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ARTICLES

NOTES

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LETTER FROM THE EDITOR

Dear Reader,

On the Fiftieth Anniversary of the March on Washington and the Birmingham Campaign, a robust fight for civil rights continues. This issue explores pressing civil rights issues of our time: racial diversity in law faculty, the impacts of Voter ID post-*Shelby County*, a legislative model to address disciplinary seclusion of juveniles in Texas, and the need for a Texas Racial Justice Act in death penalty litigation.

This issue begins with an Article by Loftus C. Carson, II, which presents and analyzes the results of his qualitative interview study on the conditions of employment for African-American law professors at U.S. law schools. His study, which is the first study of African-American law professors since the seminal 1986–87 Bell-Delgado study, indicates that both implicit and overt discrimination remain a serious barrier to the employment and success of African Americans in the legal professoriate.

The second Article, written by Anthony J. Gaughan, explores the implications of the recent *Shelby County* decision and Voter ID laws on minority voter suppression in the South. Relying on voting data and political trends, he argues for cautious optimism that Voter ID will not prove a serious barrier to minority voting rights in the long term.

The first Note, by Catherine McCulloch, discusses legislative solutions to Texas's current juvenile disciplinary seclusion practices. She argues that current practices cause psychological harm to juveniles, impose unnecessary financial burdens on the state, and are misaligned with national trends. She concludes that a bill like the 83rd Legislative Session's S.B. 1517 is a model for the future.

The second Note, by Caitlin Naidoff, presents a legislative proposal to address Texas's administration of the death penalty. Comparing Texas and North Carolina, Naidoff argues that Texas should adopt a Racial Justice Act—similar to the one recently repealed in North Carolina—to allow for death penalty appeals based on statistical evidence of systemic racial discrimination in the decision to seek or impose the death penalty.

On our website, you'll find a link to a recording of our 11/14 Fall Publication Preview Podcast—a roundtable discussion with our authors discussing these pieces. We also encourage you to connect with us on Facebook (http://on.fb.me/1erbrqP) or LinkedIn (http://linkd.in/19IF4Rl).

Thank you,

Kali Cohn, Editor-in-Chief

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ARTICLES

NOTES

Articles

Employment Opportunities and Conditions for the African-American Legal Professoriate: Perspectives from the Inside

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This article is grounded in the author's study (the study) and resulting dissertation (The Appointment and Conditions of Employment For African-American Law Faculty: Perspectives from Inside America's Legal Academy), submitted in partial fulfillment of the requirements for the Ed.D. Degree conferred upon the author by The University of Pennsylvania, May, 2012.

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I. INTRODUCTION[1]

African Americans are underrepresented on the faculties of American law schools. It is estimated that while they make up 13.1% of the U.S. population,[2] members of this group make up only 8.4% of the tenured faculty at American law schools.[3] Even that marker is not a true measure of the nation's law faculty racial diversity in what can be characterized as predominantly and/or historically white law schools (hereinafter, *HWLS*s). That is, American law faculty compilations by race do not ordinarily disaggregate *HWLS*s from others in the American law school universe;[4] the percentage of tenured faculty who are African-American at the nation's *HWLS*s is likely closer to 6%.

Furthermore, scholarship on the subject suggests that once appointed to a tenure-track law faculty position, the conditions of employment for African Americans at *HWLS*s are often problematic for them. These difficult employment conditions may be reflected in the higher attrition and lower tenure rates for African-American law faculty, as compared to white law faculty.[5] Moreover, there has been only one African-American dean of a top-fifteen law school in the nation's history,[6] and only a handful to date in the entirety of the nation's Tier I law schools.[7] Though there have been no statistical compilations on

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[1] Though this article is published in a law journal, the employment of faculty of color across higher education is a topic of interest for many. Anticipating readers who may not be familiar with the American law school universe, background information is provided, herein, even though it may state the obvious for those familiar with the American law school universe. This article is written for both audiences.

[2] *State & County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html, <http://perma.cc/N8NS-M66E>.

[3] *Total Staff & Faculty Members 2012–2013*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_staff_gender_ethnicity.authcheckdam.pdf, <http://perma.cc/8GCH-HFVH>.

[4] *See id.* (showing total staff and faculty members at all schools, regardless of historical race status).

[5] *See generally* A.B.A., THE PROMOTION, RETENTION, AND TENURING OF LAW SCHOOL FACULTY: COMPARING FACULTY HIRED IN 1990 AND 1991 TO FACULTY HIRED IN 1996 AND 1997 (2004), *available at* http://www.aals.org/documents/2005recruitmentreport.pdf, <http://perma.cc/HH2F-GLRT>.

[6] Press Release, Berkeley Names New Law School Dean (Dec. 11, 2003), *available at* http://www.universityofcalifornia.edu/news/article/5995, <http://perma.cc/SC7-4Y7F> (hailing Christopher Edley, appointed as Dean of the Law School at the University of California Berkley in 2004, as the "first African American dean to lead a top-ranked U.S. law school").

[7] *See, e.g.*, Kenneth Oldfield, *Social Class-Based Affirmative Action in High Places: Democratizing Dean Selection at America's Elite Law Schools*, 34 J. LEGAL PROF. 307, 312 (2010) (overviewing diversity in law school deanships); LeRoy Pernell, *Reflecting on the Dream of the Marathon Man: Black Dean Longevity and Its Impact on Opportunity and Diversity*, 38 U. TOL. L. REV. 571, 572–73 (2007) (noting that, at the time of the article, there were eight African-American deans at *HWLS*s that were not interim or resigned).

There are approximately two hundred law schools in the United States accredited (but not

point, other law school leadership posts[8] also seem to largely elude African-American faculty at *HWLS*s.

However, even when African-American faculty are successful at *HWLS*s—as measured by tenure—there still exists a gap between equality as an ideal and the perception of actual inequality by African-American law faculty. Unfortunately, the attainment of tenure by African-American law professors has not, historically, guaranteed their job satisfaction and perceptions of equitable treatment. In that regard, the pioneering study conducted in the winter of 1986–87 by Professors Derrick Bell and Richard Delgado (Bell-Delgado) is instructive.[9] The Bell-Delgado study participants were tenure-track and tenured minority law faculty (African-, Hispanic-, Asian-, and Native American); the results were published in a law review article authored by Professor Delgado.[10]

When asked whether they found non-minority colleagues supportive, nearly one-third of the Bell-Delgado participants answered "somewhat unsupportive" or "highly unsupportive."[11] As for institutional climate, less than one-half found their work environments "warm" and "supportive."[12] Indeed, more classified their institutional climates as "indifferent," "neutral," or "cold."[13] A majority of participants—55.7%—found their law school climates to be either "racist" or "subtly racist."[14] Only 12.2% of the participants described their work environments as "nonracist."[15] Not surprisingly, there was palpable dissatisfaction among the Bell-Delgado participants with myriad facets of life as a law faculty member of color.[16] In his conclusion, Professor Delgado observed, "it is impossible to read the survey returns without

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ranked) by the American Bar Association. *ABA-Approved Law Schools*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html, <http://perma.cc/J4DH-DAU8>. When discussing law school rankings, the author relies, herein, on the published rankings of *U.S. News and World Report*, which is perhaps the most widely referenced law school ranking. In that ranking, the top one hundred American schools are commonly referred to as Tier I (1–50 in rank) and Tier II (51–100 in rank) schools; Tier III schools are ranked 101–150 and Tier IV schools are those ranked 151 and higher (law schools in Tiers III and IV are each grouped and listed alphabetically, but not ranked individually within the groupings). *Best Law Schools: Ranked in 2013*, U.S. NEWS & WORLD REP., http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings?int=e5db0b, <http://perma.cc/PW4L-4DNX>.

[8] The other leadership positions include associate dean for academic affairs, associate dean for research, appointments chair, tenure committee chair, budget committee chair, and curriculum committee chair. *E.g.*, *2008–2009 AALS Statistical Report on Law Faculty*, ASS'N AM. L. SCH., http://www.aals.org/statistics/2009dlt/titles.html, <http://perma.cc/3WK4-8F5D>.

[9] The Bell-Delgado study was a mixed-method study (i.e., one employing both quantitative and qualitative analyses). *See generally* Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989).

[10] *Id.*

[11] *Id.* at 382.

[12] *Id.* at 390.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 391.

being acutely conscious of the pain and stress they reflect."[17]

The conditions of employment for African-American law faculty, at least in the past, may have been crystallized in what can be called "the Derrick Bell Stanford episode." Professor Bell was the first African-American tenured member of the Harvard Law School (perennially ranked 1–3, among the nation's law schools) faculty[18] and scholars across the racial spectrum generally regard him as a quite significant figure in the development of, if not a "father" of, Critical Race Theory (*CRT*), the related interest-group convergence theory, and the "tipping point" law-faculty-of-color-appointment thesis[19]—all discussed herein.

In the spring of 1986, Professor Bell was a Visiting Professor at Stanford Law School (perennially ranked 1–3, among the nation's law schools), where he taught a required Constitutional Law course to a class of first-year students.[20] A few weeks into the semester, Bell was invited to present a lecture in a recently established Constitutional Law "enrichment" lecture series.[21] Unbeknownst to him, Stanford law faculty members had initiated the weekly lecture series in response to complaints from white students about the content of Professor Bell's course, specifically, the emphasis he placed on the role of race and slavery in the U.S. Constitution's development.[22] On the eve of his scheduled lecture in the series, African-American students advised Professor Bell that, contrary to the official line, the series was aimed at remedying his perceived teaching deficiencies, especially his deviation from the pedagogical orthodoxy favored by majority-group[23] students.[24] In the wake of protests by African-American students, the extracurricular lecture series was cancelled just prior to Professor Bell's scheduled appearance.[25] Apparently, Bell was invited to participate not because

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[17] *Id.* at 369.

[18] Fred A. Bernstein, *Derrick Bell, Law Professor and Rights Advocate, Dies at 80*, N.Y. TIMES, Oct. 6, 2011, http://www.nytimes.com/2011/10/06/us/derrick-bell-pioneering-harvard-law-professor-dies-at-80.html?pagewanted=all&_r=0, <http://perma.cc/S3WX-L7DK>.

[19] Gloria Ladson-Billings, *Race Still Matters: Critical Race Theory in Education, in* THE ROUTLEDGE INTERNATIONAL HANDBOOK OF CRITICAL EDUCATION 110, 112 (Michael W. Apple et al. eds., 2009).

[20] *See* Andrew J. Bates, *Minority Law Professors: Will the Best and Brightest Continue to Teach?*, HARV. CRIMSON, Dec. 17, 1986, http://www.thecrimson.com/article/1986/12/17/minority-law-professors-will-the-best/, <http://perma.cc/8657-8Z3P>.

[21] Roy L. Brooks, *Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets*, 5 J. L. & INEQUALITY 1, 2 (1987).

[22] *Id.* It should be noted that, consistent with academic freedom, American law school courses can be highly idiosyncratic—course content is largely under the professor's dominion. *See* Robert R. Kuehn & Peter A. Joy, *Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility*, 59 J. LEGAL EDUC. 97, 97 (2009) ("As what some refer to as 'classroom' or 'podium' law professors, we exercise the same professional judgments regarding course content, casebooks, class lectures and discussion, and grades as other professors. In making those judgments, we look to legal academy norms of academic freedom . . . .").

[23] "Majority group" as used throughout, should be understood to refer to white students, faculty, institutions, etc.

[24] Brooks, *supra* note 21; *see also* Bates, *supra* note 20.

[25] Stephanie B. Goldberg, *Who's Afraid of Derrick Bell—A Conversation on Harvard, Storytelling and the Meaning of Color*, 78 A.B.A. J. 56, 57 (1992).

majority-group students wanted to hear his views, but rather to mask the real purpose of the lecture series.[26]

I began the study wondering whether, or to what extent, the Bell-Delgado study results and occurrences like the Stanford incident might be dismissible as ancient history. Would a contemporary qualitative survey yield results markedly different from those reported in Professor Delgado's law review article? Prior to embarking on the study, I pondered the question of why the percentage of African-American law professors at *HWLS*s has virtually ceased to increase. I wondered if the illumination provided by the current perspectives of tenured African-American professors, in a qualitative study, could provide some sense of how, in light of their legal academy journeys, they currently perceive the prospects for African-American professors at *HWLS*s.[27]

A. The Study

Prior to the study, no quantitative or qualitative studies of *exclusively* African-American law professors at *HWLS*s had been conducted.[28] Nor had there been a systematic effort to deconstruct the perspectives of any *law* faculty members of color since Bell-Delgado.[29] However, others had examined the views and experiences of higher education faculty of color generally (i.e., without regard to academic discipline).[30]

The study employed qualitative analysis of data collected through interviews to examine the perspectives of tenured African-American faculty about the appointment and conditions of employment for members of their ethnic group at *HWLS*s.[31] In that connection, after exploring their perspectives and inviting participants to offer potential

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[26] Goldberg, *supra* note 25, at 56.

[27] *See* MICHAEL Q. PATTON, QUALITATIVE RESEARCH AND EVALUATION METHODS 145 (3rd ed., 2002) (asserting that qualitative research can "contribute to *useful* evaluation, *practical* problem solving, real-world decision making, action research, policy analysis, and organizational or community development.").

