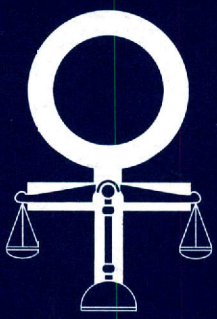

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Notes

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We celebrate the legal, social, and political advances made by women's advocates and enhance the relationship between theoretical and practical perspectives by promoting discourse gender and the law issues. We seek to enrich the dialogue between the sexes by cultivating interdisciplinary discussions and encouraging the affirmation of differences. Finally, we are committed to the challenge of presenting an integrated perspective: one that will empower all women.

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UNIVERSITY WOMEN'S EXPERIENCES IN BRINGING SECOND GENERATION SEX DISCRIMINATION CLAIMS: FURTHER SUPPORT FOR ADOPTION OF A STRUCTURAL APPROACH

Sonia Goltz, Roger Reinsch,
and Joel Tuoriniemi*

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I. INTRODUCTION

Research suggests that regulatory and justice systems may help perpetuate, rather than decrease, sex discrimination at universities. Thus, in the present study, fourteen women were interviewed about their experiences when they attempted to address the inequities they experienced at their universities via these systems. Results indicated that the women, in large part, experienced the more subtle but pervasive second generation discrimination, as opposed to the more overt and identifiable first generation discrimination. The purpose of this article is to further the understanding of second generation sex discrimination claims and to provide support for adoption of a structural approach when addressing second generation discrimination claims. Drawing extensively from the work of Professors Susan Sturm, Samuel R. Bagenstos, and Susan Bisom-Rapp, we analyze the women's experiences and argue for substantive changes in the workplace and legal process in order to better identify and remedy second generation discrimination. Part II of this article outlines the distinction between first generation and second generation discrimination claims and also describes the difficulty in bringing such claims due to the continued embracement of rigid rules and procedures. This difficulty is further perpetuated by the perception of second generation discrimination claims generally held by employers and attorneys as well as the federal and state agencies established to investigate such claims. Part III of this article examines past literature that describes the difficulty in bringing second generation discrimination claims in academia, the workplace of our interviewees. The methodology and sample used in conducting our work is contained in Part IV. Part V sets forth reasons that were identified by our interviewees as to why second generation sex discrimination claims were so difficult to bring against their respective universities and representatives. A framework to alleviate the obstacles associated with bringing second generation discrimination claims, including a discussion of a key Supreme Court decision, is provided in Part VI, calling for development of theoretical models and further research that will allow the regulatory and justice systems as well as employers to better address second generation discrimination claims arising not only within academia, but also across all lines of employment.

II. THE DIFFICULTY IN BRINGING SECOND GENERATION DISCRIMINATION CLAIMS

A. First Generation Versus Second Generation Discrimination Claims

"First generation discrimination" is generally defined as the blatant, easily detectable form of discrimination that was relatively common prior to the Civil Rights Act of 1964. Thus, after this seminal piece of legislation was passed, it was only natural that this became the type of discrimination the legal system attempted to eliminate. Professor Susan Sturm outlined the social landscape prevalent with this form of discrimination in writing:

> The first generation employment discrimination cases mirror the social and political conditions that led to the adoption of the civil rights legislation. Workplace segregation was maintained through overt exclusion, segregation of job opportunity, and conscious stereotyping. Dominant individuals and groups deliberately excluded or subordinated women and people of color. Job requirements that highly correlated with gender or race, such as educational and training prerequisites and height and weight requirements, solidified these patterns of exclusion. Thus, the first generation cases focused largely on dealing with the consequences of a long-standing structure of job segregation. . . . These more blatant practices obviated the need to uncover and analyze more subtle forms of bias that certainly operated even at the early stages of the civil rights laws and contributed to racial and gender marginalization.[1]

First generation discrimination claims of the "[s]moking guns—the sign on the door that 'Irish need not apply' or the rejection explained by the comment that 'this is no job for a woman'—are largely things of the past."[2] These wrongs were fairly easily identified by the plaintiffs because they involved some type of "deliberate" exclusion based on gender. First generation discrimination cases dealt mostly with proving specific facts that identified a form of discrimination generally accepted by all as

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1. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465-66 (2001) (citations omitted).

2. *Id.* at 459-60. *See also* Susan Bisom-Rapp, *Discerning Form From Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMP. RTS. & EMP. POL'Y J. 1, 1-2 (1999) ("Employment discrimination law has reached its mature phase. Long gone are the days when women and minorities were categorically denied access to the most lucrative and prestigious occupations. The civil rights revolution has enabled members of many protected groups to make significant economic gains. Yet despite undeniable progress, empirical evidence indicates that employment discrimination, while not as overt as in the past, can hardly be described as uncommon.").

violating both rules of law and societal norms. Given that first generation discrimination "can be addressed by disaggregating the problem into discrete legal claims,"[3] it is fairly easy to define and to produce factual evidence to support that there was discrimination. The remedies were also fairly easy to apply—stop doing those types of things. If one blatantly discriminates, he or she will lose in court. There were some attempts at a little more subtlety to disguise blatant discrimination, but the courts quickly addressed these practices.[4]

Employers handled first generation discrimination by putting policies and procedures in place that clearly stated that various forms of actual discrimination were prohibited.[5] The list of prohibited acts were generated in response to regulations enacted by the Equal Employment Opportunity Commission (hereinafter "EEOC") and court cases. An example of such rules is that one cannot inquire as to the gender or marital status of an applicant. When considering promotions and pay increases, gender may not be a factor. Under this structure, only actual performance could be considered, and therefore, performance evaluations evolved that would contain discrete and measurable factors. The purpose of these rules was to remove gender from consideration of any of the foregoing. Employees enjoyed modest levels of success in bringing first generation discrimination claims as evidence of this type of discrimination was fairly straightforward and could be proven in a court of law.[6]

Second generation discrimination, however, is more subtle because it is based on the structure of the system within a given workplace, the relational aspects of the workplace, and the specific situation. In short, it is amorphous, oftentimes a stark contrast from first generation discrimination. Sturm has noted that second generation discrimination:

> [F]requently involve[s] patterns of interaction among groups within the workplace that, over time, exclude non-dominant groups. This exclusion is difficult to trace directly to intentional, discrete actions of particular actors. . . . This form of harassment may consist of undermining women's perceived competence, freezing them out of crucial social interactions, or sanctioning behavior that departs from stereotypes about gender or sexual

3. Sturm, *supra* note 1, at 471.

4. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

5. *See* Bisom-Rapp, *supra* note 2, at 4-5 (observing the trend of corporate organizations to adopt compliance mechanisms in response to the enactment of equal employment opportunity laws).

6. *See id.* at 2-3 ("Moreover, many commentators note that civil rights law is an increasingly ineffective tool for ferreting out bias in the American workplace. This phenomenon has been attributed to doctrinal developments that favor employers, the subtle nature of discrimination itself, and the hostility of the federal judiciary to employment discrimination claims." (citations omitted)).

> orientation. It is particularly intractable, because the participants in the conduct may perceive the same conduct quite differently. Moreover, behavior that appears gender neutral, when considered in isolation, may actually produce gender bias when connected to broader exclusionary patterns. The social impact of particular conduct may vary depending upon the context in which it occurs and the organizational culture shaping the perceptions of the various participants. At the margins, it can be difficult to draw lines between discriminatory harassment and lawful, albeit unprofessional, destructive behavior.[7]

Initially, second generation bias often co-existed with first generation bias. However, because it was much easier to produce evidence of overt discrimination in first generation claims, the structural biases of second generation discrimination were not explored in the legal system or in the workplace.[8] Also, given that case precedents set in addressing first generation were narrow in scope, there was little or no history of the legal system considering second generation discrimination. More recently, second generation discrimination has also raised many allegations of bias, but because of the amorphous nature of the discrimination and the difficulty of producing direct evidence, particularly when using rules developed from first generation discrimination cases, it is much more difficult for a plaintiff to bring a successful claim.[9] To further illustrate why the rules-based approach developed for addressing first generation discrimination claims is deficient when applied to second generation discrimination, consider the following famous children's rhyme:

> Humpty Dumpty sat on a wall;
> Humpty Dumpty had a great fall.
> All the King's horses
> And all the King's men
> Couldn't put Humpty together again![10]

When Humpty Dumpty fell, the shell broke and the insides spilled out. The King's horses and men probably could have re-assembled the shell by simply looking at the pieces like a puzzle and spending the necessary time to re-assemble it. The problem with "put[ting] Humpty back together" is

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7. Sturm, *supra* note 1, at 468-69 (citations omitted).

8. *See id.* at 468.

9. *See id.* at 469 (These types of claims are, "by their nature, complex. Their complexity lies in the multiple conceptions and causes of the harm, the interactive and contextual character of the injury, the blurriness of the boundaries between legitimate and wrongful conduct, and the structural and interactive requirements of an effective remedy. This complexity resists definition and resolution through across-the-board, relatively specific commands and an after-the-fact enforcement mechanism.").

10. I. OPIE & P. OPIE, THE OXFORD DICTIONARY OF NURSERY RHYMES 213-15 (Oxford University Press 1997) (1951).

that the insides cannot be put together by simply looking at the external pieces. The insides are fungible. With the egg white and yolk, one might be able to reassemble it to look the same based on the general shape, but the supposedly repaired version would not approach what it was originally.

Therein lies the distinction between first generation and second generation discrimination. First generation discrimination claims have dealt mostly with reassembling the "shell" by following certain rules and procedures and proving specific facts that establish a violation of such rules and procedures. For instance, after the anti-discrimination laws came into existence, employers, through their attorneys, created an entire system of rules in regard to hiring, promoting, increasing pay, and firings that were intended to eliminate gender discrimination. Unfortunately, the agencies, the courts, and the lawyers (both plaintiff and defendant) bought into those rules and focused on them as the be all and the end all in deciding whether discrimination existed in a particular situation. Discrimination is more complex than what these rules addressed. Second generation discrimination occurs in conjunction with, as well as separately from, the more overt first generation discrimination. The limitations inherent with this rules-oriented approach, coupled with the universal adoption of this approach by the legal bar in providing counsel to prospective litigants, can be summarized as follows:

> Rules developed externally and imposed unilaterally, whether by courts or other regulatory bodies, cannot adequately govern the range of circumstances implicated by the general principle of nondiscrimination, or account for how those circumstances will shape the law's meaning in context. Any rule specific enough to guide behavior will inadequately account for the variability, change, and complexity characteristic of second generation problems. General rules, unless linked to local structures for their elaboration in context, provide inadequate direction to shape behavior.[11]

As such, the mindset and practices of employers and attorneys have not adapted well to second generation discrimination because everyone is still looking for specific evidence of overt discrimination—the "smoking gun." There are several aspects of second generation discrimination that this approach misses. For instance, one of the problems with second generation discrimination is that "participants in these interactions may experience the same conduct quite differently, depending on their position in relation to the conduct, their power, their gender, their mobility, their support networks, and the degree of their cross-gender interaction."[12] Part

11. Sturm, *supra* note 1, at 475 (citations omitted).
12. *Id.* at 472.

of the reason for the differences in perception of the participants' resultant biased treatment/behavior is the unique culture evolving in any given workplace that dictates work environment, hiring practices, and promotions.[13] Due to the nature of this type of bias, "the boundaries between legitimate and illegitimate behavior will be quite difficult to draw."[14]

Furthermore, because second generation discrimination is structural and situational, it is often hard to identify specific behavior that was discriminatory. Conduct that oftentimes appears normal and an accepted practice in workplace culture may in fact be biased behavior if examined over a period of time, with exclusionary patterns emerging.[15] Thus, continuing use of outmoded methods for addressing second generation discrimination unfortunately creates, in part, the feeling shared by plaintiffs, such as the women interviewed herein, that they do not "get justice" when pursuing what was perceived to be a valid discrimination claim.[16] Indeed, the processes utilized and resultant outcomes of their claims may have been different had the legal system embraced methods of proof that best demonstrate second generation discrimination. Using the analogy of the children's rhyme, employers, attorneys, administrative agencies such as the EEOC, and courts still focus on finding and putting pieces of the eggshell together (i.e., proving and remedying first generation discrimination). They remain seemingly unaware that this approach to helping Humpty does not adequately identify and attempt to restore its damaged amorphous parts, which are even larger, more substantive, and more essential components of its core being. Until a shift in this paradigm occurs, eradication of second generation discrimination claims remains tenuous.

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13. *Id.* at 470-71 ("The problems of bias . . . result from ongoing patterns of interaction shaped by organizational culture. These interactions influence workplace conditions, access, and opportunities for advancement over time, and thus constitute the structure for inclusion or exclusion. They cannot be traced solely to the sexism of a single 'bad actor.' Nor can they be addressed by disaggregating the problem into discrete legal claims. The overall gender impact of this conduct may be discernable only if examined in context and in relation to broader patterns of conduct and access. . . . The overall organizational culture affects the extent to which particular acts produce bias in a given workplace.").

14. *Id.* at 472.

15. *Id.* at 470. Indeed, as Professor Sturm has observed, "the 'wrong' of second generation discrimination cannot be reduced to a single, universal, or simple theory of discrimination. Second generation discrimination does not evoke the first generation's clear and vivid moral imagery—the exclusionary sign on the door or the fire hose directed at schoolchildren. Instead, the applicable normative theories are plural, subtle, and, not surprisingly, more complex." *Id.* at 473 (citations omitted).

16. *See* discussion *infra* Section V.

B. The Role of the Courts and Judges

Part of the problem in regard to changing the jurisprudence to adapt to second generation discrimination is the interpretation by the courts of the phrase "terms, conditions, or privileges of employment" set forth in Title VII.[17] Courts have interpreted this language to require evidence of specific facts that demonstrate discriminatory intent of the employer when making a decision affecting employment.[18] This requirement is difficult to meet in second generation discrimination due to its structural nature. Therefore, a plaintiff alleging second generation discrimination without glaring instances of discriminatory behavior in many instances receives an unfavorable outcome, leading to a perception that the legal environment is unjust. Indeed, some of the females interviewed made comments that this perceived injustice was intentional and somehow directed against them.[19] They did not understand that any injustice may have been a direct result of the use of inadequate methods derived from years of judicial decisions involving first generation discrimination and a continued failure of the courts to adopt a methodology better suited to address second generation discrimination.

C. The Workplace

Legal precedents have set forth both examples of conduct leading to liability and defenses available to employers in first generation discrimination cases. Over time, employers have crafted policies in response to these precedents intended to avoid liability for discrimination.[20] These policies, however, remain focused on addressing only traditional first generation disputes.[21] When an employee files a discrimination complaint, internally or externally, employers conditioned to deal with first generation claims will respond by seeking a clear violation of a policy and existence of specific facts supporting discriminatory intent. If courts continue to recognize only a first generation process-oriented framework, such an approach will generally work for the employer. "Laws that are ambiguous,

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17. 42 U.S.C. § 2000e-2(a)(1) (1994).

18. *See, e.g.*, Harris v. Forklift Sys., Inc. 510 U.S. 17, 21 (1993).

19. *See* discussion *infra* Section V.

20. *See* Sturm, *supra* note 1, at 543 ("Many of the internal dispute resolution mechanisms developed by employers under the current liability regime are focused exclusively on resolving individual disputes simply as a way of avoiding costly litigation. These mechanisms may consist of boilerplate from the most recent decisions of the court or the reproduction of EEOC guidelines." (citations omitted)).

21. *See id.* at 490 ("Recent scholarship has drawn attention to the risk that employers will adopt legalistic, sham, or symbolic internal processes that leave underlying patterns of bias unchanged." (citation omitted)).

procedural in emphasis, and difficult to enforce invite symbolic responses—responses designed to create a visible commitment to law, which may, but do not necessarily, reduce employment discrimination."[22]

This "symbolic" response was repeatedly identified as part of the problem for some of the females interviewed in our research. Each believed there was, in fact, an actionable discrimination claim but could not meet the requisite burdens of proof which evolved from first generation cases. Many of the females believed the employer, absent a "smoking gun" evidencing the discrimination, tended to discount the allegation and approach any resolution of the same in an unfair manner. As such, the first generation system of ambiguous and procedural rules promulgated by courts and embraced by employers created a perception of unfairness in the cases we document herein.

Because of the rule-centered approach used by courts, employers have not needed to change their policies to prevent discriminatory behavior though second generation claims have become more common.[23] Since rules are much easier to create and apply, employers have not had a need to analyze the workplace from a structural viewpoint and make changes that will avoid second generation discrimination. Transitioning from a rules-oriented approach to a structural approach is viewed by employers as complex, time consuming, and, at this point, not necessary to prevent potential liability.[24] Therefore, until an impetus for change emerges, employers will continue to rely upon policies that, while on their face address first generation discrimination, are ill-suited to prevent second generation discrimination.

Moreover, employers accepting the notion that the mere existence and reasonable enforcement of stated rules and policies will eradicate discrimination from its workplace are ill-equipped to even begin to identify, much less address, instances of second generation discrimination. Unfortunately, employers appear content to rely upon absence of a "smoking gun"—egregious conduct that forms the factual basis for a first generation claim—as indicative of a reduction/elimination of discriminatory practices. Such an approach does not address, however, embedded and oftentimes unconscious biases that are prevalent in the workplace. Professor Samuel R. Bagenstos has noted:

> Unconscious biases "sneak up" on a decision maker. They affect perceptions and evaluations of an employee in innumerable encounters that occur well before any discrete moment of work-

22. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1542 (1992).

23. *See* Sturm, *supra* note 1, at 475-78; *see also* Bisom-Rapp, *supra* note 5, at 5, for further discussion of this point.

24. *See* Sturm, *supra* note 1, at 477.

> assignment, promotion, or discharge. By the time the manager actually makes such a decision, the die may have already been cast by the earlier, biased perceptions. At that point, a supervisor—unaware of the degree to which the inputs to her decision are biased—can believe quite sincerely that she is making a "neutral" decision "on the merits."[25]

D. The Intermediaries

The intermediaries include governmental agencies at the federal and state level, oftentimes the EEOC, and outside consultants utilized by employers to reduce potential exposure to discrimination claims. They may also be "stuck" with the traditional view of what discrimination is and how a claim is proven. As Sturm observes, "[T]he long term viability of a structural regulatory regime may depend on the effectiveness of intermediaries in translating and mediating between formal law and workplace practice."[26] Some of the females in our cases clearly commented on the fact that this has not occurred.[27] The EEOC, charged with administering and enforcing the Civil Rights Act, generally does not function as an agent of change. Rather than acting in a proactive manner, its function is viewed as one of managing employment discrimination disputes. The agency is not judged on the basis of making changes but on how well it handles charges that are filed.[28] The problem thus becomes one of perception for each of the actors. The EEOC sees itself as an enforcement agency, not a change agent. The employer views the agency as someone to fear, but as long as the "proper rules are in place" and complied with, the employer will be "safe." The employee, wrongly, perceives the EEOC's role as that of an ally. This view by the employee is demonstrated by several of the remarks made by females in our cases.[29] Again, the different perceptions create great confusion about the proper role the EEOC is to undertake in addressing workplace discrimination, with affected employees often left with the belief there is no justice or fairness.

When outside consultants are retained by employers to address discrimination, they are able to identify issues with present policies and the workplace environment. Their role, generally, will not be an issue. They should be one of the change agents in an effort to better address second discrimination claims. The problem is that an employer will usually not

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25. Samuel R. Bagenstos, *The Structural Turn and Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 8 (2006) (citations omitted).

26. *See* Sturm, *supra* note 1, at 523.

27. *See* discussion *infra* Section V.

28. *See* Sturm, *supra* note 1, at 550-54, for a discussion of the EEOC's role.

29. *See* discussion *infra* Section V.

hire consultants until there is either litigation or there is a ranking member of management who recognizes a problem.[30] Thus, it appears the utility of outside consultants in effecting real change in second generation discrimination will be marginal as long as their role centers more on a reactive, rather than proactive, approach.

E. The Lawyers

Defense and plaintiffs' attorneys have become proficient in providing legal counsel within a rule-oriented framework designed to address first generation discrimination. This acquired proficiency may result in hesitancy by the bar to promote within the workplace and the courts a structural approach designed to alleviate second generation discrimination.[31] Instead, attorneys advise the employer to interpose "rules that create a 'safety zone' as a strategy of litigation avoidance."[32]

Employers' lawyers do not perceive themselves, nor are they perceived, as change agents. The very nature of their duty—advising clients on how to avoid litigation—may cause a reluctance to encourage employers to take affirmative steps to identify potential causes of discriminatory practices and deficiencies in the workplace structure. Such practices and deficiencies may be the root of embedded biases, which lead to second generation discrimination. Rather, employers view the attorney's role and value-added to an organization as limited to the drafting of prophylactic rules and procedures based upon the present landscape in discrimination law for the purpose of keeping the client out of litigation.

Attorneys for plaintiffs often consider their role limited to representation in litigation, and not that of a change agent. Due to limited resources of the plaintiff and the relative cost associated in bringing a discrimination claim, the profit motive of a plaintiff's attorney or firm usually is met only through contingency fee arrangements that require securing a judgment or settlement. Unfortunately, what results is legal counsel undertaking representation based upon the probability of fulfilling the profit motive rather than the pursuit of a just resolution.[33] That is part

30. *See* Sturm, *supra* note 1, at 492-99, for a full discussion of the Deloitte & Touche approach and solution; *see also* V. Sue Molina, *Changing the Face of Consulting: The Women's Initiative at Deloitte*, 14 REGIONAL REV. 42 (2005), *available at* http://www.bos.frb.org/economic/nerr/rr2005/q1/section3d.pdf; Deloitte's Women's Initiative: We Started a Revolution, http://www.deloitte.com/dtt/section_node/0,1042,sid%253D2261,00.html.

31. *See* Sturm, *supra* note 1, at 546.

32. *Id.* (noting that lawyers have discouraged employers from internal examination of their sexual harassment systems based upon fears that any deficiencies identified could be used in future litigation against the employer).

33. *See, e.g.*, Michael Selmi, *The Price of Discrimination: The Nature of Class Action*

of the reason that some of the interviewees in our cases felt as if their attorneys did not have "justice" as a primary consideration in either the taking or subsequent handling of the discrimination claim. From a business point of view, "justice" need not and perhaps cannot be their primary focus.

The divergence in perceived responsibilities between the foregoing players in addressing workplace discrimination may create the impression amongst plaintiffs that the administration of justice and eradication of discrimination from the workplace are not priorities. This impression is perpetuated further by the lack of development of appropriate legal procedures and substantive laws that can better handle the observed shift from first generation to second generation discrimination as well as the failure of employers to allocate proper resources geared toward the adoption of a structural approach to addressing second generation discrimination. Universities are not immune from second generation discrimination, nor are they sufficiently dealing with the issue, as set forth in the following section.

III. THE DIFFICULTY IN BRINGING SECOND GENERATION SEX DISCRIMINATION CLAIMS IN ACADEMIA

A. The Situation in Academia

Though over four decades have passed since the enactment of the Civil Rights Act, numerous studies indicate that sex discrimination is alive and well in universities despite the fact that academia likes to portray itself as an egalitarian, nurturing, uncorrupt, and protected environment.[34] In fact, legal charges of discrimination brought against universities have not

Employment Discrimination Litigation and its Effects, 81 TEX. L. REV. 1249, 1268-89 (2003) (concluding that often plaintiff's lawyers opted for money over reform of the system).

34. *See* BILLIE W. DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS (Univ. of Ill. Press 2d ed. 1990); Elizabeth Grauerholz, *Sexual Harassment in the Academy: The Case of Women Professors*, *in* SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES 272-90 (Margaret Stockdale ed., Sage Publications 1996); Nina Toren, *Would More Women Make a Difference?*, *in* STORMING THE TOWER: WOMEN IN THE ACADEMIC WORLD (Virginia O'Leary ed., Nichols Pub. Co. 1990); PAULA J. CAPLAN, LIFTING A TON OF FEATHERS: A WOMEN'S GUIDE FOR SURVIVING IN THE ACADEMIC WORLD (U. Toronto Press 1993); MICHAEL T. NETTLES ET AL., NAT'L CTR FOR EDUC. STATISTICS, STATISTICAL ANALYSIS REPORT: SALARY, PROMOTION, AND TENURE STATUS OF MINORITY AND WOMEN FACULTY IN U.S. COLLEGES AND UNIVERSITIES (2000); KUI B. RAI & JOHN W. CRITZER, AFFIRMATIVE ACTION AND THE UNIVERSITY: RACE, ETHNICITY AND GENDER IN HIGHER EDUCATION EMPLOYMENT (2000); Alyson Wylie, *The Contexts of Activism on "Climate" Issues*, *in* BREAKING ANONYMITY: THE CHILLY CLIMATE FOR WOMEN FACULTY 29-30 (Chilly Collective ed., Wilfrid Laurier Univ. Press 1995); VIRGINIA VALIAN, WHY SO SLOW: THE ADVANCEMENT OF WOMEN (MIT Press 1998).

decreased over the years as might be expected, but have increased instead. The number of tenure discrimination claims against universities in the United States more than tripled between 1992 and 1997.[35] However, statistics indicate low success rates for women plaintiffs, plaintiffs in discrimination cases, and plaintiffs suing universities as well.[36] This suggests the legal system may also play a role in the perpetuation of sex discrimination at universities. Consistent with this idea, results of the present study suggest that university women seeking justice from government agencies and the legal system face several hurdles, which are discussed below.

These increased claims suggest that women are not able to obtain justice within their universities, which could be due to the focus of many institutions on avoiding lawsuits rather than correcting discrimination.[37] Results of the present investigation are consistent with this suggestion—the women indicated they pursued their court cases only after they had tried several other avenues internally. Filing a suit was not what they had wanted to do, but it represented their last hope for obtaining justice. Although many of the women did discuss hopes for personal outcomes such as getting their jobs back, the women were most interested in obtaining public acknowledgement of the situation and stimulating change at their universities.[38]

The need for change is evident because, according to several reviews of quantitative indicators, men are overrepresented as faculty and inequities exist in terms of rank and salary.[39] Discrimination is greatest at financially affluent universities and at universities that have higher prestige or are more selective.[40] Although women account for more than half of all undergraduates in North America, the proportion drops significantly at

35. *See* Stacy Kravetz, *Work Week: A Special News Report about Life on the Job and Trends Taking Shape There*, WALL ST. J., Jan. 19, 1999, at A1.

36. *See* K.M. Clermont & S.J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); David E. Terpstra & Douglas D. Baker, *Outcomes of Sexual Harassment Charges,* 31 ACAD. MGMT. J. 185 (1988); VALIAN, *supra* note 34; *see generally,* S.L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317 (1992).

37. *See* Bisom-Rapp, *supra* note 2; Edelman, *supra* note 22; Barbara A. Gutek, *Sexual Harassment at Work: When an Organization Fails to Respond, in* SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES, *supra* note 34, at 272-90.

38. *See* discussion *infra* Section V.

39. *See* RAI & CRITZER, *supra* note 34, at 52-67; Wylie, *supra* note 34, at 29-30.

40. *See* Ernst Benjamin, *Disparities in the Salaries and Appointments of Academic Women and Men*, 85 ACADEME 60, 60-62 (1999); E.L. Dei et al., *Betrayed by the Academy: The Sexual Harassment of Women College Faculty*, 67 J. HIGHER EDUC. 149, 164 (1996); ROBERT F. SZAFRAN, UNIVERSITIES AND WOMEN FACULTY: WHY SOME ORGANIZATIONS DISCRIMINATE MORE THAN OTHERS (Praeger Publishers 1984); VALIAN, *supra* note 34.

each step up the academic ladder.[41] In the United States, women earn about forty-four percent of doctoral degrees, but hold about thirty-three percent of faculty positions and are slower to be promoted to full professor.[42]

B. Process Problems

This continuation of sex discrimination at universities is attributable at least in part to how complaints are typically handled. Universities often have poor policies and procedures in place for preventing and managing discrimination as well as poor responses to complaints when they are made. Academic procedures have been called "cumbersome" and "time-consuming," and it has been suggested that this results in most cases being resolved by victims leaving rather than by solving the underlying issues, leading to the persistence of sex discrimination at universities.[43] Thus, most targets of sex discrimination, including those in academic settings, do not report their experiences due to skepticism regarding the efficacy of anti-discrimination policies and complaint procedures, and fear of retaliation.[44] Complainants of sex discrimination often experience hostile

41. At an AACSB International New Deans Conference, it was observed that of the twenty-nine new deans present, four were female. Interview with A. Hietapelto, Interim Dean, College of Business and Management, Northeastern Illinois University, in Chicago, Illinois (June 23, 2008).

42. L.A. Krefting, *Intertwined Discourses of Merit and Gender: Evidence from Academic Employment in the USA*, 10 GENDER, WORK, & ORG. 260 (2003). None of the articles compare salary among departments/colleges; they only compare them across campus. This may cause some distortions in the comparisons since some academic fields have traditionally been lower paying (for example, most academic fields in liberal arts and education). Other areas, such as business and engineering have traditionally had higher salaries due to the competition from private employment. It is also true that due to past discrimination, many women chose to get Ph.D.'s in the humanities and arts. Therefore there are more female faculty members in those areas. That combination of values, culture, history, and competition from business may mean that the results are not based solely on present or past discrimination; rather, that may only be one factor in the discrepancies. If current research would focus on recent hires in each academic area and compare entry salaries of males and females, there may not be any salary differences. Such a survey will still show that the entry salaries in the liberal arts are lower than those in business, but it might show that there is no discrimination between males and females in either discipline's entry salaries or salaries at the different academic ranks. *See, e.g.*, A.S. Ash et al., *Compensation and Advancement of Women in Academic Medicine: Is There Equity?* 138 AM. J. OPHTHALMOLOGY 903, 903-04 (2004).

43. *See* DZIECH & WEINER, *supra* note 34; ELLEN MESSER-DAVIDOW, DISCIPLINING FEMINISM: FROM SOCIAL ACTIVISM TO ACADEMIC DISCOURSE (Duke Univ. Press 2002).

44. *See* Linda Brooks & Annette R. Perot, *Reporting Sexual Harassment: Exploring a Predictive Model*, 15 PSYCHOL. WOMEN Q. 31 (1991); Amy L. Culbertson & Paul Rosenfeld, *Assessment of Sexual Harassment in the Active-Duty Navy*, 6 MIL. PSYCHOL. 69 (1994); Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152 (1988); Patricia A. Lanier &

verbal and nonverbal behaviors as well as tangible, formal, and documented adverse job effects.[45] An important effect of their silence is that the discrimination continues. As Professor Susan Bisom-Rapp states:

> Nonetheless, the existence of these procedures does not guarantee substantive change for members of the groups that EEO law is designed to protect. In fact, their presence may provide unjustified optimism that an organization is governed fairly. For example, Edelman notes the danger of grievance procedures: they may be powerful symbols of equity and simultaneously channel employee complaints into avenues that produce few significant results. Moreover, the compliance mechanisms themselves may actually undermine the legal rights of employees. . . . Discrimination complaint handling procedures are common compliance mechanisms adopted by employers. Through the use of internal procedures, organizations buffer their activities from outside intrusion. Whether complaint procedures produce for complainants the kinds of outcomes produced by external legal processes, however, depends greatly on those who administer the procedures. While these individuals may be sincerely committed to equal employment opportunity, their position as middle managers concerned for their own careers may hamper their abilities to bring about significant change.[46]

C. *Problems with the Legal System*

There is evidence that the legal system is stuck in a first generation discrimination mentality. Some legal and organizational scholars have implicated the legal system for the failure of most institutional policies to correct discrimination.[47] These scholars have cited court decisions in

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John R. Tanner, *A Report on Gender and Gender-related Issues in the Accounting Professoriate*, 75 J. EDUC. FOR BUS. 76 (1999); Donald E. Maypole & Rosemarie Skaine, *Sexual Harassment of Blue Collar Workers*, 9 J. SOC. & SOC. WELFARE 682 (1982); Laurie A. Rudman et al., *Suffering in Silence: Procedural Justice Versus Gender Socialization Issues in University Sexual Harassment Grievance Procedures*, 17 BASIC & APPLIED SOC. PSYCH. 519 (1995); PREJUDICE: THE TARGET'S PERSPECTIVE (Janet K. Swim & Charles Stangor eds., Academic Press 1988).

45. *See* Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCHOL. 247 (2003); Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117 (1995); Sonia M. Goltz, *Women's Appeals for Equity at American Universities*, 58 HUM. REL. J. 63 (2005).

46. Bisom-Rapp, *supra* note 2, at 11-12 (footnotes omitted).

47. *See* Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCHOL. 230 (2002); Bisom-Rapp, *supra* note 2; Edelman, *supra* note 22; Lauren Edelman et. al., *The*

which employers prevailed when they showed they had mechanisms designed to prevent and correct sex discrimination and plaintiffs failed to use them. Rarely have the courts actually examined whether the procedures themselves were unbiased and effective at addressing discrimination. Furthermore, scholars have suggested that this has led to institutional policies that primarily serve to avoid the law's grasp rather than to correct discrimination.[48] Indeed, university administrators have been observed to take a legal, rather than human resources, approach to resolving sex discrimination.[49] Furthermore, even complainants at universities have been found to treat internal appeals as merely a required step to a court case, without any expectation that the appeals process will resolve their complaint.[50] Thus, the failure of the legal system to take a closer look at the effectiveness of institutional procedures for addressing discrimination may play an important role in the continuation of sex discrimination at universities. This lack of re-examination perpetuates the first generation mentality and fosters the perception of unfairness by those who are the victims of the antiquated rules.

The research literature also suggests that the legal system may be more directly responsible for women's difficulties in seeking to address inequities in academia. There appear to be at least three obstacles for women who are filing discrimination complaints against universities: (i) the legal system, including judges, juries, and lawyers, has tended to be biased against women, (ii) the system has tended to allow defendants to prevail in employment discrimination cases, and (iii) the system has shown a deference to university employment decisions in particular.[51] There is substantial evidence that women are not treated equitably in the legal system, which has been noted for its bias encompassing a number of areas, from law school to the courts.[52] This difficulty women have in obtaining equitable treatment in the legal system extends to cases of sex discrimination. Research indicates that it is difficult for women who file discrimination charges to obtain favorable settlements even when the discrimination is blatant, severe, or well-documented. For instance, one study of complaints found that the odds of complainants obtaining a

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Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth, 105 AM. J. SOC. 406 (1999).

48. *See* Bisom-Rapp, *supra* note 2, at 11.

49. *See* Gutek, *supra* note 37, at 272-90.

50. *See* Goltz, *supra* note 45.

51. *See* LORRAINE DUSKY, STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA (Crown Publishers 1996); Maureen A. Maloney, *Anatomy of Gender Bias and Backlash, in* INVESTIGATING GENDER BIAS: LAW, COURTS, AND THE LEGAL PROFESSION (J. Brockman & D.E. Chunn eds., Thomson Educ. Publ'g 1993); Clermont & Schwab, *supra* note 36; Terpstra & Baker, *supra* note 36; Pacholski, *supra* note 36.

52. *See* DUSKY, *supra* note 51; Maloney, *supra* note 51.

favorable outcome were only between forty-four and fifty-three percent if the harassment was severe, if there were witnesses, if there were supporting documents, if notice had been given to management, or if the organization took no action.[53] If none of these situations occurred, complainants' odds of winning were less than one percent. An added difficulty is that many sex discrimination cases against universities involve Title VII, which covers sex discrimination in employment. Employment discrimination cases now form the largest single category of cases in the federal civil docket at nearly ten percent.[54] However, recent research indicates that employment discrimination cases are quite difficult for plaintiffs to win. As compared with other types of discrimination cases, employment discrimination plaintiffs are less likely to have their cases resolved early in litigation, win a lower proportion of both pre-trial hearings and trials, have more of their cases appealed by defendants, and on appeal face more reversals.[55] In fact, Clermont and Schwab's analysis suggested that an average year involves 15,149 cases, and only 19 of these will result in a plaintiff winning and the win not being reversed on appeal.[56] Although the numbers from employment discrimination cases are quite discouraging, additional research suggests that plaintiffs in cases involving the academic decisions of universities fare even worse.[57] Based on these studies it is fairly clear that it is difficult to prevail based on the first generation standards of proof; therefore, it would be even more difficult to prevail when the discrimination is structural. Our case studies also support this finding.

The difficulty of winning a case if one is a female, if one is making charges of discrimination, and if these charges are against a university, has implications for other governmental processes available to women, particularly state and federal employment agencies such as the EEOC. After a policy change in 1984 during the Reagan administration, the EEOC began to use the term "reasonable cause" to represent an assessment of sufficient evidence to win a case rather than sufficient evidence to sue.[58] This, in effect, means that the EEOC is "pre-judging" the case itself without any opportunity to examine the evidence that would occur in a courtroom setting. As a result, nearly half of cases processed by the EEOC receive a "no cause" determination.[59] In addition, it has been noted that EEOC attorneys are motivated to choose cases that will advance their

53. *See* Terpstra & Baker, *supra* note 36.
54. *See* Clermont & Schwab, *supra* note 36.
55. *Id.*
56. *Id.*
57. *See* Pacholski, *supra* note 36; VALIAN, *supra* note 34.
58. *See* N. Kreiter, May 23, 1995. Prepared Testimony on the Equal Employment Opportunity Commission Before the Senate Committee on Labor and Human Resources.
59. *Id.*

careers and the goals of the agency, which are usually cases that are relatively uncontroversial and have a high probability of success.[60] To this end, the agency tends to pursue very few cases and these cases are generally small and easy. Given the record of the courts on sex discrimination cases against universities, one could expect that these types of cases are not apt to be seen as either easy or likely to be successful by regulatory agencies such as the EEOC. Our case studies also support this view of the EEOC as several of the women stated the EEOC was of little or no help.

In summary, although blame for continued sex discrimination at universities clearly can be placed on dynamics within universities themselves,[61] the possibility exists that the legal system and other governmental processes may also serve to perpetuate, rather than decrease, sex discrimination at universities. Although there are many quantitative indicators that it is very difficult for any plaintiffs of discrimination cases to win,[62] even more difficult for female plaintiffs to win discrimination cases,[63] and quite improbable that plaintiffs of cases against universities will win,[64] rarely have researchers examined underlying processes associated with these discouraging numbers.

IV. RESEARCH METHODOLOGY AND SAMPLE

The present study involved the collection and analysis of women's stories about their legal attempts to address the inequities they experienced at their universities. Qualitative methods were used for this study because they were found to be appropriate for the research question being asked, meeting the criteria outlined by Bachiochi and Weiner.[65] In other words, the research was exploratory, the context and participants' interpretations were both central to the research question, and the depth and richness of data was important for understanding the dynamics behind the statistics on university discrimination. The women's stories were organized into theme clusters that could provide a basis for generating ideas for future theory and research concerning women's legal experiences when filing complaints of

60. *See* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998).

61. *See* DZIECH & WEINER, *supra* note 34; Goltz, *supra* note 45; Rudman et al., *supra* note 44; Teresa G. Siskind & Sharon P. Kearns, *Gender Bias in the Evaluation of Female Faculty at the Citadel: A Qualitative Analysis*, 37 SEX ROLES 495 (1997).

62. *See* Clermont & Schwab, *supra* note 36.

63. *See* Terpstra & Baker, *supra* note 36.

64. *See* Pacholski, *supra* note 36; VALIAN, *supra* note 34.

65. *See* Peter D. Bachiochi & Sara P. Weiner, *Qualitative Data Collection and Analysis*, *in* HANDBOOK OF RESEARCH METHODS IN INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY 161-83 (Steven G. Rogelberg ed., Blackwell 2004) (2002).

sex discrimination at universities.

The present study was based on a sample of individuals who experienced sex discrimination and later filed suits in court against their universities after being unable to resolve their situations within their university systems. The material used for the present analysis was a subset of the entire interview. The interviews in this study indicated that the women experienced discrimination at their universities and were subsequently frustrated in their attempts to resolve their situations internally. This led to decisions to seek help outside the university setting, which is consistent with research indicating that a predictive factor of employee behavior is not necessarily the organizational decision or action itself, but rather the employees' perceptions that they receive unfair, insensitive treatment.[66] Thus, this analysis primarily concerned plaintiffs' responses to questions about their expectations and experiences after they had sought to address their situations at their universities and had decided to pursue justice in the legal system.

In order to make sure that the discrimination claims of the interviewees for the study were not spurious, the sample was limited to women who had been plaintiffs in discrimination cases with sound legal bases as judged by a panel of lawyers. Therefore, the fourteen women interviewed for this study were drawn from a set of plaintiffs of university sex discrimination cases that had been sponsored in part by a single non-profit organization. In many instances, sponsorship by this organization entails the provision of some funds to be used in the case. In a few situations, it is limited to the use of the name of the organization as a sponsor. Prior to the sponsoring of each case, a panel of eight legal professionals who were associated with the organization and experienced in discrimination cases reviewed a number of documents requested from the plaintiff and her lawyer in order to establish the validity of the case. Approximately forty percent of the women who had been sponsored by the organization agreed to be interviewed for the study.

The women, briefly profiled in Table 1, varied across a number of dimensions, as did their cases, which concerned various types of sex discrimination such as discrimination in athletics, compensation, and promotion, and sexual harassment. Six women sued private institutions and eight sued public institutions. Four institutions were located in the eastern United States, five in the Midwest, and five in the West. Nine of the plaintiffs were faculty at the time they sued, with three of these in non-tenure track positions and six in tenure-track positions. All but one faculty member both taught and conducted research; the exception only conducted

66. *See* E. Allen Lind et al., *The Winding Road from Employee to Complainant: Situational and Psychological Determinants of Wrongful-Termination Claims*, 45 ADMIN. SCI. Q. 557 (2000).

research. Five interviewees were students—two undergraduates and three graduate students. The graduate students were also employed in research and staff positions at their respective universities.

The largest proportion of participants was in science and medicine; others were in the humanities, social sciences, physical education, and business. The women also varied demographically, ranging in age from twenty to over seventy at the time of the interviews. Some were single, others divorced, and still others married. Half had no children; half had two or more children. Although information on race, religion, and sexual orientation was not requested, many of the women volunteered this information. The women were Asian, Hispanic, African-American, Caucasian, and multi-racial, heterosexual and homosexual, and Catholic, Jewish, and Protestant.

The women filed their court cases between 1980 and 1996. Seven of the cases were settled before trial, and one was settled three weeks into the trial. One plaintiff's case was dismissed for not meeting the statute of limitations. Of the remaining cases, three plaintiffs won at the lower level and two lost at the lower level. Of the cases won by the plaintiffs, two were appealed by the university and overturned at higher levels of the court system. Both cases lost by plaintiffs at the lower level were appealed. One of these appeals was denied; however, the university provided a small settlement to the plaintiff so she would not appeal the case further. The other case was still in the appeals process when the plaintiff was interviewed. These results are consistent with research indicating that, compared with other types of discrimination cases, employment discrimination plaintiffs win a lower proportion of hearings and trials, are more likely to have their cases appealed by defendants, and, on appeal, face more reversals.[67] These results are also consistent with research indicating that plaintiffs in academic cases fare even worse than plaintiffs in other employment discrimination cases.[68]

67. *See* Clermont & Schwab, *supra* note 36.

68. *See* Mary Hora, *Chalk Talk—The Courts and Academia: Tenure Discrimination Claims Against Colleges and Universities*, 30 J.L. & EDUC. 349 (2001); Pacholski, *supra* note 36; VALIAN, *supra* note 34.

Table 1. Description of Interviewees

Interviewee	Role When Filed	Relevant Field/Area	University	Type of Sex Discrimination in Court Complaint
A	Faculty	Business	Private, Midwestern	Unequal pay and promotion
B	Graduate Student	Science	Public, Midwestern	Sexual harassment; Unequal educational opportunity
C	Faculty	Science	Private, Eastern	Unequal pay and promotion
D	Undergraduate	Phys. Ed.	Public, Eastern	Unequal educational opportunity
E	Undergraduate	Liberal Arts	Private, Eastern	Sexual harassment
F	Faculty	Medicine	Public, Western	Unequal hiring and promotion; Retaliation for complaint
G	Graduate Student	Phys. Ed.	Public, Western	Unequal educational opportunity and pay
H	Faculty	Social Science	Private, Midwestern	Unequal promotion
I	Graduate Student	Medicine	Public, Western	Retaliation for complaint
J	Faculty	Humanities	Public, Western	Unequal Hiring
K	Faculty	Social Science	Public, Midwestern	Unequal pay and promotion
L	Faculty	Science	Public, Midwestern	Unequal promotion
M	Faculty	Humanities	Private, Western	Sexual harassment; Unequal pay and promotion
N	Faculty	Social Science	Private, Eastern	Sexual harassment; Unequal hiring, pay, promotion, conditions

The study used inductive methods in that no preconceived framework was used to determine the questions asked other than to draw out the sequence of events in the women's stories. In addition, no preconceived framework was used in the identification of themes in the interview transcripts. The interview followed a semi-structured format in which a set of initial questions was developed to cover the women's experiences at the university as well as their various legal experiences. This provided some degree of control by the researcher but also allowed for tailoring additional questions based on the direction of the responses of the interviewee.[69] Each interviewee's responses determined the time spent on each question and the introduction of additional issues. The interviews were conducted in person with the plaintiffs in the towns and cities where they currently live, located across the United States and averaged two to two and a half hours in length. Verbatim transcripts were created and provided the basis for analyses. Two plaintiffs also supplied materials they had written about their experiences (one was a chapter in a book and the other was a speech).

Content analysis was conducted on the transcripts to identify patterns of experiences. Themes of the transcripts were analyzed using software developed for this particular methodology (QSR N5). In this method, similar comments are coded as a theme; next, themes are organized into larger clusters of related issues. After a cluster was coded, reports were generated using the software and then used to examine the accuracy of the coding. Specialized software (Inspiration) was also used to help organize and graphically represent the themes. Coding occurred iteratively in that initial themes and clusters were identified using the first few transcripts. Then, additional transcripts were examined using the initial themes and clusters, and if a category cluster appeared inaccurate or incomplete, additional themes were added or the cluster was reorganized both in N5 and Inspiration. Following any reorganizations of categories, transcripts previously coded were re-examined and recoded if appropriate. Also, to increase the accuracy of coding, after a cluster was coded, reports that listed all coded phrases within a theme were generated using the software and used to examine the consistency of the coding. Items that were not coded consistently with other items within the category were recoded. Overall inter-rater agreement between the primary coder and a secondary coder who coded a sample of the data was sixty-nine percent. This figure is not unexpected given the exploratory and inductive nature of the present study and is within the range acceptable for drawing tentative and cautious conclusions.[70] Following the analysis and interpretation of the data,

69. *See* W. LAWRENCE NEUMAN, SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES (Allyn & Bacon 4th ed. 2000).

70. *See* KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY (Sage Publ'ns 2d ed. 2004) (1980).

participants were asked to read their interview excerpts to verify accuracy.[71] Interviewees' changes to interview excerpts were minor, not necessitating recoding.

V. PLAINTIFFS' DISCUSSIONS OF THEIR SECOND GENERATION CASES

In the following section, we discuss the themes from the interviews with the fourteen women that indicate the limitations of the current system, from universities to intermediaries and from lawyers to judges and the courts, in addressing second generation discrimination, as outlined in Table 2.[72] At their universities, the women primarily experienced second generation discrimination, which, as discussed earlier, was difficult to identify immediately but had negative effects over time because of its cumulative nature.[72] Because most of the process and solutions to discrimination issues were still based on first generation models, their universities were poorly equipped to address these situations, apparently because of a lack of motivation to handle discrimination beyond the use of superficial appeals procedures. Next, the women found that agencies and lawyers were resistant to taking the women's cases because they were viewed as being high risk and not likely to be able to recoup the resources needed. Additionally, agency investigations of the cases were minimal or nonexistent. Finally, the women discussed how the courts lacked an understanding of the many aspects of discrimination and used methods that were focused on gaming the rules rather than on solving the problem, with an end result that the universities the women sued had changed little after many months and years following their cases.

71. *See* JOHN W. CRESWELL, QUALITATIVE INQUIRY & RESEARCH DESIGN: CHOOSING AMONG FIVE TRADITIONS (Sage Publ'ns 2d ed. 1998) (1997).

72. All references in this article to comments made by the interviewees are taken from compiled interview transcripts retained by author Sonia Goltz. Requests for further information regarding the interviews may be directed to her at the following: Dr. Sonia Goltz, School of Business and Economics, Michigan Technological University, Houghton, MI 49931.

72. *See* discussion *infra* Section VI(B)(1).

