 'utopian promises' of patriarchy have been met," and to that extent, patriarchy appears just and good).

[51] Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 799–802 (1991).

[52] *Id.* at 801–02.

[53] *See generally Comparative Perspective*, *supra* note 49; MacKinnon, *supra* note 51, at 793; Kristin H. Berger Parker, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment*, 102 NW. U. L. REV. 945 (2008).

[54] Gardiner, *supra* note 44, at 323–28 (1993).

[55] *Id.* at 327.

tempt to subordinate the women around them, or exert dominance over a particular woman or group of women using misogyny, and in some cases racism, to address deep-seated insecurities about the decline of white male power in the world around them.[56]

The harmful effects of this kind of misogyny on both the consumers of pornography and those around them are readily apparent with respect to women as a group. While pornography is not itself the cause of the glass ceiling or workplace discrimination against either women generally or women of color specifically, the power dynamics at play in the creation and marketing of pornography are also at play in our day-to-day lives, contributing to the disparate treatment of women in workplaces throughout the United States. There will also be specific harms particular to women of color based on how their intersectional identities are portrayed in popular culture. These harms become glaring when examined in the context of pornography, where racial stereotypes are magnified, compared to less overt stereotyping of women of color in national advertising campaigns or broadcast television programming. Asian-American women, for example, are subject to the model minority myth[57] and the China Doll myth, which are then sexualized through the portrayal of submissive Asian-Americans in adult film. Stars engage in anal sex or a gangbang scene in which the actress who is initially perceived as childlike or "pure" submits to and is defiled by the (frequently white) men in the scene.[58] The sexualization of defiling an Asian-American woman in particular also plays into the stereotype of Asian women as submissive, seeking to please men and elders without any thought for themselves.[59] While reasonable scholars disagree on whether these performances are empowering the actresses or are simply another form of oppression,[60] they are clearly engaging with well-documented stereotypes about Asian-American women in a highly sexually-charged manner.

This kind of sexualization of stereotypes can contribute to a new

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[56] *See Comparative Perspective*, *supra* note 49, at 1079–81 (1993) (describing the Canadian Supreme Court's expansion of the definition of "obscenity" to include dehumanizing materials that place women in positions of subordination or servile submission).

[57] Stereotyping Asian-Americans as high achieving and submissive, and attempting to place a wedge between Asian-Americans and other racial and ethnic minorities in the United States. *See* Lisa Kiang et al., *Moving Beyond the Model Minority* 8 ASIAN AM. J. OF PSYCHOLOGY, Mar. 2017, at 1, 1 ("[T]he model minority stereotype refers to the idea that Asian Americans are relatively problem free, hardworking, and perseverant, and it constitutes a powerful typecast for Asian Americans today.").

[58] *See generally* Shimizu, *supra* note 31, at 268–69 (describing an Asian-American pornography star's experience in an adult film focused on gang-banging).

[59] *See generally id.* at 244–58 (providing examples of the historical patterns of racialization of Asian-American women in pornography).

[60] *See generally* Bridget J. Crawford, *Toward A Third Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007) (discussing different meanings of pornography and how they apply to women); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 13–30 (1981) (arguing that pornography perpetuates a system of male dominance and cannot be redeemed); Nan D. Hunter and Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al.*, *in* Am. Booksellers Ass'n v. Hudnut, 21 U. MICH. J.L. REF. 69 (1987) (arguing that censorship of pornography is paternalistic and would be inherently harmful to women).

sexually-charged understanding of that stereotype that has implications outside of one pornographic display, thereby exacerbating the forces of white supremacy and racism that led to the creation of the original stereotypes. Given the high demand for pornography featuring women of color, the manner in which consumers search for pornography by race, and the popularity of interracial pornography featuring white men engaging in sexual acts with women of color, it is clear that there is a substantial racial component to how Americans consume pornography.[61] Within the adult film industry, there is even the admission that producers tend to stick to particular racial stereotypes and archetypes because they are popular.[62] These same stereotypes frequently play out in a less graphic form on network television or in blockbuster films, reinforcing the hypersexual stereotypes about women of a particular racial or ethnic group.[63] All of these cultural factors signal a key interplay between race and sex in stereotyping women of color that directly impacts how they might experience workplace sexual harassment.