[28] *But cf.* RACHELLE S. GOLD, OUTSIDERS WITHIN: AFRICAN AMERICAN PROFESSORS AT PREDOMINANTLY WHITE UNIVERSITIES: A NARRATIVE INTERVIEW STUDY (2008) (discussing the results of a narrative interview study of black professors at predominately white universities); ELIZABETH MERTZ ET AL., A.B.A., AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES (2011), http://www.americanbarfoundation.org/uploads/cms/documents/after-tenure-report-_final-_with_revisions_july_9_2012-_with_track_changes_accepted.pdf, <http://perma.cc/CM47-STZR> (detailing the results from the first quantitative phase of a two-phased study looking at the "experiences of post-tenure law professors, with attention paid to their perceptions of teaching and research, the missions of law schools, diversity within the legal academy, and many other issues.").

[29] Delgado, *supra* note 9.

[30] *See generally, e.g.*, Cathy A. Trower & Richard P. Chait, *Faculty Diversity: Too Little for Too Long*, 98 HARV. MAG. 33 (2002) (discussing the lack of faculty-diversification progress and examining obstacles to and solutions for increasing faculty diversity); Caroline S. Turner, *Incorporation and Marginalization in the Academy*, 34 J. BLACK STUD. 112 (2003) (analyzing the challenges of marginalization and the benefits of incorporation of minority faculty).

[31] *See* PATTON, *supra* note 27, at 14 (contrasting qualitative and quantitative methods).

strategies for advancing African-American law faculty presence and improving their conditions of employment, the study elicited their views on the viability of organizational change, litigation, and affirmative action plans for advancing racial equity in the legal professoriate. The study employed an interview protocol that allowed for a consideration of the foundations of *CRT* as an explanation, in whole or in part, for participants' perspectives.

Why focus on perspectives rather than experiences? There were several reasons. I expected that participants' perspectives would be at least somewhat informed by experience. Indeed, I fully expected that some of the participants would volunteer that they were discussing their own experiences or that such would be obvious. On the other hand, I was convinced that if I announced an intention to *focus* on personal experience, they might be less willing to participate or less forthcoming because they might perceive my inquiries as too intrusive/personal.[32] Furthermore, I saw greater potential benefit from drawing upon the perspectives of participants, because I anticipated that they would provide a synthesis of *collective* experiences, including perceptions of the experiences of other African-American law faculty.

As it turned out, in some instances, it was not clear whether participants were relating personal information and experience, even as they were sharing their perspectives; other participants made it clear, at least some of the time, that what they related was largely, if not entirely, based on personal experience. Participants appeared to have been influenced by their own experiences, as well as by the perceptions of those similarly situated: other African-American professors at *HWLS*s.

Ultimately, the study participants were limited to those with tenure. Untenured faculty—those without job security—cannot be expected to be as forthcoming as those tenured, because they fear reprisals that might negatively influence their tenure quest. Furthermore, tenured faculty likely will have taught at least five years in the legal academy and will, therefore, have more informed perspectives than those with less experience. Moreover, the best *available* source of a sense of why African Americans fail to become tenured at *HWLS*s may very well be tenured African-American law faculty at such institutions. It is the case that, as I framed my study, I attempted to establish contact with four former African-American law professors identified to me as having been either formally denied tenure or told they would be. All declined to respond to my entreaties. It became clear, then, that I would be unable to elicit their meaningful participation in a study.[33]

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[32] I hasten to point out that highly educated African Americans may be reluctant to discuss personal experiences, especially hurtful ones that have racial components, with strangers, even other African Americans.

[33] Furthermore, I note that with regard to "failed" candidacies, institutional spokespersons cannot be expected to volunteer information they perceive as being indicative of institutional shortcomings with respect to racial diversification of their faculty, for both legal and public relations reasons. By contrast, my anonymous African-American participants were not exposed to legal damages for being

B. The Importance of Racial Diversity in the Professoriate of American Law Schools

The United States has become considerably more racially diverse, with African Americans, Asian Americans, Native Americans, and especially Hispanic Americans comprising a substantially larger portion of the total national population than ever before. This trend is expected to continue to an eventual majority-minority U.S. population by mid-century, if not sooner.[34] Given the rapidly changing demographics of the nation, it is evident that future providers of legal services will be delivering those services to clients from an ever-wider range of cultural and ethnic backgrounds. Law school community diversity holds the promise of promoting a greater understanding of how factors such as cultural biases, diverse belief systems, and different ethnic traditions might impact perceptions of civil and criminal justice, and influence the way people experience and interpret legal challenges.[35] Cross-culturally educated lawyers will be better positioned to function professionally in a racially diverse society, if trained in an environment that is reflective of that diversity. Those so educated who become judges may be better prepared to advance transracial fair play in matters of civil and criminal justice. A racially diverse faculty is widely perceived to promote cross-racial understanding and the breaking down of stereotypes.[36] In that regard, Sylvia Hurtado's work suggests that faculty of color are more likely than white faculty to challenge majority-group students' preconceived notions about racial minorities by engaging in classroom dialogue and providing additional readings regarding race and ethnicity.[37]

African-American faculty may also serve to provide African-American law students with authority figures with whom they can connect and from whom they can derive a sense of belonging that can facilitate law school success. Douglas Guiffrida's study of nineteen African-American undergraduate students investigated the characteristics of faculty that facilitate meaningful relationships between faculty and African-American students.[38] The students reported that they sought out

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honest about their perceptions.

[34] *U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now*, U.S. CENSUS BUREAU (Dec. 12, 2012), http://www.census.gov/newsroom/releases/archives/population/cb12-243.html, <http://perma.cc/Y9ZV-56B4>.

[35] Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445, 458–59 (2000).

[36] *See* Patricia Gurin, *The Compelling Need for Diversity in Education*, 5 MICH. J. RACE & L. 363, 383–84 (1999) (discussing how students educated in diverse institutions are better able to participate in an increasingly heterogeneous society).

[37] Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 187, 196 (Gary Orfield & Michael Kurlaender eds., 2001).

[38] Douglas Guiffrida, *Othermothering as a Framework for Understanding African American Students' Definitions of Student-Centered Faculty*, 76 J. HIGHER EDUC. 701, 703 (2005).

African-American faculty more often than white faculty, because such faculty tended to be relatively more affirming, supportive, and generous with their counsel, whether career, academic, or personal.[39] Further, African-American faculty were found to push African-American students to succeed.[40] African-American faculty members provided "aspects of support that even the most well intentioned White faculty could not provide."[41] Students have reported that this kind of engagement with African-American faculty facilitated their retention in school.[42] That faculty of color impact minority students positively seems beyond peradventure.[43]

Furthermore, racial diversification of the nation's law school faculties may result in an expansion of the legal academy's research agenda to include greater emphasis on topics that influence policies and practices in ways that serve to eliminate racial disparities in the provision of legal services and in other areas of American life, such as housing and employment.[44] Perhaps African-American law faculty are also better able to challenge the presumption of law's impartiality, given their experiences with and exposure to racial bias in American law and legal institutions and beyond. Further, several researchers have found that faculty of color benefit higher education by their greater predisposition to employ innovative pedagogical agendas, techniques, and practices.[45]

Moreover, because law schools serve as a training ground for many of the nation's political and civic leaders,[46] the path to leadership in a diverse nation like the United States might well include experience with and exposure to a racially diverse group of persons, including authority

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[39] *See id.* at 709 (discussing how African-American faculty provided personal advice in addtion to comprehensive career advising).

[40] *Id.* at 711.

[41] *Id.* at 718.

[42] *See, e.g.*, Anthony L. Antonio, *Faculty of Color Reconsidered: Reassessing Contributions to Scholarship*, 73 J. HIGHER EDUC. 582, 583, 591–594 (2002) (showing that African-American professors provided significant support for educational goals and were involved with students' civic, moral, and affective development); Hurtado, *supra* note 37, at 196–199 (showing that engagement with minority faculty increased the positive perception of growth in academic skills and knowledge). *But cf.* Alvin J. Schexnider, *Black Student Retention: The Role of Black Faculty and Administrators at Traditionally White Institutions*, *in* STRATEGIES FOR RETAINING MINORITY STUDENTS IN HIGHER EDUCATION 125, 131 (M. Lang & C. Ford eds., 1992) ("The backing of black faculty and administrators, albeit important, is a necessary but not sufficient condition in the effort to recruit and retain blacks and other minorities.").

[43] *See, e.g.*, Schexnider, *supra* note 42, at 126–27 (noting that the presence of minority faculty is a critical factor in successful minority student adjustment and that minority faculty also serve as role models for minority students).

[44] Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231, 252 (2009) (positing that increased information and attention about racial disparities within the legal system will help to remedy those disparities); *see also* Brief for Respondents at *2, Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3418831 (urging that diverse student bodies are "a business and economic imperative.").

[45] *E.g.*, Hurtado, *supra* note 37, at 194–96.

[46] Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (noting that law schools "represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives." (citation omitted)).

figures such as professors. Patricia Gurin's extensive study, employing longitudinal analysis to measure the impact of racial diversity in higher education, found that students are better prepared to become leaders in a pluralistic society, if they have been educated in a multicultural environment.[47] According to Gurin, racial diversity in institutions of higher education is essential to initiating the cognitive, deep, complex thinking that produces the best learning and life skills necessary for succeeding in a democratic multicultural society.[48] William Bowen[49] and Derek Bok[50] embrace similar notions, citing the nation's need for racially diverse institutions of higher education for the preparation of students for leadership in business and industry in a global society.[51]

It is also the case that racial diversity in the ranks of law school leadership posts[52] can potentially have great significance. To varying degrees, those occupying these posts help chart the course of legal education curriculum and research agendas, as well as faculty and student body compositions. Moreover, beyond leadership posts, the inclusion of the views of African-American and other faculty of color in law school governance can enrich the legal academy's decision-making processes.[53]

The benefits of racial diversity described, herein, provide American law schools with the underpinnings for making institutional commitments to pursue racially diverse communities that include African-American faculty. It seems clear that success in increasing the numbers of tenured African-American and other faculty of color in American law schools will depend on both increasing the number recruited and providing them with favorable conditions of employment. This study addresses those imperatives by identifying and discussing relevant perspectives of tenured African-American law faculty.

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[47] Gurin, *supra* note 36, at 364.

[48] *Id.* at 365 ("[S]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.").

[49] William G. Bowen was President of Princeton University from 1972 to 1988. *William G. Bowen*, ANDREW W. MELLON FOUND., http://www.mellon.org/about_foundation/staff/office-of-the-president/williambowen, <http://perma.cc/RW4H-NQER>.

[50] Derek C. Bok was President of Harvard University from 1971 to 1991. *Derek Bok*, HARV. U., http://www.harvard.edu/history/presidents/bok, <http://www.harvard.edu/history/presidents/bok>.

[51] WILLIAM G. BOWEN & DEREK C. BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 280–81 (1998).

[52] To include deans, associate deans for academic affairs, associate deans for research, appointments chairs, budget committee chairs, curriculum committee chairs, and tenure committee chairs.

[53] *See* Kellye Y. Testy, *Best Practices for Retaining and Hiring a Diverse Law Faculty*, 96 IOWA L. REV. 1707, 1708–10 (2011) (describing the need for diverse faculty in law schools). *See generally* Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011) (discussing the ways in which diversity improves decision-making processes in, bolsters the legitimacy of, and provides better access to the legal system).

II. BACKGROUND

The subjects, explored briefly in this background section, were chosen because they provide the context for understanding the perspectives of study participants regarding faculty appointment and conditions of employment for African Americans in *HWLS*s.

A substantial body of literature focuses on the problems, challenges, and circumstances that are thought to impede faculty members of color at historically white colleges and universities (*HWCU*s), but much of the literature does not disaggregate African Americans from faculty of color generally. Likewise, there is scant focus in the literature on African-American law faculty *exclusively*. The body of relevant literature does provide a rationale for racially diverse law faculties and provides, as well, a viable and meaningful way to frame the voices of African-American law faculty regarding their appointment and their conditions of employment.

I have also reviewed scholarship in law and organizational behavior with an eye toward providing a foundation for the perspectives of the study's participants regarding potential approaches or strategies that may be considered for addressing challenges faced by African-American faculty at *HWLS*s.

A. Some Historical Perspective on Faculty Ethnicity in American Institutions of Higher Education

It is important to understand the historical evolution of the presence of faculty of color in American institutions of higher education. Until relatively recently, the American professoriate consisted almost exclusively of whites, except at historically black colleges and universities (*HBCU*s).[54] Indeed, the exclusion of people of color from faculty positions at *HWCU*s was virtually complete until World War II.[55] Many of the nation's colleges and universities first opened their doors to faculty of color as late as the 1960s.[56]

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[54] William Exum, *Climbing the Crystal Stair: Values, Affirmative Action, and Minority Faculty*, 30 SOC. PROBS. 383, 385 (1983).