Table 2. Obstacles in the Legal System

Legal Step	Difficulties Encountered
Finding lawyers	Cost of a case is high, chance of winning is low
	A university defendant has deeper pockets and advantages stemming from laws and previous court decisions
	Difficult to find an experienced lawyer that has similar motivations
Filing with agencies	Service quality is poor and bureaucratic
	Long delays in the process
	Disappointing nature and extent of investigation
Court case	Plaintiff is badgered and her performance attacked
	Witnesses lie and say they do not remember
	Unfair legal games are played
	Long delays in the process
	Gender and other biases occur during the process
	Lawyers and judges do not understand sex discrimination as it is manifested in a university

A. Universities: Second Generation Sex Discrimination and Superficial Responses

The discrimination experiences discussed by the fourteen plaintiffs who were interviewed covered a large time frame, from the mid-1970s to the mid-1990s; however, this time frame appeared not to have differentially affected the themes emerging in the study with the exception of the overtness of the discrimination the women reported experiencing and their detection of it. Women who started working at their universities in earlier years were more likely to have experienced more overt forms of first generation discrimination. For instance, Interviewee N started working in the 1970s and experienced a very obvious differential in allocation of resources, including not having access to a secretary for typing papers,

unlike her male counterparts.[73] Overt discrimination is easier to detect. Interviewee N, for example, reported noticing the discrimination she experienced within the first two months of joining her university.[74]

Women joining their universities at later dates were more likely to report experiencing subtle, covert, and ongoing discrimination characteristic of the second generation form rather than overt, tangible, and discrete instances of discrimination. Interviewee A began her career in the mid-1980s and likened her discrimination experiences to "a thousand little paper cuts," a reference to her experiences of second generation discrimination.[75] This more subtle, covert type of discrimination made up the bulk of all the plaintiffs' experiences, including the women who had experienced first generation discrimination as well. Themes from the interviews suggested that this discrimination took five distinct forms. The women found that they were (i) given fewer resources, (ii) expected to perform more than men even with fewer resources, (iii) required to perform in a non-supportive and sometimes even hostile environment, (iv) discredited for their achievements and input, and (v) not rewarded for their contributions.[76]

Often, this more covert discrimination took the women some time to recognize because it involved a detection of patterns of interactions and differences in allocation of resources and tasks over time. In fact, because most of the discrimination experienced by the interviewees was second generation discrimination, immediate detection of the discrimination was the exception rather than the rule. For example, Interviewee A stated, "The incidences probably started the minute that I walked in the door, but I wasn't looking for them and a lot of them were small and somewhat subtle. And so at first they didn't tend to hit my radar screen."[77] Similarly, Interviewee B said, "When I was in it, I didn't necessarily realize it."[78] Another aspect of the second generation discrimination the women experienced was that it was so repetitious that sometimes the women accepted the behavior as being normal, as Interviewee I noted concerning the sexual jokes she constantly heard made by male peers: "You are so used to this. This is the bad part. You don't even realize [it]. You are so used to it, you don't even question [it]."[79]

The majority of interviewees reported they only fully realized the situation one to two years after they arrived at the university.[80] Three other

73. *See supra* note 72.
74. *Id.*
75. *Id.*
76. *See supra* note 72; *see also* Goltz, *supra* note 45, for further examples.
77. *See supra* note 72.
78. *Id.*
79. *Id.*
80. *Id.*

women reported experiencing and realizing the discrimination six to ten years after they took the position.[81] In many of these cases, the discrimination had been occurring, but the women had not immediately recognized it as such. Interviewee A stated:

> It took a period of time before I began to notice that the way the women were treated was different over time than the way the men were treated. That takes time to figure out because I wasn't looking for it when I walked in the door. And it took a while to convince me that it was happening because a lot of it's subtle and small, but it accumulates to a big deficit by the time you get to the end of your tenure period.[82]

Thus, the women found second generation discrimination difficult to detect, but the ultimate effects of this type of discrimination were as bad as or worse than the effects of first generation discrimination. The women discussed how their motivations for pursuing legal avenues were based on feeling trapped, abused, and beaten down by their universities.[83] Interviewee G captured the cumulative effect of the second generation discrimination she experienced as well as how it can lead to feelings of entrapment. She stated that she was feeling boxed in and like it was a situation of survival: "I took a lot for a while, but when they started saying no more program, and we're going to keep you on interim, and continuous, continuous, I mean, it got to be no, this is not right."[84] Moreover, these feelings of entrapment were exacerbated by the fact that sometimes the women knew they had been discriminated against as did others around them, but the underlying behaviors were difficult to detect. This, too, is typical of the more covert second generation discrimination. For instance, Interviewee L said that her dean told her "off the record not only that he was sorry that [she] was going, but that he was absolutely certain that there was something rotten over there and that [she] had been screwed royally."[85]

Many of the interviewees said they never pictured themselves filing a lawsuit, but they felt it was their last option after a frustrating series of attempts to resolve their situations, including informal appeals for equity as well as formal appeals within their universities, such as sexual harassment or tenure denial appeals.[86] The women discussed how they had been told that formal complaint processes in the university might hurt their situations even more, so they had first sought to obtain changes informally.[87] They

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*

did so by talking with various people, writing letters, and keeping records.[88] Although changes occurred in a few instances, responses to these appeals were generally characterized by delays as well as denial and blame-shifting, and intimidation and retaliation.[89] For instance, Interviewee A was told by a top level administrator with whom she had spoken about the women's experiences in her department, "[T]hat's what pioneers have to face."[90] Interviewee C said that her department was so enraged about a letter she had sent to the dean that they said she was dishonest, threatening, a disgrace, and should be discharged without cause.[91] The women then lost hope of being able to informally address their situations at their universities and therefore reluctantly turned to their universities' formal processes, which they had previously tried to avoid.[92] They perceived an increased likelihood they would be labeled a troublemaker, and they viewed the university processes as biased, superficial, and fairly unlikely to result in the changes they hoped for.[93] Still, some women hoped change might result. However, for the most part, the universities responded to the formal complaints in the same way as they did to the informal ones—with superficial changes, delay, denial of responsibility, retaliation, and legal maneuvering.[94] For example, Interviewee L said:

> There is no good place to appeal on the possibility of a discriminatory act. So the internal processes were, I thought, [a] façade, and I still think in many places still [a] façade. [I think] that it's done as a legal maneuver and that the institution had it set up because it discourages people from going further, discourages people from disagreeing with the outcomes. So I didn't go into it realizing that it was a façade, but I came out of it thinking that it was a façade and not very useful.[95]

Thus, the women's experiences with internal processes at their universities were consistent with the observation by Bisom-Rapp that most internal procedures in organizations have been designed more to circumvent liability in the courts and less to address discrimination problems.[96] The women's experiences also illustrate how the rules-based court system is inadequate for handling second generation discrimination,

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88. *Id.*
89. *Id.*
90. *Id.* The use of the word "pioneers" was most likely a surrogate for "females," clearly acknowledging that the system was discriminatory.
91. *See supra* note 72.
92. *Id.*
93. *Id. See also* discussion *infra* Section V.A.
94. *See supra* note 72.
95. *Id.*
96. *See* Bisom-Rapp, *supra* note 2, at 11.

as was discussed by Sturm.[97] The internal procedures that courts expected of employers only served to frustrate the women more since they were ineffective at resolving the discriminatory situations. When taken together, the second generation discrimination the women experienced over many years, the lack of attention from university personnel to their informal appeals, and the inappropriate responses to their formal ones created a large amount of anger and desperation in the women, motivating them to sue. Plaintiff H said that a lawsuit should be the last thing one does in life, adding, "I mean, I'd have to fall down an empty elevator shaft,"[98] which illustrates her desperation at this point. Two of the women discussed how their frustrations with their universities only strengthened their resolve to pursue justice. Interviewee L said that it became obvious to her that "it was going to take a two by four or a four by eight for them to realize that what they had done was just wrong."[99] Interviewee M said that her university pushed her so hard that she felt that "even if you beat me up once, twice, three times, five times, I'm going to stand up as long as I can. I felt that I was beaten up way too much to shut up."[100]

Therefore, the women pursued legal avenues partially in the hope of seeking redress for the discrimination they experienced in terms of outcomes such as equitable pay and the jobs, promotions or degrees they had sought. However, the most commonly desired outcomes were a desire for accountability and change at the institution. Six of the women discussed wanting the truth to come out and the problematic situation publicly acknowledged.[101] For instance, Interviewee E said, "Their whole defense was that this didn't happen. I wanted them to have to answer for it."[102] Eight of the women discussed their hope that legal avenues would result in change at their universities.[103] In this regard, Interviewee A stated:

> Maybe the possibility of losing money or adverse publicity would make them change. That's what made them do things while I was a faculty member. Either losing a pile of their mountain of cash or, I think even more importantly, the poor publicity about their wonderful image that they try to cultivate. Those two motivators often lead to change at that institution. So by going the external route, I thought those two factors might lead to change.[104]

97. *See generally* Sturm, *supra* note 1.
98. *See supra* note 72.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*

B. Intermediaries and Lawyers: The Role of Resources and the Bottom Line

Past research suggests that lawyers serve as a type of gatekeeper to justice through their shaping of disputes to fit their own interests, such as by responding differently to different clients, urging settlement in some cases and amplifying grievances in other cases, and choosing legal actions that provide substantial fees rather than actions, such as reconciliation, that are difficult and unprofitable.[105] Themes from the present study indicate that this shaping can be a big hurdle for women who wish to sue universities. It is very difficult to obtain legal counsel in cases against universities due to the high cost of this service compared with client income. As Interviewee I commented, "The court system doesn't really work for ordinary people because it's very complex, it's very time-consuming, and no ordinary working person can pay all of those bills."[106] Similarly, Interviewee M said, "People think that the American culture is so litigious, but when you really come down to it, only a very few are going to be able to sue. Unless you get the state or somebody to take your case."[107] Interviewee M's statement alludes to how many of the women tried to respond to the overwhelming costs—by seeking funds from others, by hoping state or federal agencies would take the case, or by trying to find attorneys to take their cases on contingency.

However, most lawyers shy away from representing clients suing universities because of the tendency of universities to prevail in the courtroom.[108] In fact, nine of the women discovered that attorneys rarely take sex discrimination cases against universities.[109] There appeared to be two important reasons for this reluctance. First, the universities the women were suing were in much better positions than the women were in terms of ability to fund a legal case. For instance, the deeper pockets of universities sometimes provided them access to the most prestigious law firms. Interviewee C stated, "[The college] had hired this huge mega firm, the biggest, most expensive, most prestigious law firm [in the city]. And probably also one of the dirtiest. There were several cases. I think for a hundred years, [law firm] and [college] had been helping each other out."[110]

Second, suing a university created difficulties in finding lawyers because it lowered the likelihood of winning the case. Universities have

105. *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 L. & SOC'Y REV. 631, 645-47 (1980-81).

106. *See supra* note 72.

107. *Id.*

108. *See* discussion *infra* at Section III.A; *see* Clermont & Schwab, *supra* note 36, at 433-435; *see* Pacholski, *supra* note 36, at 1324.

109. *See supra* note 72.

110. *Id.*

historically predominated in these types of cases because courts have been reluctant to intervene in academic decisions.[111] Interviewee C, for instance described her interpretation of the potential repercussions of *Ottaviani v. State University of New York at New Paltz*[112] on her own case:

> [In that case,] the judge at the fact finding level said, "The college has a right to make any decision it wants to." Then it went negative, negative up to the Supreme Court. [Ottaviani] suggested two law firms, the one that had handled her district level case and the other who handled the two appeals including up to the Supreme Court. At [law firm], we got a wonderful young lawyer. He said, "Oh, you have a great case, I'd love to handle it. My firm won't let me. We lost $150,000 on *Ottaviani*. They won't let me take another civil rights case."[113]

In addition to the aforementioned problems with finding an appropriate attorney that the women identified in their interviews, scholars have noted more substantive problems involving how plaintiffs' lawyers assess the viability of a second generation discrimination case. In her study of the relationship between litigation prevention and workplace bias, Bisom-Rapp argued the extent to which plaintiffs' attorneys' opinions correspond with defense literature on the effectiveness of litigation prevention strategies may increase the efficacy of compliance mechanisms and decrease the willingness of the plaintiffs' bar to undertake representation in discrimination cases.[114] In other words, "the employment bar as a whole shares a set of analytical constructs that are used to distinguish between viable and fruitless discrimination claims" that rest on the rules-based approach to handling discrimination,[115] which, as suggested by Sturm, is inappropriate for second generation discrimination cases.[116] As a result of many lawyers' reluctance to take the women's cases for a variety of factors associated with the viability of the case and resulting financial risk, several of the women had to resort to hiring lawyers they did not feel were very effective.[117] For instance, Interviewee B stated:

> I remember the frustration of not having the best lawyer because I didn't have the money for it—basically having to be at the mercy of somebody who was willing to take on your case, who

111. *See* Hora, *supra* note 68; Pacholski, *supra* note 36; VALIAN, *supra* note 34.

112. Ottaviani v. State Univ. of N.Y. at New Paltz, 875 F.2d. 365 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). In *Ottaviani*, the Second Circuit Court of Appeals affirmed judgment of the district court, which found, after conducting a bench trial, that the statistical and anecdotal evidence offered by the plaintiff did not prove a discriminatory pattern. *Id.*

113. *See supra* note 72.

114. Bisom-Rapp, *supra* note 2, at 38-39.

115. *Id.* at 39.

116. *See* Sturm, *supra* note 1.

117. *See supra* note 72.

> may not be the best lawyer. And who's fighting a university that has unlimited resources and can drag things out as long as they darn well please.[118]

A second major obstacle to accessing the courts for the women in the present study involved the governmental agencies that were created to expedite the resolution of discrimination suits, such as the EEOC. The intention of Congress was that the EEOC would help discrimination victims resolve their situations without having to hire legal counsel.[119] The commission interprets discrimination laws, issues guidelines to employers, investigates employee charges of discrimination to determine whether there is "reasonable cause" to believe discrimination has occurred, and encourages reconciliation in cases where reasonable cause is found. States also have agencies that monitor and help enforce state discrimination laws. All of the women's cases were filed with the EEOC, and three cases were also filed with state agencies.[120] At least four of the interviewees were hopeful that the agencies they filed with would facilitate them obtaining information and would help save time and money.[121]

However, the majority of the women's experiences with these agencies were characterized not by facilitation, but by poor service, delays, and inadequate investigations.[122] For instance, Interviewee J was told she was ineligible to file, which was incorrect; Interviewee N filed with two different state commissions, both of which lost her file; and Interviewee I was not told that she had to name all her supervisors on the complaint, which hurt her case two years later.[123] Also, although four women were fortunate in that the process took less than a year, Interviewee N's case took six years, and Interviewee B reported the EEOC never finished processing her complaint.[124] These delays sometimes occurred despite some of the women's attempts to expedite things, which included making several calls and trips to the agency and even asking congressmen to investigate the status of the case.[125] Despite their frustrations, most of the women understood these delays were partially a function of a lack of resources at the agencies. Interviewee J remarked:

> When I actually began to find out some of the statistics on how many complaints were made and how many they could actually investigate, I just found it really sad that a government institution

118. *Id.*
119. *See* Kreiter, *supra* note 58.
120. *See supra* note 72.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

> even exists at all that's that big of a joke, that has such nonexistent resources to investigate a problem of that magnitude.[126]

The lack of resources caused difficulty in the investigation and the attempted resolution of first generation discrimination claims left by default, even fewer resources available for administrative agencies to effectively handle second generation cases.

During the Reagan and Bush years from 1980 to 1994, the EEOC budget stayed essentially the same, and the number of staff dropped by about twenty-five percent at the same time that new legislation increased the backlog of cases, increasing the average time it took to process a charge from less than six months in 1980 to nearly a year in 1994,[127] which explains the delays the women experienced. In addition, the increased workload, policy changes, and new legislation increased the need for training while, at the same time, the stagnant budget underfunded training for many years,[128] which could explain the incompetence of agency staff that several of the women noticed.

Furthermore, five of the women were quite disappointed with the nature and extent of the investigation.[129] In Interviewee E's case, she received a response from the EEOC within two to three months, but no finding was issued with the right to sue letter because the agency was so backed up and did not want to investigate.[130] Interviewees A, F, and M discussed how the investigations performed by the agencies handling their cases seemed too perfunctory, especially for the length of time it took to get a response, and how their case workers seemed unknowledgeable about academics and university processes like tenure.[131] For instance, Interviewee M thought that her caseworker was naively buying "some of the excuses that these guys were giving her, not pinning them down enough in areas where she should be pinning them down."[132] Interviewee F believed her agency was refusing to see the larger picture: "I think at this point I had become aware that there were other women who were suing the university. And that just didn't seem to make them interested—that it

126. *Id.*

127. *See* Gilbert Casellas, Prepared Testimony on the Equal Employment Opportunity Commission before the Senate Committee on Labor and Human Resources (May 23, 1995); L.G. Morra, Prepared Testimony on the Equal Employment Opportunity Commission Before the Senate Committee on Labor and Human Resources (May 23, 1995); Kreiter, *supra* note 58.

128. *See* Casellas, *supra* note 127.

129. *See supra* note 72.

130. *Id.*

131. *Id.*

132. *Id.*

wasn't just me and that they should maybe look more broadly."[133] Interviewee C was outraged when what she thought was a strong, well-documented case was rejected by the EEOC.[134] However, her lawyer was not surprised and told her that the state commission "was there for big business and takes a few cases as show cases to prove they're doing something."[135] Interviewee A was disappointed to find out that the EEOC avoids tenure cases because they are so difficult to win in court and said, "It is not helpful for women that are facing discrimination to have a federal agency basically turn their back on this problem."[136]

The women's perceptions of the EEOC are consistent with Bisom-Rapp's observation:

> An EEOC investigator is unlikely to look beyond the information provided by an employer if it appears to provide a legitimate, non-discriminatory reason for the disputed employment action. The incentives, in fact, cut against searching review. . . . due in part to a proliferation of charges filed with the agency and the failure of agency resources to keep pace with demand. Private sector discrimination charges filed annually, for example, have averaged more than 85,000 since fiscal year 1992. Moreover, pressure to reduce the EEOC's infamous case backlog remains keen, with the agency proudly announcing recently that reforms in charge handling procedures slashed the inventory of pending cases in half.[137]

Therefore, the manner in which the EEOC approaches discrimination allegations appears to be very similar to employers' attorneys' analysis of the viability of a discrimination lawsuit. In fact, the agency seems to rely fairly heavily on employers' attorneys to prepare the information they use. The experiences set forth above by the interviewees correlate with the following:

> Recent work by Michael Selmi provides an additional explanation for the failure of EEOC investigators to delve deeply into the animating force behind a given employment decision. Selmi, discussing the behavioral incentives affecting EEOC staff attorneys, notes that case selection is guided by the attorneys' needs to advance their careers and the goals of the agency itself. This translates into an imperative to pursue relatively uncontroversial cases with a high probability of success. In fact, Selmi concludes that the agency finds merit in "an extraordinarily low percentage of filed claims, brings very few cases," and often

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *See* Bisom-Rapp, *supra* note 2, at 36-37.

pursues small easy cases.[138]

The issue of access to the legal system via lawyers and agencies is particularly important considering that difficulties during this process may discourage women from ever filing cases. It was evident from the interviews that the women in the present study were all quite persistent in trying to find good counsel and pursuing justice using the legal system. Thus, one could argue that the statistics about women's low success rates in the legal system that look exclusively at outcomes of cases once they have been filed[139] actually underestimate the difficulties women have in their attempts to achieve equity via the legal system. To truly gauge this impact, one should also include those women who have given up trying to find a lawyer or get a timely and adequate response from a state or federal agency.

C. *Courts and Judges: A Lack of Understanding, an Inappropriate Focus, and Ineffective Resolutions*

Once they accessed the legal system, the women encountered a number of other frustrations with the process. Some of these frustrations were already familiar to the women, involving dishonest statements as well as attacks on their behavior and performance made by witnesses and attorneys for the university.[140] These were responses most of the women had encountered during previous attempts to obtain justice via informal and formal mechanisms within their universities.[141] Such behaviors are representative of what O'Day has termed "defamation"—intimidation techniques designed to discourage an individual who is attempting to change a system. Techniques include distortion of events as well as attacks by administrators on the character of the individual.[142] Thus, the legal system, although it promised a fairer playing field, does not appear to decrease the likelihood that the women would experience the defamation they had already encountered at the university. However, the level of dishonesty was still surprising to some of the women given that witnesses were now testifying under oath.[143]

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138. *Id.* at 36 (quoting Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1438 (1998)) (citations omitted).

139. *See* Clermont & Schwab, *supra* note 36; Terpstra & Baker, *supra* note 36; VALIAN, *supra* note 34.

140. *See supra* note 72.

141. *Id.*

142. *See* Rory O'Day, *Intimidation Rituals: Reactions to Reform*, 10 J. APPLIED BEHAV. SCI. 373, 377-79 (1974). When we use this term later in this section, we are referring to the definition of the term as proposed by O'Day.

143. *See supra* note 72.

Another familiar frustration encountered by the women was delay.[144] Most of the women had already experienced delays at their universities, where responses to their internal appeals usually took months.[145] Often, the women interpreted both the delays they encountered at their universities and the delays that occurred in the legal system as the result of deliberate stalling techniques used by the university in an effort to get the women to drop their complaints.[146] Whether this was or was not the case, the length of the delays in the legal system still surprised many of the women, and the result of all the delays that occurred from the time the women initially sought help for their situations at their universities to the time their cases were resolved usually meant that many years had gone by—more than a decade for several of the women and two decades in the case of one woman.[147]

Both defamation and delays were somewhat expected, but the degree to which they and other legal games occurred in the legal system were surprising to the interviewees. Interviewees commented that it was not clear that the complications of the legal system improved the carriage of justice.[148] Instead, it appeared to be more like a game in which the winner was the one who figured out how to use all available legal means to his or her best advantage.[149] For instance, Interviewee D said that it did not seem fair or even productive for the defendant's attorneys to have delayed so many times.[150] Yet such tactics were procedurally within the letter of the law. Similarly, Interviewee I stated:

> I thought that the legal process is like it's advertised, that you go to court and you tell your story and then you have justice. But it turns out that you cannot tell your story. Now why can't you tell your story? Well, you have to figure it out. There are all these little rules and if you have a very excellent lawyer, then that's fine, but since there are not a lot of cases and they are all scattered, there are no lawyers specializing in this.[151]

These negative experiences with the courts that the women described may have been caused, in part, by courts having the same first generation discrimination mentality as was discussed earlier with respect to plaintiffs' attorneys and the EEOC. This would be consistent with Bisom-Rapp's observation regarding a study of judicial decisions involving discrimination

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*

in performance appraisals, which indicated that judges were far more persuaded by form and process than they were by the substantive issue of accuracy versus bias.[152]

There were two behaviors experienced in the courts that were even more unexpected by the women than the legal game-playing and relative lack of attention to substantive issues. These were the lack of understanding of the many aspects of discrimination and the presence of various biases in the court room. There may have been an assumption made by the women that attorneys and courts that handle civil rights cases should have a clear understanding of how discrimination operates in a variety of settings. However, this was not always the case. In particular, Interviewees C and L discussed how people in the legal system, including judges and even their own lawyers, had a difficult time understanding the more subtle forms of sex discrimination they experienced.[153] For example, Interviewee C described her judge as a former civil rights lawyer who had personally experienced discrimination and had no sympathy for it.[154] Yet she still faced the challenge of explaining the particular type of discrimination—sex plus marital status discrimination:

> People, including the judge and my own lawyers, had trouble understanding sex plus discrimination. [They'd say] yes, but there are women tenured in the department. We'd say, yes, but they are all single women. Our first lawyer was a man. He couldn't quite grasp that. And the data was so clear. They never tenured a married woman in the history of the college.[155]

Similarly, Interviewee L discussed the difficulties she faced: "Gender discrimination is hard to explain, even to individuals that try to remain open-minded. There was no smoking gun, no memo that said 'that bitch' or anything like that. It's tremendously subtle."[156] Interviewee L also described that while her lawyers put data on huge posters to show disparate treatment discrimination, she felt that she faced major obstacles because

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152. *See* Bisom-Rapp, *supra* note 2, at 45-46 ("Defendants were more likely to prevail when '(a) they had conducted job analysis and included written rater instructions; (b) they had allowed employees the opportunity to review appraisal results; and (c) there was evidence that more than one rater concurred with the performance assessment.' . . . In fact, a key variable relevant to appraisal system accuracy and potential bias was not significantly related to case outcome. Specifically, whether the appraisal system emphasized employee traits (considered prone to inaccuracy and bias) versus employee behaviors and results (recommended to increase accuracy and reduce bias) did not influence the judges." (quoting Jon M. Werner & Mark C. Bolino, *Explaining U.S. Courts of Appeals Decisions Involving Performance Appraisal: Accuracy, Fairness, and Validation*, 50 PERSONNEL PSYCHOL. 1, 16 (1997))).

153. *See supra* note 72.

154. *Id.*

155. *Id.*

156. *Id.*

jury members had little empathy for academics and did not want to hear about the discrimination combined with the complexities involved in how performance is weighted and judged in academia.[157]

The lack of understanding of the nature and pervasiveness of second generation discrimination by the courts was also illustrated by the fact that the women observed several instances of discrimination during their court experiences. Although the women were all too familiar with bias, they were surprised to find it in the court system because most had expected the legal system to be fairer than their universities had been. Six women spoke of various biases they experienced during their court case, including clear instances of gender bias and judges' as well as juries' apparent disinterest in or resistance to a case of discrimination (which could be construed as gender bias as well).[158] Interviewee G was amazed at the numerous instances of sex discrimination she encountered in her trial, which included lawyers for the university not addressing female witnesses for the plaintiff by their proper title of "Dr." although they did so for their own witnesses.[159] In addition, when she won her case, the university's lawyers asked for the verdict by the all female jury to be overturned with an argument implying that women simply do not think rationally.[160]

In addition, there were instances where the women perceived that judges and juries were resistant to hearing their discrimination cases. Interviewee G noted that her judge did not seem to want to hear her case and estimated that ninety-eight percent of the rulings went against her.[161] Interviewee L was concerned that her jury had no understanding or sympathy for a case of discrimination since her case was tried in an all-white Southern city that still had a good amount of segregation, where "minorities will not look you straight in the eye and natives of the state don't know that it's different (than other states). That's what they've grown up with, that's what they expect."[162] Despite the women's surprise, their experiences of biases and a lack of understanding of sex discrimination in the courts are very consistent with the literature that indicates that women are not treated equitably in the legal system across a number of areas, including sex discrimination cases.[163]

Despite the frustrations encountered during the court process, the

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *See* Maureen A. Maloney, *Anatomy of Gender Bias and Backlash, in* INVESTIGATING GENDER BIAS: LAW, COURTS, AND THE LEGAL PROFESSION (J. Brockman & D.E. Chunn eds., Thompson Educ. Publ'g 1993); DUSKY, *supra* note 51; *see also* Terpstra & Baker, *supra* note 36.

women did discuss several positive experiences and outcomes. The women most valued the information about their situations that they were able to obtain via legal means, the actions of the judges they found to be fair, and the instances when important points about their situations were successfully demonstrated. These aspects helped provide the women with a sense of validation and empowerment. They also led to at least some level of public acknowledgement of the truth of the situation, one of the most common desires the women had for their court cases. As discussed previously, the women made it clear in their interviews that accountability and change were what mattered to them most, even more than receiving the personal outcomes that they had been denied because of the discrimination. Even so, only a little more than a third of the women discussed seeing any accountability and change at their institutions as a result of their court cases.

Most of the women discussed their disappointment in the perception that they and their lawyers were constrained by the nature of the legal system. Given these constraints, their demands focused on personal outcomes, such as restoration of their position and monetary damages, rather than desires for accountability and change on the part of the defendant. For instance, two women said they were asking for their jobs back as part of their suits but really did not want to be back at their universities.[164] Interviewee M stated she became quite worried when her lawyer said her case was so strong they might actually reinstate her; she could not imagine being back near her harasser.[165] Financial compensation for the discrimination, in the form of back pay, punitive damages, and attorney's fees, was also typically requested, as discussed by seven of the women.[166] However, four of these women said they were not filing the suit to get financial compensation.[167] When these women objected to asking for money in the suit, their lawyers insisted they ask for it regardless.[168]

For example, Interviewee L expressed:

> He said, really what it comes down to is, it's about the money. I said I don't really care about the money. He said, well, you should care about the money because you'll discover when we go through all this how much money you will have lost by losing this job. I said, okay, but what I really want is an apology.[169]

As a result, the women found they had to abandon initial hopes that their lawsuits would stimulate their universities to change, as discussed by

164. *See supra* note 72.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

Interviewee A: "In the end I realized that this process isn't about trying to change them—because they aren't going to change. The process is about your own self-worth and self-esteem, and ultimately, that's what you get out of this whole process."[170]

Thus, the women's disappointment in the outcomes of their court cases serves to illustrate the consequences of using a rules-based approach to resolve second generation problems rather than a problem-solving approach. As Sturm observed and the women's experiences confirmed, the current rules-based approach that punishes violations of pre-defined legal rules does not encourage either lawyers or organizations to identify and correct problems:

> Under the current system, employers producing information that reveals problems or patterns of exclusion increase the likelihood that they will be sued. Thus, lawyers counsel clients not to collect data that could reveal racial or gender problems or to engage in self-evaluation, because that information could be used to establish a plaintiff's case. Similarly, the rule-enforcement approach to compliance induces plaintiffs' lawyers and advocates to view information about institutional problems and failures as a potential basis for establishing liability. It thus encourages these important legal actors to overlook ways of using that information proactively to develop accountability systems and promote constructive structural change.[172]

Later, Sturm concludes that, for these reasons, second generation cases are resistant to "solution through after-the-fact adjudicative sanctions for rule violations,"[171] leading these types of problems to persist when left to the discretion of employers by the courts. Indeed, this is what the women experienced in their cases. When asked to reflect upon their university and legal experiences months and years later, many concluded that little had changed at their universities beyond window dressing.[172] This was evident from the statistics as well as the fact that the complaints and suits had continued at the universities they sued.[173] In fact, the women's discussions indicated that this persistence appeared to be due to the insistence by university administrators that the discrimination they and others experienced at those universities did not even exist.[174] Thus, following the women's lawsuits, there was still little awareness or acknowledgement of their universities' discriminatory cultures by

170. *Id.*
171. *Id.* at 478.
172. *See supra* note 72.
173. *Id.*
174. *Id.*

172. Sturm, *supra* note 1, at 476.

administrators. In Interviewee H's opinion, the subtle, insidious nature of the biases the women encountered that are so easy to hide and deny—i.e., second generation discrimination—are much more harmful than clear, overt discrimination, and "the people who looked like they were thinking people and educated people and fair people"[175] are more dangerous than those who are very overt about their sexism. Interviewee A felt the biases of decision makers, however subtle, color their perceptions and their ability to evaluate people:

> Your framework and the way you perceive the world really do alter your reality. That was one of the biggest things that I learned from the whole experience. It's really discouraging to realize that it doesn't matter what you do, it's not going to measure up. Even if you accomplish what they claim you need to accomplish, they'll find some way to undermine it because deep down, there are decision makers there that have a hard time believing that women can accomplish the same thing as men.[176]

Furthermore, Interviewee A noted the worst part of her situation was that these decision makers never realized throughout her entire case what kind of problems they had:

> Towards the end of the process, I realized that there are key people there that just have no clue. They just do not think these are issues. They're not willing to even get to the frame of mind of: "We don't know if there are problems or not, but let's look to see if there are." They just assume that there are not. That this is all whining on the part of women that don't measure up and there's absolutely nothing to this other than they just didn't do their jobs and they shouldn't be on this faculty.[177]

Similarly, Interviewee F discussed how administrators can perpetuate such biases:

> [They] make an enormous difference in what happens at the institution [because] if those people have a certain view, that view pervades the whole system of decision makers. It's very hard to get someone into a deanship position who is truly committed to equal opportunity because that person will never be hired into a deanship by someone who has the opposite view.[178]

Interviewee F further expressed that, because of the people who are in charge, the hiring statistics at her university are as bad as or even worse than they were when she sued ten years ago.[179] In summary, according to

175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*

the interviews, the women's lawsuits appeared to have done little to change administrators' views of the problems at their universities, let alone motivate them to try to resolve those problems and serve as change agents.

VI. DISCUSSION AND RECOMMENDATIONS

A. Discussion

Our research supports the conclusion that the current rules-based approach to second generation discrimination claims is ineffective. As opposed to furthering the intent of anti-discrimination laws, such an approach has contributed to the myriad of complaints and frustrations expressed by our interviewees. The difficulty in establishing a second generation discrimination claim is magnified due to both legal and workplace environments that remain fixated upon applying rules and policies intended for first generation discrimination claims. Unfortunately, these rules and policies are for the most part antiquated. While first generation discrimination may still occur, such incidences have been greatly reduced since passage of anti-discrimination laws. Indeed, most discrimination claims are now structural second generation claims, and the legal system and workplace have failed to develop an appropriate framework to address these types of claims. This is unfortunate, as discrimination in the workplace, though not overt and readily identifiable, still exists and negatively impacts an affected person's ability to perform and advance in his or her given fields.[180]

Therefore, our research strengthens recent work that urges a structural approach to employment discrimination law. Effectively addressing second generation discrimination requires a change from rules that focus on discrete events and actions to an approach that focuses on restructuring the entire workplace environment.[181] Clearly the reasons the system has evolved to be one of form over substance is partly based on the fact that, historically, discrimination was very blatant and overt. Employer and judicial resources were initially allocated to address these forms of first generation discrimination. However, as most of the overt discrimination has disappeared, it has proven very difficult to replace the resultant rules-based system with a structural approach. Form over substance is perceived as easier; therefore, change has not occurred. Employers and the courts continue to embrace a system that does not even identify, much less seek to redress, second generation discrimination. A serious advancement in

180. *See* Bagenstos, *supra* note 25, at 12-13; Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 105 (2003).

181. *See* discussion *infra* Section VI(B)(1).

eradicating second generation discrimination from universities (and indeed, all workplaces) requires abandonment of the "overt acts" mentality and emphasis on structural reformation of the workplace to eliminate/reduce the risk of biases against females (and others) who have been traditionally discriminated against.[182]

However, there is a problem with trying to change the workplace. It is very difficult to justify abandonment of a rules-based system in favor of a structural approach absent incentive. The legal system has not created a model that would require or even promote such a change. There is no incentive for any employer to be a pioneer when there are no guidelines or models available to provide necessary assurances that adoption of a structural approach will allow the employer to remain in the "safe harbor" that has emerged from the rules-based approach. As an example, consider that the disparate impact doctrine requires proof of discrete employment practices—a showing that the employer uses a particular employment practice that causes a disparate impact.[183] This is inherently difficult to prove in second generation cases as the covert, discrete nature of the discriminatory practice may be deeply embedded in unconscious biases of decision makers within the workplace. To effect appropriate change, therefore, the first step is for the courts to recognize that discrimination may be structural in nature.[184]

The Supreme Court has laid the foundation for a change to a structural approach in *Watson v. Fort Worth Bank & Trust.*[185] In *Watson*, the Court allowed a plaintiff to claim that a subjective criterion used for hiring, promotion, and other employment decisions has a disparate impact on a protected group as long as that subjective criterion is not a business necessity.[186] This is significant as the Court recognized there is a relationship between unstructured discretionary employment decisions and discrimination by holding that disparate impact analysis applies to

182. *See* Green, *supra* note 180, at 145 ("[S]tructural account of disparate treatment theory . . . would hold employers directly liable under Title VII for organizational choices, institutional practices, and workplace dynamics that enable the operation of discriminatory bias on the basis of protected characteristics.").

183. *See* Bagenstos, *supra* note 25, at 13 n.57 (citing Garcia v. Woman's Hosp. of Tex., 97 F.3d 810, 813 (5th Cir. 1996) ("stating that disparate impact plaintiff must 'isolate and identify a particular employment practice which is the cause of the disparity and provide evidence sufficient to raise an inference of causation'")).

184. *See id.* at 8 ("Recognition of the pervasiveness of implicit bias lends support to a structural approach to antidiscrimination law.").

185. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988). *See also* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 758 (2005) ("Whether intended or not, Congress and the Supreme Court have provided the doctrinal tools needed to bring legal evaluation of discrimination claims more in line with the realities of discrimination.").

186. *Watson*, 487 U.S. at 989-91.

subjective employment practices, including "an employer's undisciplined system of subjective decision making."[187] The *Watson* case "reflected a recognition that systemic factors, namely the structure (or lack thereof) of decision making, caused exclusion, as well as the expression of bias by individuals or groups operating within those structures."[188] Therefore, a change to a structural approach is possible because *Watson* "has outlined a framework that is capable of providing for dynamic interactions between general legal norms and workplace-based institutional innovation that promotes effective problem solving."[189]

Though the Supreme Court has signaled a readiness to embrace a structural approach to addressing second generation discrimination claims, issues remain regarding its proper implementation. Judges and courts have not properly adapted to application of a structural model, in part, because the *Watson* Court did not fully articulate the conceptual framework for these types of claims.[190] "Supreme Court precedent seems on its face, to require lower courts to engage in rigorous scrutiny. The failure of lower courts to satisfy that obligation does not appear to be a problem that can be solved simply by telling judges that they (really, really) should scrutinize employer practices."[191] Clearly, as set forth in the interviewees' comments above, failure to apply a requisite level of scrutiny leaves the plaintiff in limbo and with a feeling that the system is not fair. Bagenstos stated:

> Employment discrimination law has always served two different purposes. The first, captured in the anti-subordination theory that is so popular among academics, reflects a broad goal of social change to eliminate group-based status inequalities. The second, captured in the so-called antidiscrimination principle, reflects a more narrow objective of eliminating the unfairness particular individuals experience when they are the victims of wrongful employer conduct. . . . As the structural turn illustrates, many of today's employment equality problems stretch the fault-based understanding of antidiscrimination law to its limit. The problem of implicit bias, which drives the calls for a structural approach to employment discrimination law, is a prime example. Discrimination actuated by implicit bias is not rooted in a set of objectionable values so much as it is built into the structure of how people's brains make sense of the avalanche of information they must process. If antidiscrimination law is to respond to such

187. *Id.* at 990-91 (citations omitted).

188. *Id.* at 994-95.

189. Sturm, *supra* note 1, at 479.

190. *See id.* at 484-90, 537 ("Some lower courts have undercut the promise of Watson, Burlington Mills, and Farragher by reverting to patterns reminiscent of the rule-enforcement mode of judicial regulation.").

191. *See* Bagenstos, *supra* note 25, at 25.

> bias effectively, the concept of wrongful discrimination must expand to embrace not only the deviant acts of especially immoral people but also the everyday actions of virtually all of us.[192]

While overt acts of discrimination have been greatly reduced through application of a rules-based approach, the structural problems which exist and lead to second generation claims will undoubtedly become more significant. "That fact poses a challenge for employment discrimination law: how can we persuade judges to use employment discrimination law to attack these structural problems when their prevailing understanding of the law is based on a model of individualized employer fault?"[193]

Bagenstos examined the legal reforms proposed by the scholars who have proposed various structural approach models to better address second generation claims, concluding that none offer a viable solution and that "the answer, in the end, may lie within the broad realm of politics and social change rather than the narrow confines of legal doctrine."[194] There is certainly some truth in his conclusion in that meaningful reform in addressing second generation discrimination requires a collaborative effort between the judicial and legislative branches, coupled with appropriate support from the employment sector. Yet there is nothing to indicate that those entrenched in discrimination claims—the lawyers, the administrative agencies, and the court system—should not take the lead in initiating the change to a structural approach. The fact that some of the victims of discrimination in the university setting discussed in this article tried to get justice and were denied, which led them to view the entire system as unfair, should be reason enough to effectuate this change. Indeed, first generation discrimination might still exist on a wide scale had we waited for social change. The Civil Rights Act of 1964 and the Supreme Court's decision in *Katzenbach v. McClung*[195] certainly served as a catalyst for change in our society. Instead of the law waiting for society to change, there are times when the law must be proactive. As such, the role of the legal system in developing a structural approach to eradicating second generation discrimination from the workplace should not be understated.

B. Recommendations for Each Player

1. Employers

Employers should review their antidiscrimination rules and policies

192. *Id.* at 40-43 (citations omitted).
193. *Id.* at 44.
194. *Id.* at 45.
195. Katzenbach v. McClung, 379 U.S. 294 (1964).

from a perspective that recognizes the need to shift from a reactive, defensive posture to a proactive approach that is designed to better identify and address second generation discrimination. Allocation of resources for utilization of appropriate quantitative and qualitative methods designed to reveal instances of second generation discrimination, including embedded biases, is needed. A good example of using quantitative methods to detect and address second generation discrimination is Deloitte & Touche and its Women's Initiative, created in response to a disturbing employment practice brought to the forefront by its chief executive officer.[196] The officer noticed a gross disparity that existed in promotion and retention rates between males and females.[197] The failure to promote females was not intentional; this practice simply "crept" into the decision making process because of some stereotypical view of females.[198] Specifically, Deloitte & Touche achieved a hiring rate of fifty percent women and assumed that the female candidates presented for partnership would approach fifty percent over time; however, a decade later the female candidates nominated for partnership remained at its historic level of ten percent.[199] Moreover, there was a growing gap in the turnover rate between men and women.[200] Deloitte's board was asked to establish the Task Force on Retention and Advancement of Women, which was charged with discovering the reasons for the high turnover rate and discussing how to reverse the trend.[201] As a result of their investigation, as well as the work of consultants, the Task Force identified obstacles to the advancement and retention of women, including a male-dominated culture in leadership positions that perpetuated stereotypes about women and built in systems for advancement (e.g., mentoring, networking) that worked for the men but not for the women.[202] In response to these findings, Deloitte created a more flexible work schedule, held training workshops, and created a system of accountability that created relatively fast and identifiable results.[203]

A similar approach in a university setting occurred at MIT after sixteen of the seventeen tenured women in the School of Science petitioned the Dean for an initiative to improve the status of women faculty in the school.[204] To address these concerns, a committee was formed and data

196. *See* Rosabeth Moss Kanter & Jane Roessner, Deloitte and Touche (A): A Hole in the Pipeline, Harvard Business School Case Study Series No. 9-300-012 (Sept. 28, 1999).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. Statement by Robert A. Brown, Provost, Mass. Inst. Tech. (Mar. 8, 2002), *available at* http://web.mit.edu/faculty/reports/provost.html (last visited Oct. 4, 2008).

was collected on percentages of women on the faculty for the previous ten years (which, oddly enough, had remained stagnant at eight percent), as well as data on salary, space, awards, resources, and responses to outside offers.[205] Results indicated that many tenured women faculty felt marginalized and that this marginalization increased as women progressed through their careers at MIT.[206] The committee made recommendations for improving the status of senior women faculty, and the Dean took immediate actions that resulted in significant progress, including an increase in the number of women faculty.[207] Changes included addressing inequities in space, resources, and equipment as well as including women in significant departmental activities.[208] As a consequence, the Provost then established committees in each of the other schools at MIT to do similar analyses.[209]

By focusing on the structure of the organization instead of on enforcing rules and policies that are ineffective due to the presence of more subtle biases, these employers took proactive approaches in addressing potential second generation claims. Key to each of these initiatives was the careful attention paid to indicators of problems. In the first case, the executive reviewed the statistics. In the second case, the dean listened to a group of women who had identified the problem by polling their colleagues. In both cases, these initial "red flags" indicating potential problems were followed by investigations into structural issues such as how people are mentored or how they are awarded space. Everyone in these organizations at some point became aware of these large-scale reviews, and the reviews almost assuredly raised people's consciousness about unintended biases. This in turn began to change the workplace cultures.

Certainly, results of our examination of the interviews indicate a proactive, problem solving (rather than reactive, defensive) investigative approach by employers is sorely needed. Many of the interviewees indicated they initiated lawsuits as a last resort in their attempts to change their workplace culture.[210] They had tried repeatedly to call attention to second generation type discrimination, initially through informal means such as talking with colleagues, writing letters, and keeping records.[211] However, their universities did not appropriately respond to these signals of potential second generation discrimination and even sometimes punished

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *See supra* note 72.
211. *Id.*

the women for voicing their concerns.[212] Many of the women reported that, by the time they initiated a formal complaint to comply with internal reporting requirements, they had already decided to use the legal system given their frustrations with the earlier university responses. Thus, we highly recommend that organizations pay close attention to complaints because they can indicate serious second generation discrimination problems.

However, waiting for complaints to arise is probably risky (just as waiting for customer complaints rather than regularly checking product quality is risky). The best option is to regularly study statistics that might indicate problems. For instance, reviews of percentages of employees at different ranks (not just upon entry) as well as their qualifications and performance could be undertaken to determine whether there are some areas where the workforce is skewed toward one gender or another that is not explainable by differences in qualifications (e.g., education or experience) and performance. If it is skewed, then employers need to ask whether there is a legitimate reason for the distribution or whether it is likely the result of some type of structural bias. These examinations are regularly conducted in the research literature and reported as indicators that discrimination exists. For example, one study looked at promotion and reward rates of men and women who had similar publication rates.[213] Unfortunately, most employers, including universities, do not make use of statistical analyses such as these and therefore are not able to identify indicators of second generation discrimination prior to them becoming embedded in the workplace culture and practices.

2. Employers' Lawyers

The employers' lawyers should begin to do more than just counsel clients on the adoption of rigid rules and policies designed to avoid litigation. Instead, a shift in the paradigm regarding the traditional role of an employer's attorney should change to include providing advice to clients that will better educate them on second generation discrimination. This shift should, in part, be based on the Supreme Court's decision in *Watson* that subjective factors may be considered. Lawyers should be more proactive in addressing the need for structural changes and provide proper guidance in promoting a better understanding of second generation discrimination. They should inform their clients that, even though it has been difficult to win such a case in the present environment, the Supreme Court has signaled a change, and when the *Watson* model is more fully

212. *Id.*
213. *See* Toren, *supra* note 34.

implemented, they will be better prepared to identify, avoid, and hopefully eradicate second generation discrimination in the workplace. Proper counsel in this area would also include information on the benefits realized by Deloitte & Touche and MIT as examples of employers that embraced a structural approach to better deal with second generation discrimination.

3. Plaintiffs' Lawyers

The plaintiffs' attorneys should cease the practice of viewing discrimination claims through a conceptual lens designed to identify only first generation discrimination. When undertaking representation, these attorneys need to be prepared to submit appropriate discovery requests and otherwise obtain information to build a case that, while seeking to find the proverbial "smoking gun" inherent in first generation discrimination, also identifies instances of second generation discrimination. Of particular concern is the perceived lack of profitability in attempting to bring a successful claim of second generation discrimination. While the *Watson* case is encouraging in that it may result in more attorneys being willing to represent clients in second generation cases, it may take some time for additional case law, which applies the *Watson* framework and begins to award judgments to plaintiffs, to emerge. Indeed, it may be necessary for non-profit organizations, such as the one which funded our interviewees' cases, to continue to lead the way in attempting to secure such judgments before attorneys in private practice embrace the notion of representing plaintiffs in second generation discrimination cases.

4. Administrative Agencies

The administrative agencies, such as the EEOC, present a unique problem. There is not much incentive under the current system for change. There are limited funds and an increasing number of cases. Naturally, this environment is conducive to agents selecting cases in which the discriminatory act or practice is readily apparent—i.e., first generation discrimination. If appropriate resources were dedicated to provide proper education to its workers in identifying second generation discrimination, however, it is possible that the EEOC, while still carrying out its role as an "enforcement agent," could also prove to be a change agent. That is, should the EEOC begin to investigate and prosecute more second generation claims because its workers are better trained in identifying such discrimination, it follows that more employers will begin to view second generation discrimination more seriously.

VII. CONCLUSION

Although scholars have previously suggested that case outcomes indicate that the legal arena, including governmental regulatory agencies, may actually help perpetuate rather than address discrimination in organizations, little was known about the particulars of women's experiences when they turn to the legal system to address the discriminatory practices arising in a university setting. Though not the intent, perpetuation of second generation discrimination within a workplace is arguably the result of an overall system that continues to search for the overt forms of discrimination prevalent in first generation claims rather than developing a better approach to addressing, and ultimately eradicating, second generation claims.

Results of the present study are valuable for understanding women's attempts to restore equity at their universities using legal avenues and provide further support for adoption of a structural model to address second generation discrimination claims.[214] Results indicate that women tend to initiate lawsuits only after they have repeatedly but unsuccessfully tried to address their discriminatory situations at their universities. Their hopes are that the justice system will represent a fairer playing field in which the truth of the situation will come out and steps will then be taken to restore equity at their universities. However, they encounter numerous obstacles along the way, the first few having to do with difficulties accessing the legal system via attorneys and state and federal civil rights agencies. Even when they do access the system, frustrations continue concerning gender and other biases within the justice system itself, renewed attacks on their performance, witnesses who are dishonest or silent, legal games played by attorneys, numerous delays, and the general lack of understanding of sex discrimination as it occurs at universities.