IV. INTERSECTIONALITY AND THE SEXUAL HARASSMENT OF WOMEN OF COLOR

Women of color experience harassment at the intersection of their identities as women and as people of color, and that harassment is often intersectional. Yet, our anti-discrimination doctrine still treats harassment and discrimination as if they exist in the separate silos of race and sex rather than as an experience that might include discrimination on the basis of several different protected characteristics all at once. This has created significant barriers to effectively enforcing anti-discrimination law to protect women of color.

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[61] *See generally* Keli Goff, *Is the Porn Industry Racist?*, THE ROOT (Apr. 3, 2013), http://www.theroot.com/articles/culture/2013/04/pornindustry_racism_whats_behind_it [https://perma.cc/28VN-7T77] (discussing the popular pornographic phenomenon of white men sleeping with women of color, explaining that interracial pornography is a popular subgenre, and relating a pornographic performer's admission that "white female performers are discouraged from participating in scenes with black men"); Gail Dines, *Yes, Pornography Is Racist*, MS. MAGAZINE (Aug. 27, 2010), http://msmagazine.com/blog/2010/08/27/yes-pornography-is-racist [https://perma.cc/GWN8-9YDA].

[62] *See generally* Goff, *supra* note 61.

[63] Consider, for example, *The Secret Life of the American Teenager*, in which the female characters with the greatest interest in and knowledge about sex were all women of color. The characters played into the model minority stereotype (Alice, a high achieving Asian-American character with an extensive knowledge about statistics on sexual activity in high school), and included an oversexed Latina character with a "bad" attitude (Adrian). These same stereotypes are reflected in *Glee*'s Santana Lopez, *Mean Girls*, *Modern Family*, and in all of the INDIANA JONES and JAMES BOND films, to name a few, frequently in connection with young female characters of color and the white men who desire or conquer them.

A. Comparing Standards for Harassment and Discrimination Based on Sex and Race

Although discrimination can occur on the basis of several different characteristics all at once, sex discrimination under Title VII is evaluated under a different standard from other forms of discrimination. This creates a high barrier to enforcement for women of color facing sexual harassment. Race discrimination claims under Title VII are not subject to the *Farragher/Ellerth* defense.[64] These claims are similarly not subject to the same kind of "severe or pervasive" standard that hostile environment sexual harassment plaintiffs are required to satisfy.[65] Although Title VII uses identical statutory language to bar discrimination on the basis of race and sex,[66] sexual harassment jurisprudence has developed an entirely different framework for conceptualizing this type of sex discrimination claim, with additional barriers to enforcement. These judicial standards create opportunities for defendants, attorneys, judges, and jurors to make additional claims or assumptions about whether conduct was "reasonable."

Furthermore, the stereotyping claims available to plaintiffs in sex discrimination cases have not gotten traction as race discrimination claims. Under *Price Waterhouse* and *Schroer*, plaintiffs in sex discrimination claims can plead discrimination based on sex stereotyping because these actions are inherently based on the plaintiffs' sex.[67] Although stereotyping is by no means limited to sex, courts have been hesitant to characterize plaintiffs' race discrimination claims as stereotyping claims.[68] Courts have narrowly construed the definition of race discrimination where stereotypes or other subjective factors were in play. For example, courts have upheld appearance policies prohibiting black women from wearing their hair naturally, or in braids, twists, or dreadlocks, implicating stereotypes about black women's professionalism and neatness.[69]

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[64] *See* discussion *infra* Part II.

[65] *Id.*

[66] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e–2 (1991).

[67] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) ("Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part."); Schroer v. Billington, 577 F. Supp. 2d 293, 303–06 (D.D.C. 2008) ("After *Price Waterhouse,* numerous federal courts have concluded that punishing employees for failure to conform to sex stereotypes is actionable sex discrimination under Title VII.").