[55] *Id.* at 384. In fact, as late as 1999, the percentage of faculty of color was quite low. *See* Deborah J. Carter & Eileen O'Brien, *Employment and Hiring Patterns for Faculty of Color*, 4 RES. BRIEFS 1, 15 (1993) (finding that the number of faculty of color did not increase as much as might have been expected during the 1980s); LEE JONES, RETAINING AFRICAN AMERICANS IN HIGHER EDUCATION: CHALLENGING PARADIGMS FOR RETAINING STUDENTS, FACULTY AND ADMINISTRATORS 177 (2001) (reporting that in 1999, less than 5% of faculty at U.S. colleges and universities were African-American).

[56] Exum, *supra* note 54, at 385; Katherine Barnes & Elizabeth Mertz, *Is It Fair? Law Professors' Perceptions of Tenure*, 61 J. LEGAL EDUC. 511, 531–32 (2012) (explaining that in the late 1960s, law faculities were first integrated with male faculty of color, who began receiving tenure in the 1970s, but it was not until the 1990s that female professors of color had any significant presence on

Much of the impetus for the early, relatively substantive efforts at racial integration of faculties of American institutions of higher education came from Title VII of the Civil Rights Act of 1964,[57] which barred discrimination based on race or ethnicity in many American arenas, to eventually include higher education.[58] It soon became clear, however, that ending *overt* discrimination alone was unlikely to lead to significant progress in bridging the racial gaps that existed across virtually every aspect of American life. Many concluded that affirmative steps, not merely the absence of negative ones, were demanded if racial inequities were to be redressed meaningfully.[59] In that regard, it was a federal order that sparked the "affirmative action" movement designed to promote the inclusion of those from racial groups historically excluded from much of American institutional life.[60] These many years later, it remains the case that federal law, executive orders, and public and private affirmative action initiatives have failed to erase African-American deficits in faculty composition at the nation's institutions of higher education, including its schools of law.[61]

B. An Overview of the Experiences of Higher Education Faculty of Color

To the extent that the considerable body of literature that catalogs the experiences of faculty of color in the academy[62] does not

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tenured American law faculties).

[57] 42 U.S.C. § 2000e-2(a)(1) (2006).

[58] Originally exempt, higher education institutions were brought within the sweep of the Act, pursuant to Congressional amendments, which took effect in 1972. H.R. REP. NO. 92-238, at 19–20; *see also* Univ. of Penn. v. EEOC, 110 S.Ct 577, 582 (1990) ("[w]hen Title VII was enacted originally in 1964, it exempted an 'educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.' Eight years later, Congress eliminated that specific exemption by enacting § 3 of the Equal Employment Opportunity Act of 1972. This extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher ranking (i.e., tenured) academic positions." (citations omitted)).

[59] *See* Mary C. Daly, *Rebuilding The City of Richmond: Congress's Power To Authorize The States To Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 913–914 (1992) (describing many employers' decisions to institute voluntary affirmative action programs); *see also* CAROLINE S. TURNER & SAMUEL L. MYERS, FACULTY OF COLOR IN ACADEME: BITTERSWEET SUCCESS 17 (2000) (suggesting that when all government contractors were required to prepare affirmative action plans for women and minorities in the early 1970s, "there was real impact on higher education," and noting that the American Association of University Professors endorsed affirmative action in faculty hiring in 1973).

[60] Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

[61] Trower & Chait, *supra* note 30, at 34–35 (citing statistics on the low numbers of minorities in faculty positions).

[62] *See generally* MARK A. CHESLER ET AL., CHALLENGING RACISM IN HIGHER EDUCATION: PROMOTING JUSTICE (2005); GAIL THOMPSON & ANGELA LOUQUE, EXPOSING THE CULTURE OF ARROGANCE IN THE ACADEMY: A BLUEPRINT FOR INCREASING BLACK FACULTY SATISFACTION (2005); Octavio Villalpando & Dolores Delgado Bernal, *A Critical Race Theory Analysis of Barriers*

disaggregate African Americans from other racial minority groups (but rather usually includes black, brown, Native-American, and Asian-American faculty[63]), it appears to assume that the issues, problems, challenges, and solutions for faculty aspirants from all such groups are similar, if not the same. To the extent that not being *white* is an operative factor in faculty appointment and conditions of employment, the assumption may have some validity.

Studies conclude that faculty of color have different levels of job satisfaction than white faculty. Uma Jayakumar et al. found that faculty of color were less satisfied with their jobs when compared to white faculty.[64] Caroline Turner and Samuel Myers synthesized data from sixty-four interviews with tenured minority faculty, finding that such faculty believed they had to work harder than whites and that they received scant support for or validation of their research and scholarship.[65]

Higher education researchers have found that faculty of color at *HWCU*s have complained of isolation and the lack of true peers in their departments and institutions.[66] These studies indicate that faculty of color at *HWCU*s are more likely than their white peers to experience a difficult institutional climate that creates job dissatisfaction and hinders tenure progress.[67] Adalberto Aguirre et al. found that faculty of color were more

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that Impede the Success of Faculty of Color, *in* THE RACIAL CRISIS IN AMERICAN HIGHER EDUCATION: CONTINUING CHALLENGES FOR THE TWENTY-FIRST CENTURY 243 (William A. Smith et al. eds., 2002); Turner, *supra* note 30, at 34.

[63] Delgado, *supra* note 9, at 350 (surveying "minority law professors"); Gregory A. Diggs et al., *Smiling Faces and Colored Spaces: The Experiences of Faculty of Color Pursuing Tenure in the Academy*, 41 URB. REV., 318 (2009) (collecting data from "faculty of color"); Guang-Lea Lee & Louis Janda, *Successful Multicultural Campus: Free From Prejudice Toward Minority Professors*, 14 MULTICULTURAL EDUC. 27, 27 (2006) (analyzing treatment of "minority professors").

[64] Uma M. Jayakumar et al., *Racial Privilege in the Professoriate: An Exploration of Campus Climate, Retention, and Satisfaction*, 80 J. HIGHER EDUC. 538, 549 (2009).

[65] TURNER & MYERS, *supra* note 59, at 85–87.

[66] EUGENE R. RICE ET AL., HEEDING NEW VOICES: ACADEMIC CAREERS FOR A NEW GENERATION 19–21 (2000); Diggs et al., *supra* note 63, at 314–15.

[67] Many African-American faculty, specifically, have greater satisfaction at *HBCU*s than at *HWCU*s, notwithstanding the fact that the latter have lower teaching loads and higher pay. *See generally* Gloria J. McNeal, *African American Nurse Faculty Satisfaction and Scholarly Productivity at Predominantly White and Historically Black Colleges and Universities*, 7 ABNF J. 4 (2003); April L. Berrian, Job Satisfaction, Perceptions of Fairness, and Perceived Departmental Support Among African-American and White Faculty (Oct. 2006) (unpublished Ph.D. dissertation, Indiana University); Quentin Wright, Factors Affecting African American Faculty Satisfaction at a Historically Black University and a Predominantly White Institution (May 2009) (unpublished Ed.D. dissertation, University of North Texas).

Furthermore, African-American faculty often feel *too* visible (compelled to serve as spokespersons for their race) and concurrently not visible *enough* (not viewed as fitting into the paradigm of what a professor should be in the eyes of department colleagues). *See, e.g.*, Adalberto Aguirre, *A Chicano Farmworker in Academe*, *in* THE LEANING IVORY TOWER 17, 21 (R. V. Padilla & R. C. Chavex eds., 1993) (describing how women and racial minorities are ignored and excluded from white, male networks); Adalberto Aguirre et al., *Majority and Minority Faculty Perceptions in Academia*, 34 RES. IN HIGHER EDUC. 371, 372 (1993) (discussing how minority faculty are seen as peripheral and relating an incident where a faculty member was addressed as a student would have been); Linda K. Johnsrud & Kathleen C. Sadao, *The Common Experience of "Otherness": Ethnic and Racial Minority Faculty*, 21 REV. HIGHER EDUC. 315, 335 (1998) (describing how racial minority faculty are "showcased on committees, panels, or commissions" and sense that they are "being called upon

likely than white faculty to perceive less opportunity to participate in departmental matters and decision-making when it did not involve minority affairs.[68]

Moreover, teaching and scholarship evaluations may be negatively influenced by race, either because of racial prejudice or because faculty of color design courses and pursue scholarship that challenge traditional paradigms.[69] Some scholars of color gravitate toward matters of particular interest to their ethnic communities; however, these matters are often given short shrift, if not dismissed entirely, in the academy.[70] Viewing matters through the prism of their own experience, white students and faculty may be dismissive of race-related topics to the point of doubting their legitimacy for classroom consideration or the subject of scholarship.[71] For example, *CRT* may face skepticism, if not derision, from well-to-do white students who do not like to hear that their prosperity may be due, in part, to the sweat and suffering of African Americans and Native Americans. Teaching and scholarship on such matters may touch a nerve, whether conscious or acknowledged.[72]

The dynamics of race sometimes come into play in the interactions of faculty of color with majority-group students, who may be more predisposed to challenge or discount the expertise of a minority faculty member than a similarly positioned majority-group faculty member. Written course evaluations may reflect this bias.[73] In her research on the personal experiences of faculty of color at *HWCU*s, Turner found that these scholars reported encountering challenges to their credibility and presence not only from students, but from peers as well.[74] Similarly, others have found that white peers and students sometimes show a lack of respect for professors of color at *HWCU*s.[75] Subjective factors like

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to represent their ethnicity, not their professional competence.").

[68] Aguirre et al., *supra* note 67, at 377.

[69] Siomara E. Valladares, Challenges in the Tenure Process: The Experiences of Faculty of Color Who Conduct Social Science, Race-based Academic Work 14–15 (2007) (unpublished Ph.D. dissertation, University of California, Los Angeles).

[70] *Id.* at 27–28.

[71] DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); *see* Anna Sampaio, *Women of Color Teaching Political Science: Examining the Intersections of Race, Gender, and Course Material in the Classroom*, 39 POL. SCI. & POL. 917, 918 (2006) (noting that a majority of research with students suggests that faculty of color who teach race-gender studies are considered insignificant and unprofessional; students often view these courses as therapy instead of areas of scientific inquiry).

[72] DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 118–120 (1993).

[73] TURNER & MYERS, *supra* note 59; Juanita Johnson-Bailey & Ronald M. Cervero, *Different Worlds and Divergent Paths: Academic Careers Defined by Race and Gender*, 78 HARV. EDUC. REV. 311, 320 (2008).

[74] Turner, *supra* note 30, at 116 (faculty "speak about the challenges they encounter in the classroom from students and peers who question not only their intelligence but their very presence as professors of color.").

[75] *See* Mary V. Alfred, *Expanding Theories of Career Development: Adding the Voices of African American Women in the White Academy*, 51 ADULT EDUC. Q. 108, 110 (2001) (discussing the minute percentage of full-time, female African-American faculty in "White institutions" and the characteristics of "[a]lienation, isolation, and social marginalization" they experience).

collegiality may be weighed in faculty peer evaluation processes to the disadvantage of faculty of color, who are not seen by those in the majority group as fitting the norm.[76]

Turner and Myers found that when institutions of higher education systematically employ mentoring and support for research and writing, faculty of color seem to have fewer quality of life complaints.[77] However, Jonathon Alger observed, "informal mentoring relationships usually develop between senior and junior colleagues who have much in common, because people tend to seek out younger versions of themselves when imparting their wisdom and experience."[78] A predisposition to replicate oneself may serve as an incentive to mentor someone of the same ethnicity, a circumstance that disadvantages racial minorities, given their "in group" underrepresentation at *HWCU*s.

Minority faculty members have reported that lack of funding and a lack of opportunity to collaborate with majority colleagues are among racial disparities found in the academy.[79] The combination of these two factors can result in fewer and lower quality publications, with consequent negative implications for obtaining tenure, research grants, salary increases, and the like, given the centrality of scholarship to such decisions.[80] There is a substantial body of literature to indicate that the positive, affirming, institutional climate supportive of faculty success—described as consisting "of an unremitting treatment of everyone at all times with the highest level of respect and fairness"[81]—may not exist for African Americans and other faculty of color at *HWCU*s.[82]

C. An Overview of the American Law School Faculty Appointment Process

The tenure-track faculty appointments process at American law schools is centered in the appointments committee, the composition of which appears to vary among law schools from eighty to one-hundred

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[76] Jonathon R. Alger, *How to Recruit and Promote Minority Faculty: Start by Playing Fair*, AM. ASS'N U. PROFESSORS, http://www.aaup.org/issues/diversity-affirmative-action/resources-diversity-and-affirmative-action/how-recruit-and-promote-minority-faculty-start-playing-fair, <http://perma.cc/YL76-4MHE>.

[77] TURNER & MYERS, *supra* note 59, at 160–64.

[78] Alger, *supra* note 76.

[79] TURNER & MYERS, *supra* note 59, at 118–20 (discussing how there is little solicitousness for minority faculty in the form of funds for travel, equipment, curriculum development, or sabbaticals, etc., and how mentoring could be employed to nurture minority and other faculty development).

[80] Kusum Singh et al., *Differences in Perception of African American Women and Men Faculty and Administrators*, 64 J. NEGRO EDUC. 401, 404 (1995).