Our case studies did not examine the underlying processes that are specifically associated with these outcomes but lay the groundwork for more specific research. Existing research does little to answer the question of what exactly goes wrong when women seek to use the justice system to address the discriminatory situations that occur at universities and, indeed, the workplace in general. However, our research demonstrates that a major part of the problem is that the entire system is stuck in a first generation discrimination mentality that cannot, and does not, properly respond to second generation discrimination. The legal system, its intermediaries, and employers continue to view sex discrimination only through a conceptual lens designed to capture instances of first generation discrimination.

214. *See* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007), for an example of a theoretical model designed to identify second generation discrimination in the workplace.

Obstacles in legal processes that may be responsible for continued application of a first generation, rules-based approach to address second generation claims should be further examined not only because both universities and legal institutions purport to be egalitarian, but also because of the implications for society of continued tolerance of discrimination at universities. Tolerance of discrimination at universities may serve to perpetuate discriminatory behavior in other organizations since students learn as much through the behaviors modeled for them—perhaps more—as they do through traditional methods.[215] Addressing inequalities at universities could be a step toward addressing discrimination in other institutions such as the corporate world and even the courts themselves.

Prior works by Professors Sturm, Bagenstos, and Bisom-Rapp have established an appropriate framework to transition to a structural approach, and the *Watson* case can serve as an impetus for such change. This article highlights the inherent weaknesses in a legal environment that continues to embrace a rules-based approach to address second generation discrimination and provides further support for adoption of a structural approach. Serious consideration by the courts of the women's experiences and the recommendations set forth herein is required. Similar consideration by employers can provide the basis for meaningful change, resulting in a genuine and effective method to better identify and eradicate second generation discrimination from the workplace.

215. *See* ALBERT BANDURA, SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY (Prentice Hall 1986).

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GENDER AND THE CHINESE LEGAL PROFESSION IN HISTORICAL PERSPECTIVE: FROM HEAVEN AND EARTH TO RULE OF WOMAN?

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In 2004, Song Yushui was chosen as one of the top ten judges in China.[1] In a China Daily article entitled "Judge Tempers Justice with Understanding," she recalls that as a child she wanted to become a modern "Bao Gong."[2] Bao Gong is a legendary Song Dynasty judge known for his incorruptible and indefatigable quest for justice.

In 2005, the New York Times published an article about Li Huijuan, another woman judge, called "A Judge Tests China's Courts, Making History."[3] Judge Li's 2003 provincial seed law ruling was the first time a Chinese judge had declared a law invalid. Constitutional law scholar He Weifang noted this was one of the "most important cases in the legal evolution of China." In the same article, Judge Li describes how, as a young girl, she was influenced by her father's refusal to accept bribes and television soap operas about ancient Chinese judges. She said, "I saw these images of judges and lawyers defending the people. I thought it was glorious."

This article explores the history of gender and the Chinese legal profession. Judges Song and Li represent the peaceful rise of the Chinese woman judge, and they rightfully claim the tradition of the *qingguan* [清官],[4] China's ancient incorruptible judges. What is this legacy? *Qingguan*

1. *Judges Tempers Justice with Understanding*, CHINA DAILY, Apr. 3, 2004, at 1.

2. *Id.*

3. Jim Yardley, *A Judge Tests China's Courts, Making History*, N.Y. TIMES, Nov. 28, 2005 at A1.

4. When Chinese words appear in this text, I sometimes include the Chinese character(s), Pinyin romanization, and tone marks for ease of pronunciation and reading for Chinese readers and learners. Not enough texts have tone marks, making a difficult language to learn even more difficult. Mandarin Chinese has four tones: (1) high tone, e.g., ā; (2) rising tone, e.g., á; (3) low tone, e.g., a and (4) falling tone, e.g., à. In most instances I use simplified Chinese characters.

represent the wisdom of China's rich legal tradition: balancing Heaven and earth. And although for thousands of years only men could become judges, district judges were called *fumu guan*, or father/mother officials. The peaceful rise of the Chinese woman judge is the fulfillment of this linguistic prophecy.

In Part I, I discuss why lawyers were deemed unnecessary in China and only men could be judges. This stems from traditional views of Heaven, earth, and the Way; the complementary forces of *yinyang* and seeking harmony; the Confucian gender roles of *nei* and *wai* (within and without), which subordinated women to men; and the *li/fa* construct, which subordinated law (*fa*) to ritual/virtue (*li*). Ironically, Ban Zhao, the ancient Confucian woman scholar, wrote about the subordination of women to men yet exemplified Confucian erudition and superiority. Thus, Confucian doctrine laid the seeds for both feminine subordination and cultivation.

In Part II, I illustrate how complementary gender roles were critical to thousands of years of reinforcing the *li/fa* construct. With respect to women, I retell ancient stories from *Lienüzhuan* (Biographies of Chinese Women), which was compiled during the Han Dynasty around 18 A.D. Because women were *nei* (within), they were restricted to the "inner chambers," where they promoted *li*. Yet just as Ban Zhao was an exception to this restriction, in one account, a daughter was *wai* (without) and even served as an informal legal advocate for her father.

I then describe the traditional male roles of the judge and of the *songshi* and *shiye*, legal counsel who had no official role in court. These were the only formal legal actors until the 19th century and *songshi* were regularly disdained for promoting *fa* and not *li*. Judges had no training in law; their only formal education was in *li*. The *songshi* and *shiye*, although considered inferior to judges, illustrate the complementary role of legal specialists. I retell stories of six *qingguan,* including Bao Gong. The *qingguan*, or incorruptible judges, balanced Heaven and earth and maternal and paternal wisdom, and they sometimes were portrayed as exercising spiritual powers.

In Part III, I discuss a turning point in China's legal and gender history. This was the defeat of China in the first Opium War in 1842, which eventually brought extraterritoriality and foreign lawyers who practiced on Chinese soil. Later, there was even a Mixed Court of Chinese and foreign judges. In this era, Western missionaries, mainly women, also brought widespread education for women and protested foot binding. They were able to tap into the legacy of Ban Zhao-style cultivation of women. They also role-modeled women who balanced Heaven and earth by being *wai*. China's first law schools opened, including a women's law school in 1912, for revolutionaries who participated in the overthrow of the Qing Dynasty, China's last imperial dynasty. In Republican China, lawyers were

first allowed in 1912, but women lawyers were not allowed until 1927. A small number of Chinese women joined the ranks of lawyers. However, the judgeship eluded women in the Republican Era (1912-1949). I retell their fascinating stories from the 1920s to the 1940s, including the story of Zheng Yuxiu, the first Chinese woman lawyer, and Zhang Jinlan, the first Chinese woman judge.

In Part IV, I discuss developments after the founding of the People's Republic of China in 1949, including her meteoric economic rise in the 21st century, stories of today's women judges, and results of recent interviews and surveys taken within one legal community in Xiamen, Fujian Province. Since the end of the Cultural Revolution (1966-1976) and the beginning of the Open Economic Reform Era (1978-present), women have entered the judiciary in disproportionate numbers because these positions represent the Confucian ideal of *nei* (within): they are perceived as suitable for women as wives, mothers, and daughters.[5] Judgeships are low-paying and less prestigious than law firm positions, which are *wai* (without) and considered more suitable for men. In fact, Chinese law firm practice and negotiations often involve heavy drinking and entertaining, which is a modern equivalent of ritual, or *li*.

I conclude that a revolutionary space for women in China's fascinating gender and legal history has opened up.[6] The inadvertent conflation of Confucian gender stratification/cultivation and mainland economics and politics has led to the redefinition of the inner chambers to judicial chambers. However, Judges Song and Li show that inadvertence can be strategic. As they have revealed, the robust future of law in China, for both men and women, lies in China's rich past. In addition to the spiritual tradition of the *qingguan*, the future of law in China lies within the erudition of Ban Zhao, the virtuous women of the *Lienüzhuan,* and all prior *shiye*, *songshi*, lawyers, and judges who have exhibited the wisdom of Heaven and earth. Judges Song and Li demonstrate that this tradition is also progressive. We begin now with China's ancient worldview.

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5. Interestingly enough, this is not the case in Japan. Women hold only around ten percent of judicial positions, and men "progress 1.2 times faster in their careers than their female colleagues." Leon Wolff, Gender, Justice and the Japanese Judiciary: Is there a Glass Ceiling for Female Judges in Japan? (unpublished manuscript, on file with the author).

6. I do not think this was a historical accident either; the richest person in China in 2007 was a twenty-six-year-old woman named Yang Huiyan. She owns sixty percent of the stock of father Yang Guoqiang's real estate development company, Country Garden Holdings, Co., worth $15 billion. At least on paper, she is worth more than George Soros, Steve Jobs, and Rupert Murdoch. David Barboza, *China Adds Billionaires with I.P.O.*, N.Y. TIMES, Apr. 21, 2007, at C1.

I. Heaven and Earth and Traditional Views of Law and Gender in China

The intricate interaction of Heaven and earth underlies traditional Chinese views of law and gender. The universe is composed of an organic whole, or holy triad, of Heaven, earth and man[7] that should be in harmony and balance. This was achieved by following *Tiāndaò* [天 道], or Way of Heaven;[8] the forces of *yīn* and *yáng* [阴 阳]; deities and spirits, including those of ancestors; and, in Confucius' analysis, an ordered hierarchy, tempered with reciprocal duties. Because Chinese tradition differentiated all phenomena in terms of *yin* and *yang* and assigned one a superior position to the other, this tradition carries the seeds of both gender stratification and cultivation. This tradition is also grounded in ritual, which mediates between Heaven and earth. This leads to today's preference for ceremony, mediation, and *guanxi*[9] over a Western notion of "rule of law." Combined with this, the seeds of gender stratification and cultivation lead to our current phenomenon of the rise of the Chinese woman judge.

China's heavenly order is called *Tiandao* [天 道] and the ruler of Heaven *Shàngdì* [上 帝]; myriad deities, ancestral spirits, and ghosts also populate the universe. *Yin* and *yang* interact to create all flux, change, and movement in the universe. They are related to *qì* [氣], which is the positive life energy in the universe and in each human being. Everything in the universe can be divided into *yin* and *yang*. For example, brightness, the sun, and heaven are *yang*. Darkness, the moon, and the earth are *yin*. Within *yin* is the potential for *yang*, and within *yang* is the potential for *yin*. Day becomes night, and night becomes day. Therefore, although opposites, *yin* and *yang* do not represent absolutes, and achieving harmony and balance are key values in the Chinese worldview.

Illustration 1. Within *yang*, the white curve is the potential for *yin*, the black dot; and vice versa. They lie within a circle reflecting the unity of the universe.

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7. HYUNG I. KIM, FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST: A COMPARATIVE STUDY 13 (Rudolph J. Gerber ed., Kennikat Press 1981).

8. *Id.* at 2.

9. *Guānxī* [關 習] refers to the art of building and using relationships to achieve mutual benefit.

How are harmony and balance achieved? They occur by observing hierarchy and mediation in nature and society.[10] Within *yinyang* lies hierarchy; *yang* is superior to *yin*.[11] The sun is greater than the moon. Likewise, in society, those in higher and lower positions should act properly towards each other. Also, both the emperor and the first-born son of each family were mediators: the emperor on behalf of the nation family [國 家 *guójiā*] and the first-born son on behalf of each family [家 庭 *jiātíng*].

Although not divine, the emperor was considered the Son of Heaven [天 子 *tiānzi*] and a direct descendant of *Shangdi*. Therefore, he served as the mediator between Heaven and earth. In fact, the Chinese character for king, *wáng*, is three lines representing Heaven, earth, and man with a line, the king, joining them: 王.[12] The emperor possessed the Mandate of Heaven [天 命 *tiān mìng*]; however, this could be lost through improper governance, which was marked by the downfall of a dynasty. The emperor regularly offered sacrifices to Heaven and earth on behalf of the nation[13] to seek the blessings of Heaven and his ancestors. This was done until 1911. Though the emperor was male, he was called the father and mother of all people,[14] and all officials under him were called *fùmu guān* [父 母 官], or "father/mother official." The word for nation in Chinese is literally "nation family" [國 家 guójiā]. This maternal and paternal role of all Chinese officials would ultimately lead to today's rise of the Chinese woman judge.

In addition to the emperor, sons played a critical role in the mediation of Heaven and earth by offering sacrifices to ancestors. Although only the emperor claimed descent from *Shangdi* and could appeal to *Shangdi* directly, all other Chinese claimed descent from ancestors to whom they could appeal. One's ancestral line, therefore, was a familial link to Heaven if one properly cared for one's ancestors. Thus, ancestors and earthly descendants enjoyed a relationship of mutuality and complementarity. At death, the departed's *yin* would descend to earth and *yang* ascend to heaven.[15] If sons regularly offered ancestors food and other means for their sustenance in the afterlife, these ancestral *yang* spirits, or *shen*, would intercede for their descendants before *Shangdi* and provide fortune and

10. GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 71 (1996).

11. KIM, *supra* note 7, at 14.

12. Interview with T. James Kodera, Professor of Religion & Co-Dir. of E. Asian Studies, Wellesley Coll. (Oct. 24, 2007).

13. LAURENCE G. THOMPSON, CHINESE RELIGION: AN INTRODUCTION 73 (2d ed., Dickenson Publ'g. Co. 1975).

14. KIM, *supra* note 7, at 14 (quoting T'ang Lu Shu I, Book I, as translated by John Wu, *in Chinese Legal Philosophy: A Brief Historical Survey*, in CHINESE CULTURE, Vol. I, No. 4, 1958, 32).

15. THOMPSON, *supra* note 13, at 10.

prosperity for them.[16] However, if proper ritual sacrifices were not followed, then ancestral ghosts, or *gui*, composed of the departed's *yin*, would haunt and curse their descendants.[17] Therefore, proper imperial and familial ritual sacrifices mediated by the emperor and other sons bound Heaven and earth together and assured blessing and protection. Put another way, the heart of Chinese society is the relationship between blessing and sacrifice. Chinese on the mainland and around the world regularly observe ancestor worship to this day.[18]

Confucius (551-479 B.C.), China's most influential sage, also taught that the Way of Heaven should be observed in other earthly relationships. Besides the relationship between Heaven and the emperor (the Mandate of Heaven)[19] and the emperor and his subjects, Confucius taught about hierarchical relationships among father and son, husband and wife, older brother and younger brother, and friend and friend. Analogous to the relationship between heavenly and earthly beings, the superior member (the first of each pairing) has the duty of care and provision; the inferior member has the duty of respect and obedience. Although friends appear to be equal, they usually develop a relationship akin to an older and younger sibling. These hierarchical relationships were expressed through *li* [禮], or ritual; the heart of *li* is *xiào* [孝], or filial piety. The character for *xiao* is the character for old, *lao* [老] supported by the word for son [子].

Confucius emphasized the cultivation of hierarchical duties through proper rituals. He taught, "Look at nothing in defiance of ritual, listen to nothing in defiance of ritual, speak of nothing in defiance of ritual, never stir hand or foot in defiance of ritual."[20] In particular, he stressed the spirit behind the rituals and not the mere acts themselves.[21] The traditional Chinese character for ritual, *li* [禮], is the combination of the characters for revelation and prayer, *shì* [示], and offering vessel *li* [豊].[22] *Shì* [示] was a representation of the sun, moon, and stars that "provided omens for humans and over time came to be associated with the affairs of spiritual beings."[23]

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16. *Id.*

17. *Id.*

18. Anecdotally, while writing this article in Xiamen, China, I awoke one morning to a burning smell. I was concerned and asked the building management about it. Unperturbed, they immediately told me that, because it was the first day of the lunar month, some neighbor must have been burning an offering to an ancestor.

19. According to Professor Zhang Shoudong, the Mandate of Heaven is key to Confucius' teaching. Interview with Zhang Shoudong, Assoc. Professor, The Law School of China Univ. Political Sci. & Law (June 15, 2008).

20. CHICHUNG HUANG, THE ANALECTS OF CONFUCIUS (LUN YU) 125 (Oxford Univ. Press 1997).

21. Interview with Professor Zhang Shoudong, *supra* note 19.

22. Professor James Kodera first brought this to my attention. Interview with T. James Kodera, *supra* note 12. *See also* THOMPSON, *supra* note 13, at 36.

23. MAYFAIR MEI-HUI YANG, GIFTS, FAVORS, AND BANQUETS: THE ART OF SOCIAL

The earliest definition of *li*, found in the oldest Chinese dictionary, the *Shuowen Jiezi*, was "a step or act, whereby we serve spiritual beings and obtain happiness."[24] So "rituals involved the sacrifice of food offerings to spiritual beings and ancestors in special vessels."[25] Common rituals during Confucius' day involved marriage, mourning, and ancestral ceremonies with poetry, music, and dance, both among the general population and in the imperial court. To this day, Confucius himself is honored with biannual rituals of music and dance in Confucian temples.

We now turn to China's gender hierarchy. Toward the end of the second and the beginning of the first centuries B.C., the association of a gender hierarchy with the *yinyang* became common, *yang* representing men and *yin* women.[26] *Yang* is also associated with reason, *xìng* [性], and *yin* with emotion, *qīng* [情].[27] Because *yin* was considered inferior to *yang*, wives were considered inferior to their husbands and daughters inferior to sons. However, balance was achieved by women giving birth to sons. Therefore, the Chinese character for "good" [好 *hao*] is a combination of a woman [女 *nü*] and a son [子 *zi*].

Sons were highly valued because they provided for their parents in life and, as mentioned earlier, in death. The Chinese character for male, *nán* [男], is composed of the characters for agricultural field, *tián* [田], and power, *lì* [力]. Sons worked in the field and cared for their parents while they lived. Also, as mentioned earlier, sons were the family priests because they offered the ancestral sacrifices to care for their parents after they died.[28] Thus, sons were little emperors because they were a critical connector between Heaven and earth for each family.[29] Today, because of the One-Child Policy (introduced in 1979), both sons and daughters are little emperors and family priests.

In contrast to the priestly role that only sons played in traditional China, daughters married and became part of their husband's family. They were therefore unavailable to care for their own parents in life or in death.[30]

RELATIONSHIPS IN CHINA 223 (Cornell Univ. Press 1994).

24. *Id.*

25. *Id.*

26. LISA RAPHALS, SHARING THE LIGHT: REPRESENTATIONS OF WOMEN AND VIRTUE IN EARLY CHINA 168 (1998).

27. *Id.* at 164.

28. FLORENCE AYSCOUGH, CHINESE WOMEN: YESTERDAY AND TODAY 31 (Da Capo Press 1975); BETTINE BIRGE, WOMEN, PROPERTY, AND CONFUCIAN REACTION IN SUNG AND YÜAN CHINA (960-1938), at 43 (2002).

29. Anecdotally, in April 2008, my friend's mother-in-law died. This Chinese woman was ninety-five years old. On her deathbed, she had different parting words for each of her relatives. Her last words to her son were to rest. Her last words to her daughter-in-law were to take care of her son. Her last words to her grandson were to bid him to perform the proper funeral rites.

30. Korea is another country heavily influenced by Confucianism. The New York

All marriages were arranged, and families had to pay a dowry when their daughters were married off. One ancient saying bluntly stated, "It is more profitable to raise geese than daughters." Another saying promoted a dichotomy between virtue and talent for women: "A man with virtue is a man of talent, a woman without talent is a woman of virtue." In other words, in order to be a proper wife and mother, it was better for a woman not to be educated or cultivated.

A woman observed the Three Followings [三 从 *sān cóng*] during her life.[31] She followed her parents until she married. She followed her husband while married, and she followed her son if widowed. Couples lived with the husband's extended family. As a daughter-in-law, a woman's duty was to exercise filial piety towards her in-laws and to bear an heir. Failure to fulfill either duty was grounds for divorce.[32]

In a commentary to the Book of Changes [易經 *Yìjīng*], one of the Five Classics of Han Confucianism states: "A woman's correct role is within [内 *nei*]; a man's correct role is without [外 *wai*]. Correctness of man and woman is the great principle of Heaven and Earth."[33]

So, if a woman was a member of a privileged class, she was restricted to the inner chambers, also known as the baton doors of the household, and devoted to embroidery and other household arts. The thousand-year practice of foot binding, finally banned in 1912, ensured that women could not wander far from their inner chambers. So the rise of today's woman judge in China is a redefinition of the inner chambers to judicial chambers. The rise of today's male lawyer in China is a redefinition of *wài* [outside] from the agricultural field to the client development field.

The reality of *nei* and *wai* in traditional China was, however, complex and relative (pun intended!). Poorer women had to labor in outside fields and, after the practice of foot binding began, often did not have their feet bound. They had no choice about being *wai*. Also, married women (almost all women) were the ultimate sojourners and outsiders and thus *wai*.[34] They left their birth family to join their husband's family

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Times reported recently that daughters are now valued as much as sons because they are taking care of their parents in their old age. According to reporter Choe Sang-Hun, "The most important factor in changing attitudes toward girls was the radical shift in the country's economy that opened the doors to women in the work force as never before and dismantled long-held traditions, which so devalued daughters that mothers would often apologize for giving birth to a girl." Choe Sang-Hun, *Where Boys were Kings, a Shift Toward Baby Girls*, N.Y. TIMES, Dec. 23, 2007, *available at* http://www.nytimes.com/2007/12/23/world/asia/23skorea.html?scp=1&sq=where%20boys%20were%20kings&st=cse.

31. KIM, *supra* note 7, at 4.

32. *See* WALLACE JOHNSON, THE T'ANG CODE II: SPECIFIC ARTICLES 167 (1997).

33. Yi 23/37, *quoted in* RAPHALS, *supra* note 26, at 197.

34. A mother's relatives are also referred to as *wai* (outside). For example, one's mother's mother is called *wai po*.

(sometimes in distant villages with new dialects and customs) and then had to constantly win the affection of their husbands and in-laws lest they be divorced. In her book on the Sung and Yuan dynasties, historian Bettine Birge also points out that, in wealthy households, women had "significant managerial responsibilities, including managing servants, arranging funerals," and exemplary widows had even wider duties including "public building projects or famine relief."[35]

We turn now to Ban Zhao (45-116 A.D.). Bān Zhaō [班 昭] is considered the most erudite woman in traditional Chinese history. She was a Confucian scholar who, among other volumes, authored *Nü Jiè* [女 誡], or Precepts for Women. Her father was the famous historian Ban Biao (3-54 A.D.) and after her historian brother Ban Gu's (32-92 A.D.) untimely death, she completed his court history of the Western Han dynasty. She was also the grandniece of the learned Consort Ban (48-6 B.C.).

Like Confucius, Ban has been both revered and criticized.[36] She represents both gender stratification and cultivation. *Nü Jie* is a primer for wives, and in it, Ban emphasizes the different nature of men and women. In Precept One, she described the ideal character of a wife as one of humility and adaptability.[37] However, in Precept Two, Ban writes that girls should be educated as well as boys.[38] This paved the way for at least well-to-do families to educate their daughters, and the widespread education of girls many centuries later. In Precept Three, Ban writes that as *yin* and *yang* differ, so do husbands and wives. Men must act through resolution and strength and women through flexibility, yieldingness, and gentleness.[39] With such character, wives must win the hearts of not only their husbands, but also of their husband's family. In fact, because the husband's mother ruled the internal household, Ban specifically addressed a wife's obedience to her mother-in-law: "Do not think of opposing, or of discussing what is, what is not . . . this is what is called the imperative duty of obedience."[40] Ban Zhao's sentiments about gender differentiation and harmony would be echoed centuries later in the description of China's women lawyers and judges by China's first woman judge, Zhang Jinlan and by journalists in the

35. BIRGE, *supra* note 28, at 288-89.

36. Xia Xiaohong, *New Meanings in a Classic: Differing Interpretations of Ban Zhao and Her Admonitions for Women in the Late Qing Dynasty*, *in* HOLDING UP HALF THE SKY: CHINESE WOMEN PAST, PRESENT, AND FUTURE 14 (Tao Jie, Zheng Bijun & Shirley L. Mow, eds., 2004) [hereafter HOLDING UP HALF THE SKY].

37. AYSCOUGH, *supra* note 28, at 239.

38. *Id.* at 242.

39. *Id.*

40. *Id.* at 247. Filial piety was owed not only to one's father but also to one's mother, mother-in-law, and stepmother. *See* GUO JUJING, THE TWENTY-FOUR FILIAL EXEMPLARS (David K. Jordan trans., 1973), http://anthro.ucsd.edu/~dkjordan/scriptorium/shiaw/xiaocontents.html.

1930s, 1940s, and today.

Thus, the relationship of Heaven, earth and the *yinyang* provides the backdrop for both gender complementarity and stratification in the Chinese worldview. The Way of Heaven was balance and harmony, which was achieved by observing hierarchical roles, including those between men and women. Among their other roles, sons, who were superior to daughters, offered rites to ancestral spirits, who in turn intervened on behalf of mortals before *Shangdi*, the ruler of Heaven. Sons mediated between Heaven and earth as the emperor did. Although thinkers like Ban Zhao taught that women could be educated, the nature and role of women was to be *nei*, or within, and men were to be *wai*, or without. Ultimately, the role of women was to bear sons: this was the critical balancing of the gender *yinyang* dialectic. However, Ban Zhao's own educational and public stature and the Confucian emphasis on cultivation paved the way for both the ready acceptance of widespread women's education at the end of the Qing era and, ultimately, the large number of women in judicial inner chambers today. We turn now to the relationship of law and morality in ancient China and how this led to both the lack of a legal profession in China until the twentieth century and the complementary roles for men and women within the *li/fa* [ritual/law] construct.

A. Traditional Views of Ritual and Law: Li and Fa in Ancient China

As Heaven, earth, and *yinyang* are the backdrop to Chinese gender complementarity and stratification, they are also the stage for Chinese morality/law (*li/fa*) complementarity and stratification. This remained throughout the Chinese dynasties, including the last one, the Qing dynasty (1644-1911). According to Richard J. Smith, "During the Qing period, elite and popular religious beliefs and practices intertwined to produce a vast, multicolored fabric of institutional and individual worship."[41]

Rulers and the general population sought the Way of Heaven. In fact, the administration of justice happened on three levels. It occurred in heavenly courts and lawsuits through deities, spirits and ghosts. It occurred at the family and village level, where patriarchs and elders wielded authority with the help of ancestors and other spiritual beings. It occurred through government magistrates, who also sought the help of magistrates in the spirit world. At each level, *li* (ritual/propriety) was *yang*, and thus superior to *fa* (law/punishment), which was *yin*. If *li* failed, *fa* was used. The Legalists taught that rulers should govern a nation by *fa*, but Confucius taught that rulers should use *li*. *Li* and *fa* were eventually harmonized as

41. RICHARD J. SMITH, CHINA'S CULTURAL HERITAGE: THE QING DYNASTY, 1644-1912, at 155 (1994).

yang and *yin*. *Li* was enforced through the family and guilds[42] and then gradually codified and enforced by the state. When *fa*, which was *yin* (inferior), was exercised, it was wielded by patriarchs and male magistrates because they were *wai* (without); women, although they were *yin* (inferior), inculcated *li* (virtue) within the family because they were *nei* (within). Lawyers were deemed unnecessary because magistrates were supposed to act as father/mother officials. Just as it would be inappropriate for a child to bring a lawyer to a dispute to be resolved by the child's parents, this was also the case in China's courts.

The Chinese believed that heavenly justice lies behind temporal, worldly justice; therefore, divination was a critical tool for both the state and the family. If a ruler failed to properly care for his subjects, either natural disasters would follow or the Mandate of Heaven [天 命 *tiān mìng*] would be lost. Also, if a family did not care for its ancestors, it would suffer misfortune. China's earliest extant writings, the Shang oracle bones, were used by the Shang rulers to divine their ancestors' revelations. Other regularly practiced divination methods involved the *Yi Jing*, meticulous astrology, and *fengshui*, the art of placement of buildings, graves, etc. to maximize harmony with heaven. Legendary judges, like Bao Gong, also known as Baō Zhěng [包 拯], whom we will discuss further below, were thought to have supernatural powers. They sometimes relied on dreams, revelations, visitations from wronged ghosts, prayers, or fasts to obtain guidance or solve cases.[43] In addition, the ancient Chinese believed that lawsuits could be filed in Heaven when justice could not be found on earth.[44] With the introduction of Buddhism to China in the Han period (206-220 A.D.), the Chinese also came to believe in various torturous penalties in the afterlife.

Alongside the ancient arts of divination, Confucianism and Legalism focused on achieving the Way of Heaven through other rituals and law, respectively. Confucianism and Legalism agreed that ultimately laws should be eliminated. However, they differed as to how this should be done. As mentioned earlier, Confucius taught the importance of instilling virtue through proper rituals. In this way, one's body becomes a ritual vessel for virtue.[45] He then took this one step further and advocated that rulers should govern by *li* and not *fa*. He taught, "Lead a people by law . . . and they will have no shame, lead a people by virtue and they will order

42. THOMPSON, *supra* note 13, at 36.

43. DORA SHU-FANG DIEN, THE CHINESE WORLDVIEW REGARDING JUSTICE AND THE SUPERNATURAL 45 (2007).

44. *Id.*

45. Professor Mayfair Mei-hui Yang came to this conclusion after comparing the characters for ritual [禮] and body [體]; both have the "ritual vessel" phonetic element [豊]. YANG, *supra* note 23, at 226.

themselves harmoniously."[46] He also taught, "At hearing legal proceedings I am no different from anybody else, but what is surely necessary is to bring it about that there is no litigation."[47] In effect, Confucius taught preventive law through clear moral duties.

Confucius had critics. *Mòzi* (墨子) (470-390 B.C.) advocated universal love and the equality of all people in contrast to hierarchical relationships. Also, Mozi taught that tradition need not be slavishly adhered to but that self-reflection and one's own experiences could be followed. Moreover, he taught that government should promote universal love and mutual benefit as the Way of Heaven.[48]

The Legalists agreed with Confucius that ultimately *fa* should be eliminated, and they agreed with Mozi that subjects should be treated equally.[49] However, because they also believed that human nature was corrupt and most leaders would not be paradigms of virtue, they taught that the Way of Heaven required harsh transitory laws to eliminate all wrongdoing. Governing by *li* was foolish, and the law "should be stronger than the people."[50] Justice had to be swift and certain and punishments so severe that they would shock and intimidate.[51] In accordance with the Daoist concept of *wúwei* [無 為], or non-interference, governance could be efficient and independent of the competence of the ruler if laws were proper.[52]

After the Warring States period (451-221 B.C.), China was finally unified by its only Legalist dynasty, the Qin dynasty (221-206 B.C.). Emperor Qin's harsh regime lasted only fifteen years. The Legalists were pragmatists and considered farmers and soldiers the most important members of the state.[53] In contrast, Confucian and other scholars were deemed termites. Reportedly, Confucian texts were burned and 460 scholars were buried alive.[54] However, a recent study of stele inscriptions during the Qin dynasty point out the importance of ritual in the Qin dynasty and its use to legitimate reign.[55] Interestingly, anti-Confucian rhetoric was revived during China's modern Cultural Revolution (1966-1976) when

46. Analects II, 3.
47. *Id.*
48. KIM, *supra* note 7, at 46.
49. *Id.*
50. *Id.* at 6.
51. DIEN, *supra* note 43, at 10.
52. *Id.* at 8.
53. *See* Shang Jun Shu 1988: Chapter 3; Han Feizi 1982 "Wu Du", *as cited by* YANG, *supra* note 23, at 222.
54. Whether these events occurred is the subject of scholarly debate. *See* MARTIN KERN, THE STELE INSCRIPTIONS OF CH'IN SHIH-HUANG: TEXT AND RITUAL IN EARLY CHINESE IMPERIAL REPRESENTATION 189 (2000).
55. *Id.*

Chairman Mao openly praised Emperor Qin and the Legalist tradition.[56]

In the dynasties that followed the Qin reign, Confucianism became state orthodoxy. In a blending of *li* and *fa*, however, Chinese rulers practiced *rú wài neì fa*,[57] or outward Confucianism and inner Legalism. The state, clans, and guilds (which were extensions of families and clans) also had complementary and sometimes overlapping jurisdictions.[58] Families had legal authority over households, which were both economic and legal units,[59] and enforced family codes. Merchant guilds enforced merchant codes.[60] The state intervened in difficult cases and those involving persons who could not be reformed by *li*, e.g., criminals and foreigners.

Over the centuries, state codes also embodied *li*. As early as the Western Zhou dynasty (1115-722 B.C.), *li* developed into a kind of unwritten law, violation of which led to punishment [刑 *xíng*], which was corporal punishment or death. The Tang Dynasty (618-907 A.D.) finished the Confucianism of the law. The Tang Code was "*Yī zhun hū li*" [一准乎礼], which means all provisions of the Tang Code were subject to *li* and were execution of *li*.[61] Violating *li* equaled committing a crime.[62] For example, cursing one's parents was cause for execution.[63]

Within this blended *li/fa* construct, legal study was discouraged by both Confucianists (*Rujia*) and Legalists (*Fajia*), and a legal profession never developed in traditional China. The Legalists asserted that once the law was published, the people should simply obey it. In the North Song Dynasty, *Rujia* scholar Si Maguang (1018-1086 A.D.) taught that the knowledge of *li* was enough for a *Shìdàfū* [士大夫], or court official. Si even asserted that studying law would hinder a society in maintaining ethics. In fact, when deciding a case, an official could, with the emperor's assent, refer to *Rujia* opinion if there were no applicable statutes.[64]

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56. The "Criticize Lin Biao, Criticize Confucius" campaign was officially launched in 1973. *See* YANG, *supra* note 23, at 210.

57. Antoaneta Bezlova, *Beijing Embraces Confucian Communism*, ASIA TIMES, Sept. 15, 1999, *available at* http://www.atimes.com/china/AI15Ad01.html (referring to a quote by Beijing University professor Zhao Zumo).

58. For a discussion of *li/fa* and dispute resolution, see Urs Martin Lauchli, *Cross-Cultural Negotiations, With a Special Focus on ADR with the Chinese*, 26 WM. MITCHELL L. REV. 1045 (2000).

59. BIRGE, *supra* note 28, at 47.

60. DAVID FAURE, CHINA AND CAPITALISM: A HISTORY OF BUSINESS ENTERPRISE IN MODERN CHINA 35 (2006).

61. TIAN WANG HUI HUI, SHU ER DUO LOU—ZHONGGUO GU DAI FA ZHI DE SHI SHI HUA [LOOPHOLE EXISTS DEFINITELY--THE SUCCESS AND FAILURE OF THE ANCIENT CHINESE LEGAL SYSTEM] 58 (Wang Chunyu ed., Lan zhou da xue chu ban she 2005).

62. *Id.* at 58-61.

63. This was also a capital offense in the Old Testament. *See Exodus* 21:17.

64. *Da Xue Yan Yi Bu*, Vol. 111 at 109.

Thus, in pursuit of the Way of Heaven and harmony, the ancients practiced divination and sought heavenly counsel. In addition, the Confucian promotion of mediation and *li* and the Legalist application of *fa* blended together as *yang* and *yin*. *Li*, which was *yang*, or superior, was first enforced by the family and guilds. *Fa*, which was *yin*, or inferior, was enforced by courts, where sentences were harsh and swift. Over the centuries, more and more Confucian tenets found their way into written law administered by the state. Magistrates were trained in the Confucian classics and not *fa*. There was no formal legal profession and women, because they were *nei* or confined to the inner chambers, were not part of the formal administration of law. Nevertheless, women played a complementary role in promoting *li*, or ritual, as daughters, wives, and mothers. We now turn to gender roles within the *yinyang* and *li/fa* construct. The stories of the *qingguan* or ancient model judges, provide powerful role models for today's legal professionals as Judges Song and Li have revealed. The women of the ancient *Liènüzhuàn* do as well.

II. Gender Roles within the Traditional Li/Fa Construct

A. Informal Counselors, Judges, and Legal Personnel in Traditional China

The melding of *li* and *fa* was a potent formula that sustained Chinese civilization for centuries. It gave Chinese rulers supreme moral authority and efficient tools to enforce that authority. Complementary and hierarchical gender roles were also essential to the longevity and potency of the *li/fa* complex. The *Liènüzhuàn* [烈 女 傳], a compilation of women's biographies by Liu Xiang during the Han Dynasty around 18 A.D., depicts how women contributed robustly to *li*. They taught their children. They advised and advocated for fathers, husbands, sons, and brothers. Thus, although women and *fa* were *yin* (inferior) because women were also *nei* (within), they focused on *li* which was *yang* (superior). However, when necessary they appealed to *fa*; they sometimes resolved disputes through powerful argumentation. Men were *wai* (without) and thus held formal roles as magistrates/judges, legal advisors to magistrates/judges, and legal advisors to litigants. Although they administered *fa*, they often appealed to *li*, which was *yang*. Today's Chinese women have joined the legal profession; however, because they remain *nei*, they have disproportionately joined the ranks of the judiciary, which has become a new *nei*, or inner chambers. Men dominate modern law firms, which are considered *wai*. As Judges Song and Li demonstrate, however, today's legal professionals can learn the proper balance of Heaven and earth, and *li* and *fa* from the fabled *qingguan*, or incorruptible judges. They can also learn this from the wise

women of the *Lienüzhuan.*

B. The Wise Women of Lienüzhuan

I will now re-tell four stories of ancient virtuous women who were moral teachers and even informal legal counselors to illustrate the role of women in the traditional *li/fa* complex. *Lienüzhuan* [烈 女 傳] was compiled by Liu Xiang, a Confucian scholar in the Han dynasty, to describe women of virtue who brought favor to their families and China, and women who brought ruin. It was written to persuade the emperor of the influence of women on statecraft.[65] It includes stories from peasant women to wives of emperors. According to Dr. Robin R. Wang, *Lienüzhuan* shows that, within the Confucian tradition, women had a "privileged position in shap[ing] the person, family and state."[66]

The first chapter is about motherly virtue [母 儀 *muyi*] and the inculcation of moral character by mothers. The story of Mencius'[67] mother is illustrative of a working mother who is a powerful moral instructor, or paradigm of *li.* After living near a graveyard and market, she moves to be near a schoolhouse as this is the best environment for Mencius' studies. When her young son returns one day and appears to be indifferent to his studies, his mother, a weaver, tears her weaving and admonishes him. According to a translation by Dr. Raphals:

> She tells him, "Your neglecting your studies is like my cutting this weaving . . . Just as in the case of a woman who neglects the means by which she eats, if a man neglects cultivating virtue, then if he does not become a thief or robber he will become a captive or a corvee laborer." Mengzi was afraid, and morning and night, never stopped studying assiduously. He served his teacher Zi Si, and consequently became the most celebrated Ru [scholar] in the empire.[68]

Chinese intellectual and cultural history might have taken a different path, but for Mencius' mother's intervention.

Our second story is about the wife of Da Zi, an official of Tao. This story illustrates the virtuous wife, also a paradigm of *li.* She is a wise wife

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65. RAPHALS, *supra* note 26, at 19.

66. Robin R. Wang, *Virtue (de), Talent (cai) and Beauty (se): Authoring a Full-Fledged Womanhood in Lienuzhuan (Biographies of Women), available at* http://www2.eastwestcenter.org/education/culauthasia/olc/abstracts/abs_Wang.pdf.

67. Next to Confucius, Mencius (372-289 B.C.) is the foremost Confucian thinker in the Chinese tradition.

68. LNZ 1:10b *quoted in* RAPHALS, *supra* note 26, at 34.

and counselor who handles a difficult situation with righteousness and mercy despite her husband's folly. Her husband amassed wealth at the expense of the people he governed, and he refused his wife's counsel. She tells her mother-in-law:

> My husband's ability is small yet his office is great; this is called rousing harm. He is without merit yet his family is rich; this is called amassing misfortune . . . his family is wealthy and the kingdom is poor; the ruler is not sedate and the people are not respectful. It is evidence of ruin to come. I desire to escape with my little son.[69]

Her mother-in-law throws her out of their family, and Da Zi's wife leaves with her little son. Later Da Zi is executed for his deeds, and his other relatives are also killed. Da Zi's mother is spared because of her age.[70] Da Zi's wife returns with her small son, takes care of the mother-in-law who originally threw her out, and rectifies the situation.[71] Thus, Da Zi's wife is respectful but does not blindly follow corrupt authority. She also exhibits not only wisdom but also divine fortitude and forgiveness.

Our third story is about a virtuous daughter. This daughter is not only a paradigm of *li* but also of *fa*. In fact, this daughter acts as a defense counselor for her father and a legal critic for the king! Ti Ying's father, a duke, was condemned to corporal punishment. He had no sons to help him, which he laments. Ti Ying submits a petition to the king that she become a slave so her father can avoid mutilation. In her petition she states that her father, even though he has committed a wrong, wishes to correct his faults but will not be able to do so with the punishment due. This is a critique of the law.[72] Ultimately, the king agrees that the law is too cruel, revises the law of corporal punishment, and excuses her father's crime.[73] Ti Ying is also respectful but willing to challenge injustice. She not only acts as an advocate but also as a willing substitute for her father's punishment.

In our fourth account, a poor woman successfully resolves a dispute with a neighbor through forceful argumentation. Her name is Xuwu. Her neighbor tries to bar her from a weaving association because Xuwu is too poor to bring her share of candles. Xuwu argues eloquently that her presence does not diminish the existing light; no one can refute her. Xuwu states, "If one more person is added to the room, the light will not decrease; if one person goes out of the room, the light will not increase."[74]

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69. *Id.* at 36.

70. LNZ 2:9, *translated in* ALBERT O'HARA, THE POSITION OF WOMAN IN EARLY CHINA 64 (1946).

71. RAPHALS, *supra* note 26, at 37.

72. *Id.* at 48.

73. O'HARA, *supra* note 70, at 185.

74. *Id.* at 183.

Thus, according to the *Lièn*üzhuàn, China's ancient women, from the poorest weaver to officials' wives, were powerful models of *li*, wisdom, and justice. They cultivated their children, knew what was reasonable and just, and even served as informal legal advocates. Their convictions were also demonstrated in their willingness to sacrifice themselves and forgive others. Thus, although women were *yin* and *nei*, they exerted influence in the *li/fa* framework. Their *li* was tempered with appropriate proportions of *fa*. They are models for today's legal professionals. We turn now to the roles that men played in the traditional *li/fa* framework.

C. *Magistrates, Shiye, and Songshi*

In traditional China, because they were *wai*, or outside actors, men served in the three legal roles that existed: magistrates, *songshi*, and *shiye*. However, of these three roles, only a magistrate had an official role in a court proceeding. This section will describe each of these legal actors and their characteristics before discussing the *qingguan,* the advent of extraterritoriality, and the modern lawyers in the Republican Era and today. In an odd turn, many men today aspire to be lawyers and not judges because lawyers are perceived as *wai* and have more prestige. In traditional China, legal advisors to parties in litigation were disdained.

For centuries, the emperor and his subordinate officials acted as magistrates. There was no separate office for judge. This is because power was centralized in the emperor and then in his agents in the provinces, prefectures and counties. The magistrate handled many duties, including ritual sacrifices, collection of taxes, public works, criminal prosecution, and civil dispute resolution. If there was litigation, the people hoped that the head official would represent the Son of Heaven—the emperor—to maintain justice. And the head official also hoped to execute his exclusive power in judicial affairs and therefore did not allow different voices in the court.[75] Like the Emperor, each local official's ritual sacrifices on behalf of the population within his jurisdiction[76] were critical to his post. In fact, each magistrate had a spiritual counterpart, the *chéng huáng* [城 隍]. The *cheng huang* was usually a deceased official who had been given spiritual authority by imperial commission and had jurisdiction over bereaved spirits, who reported to him all deeds that would otherwise go unrewarded or punished.[77] According to Laurence Thompson:

> upon arrival at a new post . . . [every magistrate was to] spend the

75. Kong Lingyi, *Ren Song Ge [No Litigation], Stele of Ren Song Ge in Shandong Qubu Kong Temple*; *citing* XU JIALI, ZHONG HUA MIN GUO LU SHI ZHI DU SHI [HISTORY OF LAWYER SYSTEM IN REPUBLIC OF CHINA] 25 (Zhongguo zhengfa da xue chu ban she 1998).

76. THOMPSON, *supra* note 13, at 77.

77. *Id.* at 81.

> night prior to formal assumption of his office in the temple of the *cheng huang*, purifying himself and praying for the assistance of his spiritual colleague. This procedure was also followed by magistrates baffled by a law case, and numerous instances are recorded of the *cheng huang* revealing the solution to his opposite number in a dream.[78]

In accordance with *li*, before a case appeared before a magistrate, it usually first went before a family, clan, and then village mediator. Some families, in fact, had written rules or codes called *jiā xùn* [家 訓].[79] If a dispute proceeded to the county level, magistrates conducted investigations and decided cases based on *li*, *fa*, and nature. Magistrates had advisors; these were called *shiye*. Sometimes defendants also had advisors called *songshi*. However, none of these advisors could attend court proceedings. *Songshi* were disreputable and considered shysters.

The main task of the magistrate was to maintain peace. Therefore he would often settle cases to maintain peace and harmony. In civil cases, magistrates applied *qing fa ben yuan qing* [情法本原情], which meant using *qíngli* [情理], reason, and *rénqíng* [人情], feeling.[80] The spirit of *qingli* and *renqing* is balance, compromise, and flexibility.[81] In criminal cases, where defendants had violated social order, they were punished harshly. It has been said that, in the former cases, parties' rights were blurred; in the latter, the parties had no rights.[82]

One of the difficulties ancient judges also faced was the conflict of respecting the emperor and obeying the law. The emperor was not restricted by the law. Some ancient judges, at the risk of being killed, would try to persuade the emperor to obey the law. But more of them would obey the will of the emperor.[83] Some judges, in fact, were only servants of the emperor. They did not judge cases according to the law and the facts but completely on the basis of the personal favor of the emperor.[84] Judges also faced conflicts from nobles and local rich families.[85] Judges that were just and serious would often be persecuted by nobles who took advantage of their position.[86]

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78. *Id.*

79. Interview with Suh-jen Yang, Adjunct Professor, Suffolk Univ. (Feb. 15, 2008).

80. GUO JIAN, GU DAI FA GUAN MIAN MIAN GUAN [EVERY ASPECT OF ANCIENT JUDGES] 171-72 (Shanghai gu ji chu ban she 1993) [hereinafter EVERY ASPECT OF ANCIENT JUDGES].

81. *Id.* at 168.

82. XU JIALI, ZHONG HUA MIN GUO LVE SHI ZHI DU SHI [HISTORY OF LAWYER SYSTEM IN REPUBLIC OF CHINA] 26-27 (Zhongguo zhengfa da xue chu ban she 1998) [hereinafter HISTORY OF LAWYER SYSTEM].

83. EVERY ASPECT OF ANCIENT JUDGES, *supra* note 80, at 182.

84. *Id.* at 191-95.

85. *Id.* at 201-04.

86. *Id.* at 196-200.

I will now briefly give six examples of legendary *qingguan* in China's history who did not cave into pressure from the emperor or nobles. I will then discuss *shiye* and *songshi*, China's ancient legal advisors. As mentioned in our introduction, the *qingguan* have influenced Judges Li and Song and many others to become judges today. They represent the best of China's ancient legal tradition the integration of Heaven and earth and *fa* tempered by *li*.

D. Qingguan

Qīngguān [清官] are China's legendary judges who exemplified moral fortitude and justice. They were characterized by devotion to China's people, refusal to accept bribes, willingness to chastise the emperor or others in power, and dedication to a simple lifestyle that balanced work and family. They are regularly portrayed in Chinese operas and in today's Chinese television dramas, which inspired Judges Song and Li. As described earlier, *qingguan* were also believed to possess supernatural powers. In many Chinese villages, there are temples dedicated to Bao Gong, the most famous *qingguan*.

1. Yàn Yīng [晏嬰]

Our first *qingguan*, Yan Ying (?-500 B.C.), prime minister to the three kings of the Qi nation for over 40 years,[87] is known for his wisdom and incorruptibility.[88] He considered the people's interests to be the fundamental concern of the nation, and he did not hesitate to confront the king. For example, many people suffered from a flood one summer. The king was impervious to the suffering of his people and kept dancing and drinking day and night. Yan Ying requested the king to send rice; but the king did nothing. Yan Ying was so outraged that he gave his own rice and furniture to the flood victims. He confronted the king then resigned and went home. The king was moved when he saw that Yan Ying had given all of his rice to the victims; he immediately ordered rice sent to the victims.[89]

Also, although Yan Ying was the prime minister, he lived a simple life.[90] He even refused land granted by the king.[91] What also made him a

87. LI XIAOHONG, QING FENG CHANG LIU TIAN DI JIAN—QING GUAN DE BEI CHUANG LI CHENG [CLEAN-FINGERED SPIRIT NEVER FADES-TRAGIC STORIES OF INCORRUPTIBLE OFFICERS IN ANCIENT CHINA] 1 (Lanzhou da xue chu ban she 2005) [hereinafter CLEAN-FINGERED SPIRIT].