[68] *See, e.g.*, EEOC v. Catastrophe Mgmt. Sols., 11 F. Supp. 3d 1139, 1144 (S.D. Ala. 2014) (holding that rescinding the charging party's offer of employment because she refused to cut off her dreadlocks was not discrimination based on race).

[69] *See generally id.;* Brown v. F.L. Roberts & Co., Inc., 419 F. Supp. 2d 7 (D. Mass. 2006) (finding that a man who did not cut hair for religious reasons and was reassigned to a less desirable work environment away from customers may have been reasonably accommodated by his employer); Katherine E. Leung, *Racial Identity Performance and Employment Discrimination Law*, 24 VA. J. SOC. POL'Y & THE LAW 57, 67 (2017) (discussing judicial decisions upholding appearance policies).

The combination of the Court's hesitance to treat plaintiffs' claims as race stereotyping claims and the additional barriers[70] plaintiffs face in sexual harassment cases in pleading and proving a case creates a barrier to many intersectional sexual harassment claims. So long as plaintiffs are forced to choose between the two claims, they will lose access to essential elements of a claim for discrimination based on harassment with deep roots in hypersexualized stereotypes about women from a particular racial or ethnic background. Under these circumstances, plaintiffs could claim race discrimination based on a string of microaggressions combined with an adverse employment action, or sexual harassment based on explicitly sexual comments creating a hostile work environment. However, they would have no clear path to recovery for a consistent string of sexually-charged racist stereotypes.

This effect may be magnified if the harassment is of a less obvious nature. Courts have historically placed a lot of weight on how women are treated in relation to other women of their racial or ethnic background. For example, courts have held what might have been actionable workplace harassment if the plaintiff were a white woman as "friendly" workplace banter when the victim is Latina.[71] Waleska Suero explains that many Latina women draw boundaries differently than white women around sexual harassment. This is a result of the oversexed Latina stereotype and the constant barrage of sexually-charged comments that many Latina women face in the workplace.[72] Because people frequently accept the stereotypes they see in popular culture or other visual mediums as truth,[73] they have a higher tolerance for such conduct. Examples include referring to a Latina woman as "bitch,"[74] discussing how much they like to touch women sexually, or how Latina women in particular like hearing sexual talk.[75] Although the women in both of those cases chose to label their experiences as harassment and pursue claims against their employers, Suero notes that these women define sexual harassment more narrowly. This is in response to the sheer volume of interactions Latina women experience that would likely qualify as harassment to a white

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[70] These additional barriers include subjective evaluations about the severity and pervasiveness of harassment evaluated against the experience of an "ordinary" reasonable woman and how she would have reasonably reacted to the harassment, the affirmative defenses allowing employers to invoke a potentially ineffective sexual harassment policy as an affirmative defense to sexual harassment claims, and evaluations of whether or not a woman was reasonable in distrusting her employer's sexual harassment policy in the event that she failed to avail herself of that policy. *See, e.g.*, Evan D. H. White, *A Hostile Environment: How the "Severe or Pervasive" Requirement and the Employer's Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C.L. REV. 853 (2006) (arguing that "the combination of the 'severe or pervasive' requirement and the employer's affirmative defense makes it difficult for victims to successfully assert a cause of action" in hostile work environment sexual harassment cases).

[71] Suero, *supra* note 39, at 146.

[72] *Id.*

[73] Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 56, 57 (Richard Delgado ed., 1995).

[74] Castellanos v. Wood Design, Inc., No. CIV. 03-3416, 2005 WL 41628, at *1 (D. Minn. Jan. 4, 2005).