[81] Lawrence E. Wharton, *Observations on Community College Leadership*, 25 COMMUNITY C. REV. 15, 18 (1997).

[82] *See* Lee & Janda, *supra* note 63, at 27 (discussing the racial bias that professors of color face, specifically, from students).

percent of the tenure-track and tenured faculty.[83] The dean chooses the chair and members of the appointments committee annually.[84]

The formal, required steps for a tenure-track or tenured appointment to an American law school faculty are: (i) the appointments committee recommends appointments to the full faculty; (ii) the full faculty votes in support of the committee's recommendation; (iii) the dean accepts and signs off on the faculty recommendation and then forwards the faculty decision, with a concurring recommendation, to the university president for approval; and (iv) the candidacy and the president's approval are then conveyed to the board of trustees for approval.[85] In practice, the most important of the formal steps are (i) and (ii), since no law faculty appointment can be made without an appointments committee recommendation and subsequent ratification vote of the full faculty.[86] Usually, at steps (iii) and (iv) the proverbial "rubber stamp" is applied, but, of course, not always.

The factors that ordinarily determine faculty appointment have essentially remained the same in the legal academy during the past four decades, the span of time study participants have spent in the legal professoriate. Law schools rely on specific factors to determine which candidates merit faculty appointment.[87] The most significant factors include: the ranking of the law school attended, performance in law school, endorsements of law faculty, law journal editing experience, judicial clerkship experience, law practice experience, advanced degrees, publications, and diversity.[88] The reasons driving law school faculty appointments include curricular needs, scholarship needs, and, in some cases, diversity needs.[89] Those interested in obtaining law faculty appointments may initiate the process by contacting schools directly, though most of those interested in such appointments begin their quests by registering with the American Association of Law Schools (*AALS*);

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[83] *See, e.g., Rules & Policies, Rule 4-3 Appointments, Promotions, and the Granting of Tenure*, DUKE L. SCH., http://law.duke.edu/about/community/rules/sec4#rule4-3, <http://perma.cc/9638-NG3K> (describing the appointments process at Duke Law School). Any nonfaculty members will be students who may or may not have a committee vote. *E.g., Student-Faculty Committees*, N.Y.U. L., http://www.law.nyu.edu/students/studentbarassociation/studentfacultycommittees, <http://perma.cc/3NL4-UYP3> (providing one non-voting seat for a student on the academic personnel committee).

[84] *Id.*

[85] University or law school charters, rules, and regulations dictate the formal process. *See generally, e.g., id.*; *see also* Testy, *supra* note 53, at 1712–14 (discussing the faculty search and hiring process).

[86] *See, e.g., Bylaws of the Association of American Law Schools, Inc.*, ASS'N AM. L. SCH. (Jan. 2008), http://www.aals.org/about_handbook_bylaws.php, <http://perma.cc/ZE27-WT7C> (stating in Section 6-5(c) that "[t]he faculty shall exercise *substantial control* over decanal and faculty appointments or changes in faculty status, such as promotions, tenure designations, and renewal or termination of term appointments . . . . Except in rare cases and for compelling reasons, *no . . . faculty appointment* . . . [will be] made over the *expressed opposition of the faculty* . . . ." (emphasis added)).

[87] *See* Ethan S. Burger & Douglas R. Richmond, *The Future of Law School Faculty Hiring in Light of Smith v. City of Jackson*, 13 VA. J. SOC. POL'Y & L. 1, 16–20 (2005) (describing the faculty search and appointment process).

[88] *See, e.g., id.* at 50–51 (describing factors that make faculty candidates attractive to law schools).

[89] *See, e.g., Bylaws of the Association of American Law Schools, Inc.*, *supra* note 86, at 6-3, 6-4.

the registry form requests disclosure of various appointment related criteria, including racial identity.[90] Law schools may consult the registry for potentially viable faculty candidates. The more elite the law school, the lesser is the dependence on *AALS* registered faculty candidates. The top-ranked law schools have antennae for viable-for-them faculty candidates and may take the initiative with regard to potential appointees. Indeed, "don't contact us (if we are interested), we'll contact you" may accurately capture the approach to faculty appointments at American law schools ranked in the top ten.

The supply of those interested in American law school tenure-track faculty appointments greatly exceeds the demand.[91] Because law faculty professorships are coveted, the competition for appointment to such positions is keen and is seemingly ever more intense.[92] Not that long ago, a U.S. Supreme Court clerkship virtually guaranteed appointment to a tenure-track position at a Tier I law school.[93] In the current competitive environment, some of these same clerks now begin their legal academy journeys at lower-ranked schools.[94]

With the competition for slots on American law school faculties so keen, it does not take much to derail a candidacy. Moreover, individual faculty member preferences, projections, instincts, and feelings are recognized bases for a "no" vote on appointments.[95] Further, faculty members need not justify their votes.[96]

D. An Overview of Tenure at American Law Schools

The granting of tenure signifies acceptance and incorporation into the ranks of the institution's permanent cadre of scholars. The status is honored across the academy and conveys an imprimatur that will hold the recipient in good stead far beyond the walls of his institution. Tenure also grants "virtually unrivalled job security."[97]

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[90] *Uncloaking Law School Hiring: A Recruit's Guide to the AALS Faculty Recruitment Conference*, AM. ASS'N LAW SCH., http://www.aals.org/frs/jle.php#3, <http://perma.cc/G52X-JPJT>.

[91] Richard E. Redding, *"Where Did You Go to Law School?" Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 595 (2003) (noting that only 10% of the over 1,000 lawyers that submit resumes to the AALS Faculty Appointments Register for legal teaching positions are offered positions).

[92] *Id.* at 596 ("the prototypical new law teacher graduated from an elite school . . . was on the staff of the law review or another journal while in law school, clerked for a judge . . . published one or two articles or notes . . . and practiced for several years . . . before entering academia.").

[93] *Id.* at 601.

[94] *See generally* ASS'N AM. LAW SCH., DIRECTORY OF LAW TEACHERS (2011–2012) (providing biographies of current law professors, including information on former Supreme Court clerkships).

[95] Paul D. Carrington, *Diversity*, 1992 UTAH L. REV. 1105, 1176 (1992). *Cf.* Burger & Richmond, *supra* note 87, at 41 (". . . already knowing members of the faculty or getting a former professor, colleague or friend to promote one's candidacy can provide a decisive advantage.").

[96] *See, e.g.*, Burger & Richmond, *supra* note 87, at 36 (noting that the evaluation of candidate qualifications is subjective and that showing discriminatory intent is difficult).

[97] Barnes & Mertz, *supra* note 56, at 61.

The formal factors for tenure at American law schools are scholarship, teaching, and service.[98] In the last three decades, the scholarship requirement has become more exacting, shifting from two substantial, published law review articles to three at Tier I schools, as well as at some schools not as highly ranked.[99] However, "the devil is in the details" with respect to whether these published works meet applicable *qualitative* standards—standards that vary from institution to institution. Tier I schools tout an "indicative of 'superior intellectual attainment'" standard for at least one of the articles.[100] All of this is, of course, highly subjective.

It is not possible to precisely characterize the relative weight accorded scholarship, as opposed to teaching, in the tenure decision-making process at American law schools. Generally speaking, the higher the rank of the school, the less is the weight given teaching in the tenure decision.[101] It is the case that the service component is accorded less, if not substantially less, weight than either scholarship or teaching in the tenure quotient across the American law school universe.[102]

Obtaining tenure at *HWLS*s may also depend significantly on institutional politics. At most law schools, the favorable vote of a super-majority of the faculty—usually between two-thirds or three-quarters of the tenured members—is required for tenure.[103] Tenure-track appointments at law schools are usually made with the expectation that tenure will later be granted.[104]

According to much of the relevant literature, as discussed herein, the politics of race and diversity often impact tenure for African Americans across the academy.[105] The tenure prospects for higher education faculty of color are thought to be negatively impacted by: (i) unclear and ambiguous requirements; (ii) professional, cultural, and social isolation; (iii) inadequate mentoring; (iv) incomplete and unconstructive (if not biased) performance evaluations; (v) methodological and research preferences; and, (vi) the competing

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[98] Devon W. Carbado & Mitu Gulati, *Tenure*, 53 J. LEGAL EDUC. 157, 159 (2003); Diggs et al., *supra* note 63, at 317.

[99] *See* Carbado & Gulati, *supra* note 98, at 160 (discussing how two to three substantial review articles seems to be the requirement for tenure).

[100] *Id.* at 160–61.

[101] Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEXAS L. REV. 403, 421–22 (1988). There may be an assumption that the bright students populating top-ranked schools do not require quality instruction to master course contents, which may explain the somewhat readier tolerance for undistinguished or poor instruction at top-ranked schools.

[102] *See, e.g.*, Carbado & Gulati, *supra* note 98, at 159 ("The two most important and, therefore, most discussed elements of the tenure decision are the evaluation of scholarship and teaching. Scant attention is paid to service, the third element of most law school tenure decisions.").

[103] Ann C. McGinley, *Discrimination In Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 UCLA WOMEN'S L.J. 1, 12–13 (2005).

[104] *Id.* at 13.

[105] Barnes & Mertz, *supra* note 56, at 511–12.

demands of research, teaching, and service.[106]

E. An Overview of Professorial Satisfaction in American Institutions of Higher Education

Generally speaking, higher education faculty members have been "satisfied" with their positions.[107] However, measurements of the *overall* level of satisfaction risks diluting the richness of individual experiences, and risks obfuscating critical areas of dissatisfaction.

Indeed, according to job facet theorists, positions of employment should be deconstructed for satisfaction analyses in light of the fact that people may be satisfied with certain aspects of their jobs while being dissatisfied with others.[108] Significant intrinsic factors for those in the professoriate include: (i) opportunities for scholarly pursuit; (ii) personal autonomy and independence; and (iii) opportunities to develop new ideas.[109] Significant extrinsic factors for professors include: (i) salary and fringe benefits; (ii) course assignments, research grants, and administrative tasks; (iii) professional and social relationships with other faculty; (iv) relationships with administration and staff; and (v) professional and social recognition.[110]

The demarcations set out by job facet theorists have particular resonance for faculty of color. In that regard, there are significant differences between African-American and white faculty with respect to satisfaction with salary, collegial interaction, student–teacher interaction, and participation in governance.[111] Satisfaction studies, then, that rely upon majority-group faculty perspectives may not accurately reflect the views held by African Americans, whose experiences in the academy may vary qualitatively from those in the majority group.

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[106] Trower & Chait, *supra* note 30, at 36–37.

[107] *See* Barry Bozeman & Monica Gaughan, *Job Satisfaction Among University Faculty: Individual, Work, and Institutional Determinants*, 82 J. HIGHER EDUC. 154, 171 (2011) (finding that university faculty are "generally quite satisfied with their jobs").

[108] James L. Bess, *Intrinsic Satisfactions from Academic Versus Other Professional Work: A Comparative Analysis*, ASHE Annual Meeting 1981, 7 (ERIC Document Reproduction Service No. Ed 203 805).

[109] *See generally* Linda S. Hagedorn et al., *Correlates of Retention for African-American Males in Community Colleges*, 3 J. C. STUDENT RETENTION 243 (2001).

[110] *Id.*

[111] TURNER & MYERS, *supra* note 59, at 22 (identifying how faculty of color, when compared with white faculty, are less satisfied with nearly every aspect of their jobs).

F. Critical Race Theory, Interest Group Convergence, and the "Tipping Point"

The Bell-Delgado survey found that the majority of the law faculty of color respondents identified their school environments as being racist, even if only by subtle manifestation.[112] There is strong theoretical support in relevant literature for such perceptions. According to *CRT*, racism is endemic and omnipresent in American life—it permeates the nation's institutions and decision-making processes.[113] Critical Race Theorists posit that America's legal system and legal institutions are all designed to or promote and protect white hegemony.[114] Critical Race Theory,

> [C]oheres in the drive to exacerbate the relationship between the law, legal doctrine, ideology and [white] racial power and the motivation not merely to understand the vexed bond between law and racial power but to change it.[115]

Critical Race Theorists reject the notion that American law and legal institutions are neutral, objective, and above politics.[116] In the *CRT* narrative, law, far from being colorblind, cements the country's racial caste system that was constructed, in part, by the legal regime.[117] According to Critical Race Theorists, law is a principal instrument for maintaining a society bereft of racial fair play and devoid of meaningful opportunities for success for most members of non-white groups.[118] The law school faculty appointment and conditions of employment plights of African Americans and other racial minorities may well be viewed clearly under a *CRT* lens.[119]

Under the interest-group convergence theory (a collateral theory to *CRT*), legislation, policy development, judicial decision-making, and majority-dominated institutional policies, practices, and procedures favor the interests of racial minorities *only* when they benefit the white majority—when majority and minority interests *converge*.[120] The *Brown v. Board of Education*[121] case may be a *CRT* paradigm. According to Bell

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[112] Delgado, *supra* note 9, at 352.

[113] *See, e.g.*, BELL, *supra* note 71, 48–50 (discussing persistence of racism in modern society).

[114] Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 875 (1990).

[115] Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1217 (2002).

[116] Cornel West, *Foreword* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xi (Kimberle Crenshaw et al. eds., 1995).