88. *Id.* at 2.

89. *Id.* at 4-5.

90. *Id.* at 5.

91. *Id.* at 6-7.

model of rectitude was his faithfulness to his wife.[92] Despite cultural acceptance of polygamy, he refused to marry other women however beautiful and powerful they were.

2. Shao Xinchen and Du Shi [邵信臣与杜诗]: "Parent" Officials

Although there were no official women judges or magistrates, as mentioned earlier, righteous officials were referred to as parent officials. This was the case with our second and third *qingguan*, Shào Xìnchén and Dù Shī in the Han Dynasty.[93]

Shao Xinchen was a mayor during the West Han Dynasty and was called Father Shao by the local people because he not only cared for the people considerately but also was strict with them.[94] For example, he led the people to dig a trench and build dykes to irrigate the farmland when the farmland could not produce due to the drought. He regulated fair use of the water so that water disputes were resolved and avoided.[95] He also forbade exorbitant funeral customs. These customs had driven some people to the edge of and others so deep into poverty that they sold their own children to pay back their debts.[96]

Du Shi (?-38 A.D.) was the most respected official during the East Han Dynasty and was named Mother Du by the people.[97] He punished criminals strictly, irrespective of how some superior officials interceded.[98] Although he earned a large salary, he did not purchase land for himself but spent his money on public projects such as irrigation works and helping the poor.[99] Thus, like Yan Ying, Du Shi was modest, loved, and incorruptible.

4. Su Qiong [苏琼]

Our fourth *qingguan* was Sū Qióng. He lived during the Bei Dynasty (386-518 A.D.).[100] While he was mayor of Nanqinghe, he successfully resolved a theft within a very short time, which discouraged thieves from stealing again. When he obtained a judicial position in the central government, he rectified many wrongly decided cases and released many wrongly convicted persons.[101] Once, there were two brothers who had a

92. *Id.* at 8-10.
93. *Id.* at 11.
94. *Id.* at 15.
95. *Id.* at 13.
96. *Id.*
97. *Id.* at 18.
98. *Id.* at 17.
99. *Id.* at 19.
100. *Id.* at 60.
101. *Id.* at 62.

fierce dispute over the division of the family's land.[102] Su did not question the over 100 witnesses involved; instead, he called the two brothers and admonished them: "there is a saying that brotherhood could not be bought by any great sum of money . . . do you think it is worthwhile giving up your brotherhood simply due to [this] land?"[103] All the people in the court were moved to tears when listening to this touching speech. In the end, the case was settled.[104] Su also lived a simple life and refused any form of gifts. In order to prevent people from sending gifts to him, he even hung a watermelon given by a retired official on an eave.[105] After this demonstration, nobody dared to send any gifts to this incorruptible official. Thus Su demonstrated *fa* tempered by *li*, *qingli*, and *renqing*.

5. Bao Zheng [包拯] (999-1062)

Our fifth *qingguan*, Bāo Zhěng, also known as Bao Gong, is perhaps the most beloved *qingguan* in Chinese history. Many villages have temples dedicated to him. Since the Song Dynasty, his life has been portrayed in many dramas and novels.[106] He is widely known for not showing favoritism either to his own relatives or to the relatives of the emperor. For example, one of his uncles acted wrongly. Bao seized his uncle and punished him strictly irrespective of what his relatives said.[107] He also stood up to the emperor's brother-in-law Zhang Yaozuo three times with the result that even the emperor feared him.[108] Bao Zheng was also well known for his wisdom.[109] In the one recorded case of Bao Zheng, a farmer came to him one day with a cow whose mouth kept bleeding. The farmer complained that somebody had cut the cow's tongue.[110] Bao told the farmer that he should kill the cow as soon as he returned home. The farmer did not understand why, but he followed the order. Three days later, another person came to the office claiming that the farmer should be punished for killing the cow. Bao realized that there were two explanations for the cow's original bleeding. Either the farmer had inflicted the injury, or his accuser had.[111] The owner's accuser confessed his crime.

Supernatural powers have been attributed to Bao Zheng. With the help of dreams, visitations from wronged ghosts, prayer, and fasting, he

102. *Id.* at 65.
103. *Id.*
104. *Id.* at 65-66.
105. *Id.* at 67.
106. *Id.* at 98.
107. *Id.* at 106.
108. *Id.* at 112-13.
109. *Id.* at 107-08.
110. *Id.*
111. *Id.*

dispensed justice among the living and dead.[112] In one account, the ghost of a murdered victim spoke from a black pot, and Judge Bao promptly had the murderers arrested.[113] In another, the ghost of a murdered concubine appeared to Judge Bao at night, and he then promptly arrested the murderer, the concubine's master's first wife.[114] Bao Zheng inspired Judge Song, the model judge mentioned at the beginning of this article. In 2008, in an effort to teach traditional culture, China's Ministry of Education began a pilot program that taught sixth graders the classical play *Zha Mei An* about Bao Zheng's investigation of a case involving the emperor's son-in-law.[115]

6. Hai Rui [海瑞] (1514-1587)

The last story of our *qingguan* is about Hai Rui. Hai Rui lived during the Ming Dynasty and is also known for his incorruptibility and faithfulness.[116] His life has also been portrayed in various dramas.[117] He wrote in his article "*Yan Shi Jiao Jie*" that "people should not live meaninglessly, but should live according to holy teaching. This does not mean that one must do great deeds or be an official. It means that one should be faithful in every small matter . . . one should resist the temptation of money and external beauty; one should do more and say less. Don't flatter your boss; don't be proud when you accomplish something . . . ."[118]

In sum, *qingguan* refused bribes, did not show favoritism to their relatives, admonished emperors, had the interests of the nation's people in mind, and lived simply, without greed and in happy families. Although only men could be magistrates and thus all *qingguan* were male, they were called "father and mother" judges. They were both paternal and maternal figures to their subordinates. Sometimes the power to wield justice from the spiritual world was attributed to them. Thus they integrated heaven and earth, *yinyang*, *li* and *fa*, and work and family and practiced the *dao* of justice. They are powerful role models to contemporary male and female judges, as Judges Li and Song have revealed, and they are promoted to China's youth today.

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112. DIEN, *supra* note 43, at 54.
113. *Id.* at 56-57.
114. *Id.* at 58-59.
115. Yangtze Yan, *Pilot Projects Adopted to Teach Children Peking Opera*, CHINA VIEW, Feb. 21, 2008, *available at* http://news.xinhuanet.com/english/2008-02/21/content_7644008.htm.
116. CLEAN-FINGERED SPIRIT, *supra* note 87, at 129.
117. *Id.* at 129-30.
118. *Id.* at 131.

E. Shiye and Songshi

Now I will describe *shiye* and *songshi*. Their role resembles that of the modern legal profession, except that that they played no official part in traditional Chinese trials. This may be because they were not direct representatives of the Son of Heaven. *Shiye*, who assisted officials in judging cases, arose as a particular profession in the Qing Dynasty.[119] *Songshi* helped litigants draft documents, but were considered shysters and sometimes punished. Punishment continues: beatings of attorneys, especially criminal defense lawyers, are reported today. *Shiye* and *songshi* were men, but there is at least one recorded story of a female *shiye*. To the extent that *shiye* and *songshi* tempered *fa* with *li*, they are also role models for today's lawyers and judges.

As mentioned earlier, in traditional China, judges did not receive formal legal training. Instead, they were trained only in *li*. All officials had to pass civil exams based on *Sishuwujing*, the Chinese classics, but officials were not tested or experienced in practical problems. *Shiye* advised these officials once they took office. Very often *shiye* were men who had failed to become officials but were still very learned. Many centuries later, after China began formal legal training in the late Qing period, those who failed to become officials again took on legal positions. So China's earliest lawyers had a hard time establishing their legitimacy. Also, many of today's judges in China have no formal legal training but are former military officials. However, unlike some of their male counterparts, many of today's women judges have been appointed because of their formal legal training.

What sources did *shiye* use in counseling judges? *Shiye* considered law, *Rujia* classical works, history, resolved cases, customs, and public opinion.[120] Although resolved cases were not law, they were influential. As mentioned earlier, the goal of judgment was to seek peace between parties.[121] Therefore, *shiye* would often postpone cases deliberately expecting the parties to settle their disputes privately.[122]

Shiye were also conscious of their relationship to the afterlife. In order to accumulate *yīndé* [陰 德, virtue in the afterlife] for their own descendants, *shiye* avoided death cases as much as possible.[123] Also, usually they would not allow women witnesses in court for fear that

119. GUO JIAN, SHI YE DANG JIA-MING QING GUAN CHANG MU HOU GUI ZE [ADVISORS HOST THE GOVERNMENT-RULE BEHIND THE SCREEN IN OFFICES IN THE MING AND QING DYNASTIES] 106 (Zhongguo Yan Shi Chu ban she 2004) [hereinafter ADVISORS].

120. *Id.* at 114-19.

121. *Id.* at 122.

122. *Id.* at 146.

123. *Id.* at 128-32.

women would feel ashamed in the court.[124]

When dealing with difficult cases, *shiye* would investigate the scene of the incident and rely on medical knowledge.[125] When a case was heard in court, *shiye* always hid behind a folding screen. If a *shiye* found any defect in a witness's testimony, he would pass a message to the magistrate.[126]

Wāng Hūizu [汪 輝祖] (1730-1807) was a model *shiye*. He was known to be very wise and familiar with the law and *li*. He resolved many difficult cases and wrote books on how to be a good *shiye*, which were very popular at that time.[127]

Interestingly enough, there was a woman *shiye* during the Qing dynasty, but her name was not recorded. Under Emperor Qianrong in Zhili Province, she served as a *shiye* for her father, brother, and husband. She learned all knowledge needed to be a good *shiye* (including law, economics, correspondence, and financial management) when she was with her father, a mayor. When her father became old, she handled his affairs and became a female *shiye*.[128]

After her father died, she became an advisor to her brother until she was thirty-nine years old. Then she married a new head of a county. After marriage, she assisted her husband in an inner office. Here she arranged for four concubines to copy documents according to her dictation and two older women to transmit the documents to her husband in the office. She was so excellent that her husband was promoted to mayor of Zhili. However, she advised him to submit his resignation reasoning that "you are only qualified to govern a county and I have no time and energy to help you because I have to manage the housework." Then she showed him a resignation letter prepared for his signature, and her husband signed his name. The couple then went back home to enjoy their lives.[129]

Thus, although *shiye* did not appear formally in court proceedings, they were indispensable to the administration of justice in China's courts. The best *shiye* combined *li* and *fa* and included at least one woman. This unnamed woman *shiye* in the Qing Dynasty pre-figured the mass movement of women from the inner chambers to the judicial chambers today. She stands in the grand legacy of Ban Zhao, the virtuous women of the *Lienüzhuan*, and the *qingguan*. She was erudite, wise, and capable of balancing work and family.

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124. *Id.* at 151-52.
125. *Id.* at 158-63.
126. *Id.* at 173.
127. *Id.* at 28-29.
128. *Id.* at 35-36; *see also* WU CHENGQIAO, QING DAI LI ZHI CONG TAN [OFFICIAL GOVERNANCE IN QING DYNASTY] Vol. 1, at 188-89 (Wen hai chu ban she 1966).
129. *Id.*

F. Songshi

Songshi is the third legal role that men occupied in traditional China. *Songshi* advised litigants and were sometimes also called *shiye*. They came about because ordinary litigants could not read or write.[130] However, *songshi* were often considered obstructers of justice. They were either banned or severely restricted after the Tang dynasty.[131] Their reputation marred the early practice of many lawyers during the Republican Era centuries later and in today's China as well. Today, criminal defense lawyers are sometimes beaten and jailed when they try to assist their clients.

Early in the Spring and Autumn era (770-475 B.C.), Deng Xi in the Zheng Nation was perhaps the first *songshi*. He was perceived as a cunning person who confounded right and wrong and in the end was killed by the Prime Minister Zichan.[132] In one account, Deng Xi instigated people to sue. A rich person drowned, and his body was found by a poor person. The decedent's family wanted to buy the body, but the poor person required too much money. The rich family did not want to pay this amount and went to Deng Xi for help. Deng Xi advised the rich family, "Don't worry, insist on the price you offered; except for you, nobody would buy that body." So the rich family did not bargain with the poor man. Then the poor person turned to Deng Xi. Deng told him, "Don't worry, insist on the price you offered because apart from you, the rich family cannot bury their dead."[133] Deng Xi was thus criticized for promoting conflict and not harmony.

However, there were some upright *songshi*. During the Qing Dynasty (1644-1911), there was a famous *songshi* named Wu Moqing (吳墨卿) in Jiangsu. He would inquire into actual circumstances whenever people asked him to write a complaint. If the person's case had no merit, he would try his best to help the parties achieve a settlement. If the person's case was meritorious, he would also try his best to win, even if the official opposed the case.[134] Thus he tempered *fa* with *li* and had the rectitude of the *qingguan*.

The Qing Dynasty government finally agreed to allow *daishu* to help litigants write legal documents. These were unpaid scriveners.[135] The law put very strict requirements on *daishu* in order to prevent them from acting

130. HISTORY OF LAWYER SYSTEM, *supra* note 82, at 26-27.
131. *Id.* at 28-29.
132. ADVISORS, *supra* note 119, at 264.
133. HISTORY OF LAWYER SYSTEM, *supra* note 82, at 32-33.
134. ADVISORS, *supra* note 119, at 265-66.
135. Brian Kennedy & Elizabeth Guo, *Raising the Bar for Taiwan's Attorneys*, TAIWAN REVIEW, July 1, 2007, *available at* http://taiwanreview.nat.gov.tw/ct.asp?xItem=24314&CtNode=128.

as *songshi*. Therefore, there were few people who received a *daishu* qualification, and *songshi* were still the main group helping litigants.[136]

Commoners also intervened in lawsuits. In the legendary Qing dynasty case of *Xiao Bai Cai*, the sister of the falsely accused doctor Yang filed an appeal for her brother while on a bed of nails. She was illiterate but had someone draft the appeal for her.[137]

Ultimately, *songshi* demonstrated that the imperial government did not have a "monopoly on legal knowledge."[138] Although there was no lawful educational organization to teach legal knowledge, *songshi* created independent channels of learning and interpretation through publishing textbooks and personal teaching.[139] They are known for influencing the legal order of the Ming and Qing Dynasties.[140] However, there are also reports of legal draughtsmen receiving three years of penal servitude or worse.[141]

Thus, in traditional China, men played public legal roles, as father/mother officials, *shiye*, and *songshi*. Women played private legal roles as advisors and moral teachers. Men were *wai*, and women were *nei*. However, China's legal structure in general was subordinate (*yin*) to its ethical and Confucian framework (*yang*) and an ultimate belief in divine justice. *Qingguan*, fabled incorruptible judges, balanced Heaven and earth, *li*, and *fa*. They lived selfless and virtuous lives and loved the common people. Although *shiye* and *songshi* had no official court role, to the extent they tempered *fa* with *li*, they also served as models of virtue and talent for today's lawyers and judges. The difficulty that *songshi* had maintaining their reputations in imperial China influenced the reputation of lawyers in the Republican Era and continues to do so today.

We now turn to Part III. Here we discuss China in the 19th century: the intervention of foreign lawyers, the birth of a legal profession in China, and the turning point for women's education. All of this paved the way for the peaceful rise of today's woman judge.

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136. HISTORY OF LAWYER SYSTEM, *supra* note 82, at 31-32.

137. X.L. WOO, EMPRESS DOWAGER CIXI: CHINA'S LAST DYNASTY AND THE LONG REIGN OF A FORMIDABLE CONCUBINE 169 (2002).

138. *Qiu Pengsheng, Fa Lv zhi Zhi: Ming Qing Song Shi yu Mu You dui Fa Zhi Xv de Zuo Yong* [*Rule of Law: The Role Played by Songshi and Muyou in Legal Order of Ming and Qing Dynasties*] 30-1, http://www.sinica.edu.tw/~pengshan/ (last visited on July 11, 2006) [hereinafter *Rule of Law: The Role*].

139. *Id.*

140. *Id.*

141. Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751 (1991).

III. A Turning Point in Gender and Legal History

A. The Influence of Missionary Schools and Foreign Lawyers

The 1800s marked the last years of the Qing dynasty and imperial rulers, and brought the influence of the Opium War and Protestant Christian missionaries, foreign concessions, and foreign attorneys to China. These influences had a profound effect on gender roles and legal actors in China. Missionaries, mainly women, established the first formal schools for girls, boarding schools so that Chinese girls could remain separate from boys. Women missionaries served as role models for a blending of *nei* and *wai* and co-mediators between Heaven and earth. Missionaries also discouraged foot binding for girls and women, which had been practiced for a millennium, and promoted instead the natural foot movement. Earlier, the Qing dynasty had tried unsuccessfully to ban this practice. China's disastrous defeat in the Opium War (1839-1842) led to the establishment of foreign concessions on Chinese soil. Foreign concessions introduced extraterritoriality and brought foreign attorneys to Chinese soil. These foreign attorneys were the first attorneys to practice on Chinese soil. However, in 1911, at the time of the Xinhai Revolution that overthrew the Qing dynasty, Chinese women had surpassed the educational goals of the Christian missionaries. They became political revolutionaries. All of these events set the stage for China's modern legal professionals, including its first women lawyers and today's peaceful rise of the Chinese woman judge.

B. Women's Schools in China and the Inadvertent Beginnings of Legal Education

Western Christian missionaries, mainly women, introduced widespread formal education for women in China. This was a turning point in China's gender history. Prior to the missionaries' founding of girls' schools, most women did not receive an education unless they were tutored in well-to-do families. And unlike Ban Zhao, most women did not receive extensive tutoring. The timing of China's first women's schools paralleled the development of women's education and reform movements in the West, including the antislavery and temperance movements in the United States. In China, girls' schools were originally set up to provide wives for Chinese helpers and to train Bible women and teachers.[142] This was similar to the founding of Christian schools in the West. Single women missionaries, who by the 1890s were two-thirds of all missionaries in China,[143] were key

142. Kwok Pui-lan, CHINESE WOMEN AND CHRISTIANITY: 1860-1927, at 17 (1992) [hereinafter Kwok].

143. Ian Welch, *Women's Work for Women: Women Missionaries in Nineteenth Century*

in promoting Chinese women's education. They held that educating Chinese women would lead to Christian influence in Chinese homes.[144] Ultimately the missionaries were successful in introducing women's education because of the legacy of women like Ban Zhao in the Confucian tradition. Women missionaries were also successful because they were female models of mediators between Heaven and earth.

To see how educational events developed in parallel fashion in the West and in China, we can consider the founding dates of schools in the United States. In 1829, America sent its first missionary to China, Dr. E.C. Bridgman. In 1833, Oberlin, America's first co-educational college, was founded by two Presbyterian ministers. In 1836, America's first women's college, Wesleyan College was founded by the Methodist Episcopal Church in Macon, Georgia. The famous three Soong sisters, who were major players in China's modern era, later attended this college.[145] In 1848, the first women's rights convention in the United States was held at the Wesleyan Chapel in Seneca Falls, New York.

In 1844, China's first girl's school was the Ningbo Girls School, founded by Maryann Aldersay of the British Oriental Society for the Advancement of Girls' Education.[146] Their curriculum included Biblical studies, Chinese, arithmetic, knitting, and embroidery.[147] Except for the biblical content, this was similar to what a proper Chinese girl might learn from a home tutor. After one year, Aldersay had fifteen students, and after eight years, she had forty students.[148] Over the next fifteen years, various missionary organizations opened girls' schools in Shanghai, Fuzhou, Guangzhou, and Xiamen.[149] By 1877, there were 2,101 girls enrolled in Catholic schools and in 1879 2,791 girls enrolled in Protestant schools.[150] Some of these schools provided free education, food, and accommodations

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China, 7, *paper presented* to the EIGHTH WOMEN IN ASIA CONFERENCE 2005, University of Technology, Sydney, 26-28 Sept. 2005, *available at* http://anglicanhistory.org/asia/china/welch2005.pdf.

144. Li Li, *Christian Women's Education in China in the Nineteenth and Early Twentieth Centuries*, 7. *paper presented* at the Fourth Annual Lilly Fellows National Research Conference, Nov. 11-14, 2004, Samford University, *available at* http://www.samford.edu/lillyhumanrights/papers/Li_Christian.pdf.

145. Ai-ling Soong (1890-1973) married H.H. Kung, one of China's wealthiest men and finance minister; Ching-ling Soong (1892-1981) married Sun Yat-Sen, the founder of the Republic of China; and May-ling Soong (1898-2003), who later transferred to Wellesley, married Chiang Kai-Shek, the leader of the Guomindang and the Republic of China.

146. Lu Meiyi, *The Awakening of Chinese Women and the Women's Movement in the Early Twentieth Century*, *in* HOLDING UP HALF THE SKY at 55 [hereinafter Meiyi].

147. Wong Yin Lee, *Women's Education in Traditional and Modern China*, 4 WOMEN'S HIST. REV. 356 (1995).

148. Karilyn Moeller, *Chinese Women Unbound: An Analysis of Women's Emancipation in China*, 4 INQUIRY 71 (Fall 2003).

149. *Id.*

150. Meiyi, *supra* note 146, at 68 n.1.

for poor girls, and some of these young girls grew up to be teachers in schools later established by the Qing government.[151] Also, some missionary families adopted Chinese girls and later sent them to the United States for education. Some of these Chinese women were the first to achieve advanced educational degrees.[152]

From 1851 to 1864, the Taiping Rebellion, an insurrection promoted by a heretical Christian cult, overtook part of China. Although it was ultimately unsuccessful, the Taiping Rebellion was a native movement that at least nominally promoted the equality of the sexes, the banning of foot binding, and monogamy. In 1874, in Xiamen, sixty Chinese Christian women gathered in church and, with an English missionary and his wife, founded China's first "Natural Feet Society" and sparked the growing protest against foot binding.[153] Missionaries also protested concubinage. Qing reformers such as Kang Youwei and Liang Qichao were influenced by missionary writings, and Liang also advocated the abolition of foot binding and the promotion of girls' schools.[154]

The first girls' school founded by Chinese was established in 1898; it was the Jingzheng Girls School in Shanghai.[155] It started with twenty students from the ages of eight and fifteen.[156] By that time, there were three hundred mission schools educating more than 7,000 girls.[157] In 1907, the Qing government promulgated the charter for China's first government girls' schools.[158] In 1909, there were 14,054 girls in schools founded by Chinese.[159] In 1922, there were 60,000 female students in mission schools.[160]

Foreign missionaries also started the first three higher educational institutions for women in China. In 1905, the Imperial Examination was abolished, ending the thousands years old monopoly of Confucian scholars on political rule. That same year, the North China Union College for Women began to offer courses for women.[161] In 1915, the Jin Ling Women's College was founded in Nanjing by several mission boards with the assistance of Smith College in Massachusetts.[162] In 1917, the

151. IDA BELLE LEWIS, THE EDUCATION OF GIRLS IN CHINA 18-25 (1919).
152. Interview with Lien Ling Ling, Professor, at Academica Sinica, Taipei (July 20, 2006).
153. Meiyi, *supra* note 146, at 68 n.7.
154. Kwok, *supra* note 142, at 106.
155. Meiyi, *supra* note 146, at 55.
156. Lee, *supra* note 147, at 356.
157. LEWIS, *supra* note 151, at 24.
158. Meiyi, *supra* note 146, at 55.
159. *Id.* at 68 n.1.
160. Kwok, *supra* note 142, at 17.
161. *Id.*
162. *Id.*

Methodist Women's Foreign Missionary Society in America founded the South China College and offered a full college course.[163] In 1919, the Chinese government founded its first college for women, the Beijing National Women's Normal School. In 1920, Peking University admitted two women students; this was the first co-educational higher education in China. This was also the same year that women gained the right to vote in the United States.

Thus, Christian missionaries, often single women, began widespread formal education for women in China, a turning point in China's gender history. They introduced a different curriculum and encouraged women to become teachers, doctors, and missionaries. Thus, they expanded the realm of *nei* to education and medical missionary work.[164] As we shall discuss next, Chinese women took this one step further by becoming political revolutionaries. Some went from *nei* to *wai* in a very short period. This was fostered also by discourse by political reformers and revolutionaries who promoted women's rights as a means to modernize China.[165] This would pave the way for China's first women lawyers and judges.

C. Women's Groups and Political Revolution

Following the short-lived Reform Movement of 1898, led by advisors to the Qing emperor, and the anti-foreign imperialist Boxer Rebellion of 1899-1901, the first decade of the 1900s also saw the beginning of many women's groups in China. These groups were composed of many women who had been educated in girls' schools. Some of these women's groups advocated political reform, women's rights, and charitable work.[166]

The Qing dynasty was toppled by the Xinhai Revolution of 1911, and the Republic of China was founded. Women were active in this revolution, including in revolutionary militias,[167] and in the years that followed, women persisted in continued political reform, and anti-imperialist and revolutionary activities. Approximately two hundred women participated in the anti-Qing revolutionary group, *Tongmenghui*, led by Dr. Sun Yat-Sen,[168] including Zheng Yuxiu, the first Chinese woman lawyer. Many of them discovered their revolutionary fervor while studying in Japan. However, despite their bravery during the Revolution and Sun Yat-Sen's

163. *Id.*

164. Because of an emphasis on a strain of Christian teaching called pietism, many Western Christian missionaries at the time failed to engage in dialogue concerning political reform.

165. Christina Kelley Gilmartin, *Engendering the Chinese Revolution: Radical Women, Communist Politics, and Mass Movements in the 1920s* 21 (1995) [hereinafter Gilmartin].

166. Meiyi, *supra* note 146, at 57.

167. *Id.* at 60.

168. *Id.* at 56.

letter that "[t]here is no disparity between men and women in terms of God-given rights . . . . In the future, women's rights to participate in politics is inevitable," the Provisional Constitution of 1911 did not guarantee equality or political participation for women.[169]

The May 4th movement in 1919, originally a student protest against the treatment of China in the Treaty of Versailles following World War I, turned into a national movement that was a turning point for China's politics, culture, and women's movement. It led the way for further critique of Western imperialism and traditional Confucian culture and the founding of the Communist Party.

Female students organized marches, strikes, and boycotts in support of the May 4th movement. Shortly thereafter, Peking University and other colleges allowed women to matriculate. Prior to that time, only universities organized by Western missionaries had accepted women students.[170]

In addition to promoting gender equality, the May 4th movement soundly condemned the role of women in the traditional Chinese family structure as virtuous mother and filial daughter[171] and instead promoted "open social interactions"[172] and "autonomy in marriage."[173] Also, a new Chinese character for "she" [她] was invented during this time.[174] According to historian Christina Gilmartin, the 1920s were also the "period of peak influence of feminism on Communist and Nationalist revolutionaries."[175] Most feminist authors at that time were male, indicating that this held both personal and political meaning for them as well.[176] Nevertheless, patriarchal patterns pervaded the Communist party.[177] Also, after the coalition between the Communist and Nationalist parties collapsed in 1927, the Nationalists embraced traditional roles for women, and the Communists also turned away from many gender reforms.[178]

Another critical turning point was the Long March in 1934, which included 2,500 women.[179] The women who endured the Long March, which included intellectuals and peasants, became leaders who mobilized

169. "Fu nüjie gonghe xijihui han" [Letter in Response to the Women's Republican Society], Sun Zhongshan quanji, Vol. 2, 52-53, as *quoted by* Meiyi, *supra* note 146, at 61.

170. Meiyi, *supra* note 146, at 65.

171. Gilmartin, *supra* note 169, at 23.

172. Meiyi, *supra* note 146, at 65.

173. *Id.* at 66.

174. Gilmartin, *supra* note 165, at 22.

175. *Id.* at 3.

176. *Id.* at 20.

177. *Id.* at 104-14.

178. *Id.* at 10-11.

179. It is estimated that altogether around 100,000 began the Long March and only 7,000 of these completed it. This retreat by the Communists resulted in Mao's leadership of the Party and much needed support of the Communists by China's peasant population.

other women. This culminated in the founding of the All-China Women's Federation in 1949. For forty years, aside from the time of disruption of the Cultural Revolution, this organization was led by women veterans of the Long March.[180]

Thus the 1800s and early twentieth century saw not only revolutionary change for China but for its women as well. Eventually, improving the lives of Chinese women became tied with cries for national reform and revolution. Beginning with widespread primary and secondary education for girls provided by Christian women missionaries, Chinese girls were eventually welcomed into universities, both in China and abroad. Simultaneously foot binding declined and women took on lives as teachers, doctors, missionaries, and political revolutionaries. They quickly moved from *nei* to *wai* and from bound feet to bound books. As political revolutionaries they were introduced to the study of law. When lawyers were finally allowed in Republican China, women joined their ranks as soon they were able, however the judgeship eluded women in Republican China. This would lay the foundation for today's Chinese women lawyers and judges. In some ways, Chinese women were as progressive, if not more progressive than their Western sisters. In one generation, some went from seclusion and immobility to being political revolutionary. We turn now to the advent of extraterritoriality and China's first foreign and then Chinese lawyers.

D. Foreign Lawyers in China and Legal Reform

Because China's *li/fa* construct did not allow for lawyers, the first lawyers in China were foreign attorneys. They practiced their own countries' law in China because of the doctrine of extraterritoriality. This was part of a broader movement in which various Western powers had extracted extraterritorial rights in India, Japan, and other non-European nations.[181] After China's defeat in the first Opium War (1839-1842), foreign missionaries founded girls' schools while foreign attorneys practiced foreign law in territories given to their foreign governments. The foreign victors demanded this because they perceived China's harsh punishments to be primitive and barbaric. This was ironic because the Chinese considered the foreigners barbaric. These foreign lawyers had a profound influence on Chinese legal actors. Some Chinese apprenticed for foreign lawyers and although China ultimately adopted a code that was modeled on that of civil law countries, including Japan, Germany and

180. Meiyi, *supra* note 146, at 81, 87.

181. For a discussion of the broader context of extraterritoriality, see R.P. Anand, *Universality of International Law: An Asian Perspective* 1-35, *available at* http://www.aalco.int/RP%20Anand2007.pdf (last visited July 18, 2008).

Switzerland, the model of the American and English practitioner has shaped the way Chinese lawyers practiced law then and now. I will now discuss how extraterritoriality came about and the legal reforms undertaken at the end of the Qing Dynasty and during the Republican Era.

After China's devastating defeat in the first Opium War, she signed the Treaty of Nanking in 1842 with Great Britain. While the Treaty itself did not specifically mention extraterritoriality, [182] Article XIII of the General Resolutions arranged for cross-cultural mediation and then adjudication according to the laws of the parties.[183] Seeking similar access to China, the United States entered into its first treaty with China in 1844. This treaty, the Treaty of Wanghia, explicitly mentioned extraterritoriality.[184][185] Because of the "most favored nation" clause, these extraterritorial rights were then claimed by all nations entering into treaty

182. Pär Cassel has argued that there was a tradition of extraterritoriality in China, including between the Han Chinese and Manchus. *See* Pär Cassel, *Excavating Extraterritoriality: the "Judicial Sub-Prefect" as a Prototype for the Mixed Court in Shanghai*, 24 IMPERIAL LATE CHINA, No. 2, 156, 169 (Dec. 2003).

183. Article XIII stated:

> *Whenever a British subject has to complain of a Chinese he must first proceed* to the [British] Consulate and state his grievance. The Consul will thereupon enquire into the merits of the case and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, he shall no less listen to his complaint, and endeavour to settle it in a friendly manner .... If unfortunately, any disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of a Chinese Officer that they may together examine into the merits of the case, and decide it equitably. Regarding the punishment of English criminals, the English Government will enact the laws necessary to attain that end, and the Consul will be empowered to put them into force and regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by correspondence which took place at Nanking, after the concluding of the peace.

FRANCIS LISTER HAWKS POTT, A SHORT HISTORY OF SHANGHAI: CHAPTER 2, *available at* http://www.earnshaw.com/shanghai-ed-india/tales/library/ pott/pott02.htm (last visited on Aug. 26, 2006) [hereinafter, POTT CHAPTER 2].

184. Regarding criminal acts, Article XXI of that Treaty reads as follows:

> Subjects of China who may be guilty of any criminal act towards citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China, and citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul or other public functionary of the United States thereto authorized according to the laws of the United States; and in order to secure the prevention of all controversy and disaffection, justice shall be equitably and impartially administered on both sides.

185. In 1882 the United States also passed the Chinese Exclusion Act. This resulted on a ban on Chinese immigration until 1943. The preamble to the 1883 Act stated, ". . . in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof . . . ."

relations with China. This paved the way for foreign attorneys to practice on Chinese soil and to eventually represent Chinese clients in the foreign concessions. This also paved the way for foreign judges to have jurisdiction over Chinese subjects there. From the perspective of one Western observer, Francis Pott, "The Chinese authorities appear to have entered into this arrangement in regard to extraterritoriality without protest. They were glad to be freed of the responsibility of controlling those who appeared to be turbulent foreigners and to hand them over to their own authorities".[186]

Foreigners lived in settlements in the Treaty ports and because of political and civil unrest in China brought on by the Taiping Rebellion many Chinese sought refuge in the foreign settlements in Shanghai. This led to the founding of the Shanghai Mixed Court in 1864. In addition to the Mixed Court there were also foreign consular courts in Shanghai.

At first the Mixed Court was presided over by a deputy of the Shanghai Magistrate who alone heard criminal cases and civil cases between Chinese who resided in the foreign concessions. However, when a foreigner was involved, a delegate from one of the foreign consulates sat as assessor with the deputy. Appeals were heard by the Taotai sitting with a Consul as assessor.[187] According to Pott, "Later the consular assessor became a party to the judgment in every case—in police cases because of the interest of the foreign community, and in suits between Chinese, on the ground that the Chinese official, with his traditional methods of enforcing judgments, must not be admitted to an unfettered jurisdiction within the area reserved for foreign trade and residence. These changes, as we shall see later, came to be regarded by the Chinese as an infringement of their sovereign rights."[188]

In 1865 the British Government appointed Sir Edmund Homby as Chief Justice of a British Court for Shanghai, and this Court, instead of the Consulate, now held authority over legal matters.[189] As of 1911, there were fourteen treaty powers in Shanghai and thus fourteen distinct courts, each administering its own national law.[190] A census of 1895 reported that more Chinese in Shanghai lived in the foreign settlements than in the city; 286,753 lived in the settlements and 125,000 in the city. The census of the foreign population in 1905 showed 3,713 British, 2,157 Japanese, 1,329 Portuguese, 991 Americans, 785 Germans and 568 Indians, out of a total of

186. POTT CHAPTER 2, *supra* note 183.

187. FRANCIS LISTER HAWKS POTT, A SHORT HISTORY OF SHANGHAI: CHAPTER 7, *available at* http://www.earnshaw.com/shanghai-ed-india/tales/library/pott/pott07.htm (last visited Aug. 26, 2006) [hereinafter, POTT CHAPTER 7].

188. *Id.*

189. *Id.*

190. 1911 ENCYCLOPEDIA BRITANNICA: SHANGHAI (publisher and editor and date), *available at* http://www.1911encyclopedia.org/Shanghai. (last visited Aug. 26, 2006).

11,497 foreigners.[191] The Mixed Court was returned to the Chinese and reorganized as the Provisional Court on January 1, 1927 over the protests of the American Far East Bar Association.[192] Up until that time, foreign lawyers were quite prosperous in their representation of both foreign and Chinese clients.[193] This prevented early Chinese lawyers from establishing their reputations.

Thus the defeat of China in the Opium War led not only to new schools for Chinese women, but treaty ports for foreign powers, extraterritoriality and the practice of foreign law by foreign attorneys on Chinese soil, and eventually a Mixed Court in Shanghai. Because many Chinese also lived within the foreign concessions in Shanghai, this shaped the Chinese legal profession that was to follow. Shanghai was to become a leading center for Chinese lawyers then, as it is today. Until 1927, foreign lawyers dominated the practice of law in China. Women became lawyers in Shanghai as soon as they were allowed to in 1927, and some of their stories will be described below.

E. The Beginnings of Modern Legal Education in China and the Legal Profession

As mentioned earlier, because of the *li/fa* construct, traditional Chinese government officials studied only the Confucian classics. There was only informal legal training promulgated by *shiye* and *songshi.* But China's devastating defeat in several wars during the 19th century led to reform of this educational monopoly. The Qing first promoted Japanese legal education then schools of "law and politics." Some Qing reformers also drafted regulations for lawyers. Although they were never promulgated, they served as a foundation for laws under the Republic of China. China allowed its first male lawyers the same year the Republic of China was founded in 1912, then instituted a series of modern laws and legal institutions until 1949, although their influence was limited. Women lawyers were not allowed until 1927. Because of the history of *songshi* and the competition of foreign lawyers, early Chinese lawyers faced obstacles in obtaining work and in establishing their reputations. However, after foreign lawyers were banned from representing Chinese clients in 1927, the prestige of Chinese lawyers grew. Also, as demonstrated later in the stories

191. *Id.*

192. Yin Xu and Xiaogun Xu, *Becoming Professional: Chinese Accountants in Early 20th Century Shanghai*, 30 ACCT. HISTORIANS J., No. 1, 129, 143-146 (June 2003).

193. Sun Huimin, *Xing Bie yu Zhi Ye: Min Guo Shi Qi Shanghai de Nv Xing Zhongguo Lv Shi (1927-1949)* [*Gender and Profession: Chinese Female Lawyers in Shanghai in the Republican China (1927-1949)*] (translation by Xu Huiting on file with the author) [hereinafter *Gender and Profession*].

of early women lawyers, they often enjoyed a reputation for integrity and justice. They were able to do this to the extent they integrated *li* and *fa*.

Formal Chinese legal education had its humble beginnings in the late Qing dynasty. Because the Japanese were viewed as successful in achieving modern reforms,[194] the Qing dynasty promoted Japanese legal education in order to train new officials. However, there were more law graduates than there were positions for officials. Therefore law graduates who could not become officials became lawyers. It was because of this situation that lawyers were considered inferior to officials.[195] Today the situation is reversed. Many judges today have less education than lawyers.

With the exception of the Jingshi Law School, the Chinese government did not value law as an independent subject. Most schools offered "law and politics" and focused on cultivation of governmental officials and diplomats. Most law students were thus focused on reforming China and becoming an official.[196] This was in line with the longstanding deference given to officials and not *songshi* or *shiye*. To this day, many law schools in China are still called schools of "law and politics."

In 1906, two Qing draftsmen, Shen Jiaben and Wu Tingfang completed a criminal and civil procedural law. This draft provided for professional lawyers.[197] Although this draft was never adopted, a blueprint was available.[198] Part of the purposes of the draft for lawyers was to combat the influence of foreign lawyers. Shen Jiaben wrote the emperor expressing concern that Chinese citizens who consulted foreign lawyers were disadvantaged when the foreign lawyers' own countrymen were involved.[199]

The 1909 Trial Courts Tentative Regulation and Courts Personnel Regulation in 1910 specifically provided for lawyers. Although these two regulations were not executed completely, they also provided a good basis for the establishment of a lawyer system for the Republic of China.[200]

In 1911, Dr. Sun Yat-sen's new republic included a reformed judicial system and lawyer system.[201]

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194. Japan shook off extraterritoriality in 1899 after aggressive military and legal campaigns.

195. Sun Huimin, *Cong Dongjing, Beijing Dao Shanghai—Ri Xi Fa Lv Jiao Yu Yu Zhongguo Lv Shi Zhi Du de Yang Cheng (1902-1914)* 157-58 [*From Tokyo, Beijing to Shanghai: Japanese Legal Education and Establishment of Chinese Lawyer System (1902-1914)*].

196. *Id.* at 157, 195-96.

197. HISTORY OF LAWYER SYSTEM, *supra* note 82, at 17.

198. *Id.* at 21.

199. Li Yuwen, *Lawyers in China: A "flourishing" profession in a rapidly changing society?*, CHINA PERSPECTIVES, 20 Jan.-Feb. 2000, *available at* http://www.cefc.com.hk/pccpa.php?aid=1605.

200. HISTORY OF LAWYER SYSTEM, *supra* note 82, at 21.

201. *Id.* at 37.

Altogether, there were three stages in the development of professional lawyers in the Republic of China. The first stage was during the Nanjing tentative government and Beiyang government period (1912-1926). In this period, the tentative Lawyer Regulation and other subordinating rules were passed. In the second stage, i.e., the Nanjing government period (1927-1940), major amendments were made by adopting the Lawyer Regulation and other correspondent regulations. In the third stage, after the end of Nanjing government, the Law Act was adopted in 1940.[202] Women were allowed to become lawyers in the second stage.

In 1912, the Republic of China published the Tentative Lawyer Regulation.[203] This system was modeled after those of Germany and Japan.[204] According to these regulations, lawyers had to be male graduates of a university of politics and law who were at least twenty years old, had passed the lawyers examination, and were members of a lawyers association.[205] These regulations also officially authorized lawyers to appear in court for the first time in Chinese history.[206]

In 1913 there were about 1,700 lawyers registered with the Ministry of Justice[207] and around forty-nine law colleges in China.[208] In 1915, China's most famous law school in the south was established at Soochow University, which was founded by American missionaries from the Methodist Episcopal Church South.[209] In 1917 lawyers were authorized to draft contracts and wills and to enter into contracts on their client's behalf.[210]

During this first stage (1912-1926), the lawyer system was only carried out in the central judicial organs and superior provincial courts and a small number of inferior courts. Judicial independence was established at this level.[211] But as a separation of powers was put into practice gradually, the lawyer system also started to take effect below the provincial level.[212] Women were not allowed to practice law during this stage.

The establishment of new courts, however, was a very difficult process due to frequent battles among military officers and warlords and a

202. *Id.* at 55.
203. *Id.* at 40.
204. *Id.* at 51.
205. Li, *supra* note 199, at 20.
206. *Id.*
207. *Id.*
208. Alison W. Conner, *Training China's Early Modern Lawyers: Soochow University Law School*, 8 J. CHINESE L. 1 (1994) [hereinafter Conner I].
209. *Id.* at 4.
210. Alison W. Conner, *Lawyers and the Legal Profession During the Republican Period*, *in* CIVIL LAW IN QING AND REPUBLICAN CHINA 216-7 (Kathryn Bernhardt, ed., Stanford Univ. Press, 1994).
211. HISTORY OF LAWYER SYSTEM, *supra* note 82, at 58.
212. *Id.* at 61.

weak central government. As far as the first trial court in counties is concerned, among over 2,000 counties, only 91 had special judicial organs. The majority still adopted the traditional model wherein the head of the county judged cases while dealing with administrative affairs.[213]

Even in the new courts, the transition to a professional bar was difficult. Litigants were unfamiliar with retaining lawyers.[214] Chinese litigants also often continued to enlist the assistance of the foreign lawyers who practiced in the foreign concessions, or rented zones.[215] After 1926, however, foreign lawyers were no longer allowed to represent Chinese clients. Therefore, Chinese lawyers became prosperous and many young people decided to become lawyers. Shanghai was an especially popular venue for lawyers.[216]

The second stage of lawyer development began in 1927. In 1927, the Beiyang government promulgated the Lawyer Regulation. The Nanjing government adopted this regulation with some slight amendments. In this regulation, the restriction on female lawyers was finally abolished[217] and foreigners were forbidden from representing Chinese.

Between 1926 and 1934 the number of members of the Shanghai Bar Association increased from 235 to 1,174, making it the largest bar association.[218] Fierce competition developed because of the larger number of lawyers. In 1935 there were 10,249 registered lawyers with the Ministry of Justice.[219]

The government initiated revision of the Lawyer Regulation in 1935 and made a draft in 1940. This began the third stage of lawyer development. On January 11, 1941 the government issued and enforced the Lawyer Act (amended in 1945).[220] The lawyer regulations in this early stage provided again and again that a lawyer must not act on behalf of clients actively or positively. Specifically, the lawyers were not to help or goad meritless litigation. These regulations authorized officials to punish lawyers at will. Officials did not want an opponent to "control" them or supervise them.[221] Thus some lawyers during this period still faced the disdain of the *songshi*.

The shape of China's legal profession was also influenced by the law

213. *Id.* at 59.
214. *Id.* at 60.
215. *Gender and Profession, supra* note 193.
216. *Id.*
217. HISTORY OF LAWYER SYSTEM, *supra* note 82, at 97.
218. *Shanghai Lv Shi Gong Hui Hui Yuan Tong Ji Biao* [*The Statistics of Members of Shanghai Bar Association*], 33 SHANGHAI LV SHI GONG HUI BAO GAO SHU [SHANGHAI BAR ASSOCIATION REPORTS], 238-39.
219. Li, *supra* note 199, at 20.
220. HISTORY OF LAWYER SYSTEM, *supra* note 82, at 97.
221. *Id.* at 133.

students, who had graduated from Japanese law schools, and the new local republican governments.[222] In Professor Sun Huei-min's study of lawyers in Shanghai in 1911-1912, she found that while Japanese law graduates promoted the legal profession in Shanghai, they did not adopt many features of Japanese lawyers, but rather adopted features from the common law practices of foreign lawyers in the rented zones, or foreign concessions. This was due in part to the Shanghai government's amendment of the Mixed Court trial system.[223]

Also, according to the study of one school, Soochow University Law School, its students in the 1930s and 1940s came from commercial or professional families and many students identified lawyers in their family. Women students also had stronger ties to the legal profession than their male counterparts. Almost ten percent of women students listed a lawyer as a family head and another eight percent listed a lawyer-relative as a guarantor. Professor Conner, author of this study on Soochow Law School, notes that only twenty-five years after the founding of a private legal profession in China that some twenty to thirty percent of Soochow students had lawyers as family heads or guarantors.[224]

Thus, China's Republican Era marked a swift introduction of a legal profession to China. This was brought about through legislation and institution of political and law departments, law schools, and bar associations. Foreign attorneys who practiced in the foreign concessions were the first to dominate the representation of Chinese clients. After 1926, however, they were no longer allowed to represent Chinese clients, spurring the growth and prestige of Chinese lawyers. Although the first law school for women was founded in 1911 to further train the women who had participated in the Xinhai Revolution, women were not allowed to practice law until 1927. This sixteen year gap would be a fruitful area for further study. We will now discuss women's entry into the Chinese legal profession by examining Professor Sun's study of Shanghai's first women lawyers, who paved the way for today's women judges.

F. China's First Women Lawyers

Although women were not allowed to practice law until 1927, modern legal education for Chinese women began in 1911 as a result of the Xinhai Revolution. There were, in fact, Chinese law schools for women, as there

222. *Sun Huimin, Zhongguo Lv Shi Zhi Du de Jian Li- Yi Shanghai Wei Zhong Xin de Guan Cha [Establishment of Chinese Lawyer System—an observation of Shanghai as a main object (1911-1912)]*, 3 STUDY ON HISTORY OF CHINESE LEGAL SYSTEM 121, 153 (2001).

223. *Id.*

224. Conner I, *supra* note 208, at 32.

were in the United States in the early years. The first law school for women grew out of the fervor of women who helped topple the Qing Dynasty. Later, women studied law in co-educational institutions. The first woman lawyer in China was a Frenchwoman, Flora Rosenberg, who practiced in the French Concession in 1921. After 1927, Chinese women joined the profession in small, but visible numbers. The first Chinese woman lawyer was Zheng Yuxiu, who had participated in the Xinhai Revolution. In Shanghai, the progress of Chinese women lawyers was regularly reported on in local newspapers. These news accounts demonstrate that they received some favor, especially when they were able to demonstrate their use of *li* and *fa*, *qingli* and *renqing*. They are similar to reports today about China's women lawyers and judges.

Legal education for women in China, like women's education in general, parallels developments in the United States. In the United States, law schools were founded for women because they were rejected from other law schools. In 1898, Ellen Spencer Mussy and Emma Gillett founded the Washington College of Law in the District of Columbia; it is now the law school of American University. In 1908, the Portia Law School in Boston was created for women to attend classes in the evening. It is now the New England School of Law.[225]

One month after the Xinhai Revolution in 1911, China's first school of law and politics for women, which was in Shanghai, was advertised. The advertisement read:

> Since the Civil Army started the revolution, we women have been as fervent as men. When the Republican state is founded, we will gain suffrage so as to illumine the whole world. In order to [train talented women] for the future Congress, the first female law and politics school will be founded in Shanghai.[226]

According to Professor Sun, Mr. Li Pingshu was the founder behind the Shanghai women's law school. He recalled:

> In the winter of the year of the Xinhai revolution, many female students came to Shanghai . . . to collect money for the army. But they did not succeed and were desperate. I had sympathy for them and discussed with my classmate Li Baoliang about founding a women's law school . . . ."