[75] Andrade v. Kwon, No. 3:08CV479, 2012 WL 3059616, at *1 (D. Conn. Mar. 26, 2012).

woman who was not subject to the oversexed Latina stereotype.[76]

While the stereotypes applied to women of color will vary based on their racial and ethnic backgrounds, the sexual nature of those stereotypes is relatively consistent and could have a devastating effect on women of color's ability to use sexual harassment law to protect themselves from hostile work environments if those very stereotypes are considered by fact finders to normalize sexual harassment itself. When the stereotypes in film or television are eventually so normalized that we accept them as fact, they impact our understanding of what interactions with people of particular racial or ethnic backgrounds could look like without violating social norms.[77] In light of the highly subjective severe or pervasive standard used to evaluate sexual harassment claims by measuring them as an ordinary woman's experience and expectations of the workplace, it is plausible that the stereotypes that are accepted as factual in popular culture could bleed into a fact finder's decision making process and color their definition of "normal" when evaluating a complaint.

B. Measuring Harassment and Discrimination by White Women's and Men of Color's Experiences

The phenomenon whereby discrimination claims are rooted in white women's and men of color's experiences further marginalizes women of color and has the potential to chill enforcement of anti-discrimination law on behalf of women of color. This effect can become exaggerated when we accept stereotypes that normalize the objectification and sexualization of women of color. While the EEOC has made some efforts in recent years to bring more intersectional claims and has even had some small measures of success, [78] the doctrine itself is hostile to intersectional claims. Furthermore, none of these intersectional claims deal with sexual harassment but instead deal with adverse employment actions based on a combination of protected characteristics.[79]

Kimberl... Crenshaw's definition of intersectionality specifically calls attention to how women of color, and the unique political and social needs that exist at the intersection of their racial and gender identities,

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[76] *See* Suero, *supra* note 39, at 129 (arguing that "the societal stereotypes about Latinas not only impact their experiences with sexual harassment but also impact the ways in which Latinas define and confront offensive sexual behavior at work").

[77] *See* Russell, *supra* note 73, at 57 (using the term "dominant gaze" to describe the tendency of American popular cinema to objectify and trivialize the racial identity and experiences of people of color, even when it purports to represent them).

[78] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SIGNIFICANT EEOC RACE/COLOR CASES [hereinafter RACE/COLOR CASES], https://www1.eeoc.gov//eeoc/initiatives/erace/caselist.cfm?renderforprint=1 [https://perma.cc/66RK-U52Z]. *See, e.g.*, EEOC v. Sears Roebuck & Co., No. 79-1957 A, 1980 WL 108 (N.D. Ga. Mar. 14, 1980).

[79] RACE/COLOR CASES, *supra* note 78.

have been left out of conversations about social movements and fighting discrimination.[80] She explains that by centering the experiences of white women and men of color, both the white feminist movement and anti-racism activists marginalize women of color. Crenshaw advocates for an intersectional approach to fighting discrimination that acknowledges and addresses the needs of members of marginalized groups on the basis of all of their identities.[81] In the decades since these articles were first published, intersectionality has become a prominent part of academic conversations in elite university buildings around the country and within many social justice movements. But as much as intersectionality has changed the face of social justice movements in this country, it has not completely permeated civil rights laws like Title VII.[82]

Ultimately, intersectional identities are a fundamental part of how women of color experience the world around them, whether employment discrimination doctrine acknowledges that intersectionality or not. A woman of color's experience of most spaces is impacted by others' perceptions of her racial or ethnic background and by her decision to assimilate to white cultural norms or instead to amplify her cultural backgrounds and experiences.[83] So naturally, intersectional identities play a key role in how women of color are harassed in the workplace and in how they experience sexual harassment, whether sexual harassment laws recognize that role or not. Identity impacts how people experience harassment, how others react to reports of harassment, and even the form the harassment might take.

American anti-discrimination law currently operates in a comparative framework, rather than an equality framework. When dealing with discrimination, the laws compares the plaintiff's experience to the experience of a similarly situated person who does not have that protected characteristic.[84] But as Devon Carbado and Mitu Gulati point out, this does not capture all of the discrimination taking place in American

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[80] Crenshaw, *supra* note 29, at 1244 (discussing the "various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color").