[117] *See, e.g.*, DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 126–27 (5th ed. 2004).

[118] DERRICK A. BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 187–88 (2004).

[119] Robin Hughes & Mark Giles, *CRiT Walking in Higher Education: Activating Critical Race Theory in the Academy*, 13 RACE, ETHNICITY, & EDUC. 41, 44 (2010).

[120] Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 16–18 (2001).

[121] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

and others, perhaps the real reason for the *Brown* ruling is not found in the Constitution's Equal Protection Clause.[122] Nor was it rendered to achieve justice and fair play for African Americans or to help them prosper.[123] Rather, *Brown* reflects a mindfulness of the fact that the existence of racially-segregated-by-law American institutions in the nation's South and Southwest was hurting the country's standing in the third world.[124] This geopolitical reality is something that the architect of the Court's opinion in *Brown* and the masterful assembler of the Supreme Court's unanimity in *Brown*, Chief Justice Earl Warren, former Governor of California and Republican Vice-Presidential nominee (1948), would have been keenly aware of.

Further, the "Cold War" generated a battle—between capitalism and communism, and between America and the Soviet Union—for the hearts and minds of third world peoples, people of color.[125] How could the U.S. win such a battle when, as was the case, the diplomats from most African nations could not partake of a meal in the "Whites only" restaurants that predominated in the nation's capital—Washington D.C.? Because de jure segregation undermined America's campaign to win the allegiance of people of color in the third world, the interests of white Americans in non-"Jim Crow" states (i.e., those without racial segregation by law) converged with the interests of African Americans. This convergence provides a context for the Civil Rights Act of 1964. Professor Bell concludes that without communism and third world public relations-related concerns, the nation's white majority would not have ended de jure segregation in the South and Southwest, or at least would not have done so as early as 1964.[126]

Subsequent to Professor Bell's articulation of the interest-group convergence theory, seemingly incontrovertible evidence in support of the thesis was uncovered. Professor Mary Dudziak discovered cables, messages, memoranda, and other direct evidence that U.S. government decision-makers were mindful of the nation's hypocrisy on racial equality and the need to end legal segregation as a prerequisite for success in ideological battles with the Soviet Union.[127] In a similar vein, it is notable that all of the U.S. Representatives and Senators who voted for the Civil Rights Act of 1964 were from states that did not have legal segregation regimes.[128] Consistent with the thesis, it may be observed that congresspersons voting for the 1964 Act gave up nothing, because

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[122] *See* Bell, *supra* note 120, at 522 (situating this argument and providing critiques).
[123] *Id.*
[124] *Id.* at 524.
[125] BELL, *supra* note 118, at 60.
[126] *See id.*(describing the impetus for the *Brown* decision as resulting from a "white court" ensuring "stable institutions" (quotation omitted)).
[127] *See generally* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).
[128] Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1462–63 (2003).

their constituents were not impacted, since the Act was not thought to threaten the de facto racial segregation extant in their political jurisdictions.

Derrick Bell, a chief architect of *CRT* as well as the interrelated interest-group convergence theory, also advanced a companion notion, the "tipping point" faculty-of-color-appointment thesis.[129] According to one narrative, under the prevailing *HWLS* faculty composition template, there is an appropriate number (or range of numbers) of African-American faculty/faculty of color that satisfies institutional imperatives.[130] That is because the number is consistent with, for example, (1) norms, (2) avoiding negative publicity, (3) avoiding political condemnation and pressure, (4) avoiding lawsuits, etc. A good faith effort to obtain fruits of diversity may be in the mix. When a faculty is at the "point," in terms of number of African-American faculty that satisfies these imperatives, a balance of sorts will have been achieved.[131] An additional such faculty appointment would tip, upset, or destroy the "right" institutional balance.[132] The "point" is made by majority-group faculty members according to *their* sensibilities, which will vary from institution to institution, and time frame to time frame, considering as well the socio-political factors therein influential.[133]

The tipping-point theory is ever so consistent with the interest-group convergence doctrine. Accordingly, those in the majority group who dominate the faculty appointment process at *HWLS*s will appoint and promote the interests of African American and other racial minority law faculty only when they perceive that their group will benefit.[134] For example, assume that an *HWLS* with average student enrollment,[135] located in a city with a significant African-American population, had no African-American faculty, perhaps because the *one* departed. To avoid being caught in a "hot spotlight" of sorts, majority-group faculty members will be spurred to appoint an African American to the faculty—interests will converge. On the other hand, if there were already two or three African-American faculty members, there would be less pressure and no critical "hot spotlight." That is, although two or three is a low number absolutely, the institution would not be subject to a broad critique (negative media coverage, criticism from African-American political leaders and civic groups, and so forth). Therefore, majority-group interests would not be served by an increase in the number of African-American faculty and, hence, there would be no

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[129] Derrick A. Bell, *Application of "The Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319, 323–24 (1986).

[130] *See id.* at 322 (describing the tipping-point theory as applied to law faculty hiring).

[131] *See* Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 49 (1986) (describing the tipping-point theory as applied to law faculty hiring through a fictional narrative).

[132] *Id.*

[133] Bell, *supra* note 129, at 324.

[134] *Id.* at 323–27.

[135] Approximately 600 students.

convergence of interests. As such, an additional African-American appointment would tip the ideal balance, since the "right" number had been attained. Moreover, with no spotlight on conditions of employment for African-American law faculty, there is no interest convergence in having their institutional quality of life equal that of majority-group professors.

To summarize then, according to the narrative, if majority-group faculty perceive that they have nothing to gain by increasing the number of African-American faculty and nothing to gain by improving their conditions of employment, neither can be expected to occur. Indeed, not only would those in the majority have nothing to gain, they would lose faculty slots, salary, and other benefits they disproportionately enjoy at present—there would be interest *divergence*.

G. Racism and Implicit Bias

When exploring the experiences of faculty of color at American institutions of higher education, majority-group scholars often do not even mention racism,[136] although historically conditioned deprivations that disproportionally affect African Americans (e.g., poverty, poor schooling) may be cited. That said, racism, though at times obscured and perhaps largely unconscious, cannot be summarily dismissed as an explanation, or part of the explanation, for the difficult journey experienced by many people of color who aspire to successful professorial careers in the legal academy. As Lawrence Hinman observed, "[r]acism has been a pervasive and disturbing fact of American society. . . . The legacy, and in some cases the continuing reality, of that racism is still with us today."[137] The issue of racism, it would seem, necessarily informs the discussion of African-American and other faculty of color at *HWCU*s, given its omnipresence in American life.

Faculty appointment and tenure decisions may represent a form of institutional racism, manifested through seemingly benign policies and practices designed to support so-called institutional standards; however, these polices and practices may unnecessarily generate disparately worse outcomes for people of color.[138] Turner et al. found that many faculty of color perceived subtle and persistent racism that is generally not

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[136] *E.g.*, Ying Zhou & James F. Volkwein, *Examining the Influences on Faculty Departure Intentions: A Comparison of Tenured Versus Nontenured Faculty at Research Universities Using NSOPF-99*, 45 RES. HIGHER EDUC. 139, 165–68 (2004) (exploring patterns of turnover intentions of faculty, but excluding issues of racism from their model).

[137] LAWRENCE M. HINMAN, CONTEMPORARY MORAL ISSUES: DIVERSITY AND CONSENSUS 257 (2d ed. 2000).

[138] *See generally* Carmen Suarez, Faculty of Color Career Satisfaction: The Intersection of Race, Preparation, and Opportunity (Nov. 1, 2007) (unpublished Ph.D. dissertation, Southern Illinois University-Carbondale); James D. Anderson, *Race, Meritocracy, and the American Academy During the Immediate Post-World War II Era*, 33 HIST. EDUC. Q. 151 (1993).

acknowledged or appreciated by majority-group faculty members.[139]

Although Critical Race Theorists and adherents to the interest group convergence school do not appear to focus on whether and when the racism they condemn is intentional, research that does make such a distinction seems relevant because it may advance an understanding of the viability of these theories. Conscious or explicit racial bias exists in American society, including in the legal academy; one in ten of the minority law professors surveyed by Bell-Delgado indicated they thought that the climate at their law schools was explicitly racist.[140] While it is not clear how significant an impediment *conscious* racism is to African-American success and satisfaction in the legal professoriate, *unconscious* bias may very well play a role.[141] Research clearly indicates that racial biases can influence unconscious behavior.[142] Because unconscious bias is difficult to prove and perhaps even more difficult to counter, it poses a substantial challenge to those negatively impacted by it.[143]

The Bell-Delgado survey of law faculty of color found that while 10.4% of participants perceived unsubtle racism at their institutions, 45.3% of the participants perceived subtle racism.[144] Psychologists term these unconscious influences "implicit biases"—meaning attitudes that people embrace but do not consciously recognize.[145] Implicit biases

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[139] Through a 177-item, self-administered survey of full-time medical school faculty members working at twenty-four randomly selected medical schools in the United States, Turner et al. found that minority faculty members were substantially more likely than majority faculty members to perceive racial or ethnic bias in their academic careers. Caroline Sotello Viernes Turner et al., *Exploring Underrepresentation: The Case of Faculty of Color in the Midwest*, 70 J. HIGHER EDUC. 27, 28 (1999) (discussing that the study found that the predominant barrier to people of color becoming productive and satisfied members of the professoriate is pervasive racial and ethnic bias that creates unwelcoming and unsupporting work environments).

[140] Delgado, *supra* note 9, at 366.

[141] *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 372, 387 (1987) ("Black managers, black professors, and black doctors are confronted with reactions ranging from disbelief to resistance to concern about their competence . . . . The workings of the unconscious make this dissonance between efforts to achieve full civil rights for blacks and the self-interest of those who are most able to effect change even more difficult to overcome."); *see also* Melissa Hart, *Disparate Impact Discrimination: The Limits of Litigation, the Possibilities for Internal Compliance*, 33 J.C. & U.L. 547, 556 (2007) (identifying common hiring and employment practices which, "while appearing neutral, in fact [operate] as a 'built-in headwind' to progress for women and minorities in the workplace.").

[142] *See* John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 132, 134 (Jennifer Eberhardt & Susan Fiske eds., 1998) (describing the phenomenon of aversive racism as a "subtle, often unintentional, form of bias that characterizes many white Americans who possess strong egalitarian values and who believe that they are non-prejudiced.").

[143] *See, e.g.*, William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 811–12 (2004) (providing evidence that "implicit negative associations to a social group may result in an automatic emotional response when encountering members of that group."); Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOC. PSYCHOL. Q. 23, 23 (1983) (examining the prevalence of racism beyond surface level interactions).

[144] Delgado, *supra* note 9, at 390.

[145] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006).

might even conflict with espoused values or beliefs.[146] Consequently, many in the majority group explicitly opposed to racial bias, nonetheless, unwittingly harbor negative associations with respect to racial minorities.[147]

The Implicit Association Test (IAT) has emerged as a credible measuring tool for the detection of implicit racial bias.[148] The racial attitude IAT requires test takers to complete several rounds where they sort words into categories of "good" and "bad," faces into categories of "African American" and "European American," and paired words and faces (one round of "African American/Bad" and "European American/Good," and one round of the reverse).[149] The test measures how long it takes participants to sort the stimuli, and the difference in average reaction times provides a measure of the test taker's association between the two categories.[150] A decade's worth of IAT research suggests, if not proves, that roughly 75% of whites in America harbor anti-black and pro-white biases.[151]

Other research catalogs the prevalence and perniciousness of implicit racial bias. In a videotaped police-simulation exercise, those participating were tasked with quickly determining whether a person was holding a gun or something harmless, such as a wallet or cell phone.[152] Participants were more likely to mistake an unarmed black person as being armed and, conversely, mistake an armed white person as being unarmed.[153]

In another study, those participating reacted differently to a televised crime story depending upon whether the story featured a mug shot of a white or black suspect.[154] All other material in the story was identical; in fact, the two mug shots were actually the same photograph, with altered skin hue.[155] White participants showed more support for punitive remedies for the perpetrator after seeing the mug shot of a

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[146] *Id.* at 951.

[147] *See id.* (describing implicit biases as "especially intriguing, and also especially problematic, because they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles."); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 734 (2000) (demonstrating the prevalence of unconscious social evaluations that might contradict measures in the conscious form).

[148] Since 1997, over 200 studies have been published using the IAT and over 4.5 million people have taken the test online. *FAQ on Implicit Bias*, STAN. SCH. MED., http://med.stanford.edu/diversity/FAQ_REDE.html, <http://perma.cc/FA87-HEN6>.

[149] *About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html, <http://perma.cc/N4FB-S25W>.

[150] That is, a test taker who more quickly sorts "European American/Good" than she does "African American/Good" may have an automatic perference for whites. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 46 (2013).

[151] *Id.* at 47.

[152] Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 166 (2008).

[153] *Id.* at 169.

[154] Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 571 (2000).