After Mr. Li's school was founded, there were several other schools founded for women; but their quality was poor and recruiting was difficult. In 1923, Shen Yibin, a women's suffrage advocate, founded a women's

225. New England Law, Admissions, http://www.nesl.edu/admissions/ (last visited Dec. 21, 2009).

226. Ren She Nv Zi Fa Zheng Xue Tang Zhao Sheng Guang Gao [Notice of Recruiting Students of Female Law and Politics School], Min Li Bao, Dec. 9, 1911 at 1.

law and politics school with her husband in the English settlement of Shanghai.[227] It soon became co-educational. In 1927 there were three women graduates.[228] Between 1917 and 1932, Shanghai *Fa Zheng Xue Yuan* (the original name is Shanghai *Fa Zheng Da Xue*) had 18 women graduates among the 444 undergraduates of law and politics departments; and 29 women graduates among the 479 graduate students.[229] In other words, women graduates accounted for five percent of total graduates.

For Shanghai *Fa Xue Yuan* (Shanghai Law School, the original name is Shanghai *Fa Ke Da Xue*), between 1931 and 1948, among the 747 graduates in the law department, [230] there were 62 women. Women graduates accounted for eight percent of total graduates.[231] These numbers can be contrasted with the overall number of female students in middle schools and colleges in the region during that time. In 1930, female middle school students accounted for over ten percent of total students in the Jiangsu and Zhejiang areas and twenty percent in Shanghai. In 1931, women students were twelve percent of all college students.[232] Overall, few women studied law.

From 1931-1949, women accounted for twelve percent of graduates from Soochow Law School but their numbers increased in later years; from 1941-1949 they comprised eighteen percent of the student body.[233] After

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227. A report of the English periodical Zhongguo Fa Xue Ping Lun [The China Law Review] points out that the school was founded by a group named "Shanghai Nv Quan Yun Dong Xie Hui [The Shanghai Women's Rights Movement Association] with the goal to train Chinese women to have ability to vote. Current Event, 1 CHINA LAW REVIEW 154 (1923), *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 5, n.17.

228. Ziwang, *Visit with the Lawyer Shi Liang*, 2 FU NV SHENG HUO [WOMEN'S LIFE] 54 (1936), as cited by Sun Huimin in *Gender and Profession, supra* note 193, at 5 n.21.

229. "Page 98 of this roll mistook the fourth female lawyer Chen Yunhuang to be male. This shows that the roll was probably not accurate in telling the total number of women graduates but it does reflect the great disparity between the number of male and female students in this school," Sun Huimin in *Gender and Profession, supra* note 193, at 6, n.28.

230. Shanghai Fa Xue Yuan Fa Lv Xi Bi Ye Xue Sheng Diao Cha Biao [A Survey of Graduates of the Law Department of Shanghai Law School in 1946], Shanghai Fa Xue Yuan Dang An [Archives of Shanghai Law School], Shanghai Archives Office, Q 247-1-61, at 5, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 6 n.29.

231. Shanghai Fa Xue Yuan 34-37 Nian Du Bi Ye Sheng Ming Ce [The Roll of the Graduates in the 1934-1937 of Shanghai Law School] Shanghai Fa Xue Yuan Dang An [Archives of Shanghai Law School], Shanghai Archives Office, Q247-1-75; Shanghai Fa Xue Yuan Li Jie Bi Ye Sheng Ming Ce [The Roll of the Graduates of Shanghai Law School] Shanghai Fa Xue Yuan Dang An [Archives of Shanghai Law School], Shanghai Archives Office, Q247-1-77 *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 6 n.30.

232. Cheng Difan, Zhongguo Xian Dai Nv Zi Jiao Yv Shi [History of Modern Women Education in China] (Shanghai: Zhong hua shu jv, 1936), 180, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 6 n.31.

233. Conner I, *supra* note 208, at 31. The percentage of women in legal education may have been higher in China than in the United States at that time. In 1972, only nine percent

WWII, two women taught law at Soochow Law School: Cecilia Sieu-Ling Zung and Grace M.T. Tan, both after obtaining their J.S.D. degrees from New York University Law School.[234] Interestingly, in the United States, women constituted only 3-4.5 percent of law students from 1947-1967 and in 1945 there were only three tenure-track women faculty at American Association of Law Schools member schools.[235]

Political revolution and allegiance to a new China catapulted some Chinese women into the legal profession and public office. Prepared by women's primary and secondary education, provided either by missionaries or by the Chinese government, some Chinese women moved from *nei* to *wai*, and from *li* to *fa*. Women's law schools were founded in China after 1911. Gradually, women began to attend co-educational schools. We turn now to Shanghai's first women lawyers, Flora Rosenberg, Zheng Yuxiu and Zhang Shunqin, believed also to be the first women lawyers in China. They received their legal education overseas because reputable Chinese options were not available to them. We will then discuss those who followed and were chronicled in Shanghai's newspapers during the Republican Era. Courageous and creative, they paved the way for today's Chinese lawyers and judges.

G. The First Women Lawyers in China

The first woman lawyer in Shanghai was a Frenchwoman, Flora Rosenberg, who practiced in the French Concession in 1921.[236] She was heralded in Chinese newspapers at the time. The first Chinese woman lawyer was Zheng Yuxiu and the second was Zhang Shunqin. They received their legal education overseas.

Zheng Yuxiu (1891-1959) began as a political revolutionary. She was born in Guangdong and, as a small child, learned to read ancient works and poems from her mother. Like many educated girls of her day, she then studied in a Christian school. She was a student at Tianjin Chongshi Church Female School. In 1905, at the age of fourteen, she went to study in Japan and then joined the China League Association (中国同盟会 *Zhōngguó Tóngménghuì*), one of the chief organizations that later overthrew the Qing government. Then she founded the Jingjin Classmates Association with Wang Jingwei, Li Shizeng, and others, and organized a

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of law students in the US were female. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, APPROVED LAW SCHOOLS, 1998 EDITION *451* (Macmillan General Reference 1997).

234. Conner I, *supra* note 208, at 24.

235. Ruth Bader Ginsburg, *Remarks On Women's Progress At The Bar And On The Bench*, 89 CORNELL L. REV. 801, 804 (2004).

236. *Gender and Profession, supra* note 193, at 1.

secret assassination plot against the Qing Dynasty. She went back to China in 1911 and joined in the Xinhai Revolution [辛亥革命].

In 1914, at the age of twenty-three she went to France; she received her doctorate in law in 1925. She wrote on the constitutionality of China. Thus, like Flora Rosenburg, she studied in France. In the 1920s she was also active in international women's suffrage activities. In 1926 she returned to China and founded a law firm with her classmate Wei Daoming, who later married her.[237] She was also the first Chinese lawyer to practice before the French courts in Shanghai.[238] In March 1927, she was elected to be commissioner of the tentative Shanghai government. She was also later active in the Nanjing government and served as dean of the Shanghai Law and Politics College. Among her writings were *Wo de Ge Ming Shi Dai* (My Revolutionary Age 我的革命时代), *Tong Nian he Ge Ming de Hui Yi* (The Memory of Childhood and Revolution 童年和革命的回忆), *Zhongguo de Li Xian Yun Dong* (The Constitutionality Movement of China 中国的立宪运动), and *Guo Ji Lian Meng Gai Kuang* (A General Introduction to the League of Nations 国际联盟概况等).[239]

The second female lawyer in Shanghai was Zhang Shunqin. She received her license in Britain and even practiced in London and Singapore. In China, she worked in the law firm of her brother-in-law, the famous lawyer Luo Jiawei.[240]

Another lawyer of note was Shi Liang. Shi Liang graduated from the Shanghai Law and Politics University in 1927.[241] In 1932, she opened her own law firm where she displayed an engraved sign that stated "to protect human rights."[242] In 1936, she was jailed for seven months by the

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237. *Zhongguo di yi ming nv buo shi he nv lv shi Zheng Yuxiu* [*China's First Woman Ph.D. and Lawyer*], Apr. 26, 2004, *available at* http://www.szzx.gov.cn/wsl/szws/6/200602/t20060224_41063.htm.

238. Robyn Hamilton, *Dutiful Daughters: Views of Chinese Women Descended from the Zeng Clan, presented to* The International Federation for Research in Women's History Conference, Sydney, Australia, 2005 at 12.

239. Shtong.gov.cn, Zheng Yuxiu (1891-1959), http://www.shtong.gov.cn/node2/node2245/node63852/node63858/node63883/node64475/userobject1ai57988.html (last visited Aug. 25, 2008).

240. Siwei, Hai Shang You Yi Nv Lv Shi [Another Female Lawyer in Shanghai], Jing Bao, Oct. 6, 1930, at 2, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 8 n.40.

241. *Forum in Memory of Chinese Female Leader Held*, PEOPLE'S DAILY ONLINE, Apr. 26, 2000, *available at* http://english.peopledaily.com.cn/english/200004/26/eng20000426_39787.html (last visited Aug. 25, 2008).

242. Zhang Liang, *Zou Chu Li Shi de Xuan Xiao: Shi Liang Lv Shi Sheng Ya Ji Lue* [*History's Clamor: The Career of Lawyer Shi Liang*], FA ZHI RI BAO FA ZHENG WANG SHI ZHUAN LANG, July 29, 2007, *available at* http://news.sohu.com/20070729/n251299165.shtml (translation by Jin Wang on file with the author).

Guomindang for Communist activity.[243] During that time she served as a volunteer lawyer for fellow women prisoners.[244] After 1949, she became the first minister of justice in the People's Republic of China.[245]

H. The Reputation of Women Lawyers in Republican China

Professor Sun Huei-min has studied both news reports and archives of women lawyers during the years 1927-1949. Although the number of women lawyers was relatively low, they were well documented in the press. They sometimes received favorable press coverage for their intelligence and competence. One lawyer was criticized for advertising herself as a woman. However, some clients also considered them less powerful than their male counterparts. Their salaries were also lower. Also, although women lawyers did not exclusively represent women, they felt a special responsibility to reach out to women clients. They sometimes advertised themselves as female attorneys, wrote advice columns for women, and provided pro bono services for women. They were courageous and creative as they blended *nei* and *wai*, *li* and *fa*. However, the judiciary eluded Chinese women during the Republican Era.

Professor Sun has found that in the 1930s newspapers reported on the first, second, third, etc., women lawyers. In 1933, a reporter published a list of twenty-four female lawyers.[246] The press also reported on the number of women members in the Shanghai Bar Association and their roles. In 1936, there were over fifty women members compared to 1,263 male members.[247] While women became committee members of the bar association, they never entered the decision-making center of the association.

In general, the reputation of female lawyers in the press was better than that of men lawyers. When the reporter of *Zheng Yi* [Justice], Wang Jianfu, reported on the spring conference of the Shanghai Bar Association in 1932, he praised Yang Zhihao for good communication, Zhou Wenji for eloquence, and Zhu Sue for a sharp writing style.[248] The reporter of *Jin*

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243. *Id.*

244. *Id.*

245. *Forum in Memory of Chinese Female Leader Held, supra* note 241.

246. Junyi, Nv Lv Shi 24 Ren [24 Female Lawyers], Jin Gang Zuan, Apr. 16, 1933, at 1 *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 8 n.43.

247. Shanghai Lv Shi Gong Hui Hui Yuan Ren Shu Ji Cheng Jie Nian Biao, 1925 [The Yearly Report of the Number of Members and Reprimand of Shanghai Bar Association, 1925], Shanghai Lv Shi Gong Hui Dang An [Archives of the Shanghai Bar Association], Shanghai Archives, Q190-1-13739, 190. "There is a list of women members on page 192 of the same volume in which 57 female names were listed and 8 of them quit the association and thus only 49 were members." *Id. as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 9 n.46.

248. Wang Jianfu, Lv Shi Gong Hui Gai Xuan xiang Wen [Detailed News on the Reelection of the Bar Association], Zhengyi [Justice], Mar. 28, 1932, at 2, *as cited by* Sun

Gang Zuan, Liao Weng wrote a report entitled "Jin Guo Bu Rang Xv Mei"("Women are not Inferior to Men") describing the heroic posture of a female lawyer named Zhou Wenji when she appeared in a local court in Shanghai:

> A female lawyer named Zhou Wenji appeared in the local court the other day. There were several lawyers in the court, who did not pay attention to her. But after the court hearing began, Lawyer Zhou stood up and made a very excellent presentation with pure Peking language. She was quite calm, and presented leisurely and gracefully. She presented very clear, logical reasoning by referring to the jurisprudence and articulating her legal opinion. All the people in the court marveled at her excellent performance.[249]

Another judge commented on a female lawyer in his 1934 diary as follows, ". . . presented clearly, articulately, fairly logically. At present, there is even such a talented woman, which is very uncommon and precious."[250]

One 1934 report also remarked on the private life of a woman lawyer, Tu Kenfan, indicating that *nei* was just important as *wai*: "Ms. Tu was the minor owner of a large toggery in Nanjing Road. She owned much wealth and was a famous merchant in Shanghai. Ms. Tu is very good with her husband and therefore their marriage is very successful."[251]

Women attorneys advertised in newspapers, as did men attorneys. Tu Kuenfan presented a flattering picture of herself in the newspaper *Jing Bao* and then invited reporters to a banquet. The newspaper wrote afterwards:

> Tu loves justice and does not care whether the client pays her. If she loses a case, she cannot eat and even weeps. Whenever she accepts a difficult case, she will consult experienced colleagues with the aim of winning. Therefore people like to retain her.[252]

Another woman attorney, Han Jiazheng was reprimanded by the bar association for advertising herself as "Han Jiazheng, woman lawyer." In a letter sent to her and noticed to all bar members, the committee stated:

> Lawyers serve society irrespective of their gender according to

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Huimin in *Gender and Profession, supra* note 193, at 10 n.49.

249. Liaoweng, Zhi Fen Bu Rang Xv Mei [Women are Not Inferior to Men], Jin Gang Zuan, Sept. 5, 1932, at 1, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 10 n.50.

250. Peng Sufu Ri Ji [Peng Sufu's Diary], Jan. 12, 1934, Archives of Shanghai Bar Association, Shanghai Archives, Q 190-1-827, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 11 n.57.

251. Chanmian, Tu Kunfan Nv Lv Shi Xi Bei Sui Yuan zhi Xing [The Female Lawyer Tu Kunfan's Visit to Suiyuan in the Northwest], Jin Gang Zuan, Dec. 8, 1936, at 1, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 10 n.51.

252. Xiao Zhen, Hao Sheng Nv Lv Shi [Admirable Female Lawyers], Jing Bao, July 28, 1933, at 3, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 12 n.61.

> the law and the job is in essence different from business competition. Therefore the judicial department has ordered again and again that lawyers should respect themselves and pay attention to duty and ethics. Now you have published the above-mentioned advertisements in the newspaper attempting to show your special characteristics. This deed is nearly boasting and is indeed not in line with proper ethics.[253]

Han protested, asserting that by using "female" in the advertisement she was stating a fact and not trying to "gain attention by stressing her difference."[254]

Some women lawyers also wrote legal advice columns. Han Xuezhang tried a friendly tone. In March 1939 she wrote:

> The issue you raised is called non-marital children in the civil law, which means children not born by a formal couple. But according to item 1 of Art.1065, "non-marital children may be perceived as marital children. If a non-marital child is nurtured by his or her father, it is considered to be adoption." Although Debao is not a marital child of Zhang Jun, since he is nurtured by Mr. Zhang and Mr. Zhang signed his name when Debao went to school there is strong evidence of nurturing. So it is of course an adoption. Since it is an adoption, Debao is considered to be a marital child. How could his stepmother refuse to accept him? No problem, you can sue her and gain the inheritance.[255]

Being a woman lawyer not only attracted media attention but prejudice. The reporter of *Da Gong Bao Jiang Yixiao* wrote in 1936 that society perceived "female lawyers . . . as [not as] powerful as male lawyers in dealing with cases."[256] Even Zheng Yvxiu who had a doctorate in law was deemed to have lacked experience.[257] The well-known "third female

253. Shanghai Lv Shi Gong Hui Chang Wu Wei Yuan Hui Zhi Han Jiazheng Hui Yuan Han Gao (Chu Gao), Aug. 3, 1934 [Letter from the Standing Committee of the Shanghai Bar Association to the member Han Jiazheng], Shanghai Lv Shi Gong Hui Bao Gao Shu [Reports of Shanghai Bar Association], at 102, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 13 n.63-64.

254. Han Jiazheng Zhi Shanghai Lv Shi Gong Hui Chang Wu Wei Yuan Hui Han, August 4, 1934 [Letter from Han Jiazheng to the Standing Committee of Shanghai Bar Association, Aug. 4, 1934], Archives of the Shanghai Bar Association, Shanghai Archives, Q 190-1-13671, at 9, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 13 n.65.

255. Xin Xiang [Mail Box], Shanghai Fu Nv [Shanghai Women], Vol.2 Issue 9 (1939), 32, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 16 n.83.

256. Ms. Yixiao, Shanghai Zhi Ye Fu Nv Fang Wen Ji: Lv Shi Jiang Huiro Nv Shi [Interviews of Shanghai Professional Women: the Lawyer Ms. Jiang Huiruo], Da Gong Bao, Shanghai edition, Sept. 29, 1936, at 6, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 17 n.85.

257. SHI LIANG, SHI LIANG ZI SHU [AUTOBIOGRAPHY OF SHI LIANG] (Beijing: Zhongguo wen shi chu ban she 1987) 15. Madame Wei Tao-ming, *My Revolutionary Years*, 146 *as*

lawyer in Shanghai" Yang Zhihao was even dropped by her client right before a court hearing in a well-publicized case.[258]

There was also an income gap between male and female attorneys. In 1946, the Shanghai bar association required each member to report their income, which the association divided into six grades. Of the 958 members who should pay tax, 62 were listed in the highest grade Jia A, and only one, Han Xuezhang was female. In the first three grades, besides Han Xuezhang, there were only two other females, Shi Liang and Zhu Kuangzheng.[259]

Some women lawyers deemed it their responsibility to champion women's rights. Jin Shiyin called on new female lawyers in the article "The Particular Responsibility of Female Lawyers Nowadays" in 1931, to give up the greedy image of male lawyers who served wrongdoers, and to provide legal counseling services for women for free so as to help them to be rid of oppression and to strive for rights.[260]

Jiang Huiruo was a volunteer legal counselor in the *Fu Nv Xie Jin Hui* (Association for the Advancement of Feminism 婦女协进会). When interviewed in 1936 she stated:

> I entered the law and politics school in 1930. The north and the south had been united and the women's movement was proceeding very heatedly. However, I realized that although women received equal rights in name, in reality women were still oppressed, exploited, and ravaged by the male-dominated society although women's status had improved a little. They did not know how to seek redress for injustice or where to appeal for their suffering. Therefore I decided to study law. I wished I could help alleviate their suffering and give those who have

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cited by Sun Huimin in *Gender and Profession, supra* note 193, at 17 n.89.

258. Yang Zhihao and her teacher Zheng Yvxiu were attorneys for the wife in the well-reported case in which Dr. Tang Huixuan accused his wife of fornication. But the wife fired Yang Zhihao just before the hearing was about to begin and retained the experienced and well-known male lawyers Yan Yinwu and Jiang Yiping. Bo Shi Kong Qi Tong Jian An [A Doctor Accused His Wife of Fornication], Min Guo Daily [Republican China Daily], Nov. 13, 1930, no. 2 at 3; Nov. 23, 1930, no.4 at 2, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 13 n.69.

259. Shanghai Lv Shi Gong Hui Zhi Cai Zheng Bu Shanghai Zhi Jie Shui Jv Han, Aug. 4, 1937, Archives of Shanghai Bar Association, Shanghai Archives, Q 190-1-13855, at 34. Shanghai Lv Shi Gong Hui Hui Yuan 35 Nian Du Er Jia Suo De Sui E Deng Ji Ping Bao Qing Ce, July 1947 [Grading Report of Income for Second Jia Income Tax of members of Shanghai Bar Association in 1946, July 1947], Archives of Shanghai Bar Association, Shanghai Archives, Q 190-1-13855, at 36-87 *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 14 n.73.

260. Jin Shiyin, Jin Ri Nv Lv Shi de Te Bie Ze Ren [The Particular Responsibility of Female Lawyers Nowadays], Women Gong Ming [Women Resonance], Issue 52 (July 15, 1931), at 10-4, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 14 n.75.

suffered injustice just assistance.[261]

Like other women volunteer lawyers, Jiang sacrificed in order to provide free legal services to needy women. For example, she did not receive any payment from the women who sought help from the association but instead had to spend her own money for transportation and documentation fees. But as long as she could resolve her client's troubles, she felt satisfied, comforted, and joyful.[262]

Professor Sun has also studied the archives of the law firms of Yv Xiufang and Shi Liang. Between 1946 and 1949, Yv Xiufang dealt with at least fifty-two cases. Her main business was criminal defense cases and her clients were also mainly male. Of the fifty-two cases, there were eleven civil and twenty-nine criminal cases. The eleven civil cases could be divided into two types: marriage cases and tenancy cases. Of the twenty-nine criminal cases Yv dealt with, at least five of them were caused by marriage conflicts and six clients were females.[263]

As with Yv Xiufang, the clients of Shi Liang and Lu Shaohua's law firm were mainly male. In 1947, Cao Qingyun destroyed the reception room of Shi Liang's law firm simply because Shi Liang was his wife's attorney in the marital dispute.[264]

Thus, China's earliest women lawyers, although few in number, opened their own offices, advertised their services, joined bar associations, and enjoyed various reputations for being articulate, skilled, kind, passionate for justice, and less competent than their male counterparts. Some sought to represent women clients and to write advice columns for women, but in general they represented both men and women, and sometimes mainly men. As pioneering women who lived *nei* and *wai* lives, they were courageous, and creative in integrating *li* and *fa*. We will now discuss China's first woman judge, Zhang Jinlan. In contrast to today's large numbers of women judges in economic reform-era China, Republican China did not have its first women judge until approximately twenty years after women were allowed to practice law. This could be because the prestige of judges may have been higher in the Republican Era.

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261. Ms. Yixiao, Shanghai Zhi Ye Fu Nv Fang Wen Ji: Lv Shi Jiang Huiro Nv Shi [Interviews of Shanghai Professional Women: the Lawyer Ms. Jiang Huiruo], Da Gong Bao, Shanghai edition, Sept. 29, 1936, at 6, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 15 n.76.

262. *Id.* at 7.

263. *Gender and Profession, supra* note 193, at 17.

264. Tian Huijing (the clerk of Lu Shaohua and Shi Liang's law firm) Zhi Cao Qingyun Han, December 20, 1947 [Letter from Tian Huijing (the clerk of Lu Shaohua and Shi Liang's law firm) to Cao Qingyun, Dec. 20, 1947], Shanghai Lv Shi Gong Hui Dang An [Archives of Shanghai Bar Association], Shanghai Archives, Q 190-1-14557, at 6, *as cited by* Sun Huimin in *Gender and Profession, supra* note 193, at 18 n.95.

I. China's First Woman Judge

China's first woman judge was Zhang Jinlan.[265] Like Ban Zhao centuries earlier, she was influenced by her father's and brother's work. Also like Ban Zhao, she advocated the harmonization of *yin* and *yang*, *li* and *fa*. Zhang's father was a famous lawyer, and her brother worked in a local court. She graduated first in her class at Xibei University in 1942. She decided to take part in the judicial officer examination in Xian and walked alone for over 200 li to travel there. She became a judge advocate in Xijing in Shanxi. In October 1948, she flew to Tainan from Nanjing and was appointed judge of the Tainan court. She spent most of her career in Taiwan.

In one famous case adjudged by Zhang, a female lecturer Zhu Zhenyun committed suicide because she was abandoned by her lover who had a wife on mainland China. In the first instance, the man Wang Shi'an was sentenced to three years in jail. Wang appealed. On appeal, in opposition to public sentiment about the case, Judge Zhang announced that Wang was not guilty and released him. Zhang stated that "Wang is morally obligated to undertake liability for the female lecturer's death; however, in the legal sense, Zhu is not only an adult, but also highly educated, and therefore should be able to reason rationally."[266]

In April 1956, Zhang was appointed to be a judge on the Supreme Court of Taiwan. Upon the 30th anniversary of her graduation from college, she wrote that a woman should learn the strengths of men and avoid the weaknesses of women and cooperate with men in order to make great achievement in the society.[267] Thus, in words sounding like her ancient sister Ban Zhao, Zhang's success appears to be at least in part due to a *yinyang* harmonization of gender roles.

During the Republican Era, the legal profession was formally established. As political revolutionaries, women gained access to legal education first and then in 1927 the formal right to become lawyers. Although their numbers were few, they received favorable press coverage and a few built large and lucrative practices. Some especially undertook to help indigent women clients and address women's rights. After about twenty years, China had its first woman judge. Like Ban Zhao many centuries before, she advocated a harmonization of gender roles. We turn now to law and gender in the People's Republic of China. Both a renewed disdain for *fa*, and surge in legal professionalism have led to the

265. The first woman judge after 1949 was Fei Lulu. She served as a judge of the Higher Court of Tianjin for five years. Then she spent twenty years "branded as a rightist ostracized by society." *Woman recalls a life helping others*, CHINA DAILY, Mar. 4, 1996.

266. *Id.*

267. *Id.*

phenomenon of the peaceful rise of the Chinese woman judge. Part IV is our final chapter in the history of law and gender.

IV. Law and Gender in New China

In 1949 Chairman Mao founded the People's Republic of China. New China brought women's equality to the forefront for the whole nation. However, Professor Mayfair Yang and others have called Maoist China, especially the Cultural Revolution (1966-1976), an era of "gender erasure" where women were denied a separate identity,[268] and the recent years of economic reform an era of "female commodification," where skimpily clad women regularly adorn advertising.[269] The One-Child Policy introduced in 1979 has also skewed the number of females in China. To this day, women also represent a small percentage of government officials. In 2007, they made up twenty percent of the parliament and less than eight percent of the Communist Party's elite Central Committee.[270] Although the legal profession suffered a setback after 1949, and near extinction during the Cultural Revolution, since then, lawyers have grown in number and prestige. And women have joined the ranks of judges in disproportionate numbers due to the general lack of prestige for judges and lingering Confucian gender stratification. However, as Judges Song and Li demonstrate, this entry is also due to the legacy of the *qingguan* and can be revolutionary as well.

In September 1949, when the "Common Principles" were passed at the Chinese People's Political Consultative Conference, women made up ten percent of the representatives and it was announced that the government was "discarding the feudal system of oppressing women."[271] In 1950, a new marriage law was promulgated that allowed freedom of marriage. Mao also proclaimed that "women hold up half the sky" and women entered the ranks of men who worked outside the home. In 1956, women made up twelve percent of national people's representatives.[272]

The new government also abolished the former legal system and profession. In fact, lawyers from the old regime were deemed "litigation

268. Mayfair Mei-hui Yang, *From Gender Erasure to Gender Difference: State Feminism, Consumer Sexuality, and Women's Public Sphere in China*, *in* SPACES OF THEIR OWN: WOMEN'S PUBLIC SPHERE IN TRANSNATIONAL CHINA 41 (Mayfair Meihui Yang ed., 1999).

269. *Id.* at 47.

270. Lindsay Beck, *Women a Rare Sight in China's Corridors of Power*, N. Y. TIMES, Sept. 12, 2007.

271. Wang Qingshu, *The History and Current Status of Chinese Women's Participation in Politics*, *in* HOLDING UP HALF THE SKY: CHINESE WOMEN PAST, PRESENT AND FUTURE 96-97 (Tao Jie, Zheng Bijun, & Shirley L. Mow, eds., 2004).

272. *Id.* at 97.

tricksters"[273] and "representatives of an exploiting class."[274] So this was ironically a fallback to the legal skepticism of the imperial era towards *songshi*.

During the 1950s China borrowed heavily from Soviet legal models and a new lawyer system did allow for defense attorneys. In 1957, there were around 2,500 full time lawyers and 300 adjunct lawyers, however, lawyers were public servants and no private law firms were allowed.[275] In the middle of 1957, during the Anti-Rightist Movement, lawyers were criticized as Rightists and sent to the countryside and in 1959, the Ministry of Justice was dismantled.[276] Also, during the devastating Cultural Revolution of 1966-1976, higher education and a formal legal system was halted, and lawyers and judges were sent to the countryside to work, along with other intellectuals. Although Confucius was one of the main targets of the Cultural Revolution, this also was an ironic recall of his view of law and lawyers. The first woman judge after 1949 was Fei Lulu. She served as a judge of the Higher Court of Tianjin for five years. However, then she spent twenty years "branded as a rightist ostracized by society."[277] During the Cultural Revolution she was forced to clean toilets.[278]

Since 1978, China's Open Reform Policy has led to the reestablishment of its law schools and formal legal system. This period also introduced a socialist market economy and the One Child Policy. Many have argued that both have led to new discrimination against women in China, including female infanticide, forced abortions, and job discrimination.[279] Female infanticide and forced abortions are due in part to the traditional preference for sons discussed earlier. China's economic policies have led to its meteoric rise to being the world's fourth largest economy today.

In 1979, the Ministry of Justice was re-established and it was authorized to administer the legal profession. In 1980, the Provisional Regulations of the People's Republic of China on Lawyers were promulgated. Lawyers were defined as "legal workers of the State."[280] From 1979 to 1984, there were about 11,000 lawyers in China. By 1992, there were 45,666, and by 1997, 98,902 lawyers.[281] In 1986, the Ministry

273. Yuwen, *supra* note 199, at 96-97.

274. Henry R. Zheng, *The Evolving Role of Lawyers and Legal Practice in China*, 36 AM. J. COMP. L. 474 (1988).

275. Yuwen, *supra* note 199, at 20.

276. *Id.*

277. *Supra* note 265.

278. Id.

279. *See* Anna Han, *Holding Up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791 (2001).

280. Yuwen, *supra* note 199, at 20.

281. Zhongguo falü nianjian [Law Yearbook of China], Zhongguo falü nianjian she,

of Justice began administering a national bar examination. The same year the All-China National Lawyers Association was established.[282] In 2005, there were 244,000 candidates for the examination.[283] In 2008, there are over 143,000 lawyers in China.[284]

In 1988, the first co-operative law firm appeared in Baoding city in Hebei province.[285] In 1993, the Ministry of Justice issued Proposals on Deepening Lawyers' Reform that allowed for partnership law firms.[286] In 1995, the Judiciary Law outlined educational and legal standards for judges. In 1997, the Lawyers Law came into force. Lawyers are now characterized as "legal practitioners" and no longer as "legal workers of the state."[287] In 2007, the Lawyers Law was revised to allow criminal defense attorneys more access to clients and evidence, and greater ease in forming law firms.

Lawyers and judges sometimes have a tense relationship: ill-trained judges are criticized for ignoring legal arguments made by attorneys. In one extreme case in 1995, lawyer Zhou Chengxi was handcuffed by three judges in an intermediate court and beaten for over seventy-five minutes because he "insisted on his opinion in a civil case."[288] Lawyers sometimes resort to bribes and other favors to persuade judges. Lawyers have also been kidnapped, detained, and punished for representing their clients.[289] Judges also may be punished for rendering incorrect decisions.

Lawyers also sometimes have adversarial relationships with their clients because of some clients' failure to pay lawyers' fees.[290] In his 2001 study of Beijing lawyers and their screening conversations with potential clients, Professor Ethan Michelson quotes Lawyer Zhong, who states:

> As a lawyer, you must conquer your client. Seventy percent of a lawyer's time and effort is spent on clients . . . . The contradictions between lawyers and clients are the most concentrated. If the lawyer loses control, the lawyer will suffer the most harm of all . . . . This is ten years of experience in a

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1993-1998, *as cited by* Yuwen, *supra* note 199, at 20.

282. *Id.*

283. Cui Yuqing, *China has a strong demand for lawyers*, CHINA ECONOMIC NET, Oct. 11, 2005.

284. *China has more than 143,000 lawyers*, XINHUA NEWS AGENCY, Apr. 15, 2008, *available at* http://english.sina.com/china/1/2008/0415/154870.html.

285. Yuwen, *supra* note 199, at 20.

286. *Id.*

287. *Id.*

288. Xiao Shengxi et. al., eds., Lushi xue [Lawyers' Studies], Peking, Jiaoyu chubanshe, 1996, at 88 *as cited in* Yuwen, *supra* note 199, at 20.

289. Yuwen, *supra* note 199, at 20.

290. Ethan Michelson, *The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work*, 40 LAW & SOC'Y REV. 1, 18 (2006).

nutshell.[291]

Also, lawyers sometimes screen out problematic clients by using moral stereotypes, e.g., divorcees are difficult people.[292] Although Michelson's article argues that today's lawyers obstruct justice because of this type of screening, ironically, this defensive posture by today's lawyers harks back to accusations against *songshi* that *songshi* obstructed justice because they encouraged litigation.

In 1995, the State Council announced that "equality of the sexes" was basic national policy and began the Program for Chinese Women's Development.[293] In 1998, women represented twenty-two percent of all representatives elected to the ninth National People's Congress. In 2000, women represented thirty-six percent of all cadres in public management positions.[294]

Since 1949, the history of the People's Republic of China shows first a dismantling of the legal profession that was earlier in place, and then, after the Cultural Revolution, a surge in personnel unprecedented in world legal history. This surge has accompanied phenomenal unprecedented economic growth. The history of women in the PRC shows a state policy of gender equality. This has led to large numbers of women in the legal profession and judiciary. As described below, however, this state policy has been harmonized with Confucian gender roles. Chinese women are expected to be the new *li* and *nei* of the legal profession.

A. Today's Chinese Women Lawyers and Judges

The number of Chinese women lawyers and judges has been steadily increasing. However, in newspapers and books, their roles as both legal professionals and family members are often presented as conflicting. Also, their perceived female traits are pointed out in how they handle themselves professionally. In general, Chinese women lawyers and judges are praised when they are able to harmonize their roles as wives, mothers, and professionals. Also, they are praised when they bring traditional virtues such as diligence, compassion and patience to their work. Thus, contemporary accounts recall ancient authors like Ban Zhao, and the newspaper reports of the 1930s. Women are portrayed in a positive light when they balance *li* and *fa*, *nei* and *wai* and see their roles as complementary to that of men. Interestingly, some of today's women lawyers and judges see their work as gender-neutral and usually do not

291. *Id.*
292. *Id.* at 21.
293. Wang, *supra* note 271, at 98.
294. *Id.* at 99.

portray themselves as using feminine traits in their work. After reviewing recent statistics about women lawyers and judges, and their perceived characteristics, we will hear the accounts of six women judges, including Judges Song and Li, with whom we began our article.

In 1994, the Chinese Women Judges Association was formed as part of the All-China Women's Federation.[295] In 1996, while there were around 98,000 lawyers in China, there were 156,000 judges. Of that number, fifteen percent were women judges.[296] Four years later, there were 21,000 female judges or nineteen percent of all judges.[297] However, in certain courts the percentage of women judges was much higher. In 1998, it was reported that forty-three percent of all judges in Beijing's Xicheng district were women.[298] In 2004, thirty-nine percent of all judges in Shanghai were women.[299] Interestingly, that same year, only twenty-five of all federal judges in the United States were women.[300] The higher percentage of judges in at least two of China's cities may be due to the number of female law graduates there who choose judgeships. Many judges outside of China's cities have not received formal legal education.

Book accounts herald feminine advantages for lawyers and judges. In a 2002 book on Shanghai's famous women lawyers, it was noted that twenty-two percent of lawyers were women.[301] Moreover, the text went on to point out the "natural advantages" of female lawyers:

> They are rather practical when analyzing the issues. And they also cherish their current positions with a great ambition and passion. They are kind and considerate. They are apt to sympathize with the weak and try their best to resolve difficulties for them. Besides, they are very careful and fastidious.[302]

In a book published in 2004 about women judges, they were noted to have peculiar prudence and exquisite character and to also be very passionate and patient.[303] On March 9, 2005, it was reported that thirty-

295. *Judiciary Promotes Women's Role*, CHINA DAILY, Oct. 9, 1996.

296. *Id.*

297. Wang, *supra* note 271, at 99. Another statistic was cited in 1996. According to the China Daily, there were 23,000 women judges, or around 15 percent of all 156,000 judges. *Judiciary promotes women's role*, *supra* note 295.

298. *Women Judges Respectable*, CHINA DAILY, Sept. 16, 1998.

299. FA TING LI DE GU SHI—SHANGHAI NV FA GUAN SI FA WEI MIN SHI LU [STORIES FROM THE COURT—THE RECORD OF SHANGHAI FEMALE JUDGES IN JUDGING CASES]1(Zheng Zhaofang, et al. eds., Shanghai ren min chu ban she 2004). [hereinafter STORIES FROM THE COURT].

300. Ginsburg, *supra* note 235, at 806.

301. JIN GUO BIAN CAI—27 WEI SHANGHAI ZHI MING NV LV SHI SHOU JI [TALENTED WOMEN ADVOCATES—27 FAMOUS FEMALE LAWYERS IN SHANGHAI] 1(Miao Linfeng et al. eds., Shanghai ren min chu ban she 2002).

302. *Id.*

303. STORIES FROM THE COURT, *supra* note 299.

four women judges were recognized as "national outstanding judges" by the Supreme Court of China. Echoing ancient *nei/wai* principles, Gu Xiulian, the chair of the National Women's League and associate chief of the Standing Committee of the National People's Congress, praised the female judges and staff for coping with the double pressure of work and family, study and life and noted their perceived feminine traits: "In the court, they are just judges and in the family, they are good daughters, gentle wives and kind mothers. Female judges play an important role in the court. They are capable and experienced and rational, and meanwhile they are considerate, sentimental and gentle."[304] This harks back to the ancient uses of *qingli* and *renqing* by magistrates and the writings of Ban Zhao.

We now turn to other newspaper and book accounts of five women judges, two from 1998 and three from 2004-2005, that track Chair Gu's statements. The first two, Judge Zhao and Judge Xu, are part of Beijing's Xicheng District Court. Judge Zhao's account illustrates the perceived conflict between judging and being a wife and mother. And interestingly, she speaks of overcoming feminine traits in the courtroom. Judge Xu's account illustrates the low prestige of the judgeship.[305]

In 1998, Judge Zhao Qingli had been a judge for twelve years. Her husband was a businessman who frequently traveled to India and her son was four years old. A China Daily account states:

> In court, she wears a tight-fitting uniform and sits with the national emblem on the wall behind her. "Does the plaintiff have additional remarks?" the judge asked in a low, dignified voice, making her authority clear to the courtroom. But after the session, Zhao Qingli is relaxed and soft. Dressed in pink, with a short hair-cut, she speaks in a gentle voice. Away from the court, Zhao admits she is a very different person. "It will be hard for me to control the situation if I talk only in a gentle voice," said Zhao. "But if I take my court persona home, my son won't live with me," she said with a smile.[306]

Later in the article, Judge Zhao states that in the court there is no real gender difference:

> It is a question of being what I need to be when I'm in the court. When I'm doing my job, I'm very determined and decisive because that's how I have to be . . . we have to be strong-minded and aggressive. But of course, we must hold onto justice first of all.[307]

Judge Zhao also states in the article that because of his travels her husband

304. *Id.*
305. *Women Judges Respectable, supra* note 298.
306. *Id.*
307. *Id.*

is unavailable to do housework; in the previous three months she has slept only three hours a day and she reviews court files deep into the night, while her four year old son is asleep.[308]

Another judge in Judge Zhao's court, Judge Xu talked about vacillating over her career choice. Although she enjoyed her work, she almost decided to change her job. What convinced her to remain were the words of a schoolmate at her twentieth class reunion. He had moved to the United States and become very wealthy through the securities business. Although everyone else thought he was the most successful graduate in the class, he pulled Judge Zhao aside, took a picture with her and told her how honored he was to know a woman judge in China.[309]

We now turn to 2004-2005 accounts of three other judges. They illustrate how women judges are praised for traditional virtues and how at least one of them harmonizes her role with male judges. They are Judges Song and Guo in Beijing and Judge Yang in Shanghai.

As mentioned at the beginning of this article, Song Yushui is a renowned judge in Beijing. She was chosen as one of the top ten legal professionals in China in 2004 and has been called a female Baogong.[310] She has served as director of the intellectual property division of the Haidian court in Beijing. Her colleague Ma Xiurong regards Song as a judge who combines traditional virtues with modern savvy. According to Ma, these traditional virtues are diligence, and respecting and understanding others. Judge Song's savvy is combining modern jurisprudence with the circumstances of China.

Song herself mentions that "we also want to help the parties to accomplish their interests as far as possible." When questioned about the differences between women and men judges, Song downplays them and answers that men and women judges must work together harmoniously:

> Men and women constitute a harmonious society, both female judges and male judges are undertaking the holy mission of judging. Female judges often work beside male judges who have strong abilities in leadership and work with boldness. As far as judges as a profession is concerned, there are not too many differences between men and women . . . . Harmony and balance is the object sought by judges. Therefore as a female judge, one should not attack men because of gender; rather one should respect oneself, be independent, and respect male judges so that men will respect women accordingly and peace may be

308. *Id.*

309. *Id.*

310. Zhang Jin & Liu Yan, *You Zhongguo Nv Bao Gong Zhi Cheng de Song Yushui* [*A Chinese Female Baogong—Song Yushui*], YANTAI EVENING NEWS, Apr. 19, 2005, *available at* http://www.shm.com.cn/newscenter/2005-04/19/content_751374.htm.

accomplished.[311]

Song also references the spiritual nature of judging, when she states that "promoting and upholding justice is a judge's sacred responsibility" and "sternness and solemnity are a judge's external image. But a judge's heart should be full of kindness and sympathy as well as a passion for justice."[312] According to the China Daily, she also said that a "judge should try to promote a close relationship between her or himself and the parties involved in any case, so that they can communicate more readily with the judge and accept the judges' decisions or ruling."[313]

Guo Qiuxiang, our fourth judge, is a judge in the criminal division of Shijingshan court in Beijing and has also been recognized as a model judge. She is considered firm but gentle. In one case involving complex accounting she uncovered 100,000 yuan more in wrongdoing. Due to her diligence, most economical criminal cases are given to her for hearing.[314]

She has also been praised for judging juvenile criminal cases with the traditional virtues of patience and compassion. Once she judged a case involving a teenager whose father was dead and whose mother had married another person. After the hearing, she gave the boy her contact number and welcomed him to turn to her if there was any difficulty. The boy was penniless after being released and was almost in despair. He then turned to Judge Guo. She encouraged him to live a positive life and the boy was then willing to go back to his hometown to live a new life. Judge Guo gave him some money and bought him a ticket home.[315]

Our fifth judge, Gong Yanmin [龚燕敏], the chief justice in the first Civil Division of the Nanhui Area Court, Shanghai[316] has also been commended for her balance of law and compassion. She handled a case that involved a dispute between a father who wanted custody of his daughter and a grandfather who had cared for the daughter after the mother had died.[317] The father had never cared for his daughter before and the ten year old girl, Ye Fan, wanted to continue to live with her grandparents.[318]

Judge Gong patiently persuaded the two parties to calm down and helped them to think from the perspective of benefiting the child. In addition, the judge even visited Ye Fan's school to interview her. Judge Gong then decided that according to civil and marriage law, the father's duty as a parent had not been terminated. However, a transitional period of

311. *Judges Tempers Justice with Understanding, supra* note 1.
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. STORIES FROM THE COURT, *supra* note 299, at 1.
317. *Id.*
318. *Id.*

six months would be allowed for Ye Fan to continue to live with her grandparents.[319] Neither party appealed and the case received favorable press.[320] Wang An, associate head of Nanhui Area Court commended Judge Gong's decision for its exquisite and considerate nature. He wrote, "It is a creative application of the law and shows love for a minor."[321] He added, "Gong found the best combination of law and emotion and achieved a great social effect. She is really a professional judge."[322]

Our last profile in this section is our most controversial but illustrative example of the powerful legacy of the *qingguan*. As mentioned at the beginning of this article, in 2003 Judge Li Huìjuān (李 慧 娟) ruled that a provincial seed law was invalid because it conflicted with a national law. This was the first time in China's history that a judge had so ruled. A masters graduate of the prestigious University of Politics and Law in Beijing, Judge Li served at the Luoyang Municipal Intermediate Court in Henan Province.[323] In a dispute between two local companies, she was the presiding judge on a panel that had to decide which damage calculation to use, that of the national Seed Law, or of a seed pricing regulation promulgated by the Henan Provincial People's Congress.[324] The case was apparently politically charged and twice Judge Li was approached by the parties while the case was pending. She avoided contact with them.[325]

Based on their understanding of Article 64 of the Legislation Law, Judge Li's panel not only applied the national law, but also stated the conflicting provincial law was "naturally" invalid [自然无效].[326] When the Henan Provincial People's Congress heard of the decision, Judge Li and Judge Zhao Guangyun, who had approved the opinion, were dismissed from their jobs.[327] Distraught, Judge Li contacted her husband who worked in Beijing as a software developer.[328] Her husband urged her to seek help

319. *Id.* at 2-3.

320. *Id.* at 3.

321. *Id.* at 3-4.

322. *Id.* at 4.

323. Yardley, *supra* note 3.

324. *Luoyang City "Seed Case Highlights Chinese Courts" Lack of Authority to Declare Laws Invalid*, 2 CHINA LAW & GOVERNANCE REVIEW 21 (June 2004), *available at* http://www.chinareview.info/issue2/pages/case.htm [hereinafter *Luoyang City*].

325. Yardley, *supra* note 3.

326. *Luoyang City supra* note 324. Article 64 states in part, "Where a national law or administrative regulation enacted by the state has come into force, any provision in the local decree which contravenes it shall be invalid, and the enacting body shall amend or repeal such provision on a timely basis." The Legislation Law of the People's Republic of China.

327. Zhao Lei, *Li Huijuan: Tiaozhan Difang Fa* [*Li Huijuan: Challenges Local Legislation*], July 25, 2004, *available at* http://www.dffy.com/fayanguancha/fangyuan/200407/20040725162155.htm.

328. Yardley, *supra* note 3.

in Beijing.[329] She wrote a "long passionate letter" to the China Women Judges' Association in which she "promised to 'undergo criticism and education' if she had erred. But if I'm right, I will protect my integrity and defend the integrity of the law, even if it means being like a moth that flies into a flame."[330] She also wrote, "An order by those in power has forced local leaders, none of whom dared to stand on principle, to sacrifice me. I'm just an ordinary person, a female judge who tried to protect the law. Who is going to protect my rights?"[331]

The Association "told [Judge Li] that she had been treated too harshly and agreed to contact someone at the People's Supreme Court."[332] This ultimately led to media attention and support from legal scholars and attorneys for Judge Li. They petitioned the National People's Congress and organized a conference at Tsinghua University's law school on judicial reform.[333] China's legal framework allows for the Standing Committee of the National People's Congress to invalidate a law. Up until the controversy over the seed case, however, there was no mechanism in place for the Committee to review laws. Since then the National People's Congress has set up a review panel and Judge Li's job was reinstated. With increasing legislation, many conflicts exist between laws, however, judges usually enforce the national law without declaring the local law invalid. Judge Li and her panel took the bold step of stating the provincial law was invalid.

According to Judge Li, the provincial law was invalid because of the Legislation Law; her ruling merely stated its invalidity and did not cause it.[334] Xiao Taifu, a member of the Beijing Lawyers' Association, has described Judge Li's approach as trailblazing [chuàng xīn 创 新] and not in conflict with the Constitution.[335] As mentioned earlier, Judge Li's role models were her official father who refused bribes and the ancient judges she watched on television, the *qingguan*.

Thus China's legal profession, though halted during the Cultural Revolution, has grown exponentially since then. Women have not only joined its ranks but have especially swelled the ranks of the judiciary in urban spots. In newspaper and book accounts, these women practitioners and judges are noted for balancing *li* and *fa*, *qingli* and *renqing*, law and emotion, work and family and displaying female virtues. Echoing their ancient sister Ban Zhao, they themselves sometimes advocate a

329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. Lei, *supra* note 327.
335. *Id.*

complementary and harmonious existence with their male counterparts. However, unlike Ban Zhao they sometimes consider their work gender-neutral. Judges Song Yushui and Li Huijuan, mentioned at the beginning of this article, also identify with China's *qingguan* and Judge Song has been called a female Baogong. Judge Li has made history as the first judge to rule a provincial law invalid. Her role models for pursuing justice included the ancient *qingguan*. And her appeal to the China Women Judges' Association as a "female judge" led to her vindication after she was dismissed from her job.

I will now discuss observations about gender and law from surveys and interviews conducted among one legal community in Fujian Province in 2005. They also imply a Confucian gender distinction of *nei* and *wai* and explain why so many women have become judges. However, they fail to state the historical significance of women in the legal profession and judiciary and their potential to impact China's rule of law.