[81] *Id.* at 1244 (explaining that because "of their intersectional identity as both women *and* of color within discourses that are shaped to respond to" either feminism or anti-racism, women of color are marginalized within both).

[82] *See, e.g.*, Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 710–29 (2001) (arguing that failure to consider discrimination through an intersectional lens under Title VII allows racial identity performance discrimination to persist, particularly so long as claims are evaluated in comparison to similarly situated parties rather than evaluating how one employee's intersectional identity may be subject to very specific forms of discrimination that those comparisons simply do not capture).

[83] *See, e.g.*, Margaret E. Montoya, *Máscaras y Trenzas: Reflexiones un Proyecto de Identidad y Análisis a Través de Viente Años*, 36 HARV. J. L. & GENDER 469, 471 (2013) (explaining how Montoya starts each class and academic talk in Spanish to introduce Brown Space into White Space).

[84] MACKINNON, *supra* note 5, at 22–23 ("The fact that there may be no comparable man is seen not as reason to reexamine the requirement of comparability; it is seen only a reason to provide an exception for a unique and otherwise sympathetic sex-linked need, thereby preserving the sameness/difference approach.").

workplaces.[85] The comparative framework must, by its very nature, center the experiences of some supposedly typical individual outside the protected class and then evaluate whether or not the plaintiff and that "typical" party are similarly situated. This leaves significant room for parties to frame themselves and one another in ways that make it more or less likely that a fact finder will treat the parties as similarly situated. This may even include considerations of whether or not women of color and white women are similarly situated, or downplay racial elements of discrimination and harassment to highlight how women of color and the "typical" white woman are similarly situated. If we know that the judge and jury evaluating a harassment claim will approach it after internalizing stereotypes about women of color that they have seen normalized in popular culture, women of color may choose to frame their complaints in a certain way. For example, they can play up aspects of the harassment that could impact all women, rather than acknowledging that there are racial elements to the claim as well. While this strategy may seem effective to achieve a positive outcome in one specific case, it also fails to create judicial precedent for future intersectional harassment claims to rely upon.

C. Sacrificing Elements of Discrimination Claims to Develop a Larger Class of Plaintiffs

On a very practical level, plaintiffs and attorneys also have to make choices about which claims to pursue and how to define a potential class of plaintiffs. This is a significant and pervasive issue for programming and policy for women in the legal community,[86] which has had a dramatic impact on the development of sexual harassment and sex discrimination law. In an attempt to attract more members and put on programming that is interesting and useful to the largest number of women, women's law societies and bar associations often neglect to address women of color and their experiences directly.[87] The result is programming that addresses white women's experiences and needs, treating them as the norm and as universal to all women, while neglecting the challenges women of color specifically face in the workplace.[88] This treatment of women as a homogenous group that does not experience race discrimination as women, or sex discrimination as people of color, may increase the number of people a program or group includes. But, it does this at the expense of not addressing very real intersectional discrimina-

[85] Carbado & Gulati, *supra* note 82, at 703.
[86] Hirsch, *supra* note 31, at 106.
[87] *Id.* at 107.
[88] *See id.* at 118–19.

tion.[89]

With these undercurrents permeating the legal community, attorneys working to combat systemic discrimination and harassment in the workplace are faced with the decision of whether to address sex discrimination with intersectional legal theories. This does not create law that is the most protective of women with intersectional identities, nor does it focus on a narrower construction of the issue that would allow women to raise a broader class of potential claimants. This is magnified in cases like *Dukes v. Wal-Mart*, where plaintiffs' attorneys tried to build a broad coalition of plaintiffs and combat an entire system of discriminatory practices in a particular corporation.[90] In *Dukes*, the plaintiffs took a race-blind approach to fighting discrimination, instead pursuing a claim based on the amount of discretion given to managers, which resulted in shockingly low promotion rates for women employees.[91] While this resulted in one of the largest proposed classes in American litigation, it also neglected to address experiences of women of color specifically or to explore possible racial disparities in the hiring and promotions at Wal-Mart.[92]