[155] *Id.* at 563.

supposedly black suspect.[156] I have been unable to locate any study of anti-African-American bias in the nation's history that has concluded such bias is *not* present.[157]

H. An Overview of Organizational Behavior Change

Do tenured African-American law professors perceive viable organizational strategies or approaches that might be employed to advance the appointment of African Americans to law faculties and promote high-quality employment conditions post-appointment? Though this study does not focus on organizations, I broach this subtopic because the literature suggests that institutional inclusion of underrepresented groups can be affected by organizational change. Further, some of the study participants cited organizational behavior change as a means of addressing challenges faced by African-American legal academics.

A cultural perspective can serve as a lens for examining and understanding events that transpire in institutions of higher education and the behavior of faculty, administrators, students, and staff. Institutional culture in higher education has been defined as "persistent patterns of norms, values, practices, beliefs, and assumptions that shape the behavior of individuals and groups in a college or university and provide a frame of reference within which to interpret the meaning of events and actions on and off the campus."[158] Organizational cultures establish the boundaries within which various institutional behaviors and processes take place. All organizations by definition have a culture, which can inhibit, as well as facilitate, desired institutional outcomes.[159]

Culture change has been described as the conscious, planned effort to replace existing customs and practices with new ideas and approaches that are a better fit for the extant environment.[160] Some studies of efforts to change organizational culture have concluded that institutional culture is immutable, that it cannot be altered in intentional ways.[161] Other scholars reject a "culture is immutable" thesis and instead embrace the notion that organizational culture can be changed intentionally.[162]

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[156] *Id.*

[157] Even medical doctors appear not to be immune from racially biased impulses. One study found that M.D.s more readily recommended appropriate care for white patients than for black patients, refuting the suggestion that those in the majority who are highly educated are immune from racist impulses. BANAJI & GREENWALD, *supra* note 150, at 200.

[158] GEORGE KUH & ELIZABETH WHITT, THE INVISIBLE TAPESTRY: CULTURE IN AMERICAN COLLEGES AND UNIVERSITIES 6 (1988), *available at* http://files.eric.ed.gov/fulltext/ED299934.pdf.

[159] *Id.* at iv-v.

[160] HARRISON M. TRICE & JANICE M. BEYER, THE CULTURES OF WORK ORGANIZATIONS 395 (1993).

[161] *Id.* at 16.

[162] *See* William Ouchi & Alan Wilkins, *Organizational Culture*, 11 ANN. REV. SOC. 457, 478 (1985) (describing the controversy about whether organizational "culture is a dependent or an independent variable"); T.J. Peters, *Putting Excellence Into Management*, 21 BUS. WK. 196, (1980), reprinted in

Another key component of the institutional change process involves assessing an organization's environment from multiple perspectives. Lee Bolman and Terrance Deal write extensively about reviewing organizations through a series of four conceptual frames: human resources, symbolic, political, and structural.[163] This comprehensive assessment tool can be employed to identify institutional challenges and potential strategies for addressing them.[164]

The relevance of each of these frames to institutional efforts at racial inclusion is supported in faculty diversity literature. For example, Alger contends that higher education leaders, who are positioned to change institutional cultures in ways supportive of racial diversity, often act in ways at variance with that ideal.[165] Faculty of color recruitment and retention may be negatively impacted by the application of traditional criteria in higher education evaluative processes.[166] Notably, members of the appointments, tenure, and budget committees (which may determine salary and benefits for tenured faculty) may discount new and emerging areas of scholarship developed by faculty of color.[167]

MCKINSEY QUARTERLY 31, 32–33 (1980) (giving examples of managers who mandated and led changes that then became part of the company's culture); Vijay Sathe, *Implications of Corporate Culture: A Manager's Guide to Action*, 12 ORGANIZATIONAL DYNAMICS 5, 17–21 (1983) (discussing how managers can intentionally create organizational culture change). Institutional cultures can be modified, for example, by creating new units, by changing staff, by altering leadership styles or by redefining the organizational strategies and mission. Ouchi & Wilkins, *supra* note 162, 476–77 (1985).

However, bringing significant change to institutions of higher education can be difficult. PETER ECKEL & ADRIANNA KEZAR, TAKING THE REINS: INSTITUTIONAL TRANSFORMATION IN HIGHER EDUCATION 47 (2003) (explaining that, as related to a study of twenty-three institutions of higher education, transformational change can be realized in the academy "with significant dedication, institution-wide recognition and commitment, and a lot of hard work."); TURNER & MYERS, *supra* note 59, at 221 (asserting that serious and sustained efforts to change organizational culture are required in order to provide campus environments with inclusivity and affirming conditions of employment for minority faculty members).

[163] LEE BOLMAN & TERRANCE DEAL, REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE AND LEADERSHIP 15–16 (2nd ed. 2003).

[164] *Id.* The human resource frame has the potential to provide particular insights into building and sustaining faculty diversity initiatives (the focus is on investing in a diverse pool of people). The symbolic frame may be considered whenever motivation and commitment are essential to the change effort (organizations are cultures and by understanding symbols, leaders are better able to influence their organizations). The political frame has utility for the assessment of the complex interests of various groups and individuals as they compete for scarce organizational resources (e.g., if racial identity influences resource allocation, institutional politics will be implicated). The structural frame facilitates the analysis of institutional policy and practice deficiencies that might be impeding the achievement of organizational goals, such as greater racial diversity.

[165] Alger, *supra* note 76 (reporting the beliefs of deans and affirmative action officers).

[166] *Id.*

[167] *Id.*

III. FINDINGS

A. Methodology

The primary purpose of the study was to discern the *perspectives* of tenured African-American law professors regarding: (i) the appointment of and conditions of employment for members of their ethnic group at *HWLS*s; (ii) complexities, challenges, and circumstances, if any, which may be more common for African-American faculty than for majority-group faculty; and (iii) potential strategies that might be employed to address any special challenges or circumstances which may be complicating, if not impeding, African-American inclusion in the legal professoriate.

Because I wanted to understand the perspectives of the study participants, I chose a qualitative research design, which allowed me to focus on the essence of the subject phenomenon rather than its measurement, and allowed for in-depth probing rather than mere generalization.[168] Qualitative research encompasses several unique characteristics that distinguish it from quantitative research. Rather than emphasizing numerical facts and figures when reporting on a phenomenon, qualitative research utilizes descriptive narratives and storytelling to capture the voices of the participants through questions, quotations, and extracted themes.[169] The study interviews were informal, substantial, interactive, and—importantly—employed open-ended questions directed to participants who have the same basic experience relevant to the study phenomena.[170] Questions guiding the study are in the Appendix.

Participants were selected because they were African American and had attained tenured status at an *HWLS*; consequently, they were well positioned to bring a depth of insight to the study and to provide direct insight into the challenges faced by African-American faculty at such institutions. The study sample of twenty-four participants included fourteen men and ten women.[171] The twenty-four participants in the

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[168] *See, e.g.*, CLARK MOUSTAKAS, PHENOMENOLOGICAL RESEARCH METHODS 27, 47 (1994) (describing phenomenological studies as a process which includes self-reflection and an understanding of "something that shows itself," rather than a measurement of facts); PATTON, *supra* note 27, at 493.

[169] *See generally* JOHN W. CRESWELL, QUALITATIVE INQUIRY & RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES (3d ed. 2013).

[170] *See* MOUSTAKAS, *supra* note 168, at 33 (explaining that the researcher should set aside "everyday understandings, judgments, and knowings" so that he can revisit phenomena "freshly, naively, [and] in a wide open sense."); PATTON, *supra* note 27, at 20–21 ("open-ended reponses permit one to understand the world as seen by the respondents.").

[171] Potential participants were selected from The Association of American Law Schools' Directory of Law Teachers 2010–2011 (The Directory). The Directory (published annually) identifies all full-time American law faculty and includes, prescribed by form, biographical information by year (for example, Clerk to Justice Ruth Bader Ginsburg, U.S. Supreme Court, Wash., D.C., 2002–2003). No

study span two generations, with the oldest having entered college in the late 1950s.

B. Relationships

1. Deans

On the micro level (dean to individual faculty member), law school deans received some praise in the study. All of the participants acknowledged some level of support from their dean at both the appointment and tenure stages. Such support appears to have ranged from moderate to substantial. No participant criticized their dean for lack of support at the points of hiring and tenure, not surprisingly since, as a practical matter, neither happens without at least some support from the dean. Deans do appear to have been faithful in the sense that participants who were provided support from the dean at appointment appear to have also received it at the tenure stage where the dean was the same; two participants reported a diminution in support at the tenure stage, when the deanship had turned over after their appointments.

On the macro level (regarding continual, meaningful institution-wide inclusion efforts), the study found little praise for the nation's law school deans, past or present. As one senior participant put it,

> Law school deans don't go out of their way or spend extra

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personal information beyond year of birth is provided in the directory. The Directory does contain a self-selected listing of minority law faculty. The author's reliance on the Directory for participant options was consistent with a commitment to field a diverse group of participants in terms of gender, number of years in the legal academy, principal subject areas, size and rank of school, type of school (public or private), and location of school. The Directory provides the aforementioned information.

In terms of years in the legal professoriate, I sought and achieved roughly equal numbers in three categories of service spans: 5 to 15 years, 15 to 25 years, and over 25 years. Eleven participants specialized, at least in part, in the relationship between race and law. An equal number of the participants were on faculties of public law schools and private law schools. Equal numbers were on faculties of law schools ranked by *U.S. News & World Report* 1–100 and 101 and above. An equal number of participants were on faculties with student enrollments below 600 and above 600, roughly the median student enrollment at American law schools. Participants were at schools in all parts of the country.

I employed several steps to ensure the trustworthiness of my findings. Yvonna Lincoln and Egon Guba, and Kathleen Manning emphasize the role of the researcher, as well as his ability to appropriately apply the steps of the chosen methodology, to establish trustworthiness in qualitative studies. *See generally* YVONNA S. LINCOLN & EGON G. GUBA, NATURALISTIC INQUIRY (1985); Kathleen Manning, *A Rationale for Using Qualitative Research in Student Affairs,* 33 J. C. STUDENT DEV. 132, 133 (1992).

I was mindful as well of factors John Creswell identifies as being important in qualitative research: (i) the researcher's interpretations of the findings similar to those of participants; (ii) significant phenomena clearly identified; (iii) the procedures employed for data analysis identified by researchers such as Clark Moustakas; (iv) the researcher conveyed the overall essence of the experience of the participants; and (v) the researcher was reflective. *See generally* CRESWELL, *supra* note 169. With regard to the aforementioned steps, I followed the Creswell prescriptions.

> capital on minority appointments. If their faculties wish to add to racial diversity, they will lead the effort. It seems though that if the faculty is content with the racial diversity [then present at the law school] so is the dean.

To be sure, the entirety of the participant group reported having access to the requisite physical (i.e., instrumental) resources to accomplish their work and, significantly, to attain tenure. Research funds, leaves, funds to attend conferences, and course relief, seemingly, were provided as necessary. No criticism was leveled at deans on this account in the study.

That said, participants cited "the limited commitment" of most *HWLS* deans to adding African-American faculty, a notion that was further captured by one participant who recalled:

> I have seen it more than once. Law school deans, acting law school deans, pull out all stops to make sure their school has an African American on the faculty. The buck stops there, at the dean's suite. They get in full court press mode, they definitely do not want to be the dean of the Whitey Law School, not now. It is too politically incorrect no matter where the law school is located . . . . Once there is an African American in place, the same dean will hang out a 'No Vacancy' sign. 'Need not apply' goes into effect. Law schools practice the worst kind of tokenism. I have been at [blank] law schools and it is the same everywhere.

Moreover, with respect to the quality of their professional lives, participants discussed not only the absence of solicitousness by majority-group deans and administrators, but also the presence of indifference—if not outright discrimination. For example, four participants indicated that it appeared that their present or former law school deans "forced"—through their associate deans—African Americans to teach courses they did not wish to teach with greater frequency than they "forced" white faculty (if the latter were "forced" to teach particular courses at all).

Six participants pointed to an experience in which the dean and or university president used or attempted to use them for public relations purposes. One participant recalled:

> The dean called me in after [an African-American faculty member] left [i.e., resigned]. He was all concerned about an editorial in the campus newspaper blasting the [law] school's record on diversity. He asked me to help with a letter in response. I said no!

Participants overwhelmingly endorsed the notion that law school deans and university presidents were key to any African-American gains in the legal academy. To the extent that African-American appointments

have stalled and conditions of employment have reflected race-based inequity, deans were seen as part of the problem. There was a broad consensus among participants that tipping-point hiring policies, faculty-of-color exclusion practices, lateral-only-faculty-of-color appointment strategies, racial inequity in compensation and benefits, and so on, are signed off on, if not embraced, by most *HWLS* deans. Moreover, six participants recounted a sharp drop-off in intensity and the level of outreach they received after their appointments, compared with that received prior to appointment; they felt that systematic efforts to support their successful integration into the faculty were lacking. In other words, deans were criticized for doing too little between initial appointment and the formal tenure decision point.

Notably, it is during this period that African-American faculty attrition occurs at *HWLS*s at rates greater than white attrition. All of the participants pointed to assistance from deans at the formal tenure review point in the process, even if they were not particularly helpful between appointment and the semester of the tenure decision. For example, at the tenure voting stage, deans were favorably cited by participants for garnering support (i.e., the necessary votes). Unfortunately, the study was unable to gather perspectives regarding the correlation between the efforts, or lack thereof, of *HWLS* deans and failed African-American faculty candidacies.