B. 2005 Surveys and Interviews

In the spring of 2005 I conducted surveys and interviews of Chinese law students, professors, lawyers and judges when I was a visiting professor in Fujian Province. I discovered attitudes about law and gender that reflect ancient Chinese norms but which have been creatively adapted to contemporary legal professional circumstances.

Altogether I interviewed around thirty persons and received sixty written surveys. I inquired about reasons for attending law school, aspirations for after law school, reasons for professional choices, and gender perceptions in and out of law school. The results revealed that as in the U.S., media images are a powerful influence on prospective law students. Also, during law school, female students are perceived as more diligent and receive higher grades while male students are perceived as more creative. Male professors are perceived as better classroom instructors and researchers because women professors have home and family responsibilities. Females are discouraged from entering law firms because they are considered more suitable for men. Civil service positions and judgeships are considered more suitable for women because they provide a stable and secure environment for women. Thus women have become the new *li* in an updated *li/fa* construct. I conclude that a revolutionary space has opened up for women judges in our present era.

C. Reasons for Entering Law School

Very few students had lawyers in their family, because their parents were in the generation that could not attend college because of the Cultural

Revolution. Despite this, their parents encouraged them to attend law school because the legal profession is considered prestigious in China today. This is a far cry from the days of the late Qing dynasty, the early days of the Republic, and the time of the Cultural Revolution. Several female students mentioned that while they were growing up they watched television shows produced in Hong Kong about lawyers. One remarked that when she was around 10 years old in 1992 she watched a Hong Kong TV show with a female lawyer named Xuan Xuan. Xuan Xuan's father was a judge, and her sister was a lawyer also. Xuan Xuan was attractive, well-dressed, and a successful and honorable lawyer. She was smart, articulate, and aggressive in court. However, in her personal life she was gentle. She was not married, but had a good-looking boyfriend. Thus, while Judges Song and Li looked to stories about Judge Bao to inspire them, today's generation of female students look to Hong Kong TV shows, which, of course, have been influenced by the British legal system. None of the students mentioned Judge Bao.

Other students admitted that law was not their first choice, but that they had been selected for the law program because of their test scores. Some students mentioned that money was a draw for them. The average annual business income of a lawyer reached 65,000 yuan in 2002 and 0.4 million yuan for a lawyer in Beijing in 2003.[336] Many Chinese earn less than 24,000 yuan a year.

D. Gender Perceptions in Law School

Students and faculty of both genders agreed that female students were more diligent and received higher grades. They are better able to memorize materials. Also, there is a perception that females have better English skills and therefore now dominate the moot court teams that participate in prestigious international competitions that use English, e.g., the Jessup Competition and the Willem C. Vis International Commercial Arbitration Moot in Vienna. However, students and faculty members of both genders commented that male students were more logical, creative, independent, big picture-oriented, and were preferred as research assistants. Students mentioned that female faculty were less humorous in the classroom and stuck pretty close to their texts. They were gentle and more caring about students. Students sometimes preferred male faculty because they were humorous, more lively lecturers, and more systematic. Among students and male faculty there was a perception that women faculty were not as accomplished scholars because they had the demands of taking care of

336. Cui Yuqing, *China has a strong demand for lawyers*, CHINA ECONOMIC NET, Oct. 11, 2005.

children, parents and in-laws. Also, students remarked that if a woman professor was unmarried, she was pitied. Thus, women expect to marry and raise children. A single life was considered odd.

E. View of Law Professors

One professor who had graduated in the 1980s remarked that at that time lawyers had a low social status because they were perceived to be helping "bad people." She considers some female students as "too passive" and she encourages them to not just rely on the achievements of their boyfriends and husbands. She mentioned that most well-known excellent lawyers are male; women lawyers have child-care responsibilities. Also, if a woman is a successful lawyer but has a poor family life, this is considered disgraceful. She also mentioned that some women who were successful lawyers had been divorced by their husbands, therefore some women prefer to be unsuccessful lawyers.

One male professor noted that women professors get along with students better and may be more concerned with the over-all well-being of their students. Another male professor noted that female students are more diligent and speak up more in class. Two male professors noted that male students are more logical.

One male professor noted that eight to nine years ago, there were more male students than female students; since then there are now more female students than male students. In the entering class of 2004 undergraduate law students, two-thirds were female. However, it is much easier for male students to get jobs. Law firms require *ying chou* (entertaining clients), *chu chai* (business travel), and long hours.

When asked what percentage of housework he did, one married male law professor answered twenty percent. Thus, among professors there is also a clear gender-role consciousness. Female professors are expected to subordinate their professional work to caring for their families and a successful female should be wary of alienating a spouse.

F. Gender Perceptions about Law Firms

According to popular perceptions among students, law firm practice requires entertaining clients (应 酬 *yīng chóu*) and taking business trips (出 差 *chū chaī*). *Ying chou* can take a variety of forms, for example, drinking with clients and judges and sometimes providing evening entertainment including female companions. *Ying chou* literally means obligatory rewards and the character for *chou* is composed of the characters for wine vessel 酉 and land 州. (According to one source outside of this survey, law firm negotiations in Beijing are often carried on with heavy drinking.)

Female students were discouraged from entering law firms for these reasons. Such a lifestyle was not conducive to raising a child, housekeeping, and one's responsibilities to one's parents.

One female law student remarked that it was dangerous for a woman to become a lawyer because clients might take revenge on a lawyer. Also another remarked that if a woman is a civil servant, it's easier to find a husband because a civil position is a stable job. Another female student remarked that "all lawyers said their work is too difficult for females and not good for family life."

According to one female attorney, law firms require young lawyers to find their own clients and their salaries are based on these cases. She said that women have a harder time getting clients. She also agreed that lawyers have to *ying chou*. She said that women attorneys were more detail-oriented, diligent, and patient. What she liked about her position was the flexibility of it, since she could decide how much time to invest into her work. Before she had a child she would often eat with colleagues and not leave work until 9pm. After she had her child, she decided to limit her hours to 8:30am-5pm. She said that some clients do not want a woman attorney; however, women clients involved in a divorce sometimes want a female attorney.

Mayfair Yang's book on the art of *guanxi* indicates that there may be a gender divide on the ability to attract clients.[337] Based on interviews she conducted in the 1980s she found that there was a perception that women should not be seen too often in public; this would damage their social reputations. Women, however, could be active in guanxi networks with other women and over "small things."[338]

One married female lawyer revealed that she did most of the housework. Two male lawyers revealed that they did thirty percent of housework and their wives did seventy percent. One male lawyer wrote that a maid did the housework and a nanny did the child-rearing. One female lawyer wrote that she did fifty percent of the housework; she also wrote that some clients doubt her ability.

G. Judges

By passing the national bar examination, law graduates may become judges right after school. Judges receive a fixed salary and have stable hours, though with increased case loads, these are getting longer and longer. One married female judge revealed that she did eighty percent of the housework and seventy percent of the child-rearing. Another married

337. YANG, *supra* note 23 at 78-85.
338. *Id.*

judge revealed she did eighty percent of the housework and child-rearing. Another married judge revealed that she did seventy percent of the housework and eighty percent of the child-rearing. Another revealed that she did sixty percent of the housework and child-rearing. One revealed that she took care of her daughter, while her husband did the housework. Another married judge revealed that she did eighty percent of the housework. Finally, one judge wrote that female judges obey ethics rules better and refuse dinner invitations from parties.

I interviewed one legal journalist. She said that in one year she had observed around 200 trials. Around fifty percent of the judges were women, however, only three or four lawyers managing these cases were women; ten assistant lawyers were women. She thought that being a judge was well-suited to the female personality, however the salary was considered low, only two to three thousand yuan a month. She said that the female judges were more serious and wise (明 睿 *míngruì*); the male judges were more imposing (威 懾 力 *wēishèlì*).

Thus, according to surveys and interviews conducted in one legal community, today's lawyers, law students, and judges are keenly aware of gender roles and have adapted complementary Confucian categories of *nei* and *wai* accordingly. Although male students and professors are perceived to be more creative and outgoing, female students and professors are considered to be more diligent and family-oriented. Female students are quickly becoming the majority of law students. They are encouraged to become judges because this is more conducive to their family roles as *nei.* Men are encouraged to become lawyers because this is considered *wai* and involves business trips and entertaining clients. The practice of *ying chou* appears to be an updated version of ancient rituals. Women judges, although facing increasingly longer hours, still do most of the housework.

V. Conclusion

China's new legal profession, like the rest of China, is in the process of a historic sea-change. Although the legal profession represents a new institution in China's long history, ancient attitudes towards gender and law influence its contours today. The ancient Chinese believed that Heaven and earth and *yinyang* should be in harmony. Women are *yin* and men are *yang*. *Yang* was considered superior to *yin* so men were considered superior to women and their role was to be *wai*, outside the home, while women were supposed to be *nei*, or inside the home. As the Emperor mediated between Heaven and earth, sons mediated between ancestral spirits and earthly descendants. Husbands navigated the divide between the family home and the outside world.

The ancient Chinese also believed that law is *yin* and *li,* or morality, is

yang; therefore, morality is superior to law. Because of the *nei/wai* distinction, only men could become officials who acted as magistrates (there was no separate position for judges), or *shiye*, their advisors, or *songshi*, the often despised advisors to litigants. However, women nevertheless promoted *li* and justice in their families, and indirectly in society through influencing their husbands, sons and brothers. China's more celebrated judges were called *qingguan*. They were legendary, spiritual, wise and just judges. Although women could not be *qingguan*, inspiring stories of virtuous, righteous and wise women were catalogued in the ancient *Lienüzhuan* as they promoted virtue from the inner chambers. One story was even about a daughter who argued her father's case before the Emperor. Thus gender roles were critical to preserving the *li/fa* construct for centuries.

The nineteenth century was a turning point for law and gender. As education became more readily available to women in the West, Christian women missionaries introduced widespread formal education for women in China. Women missionaries modeled co-mediation with men of Heaven and earth, and a blending of *nei* and *wai*. China's defeat in the Opium War brought foreign concessions, extraterritoriality and lawyers to China. The late Qing dynasty hurriedly instituted legal and educational reforms. The Republic of China continued these reforms and China's legal profession was born. However, these early lawyers had to contend with perceptions of a second-class status, much like the *songshi* of old. Surprisingly, despite centuries of subordination, Chinese women were active in achieving not only revolutionary reform in early 20th century China, but in joining the ranks of China's new legal profession during the Republican Era. Although they were later discontinued, several law schools for women were founded at the dawn of Republican China. During the 1930s and 1940s Chinese women practiced law and regularly made headlines. In one generation they went from having bound feet to being political revolutionaries and legal innovators. Their quick ascent was due in part to the tradition of feminine scholarly cultivation exemplified by Ban Zhao, the ancient woman Confucian scholar.[339] However, there were hardly any women judges during the Republican Era.

After the founding of the People's Republic of China, the status of law and lawyers wavered. During the Cultural Revolution, along with the rest

339. Professor Shu-chin Grace Kuo notes that the Confucian respect for intellectuals and emphasis on education has benefited Taiwanese women legal professionals. In her study of women legal professionals in Taiwan she found gender stratification among lawyers, judges, and prosecutors. Shu-chin Grace Kuo, *Symposium: The Feminism and Legal Theory Project: Celebrating Twenty Years of Feminist Pedagogy, Praxis and Prisms: Rethinking the Masculine Character of the Legal Profession: A Case Study of Female Legal Professionals and their Gendered Life in Taiwan*, 13 AM. U.J. GENDER SOC. POL'Y & L. 25, 46 (2005).

of society, the legal profession suffered a huge setback. However, the crisis of the Cultural Revolution led to a decision not only to open up China to economic reform, but also to legal reforms. This has led to China's phenomenal economic growth and growing, prestigious legal profession.

While the stigma of being a lawyer is fading in China (it still exists for criminal defense attorneys), today's men and women wrestle with, as in the rest of the world, how traditional gender roles shape professional choices and conduct.[340] Many women have become judges because this is *nei*, or more suitable for women than the practice of law. It is also lower-paying and less prestigious. Whether by human accident or divine design, however, a window of opportunity has opened up for China's women judges. This is the first time in China's history that there are so many women judges. As China's political and legal system changes, these judicial positions may yield a powerful sphere of influence. Judge Li Huijian's landmark decision on judicial independence, mentioned at the beginning of this article and in Part IV, illustrates this. Thus, China's women judges, along with their male counterparts, are making their mark in the most populous country in the world. Like Judges Song and Li they can be inspired by China's incorruptible, courageous and compassionate *qingguan*, the ancient wise women of the *Lièniüzhuàn* and the virtuous *shiye, songshi*, and pioneer lawyers and judges that followed. At their best, these legal ancestors harmonized Heaven and Earth, virtue and talent. This Chinese legal tradition can be both timeless and progressive.

340. Although the legal profession in the U.S. is much older, women did not join in large numbers until the 1970s after the women's liberation movement. Today women constitute around forty-seven percent of all law students, thirty percent of lawyers, and twenty-three percent of federal judges. A Current Glance at Women in the Law, 2006, American Bar Association Commission on Women in the Profession. Like other professional and executive positions, the glass ceiling is a reality in many law firms. Although many women join law firms in the U.S., few stay. In 2005 about seventeen percent of partners in major law firms are women, compared with thirteen percent in 1995. According to a March 19, 2006 article in the New York Times entitled "Why Do So Few Women Reach the Top of Big Law Firms?" reasons as to why women join law firms but do not remain include "errant mentoring, opaque networking opportunities, low-grade case assignments or arbitrary male control of key management committees," and the difficulty of self and social expectations about household roles and child-rearing. Women still do the majority of housework even though they are employed outside their homes. One woman partner has said of her firm, "We are very accommodating with leaves and flexible schedules, and even with that we still lose women. I think the pressures on women from spouses, family, peers, schools and others is huge." Also, in the U.S., judges usually come from the ranks of seasoned litigators; therefore many women end up working in in-house counsel positions rather than as judges.

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GOOD VIBRATIONS: LIBERATING SEXUALITY FROM THE COMMERCIAL REGULATION OF SEXUAL DEVICES

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Introduction

"Some governments fear sex toys' inherent promise of liberation, and

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outlaw them . . . . We dream of a sexually liberated citizenry."[1]

I was being trained to sell sex toys[2] in Texas. The year was 2006, and I had just gotten a job working in Austin's only woman-owned sex toy store. The problem with being trained to sell sex toys in Austin in 2006 was that it was illegal to sell sexual devices in Texas. My trainer was very clear about what language I had to use when selling sexual devices. The police had raided the store more than once and arrested the owner and sales clerks. The employee training me first took me over to the vibrators and sternly told me to never refer to them as vibrators in front of customers. "Well, what should I call them?" I asked. "You have to say they are point specific body massagers," she responded. Next we came to dildos. "Now if a customer asks for a dildo, you have to say that we do not sell dildos. Dildos are illegal to sell in Texas. However, we do carry educational models for the purpose of condom demonstrations." Finally, we came to butt plugs. "Well, what should I call these?" I asked. "Those are butt plugs," she responded. "What?" I responded. "We can't say vibrator or dildo, but we can say butt plug?" "Yes," she responded, "an anus isn't defined as a sexual orifice under Texas law,[3] and don't you know sodomy is legal now here in Texas.[4] You can put whatever you want up your butt."

The commercial regulation of sexual devices pathologizes people who use them as either sexual deviants violating obscenity statutes or as sexually impaired people who need a device in order to cure or alleviate a sexual abnormality. While the majority of customers at Austin's woman-owned sex toy store likely knew what they were purchasing and did not have any plans to use their new dildo to model condoms, the fact that such customers had to lie in order to purchase what they wanted or go through the ordeal of getting a note from their doctor impedes their constitutional right of sexual intimacy and bodily autonomy. The Fourteenth Amendment establishes a substantive due process right to private sexual intimacy that

1. RACHEL VENNING & CLAIRE CAVANNAH, SEX TOYS 101: A PLAYFULLY UNINHIBITED GUIDE 11 (2003). Venning and Cavannah are also the founders and owners of "Babeland" a woman-owned chain of sex toy stores. *See* http://www.babeland.com.

2. "The expression 'sex toy' usually refers to objects and devices used for sexual enhancement, especially commercially manufactured and sold." *See* MARTHA CORNOG, THE BIG BOOK OF MASTURBATION: FROM ANGST TO ZEAL 141 (2003).

3. In *Sewell v. Georgia*, 435 U.S. 982 (1978), the Supreme Court for the first time was addressed with the issue of the commercial regulation of sexual devices. The Court dismissed the appeal for want of a federal question. In his dissent, Justice Brennan asserted that a Georgia statute regulating devices that are "designed or marketed as useful primarily for the stimulation of human genital organs" should not apply to an "anal stimulator" because "[s]o far as I know, no dictionary includes the human anus among the genital organs." *Id.* at 986 n.3 (Brennan, J., dissenting).

4. Lawrence v. Texas, 539 U.S. 558 (2003) (Texas sodomy law unconstitutional under the Fourteenth Amendment Due Process Clause).

has been articulated in judicial cases addressing issues of contraception, abortion, and sodomy. Asserting a substantive due process right against the commercial regulation of sexual devices carries an inherent promise of liberation in that it asserts a right to individual sexual intimacy for the sake of sexual pleasure in itself.

The issue of the commercial regulation of sexual devices has recently led to a solid split between the Fifth and Eleventh Circuit Courts. Given that a circuit court split may constitute grounds for a writ of certiorari,[5] if the Supreme Court finds that the issue is in fact a compelling government interest, it stands to follow that the commercial distribution of sexual devices could potentially become the case in which the Supreme Court clarifies whether the Fourteenth Amendment confers a fundamental right to private, non-commercial sexual activity and whether the holding of *Lawrence v. Texas* is controlling in substantive due process cases.

In February 2008, the Fifth Circuit held that Texas's obscenity statutes that regulated the commercial distribution of sexual devices are unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[6] *Reliable Consultants, Inc. v. Earle*[7] marks a watershed in litigation challenging obscenity statutes regulating sexual devices in that the court legitimized the right of people to use sexual devices to engage in private intimate conduct of their choosing rather than asserting that the only legitimate use of sexual devices was a bona fide medical malady.[8] The Fifth Circuit applied the Supreme Court's holding in *Lawrence v. Texas*[9] as controlling in substantive due process cases and followed a precedent of substantive due process cases that acknowledge a constitutional right to sexual intimacy and bodily autonomy.[10]

The Fifth Circuit's holding in *Reliable Consultants* conflicts with the

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5. SUP. CT. R. 10.

6. TEX. PENAL CODE ANN. § 43.21(a)(7) (Vernon 1979) ("'Obscene device' means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs"), *invalidated by* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008); TEX. PENAL CODE ANN. § 43.23 (Vernon 2003) ("(a) A person commits an offense if, knowing its content and character, he promotes or possesses with intent to promote any obscene material or obscene device. . . . [If done] in the course of . . . business [it] is presumed [that the person has] knowledge of its content and character. (f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same. (g) It is an affirmative defense . . . that the person who possesses or promotes material or a device . . . does so for a bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose."), *invalidated by Reliable Consultants*, 517 F.3d 738.

7. *Reliable Consultants*, 517 F.3d 738.

8. *Id.* at 747.

9. *Lawrence*, 539 U.S. 558.

10. *Reliable Consultants*, 517 F.3d at 744.

opinion of the Eleventh Circuit in the 2007 case of *Williams v. Morgan* in which the Eleventh Circuit upheld a "materially identical"[11] Alabama obscenity statute regulating the commercial sale of sexual devices as constitutional.[12]

In 2007, prior to the Fifth Circuit's ruling in *Reliable Consultants* and the resulting circuit split, the Supreme Court denied certiorari to review the Eleventh Circuit's ruling in *Williams v. Morgan*.[13] Given the present circuit split, legal commentators speculate as to whether the Supreme Court will address the issue and clarify the precedential scope of *Lawrence* by analyzing whether there is a substantial due process right to sell and distribute sex toys.[14] However, given the State of Texas's decision in October 2008 not to seek writ of certiorari in the case of *Reliable Consultants*,[15] it now seems unlikely that the issue will be addressed by the Supreme Court anytime soon. Yet there still exists a solid circuit split on the issue with regulations restricting the sale of sexual devices in Kansas,[16] Colorado,[17] and Alabama,[18] so the issue is not likely to go away. This Article will examine the varying outcomes in the cases of *Reliable Consultants* and *Williams v. Morgan* as the result of long-contested ideologies of women's sexuality and of a constitutional right to intimate sexual privacy and bodily autonomy.

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11. ALA. CODE §13A-12-200.2(a)(1) (1998) (Provides that it is unlawful for "any person or wholesaler, to knowingly distribute or produce any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal.").

12. Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 77 (2007).

13. *Id.*

14. *See, e.g.*, Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/posts/1217653450.shtml (Aug. 2, 2008, 01:04 EST) (predicting that the Supreme Court will hear the case and reverse the Fifth Circuit's ruling by 6-3). *But see, e.g.*, Nan Hunter, *Sex Toys for the Supremes*, Hunter of Justice (Aug. 3, 2008), http://hunterforjustice.typepad.com/hunter_of_justice/2008/08/sex-toy.html (last visited Dec. 8, 2008) (writing that the Supreme Court will not grant certiori to hear the case because the issue is "just too indignified").

15. Mark Kerns, *Sex Toy Sales Now Completely Legal in Fifth Circuit: Texas Decides Not to Seek Cert in Reliable Consultants Case*, Nov. 2, 2008, AVN MEDIA NETWORK, http://www.avn.com/law/articles/33144.html (last visited Dec. 8, 2008).

16. KAN. STAT. ANN. § 21-4301(c)(3) (2006) ("'Obscene device' means a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs, except such devices disseminated or promoted for the purpose of medical or psychological therapy.").

17. COLO. REV. STAT. § 18-7-101(3) (2008) ("'Obscene device' means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.").

18. Ala. Code §13A-12-200.2 (1998).

While both men and women purchase and use sexual devices, this Article will primarily focus upon how statutes restricting the commercial sale of sexual devices impact women's sexuality. The primary statutes[19] at issue in this Article do not outlaw the sale of lubricants, condoms, and medications such as Viagra; however, the sale of "sexual aids" used primarily by women, including vibrators and dildos,[20] are restricted.[21] As noted by sex educator and writer Tristan Taormino:

> The majority of people who use dildos, vibrators, and other insertable sex toys are women, [and] making them contraband is another institutionalized form of controlling female sexuality. There's also an insidious double standard at play: A much higher percentage of men than women can masturbate to orgasm with their own hands.[22]

This Article posits that the regulatory prohibition on the sale of sexual devices is emblematic of a larger historical and systemic effort to define and control sexuality outside of heterosexual marital coitus. While the commercial regulation of sexual devices could also arguably be framed in terms of a Fourteenth Amendment equal protection violation, this Article posits that the commercial regulation of sexual devices violates the substantive due process right to sexual intimacy that acknowledges individual bodily autonomy as well as relational sexual intimacy of both men and women.

Part One of this Article will begin by examining the nineteenth century advent of the vibrator as a medical tool and its relationship to the codification of sexual identities and the systemic regulation of women's sexuality. The Article will then look at the early women's rights movement and the framing of a substantive due process right to sexual privacy. The Article will address how these rights were elucidated in the "sexual freedom" cases from *Griswold v. Connecticut*[23] to *Planned Parenthood of Southeastern Pennsylvania v. Casey*[24] and the varying frameworks of substantive due process analysis applied by the Supreme Court in *Washington v. Glucksberg*[25] and *Lawrence v. Texas*.[26]

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19. TEX. PENAL CODE ANN. § 43.21 (Vernon 1979) *invalidated by* Reliable Consultants, Inc. v. Earle, 517 F.3d. 738 (5th Cir. 2008); TEX. PENAL CODE ANN. § 43.23 (Vernon 2003) *invalidated by Reliable Consultants*, Inc. v. Earle, 517 F.3d. 738 (5th Cir. 2008); Ala. Code §13A-12-200.2 (1998).

20. CORNOG, *supra* note 2, at 73.

21. Tristan Taormino, *Dallas Dildo Defiance*, VILLAGE VOICE, May 21, 2002, *available at* http://www.villagevoice.com/2002-05-21/columns/dallas-dildo-defiance/1.

22. *Id.*

23. Griswold v. Connecticut, 381 U.S. 479 (1965).

24. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

25. Washington v. Glucksberg, 521 U.S. 702 (1997).

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

In Part Two, the Article will examine the legal challenges to commercial regulations of sexual devices. It will address the medical value of sexual devices argument used to challenge obscenity statutes governing the sale of sexual devices. The Article will then focus on the legal challenges to commercial regulations, particularly in Texas and Alabama, and how the Supreme Court's decision in *Lawrence v. Texas* affected these challenges.

In Part Three, the Article looks to the future of substantive due process and the regulation of sexual devices. It addresses the issue of judicial review and whether *Reliable Consultants, Inc. v. Earle* was an "activist" decision. The Article will then considers what jurisprudence may be expected in challenges against the regulation of sexual devices after the *Williams* and *Reliable Consultants* cases. In Part Four, the Article concludes that it is imperative, in framing a substantive due process claim for the sale and distribution of commercial sexual devices, that the history and legal theories of women and sexual minorities be considered and advocated in order to advocate for a more fully protected right to sexual privacy and bodily autonomy.

I. Sexual Deviants, Hysterics, and Criminals: The Codification of Sexuality and the Subsequent Fight for Sexual Privacy

A. Advent of the Hysterical Woman

Vibrators were developed as a medical instrument in 1880 to assist physicians in treating "hysteria" in women.[27] "Hysteria," which literally translates to mean "womb disease,"[28] was one of the most frequently diagnosed diseases in the United States until 1952.[29] "Massage to orgasm" was the standard treatment for hysteria, and the invention of the vibrator was to assist physicians "fatigued" by the "time-consuming" process of clitorally massaging women to orgasm.[30] Female masturbation was regarded as unchaste and unhealthy and was discouraged by medical professionals.[31] The massage of women's genitalia to orgasm was not thought of as related to masturbation or generally even acknowledged as sexual.[32] The common view of women's sexuality was that women either had no sexual feelings at all or that they experienced sufficient pleasure

27. RACHEL MAINES, THE TECHNOLOGY OF ORGASM: "HYSTERIA," THE VIBRATOR, AND WOMEN'S SEXUAL SATISFACTION 3 (1999).
28. *Id.* at 1.
29. *Id.* at 11.
30. *Id.* at 1, 11.
31. *Id.* at 3.
32. *Id.* at 10.

from marital intercourse. Historian Dr. Rachel Maines writes:

> The symptoms defined until 1952 as hysteria . . . may have been at least in part the normal functioning of women's sexuality in a patriarchal social context that did not recognize its essential difference from male sexuality, with its traditional emphasis on coitus. The historically androcentric and pro-natal model of healthy, "normal" heterosexuality is penetration of the vagina by the penis to male orgasm.[33]

Modern studies of female sexuality have overwhelmingly discredited these archaic ideologies of women's sexuality (or asexuality), showing that, for most women, masturbation and clitoral stimulation, rather than androcentric penetration, are the most reliable forms of orgasm and sexual pleasure.[34]

Androcentric models of procreative sexuality within marriage nonetheless continue to be advocated by many as the cornerstone of Western civilization and patriarchy.[35] In Foucault's *History of Sexuality, Vol. 1*, he examined the "devices" linking sexuality with mechanisms and networks of power by tracing the evolution of sexual practice and discourse in Western European society.[36] While Dr. Maines contends that hysteria has existed "since the time of Hippocrates,"[37] Foucault's work helps to understand how the eighteenth century Enlightenment and nineteenth century Victorian era radically altered the way people thought about the individual and the individual's actions in society. In this period, people's notions of identity developed.[38] As institutions and regulations and other forms of power sought to control people's actions, people's actions became

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33. *Id.* at 3.

34. *Id.* at 65.

35. *See, e.g.*, John Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1063-69 (1994) ("Non-marital intercourse . . . has no [such] point and therefore is unacceptable."); Robert George & Gerard Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 305 (1995) ("The justifying point of sexual relations between spouses (fertile or not) is the 'intrinsic good of marriage,' its one-flesh communion of persons consummated by acts 'of the reproductive type.'"); James Dobson, Ph.D. Chairman & Founder of "Focus on the Family," *Satan's Counter-Attack Against International Evangelism*, http://unityinchrist.com/counterattack/counterattack1.htm ("A handful of power-obsessed judges is determined to force the homosexual agenda down the throats of the people and thereby change forever the legal definition of marriage. . . . I cannot overstate the dire ramifications of what is happening in the United States and other Western nations. For millennia, traditional marriage has been celebrated by every culture on earth as the cornerstone of society. But in the late 60s and early 70s, no-fault divorce laws, radical feminism and a sweeping sexual revolution combined here in the United States to rip apart the fabric of the family.").

36. 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, AN INTRODUCTION (Robert Hurley, trans., Vintage Books 1990) (1978).

37. MAINES, *supra* note 27, at 3.

38. *See* FOUCAULT, *supra* note 36, at 20.

associated with the idea of a persona as their source.[39] For example, a person who practiced sodomy no longer was just a sodomite but a "pervert" acting "against laws" of normalcy.[40] A woman who may not enjoy marital coitus sex was identified as a "hysteric" or "frigid."[41] This *nature* that compelled the "pervert" was a "sexuality."[42] Once a sexuality was proposed, an array of institutions, therapies, and disciplines proliferated into a science of sexuality.[43] The aim of this science was not to abolish sexuality but to manage and control people's sexuality.[44] Marital heterosexual coitus, where the goal is procreation and the male orgasm is assured, was viewed as normal and therefore did not need an identity.[45] According to Foucault's theory, anyone who participated in or advocated sexual acts outside of marital heterosexual coitus was viewed as a threat to the social order and in order to maintain the social order, such person's sexual acts were and identified as a sexuality, so that they could be more easily monitored and controlled. The first sexual act and sexuality to be proposed in such a manner by this new science of sexuality, was that of the frigid or the hysterical woman:

> [T]he first figure to be invested by the deployment of sexuality, one of the first to be "sexualized," was the "idle" woman. She inhabited the outer edge of the "world," in which she always had to appear as a value, and of the family, where she was assigned a new destiny charged with conjugal and parental obligations. Thus there emerged the "nervous" woman, the woman afflicted with "vapors;" in this figure, the hysterization of women found its anchorage point.[46]

The family was a primary agency of control with the expectations and duties of marriage and motherhood, and it was the family that first became a locus for medical intervention of sex and sexuality.[47] However, the preservation of the family institution and of the hierarchy of gender roles and sexualities and the safeguarding of the social order also required the intervention of the state in a regulatory manner, particularly by controlling women's reproductive functions.[48] When the tools that assisted in the medicalization of women's sexuality, such as the vibrator, emerged as a clearly erotic aid and tool of female sexual autonomy, the state sought to

39. *See id.* at 43.
40. *Id.* at 38-39.
41. *Id.* at 104-05.
42. *Id.* at 43.
43. FOUCAULT, *supra* note 36, at 147.
44. *Id.*
45. MAINES, *supra* note 27, at 112.
46. FOUCAULT, *supra* note 36, at 121.
47. *Id.* at 147.
48. *Id.*

regulate the commercial sale of sexual devices.[49] By limiting access to sexual devices, except for medical purposes, the state pathologized the people who used them for purely sexual enjoyment as either hysterics or criminals.[50] "There is a systemic effort to subsume knowledge that the clitoris, not the vagina, is the seat of greatest sexual feeling in most women into the androcentric model and to avoid one-to-one heterosexual confrontation over orgasmic mutuality by shifting the dispute onto medical ground."[51]

The huge disconnect between the perception of women's sexuality and women's actual sexual practices began to manifest publicly by the early twentieth century.[52] "The social camouflage of the vibrator as a home and professional medical instrument seems to have remained more or less intact until the end of the 1920's" when sex toys began to appear in erotic films and in the explosion of advertisements for vibrators in mainstream publications and mail-order catalogues including Sears, Roebuck and Company's *Electric Goods* catalog and *Heart's Magazine*.[53] The vibrator became increasingly controversial as men began to realize that women might enjoy using a vibrator for sexual stimulation.[54] "The illusion of a clinical process distinct from sexuality and orgasm could not be sustained,"[55] and from the 1930s until the 1970s, vibrators fell out of mainstream advertisements and their sale was increasingly more regulated.[56]

The matrices of power that sought out, identified, and established sexualities gave them analytical, visible, and permanent realities. A result of this is that sexes, identities, and sexualities defined as perverse or abnormal have become a basis of resistance. Sexual liberation movements have found a locus of legal protections for these identities and sexualities by articulating a fundamental right to sexual liberties as protected by the Due Process Clause of the Fourteenth Amendment.

B. Framing a Right to Sexual Privacy

At the height of the Victorian era, the codification of laws regulating sexuality came to fruition under the federal Comstock Act of 1873 and in similar state legislation in twenty-four states, known collectively as the

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49. MAINES, *supra* note 27 at 10, 20.

50. Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 345 (2006).

51. MAINES, *supra* note 27, at 112.

52. *Id.* at 20.

53. *Id.* at 20, 104.

54. *Id.* at 10.

55. *Id.*

56. *Id.* at 109.

Comstock Laws.[57] The Comstock Laws sought to criminalize contraception and to censor sexual obscenity, which included the advertising of contraception that was deemed obscene.[58] Named after Anthony Comstock, a New York City salesman[59] turned "anti-obscenity zealot"[60] who opposed "sex without fear of pregnancy even in the marriage bed."[61] Comstock adamantly opposed sex for the sake of pleasure and viewed masturbation as a threat to society, socially and individually.[62] Masturbation, particularly by married women, "raised doubts about the ideal of mutual bliss in coitus" and was therefore viewed as a threat to the accepted social order as it "conflicted at a literally visceral level with the androcentric paradigm."[63] Moreover:

> The ultimate goal of anti-obscenity campaigns [is] the prevention of masturbation. However, masturbation is extraordinarily difficult to detect, and hence to control, because it is an extremely clandestine activity. A direct attack against the evils of masturbation is therefore unfeasible. This being the case, Comstock and like-minded anti-obscenity crusaders instead attacked the "scourge" that provokes, accompanies, and reinforces the sin of masturbation—namely, pornography.[64]

By the 1870s, pharmacies were selling contraception, which was well advertised.[65] Contraceptives were cheap, easy to produce, in high demand,[66] and gave women control over their bodies and reproductive lives. The Comstock Laws conflated contraception with abortion, masturbation, and pornography and deemed all of them obscene and criminal.[67]

An example of the impact of the Comstock Laws on individuals during this time is evidenced by the life and death of free speech advocate, writer, and sexual counselor Ida Craddock. Craddock believed that ignorance of basic sexuality was the root of many of the problems in

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57. ANDREA TONE, DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA 24 (2002).

58. *Id.* at 13.

59. *Id.* at 7.

60. PAUL R. ABRAMSON, STEVEN D. PINKERTON, & MARK HUPPIN, SEXUAL RIGHTS IN AMERICA 102 (2003).

61. Daniel J. Kleves, *The Secret History of Birth Control,* N.Y. TIMES, July 22, 2001, at 11, *available at* http://www.nytimes.com/2001/07/22/books/the-secret-history-of-birth-control.html?n=Top/Features/Books/Book%20Reviews&pagewanted=1.

62. ABRAMSON, PINKERTON, & HUPPIN, *supra* note 60, at 102.

63. MAINES *supra* note 27, at 56.

64. ABRAMSON, PINKERTON, & HUPPIN, *supra* note 60, at 102.

65. TONE, *supra* note 57, at 14.

66. *Id.* at 66.

67. Margaret A. Blanchard & John E. Semonche, *Anthony Comstock and His Adversaries*, 11 COMM. L. & POL'Y 317 (2006).

society.[68] She traveled much of the Northeast, providing sexual counseling to married couples and writing pamphlets on sexual intimacy.[69] Between 1893 and 1902, Craddock was repeatedly jailed under Comstock Laws, and for three months, she was admitted to an insane asylum against her will.[70] In 1902, Ida Craddock distributed an article entitled "The Wedding Night" in which she "encouraged [married] couples to approach first intercourse gradually over the course of several nights and with consideration for each partner's pleasure."[71] For distributing the pamphlet through the mail, Craddock was arrested for violating New York's obscenity statutes. At her trial in the New York state courts she was convicted by a jury whom the judge had refused to allow to even see the documents, and sentenced to three months in a workhouse.

Upon her release, Craddock was immediately rearrested and convicted under the federal Comstock law for the same crime.[72] Craddock had been encouraged to plead insanity in order to avoid prison but she refused.[73] On the day before she was to go to federal prison, Craddock committed suicide and wrote a public suicide note condemning Anthony Comstock and the Comstock Laws.[74] In it, she predicted "the American public will awaken to a sense of the danger which threatens it from Comstockism."[75]

The birth control movement of the early nineteenth century took up the challenge to Comstockism and challenged the notion of women as solely mothers and procreators. The African American community was at the forefront of advocating for the rights of "motherhood at her own discretion."[76] While many women advocated for the rights of women's control of their sexuality and reproduction, Margaret Sanger,[77] the founder

68. Vere Chappell, Grand Treasurer Gen., Ordo Templi Orientis, Address at the Second National Ordo Templi Orientis Conference: Ida Craddock: Sexual Mystic and Martyr for Freedom (Aug. 7, 1999), *available at* http://www.idacraddock.org/intro.html (last visited Dec. 8, 2008).

69. *Id.*

70. *Id.*

71. Inez L. Schaechterle, Speaking of Sex: the Rhetorical Strategies of Frances Willard, Victoria Woodhull, and Ida Craddock, 52 (Aug. 2005) (unpublished Ph.D. dissertation, Bowling Green State University), http://etd.ohiolink.edu/send-pdf.cgi/Schaechterle%20Inez%20L.pdf?acc_num=bgsu1119623833.

72. *Id.*

73. Chappell, *supra* note 68.

74. Schaechterle, *supra* note 71.

75. Ida Craddock, Letter to the Public (Oct. 16, 1902), *available at* http://www.idacraddock.org/public.html.

76. *See* W.E.B. DuBois, *The Damnation of Women* (1919), *reprinted in* THE NEW CRISIS, Nov./Dec. 2000 Special Report, at 3.

77. Margaret Sanger is often credited as the founder of the birth control movement in the United States. Her impact on developing a legal and political strategy for the advocacy of women's right to birth control is undeniable. Sanger was, however, not in any way an advocate of masturbation, and further, her ideas about birth control advocated an adamant

of the Birth Control League (which would later become Planned Parenthood), would become the most closely linked with the movement.[78] Sanger challenged state prohibitions and regimes of ignorance about female sexuality as leading to "compulsory motherhood."[79] Sanger believed that legal challenges to birth control legislation would provide relief faster than lobbying for legislative change, and in 1916, she opened a birth control clinic in Brooklyn, New York, seeking to test a law stating that no one could give information to prevent contraception to anyone for any reason.[80] Sanger succeeded in creating the first legal victory for the birth control movement when the New York Court of Appeals broadened the interpretation of the statute to permit the medical community to distribute birth control.[81]

Sanger argued, "No woman can call herself free who does not own and control her own body"[82] and believed that procreative choices should be left to women and not their doctors. She therefore appealed the ruling of her case up to the Supreme Court.[83] While Sanger lost in the Supreme Court, she established a legal argument tying sexual autonomy to a privacy right in the Due Process Clause of the Fourteenth Amendment, arguing that:

> [P]ersonal "liberty" includes not only freedom from physical restraint, but also the right "to be let alone," to determine one's mode of life . . . and is invaded not only by a deprivation of life, but also a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament and lawful desires of the individual.[84]

Issues addressing women's sexual liberation, from birth control to abortion, sexuality, and the use of sexual devices, reached an apex of public discourse and political organizing in the 1960s and '70s with the women's

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ideology of racism and eugenics as a goal of birth control. *See, e.g.,* MARGARET SANGER, WHAT EVERY BOY AND GIRL SHOULD KNOW (Bretano's 1927) (1915); Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, BIRTH CONTROL REV., Oct. 1921, at 5; Margaret Sanger, *The Function of Sterilization*, BIRTH CONTROL REV., Oct. 1926, at 299.

78. LINDA K. KERBER & JANE SHERRON DE HART, WOMEN'S AMERICA: REFOCUSING THE PAST 355 (2000).

79. MARGARET SANGER, THE PIVOT OF CIVILIZATION 136 (1922).

80. Margaret Sanger, *A Public Nuisance, in* MY FIGHT FOR BORTH CONTROL (1931), *reprinted in* WOMEN'S AMERICA: REFOCUSING THE PAST, at 360 (Linda K. Kerber & Jane Sherron De Hart eds., 2000).

81. ELLEN CHESLER, WOMEN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA 160 (1992).

82. Margaret Sanger, *Woman and the New Race* (1920), *reprinted in* A PEOPLE'S HISTORY OF THE UNITED STATES , 343 (Howard Zinn ed., 1980).

83. *Id.* at 5.

84. *Id.*

liberation movement.[85] Some women argued that awareness and empowerment of their sexuality was, in fact, key to "changing the world."[86] The sexual liberation movement for women could be seen in the proliferation of women's health care resources, clinics, collectives, consciousness raising seminars, books such as *Our Bodies, Ourselves*[87] and *Liberating Masturbation*,[88] and the establishment of women-owned sex toy stores by feminists such as Dell Williams, who opened Eve's Garden in New York, and Joani Blanks, who opened Good Vibrations in San Francisco.[89] At the same time, Sanger's argument that there exists a right to sexual liberties protected by the Due Process Clause began to come to fruition in the "sexual freedom" cases.

C. *The "Sexual Freedom" Cases from* Griswold *to* Casey

In a series of decisions between 1965 and 1977, the Supreme Court articulated a constitutional privacy right of sexual and reproductive autonomy in a line of cases generally known as the "sexual freedom cases."[90] Judge Posner has more recently relabeled these cases the "sexual liberty cases."[91] In the 1965 case of *Griswold v. Connecticut*, the Supreme Court struck down the Connecticut law banning contraceptive use as unconstitutionally intruding upon a right to intimate sexual privacy within a marriage.[92] *Griswold* was the first Supreme Court decision to recognize a "right of privacy" as a fundamental substantive "liberty" protected by the Due Process Clause of the U.S. Constitution.[93] By upholding a married couple's right to use contraception to prevent pregnancy, the Court established that promotion of procreation is not the sole or defining purpose of marriage.[94] The historical tendency to limit women's sexuality to roles as procreator and mother began to be chipped away.

In the following years, the right to marital sexual privacy under *Griswold* was expanded by a series of legal challenges that established a

85. Lynn Comella, Assistant Professor, Women's Studies Department, University of Nevada, Las Vegas, Address at the Center for Sex and Culture: What's a Feminist Like You Doing in a Business Like This? The Growth of Women's Sex Toy Entrepreneurship in the United States (Mar. 21, 2008) (on file with author).

86. *Id.*

87. BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, OUR BODIES, OURSELVES (1973).

88. BETTY DODSON, LIBERATING MASTURBATION (1972).

89. *Id.*

90. RICHARD POSNER, SEX AND REASON 339 (1992).

91. *Id.*

92. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

93. *Id.* at 486.

94. *In re* Marriage Cases, 183 P.3d 384, 432 (Cal. 2008) (citing *Griswold*, 381 U.S. 479).

constitutional privacy right to heterosexual sexual activity.[95] This series of cases began with *Eisenstadt v. Baird* (1972), in which an equal protection claim extended the right to sexual privacy and contraceptive use to non-married women. The Court stated: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[96] Next, *Roe v. Wade* (1973) conferred the right of women to have an abortion as a fundamental privacy right.[97] Then, *Carey v. Population Services International* (1977), in which a New York statute prohibiting the distribution of all contraceptives to people under the age of sixteen and to anyone over sixteen by anyone other than pharmacists and banning the advertising or display of contraceptives was declared unconstitutional.[98] The Court in *Carey* also held that a corporation that sold contraceptives had standing to challenge the statute and that any regulation imposing a burden on the fundamental decision whether to procreate or not procreate must be justified by a compelling governmental interest.[99]

The Supreme Court replaced heightened scrutiny with an "undue burden" standard in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992).[100] This standard established that the state must demonstrate a compelling governmental interest when it places an undue burden on a protected liberty interest. A statute places an undue burden when it has the "purpose or effect of placing a substantial obstacle" on a liberty interest. In this case, the Court held that Pennsylvania's twenty-four hour waiting period, informed consent, and parental notification requirements did not place an undue burden on the right to an abortion but that spousal notification requirements did. While the ruling was a step back for abortion rights, the decision nonetheless maintained women's autonomy from their husbands in regards to decisions about their reproductive rights, sexual privacy, and bodily autonomy.

The sheer number of suits regarding sexual privacy that came before the courts in the years following *Griswold* can be accounted for by the number of "movement suits" brought by feminists.[101] In *Before Roe: Abortion Policy in the States*, Rosemary Nossiff writes:

The privacy argument articulated in *Griswold* in the context of

95. Angela Holt, Comment, *My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama's Anti-Vibrator Law*, 53 ALA. L. REV. 927, 938 (2002).

96. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

97. Roe v. Wade, 410 U.S. 113 (1973).

98. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

99. *Id.*

100. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992).

101. ROSEMARY NOSSIFF, BEFORE ROE: ABORTION POLICY IN THE STATES 7 (2000).

> contraception supported the feminist claim that reproductive control was a matter of individual liberty. They argued that since women were the individuals who became pregnant, laws that prohibited their access to abortion, as well as contraceptives, were unconstitutional because they violated women's Fourteenth Amendment rights to liberty and property, which included both the right to privacy and control of one's body.[102]

The "sexual freedom" cases confer a sexual privacy right by establishing the idea that if there is a constitutional right to prevent conception or have an abortion, then it follows that there must be a right to cause conception. Hence the freedom to engage in sexual relations must be implied from these cases. Critics of the idea that there is a fundamental right to sexual privacy and an individual right to bodily autonomy frame the right from these cases narrowly as only conferring a fundamental right as to "whether to bear or beget a child."[103] These critics argue that conception and sexual relations are different and that the affirmative right to procreate does not need to include a right to copulate for non-procreative purposes.[104] This argument reaffirms procreation as the only legitimate purpose of sex: a sexual model that focuses on the male orgasm while displaying indifference to female sexual pleasure.

Women's success in fighting for a "right of privacy" changed the national discourse regarding sexuality by allowing all people to begin reframing and defining their sexuality and sexual identities. People were able to advocate for themselves as sexual beings with a right to control their own bodies and pleasures. While feminists in the United States had been overwhelmingly united in the movement for reproductive rights, the feminist movement split divisively over how to approach sexuality in the aftermath of *Roe*.[105]

For the successes of the feminist movement between *Griswold* and *Roe*, each victory has been tempered by backlash and the "near instantaneous conservative reconstruction."[106] *Roe v. Wade* galvanized the creation of an anti-choice movement.[107] Furthermore, the feminist

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102. *Id.* at 70.

103. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

104. *See, e.g.*, David B. Cruz, Note, *"The Sexual Freedom Cases"? Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299 (2000).

105. Many feminist groups split over issues of sex and sexuality in the 1970s and '80s, particularly regarding regulation of pornography. There was also a divide that occurred between many heterosexual women and lesbians, with many straight feminists having no interest in advocating for the rights of lesbians. There are many, many books and articles on the varying viewpoints of sexuality in feminist communities. *See, e.g.*, WENDY KOLMAR & FRANCES BARTKOWSKI, FEMINIST THEORY: A READER (2000).

106. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 2-3 (1994).

107. Ruthann Robson, *Judicial Review and Sexual Freedom*, 30 U. HAW. L. REV. 1, 24-

movement itself became very divided in the aftermath of *Roe v. Wade*: many women lost interest in advocating for sexual freedoms beyond reproductive rights while divisiveness developed over the issues of obscenity and pornography between "pro-sex feminists" and "pro-censorship feminists."[108] However, "'backlash' and 'positive change' are not mutually exclusive . . . [and] the role of the courts in social change is not capable of simplistic equations."[109] This lack of a simple equation to analyze substantive due process was compounded in the years after *Roe* in the development of varying standards of analysis in the cases of *Washington v. Glucksberg* and *Lawrence v. Texas*. *Lawrence v. Texas* affirmed that the "right to privacy" recognizes sexual intimacy beyond procreative sex,[110] yet whether courts would apply the holding of *Lawrence* or recognize any of the rights enumerated from the sexual freedom cases essentializes the split between the Eleventh and the Fifth Circuits regarding the commercial regulation of sex toys.