While sexual harassment claims specifically are less likely to be systemic cases, hostile work environment claims have the potential to be class action suits if the harassment is sufficiently ingrained in the corporate culture. As a result, attorneys and plaintiffs may be faced with similar questions in sexual harassment cases. They may have to make determinations about the remedies available to a larger class of plaintiffs, the increased compensation for attorneys in contingency fee agreements as a result of larger classes, and the corresponding increase in settlement offers or damages awards. It would be easy to choose to pursue the higher rate of compensation and the broader class, particularly considering that those class members are likely experiencing a hostile work environment. But that choice comes with a cost in developing good, intersectional sexual harassment and sex discrimination law, and may present an insurmountable barrier to creating intersectional doctrine.

V. MICROAGGRESSIONS AS HARASSMENT

People with marginalized identities experience microaggressions[93]

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[89] Crenshaw, *supra* note 29, at 1242 (explaining the problems with the erasure of intra-group differences in feminist and anti-racist policymaking).

[90] *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., No. C-01-2252-CRB, 2011 WL 7037084, at *3–4 (N.D. Cal. Oct. 27, 2011) (containing a complaint brought on behalf of a broad coalition of plaintiffs).

[91] *Id.* at *8.

[92] Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338, 360–61 (2011).

[93] *See* Aisha M. B. Holder et al., *Racial Microaggression Experiences and Coping Strategies of Black Women in Corporate Leadership*, 2 QUALITATIVE PSYCHOLOGY 164, 164–65 (2015) (adopting the definition of microaggressions as commonplace verbal, environmental, or behavioral indigni-

every day, and if pervasive enough, modern sexual harassment law might recognize those microaggressions as a form of sexual harassment. Common examples of such microaggressions include coworkers asking, "No, where are you really from?" or making comments such as, "Oh you're just like the cutest little China Doll." Other examples include compliments about how well a nonwhite employee speaks English, or how articulate they are. Employers may overlook a woman's or person of color's ideas only to gush about how good the suggestion is when a white or male coworker restates the idea as their own, and minority employees may be pushed into "diversity" positions rather than traditional corporate management positions.[94]

All women can experience many of these microaggressions, but some microaggressions, like the comment about looking like a China Doll, are rooted in stereotypes about both race and sex. This means that only women of color, and in this case women of Asian descent, will face them. By their very nature, microaggressions are not obvious, but are instead subtle enough that they may go unnoticed by those who do not possess that marginalized trait. In many cases the perpetrator will not recognize the racist or sexist animus in their actions.[95] As a result, combatting microaggressions has not been a driving force behind the development of sexual harassment law, despite their substantial impact on the terms and conditions of employment for the employees who experience them.

A. Inherent Sexualization in Racist Comments Targeting Women of Color

Microaggressions have deep roots in stereotypes, which, as established above, include a highly sexualized component with respect to women of color. As a result, many microaggressions contain a distinct sexual component and will be experienced as a form of sexual harassment by women of color subjected to them. Seemingly inconsequential interactions in which women of color are referred to as exotic, oriental,

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ties, whether intentional or unintentional, which communicate hostile, derogatory racial slights often based on stereotypes).

[94] *See generally id.*; Anne Fisher, *How Microaggressions Can Wreck Your Business*, FORTUNE (Nov. 19, 2015), http://fortune.com/2015/11/19/microaggressions-talent-business [https://perma.cc/P7NA-A3K8]; *African American Women, Microaggressions, and Workplace Bullying*, CONN. HEALTHY WORKPLACE ADVOC. (May 12, 2010), http://ctbullybusters.blogspot.com/2010/05/african-american-women-microaggressions.html [https://perma.cc/N9ER-2CSG]; Heben Nigatu, *21 Microaggressions You Hear on a Daily Basis*, BUZZFEED (Dec. 9, 2013), https://www.buzzfeed.com/hnigatu/racial-microagressions-you-hear-on-a-daily-basis?utm_term=.fqypXrdoO#.vuwMLQ8b2 [https://perma.cc/5GAG-GGPP]; Tanzina Vega, *Working While Brown: What Discrimination Looks Like Now*, CNN (Nov. 25, 2015), http://money.cnn.com/2015/11/25/news/economy/racial-discrimination-work/ [https://perma.cc/K989-FQ5M].