Participants' review of deans' efforts to ensure even a modicum of inclusion for African-American faculty, post tenure—much less a high-quality professional experience—yielded failing grades virtually across the board. Most participants seemed to indicate that *HWLS* deans largely abandon any pretense of a real commitment to a high quality of institutional life for African-American faculty after such faculty attain tenure. Or, in the words of one participant, "you got tenure, now don't bother me!" and "I'm off the hook now."

The deans of law schools were perceived by participants as being key to faculty salary, benefits, offices, parking spaces, grants, leaves, endowed chairs, research funds, travel grants, course reduction, center and program directorships, etc.—all of the instrumental factors that determine quality of institutional life for professors. In some way, shape, form, or fashion, all of the participants conveyed their perception that, generally speaking, African-American professors just get less from the legal academy than majority-group faculty—the only real question being how much less. All of the participants thought the dean of the law school was the most important cog in the law school machinery and that, by their failure to lead with respect to institutional inclusion, they bore considerable responsibility for "the less" participants perceived that African-American faculty receive at *HWLS*s.

2. Majority-Group Faculty

The connectedness of the participants to their law schools and majority-group faculty varied widely. I found the relationship between African-American law professors and the majority-group members of their faculties to be one that, generally speaking, could be cast as "at arm's length." Close relationships across racial lines seem few and far between in the legal professoriate.

Participants often characterized their relationships with their law schools and/or majority-faculty "colleagues" as being merely "O.K," "all right," or "fine." The words of one participant that "I pretty much get along with my colleagues" were among the underwhelmingly enthusiastic responses I heard. Not one participant used "great" or a similar term to describe relationships with majority-group faculty *generally*. Four participants did describe individual relationships with some particular majority-group faculty members as being "good" or "great."

The participants shared perspectives, feelings, and experiences suggesting that many, if not most, African-American law professors have cordial, but not fully collegial relationships with the bulk of the majority-group members of their law school faculties. One participant allowed: "I'm friendly, they're friendly but we don't hang out." Eight participants observed what might be deemed a lack of emotional or psychological support from most majority-group faculty. One participant declared, "I do not know that they take our [African-American's] success to heart in the same way they do [the success of] their own." Moreover, it is not difficult to imagine some transracial trust issues at some *HWLS*s after hearing, "I have to watch my back," "at the end, you're an outsider, when you forget that you set yourself up for disappointment," and similar sentiments.

A few majority-group faculty members did provide a significant degree of intellectual support to some of the participants. In that regard, one participant offered the following testimonial:

> I almost feel like I should apologize about I guess my good luck. I have been in law teaching long enough to know that it is tough for African Americans to be appointed to law faculties and to get tenure. The scholarship in the area and my contacts in law teaching leave me no doubt. I lucked out. I had a very good [law faculty] mentor who started working with me before I arrived here . . . . I had a draft of an article that I drew from a case I worked on at [blank]. The draft was part of my application file so my mentor had it. He called while I was still at [blank] but had been given a six-month notice . . . . He said he had some thoughts on my draft. With my mentor's help and that of other faculty members, the draft was turned

> into an article that was accepted for publication before I arrived on campus. That fact created goodwill for me. I teach [blank] and [blank] and courses and seminars that focus on race and the law. I have published articles on [blank] and [blank] and on race. My colleagues have provided consistent strong support for my writing. They have marked up numerous drafts . . . . It is ironic, the most help came on a race piece. None of the colleagues knew anything about the topic, which is why they asked the best questions. Answering those questions left me with a finished article which ended up in a good law review . . . . I know my report goes against the grain but my colleagues have been there for me with substantial intellectual support.

Only three other participants reported assistance of this character in terms of commitment and effort. For those participants whose scholarship was not race-related, "some," "a modest amount," and "a little" reading and critiquing of scholarship by majority-group faculty members were more common experiences. The eleven participants whose scholarship focused, at least in part on race, agreed that, for the most part, majority-group faculty did not provide support with helping to conceptualize their work. As one participant observed,

> I have been interested in Critical Race Theory since I took a seminar on Race and Law during fall semester of my third year of law school. I was able to develop my seminar paper under an independent study the following spring. I continued to work on it the following year during a judicial clerkship as well as during the two years I spent at a law firm. When I joined the faculty at [blank], I was to teach [blank] and whatever else I wanted to teach. I taught a seminar and used the same material and syllabus I had as a law student, except I added material in the areas of my paper. White colleagues were obsessed with asking me, "What are you working on?"—their questions began and ended there when I described my *CRT* paper topic and its history. In the two years between joining the faculty and having my paper published in [a law journal], I got no follow up questions on my research, nothing about my thesis, no suggestions about other scholarship I should look at, other scholars I might look to . . . I noticed that other untenured white faculty seemed to garner real interest in their scholarship. The senior faculty inquiries did not end with "What are you working on?"

Another participant offered a similar critique:

> If you write on race, you may be the only one on the faculty who does. That was the situation for me. Trying to get any

> meaningful feedback was like pulling teeth. "I do not know enough." That did not prevent them from commenting on the work of others outside their areas of expertise.

To the extent participants who wrote on race looked for peer support, they tended to look to sources external to their law school. Four participants did report that their majority-group colleagues were supportive of their research and writing on race with general advice and encouragement.

The study did find some intra-law faculty transracial collegiality to be sure, but the counter narrative is, perhaps, more telling with regard to the state of the subject relations. Notably, only twenty-five percent of the participants reported that they felt "respected," "appreciated," or "welcomed" by the bulk of the majority-group members of their faculties.

Further, eleven of the participants actually used the terms "disconnect/disconnected," "detached," "withdrawn," "disengaged," or "estranged" when describing their relationships to their current law school and/or majority-group law faculty. These self-characterizations are evidence that life in the legal professoriate can take a toll on African Americans over time, resulting in some, if not considerable, distance between them and their historically white institutions, and the majority-group faculty members. The following story is representative:

> I was quite happy when I landed a job at [blank]. But it did not take me long to wonder about my choice. There were so many racist moments. At first, I thought that I would not let it affect me but it started to. Then, of course, I heard through the grapevine that I had an attitude, which I probably did in reacting to the environment. No one was going out of their way to help me and I kept encountering racism, suntan and fried chicken cracks, ID checks by campus police, women grabbing their purses when I came near. For me, the worst was how black and Latino candidates for appointment were trashed. It seemed to me that white unsuccessful candidates were rejected but black and Latino candidates were savaged. I never got whether such a record was needed as a defense or was just the product of racial hate-on. I am not the kind of person who displays anger, so I was stewing and I guess it was showing. Then, I recalled the "attitude" comment and began to think I should not treat it as an aside . . . . I knew that there was a line out there that was negative and could hurt me for tenure. I figured that if the line was out there, the worst thing I could do, would be to play into it. I figured I better be a model citizen until I got tenure. Once I got tenure I just decided I did not want to hear racist cracks anymore or put up with all the things that gave me a headache so I just decided to

> withdraw. I am now totally withdrawn . . . . Engagement brings multiple forms of disrespect . . . I do not want to spend time and energy butting my head against the wall.

Disengagement was a conscious choice of some of the participants in reacting to what they perceived to be a "chilly climate" for African-American faculty at their law schools. One participant who has embraced disengagement shared his perspectives this way:

> Disengagement means office door shut—minimizes insults, indignities, overhearing racist commentary, overhearing racist jokes. Further, you do not have to attend meetings with consequent insults, indignities, racist commentary, racist jokes. You do not have to attend lunch with racists overt or covert to keep your job . . . . You have the ability as a law professor to draw the line on assaults to your existence in ways you cannot in law firms or business organizations . . . .

All of the participants who reported being disconnected from their law schools or faculties seemed to have had a meaningful connection with at least a small segment of law school faculty or other parts of their universities. As one participant noted: "I found a comfort level with the folks over at [another institution on campus] that I never found here." Another observed, "there is more diversity at [another institution on campus]—I'm drawn to that."

Two participants recalled occasions when they were encouraged to confidentially share sensitive, racially-based concerns with majority-group colleagues, only to find out later that the conversation had been divulged to other colleagues. In a similar vein, two participants reported that majority-group faculty, at times, seemed to undermine the professorial authority and credibility of faculty of color among the student body by, for example, discussing a faculty member of color on very personal terms with students. In this regard, one participant recounted,

> Some African-American students stopped by my office specifically to tell me that another professor had mentioned me by name in class several times. They thought it strange. So did I, especially since I had no relationship with the guy. I let the offender know that I did not appreciate the trespass.

In terms of colleague interactions, participants spoke of condescending tones of voice (n=2) and of racist cracks (n=4). In a similar vein, participants complained of feeling as if they were constantly under a microscope (n=3), of having their privacy invaded (n=2), and of being the subject of stereotypical projections (n=5) and idle gossip (n=4).

Five participants volunteered that the racial climate at their current law schools was more welcoming to and inclusive for African-American professors than it was at previous *HWLS*s where they taught. All five of

these transferees allowed that the positive difference was what they were seeking when they changed schools. A law school's racial climate for African-American faculty may vary by geography, according to participants. Eight participants mentioned that the geographical location of a law school may influence how African Americans experience their law school professorship. They perceived law schools in the South and Southwest to have chillier climates for African-American faculty. Perhaps the history of legal segregation in and the race relations culture of those regions shows up in various ways, such as in student predisposition to racism or racial insensitivity, even today. That point was made by a couple of participants, one of whom declared, "what happened outside [a law school's] walls will influence what happens inside."

3. Administrative Staff

Little in the literature on the professional lives of academics focuses on their relations with administrative staff. Such relations, however, were identified by a majority of the participants as possibly exemplifying how African Americans experience the legal professoriate differently than majority-group members. Fourteen participants cited difficulty in treatment by or interaction with law school staff members as being especially problematic for African-American faculty at *HWLS*s.[172]

Complaints were voiced about what some participants perceived to be law school staff manifestations of contempt for African-American faculty. Twelve participants reported having had experiences with majority-group staffers that were described by those participants as being "offensive," "demeaning," and/or "disrespectful" to them, if only in some inchoate way. These participants reported experiencing "attitude," if not differential treatment, from all kinds of administrators and staff, including associate deans, assistant deans, registrars, placement officers, library staff, and secretaries, which, they opined, would not have been accorded to majority-group faculty. Dealing with manifestations of disrespect from staff appeared to be a frequent state of affairs for five participants, one of whom offered the following:

> If I request particular classrooms, particular class times, I never get them. The library loses my research requests. If I limit enrollment, the request is "lost" so I have to teach everyone who signed up . . . . My posting for a research assistant was never posted. I have complained about staff services. I stopped complaining when it occurred to me that no one else was complaining. I do not have to tell you what I

[172] Twelve of the fourteen cited this difficulty from personal experience.

think has been going on.

Further, participants indicated that, in some cases, it was their perception that staff provided different levels of support to African-American than to white faculty. In that regard, four participants (three female) remarked that they thought white administrative assistants and secretaries put the work of African-American faculty at the back of the line. According to one female participant:

> My administrative assistant can never seem to find time for my work. I snooped around as unobtrusively as I could and found that time after time the work of other professors she works for were completed while my tasks were not attended to, though their work had been submitted after mine. I am on my third assistant in four years with the same results. Now, I only assign my assistant things that are not time sensitive. When I complain the assistants look at me like I am being unreasonable. The head of personnel is willing to switch my assistants but not to insist that I be treated with respect. I have gone over this with my sisters at other schools to find out that my experience is the usual one for us . . . . I know that women do not want to work for other women is a notion that is out there but all of my assistants have had white women assigned [to] them and their work has always seemed to get done before mine. I have gone as far as asking others if they told the assistant they needed prioritized treatment. No was the answer . . . black women are at the bottom of the barrel . . . .

One participant asserted, "White administrative staffers are more willing to take on [challenge] black faculty members and black administrators than they are willing to take on whites in those positions." Moreover, according to one participant, "If you are involved in a dispute in the community, no one has your back." In a similar vein, one participant declared, "In any dispute involving a [black faculty member and a] white person, be they staff, student, homeless transient—the words and positions of whites will be the ones respected."

Campus police were cited by two-thirds of the participants for sometimes treating African-American faculty disparately, though it is not clear that all of these participants referred to a personal experience. In law school buildings after "normal hours," participants, and other African-American faculty they were familiar with, had been subjected to "you-must-be-a-criminal" treatment, rather than the respectful treatment ordinarily extended to white faculty. The message, according to one participant: "[y]ou know . . . a black man should not be in a place of business and affairs after [regular] hours unless he is clearly a maintenance man." Participants spoke of "in the law building while black," "at the university while black"—take-offs on "driving while black." In a similar vein, one participant reported:

> I was stopped for I.D. checks by campus police when I was at [blank] every evening or weekend I was in the law school. When I asked other faculty members, obviously white, if they were stopped and asked to provide identification—No. I wrote the Chief of Campus Police a letter complaining about being stopped when white colleagues were not. The Chief came to my office. We exchanged pleasantries; he took out a notebook and then asked me for the names of the officers and the dates of the stops. I asked him can you not tell me that information—who patrols. He said every officer would be assigned the law school within a certain period of time, I've forgotten. He told me every officer's picture hangs on a wall at headquarters so I could take a look to see if I could identify anyone. I said no thank you. The Chief promised to look into it but I never heard back.