D. *Varying Frameworks of Substantive Due Process:* Glucksberg *vs.* Lawrence

Two competing analyses of substantive due process rights have developed in the aftermath of *Casey*—the formalistic and narrow approach established in *Washington v. Glucksberg*[111] and the broader and less structured approach used in *Lawrence v. Texas*.[112] In *Glucksberg*, the respondents, relying upon *Casey* and *Cruzan v. Missouri Department of Health*,[113] argued that there exists a personal autonomy liberty interest protected by the Due Process Clause which extends to encompass physician-assisted suicide as a constitutionally protected personal choice when made by a mentally competent, terminally ill adult. The Court determined that the statute did not violate the Due Process Clause by applying a new method of substantive due process analysis.[114] Rehnquist, writing for the majority, asserted that the Due Process Clause protects fundamental rights and liberties that can pass the *Palko* test, a test that espouses a natural law philosophy of fundamental rights. To do this, a court must first formulate a "careful description" of the right at issue.

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25 (2007).

108. *See, e.g.*, Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Lisa Duggan, Nan Hunter, & Carol Vance, *False Promises: Feminist Anti-Pornography Legislation*, 38 N.Y.L. SCH. L. REV. 133 (1993).

109. Robson, *supra* note 107, at 25.

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

111. Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

112. *Lawrence*, 539 U.S. 558.

113. Cruzan v. Mo. Dept. of Health, 497 U.S. 261 (1997).

114. *Glucksberg*, 521 U.S. at 721.

Then, in order to determine what level of scrutiny to apply to the right, the court will examine if the asserted right is "'deeply rooted in this Nation's history and tradition'"[115] and is "'implicit in the concept of ordered liberty'" to the degree that liberty or justice would not "exist if they were sacrificed."[116] State action burdening enumerated fundamental rights and liberty interests that meet the criteria of the *Palko* test will be subjected to strict scrutiny while all other legislation need only be rationally related to a legitimate state interest.[117]

In *Lawrence v. Texas*, the Court ruled that a Texas statute criminalizing sodomy violated the Due Process Clause, explicitly overruling *Bowers v. Hardwick,* in which the Court had upheld a Georgia statute against sodomy.[118] *Lawrence* follows the precedent of a "right to privacy" established by the sexual freedom cases by affirming that the laws burdening the choice to engage in non-procreative sex are subjected to special constitutional protection.[119] While Justice Scalia accuses the majority in *Lawrence* of engaging in "judicial activism," it is actually *Bowers* and *Glucksberg* that significantly depart from the due process analysis of issues of sexual liberty that the Court had been following since *Griswold.*[120] The majority in *Lawrence* held that Justice Stevens's dissent in *Bowers* should have been controlling as it was the proper legal analysis. Stevens's dissent is reproduced in *Lawrence* as now controlling:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.[121]

While the Court did not explicitly recognize a fundamental right to sexual privacy in *Lawrence*, the Court emphasized the "respect the Constitution demands" for the autonomy of a person in making intimate

115. *Id.* (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977)).
116. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).
117. *Id.*
118. *Lawrence*, 539 U.S. at 577-78.
119. *Id.* at 576-77.
120. *Id.* at 586.
121. *Id.* at 577-78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

and personal choices.[122] In Justice O'Connor's concurrence, she held that the Texas sodomy statutes were unconstitutional under the Fourteenth Amendment's Equal Protection Clause.[123] Citing *Romer v. Evans*, she held that moral disapproval of a group does not constitute a legitimate state interest since a legal classification must not be drawn of animus.[124] While the majority in *Lawrence* applied a substantive due process analysis in which they applied rational basis, the fact that Texas could not present a legitimate state interest for its invasion into the private sexual life of consenting adults further shows the irrationality of the Texas obscenity law at issue in *Lawrence.*

In *Lawrence*, the Court did not apply the limited *Palko* test from *Glucksberg* as controlling but rather reaffirmed that the "expansive and protective provisions of our constitutions, such as the Due Process Clause, were drafted with the knowledge that 'times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.'"[125] *Lawrence*'s approach to substantive due process allows greater room for a full articulation of the right at stake and also reestablishes that a plaintiff need not show "a deeply rooted history of legislative protection of the asserted right if there is an absence of proscription or if recent developments in the law indicate recognition of that liberty."[126]

The schism as to whether *Glucksberg* or *Lawrence* is controlling in substantive due process cases is fraught with serious implications for advocates of both sides. Rather than an issue of clarity, the ambivalence of *Lawrence* is being exploited by litigants and courts whose natural law approach to fundamental rights views preservation of the family institution and the hierarchy of gender roles and sexualities as integral to the safeguarding of the social order. Scalia's *hysteria*[127] in his dissent in *Lawrence* exemplifies this when he argues that there will be a "massive disruption of the current social order" if morality alone cannot be used as a rational basis and that this will create a domino effect overturning all laws

122. *Id.* at 574.

123. *Id.* at 579 (O'Connor, J., concurring).

124. *Id.* at 580.

125. *In re* Marriage Cases, 183 P.3d 384, 451 (Cal. 2008) (quoting Lawrence v. Texas, 539 U.S. at 579).

126. Jota Borgmann, *Hunting Expeditions: Perverting Substantive Due Process and Undermining Sexual Privacy in the Pursuit of Moral Trophy Game,* 15 UCLA WOMEN'S L.J. 171, 190 (2006).

127. While the pun here is intentional, the fear exhibited by Scalia in his dissent in *Lawrence* at the prospect of the Supreme Court overturning sodomy statutes and asserting that morality alone is insufficient to uphold statutes regulating private, consensual sexuality are in fact classic symptoms associated with hysteria, which include anxiousness, irritability, and erotic fantasy. *See* MAINES, *supra* note 27, at 8.

against "fornication, bigamy, adultery, incest, bestiality, and obscenity."[128] The cases analyzing a substantive due process right to commercially sell sexual devices, particularly that of the Eleventh Circuit in the *Williams* cases, exemplify the fear of courts to acknowledge a constitutional privacy right to sexual intimacy and how denying such a right can be used by courts to reassert the social orders of gender and sexuality established and codified in the Victorian era.

II. A Constitutional Right to Intimate Sexual Privacy and Bodily Autonomy

A. The Sexual Device Cases and the Medical Value Argument

"I don't want any state legislature telling me how I can or cannot come."[129]

While neither the federal government nor the states have any laws that explicitly prohibit the use of sexual devices such as vibrators and dildos, many states and localities continue to regulate the sale of sexual devices via obscenity statutes.[130] The Food and Drug Administration defines vibrators purely in terms of their medical value.[131] Moreover:

> Partially due to factors such as sex-industry zoning and lax enforcement as well as the "wait and see" attitude towards enforcement that has prevailed as several states wait for legal precedents to emerge elsewhere, anti-vibrator laws have been publicly tested in only six states: Alabama,[132] Louisiana,[133]

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128. Lawrence v. Texas, 539 U.S. 558, 591, 599 (2003) (Scalia, J., dissenting).

129. Taormino, *supra* note 21.

130. Lindemann, *supra* note 50, at 330.

131. 21 C.F.R. § 890.5660 (2001) ("A therapeutic massager is an electrically powered device intended for medical purposes, such as to relieve minor muscle aches and pains."); 21 C.F.R. § 890.5975 ("A therapeutic vibrator is an electrically powered device intended for medical purposes that incorporates various kinds of pads and that is held in the hand or attached to the hand or to a table. It is intended for various uses, such as relaxing muscles and relieving minor aches and pains.").

132. ALA. CODE § 13A-12-200.2 (1998).

133. In *State v. Brenan*, 772 So. 2d 64 (La. 2000), the Louisiana Supreme Court held that Title 14, Section 106.1 of the Louisiana Revised Statutes, which bans the promotion of obscene devices, is unconstitutional, however, the law remains on the books, reading in pertinent part: "(1) 'Obscene device' means a device, including an artificial penis or artificial vagina, which is designed or marketed as useful primarily for the stimulation of human genital organs. (2) 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, distribute, circulate, disseminate, present, or exhibit, including the offer or agreement to do any of these things, for the purpose of sale or resale. B. No person shall knowingly and intentionally promote an obscene device." LA. REV. STAT. ANN. §14:106.1 (1970) (amended 1985) (effective June 15, 2001).

> Kansas,[134] Colorado,[135] Georgia,[136] and Texas.[137] Legal challenges to vibrator bans in these states have arisen both as a result of specific acts of prosecution under the obscenity statutes and challenges from individuals who have called into question the constitutionality of the laws.[138]

The legal challenges to the constitutionality of these statutes have predominately focused upon whether the statutes infringe upon the use of a vibrator as a legitimate medical instrument rather than as a right to sexual privacy.[139]

Given that the sale of sexual devices is governed by obscenity statutes, those that have challenged such statutes have predominately used the medical therapeutic value argument in order to prove that the sexual devices in question have non-prurient value and are thus not obscene.[140] The Supreme Court first held that a category of expression called "obscenity" lacked First Amendment protection in 1957 in the case of *Roth v. United States*.[141] For the next sixteen years, the Supreme Court fought over the definition of obscenity, settling in 1973 on a standard known as the *Miller* doctrine despite the vigorous dissent of four members of the

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134. In *State v Hughes*, 792 P.2d 1023 (Kan. 1990), the Kansas obscenity statute was found unconstitutional. However, the statute was amended and remains on the books today. KAN. STAT. ANN. § 21-4301(c)(3) (2006).

135. In *People* ex rel. *Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 370 (Colo. 1985), the Court held that "[t]he statutory scheme, in its present form, impermissibly burdens the right of privacy of those seeking to make legitimate medical or therapeutic use of such devices. The effect of the statute as now written is to equate sex with obscenity. The state has demonstrated no interest in the broad prohibition of these articles sufficiently compelling to justify the infringement on the privacy right of those seeking to use them in legitimate ways. Thus, we hold the statutory prohibition against the promotion of obscene devices to be unconstitutional." The Court upheld the remaining parts of the statute. COLO. REV. STAT. § 18-7-101(3) (2008).

136. GA. CODE ANN. § 16-12-80(c)-(e) (2008) ("Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section. (d) Material not otherwise obscene may be obscene under this Code section if the distribution thereof, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal. (e) It is an affirmative defense under this Code section that dissemination of the material was restricted to: (1) A person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or (2) A person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.").

137. TEX. PENAL CODE ANN. § 43.21(a)(7) (Vernon 1979), *invalidated by* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008); TEX. PENAL CODE ANN. § 43.23 (Vernon 2003), *invalidated by Reliable Consultants*, 517 F.3d. 738.

138. Lindemann, *supra* note 50, at 331.

139. *Id.* at 339.

140. *Id.* at 343.

141. Roth v. United States, 354 U.S. 476, 485 (1957).

Court.[142] The test developed in *Miller v. California* remains today; however, the doctrine has continuously proved debatable, with many legal scholars, including Supreme Court justices, calling for a reexamination of the doctrine.[143]

In the Supreme Court's debates over what constitutes obscenity and how it may be regulated, the Court has recognized that the states have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.[144] In *Miller*, the Supreme Court held that obscene material is not protected by the Constitution and that the standards to be applied by the states in determining whether material is obscene and subject to regulation must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.[145] In *Paris Adult Theater I v. Slaton*, the Supreme Court held that states have a legitimate power to regulate obscene commerce by asserting that commerce of obscene material has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize the states' right to maintain a decent society.[146] While the states retain broad power to regulate obscenity, that power simply does not extend to mere possession of obscene material by the individual in the privacy of their own home.[147]

Given the legal protection of personal possession of obscene materials in the privacy of one's home as well as the right to privacy regarding intimacy conferred by the sexual freedom line of cases, no state explicitly prohibits the personal use of sexual devices by individuals within their homes.[148] However, regulating the commercial sale of sexual devices directly impedes people's ability to purchase and therefore use sexual devices within the confines of their home. The Supreme Court in *Carey v. Population Services International* held that pharmacists had standing to bring an action challenging a New York statute regulating the commercial sale of contraceptives in that it burdened individuals' ability to access contraceptives and therefore substantially burdened their constitutional

142. Miller v. California, 413 U.S. 15, 19 (1973).

143. Amy Adler, *All Porn All the Time*, 31 NYU REV. L. & SOC. CHANGE 695, 700 n.26 (2007) (citing *Pope v. Illinois*, 482 U.S. 497, 505 (1987) (Scalia, J., concurring), in which Justice Scalia suggests "the need for reexamination of *Miller*.").

144. *Miller*, 413 U.S. at 19.

145. *Id.* at 24.

146. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973).

147. Stanley v. Georgia, 394 U.S. 557, 568 (1969).

148. Lindemann, *supra* note 50, at 330.

right to use contraceptives.[149] Regulating the commercial sale of sexual devices burdens individuals' ability to access sexual devices and therefore unconstitutionally burdens their constitutional right to use sexual devices in the privacy of their home.

Yet, cases prior to *Reliable Consultants* have consistently emphasized the medical uses of sexual devices rather than the right to use sexual devices as a personal liberty privacy right.[150] This argument has effectively re-pathologized women's use of vibrators by mandating its legitimacy solely to its medical advantages.[151] "Inextricably binding the vibrator's legitimacy to medical advantages, rather than its pleasurable capacities, these cases have succeeded in sending the vibrator back into the medical closet, thus essentially bringing us full circle to the Victorian epoch of the vibrator's inception."[152] However, as established by the obscenity doctrine asserted in *Miller*, in order to challenge that an obscenity statute is unconstitutional, it must be established that the material that it regulates does not appeal to a prurient interest and is overbroad in its scope.

In an early sexual device case, *Sewell v. State*, the Supreme Court of Georgia upheld the conviction of a plaintiff sentenced to twelve months in prison and a $4,000 fine for selling a magazine and an "artificial vagina" to an undercover officer.[153] The plaintiff argued that there was no rational basis for Georgia's obscenity statute and that it was unconstitutionally vague in its regulation of "any device designed or marketed as useful primarily for the stimulation of human genital organs."[154] Georgia's court declined to analyze whether the statute was vague and, rather, asserted that such devices are "obscene as a matter of law."[155] On appeal to the Supreme Court, the Court dismissed plaintiff's appeal as lacking a substantial federal question.[156] However, in anticipation that this issue may again reach the Supreme Court, Justices Marshall and Stewart joined a dissent written by Brennan, arguing that regulation of sexual devices did in fact raise "a substantial federal question" and "one of first impression" for the Court.[157]

In the aftermath of *Sewell*, plaintiffs sought to challenge similar obscenity statutes by arguing that the sexual devices did not appeal to prurient interests because they provided medical benefits. In *State v. Hughes*, the Kansas Supreme Court ruled that its obscenity statute regulating sexual devices was unconstitutionally overbroad in its violation

149. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).
150. Lindemann, *supra* note 50, at 344.
151. *Id.* at 346.
152. *Id.*
153. Sewell v. State, 233 S.E.2d 187, 188 (Ga. 1977).
154. *Id.*
155. *Id.* at 189.
156. Sewell v. Georgia, 435 U.S. 982 (1978).
157. *Id.* at 985 (Brennan, J., dissenting).

of privacy rights protected by the Fourteenth Amendment to the extent that the statute prohibited therapeutic use of such devices for medical and psychological disorders.[158] The defendant had provided an expert medical witness who testified that the vibrator had medical value in treating an orgasmic women "who may be particularly susceptible to pelvic inflammatory disease, psychological problems, and difficulty in marital relationships" and women suffering "urinary stress incontinence."[159] In the aftermath of *Hughes*, Kansas amended its statute to include medical and therapeutic uses, and the statute remains on the books today.[160]

The legitimate use of the vibrator as a medical instrument was also upheld in the Colorado case of *People v. Seven Thirty-Five East Colfax, Inc.*[161] In this case, the court held that sections 18-7-101(3) and (4) of the state's obscenity statute violated the Due Process Clause of the state and federal constitutions because it was overbroad and impermissibly burdened the right of privacy of those seeking to make legitimate medical or therapeutic use of such devices and thus was unconstitutional.[162] The court upheld the remaining parts of the statute, stating that the goal of regulating obscenity should not be "disturbed because of an unconstitutional flaw."[163]

In *State v. Brenan*, the Louisiana Supreme Court held that the state obscenity statute banning the promotion and distribution of obscene devices unconstitutionally burdens the legitimate operation of such devices for medical reasons.[164] Framing the right at issue narrowly as the right to promote sexual devices, the court applied a *Glucksberg* analysis to the issue and held that statutes making it a crime to promote obscene devices did not unconstitutionally infringe on the right to privacy guaranteed by the state or federal constitution and that such statutes furthered legitimate state interests.[165] However, the court found that Louisiana's statute did not bear a rational relationship to that interest as it placed an unqualified ban on all sexual devices that were designed or marketed primarily for stimulation of human genitals, thereby ignoring the fact that, in some cases, use of sexual devices was therapeutically appropriate, and therefore, the statute violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[166] The state's action in banning all such devices without any review of their prurience or medical use was not rationally related to the

158. State v. Hughes, 792 P.2d 1023, 1032 (Kan. 1990).
159. *Id.* at 1025.
160. KAN. STAT. ANN. § 21-4301(3) (2006).
161. People *ex rel.* Tooley v. Seven Thirty-Five E. Colfax, Inc., 697 P.2d 348 (Colo. 1985).
162. *Id.* at 370.
163. *Id.* at 372.
164. State v. Brenan, 772 So. 2d 64 (La. 2000).
165. *Id.* at 72.
166. *Id.* at 76.

"war on obscenity."[167]

B. *The Texas Sexual Device Cases Prior to* Lawrence

"It is easier to buy a gun than a vibrator in Texas."[168]

Prior to the Fifth Circuit ruling in *Reliable Consultants* in 2008, the issue of Texas's state regulation of sexual devices had been litigated in both the Fifth Circuit and Texas state courts. In 1979, the Texas legislature rewrote the state's penal code provisions defining obscenity to include the commercial regulation of "obscene devices," defined in the statute as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs."[169] Prior to the law going into effect, entrepreneurs in the "adult entertainment" business brought separate actions challenging the statute in the case of *Red Bluff v. Vance*.[170] The plaintiffs brought varying causes of action against the statute, including arguments that it was unconstitutionally vague and overbroad, denied procedural due process, infringed upon fundamental rights of expression and personal autonomy, and denied equal protection to handicapped persons dependent upon the devices for sexual gratification.[171] Citing the Georgia Supreme Court's decision in *Sewell v. State*, the court accepted the statute's definition of devices as "obscene per se"[172] and upheld the constitutionality of the statute.[173] While the court rejected plaintiff Henry Gullick's assertion that a vibrator is a legitimate medical treatment for lack of evidence, the court did acknowledge the potential of such a treatment-related right.[174]

In *Yorko v. State*, the appellant appealed his criminal conviction of possession with intent to sell a sexual device, namely a dildo.[175] The appellant rejected using the medical paradigm argument and, rather, argued that the statute violated the individual right of privacy afforded by the Due Process Clause of the Fourteenth Amendment.[176] Analogizing the use of sexual devices to the use of contraceptives, appellant cited the sexual freedom cases as affording a fundamental right to privacy infringed upon by Texas's obscenity statute. The appellant asserted that:

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167. *Id.*
168. VENNING & CAVANNAH, *supra* note 1, at 11.
169. Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1025 (5th Cir. 1981).
170. *Id.* at 1024.
171. *Id.* at 1026.
172. *Id.* at 1027 (citing Sewell v. State, 233 S.E.2d 187 (Ga.1977)).
173. *Sewell*, 233 S.E.2d 187.
174. *Red Bluff v. Vance*, 648 F.2d at 1027.
175. Yorko v. State, 690 S.W.2d 260, 261 (Tex. Crim. App. 1985).
176. *Id.*

> [A]ny attempt by the State to criminalize the use or sale of condoms, diaphragms or similar birth control aids would clearly violate the constitutional right of privacy recognized in *Griswold*, and *Carey*. Unless there is some exotic and heretofore unarticulated distinction to be drawn between sexual devices that stimulate and gratify and sexual devices that do not, the same principle of freedom of choice operable in *Griswold* and *Carey* with respect to a matter of peculiarly private concern likewise invalidates any attempt by the State to control an individual's private modes of sexual stimulation or gratification.[177]

The court rejected the appellant's argument by narrowly framing the constitutional right enumerated from *Griswold* to *Carey* as merely a "constitutionally protected decision not to beget a child" rather than a constitutional right to sexual privacy and intimacy.[178] The *Yorko* court rejected the appellant's argument that sexual devices are like contraceptives and asserted that, since sexual devices are used for sexual stimulation and gratification, the right "not to beget a child" does not apply to the right to use a sexual device.[179] The court held that sexual devices are therefore obscene and the state has a right to ban obscenity under its police powers in order to protect the social interest in social order and morality.[180]

The *Yorko* and *Red Bluff* decisions predate the Supreme Court holding in *Lawrence v. Texas*. *Lawrence*'s holding contradicts the Texas Court of Criminal Appeal's analysis of the issue at stake in *Yorko*. In *Lawrence*, the Supreme Court held that the constitution protects individuals' "intimate choices."[181] This statement asserts that *Griswold*'s intimacy framework is controlling and not the narrow privacy right articulated in *Carey*. If the right to privacy is therefore about intimacy rather than the right "not to beget a child," then the analysis applied by the Texas Criminal Court in *Yorko* is wrong. This is particularly relevant considering that *Yorko* has been held as controlling in numerous Texas Criminal Court cases, including cases decided after *Lawrence* and even *Reliable Consultants*.[182]

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177. *Id.* at 264.

178. *Id.* at 263.

179. *Id.* at 265.

180. *Id.*

181. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

182. *See, e.g.*, Regalado v. State, 872 S.W.2d 7 (Tex. Crim. App. 1994) (Relying primarily on *Yorko* and *Red Bluff*, the court upheld a store clerk's conviction for possession of obscene devices. The case is infamous for the one-sentence concurring decision of Justice Brown who wrote only, "Here we go raising the price of dildos again. Since this appears to be the law in Texas I must concur."); Texas v. Acosta, 2005 Tex. App. LEXIS 7170, 7 (Tex. Crim. App. 2005) (The court framed the right at issue in *Lawrence* narrowly as whether "sex between two members of the same sex can be denied by law when practiced in the privacy of their apartment." The court then held that the regulation of sexual devices was analogous to prostitution and public sex and therefore not protected under *Lawrence*.);

The holdings in the majority of the sexual device cases characterize sexual devices as either obscene per se or legitimate solely for the purpose of medical uses. This dichotomy effectively pathologizes users of sexual devices for the purpose of sexual gratification as either criminal or sexually impaired:

> A sexually-healthy woman using a vibrator not proscribed by a doctor to relieve sexual tension is, by definition, either engaging in an obscene activity, or is medically or psychologically dysfunctional; yet the verdicts in these cases do not clarify under which classification she would fall. Thus, autonomous female sexuality is either criminalized or pathologized.[183]

Accepting sexual devices as either per se obscenity or legitimate solely for medical use systemically limits women's sexuality to the roles of procreator, hysteric, or criminal just as it was under the nineteenth century Comstock Laws. In the Eleventh Circuit *Williams* cases, the court would go so far as to cite the Victorian era Comstock Laws as indicative of such regulations being deeply rooted in our nation's history and therefore constitutional.

C. *The Alabama Cases from* Williams I *to* Williams VI

In 2007 Sherri Williams, the owner of "Pleasures," a small chain of adult stores in Alabama, faced the Eleventh Circuit for the third time in nine years.[184] Ms. Williams is one of several plaintiffs, who are both vendors as well as users of sex toys, for whom the American Civil Liberties Union ("ACLU") has filed suit to enjoin the enforcement of a statute passed by the Alabama legislature in 1998.[185] The statute prohibits the commercial distribution but not the use of "any device designed or marketed as useful primarily for the stimulation of human genital organs"[186] unless the sale of the sexual device is "for a bona fide medical,

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Villarreal v. State, 267 S.W.3d 204, 209 n.26 (Tex. Crim. App. 2008) (The court says that it shares the sentiment of "displeasure" displayed by Justice Curtis Brown in *Regalado* but that Fifth Circuit precedent is not binding on Texas courts and that they "have little reason to believe that the court of criminal appeals now takes issue with its holding in *Yorko*."). In none of these cases do the courts analyze whether the analysis in *Yorko* is in fact correct; rather, it is just asserted that the statutes have been analyzed by the Texas Court of Criminal Appeals and been found facially constitutional.

183. Lindemann, *supra* note 50, at 341.

184. Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007) (citing ALA. CODE § 13A-12-200.2(a)(1) (1998)) [hereinafter *Williams VI*].

185. Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1234 (11th Cir. 2004) [hereinafter *Williams IV*].

186. *Williams VI*, 478 F.3d at 1318.

scientific, educational, legislative, judicial, or law enforcement purpose."[187]

The legal challenge to Alabama's obscenity statute first reached the Eleventh Circuit in 2001 in *Williams v. Pryor*.[188] The Eleventh Circuit held that a statute banning the commercial distribution of sexual devices is rationally related to the State of Alabama's legitimate governmental interest in public morality and that "[t]he crafting & safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny."[189] The Eleventh Circuit made clear that they viewed sexual devices and people's individual sexual autonomy as not just an issue of public morality but as a threat to the state and the social order, stating that "the State abhors the 'commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation, or familial relationships [as] an evil, an obscenity . . . detrimental to the health and morality of the state.'"[190] The Court dismissed a facial challenge to the law by stating that minors lacked a fundamental right of access to the devices. The case was remanded to a district court to consider the as-applied challenges by four adult women. On remand, the district court ruled that the adult plaintiffs had a fundamental right to sexual privacy and that the State had no compelling interest to justify the regulation.[191] The case was then appealed by the State, and in 2004, the case came before the Eleventh Circuit for a second time.[192]

Eleven months before the Eleventh Circuit's second review of the issue, the Supreme Court decided *Lawrence v. Texas*.[193] The Eleventh Circuit critiqued the Supreme Court majority's substantive due process framework in *Lawrence* while essentially dismissing it and, rather, adhered to Scalia's dissent in *Lawrence* by applying *Glucksberg*'s *Palko* test as controlling in substantive due process cases.[194] The court articulated the right at issue in the case narrowly as "the right to use sexual devices when engaging in lawful, private, sexual activity."[195] The court then analyzed if this right was "deeply rooted in the nation's history and implicit in the concept of ordered liberty." The court completely dismissed the district court's findings and broad framing of the issue and asserted that

187. *Id.* (citing ALA. CODE § 13A-12-200.4 (1998)).

188. Williams v. Pryor, 240 F.3d 944 (11th Cir. 2001) [hereinafter *Williams II*].

189. *Id.* at 949.

190. Williams v. Pryor, 220 F. Supp. 2d 1257, 1301 (N.D. Ala. 2002) (quoting Williams v. Pryor, 41 F. Supp. 2d 1257, 1285-86 (N.D. Ala. 1999) (citation omitted)) [hereinafter *Williams III*].

191. *Williams VI*, 478 F.3d at 1320.

192. *Williams IV*, 378 F. 3d 1232 (11th Cir. 2004).

193. *Id.* at 1235 (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

194. *Id.* at 1253-55.

195. *Id.* at 1242.

substantive due process precedents have never "recognized a free-standing 'right to sexual privacy.'"[196] The court was arbitrary in its analysis of what history was relevant and acknowledged the Comstock Laws as relevant while dismissing the testimony of Dr. Rachel Maines as to the historical uses of sex toys as an "irrelevant exploration of the history of sex in America."[197] The court criticized the district court for not showing a history of proscriptions against sexual devices as deeply rooted in history.[198] Therefore, the court said that the evidence failed to show a deeply rooted right and upheld the court's prior ruling that the statute was rationally related to Alabama's legitimate government interest in public morality.[199]

The case was then remanded to district court, where the court analyzed whether the case was distinguishable from *Lawrence* and whether the holding in *Lawrence* that morality was not a sufficient rational basis was applicable here.[200] The district court quoted Scalia's dissent in *Lawrence* where he wrote, "[T]o hold that public morality can never serve as a rational basis for legislation after *Lawrence* would cause a 'massive disruption of the social order,' one this court is not willing to set in motion."[201] The district court distinguished the case from *Lawrence* by saying that *Lawrence* implicates equal protection concerns that this case did not even though *Lawrence* was decided upon substantive due process and not equal protection grounds.[202] On appeal, the case came back to the Eleventh Circuit for a third time in 2007.[203]

In deciding *Williams VI*, the Eleventh Circuit once again upheld the constitutionality of Alabama's commercial ban on sexual devices by arguing that *Lawrence* was inapplicable "because the challenged statute in this case does not target private activity, but public, commercial activity" and that the state's interest in promoting and preserving public morality remains a sufficient rational basis.[204] The court notes that its prior decisions would normally be controlling but that the law-of-case doctrine may be overcome if "subsequently released controlling authority dictates a contrary result."[205] The plaintiffs argued that *Lawrence* was controlling and that it dictated that public morality alone is an insufficient legitimate

196. *Id.* at 1235.
197. *Id.* at 1242.
198. *Id.*
199. *Id.*
200. Williams v. King, 420 F. Supp. 2d 1224 (N.D. Ala. 2006) [hereinafter *Williams V*].
201. *Id.* at 1250 (quoting Lawrence v. Texas, 539 U.S. 558, 590 (Scalia, J., dissenting)).
202. *Id.*
203. *Williams VI*, 478 F.3d 1316 (11th Cir. 2007).
204. *Id.* at 1322-23.
205. *Id.* at 1321 (citing Alphamed, Inc. v. B. Braun Med., Inc., 367 F.3d 1280 (11th Cir. 2004)).

basis for governmental intrusions into the private decisions consenting adults make about sexual intimacy.[206] The Eleventh Circuit completely disregarded the plaintiffs' argument, and rather than looking to *Lawrence* as controlling and binding authority, the court applies the dicta of Scalia's dissent in *Lawrence* as controlling.[207]

The influence of Scalia's dissent in *Lawrence* on the Eleventh Circuit is evident not only in *Williams v. Morgan* but also in the Eleventh Circuit's analysis in the case of *Lofton v. Secretary of the Department of Children and Family Services*, which predates both the *Williams IV* and *VI* decisions.[208] In this case, the Eleventh Circuit narrowly framed the holding in *Lawrence* as merely the "substantive due process [that] does not permit a state to impose a criminal prohibition on private consensual homosexual conduct."[209] In *Lofton*, the court upheld a Florida law prohibiting homosexual people from adopting children. As part of its rationale, the court wrote that from "Plato to Simone de Beauvoir," the marital structure endures as the superior model according to "the accumulated wisdom of several millennia of human experience."[210] Therefore, "the state's interest in promoting and preserving public morality remains a sufficient rational basis."[211] The court's insistence on the roles of "mother" and "father" and the marital unit shows a natural law philosophy of women as merely procreators and mothers in which sex is threatening and must be controlled.

The Eleventh Circuit's reliance in *Williams VI* on its previous holding in *Lofton* and on Scalia's dissent in *Lawrence* as well as its insistence that morality is still a legitimate state interest shows a disregard not just of the Supreme Court's holding in *Lawrence* but of the line of sexual freedom cases from *Griswold* that have clearly articulated a constitutional right to private sexual intimacy. Even if the Eleventh Circuit wanted to assert a *Glucksberg* approach to analyzing the issue, it still very easily could have analogized sex toys to contraceptives and found a protected fundamental right. Yet, the Eleventh Circuit made the same fundamental analytical mistake in failing to recognize the constitutional right to intimacy that

206. *Williams VI*, 478 F.3d at 1321.

207. *Id.* at 1320 (The Eleventh Circuit cites the district court decision in *Williams V* that morality remains a legitimate state interest and their quotation of Justice Scalia's dissent in *Lawrence* at 1249-50, where Justice Scalia opines that "[t]o hold that public morality can never serve as a rational basis for legislation after *Lawrence* would cause a 'massive disruption of the social order,' one this court is not willing to set into motion."). The Eleventh Circuit then upholds the lower court's decision stating, "preserving public morality remains a sufficient rational basis." *Id.* at 1323.

208. Lofton v. Sec'y of the Dep't of Children and Family Servs., 358 F.3d 804, 815 (11th Cir. 2004).

209. *Id.* at 815-16.

210. *Id.* at 820.

211. *Williams VI*, 478 F.3d at 1322-23.

Yorko v. State had made prior to the Supreme Court's ruling in *Lawrence*. The Eleventh Circuit disregarded not only the holding of *Lawrence* but also the precedents of *Griswold*, *Eisenstadt*, *Roe*, and *Carey* by describing the fundamental rights conferred in these cases as being merely "closely related to sexual intimacy."[212] Given that these cases address issues of contraception, sodomy, and abortion—issues that the Supreme Court has identified as "intimate choices" directly correlated to sexual intimacy as well as bodily autonomy—it is unprecedented for the Eleventh Circuit to categorize the right merely as "*closely related* to sexual intimacy."[213] Rather, the Eleventh Circuit is refusing to acknowledge the constitutional rights of any identities or sexualities outside of heteronormative procreative and/or pathologized roles that can be regulated.

The court argues that it is able to disregard case law from *Griswold* through *Lawrence* by using the *Glucksburg* approach of narrowly framing the liberty issue at stake as a purely commercial restriction on the sale of sexual devices.[214] The court rejects the plaintiffs' argument that restrictions on the ability to purchase an item is tantamount to a restriction on being able to use the item and that restricting people from being able to use sexual devices constitutes an unconstitutional intrusion into people's personal and private decisions about their sexual intimacy and autonomy.[215] This directly contradicts the precedents established by the Supreme Court in *Griswold* and *Carey* as well as other state courts who have addressed the issue of sexual devices such as the Colorado court in *People v. Seven Thirty-Five East Colfax, Inc.* Each of these cases have held that limiting who may sell or distribute a certain product (whether contraceptives or sexual devices) limits the ability of individuals to access those products, which therefore places a substantial burden on the right of individuals to assert their constitutional right to use the product.[216] By limiting the issue to the commercial sale of sexual devices, the Eleventh Circuit asserts, "[T]here is nothing 'private' or 'consensual' about the advertising and sale of the dildo."[217] By framing the issue as public and commercial, the court

212. *Williams IV*, 378 F.3d 1232, 1237 (11th Cir. 2004).

213. *Id.*

214. *Williams VI*, 478 F.3d at 1322.

215. *Id.*

216. People *ex rel.* Tooley v. Seven Thirty-Five E. Colfax, Inc., 697 P.2d 348, 368-69 (Colo. 1985) (citing Griswold v. Connecticut, 381 U.S. 479 (1965)); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

217. *Seven Thirty-Five E. Colfax*, 697 P.2d at 368-69; *cf.* Roe v. Wade, 410 U.S. 113 (1973). The court here uses the same line of reasoning as Justice Rehnquist in his dissent in *Roe v. Wade*, in which he asserted, "A transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word." *Roe*, 410 U.S. at 172 (1973) (Rehnquist, J., dissenting). The Court majority in *Roe*, however, disagreed with Rehnquist and found that such a transaction is in fact a constitutionally protected right of privacy.

is able to deny applying *Lawrence*, which they argue is only applicable to private activity.

The Eleventh Circuit looks to the earlier sexual device cases and the definition of sexual devices given by the FDA in order to assert that sexual devices have "medically and psychologically therapeutic uses" and that the medical exemption in the statute is therefore sufficient to sustain it. Yet by allowing the sale of sexual devices for solely medical purposes, the court continues the legacy of criminalizing and pathologizing all people who use sexual devices. The Eleventh Circuit completely disregarded the testimony of people who actually used sexual devices and accused the expert witness, Dr. Maines, of having an "agenda" and being "biased" in her affidavit, in which she had highlighted the "lost autonomy of women in their sexual and reproductive health."[218] The Eleventh Circuit in *Williams VI* does not even acknowledge that the Comstock Laws, which it had cited in its prior opinion as indicative of a history of regulations against sexual devices, had applied almost exclusively to contraceptives, abortion, and pornography and not sexual devices.[219] In fact, if it had acknowledged this, it would have been potentially fatal to the court's narrow analysis because acknowledging that regulation of contraceptives is analogous to regulation of sexual devices forces the court to acknowledge the fundamental right to use contraceptives conferred by *Griswold* and *Eisenstadt*.

The Eleventh Circuit's articulation of the importance of the heterosexual family in *Lofton* and their blatant disregard for women's sexual experiences in the *Williams* cases, except when being medically treated, reassert the notion of women's sexuality as being legitimate only when confined to the roles of a procreative mother, criminal, or a hysteric in need of medical care.

D. *Liberating Sexuality from the Commercial Regulation of Sexual Devices:* Reliable Consultants, Inc. v. Earle.

In the Fifth Circuit's ruling in *Reliable Consultants, Inc. v. Earle*, the court overturned a Texas obscenity statute that criminalized the selling, advertising, giving, or lending of a device designed or marketed for sexual stimulation as impermissibly burdening customers' substantive due process right to engage in private intimate conduct free from governmental intrusion.[220] The court looked to *Lawrence* as the controlling authority, and, similar to *Lawrence*, it refrained from stating whether a fundamental right to sexual privacy exists. Rather, the court articulated a liberty right of people to be free from governmental intrusion regarding "the most private

218. Borgmann, *supra* note 126, at 203.
219. *Id.* at 195.
220. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 748 (5th Cir. 2008).

human conduct, sexual behavior."[221] The court also reaffirmed the holding from *Lawrence* that public morality is an insufficient justification for a law that regulates private sexual intimacy.[222]

Since 2003, circuit courts have split on how they articulate the holding of *Lawrence*, but they have all consistently applied rational basis in analyzing matters of non-commercial consensual sexual activity of adults.[223] A narrow and strict reading of *Lawrence* as having merely overturned *Bowers* and only invalidating statutes that clearly criminalize private, consensual, adult, noncommercial sex is to effectively render not only *Lawrence* but the jurisprudence upon which *Lawrence* was built moot. Scalia's dissent in *Lawrence*, in attacking the Court's overturning of *Bowers*, practically invites anti-choice activists to try to overturn *Roe*.[224] It is in this context, with the future of sexual rights ever more tenuous in an exceedingly conservative Court, that the Fifth Circuit's ruling in *Reliable Consultants* is so valuable.[225]

The plaintiffs in the case consisted of two commercial vendors of sexual devices, Reliable Consultants, Inc., which operated retail stores in Texas, and PHE, Inc., which sells sexual devices by internet and mail.[226] The plaintiffs filed a declaratory action challenging the constitutionality of the statute alleging that it violated their Fourteenth and First Amendment rights to substantive liberty and commercial speech.[227] The district court granted a motion to dismiss the plaintiffs' suit, holding that there existed no

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221. *Id.* at 743.

222. *Id.* at 745.

223. *See, e.g.,* Sylvester v. Fogley, 465 F.3d 851, 857 (8th Cir. 2006). In *Sylvester*, the court stated that *Lawrence* confers a liberty interest which "'protects the person from unwarranted government intrusions into . . . private places. In our tradition the State is not omnipresent in the home. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 562 (2003)). However, the court held that "the exact contours of that right are unknown and identifying the precise standard of review to be applied to the government's interference with that right can be formidable," and they therefore applied rational basis in analyzing whether an investigation of an officer's sexual relations with a crime victim violated the officer's privacy rights. *Id.* at 857-58. *See also* Muth v. Frank, 412 F.3d 808, 817-18 (7th Cir. 2005) (The Court described the liberty interest protected by *Lawrence* narrowly as merely that "states could not enact laws that criminalized homosexual sodomy between consenting adults" and that "no fundamental right of adults to engage in all forms of private consensual sexual conduct" existed and therefore applied rational basis in analyzing an incest statute.).

224. *Lawrence*, 539 U.S. at 587.

225. *See* Tom Curry, *Roberts, Alito Help Define New Supreme Court: Frustrated on Other Fronts, Bush Can Claim Some Success on the High Court*, MSNBC.COM, June 18, 2007, http://www.msnbc.msn.com/id/19244921/ (last visited Dec. 8, 2008) (President Bush's appointments of Justices Alito and Roberts "have bolstered the conservative wing of the Court.").

226. *Reliable Consultants*, 517 F.3d 738, 741-42 (5th Cir. 2008).

227. *Id.* at 742.

constitutionally protected right to publicly promote obscene devices.[228] The plaintiffs appealed the district court's dismissal, and the Fifth Circuit accepted review, finding that the plaintiffs had pleaded "enough facts to state a claim of relief that is plausible on its face."[229]

In considering the liberty right at stake, the State argued that the plaintiffs were claiming "the right to stimulate one's genitals for non-medical purposes unrelated to procreation or outside of an interpersonal relationship."[230] The court rejected the State's articulation of the right at stake as too narrow and goes further in stating that the Eleventh Circuit also inappropriately identified the issue in the *Williams* cases when it narrowly described the right as the right to use sex toys.[231] The Fifth Circuit asserts the importance of framing the issue in a manner that encompasses the breadth of what is at stake. In *Bowers* and in the *Williams* cases, the Supreme Court and the Eleventh Circuit, respectively, focused upon the plaintiffs' acts as the right at issue (sodomy in *Bowers* and the right to sell sex toys in *Williams*). By focusing on the act denies and demeans the plaintiffs by not taking into account the full repercussions of the liberty interest at stake. Framing the liberty right as merely the right to promote sexual devices, as done by the *Williams* cases and the earlier sexual device cases such as *Hughes* and *Brenan*, the courts pathologize and criminalize anyone who sells or uses a sex toy without a bona fide medical purpose. Articulating a full liberty right allows people who sell and/or use sexual devices to more fully articulate how the states' action is unconstitutionally violating their liberty or equal protection rights.

In *Reliable Consultants*, the court takes a broader approach not only in articulating the liberty issue but also in recognizing that there are a multiplicity of reasons that people use sex toys and that whether the person is married or single or using sex toys for therapeutic needs or out of a basic sexual desire that use of sex toys in all such circumstances are constitutionally protected. The court cites Danielle Lindemann's article, *Pathology Full Circle: A History of Anti-vibrator Legislation in the United States,*[232] in which the author traces how sexual device cases have legitimated the use of sexual devices only when there is a medical benefit, which effectively criminalizes or pathologizes all women who use sexual devices.[233] In the article cited by the Fifth Circuit, Lindemann argues that sexual gratification in and of itself is a valid legal objective that should be

228. *Id.*
229. *Id.*
230. *Id.* at 743.
231. *Reliable Consultants*, 517 F. 3d at 742.
232. Lindemann, *supra* note 50, at 330.
233. *Reliable Consultants*, 517 F.3d at 742 n.16 (citing Lindemann, *supra* note 50, at 327-30, 336-41).

argued in such cases.[234] While the court mentions medical and marital uses of sexual devices, it does not use these reasons to justifying the statute. Rather, the court advocates a constitutional right to sexual intimacy and autonomy in overturning the statute.

In *Reliable* Consultants, the State began its case by arguing that the plaintiffs, as vendors of sexual devices, did not have standing to bring this suit. The court rejected this argument and noted Supreme Court precedent holding that providers of a product may bring suit when a regulation on commercial activities unconstitutionally burdens the provider's clients, citing in particular *Griswold* and *Carey*, and that pharmacists had standing to bring the suit to advocating for the right to distribute contraceptives.[235] The Fifth Circuit mentions the line of sexual freedom cases several times in its opinion, particularly *Griswold* and *Carey*.[236] By acknowledging the applicability of these cases to the use of sex toys, the court does not explicitly say that it is identifying a fundamental right to be free from governmental intrusion in adult consensual sexual intimacy that is neither public nor commercial, but the analogies to fundamental rights cases infer that the court is leaning that way.

The State also tries to argue that *Lawrence* does not apply because the statute here is not targeting a class of people.[237] The argument is irrelevant, however, since the Supreme Court decided *Lawrence* on due process and not equal protection grounds.[238]

The State's primary justifications for the statute in *Reliable Consultants* is taken straight from *Williams*, where the Eleventh Circuit had held that "discouraging prurient interest in autonomous sex" is a legitimate state interest.[239] In *Reliable Consultants*, the State asserted that it, too, had a legitimate state interest in "discouraging prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibiting the commercial sale of sex."[240] In marked contrast to the *Williams* court and the other earlier sexual device cases, the Fifth Circuit

234. Lindemann, *supra* note 50, at 344.

235. *Reliable Consultants*, 517 F.3d at 743.

236. *Id.* at 743, 744.

237. *Id.* at 744.

238. *Id.*. *See* Lawrence v. Texas, 539 U. S. 558, 582 (2003) (O'Connor, J., concurring). In Justice O'Connor's concurrence in *Lawrence*, she held the statute unconstitutional under the Equal Protection Clause rather that the Due Process Clause of the Fourteenth Amendment, writing, "This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.*

239. *Reliable Consultants*, 517 F.3d at 738 (citing *Williams VI*, 478 F.3d 1316, 1321-24 (11th Cir. 2007)).

240. *Id.* at 744.

applied *Lawrence*'s holding that morality alone is an insufficient basis to satisfy rational basis and dismissed the State's justification as morality based.[241] While the State also asserts that the regulation protects children and unwilling adults from exposure to sexual devices, the court notes that the regulation is in no way rationally connected to serve this interest.[242] Furthermore, the impact of the regulation on users of sexual devices makes this a clearly private issue of sexual intimacy and not a commercial and/or public issue.[243] Given that the liberty right at issue does not involve public conduct or prostitution and that morality alone is an insufficient legitimate interest, the State's arguments fail.

Reliable Consultants marks a noted contrast from other circuit courts' precedents since *Lawrence.* While the Fifth Circuit does not explicitly hold that there is a fundamental right to sexual liberty and autonomy in consenting adults and individuals, the court does make a marked departure from the narrow analysis applied in the *Williams* cases that have sought to eviscerate due process rights. *Reliable Consultants* establishes a model of how to do a due process analysis for other courts that seem confused as to how to apply *Lawrence.* While far from perfect in its reluctance to recognize a fundamental right, *Reliable Consultants*' abandonment of the *Glucksburg* approach in asserting a much broader impermissible burden standard is promising to the future of substantive due process analysis.

III. The Future of Substantive Due Process and the Commercial Regulation of Sexual Devices

A. Reliable Consultants *and the Issue of Judicial Review*

On August 1, 2008, the Fifth Circuit Court of Appeals denied the Petition for Panel Rehearing En Banc of the court's panel decision on February 12, 2008, in the case of *Reliable Consultants, Inc. v. Earle.*[244] The court was polled at the request of one of the members of the court, with the majority voting to deny en banc review.[245] However, seven judges dissented and found the issue so jurisprudentially pressing that they issued three strongly worded written dissents, all of which noted the circuit split with the Eleventh Circuit in the *Williams* cases.[246]

In Judge Garza's dissent against the Fifth Circuit's denial on the

241. *Id.* at 745.
242. *Id.* at 746.
243. *Id.*
244. Reliable Consultants, Inc. v Earle, 538 F.3d 355, 356 (5th Cir, 2008) (en banc) (denying rehearing and rehearing en banc).
245. *Id* at 356.
246. *Id.* at 360-61, 365.

Petition for Panel Rehearing En Banc, he asserts that that the issue in *Reliable Consultants* is about more than the commercial regulation of sexual devices and is really about the issue of judicial review.[247] The dissent dismisses the court's majority ruling by espousing the mantra that the Supreme Court and the Fifth Circuit are acting as an "activist" court by enumerating rights not explicitly addressed in the Constitution:

> The issue before us is not the choice but rather who chooses. When the judiciary ventures into the legislative realm, as the Court did in *Lawrence* and as the *Reliable* majority has done here, codifying its members' policy preferences and moral judgments as judicially-created rules of constitutional law, the courts forget that "the people, not the courts, established the Constitution; it is a document of self-determination, not judicial interpretation [sic]."[248]

The issue of judicial review is most often attacked when it is applied to cases involving issues of sexual freedom.[249] "The coupling of accusation of 'judicial activism' with 'intent of the Framers' is a hallmark of conservative rhetoric; the reference to 'original intent' is meant to serve as the proper leash on the judiciary."[250] Scalia has particularly taken the position in sexual freedom cases that the Supreme Court has acted beyond its scope, going so far as accusing the Court majority in *Lawrence* of having taken sides in a culture war where the Court has "signed on to the so-called homosexual agenda" in order to "invent" constitutional rights.[251] The dissent accuses the Fifth Circuit of further codifying the so-called homosexual agenda by applying the Supreme Court's *Lawrence* holding in *Reliable Consultants* and therefore treating unenumerated rights as precedent. This is, however, misleading. The Supreme Court in *Lawrence*, as well as the Fifth Circuit in *Reliable Consultants*, was not creating a substantive due process right to sexual intimacy out of thin air but, rather, from a long line of precedential cases from *Griswold* onward. The equality and liberty interests articulated in the Fourteenth Amendment are not meant to be "'time-dated' at the year 1868, when the Amendment was passed."[252]

Those that advocate for judicial restraint argue that issues not explicitly recognized by the framers of the Constitution as protected rights should be left to state legislatures, elected by the people, to decide.[253]

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247. *Id.* at 364 (Garcia, J., dissenting).