[95] Tori DeAngelis, *Unmasking Racial Microaggressions*, 40 AM. PSYCHOL. ASS'N. 42, 42 (2009).

"spicy," or "salty,"[96] to name a few examples, carry distinctly sexual undertones for those familiar with the history of sexualization, objectification, and oppression of women using stereotypes about their promiscuity or other sexual attributes.

Despite the sexual nature of the stereotypes about women of color, and the very real impact that microaggressions have on the terms and conditions of women's employment regardless of their racial background, the closest we have come to acknowledging microaggressions in relation to sexual harassment law is as a "gateway" to sexual harassment.[97] Most sexual harassment cases instead appear to rely on explicitly sexual language, the interpretation of which is not open to debate.[98]

Not all racist comments directed at women of color are explicitly sexual but many of them engage with stereotypes, which are inextricably intertwined with sexualizing women of color. Calling an Asian-American woman a "chink" or "slanty-eyed," for example, is not a gendered comment, but simply a racist one. Calling her a China Doll, by comparison, invokes stereotypes about Asian-American women specifically, and includes a highly sexualized component.[99] Even the stereotypes that are not about treating women of color as sex objects—for example, the tiger mom, mammy, or angry black woman stereotypes—are about framing these supposed traits as sexually repulsive or completely asexual. Yet, these stereotypes are based on a white conception of other racial groups, and are in many ways the flip side of stereotypes sexualizing women of color based on their fiery tempers or animal sexuality, which are rooted in white men's desire to tame women of a particular racial background.[100] Despite the clear intersection of race and sex in the stereotypes women of color face, we have yet to conceptualize an intersectional theory of sex discrimination or sexual harassment law.

B. Microaggressions as a Form of Identity Discrimination

Neither Title VII itself nor sexual harassment jurisprudence explicitly precludes treating microaggressions as a form of sexual harassment if they are pervasive enough to alter the terms and conditions of employment.[101] Plaintiffs would, however, still have to convince a fact finder

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[96] *See, e.g.*, Vega, *supra* note 94 (describing examples of microaggressive phrases used against people of color in workplace settings).

[97] Rachel E. Gartner & Paul R. Sterzing, *Gender Microaggressions as a Gateway to Sexual Harassment and Sexual Assault: Expanding the Conceptualization of Youth Sexual Violence*, 31 AFFILIA 491, 491 (2016).

[98] *See generally* Suero, *supra* note 39.

[99] *See generally* D'EMILIO & FREEDMAN, *supra* note 33, at 85–108; Kuo, *supra* note 33.

[100] *See generally* D'EMILIO & FREEDMAN, *supra* note 33, at 85–108.

[101] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1991); *Vinson*, 477 U.S. at 62; MACKINNON, *supra* note 5.

that the microaggressions were discriminatory language, that they were severe and pervasive enough to alter the terms and conditions of employment, and that the employer was unreasonable in failing to redress that type of harassment under its anti-discrimination policy.[102] These requirements are so deeply entrenched in our understanding of sexual harassment that, in conjunction with the comparative model upon which sexual harassment law is built, they act as a practical bar to litigation in cases involving sexual harassment through microaggressions.