248. *Id.* at 364 (quoting Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1115 (5th Cir. 1997) (Garza, J., specially concurring)).

249. Robson, *supra* note 107, at 7.

250. *Id.* at 8.

251. Lawrence v. Texas, 539 U.S. 558, 602-603 (2003) (Scalia, J., dissenting).

252. Robson, *supra* note 107, at 8.

253. *Id.* at 9.

However, many conservative justices and commentators have been inconsistent in their criticism of judicial review.[254] While arguing that the Court should not enshrine constitutional rights as they apply to sexual freedoms, conservatives have routinely applied their own judicial review declaring innumerable federal and state statutes unconstitutional when it serves them ideologically.[255] "Even those who argue against judicial review most stridently and most expressly, including Justice Scalia, are more accurately quarreling with the results in particular cases rather than judicial review generally."[256]

Critics of "judicial activism" have argued that issues not expressly identified by the Constitution, for example abortion, contraceptives, same-sex marriage, sodomy, and sexual devices, should be left to the democratic process of individual states.[257] Justice Scalia has consistently referred to Supreme Court decisions that overturn state laws restricting the rights of women and sexual minorities as an "undemocratic" imposition upon Americans of the will of a favored "elite class from which the Members of this institution are selected."[258] Yet in the 2008 decision in *District of Columbia v. Heller*, Scalia, writing for the majority, articulates a decision that is the essence of judicial activism.[259] Seventh Circuit Judge Richard Posner writes that the *Heller* decision "is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology."[260] Fourth Circuit Judge J. Harvie

254. *Id.* at 11.

255. *See generally* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 320 (1996) (in which Posner's basic definition of an activist court is court "acting contrary to the will of the other branches of government."); Robson, *supra* note 107, at 11-13 (noting that "[d]uring the 1994-2000 terms, Justice Scalia voted to declare unconstitutional federal, state, or local acts twenty-five times," far more than Justices Souter (seventeen), Ginsburg (fourteen), and Breyer (fourteen) and that the Rehnquist Court (1986-2005) "declar[ed] almost twice as many Congressional statutes unconstitutional as the Warren Court, 1954-1969, and . . . [the] Burger Court, 1969-1986").

256. Robson, *supra* note 107, at 11.

257. *Id.* at 9.

258. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

259. Distric of Columbia v. Heller, 128 S. Ct. 2783 (2008). Disregarding two centuries of precedent and the democratic legislative process through which the District of Columbia city council had enacted the Firearms Control Regulations Act of 1975, the Supreme Court held the law as unconstitutionally infringing upon a Second Amendment individual right to possess guns. *Id.* The Second Amendment does not expressly articulate an individual right to possess arms or any right to possess arms for purely private purposes, but the conservative justices of the court had no problem articulating their political preference out of the Second Amendments ambiguous text. Scalia opines, "The enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Id.* at 2822. However, Justice Stevens notes in the dissent that "the right the Court announces was not 'enshrined' in the Second Amendment by the Framers; it is the product of today's law-changing decision." *Id.* at 2846 (Stevens, J., dissenting).

260. Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*,

Wilkinson has written that "*Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts."[261]

All members of the federal judiciary practice judicial activism, yet the accusation that a court is acting in an activist capacity outside of its scope is continuously hurled at judges rendering "liberal" decisions regarding issues of sex and sexuality, just as the Fifth Circuit dissent has hurled this accusation at the three-judge panel who made the controlling decision in *Reliable Consultants*.[262] The Eleventh Circuit and the dissent of the Fifth Circuit posit that the real issue in the commercial regulation of sexual devices is the role of the judiciary and whether or not it is venturing into the legislative realm when asserting sexual privacy as a liberty right.[263] However, the continuous practice of judicial activism by these same critics shows that the accusation of being an activist court is merely a tactic to restrain courts from recognizing a fundamental right to sexual privacy.

B. After Williams *and* Reliable Consultants—*the Supreme Court?*

"Here we go raising the price of dildos again."[264]

The aftermath of the Fifth Circuit's ruling in *Reliable Consultants* has not only led to a circuit split but also a split between the federal and state courts. In July 2008, the Texas Court of Criminal Appeals upheld the conviction of Beatrice Villarreal, a sales clerk at an adult store, for selling a vibrator to an undercover police officer.[265] Despite the Fifth Circuit's

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NEW REPUBLIC, Aug. 27, 2008, *available at* http://www.tnr.com/politics/story.html?id=d2f38db8-3c8a-477e-bd0a-5bd56de0e7c0 (last visited Dec. 8, 2008).

261. J. Harvie Wilkinson III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming 2009), *excerpted in* Adam Liptik, *Rulings on Guns Elicits Rebuke on the Right*, N.Y. TIMES, Oct. 20, 2008, at A15, *available at* http://www.nytimes.com/2008/10/21/washington/21guns.html?scp=1&sq=Rulings%20on%20Guns%20Elicits%20Rebuke%20on%20the%20Right&st=cse.

262. Robson, *supra* note 107, at 13.

263. Reliable Consultants, Inc. v. Earle, 538 F.3d 355, 364 (5th Cir. 2008) (en banc) (Garza, J., dissenting) ("The issue before us is not the choice but rather who chooses. When the judiciary ventures into the legislative realm, as the Court did in *Lawrence* and as the *Reliable* majority has done here, codifying its members' policy preferences and moral judgments as judicially-created rules of constitutional law, the courts forget that "the people, not the courts, established the Constitution; it is a document of self-determination, not judicial interpretation [sic]" (quoting Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1115 (5th Cir.1997) (Garza, J., specially concurring)).

264. Regalado v. State, 872 S.W.2d 7, 11 (Tex. Crim. App. 1994) (Brown, C.J., concurring), *cert. denied*, 513 U.S. 871 (1994). *See also* Villarreal v. Texas, 267 S.W.3d 204, 207 (Tex. App.-13th 2008).

265. *Villarreal*, 267 S.W.3d 204.

ruling in *Reliable Consultants* that sections 43.21 and 43.23 of the Texas Penal Code are unconstitutional, the court in *Villarreal* held that "Fifth Circuit precedent is not binding on Texas courts, and its constitutional pronouncements are highly persuasive at best."[266] While the Texas Criminal Court of Appeals may assert that the Criminal Court's past rulings in *Yorko* and *Regalado* are controlling and that Fifth Circuit decisions are non-binding on Texas state courts,[267] the obscene device laws governing sexual devices have in fact been overturned by the Fifth Circuit's decision in *Reliable Consultants.* Following the Fifth Circuit's denial to rehear *Reliable Consultants* en banc and the decision by the State of Texas to not seek writ of certiorari in the case, the decision of the Fifth Circuit in *Reliable Consultants*, does in fact create binding law in Texas as well the other states under Fifth Circuit jurisprudence, including Louisiana and Mississippi. This leaves Kansas, Colorado, and Alabama as the primary states regulating the sale of sexual devices.

In Alabama, it does not appear as though Sherri Williams will be facing the Eleventh Circuit again anytime soon, as the Supreme Court's denial of writ of certiorari in the case has limited any type of judicial recourse available to her and the other litigants. Following the Supreme Court's decision in 2007, Alabama Attorney General Troy King has sought to lift the federal injunction against enforcement of the state's sexual device laws.[268] Ms. Williams has sought to change the law legislatively by hiring a lobbyist and filing a bill in the Alabama legislature to overturn the laws regulating sexual devices.[269]

The statutes regulating the commercial distribution of sexual devices have already been challenged in both Kansas and Colorado, in *State v. Hughes* and *People v. Seven Thirty-Five East Colfax, Inc.*, respectively. In both cases, the courts accepted that sexual devices had therapeutic medical purposes and that their state statutes impermissibly burdened people's use of such devices for medical reasons. Each state amended the statutes to make medical exceptions for people seeking to buy sexual devices. Given that both Alabama and Texas had similar medical exceptions, it will be interesting to see if the statutes in Colorado and Kansas will be challenged once again as impermissibly burdening people's substantive due process right to sexual privacy. If so, it is possible that the issue of regulating the commercial distribution of sexual devices and the split between the Fifth

266. *Id.* at 208.

267. *Id.* at 207-08.

268. Stephanie Taylor, *Policing Sex Toy Ban is Not Seen as High Priority*, TUSCALOOSA NEWS, Oct. 4, 2007, *available at* http://www.tuscaloosanews.com/article/20071004/NEWS/710040332/1007 (last visited Dec. 8, 2008).

269. *Id.*

and the Eleventh Circuits on the issue could be readdressed by a challenge brought in the Tenth Circuit. However, it does not look likely that the issue of the constitutionality of statutes regulating the commercial sale of sexual devices will be clarified or making its way to the Supreme Court anytime soon.

IV. Conclusion

The issue highlighted by the Fifth and Eleventh Circuit Court split over the commercial regulation of sexual devices is the historical and philosophical divide over the rights of women and sexual minorities to control their own bodies and to sexual privacy free from governmental constraint. "Within the United States and globally, sexual freedom for lesbians, other sexual minorities, and women has been procured both through judicial review and through democratic processes, and both have yielded disappointments"[270] as well as some successes, as evidenced by the Fifth Circuit ruling in *Reliable Consultants*. The commercial regulation of sexual devices illustrates the historical codification and regulation of women and sexual minorities, and how it is that two circuit courts have both been able to cite precedent in garnering opposing outcomes.

From the development of the vibrator as a medical instrument in 1880 until the decision by the Fifth Circuit in *Reliable Consultants* in 2008, statutes and judicial decisions from the Comstock Laws to the *Williams* cases have pathologized users of sexual devices as either criminal or sexually impaired. Women have long sought and organized to reclaim and redefine sexuality away from the limited identities of the Victorian era, such as the hysteric, the procreative mother, and the sexual deviant. Feminists have long asserted the importance of sexual liberty, autonomy, and privacy to women's empowerment. A constitutional right to privacy regarding sexual intimacy and bodily autonomy has been fought for and established in judicial cases from *Griswold* through *Lawrence*. The issue of the commercial regulation of sexual devices is as imperative to sexual freedom as contraception, abortion, and sodomy as it recognizes a right to individual sexual intimacy and not just sexual intimacy within a couple.

The sexual device cases exemplify varying approaches to asserting a constitutional right of sexual intimacy. Advocating the use of sexual devices solely for medical purposes limits women's sexuality as it continues to pathologize it. *Reliable Consultants* is relevant to the struggle for expansive sexual freedom in that it asserts a framework as to how to apply the *Lawrence* holding to substantive due process claims and rejects the limitations of *Glucksberg*'s *Palko* test. *Reliable Consultants* also

270. Robson, *supra* note 107, at 27.

recognizes that many people seek to use sexual devices out of pure sexual desire and that to do so is a legitimate, constitutionally protected right. Given that "judicial review is overwhelmingly implemented by men and bound to conservative precedent constructed by men of previous generations,"[271] it is imperative that, in framing substantive due process legal arguments for the sale and distribution of commercial sexual devices, the history and legal theories of women and sexual minorities be considered and advocated.

271. *Id.* at 26.

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DOMESTIC VIOLENCE LITIGATION IN THE WAKE OF *DESHANEY* AND *CASTLE ROCK*

Lisa Snead*

I. Introduction

In the last two decades, the United States Supreme Court has eviscerated federal remedies available to survivors of domestic violence when police officers refuse to enforce protective orders.[1] *DeShaney v.*

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*. University of Texas School of Law, J.D. 2009; The College of William and Mary, B.A. 2006. Lisa would like to thank her parents and Professor Sarah Buel for their guidance and support.

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1. Throughout this note, the terms "protective order" and "restraining order" will be used interchangeably. Differences between these two orders will depend upon state law. The differences are not significant for purposes of this note as domestic violence survivors should be able to hold state actors liable for failure to enforce court-issued orders, regardless

Winnebago County Department of Social Services[2] (hereinafter "*DeShaney*") has essentially eliminated substantive due process as a viable remedy while *City of Castle Rock v. Gonzales*[3] (hereinafter "*Castle Rock*") has done the same with procedural due process. The remaining equal protection claims are rarely a realistic remedy for survivors as the elements of a prima facie equal protection case require that the plaintiff-survivor prove an actual intent to discriminate.[4]

Survivors of domestic violence need legal remedies in order to encourage police officers to enforce their protective orders. Damages, like the two million dollars awarded to Dina Sorichetti and her mother when the New York Police Department (NYPD) failed to enforce their protective order,[5] can (and will) motivate police departments to clarify and update their domestic violence policies. In the wake of this case, the NYPD re-wrote its arrest policies to include mandatory arrests in domestic violence cases.[6] As Professor Kristian Miccio noted, the change was not the result of lobbying, guilt, or good will; instead, the change was a direct result of the police department's liability for the two million dollar damage award.[7] If police officers learn there are no legal consequences for failing to enforce protective orders, there will be little incentive for officers to enforce orders, particularly if "mandatory" no longer means "mandatory."[8] If, on the other hand, survivors are able to hold state actors accountable for their actions, then police officers will be more willing to enforce protection orders rather than risk being sued.[9]

State courts must recognize remedies for survivors in order to provide victims with recourse now. Survivors in many states still need legislation that will provide them with the means to ensure police officers enforce

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of what states call them.

In addition, female nouns and pronouns are generally used when talking about survivors while male nouns are used when discussing batterers as well as police officers. This usage is not meant to diminish or ignore the experiences of male and/or same-sex domestic violence victims or female police officers and is merely done for greater readability.

2. 489 U.S. 189 (1989).

3. 545 U.S. 748 (2005).

4. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977).

5. Sorichetti v. City of New York, 482 N.E.2d 70, 72 (N.Y. 1985).

6. N.Y. CRIM. PROC. § 140.10 (McKinney 1999), *cited in* G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 170-71 (2000).

7. Miccio, *supra* note 6.

8. In addition to denying Jessica Gonzales's claim for relief under the Due Process Clause, the United States Supreme Court noted that "mandatory" does not really mean "mandatory" in the context of domestic violence arrest policies. *Castle Rock*, 545 U.S. at 760.

9. Miccio, *supra* note 6.

domestic violence protective orders. At the same time, domestic violence victims cannot wait for legislators to recognize the need for remedies and then begin the long process of drafting and passing legislation.[10] Until state legislators codify remedies, courts, particularly state courts, must find alternative means to ensure domestic violence victims are not left without remedies when their protective orders are not enforced. The state-created danger and special relationship doctrines are both viable legal doctrines that can provide survivors with recourse when municipalities and individual police officers fail to enforce protective orders.

II. Current Domestic Violence Remedies Are Inadequate for the Vast Majority of Domestic Violence Victims

Where state actors have investigated allegations of abuse and returned a child to a perpetrator of violence, substantive due process does not provide that child with an entitlement to state protection, even when state actors are aware of the dangers posed to the victim by the third party.[11] In *DeShaney*, the citizen who was not entitled to state protection was four year-old Joshua DeShaney, whose father abused him so severely that he is now in a permanent, semi-vegetative state.[12] The Winnebago County Department of Social Services investigated reports of child abuse committed against Joshua by his father for over two years.[13] Despite multiple reports of abuse and medical evidence of Joshua's repeated injuries, Social Services allowed the young boy to remain in the care of his father.[14] In the suit brought on Joshua's behalf against the Department of Social Services, the United States Supreme Court held that the department was not liable for the injuries to Joshua since social workers had not left him in a worse position than before the state's involvement.[15] The Due Process Clause did not require Winnebago County Department of Social Services to protect Joshua from acts of violence committed by his father.[16] In dicta, the Court indicated that state actors still owe a duty of care to

10. For an abbreviated timeline of a bill's passage in the U.S. Senate alone, see U.S. Senate, Legislative Process: How a Senate Bill Becomes a Law, http://www.senate.gov/reference/resources/pdf/legprocessflowchart.pdf (last visited Dec. 20, 2007).

11. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

12. *Id.* at 192-93.

13. *Id.*

14. *Id.*

15. *Id.* at 201.

16. *Id.* The Court went on to note that if Joshua were removed from his home, placed in foster care, and then abused, the state might be liable. *Id.* As long as Joshua was abused at home, he was in no worse a position than before, and Social Services was immune from liability. *Id.*

victims of third-party violence if a special relationship exists between the victim and the state actor.[17] In this instance, the state would owe a duty to Joshua under the special relationship doctrine if he had still been in the physical custody of the state.[18]

Almost two decades after its decision in *DeShaney*, the United States Supreme Court held that procedural due process likewise does not provide a victim with an entitlement to state protection, even when the victim has a valid restraining order.[19] In this case, the citizens who were not entitled to protection were Jessica Gonzales and her three daughters, Rebecca, Katheryn, and Leslie. On June 22, 1999, Gonzales's ex-husband abducted his daughters in direct violation of a restraining order and, after spending the evening with them at an amusement park, murdered the three little girls.[20] During this almost eight-hour ordeal, Gonzales called the police repeatedly, telling them she had a restraining order and that her husband had the girls in a nearby amusement park in clear violation of the order.[21] The Castle Rock police officers on duty did not contact security at the amusement park or issue any kind of alert for the missing girls; instead, they repeatedly told Jessica Gonzales that they could do nothing about the restraining order and that she should wait a few more hours to see if her ex-husband brought the girls home.[22] The night ended when Gonzales's ex-husband drove to the Castle Rock Police Department and opened fire.[23] After the police killed him with return fire, they found the dead bodies of Rebecca, Katheryn, and Leslie Gonzales in his truck.[24] Jessica Gonzales sued the police officers and the City of Castle Rock for failure to enforce her restraining order, alleging procedural due process and 42 U.S.C. § 1983 violations. Gonzales claimed that Title 18, Article 6, Section 803.5 of the Colorado Revised Code required the officers to enforce her protective order and that the officers violated her civil rights when they refused to do so.[25] The United States Supreme Court ultimately disagreed with Gonzales and held that victims of domestic violence do not have a property interest in

17. *Id.* at 199-200.
18. *Id.*
19. Town of Castle Rock v. Gonzales, 545 U.S. 748, 764 (2005).
20. *Id.* at 753-54.
21. *Id.*
22. *Id.*; Gonzales v. City of Castle Rock, 366 F.3d 1093, 1097-98 (10th Cir. 2004).
23. *Castle Rock*, 545 U.S. at 754 (2005).
24. *Id.*
25. The language printed on the back of the restraining order, pursuant to title 18, article 6, section 803.5(3) of the Colorado Revised Statutes, stated, "A peace officer *shall* use every reasonable means to enforce a restraining order. (b) A peace officer *shall* arrest, or . . . seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that: (I) The restrained person has violated or attempted to violate any provision of a restraining order," *cited in Castle Rock*, 545 U.S. at 759 (emphasis added).

having their protective orders enforced,[26] even when the legislature has mandated arrest.[27]

In a limited number of cases, domestic violence survivors have successfully litigated equal protection claims under the Fifth and Fourteenth Amendments; however, these claims are inadequate remedies for most domestic violence survivors. In order to make a prima facie case for an equal protection violation, a survivor of domestic violence must establish discriminatory purpose or intent; it is not enough to demonstrate that there is a disproportionate effect of a policy.[28] A survivor must therefore point to specific facts beyond her own experience that show a policy or custom to provide less protection to domestic violence victims than to victims of similar crimes.[29] In addition to proving there is a discriminatory policy, the victim must also provide evidence that "discrimination was the motivating factor" behind the policy.[30]

In *Watson v. City of Kansas City, Kansas*, the Tenth Circuit found that police officers violated Nancy Watson's equal protection rights only after she presented extensive evidence about police officer training and statistics that demonstrated that domestic violence crimes were systematically treated differently than other similar assault crimes in Kansas City.[31] Similarly, the domestic violence survivor in *Thurman v. City of Torrington* provided evidence gathered over an eight-month period to demonstrate that the city systematically provided domestic violence victims with inadequate protection.[32] These cases are the exception rather than the rule as most victims will not have sufficient evidence to prove that there is an official custom or policy to discriminate against domestic violence victims, much less prove that the intent to discriminate was the motivating factor behind implementing the policy. While lawyers whose clients met the exacting prima facie requirements of an equal protection claim should use this remedy, equal protection is, in general, too difficult to prove for the vast majority of victims.

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26. *Castle Rock*, 545 U.S. at 764.

27. Respondent's Brief on the Merits at 20, Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (No. 04-278) (citing Melody K. Fuller & Janet L. Stansberry, *1994 Legislature Strengthens Domestic Violence Protective Orders*, 23 COLO. LAW. 2327 (1994) and Transcript February 15, 1994, House Judiciary Committee Hearings on House Bill 1253 at 2-5, 40-42).

28. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977).

29. Watson v. City of Kansas City, 857 F.2d 690, 694-95 (10th Cir. 1988).

30. *Id.*

31. *See id.*

32. 595 F. Supp. 1521, 1530 (D. Conn. 1984).

III. The State-Created Danger and Special Relationship Doctrines Provide Courts with a Means to Recognize Remedies for Domestic Violence Victims

The "no duty" rule, whereby police officers do not have a general duty to protect individual members of the public from acts of violence committed by third parties,[33] prevents domestic violence survivors from recovering damages when police officers fail to enforce their protective orders. In suing their respective municipalities, both Joshua DeShaney and Jessica Gonzales were attempting to create exceptions to the "no duty" rule. If they had been successful, then state actors could be liable for harms caused by third parties if the actors failed to act consistently with the demands of the Due Process Clause. Unless an exception to the "no duty" rule exists, state actors are essentially immune to suits.[34]

The state-created danger doctrine and the special relationship doctrine remain viable exceptions to the general "no duty" rule. Many courts recognize at least one of the doctrines and apply them in other areas of the law.[35] While neither doctrine as currently applied in domestic violence cases is an ideal solution, both doctrines are promising remedies for survivors. Courts must be willing to adopt these doctrines and apply them within the specific context of domestic violence litigation. Doing so can create recourse for domestic violence victims whose protective orders are not enforced by state actors.

A. The State-Created Danger Doctrine

Under the state-created danger doctrine, state actors can be liable for harm caused by their affirmative acts if they place a victim in a more dangerous position.[36] Under this doctrine, police officers can be liable for

33. *See, e.g.*, Mastroianni v. County of Suffolk, 691 N.E.2d 613, 615-16 (N.Y. 1997); Cockerham-Ellerbee v. Town of Jonesville, 626 S.E.2d 685, 687-88 (N.C. 2006); Kane v. Lamothe, 936 A.2d 1303, 1307-08 (Vt. 2007).

34. *Kane*, 936 A.2d, 1306-07.

35. *See, e.g.*, Penilla v. City of Huntington Park, 115 F.3d 707 (9th Cir. 1997) (holding that police officers could be liable under the state-created danger doctrine when they responded first to the scene of a medical emergency, cancelled medics, broke into the home, moved the obviously ill person inside the house, locked the door, and left); Kneipp v. Tedder, 95 F.3d 1199 (3rd Cir. 1996) (holding that appellants had stated a viable claim under the state-created danger doctrine when a police officer allowed an obviously intoxicated woman to go home unattended after implying that he would look after her); *but see,* Braswell v. Braswell, 410 S.E.2d 897 (N.C. 1991) (demonstrating a willingness to adopt the special relationship exception to the "no duty" rule, but holding that the promises made to the victim were insufficient to trigger the application of the exception to her case.)

36. Bowers v. Devito, 686 F.2d 616, 618 (7th Cir. 1982) (comparing state actors who put a man in a position of danger from third parties to tortfeasors who throw a person into a

refusing to enforce protective orders if this failure to enforce places the victim in greater danger than she faced before. The elements of the exception vary slightly from state to state and circuit to circuit, but in general, the court must find that a relationship existed such that the survivor was a foreseeable victim of the state actor's actions and that the state actor affirmatively used his or her authority in a way that rendered the citizen more vulnerable to the danger.[37] Many courts have added the requirement that the actions be "shocking to the conscience."[38]

Victims of domestic violence have historically used the state-created danger doctrine with limited success. *Burella v. City of Philadelphia*, decided by the Third Circuit in 2007, is demonstrative of typical problems facing domestic violence victims who rely on this doctrine. In January 1999, a veteran police officer seriously injured his wife and then committed suicide; the officer's wife, Jill Burella, had endured years of physical and emotional abuse and had reported many of these instances of abuse to the police.[39] In the days before the final violent episode, she had repeatedly contacted the police because her husband had continued to threaten her after she obtained protection orders.[40] The Third Circuit held that Jill Burella had not articulated a valid constitutional claim, finding that the Philadelphia Police did not create a danger that would give rise to a duty exception under *DeShaney* and *Castle Rock*.[41] As such, the officers were entitled to immunity for their actions.[42] The Third Circuit's articulation of the state-created danger doctrine required Jill Burella to prove four elements: 1) the harm was foreseeable and direct, 2) the state actor acted "with a degree of culpability that shocks the conscience," 3) a relationship existed between herself and the police department such that she was a foreseeable victim of the state actor's acts, and 4) that the state actor "affirmatively used his or her authority in such a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all."[43]

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snake pit).

37. This articulation of the requirements is an amalgam of the common articulations of this exception. Specific state and circuit articulations of the doctrine appear in discussions of cases. *See, e.g., infra* notes 38, 52.

38. Burella v. City of Philadelphia, 501 F.3d 134, 147 (3d Cir. 2007); *see also* May v. Franklin County Bd. of Comm'rs, 59 F. App'x. 786, 794 (6th Cir. 2003); Forrester v. Bass, 397 F.3d 1047, 1058 (8th Cir. 2005).

39. *Burella*, 501 F.3d at 136-38.

40. *Id.*

41. *Id.* at 136. While this case concerns federal law, Jill Burella could have sought relief in state court under the same state-created danger doctrine. The problems faced by Jill Burella in getting the Third Circuit to recognize her claim are the same faced by victims seeking redress in state courts.

42. *Id.* at 150.

43. *Id.* at 147.

The two elements of the state-created danger exception that currently stand in the way of domestic violence victims using the doctrine as a realistic remedy are the affirmative act and "shocking to the conscience" requirements. Rather than abandoning this doctrine because of these two elements, lawyers should argue for minor changes in the way courts define these requirements as applied to domestic violence cases. If courts are willing to consider "affirmative acts" within the specific context of domestic violence and to find that deliberate indifference to a known or obvious danger is "shocking to the conscience," then the state-created danger doctrine is still a viable remedy for survivors whose protective orders are not enforced.

1. Affirmative Failure to Act

The courts' interpretation of the affirmative action element prevents survivors from using this doctrine because police officers' failing to respond or choosing not to enforce protective orders are seen as negative, rather than affirmative, acts.[44] Nearly every police "act" or "commission" can be re-characterized as a failure to act or an "omission"—*e.g.*, allowing a batterer to return home contrary to a mandatory arrest law becomes a failure to arrest. Likewise, choosing not to alert amusement park security or Denver police that Simon Gonzales had abducted the three girls can be re-characterized as merely not making a telephone call. An act sufficiently "affirmative" to satisfy this element must be one that "limit[s] in some way the liberty of a citizen to act on his [or her] own behalf."[45]

Characterizing police failures to enforce protective orders as negative acts not only mischaracterizes such acts, but also ignores the dynamics of domestic violence. Separation violence after victims leave their batterers and increased acts of violence after victims receive protective orders are well-documented phenomena.[46] At the same time, protective orders work in most cases. According to San Diego City Attorney Casey Gwinn, only

44. *Id. See also* Gonzales v. City of Castle Rock, 2001 U.S. Dist. LEXIS 26018 at *11 (D. Colo. 2001) (quoting Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993)).

45. *Gonzales*, 2001 U.S. Dist. LEXIS at *11 (quoting *Reed*, 986 F.2d at 1125).

46. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE L.J. & FEMINISM 3, 11 (1999) (citing Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH L. REV. 1, 65-71 (1991) and Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 274 & nn.12-13 (1995)); Caitlin E. Borgman, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. REV. 1280, 1308 (1990). *See also* Adele Harrell & Barbara Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *reprinted in* LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS 49, *supra*, at 50 (noting that abuse after receiving a protective order is even higher for women who have custody of children).

seventeen percent of restraining-order applications result in a 911 call.[47] Along the same lines, a recent study in the *Journal of the American Medical Association* noted an eighty percent reduction in police-reported physical violence in the year after domestic violence survivors obtained permanent protective orders.[48] Failure to enforce protective orders, however, will only serve to reverse these statistics. Several domestic violence organizations noted in their joint amicus brief for Jessica Gonzales that failure to enforce domestic violence protective orders will result in increased separation violence as batterers learn that the police will not enforce these slips of paper.[49] Likewise, the number of women seeking protective orders will decrease as women learn that police will not enforce them and that they can trigger increased separation violence.[50] Inducing a woman to rely on her protective order and then failing to enforce it thus directly limits the abilities of a domestic violence victim to act on her own behalf to find protection for herself and her children.[51]

In light of the considerations above, the 2006 case *Kennedy v. City of Ridgefield* (hereinafter "*Kennedy*") provides a useful model for lawyers seeking remedies for survivors of domestic violence.[52] In this case, a mother, Mrs. Kennedy, reported the rape of her nine-year-old daughter at the hands of a neighborhood boy and specifically requested that the police inform her before they approached the boy since he was known to be particularly violent.[53] Despite assuring Mrs. Kennedy that the police would talk to her before informing the boy's family, an officer approached the boy's mother first and informed her of the pending charges.[54] The officer

47. Mark Sauer, *Paper Weight; In Most Abuse Cases, Simple Restraining Orders have a Positive Impact, but Sometimes They Trigger Violent Rage*, SAN DIEGO UNION-TRIB., Jan. 18, 2004, at E1.

48. Victoria Holt et. al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 J. AM. MED. ASS'N 589, 593 (2002).

49. Brief Amici Curiae of the National Network to End Domestic Violence, et. al, in Support of Respondent, at *5-6, Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (No. 04-278).

50. *Id.*

51. OFFICER OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME BULLETIN: LEGAL SERIES BULLETIN #4 (2002), *available at* http://www.ojp.gov/ovc/publications/bulletins/legalseries/bulletin4/welcome.html (last visited Dec. 20, 2007). The economic impact of domestic violence is particularly relevant here as most victims who return to their batterers cite financial concerns as one of the main reasons (if not the main reason) they return. *See* Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A. Why Abuse Victims Stay*, 28 COLO. LAW. 19, 21 (1999). Thus, even for victims from higher socio-economic classes, finding money for private security or other protection alternatives can be daunting. For victims from lower socio-economic classes, finding alternative means of protection may be impossible.

52. 439 F.3d 1055 (9th Cir. 2006).

53. *Id.* at 1057, 1058.

54. *Id.* at 1058.

then informed Mrs. Kennedy that he had told the boy's family.[55] He assured Mrs. Kennedy that the police would patrol around both houses that night.[56] Early the next morning, the boy broke into the house, killed Mr. Kennedy, and severely wounded Mrs. Kennedy.[57] The Ninth Circuit held that assuring Mrs. Kennedy that police would contact her first and would patrol the area were sufficiently affirmative acts under the state-created danger doctrine. The Court emphasized that the acts of the officer "unreasonably created a false sense of security" that made the Kennedys more vulnerable to the danger created by the officer informing the boy's mother of the pending charges.[58] Applying the Ninth Circuit's reasoning in *Kennedy* to domestic violence cases, state actors thus act affirmatively to create danger when they inform a batterer that he has a protective order against him (by serving him) and then create a false sense of security in the victim by allowing her to think her protective order will be enforced.

When evaluating police refusal to enforce protective orders, courts must examine domestic violence cases with an awareness of the dynamics of abusive relationships as well as the financial (and other) constraints placed on victims. Courts must recognize that issuing protective orders and then choosing not to enforce them are not merely failures to act, but instead are affirmative actions that lull victims into thinking they are safe. These refusals to honor arrest provisions in protective orders remove the ability of a victim to provide for her own protection. If courts are willing to apply *Kennedy*-esque reasoning to domestic violence cases, the state-created danger doctrine can become a viable remedy for domestic violence survivors.

2. Deliberate Indifference is "Shocking to the Conscience"

Courts that require the affirmative actions of the state actor to "shock the conscience" place an unnecessary hurdle in the way of domestic violence victims seeking to use the state-created danger doctrine, since not much seems to "shock the conscience" of the courts. For example, the Sixth Circuit was not shocked when police officers responding to several 911 calls in which the victim was screaming and the batterer could be heard inside the house, knocked on a door, looked in a window, and left, doing nothing more.[59] The batterer was restraining the victim inside the house during the officers' visit and subsequently murdered her.[60] Perhaps more

55. *Id.*
56. *Id.*
57. *Id.* at 1057-58.
58. *Id.* at 1059, 1063.
59. May v. Franklin County Bd. of Comm'rs, 59 F. App'x. 786, 788 (6th Cir. 2003).
60. *Id.* at 789.

"shocking," the Eighth Circuit was not shocked in 2005 when social services failed to intervene or even investigate after repeatedly receiving reports that a mother and her live-in partner were torturing and starving her five young children.[61]

The district court that first heard Jessica Gonzales's case is a paradigm for many of the courts that use "shocks the conscience" as an element of the state-created danger doctrine in domestic violence cases. In order to find that an act "shocks the conscience," the court stated that the act must show "a degree of outrageousness and magnitude of potential or actual harm that is truly conscience shocking."[62] In expounding on their illuminating statement that something that "shocks the conscience" must be "truly conscience shocking," the court stated that meeting this standard requires more than mere "intentionally or recklessly causing injury" to the victim by "abusing or misusing government power."[63] If an intentional abuse of government power is insufficient to shock the conscience, it is unclear exactly what, if anything, the district court that articulated this standard would be willing to label "conscience shocking."

The deliberate indifference to a known or obvious danger element, applied by the Ninth Circuit in *Kennedy*, is a better standard for domestic violence cases, and courts should apply this standard in place of "shocking to the conscience."[64] The deliberate indifference standard, rather than relying on subjective conceptions of what is shocking, requires proof that an "actor disregarded a known or obvious consequence of his actions."[65] In *Kennedy*, the Court emphasized the boy's extensive violent history as well

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61. Forrester v. Bass, 397 F.3d 1047, 1050 (8th Cir. 2005). Two of the children died from their treatment.

62. Gonzales v. City of Castle Rock, 2001 U.S. Dist. LEXIS 26018 at *10 (D. Colo. 2001) (quoting Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995)).

63. *Id.*

64. Arguably, a court can keep the "shocking to the conscience" language articulated in its jurisdiction's definition of the state-created danger doctrine. Rather than completely restate the law, courts can simply hold that deliberate indifference to the obvious danger posed to domestic violence victims when their protective orders are not enforced constitutes behavior that is "shocking." Given that the Family Violence Prevention Fund estimated that more than half a million American women were victims of nonfatal violence at the hands of their intimate partners in 2001 and that more than three women are murdered by intimate partners each day, it does not seem a stretch to hold that ignoring the danger posed to victims of domestic violence is "shocking." *See* BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf.

65. Kennedy v. City of Ridgefield, 439 F.3d 1055, 1064 (9th Cir. 2006) (quoting Christie v. Iopa, 176 F.3d 1231, 1240 (9th Cir. 1999)). The Ninth Circuit further pointed out that it had specifically refrained from articulating a mental state standard that used "shocking to the conscience" because such a standard "sheds more heat than light" on the mental state of the actor. *Id.* at 1064-65.

as the officer's notification of the boy's family despite this knowledge.[66] In addition, the Court noted that the officer assured the Kennedys that he would provide surveillance, an act that either did not happen or was woefully inadequate.[67] The Ninth Circuit held that these behaviors were sufficient to prove a deliberate indifference to a known consequence of the officer's actions.[68]

Applying the *Kennedy* standard to the facts of *Castle Rock* demonstrates why deliberate indifference is a preferable element of the state-created danger doctrine. First, the danger to Jessica Gonzales was known or obvious to the police officers given that Jessica Gonzales possessed a permanent restraining order (PRO) with language excluding her ex-husband from the house. Under Colorado law, a victim of domestic violence with a PRO can exclude her batterer from the house only if the court issuing the order found that "physical or emotional harm would result if [the batterer] were not excluded from the family home."[69] Gonzales's protective order, which she showed to Castle Rock's police officers, specifically contained the above language which should have indicated to officers responding to her 911 calls that her husband posed a danger to her and her three daughters.[70] In addition, throughout the night, Jessica Gonzales called the police station five times and spoke with officers in person at least twice.[71] After their initial contact with Jessica Gonzales, the police never attempted to enforce the PRO again despite the fact that they knew where her ex-husband and the children were; instead, they told her to simply wait.[72] In light of Colorado's mandatory arrest laws as well as the specific language of Jessica Gonzales's protective order, it is reasonable to conclude that the acts of the Castle Rock police officers were deliberately indifferent to a known danger faced by Jessica, Rebecca, Katheryn, and Leslie Gonzales.

In order to make the state-created danger doctrine a viable remedy in domestic violence cases, state and federal courts must apply the more objective "deliberate indifference" standard instead of relying on their own concepts of what is "shocking to the conscience." Under this test, the inquiry shifts from subjective evaluations of an officer's mental state to 1) whether there was a known or obvious danger and 2) whether the officer's actions demonstrate deliberate indifference to the known or obvious danger.

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66. *Id.* at 1058, 1063.
67. *Id.* at 1065.
68. *Id.*
69. Gonzales v. City of Castle Rock, 366 F.3d 1093, 1096 (10th Cir. 2004) (citing COLO. REV. STAT. § 14-10-108(2)).
70. *Id.* at 1096-97.
71. *Id.* at 1097-98.
72. *Id.*

The deliberate indifference standard, while being easier for victims to meet than "shocking to the conscience," does not remove immunity for most state actors. Merely negligent acts and well-intentioned but misguided acts of state actors will not result in liability, since victims are required to point to specific instances in the record that demonstrate a deliberate indifference to the danger they face.[73] Only the most culpable state actors, the deliberately indifferent, are liable under this conception of the state-created danger doctrine.

B. The Special Relationship Doctrine

Though limited to use in state courts, the special relationship doctrine is another exception to the general no-duty rule that can provide survivors with causes of action against officers who fail to enforce protective orders.[74] The United States Supreme Court's interpretation of the Due Process Clause is not binding on state courts' interpretations of their own constitutions; therefore, courts are free to recognize a special relationship exception where the victim was not in actual physical custody of a state actor.[75] The special relationship doctrine articulated by New York state courts provides an exception to the general no-duty rule by imposing a duty to act on state actors who 1) have assumed an affirmative duty to act either by promises or actions, 2) know that inaction on their part can lead to harm, and 3) have had direct contact with the victim; in addition, New York requires 4) that the victim's reliance on the actor's affirmative undertaking be "justifiable."[76] As discussed below, this fourth requirement is problematic as applied in domestic violence cases. At the same time, New York's articulation of the doctrine provides other courts with a starting point for recognizing special relationships.

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73. *See, e.g.,* Kennedy v. City of Ridgefield, 439 F.3d 1055, 1064-65 (9th Cir. 2006) (emphasizing that Mrs. Kennedy pointed to individual assurances and acts on the part of the officer to articulate her state-created danger exception).

74. After *DeShaney*, the special relationship doctrine cannot be used in due process litigation in federal courts as an exception to the no-duty rule unless the state had the victim in actual physical custody at the time of the injury. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199 (1989).

75. *See id.* at 202 (stating that states are free to impose duties and provide protection through their courts and legislatures); Town of Castle Rock v. Gonzales, 545 U.S. 748, 768-69 (2005) (noting that Colorado was free to enact a system that could hold police departments financially liable for crimes despite the fact that the Framers had not intended to do so when they enacted the Fourteenth Amendment).

76. Mastroianni v. County of Suffolk, 691 N.E.2d 613, 616 (N.Y. 1997) (citing Cuffy v. City of New York, 505 N.E.2d 937, 940 (N.Y. 1987)). *See also* Sorichetti v. City of New York, 482 N.E.2d 70, 74-75 (N.Y. 1985) (noting that the special relationship doctrine is an exception to the general rule that police officers do not owe citizens a duty of protection from violent acts of third parties).

1. Protection Orders, Assuming a Duty, and Knowledge that Inaction Can Lead to Harm

The special relationship doctrine as articulated by the New York courts holds promise for victims of domestic violence because possession of a protection order immediately satisfies the first two elements of the relationship. In New York, orders of protection "shall constitute authority" for officers "to arrest a person charged with violating the terms of such order of protection."[77] In *Cuffy v. City of New York*, the Court noted that the order represented a legislative and judicial determination that the holder was entitled to a certain degree of protection from a specific individual.[78] The court's issuance of a protective order therefore imposes an affirmative duty to act on police officers responsible for enforcing the protective order. Once a victim presents a valid order of protection, an officer is bound to investigate and take "appropriate action."[79] Likewise, the protection order is "presumptive evidence" that the court has already found that the person named on the order is dangerous.[80] Once a victim shows an officer her protection order, he immediately knows, or should know, that inaction in the face of threats by the person named on the order will lead to harm.[81]

2. Direct Contact Between Victims and State Actors

The direct contact element of the special relationship exception will likewise be a simple element for most survivors to prove, particularly in light of the fact that New York courts use a "flexible approach" to the element when a victim has a protective order. It is important to note that a protective order alone does not satisfy this element; however, the courts do take such orders into account.[82] The court in *Mastroianni v. County of Suffolk*, for example, found that the police officers responding to a 911 call and watching the victim move her furniture back into the house for over an hour constituted direct contact.[83] In *Mastroianni*, the officers' response to the 911 call was, in fact, the only contact the officers had with the victim as she had been murdered by her batterer the next time they saw her.[84]

Other state courts evaluating the direct contact element should adopt a

77. N.Y. FAM. CT. ACT § 168 (McKinney 1981), *cited in Sorichetti*, 482 N.E.2d at 75 and *Mastroianni*, 691 N.E.2d at 616.

78. *Cuffy*, 505 N.E.2d at 940, *quoted in Mastroianni*, 691 N.E.2d at 616.

79. *Sorichetti*, 482 N.E.2d at 75.

80. *Cuffy*, 505 N.E.2d at 940, *quoted in Mastroianni*, 691 N.E.2d at 616.

81. *Id.*

82. *Mastroianni*, 691 N.E.2d at 616.

83. *Id.* at 615, 616-17. In this case, the batterer had violated the order of protection, entered the house, and begun throwing the victim's furniture into the yard.

84. *Id.* at 215.

similar discretionary approach when a survivor has a protective order. As long as there is direct face-to-face contact during which officers speak with the victim, courts should be willing to find that this element is satisfied. Courts should also flexibly evaluate cases where contact between state actors and victims is limited to telephone communications. In these instances, police contact should be evaluated in terms of reasonableness. If an officer acted reasonably in responding to a domestic violence 911 call and simply did not arrive in time to prevent injury, this officer should not be liable for harm to the victim absent other contacts. On the other hand, if an officer follows the example of the Castle Rock police officers and chooses to go to dinner rather than respond to a plea for help from a domestic violence victim,[85] the court should evaluate the reasonableness of the officer's acts and find that he did have direct contact sufficient to satisfy this element.

3. "Justifiable Reliance" and the Problems Created by Domestic Violence

The requirement that reliance on the state actor be "justifiable" creates a problem for victims of domestic violence since at least one court has held that repeated or prolonged contacts with police officers render reliance unjustified.[86] The line between justified and unjustified reliance is unclear. Under this standard, it is possible that reliance is never justified unless police have responded before and enforced an order. On the other hand, reliance may always be justified unless police have failed to enforce a victim's protective order in the past. The line may be in the middle—it is justifiable to rely on officers who tell a victim to wait for an hour and a half,[87] but perhaps after being told to wait for eight hours, the reliance is no longer justified. Ultimately, the determination of what is reliable will depend upon the facts in the specific case.

Courts must consider the dynamics of domestic violence when deciding whether reliance on state actors is justified. The issuance of a protection order should be sufficient to justify reliance, especially where language printed on the order leads the possessor to believe that police officers are required to enforce the order.[88] One study found that ninety-

85. Town of Castle Rock v. Gonzales, 545 U.S. 748, 754 (2005).

86. *Cuffy*, 505 N.E.2d at 941-42.

87. Sorichetti v. City of New York, 482 N.E.2d 70, 76 (N.Y. 1985).

88. *See, e.g.*, note 25 (language printed on the back of Jessica Gonzales's protection order stating that police "shall enforce" the order). *See also* Brief Amicus Curiae of the American Civil Liberties Union and ACLU Colorado et. al. in Support of Respondent at *18-20, Town of Castle Rock v. Gonzales 545 U.S. 748 (2005) (No. 04-278) (arguing that the protective order placed Jessica Gonzales at risk of retaliatory violence and that the order specifically provided that police would address this risk).

five percent of women seeking protective orders believed that police would respond rapidly if their batterer violated their protective order.[89] Under a strict interpretation of justifiable reliance, approximately ninety-five percent of women seeking protective orders in 1995 were unjustified in relying on the police. In addition, when state actors tell victims to "go home and wait," courts should find that victims' reliance on the police is justified since many victims have no alternatives, particularly if a victim has never called the police before and is unaware that officers will not enforce her order.[90] Victims are entitled to notice if their protective orders will not be enforced. Until they receive this notice, their reliance is reasonable.

Courts that take domestic violence into account when evaluating justifiable reliance are not stripping police officers of their immunity outright. Changing the special relationship doctrine to be more flexible for abuse survivors does not mean a police officer will immediately be at risk of being sued any time he interacts with a survivor. Once a court finds a special relationship exists, it must still evaluate the officer's conduct for reasonableness.[91] The reasonableness standard does not require that police officers be infallible in their decision-making. The inquiry focuses on the reasonableness of the officer's acts in light of the circumstances as he knew them at the time of the incident.[92] Only those police officers who do not act reasonably when faced with a domestic violence victim bearing a protective order in hand will be liable.

4. Applying the Special Relationship Standard to the Facts of *Castle Rock*

Jessica Gonzales meets the requirements of the special relationship exception as articulated by the New York courts. First, Jessica Gonzales had a valid restraining order issued against her ex-husband.[93] By issuing the order, Colorado State actors affirmatively assumed a duty to protect her.[94] Second, when Gonzales showed the officers her restraining order,

89. Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 417 (1995).

90. *See, e.g., Sorichetti*, 482 N.E.2d at 76 (holding that the "helpless and distraught" mother in this instance had no alternatives to seeking assistance from the police and that, as such, her reliance was justified). *See also* OFFICE FOR VICTIMS OF CRIME BULLETIN, *supra* note 51 (discussing how inducing domestic violence survivors to rely on protective orders and then failing to enforce them limits the abilities of victims to act on their own behalf).

91. Mastroianni v. County of Suffolk, 691 N.E.2d 613, 616 (N.Y. 1997).

92. Saucier v. Katz, 533 U.S. 194, 205 (2001).

93. Town of Castle Rock v. Gonzales, 545 U.S. 748, 750-53 (2005).

94. *See* Cuffy v. City of New York, 505 N.E.2d 937, 940 (N.Y. 1987), *quoted in Mastroianni*, 691 N.E.2d at 616.

the officers immediately knew (or should have known) that inaction on their part could lead to harm.[95] Over the next eight hours, Jessica Gonzales called the police five times and spoke with police officers face-to-face twice.[96] A total of seven contacts over eight hours absolutely satisfies the direct contact prong of the special relationship test. Finally, Jessica Gonzales's reliance on the police officers to enforce her order was justified in light of her circumstances. She was justified in believing that if a court would issue a protective order, then police officers would enforce it. She was justified in reading the language on the back of her restraining order to mean that police officers would enforce the order.[97] She was justified in calling the police and relying on them to act when she informed them that her ex-husband had abducted her three daughters. She was justified in continuing to rely on police officers eight hours after she first called them because, by that point, she could rely on nothing else.

IV. Conclusion and Recommendations

Courts must provide recourse to domestic violence victims now, before more batterers learn that police officers will not enforce protection orders. While state legislation can be a clearer and, in many ways, preferable method for creating remedies for domestic violence victims, courts cannot wait for state legislators to act. The state-created danger and special relationship doctrines are legal theories already recognized in other areas of law and in several jurisdictions. Adopting and applying these standards to domestic violence litigation should not be a stretch.

In addition, lawyers representing domestic violence victims should be willing to use special exceptions to the general "no duty" rule like the state-created danger and special relationship doctrines. In arguing for remedies for their domestic violence clients, lawyers should emphasize the constraints created by domestic violence, particularly when arguing about what constitutes an "affirmative act" or "justifiable reliance." Finally, the courts, lawyers, and victim advocates must also continue to advocate for safety planning, particularly in light of documented instances of separation and retaliation violence. Even in jurisdictions where police officers enforce protective orders, safety planning can be vital to the survival of these women.

95. *See id.*
96. *Castle Rock*, 545 U.S. at 753-54.
97. COLO. REV. STAT. § 18-6-803.5(3).


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