There are, however, other theories under which microaggressions as a form of sexual harassment could be litigated. Ultimately, microaggressions are an implicit communication of the actor's racist or sexist beliefs, whether or not the actor is even aware of those beliefs. In many ways, this makes microaggressions ripe for the development of an identity performance discrimination theory. Devon Carbado and Mitu Gulati define identity performance discrimination as discrimination on the basis of race, resulting from failure to perform that racial identity in ways that assimilate to whiteness.[103] Identity performance discrimination is in many ways[104] similar to sex stereotyping theories of sex discrimination, which are often rooted in a plaintiff's failure to adhere to certain stereotypes about her sex. This includes, in some cases, gender identity discrimination theories under which plaintiffs have had a significant measure of success.[105]

Combining the sex stereotyping theory of discrimination with identity performance discrimination would give plaintiffs a key entry point to combat microaggressions. The combination is also rooted in existing doctrine, giving courts a concrete jumping off point to expand modern discrimination law to cover this particular form of harassment. While microaggressions may not result in a significant number of adverse employment actions, they do change the terms and conditions of employment. For women of color, this alteration of terms and conditions is amplified even further by the intersection of their identities, as is true of many women of color's experiences with race and sex discrimination more generally.[106]

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[102] *See* discussion *infra* Part II.

[103] Carbado & Gulati, *supra* note 82, at 701 ("[T]he theory of identity performance is that a person's experiences with and vulnerability to discrimination are based not just on a status marker of difference . . . but also on the choices that person makes about how to present her difference. . . ."). *See generally* Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262–63 (1999).

[104] It is, however, important to note that where sex stereotyping discrimination forces plaintiffs to adhere to the traditional gender norms for the gender with which they identify, identity performance discrimination forces individuals to conform to the racial norms of a race with which they do not identify.

[105] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (recognizing sex stereotypes in a Title VII action); Schroer v. Billington, 577 F. Supp. 2d 293, 303–06 (D.D.C. 2008) (same).

[106] *See generally* Mark Hansen, *Worst of Both Worlds: Women of Color in the Legal Profession Face Double Whammy of Discrimination*, 92 AMER. BAR ASS'N. J. 62, 62 (2006) (explaining that minority women struggle against gender and race discrimination barriers to advancement in the legal profession).

C. Implicit Bias as a Barrier to Using Sexual Harassment Law to Stop Microaggressions

Even if our anti-discrimination laws recognized this kind of intersectional identity performance discrimination or harassment claim, plaintiffs would still have to convince fact finders of the merits of these claims. This means that as a practical matter, judges' and juries' implicit bias[107] may act as a barrier to enforcement, even if there were precedent for such an intersectional complaint of harassment or discrimination. Absent such precedent, implicit bias may act as a barrier to ever realizing such an intersectional approach to fighting workplace harassment and discrimination.

CONCLUSION

Women of color's experiences of sexual harassment in the workplace are incredibly varied, but for many of us, sexual harassment frequently includes a racial component rooted in hypersexualized stereotypes. While modern anti-discrimination law and sexual harassment law have made significant strides toward addressing certain types of discrimination, the different standards of evaluation for race discrimination and sex discrimination claims make pursuit of an intersectional claim difficult and perhaps even impossible. The barriers to pursuing these claims, however, have not altered the reality of the unique forms of discrimination women of color face because of their race and sex, nor the importance of redressing that harm.

Sex discrimination law and sex stereotyping theories of discrimination provide a promising framework for addressing this particular brand of discrimination. The stereotyping theory of discrimination combined with identity performance discrimination theory has the potential to make a significant impact on how we understand workplace discrimination and address the reality of how women of color are harassed and discriminated against because of both their race and sex. Even with this blueprint in place, litigators face an uphill battle as a result of the historic siloing of race and sex discrimination claims.

In light of the reality of how women of color experience discrimination, often through microaggressions in addition to more explicitly hostile acts of discrimination, and of the very real impact that microaggressions can have on the terms and conditions of employment, it is essential that we change how we evaluate intersectional claims of dis-

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[107] *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006) ("*Implicit biases* are discriminatory biases based on implicit attitudes or implicit stereotypes.").

crimination. By treating race discrimination and sex discrimination as if they are entirely separate from one another and centering the experiences of white women and men of color in developing our anti-discrimination laws, we miss opportunities to address forms of harassment and discrimination that are most frequently deployed against women of color.