Four participants cited being "overlooked," "dismissed," "not sympathized with," or "not supported" by majority-group faculty members or administrators when they complained about maltreatment of a racially-profiling character by campus police. One participant pointed out, "The university's police conduct sends . . . an institutional message of exclusion."

4. Students

Participants' perspectives suggest that interacting with majority-group students can be a complex component of the professional lives of African-American law faculty members—both a great source of satisfaction and a great source of dissatisfaction.

It can be noted that course assignments at most law schools attempt to balance the institution's needs with the desires of individual professors. Professors teach certain courses that the institution requires or needs and, in turn, are allowed to teach courses or seminars they want to teach.[173] Most of the participants currently taught at least one required course or their law school's only section of a commonly selected (though not required) basic-to-the-practice-of-law course, such as Business Associations.[174] Required courses—those usually taught in the first

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[173] At a small-enrollment law school with modest resources, a professor's course list for the academic year might be three "needs" courses and one professorial "elective" per academic year. At a top-ranked law school, it would not be unusual for a professor to have only a three-course load with two of those courses being selected by the professor.

[174] I use basic course to mean a course that is rarely required to be completed for law school graduation but is, nonetheless, taken by a majority of students. For example, the basic course—Business Asssociations—is required to be completed for graduation at few, if any, American law schools. That said, a substantial majority (perhaps 85–90%) of all law students will likely complete such a course.

year—appear to be most problematic for African-American law faculty. Findings on this point reflect the perception of the participants who had taught them, as well as those who had not. Majority-group students conscious of their own racism simply do not take courses taught by African-American professors, if they can avoid doing so; however, law school students are not permitted to opt out of randomly assigned required classes.[175]

All of the participants agreed that the following age-old adage still applies: "a new-to-teaching white male law professor appearing before white law students on the first day of classes is presumed by them to be competent until he proves otherwise; a new-to-teaching African-American law professor appearing before white law students is presumed by them to be incompetent until he proves otherwise." In a similar vein, three participants used the words, "You are on trial" to explain a view of the dynamic involved when African Americans teach at *HWLS*s.

The experiences of participants ranged from an occasional relatively minor incident every few years to the truly obnoxious on a regular basis. One participant offered the following observation.

> I rarely have a year without what I call "white student problems" that bother me . . . . I wonder if I have "pick on me" written on my forehead . . . . I have students calling me by first name, questioning my expertise, just a lot of negative, disrespectful interactions.

Though acknowledging the phenomenon, some participants appeared to minimize so-called "white student problems," seemingly subscribing to the notion that they can be dispatched in the ordinary course. According to this line of thinking, African-American law professors can prevail at "trial" by demonstrating competence as instructors. This view was reflected in the following observation:

> They [majority students] look you [African-American law professors] over pretty good—waiting for you to screw up. If you don't screw up, you won't have a problem but know they are ready to pounce.

Indeed, a half-dozen participants mentioned that they or other African-American law professors had won awards for teaching excellence (though some of these determinations were not made by students, but by administrators and alumni).

Despite this positive note, all of the participants acknowledged that relations between African-American faculty and at least some white

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[175] In larger enrollment law schools, required courses might be divided into two or more sections. Where this is the case, students are randomly assigned to particular classes and such assignments are not subject to change based on a student's preference for a professor other than the one randomly assigned.

students can, at least occasionally, be problematic for the professor. Virtually all of the participants acknowledged that African-American law professors can face harsher judgments about their instruction than do majority-group faculty members. In that regard, I note the perspectives of one participant:

> Quite a few law professors struggle with teaching when they begin their careers as law professors. When beginning white professors struggle with teaching everyone is sympathetic, since it is not unexpected. "Hey give 'em a break—he/she is just starting." Now, let an African American have some problems teaching even in their first semester. "I knew it, I knew it, they just cannot cut it. They are not up to it." The students abandon you in the sense they disengage other than to discuss how bad your teaching is. The faculty, your colleagues betray you—yes, betray you. They take what the students say as gospel. Some faculty actually encourage the students to discuss your problems, even though the norm is that faculty do not discuss other faculty with students.

According to another participant, "If you catch low evals they can become a self-fulfilling prophecy . . . students review those [evaluations]." The participant added, "Your reputation influences evaluations, and of course it is harder for blacks to live down a reputation of being a poor teacher." A half-dozen participants essentially subscribed to this idea.

Having majority-group law students who know that they do not want an African-American instructor is not an experience limited to those professors who teach required courses. At relatively small-enrollment law schools, if an African-American professor is the only faculty member teaching (the not required course) Business Associations, she will likely have at least some majority-group students who are consciously biased against African Americans. The absence of the course on their transcript can be thought by such students to cause more problems for them than having an African-American professor, so they will take the class. At large-enrollment law schools, there will ordinarily be more than one section of Business Associations in any academic year, so those who wish to avoid having an African-American professor will usually be able to do so.

At the end of the day, according to participants, most African-American law professors will have at least some students who consciously embrace negative stereotypes about African Americans, which may be manifested, for example, by classroom conduct that is disrespectful to the professor or through lower teaching evaluations than would be the case if the professor were white.

As one-third of the participants discussed, at least some majority-group students will have come from racially parochial

backgrounds, will have had little interaction with African Americans, and will not have personally witnessed African Americans functioning in authoritative roles. Consequently, encountering such faculty and acknowledging their expertise may clash with the worldviews of some majority-group students. In this regard, one participant declared:

> [W]hite students have been socialized to view the world in a particular way that's loaded up with black stereotypes and even having a brilliant and effective black professor for three or four hours a week for fourteen weeks is not a match for years of exposure to "black is not beautiful."

In any event, nine of the participants reported that, in their experience, some majority-group students would especially resist being presented with material that challenges the notion of the impartiality and objectivity of American law and legal institutions. In that respect, one participant declared: "I had to learn the hard way—introducing Critical Race Theory in first-year Contracts . . . I was practically run out of town. I recouped though and laid off the Crit. Stuff." Another participant reported encountering some student resistance to her counter-hegemonic pedagogy with what she described as "disrespectful and over the top reactions" when she introduced some Critical Race Theory in a first-year property law class. Participants believed that, for some white students, the "problem" appeared to be the messenger; for others, it was the message; and, of course, for some it was both.

According to eight participants, if majority-group students conscious of their racism sign up for an elective course taught (unbeknownst to them) by an African American, they will simply drop the course after the first class meeting. One participant announced, "I would like to see statistics on first day of class drops by race." On the other hand, most participants appeared to have few student problems, which they characterized as racial in character, in elective courses, even those that were *CRT* based. One participant's observation—"If I have a problem with white students it will be the first year"—is representative of what I heard from other participants. They were quick to point out, however, that full disclosure regarding any race-based course approaches or content were key to avoiding majority-group student dissatisfaction and manifestations thereof in elective courses. As one participant put it: "Transparency is the key. If you describe your [course] offering you will avoid [student] unhappiness." While participants perceived "white student problems" to be, generally speaking, few and far between in elective courses, they were not entirely nonexistent. As one participant noted, "They [majority-group students] can still be more argumentative, less deferential with us even though it is likely they may not realize it." Another participant observed, "Oh, you are going to get subtle reminders that they are white and you are not. You can bet on it."

Participants perceived that majority-group students were more apt

to challenge their authority and expertise in theory-oriented courses, heavily influenced by philosophy, history, political science, sociology, and economics. In courses the development of which is influenced heavily by practice, the participants perceived that African-American law professors with relevant practice experience were less likely to be challenged by majority-group students. As one participant announced, "If the course is about theory, they [majority-group students] assume they know as much as you do." Seemingly, some majority-group students are predisposed to believe that their white professors are "smarter" than they are, but that their black professors are not.

That white law students can be grossly racist or racially insensitive was highlighted by four participants who referenced a party thrown by white students at a top-twenty law school several years ago. The students blackened their faces, donned "Afro wigs," padded their buttocks, clayed their noses, sported quite full artificial lips, bedazzled themselves with chains, and "blinged" their teeth for what they advertised as a "Ghetto Fabulous" party. Boom boxes blared, but not loudly enough to drown out ebonically-correct conversations.

Based on the interviews, there would appear to be a degree of race-based nastiness that finds some African-American professors at *HWLS*s. Two participants even reported knowing of cases in which African-American students discovered majority-group law students plotting strategies—that included scripts—to trip up African-American professors. In a similar vein, it is worth noting that a half-dozen participants discussed law school "community" blogospheres—places where anonymous messages are posted—that contain racist commentary of the foulest and most hateful kind, presumably posted by majority-group students. While none of these participants apparently sought blogosphere access, they indicated that African-American students regularly apprised them of racist law school blogosphere commentary.

In an entirely different vein, teaching students from across the racial spectrum, especially in elective courses with self-selected students, was a satisfying experience for some participants. Further, one-half of the participants spoke of the enjoyment derived from nurturing students, across the ethnic spectrum, and helping them to develop intellectually and preparing them to be lawyers. For a few, interacting with students of all races appeared to provide some of the support that faculty collegiality ideally is supposed to provide. One participant noted:

> Over time I have looked to my [student] research assistants as sounding boards in connection with my scholarship. I also pick their brains, their views on various institutional matters.

Finally, eleven of the participants singled out engagements with African-American or other students of color that brought them a great deal of satisfaction. Serving as advisor to the black law student group or

mentoring African-American students seemed to be a cherished role for those eleven in such positions. In this regard, one participant related the following:

> Even before I got here [as an untenured professor] people from all parts of the country were calling to tell me "whatever you do, do not let the black students eat up all your time counseling them." So I was hesitant at first and begged off when black students sought me out but when I started my second year, I decided to be more open. Contrary to everything I heard, my contacts with black students enriched my experience.

C. Terms and Conditions

1. Appointments

There was solid support among participants for the notion that, generally speaking, *HWLS*s are committed to *some* racial diversity in their faculties. Indeed, eighteen of the participants acknowledged, in some fashion, that without an institutional embrace of diversity at some level, the underrepresentation of African Americans on law faculties at *HWLS*s would be even more marked than at present. As one participant observed, "if [there were] no law school commitment to diversity, fewer of us would be law professors." By reference to their own situations or African-American faculty appointments more generally, eleven participants indicated that *HWLS*s should be commended for putting a thumb on the scale to promote racial diversity. In that regard, one participant weighed in with:

> Let's say there are no blacks on the law faculty. Let's say there is a black candidate who graduated from a top law school, was an editor of [a] Journal, has top law firm experience, published a solid law review note, wants to teach a traditional property law course—no critical race theory [in the property course]—but does want to teach at least one course or seminar focused on critical race theory. Further, the candidate presented him or herself well and a majority of the students urge the appointment. This candidate is going to be appointed . . . a segment will be opposed. They will not publicly oppose, not politically correct and they can't stop the appointment . . . .

That said, there was broad recognition among participants that *increasing* law faculty racial diversity beyond current levels constitutes a

substantial challenge. All the participants perceived complications and challenges in the appointment of African Americans to tenure-track professorships at *HWLS*s. Eleven participants shared their perception that historically-conditioned, cumulative disadvantages visited upon many African Americans (e.g., low income background, weak primary and secondary schools) can be impediments to realizing the kind of "off the chart" law school performance achieved by some in the majority group. The following observation is typical in that regard:

> It is unrealistic to expect that many black Americans would be in a position to compete with whites for faculty positions given all the advantages that many of them have and all disadvantages blacks have . . . . I'm generalizing, it's the way I see it.

For starters, participants pointed out that the legal professoriate has pipeline challenges[176] with respect to African Americans. Directly or indirectly, all of the participants who offered appointment prescriptions (n=13) indicated, in some fashion, that the pool of African Americans who are qualified for law faculty positions under *traditional* criteria remains relatively small. Participants described how a significantly lower percentage of African Americans have access to a high quality K–12 education, a circumstance that negatively impacts their ability to access college. Even when disadvantaged African Americans manage to access college, poor K–12 preparation will make it difficult for them to master college in a way that positions them to be highly successful in contending with the rigors of a law school curriculum.

According to four participants, some potentially qualified African-American law school faculty candidates eschew that career path due to their negative perception of law school culture, values, and expectations based on their experiences as law students. Of these four, one participant spoke of "condescension," another of "chilliness," another of "whiteness" when referencing their law school student days—and *they came back* to the legal academy! While these participants joined the legal professoriate despite these perceptions, it was their belief that certain law school "racial atmospherics" (as described by one participant) had turned other African Americans off to such an idea. In that regard, one of the four noted that:

> I have black friends from my law school days who do not understand my career choice given their feelings about how shabbily black law students were treated at [law school].

Many of the participants (n=13) pointed out that, in their opinion, there are some majority-group faculty in the legal academy who are just opposed to lifting any institutional fingers to accommodate

[176] The "pipeline" refers to the route to be taken in preparation for a law faculty position.

African-American faculty aspirants. The joint brief of law professors opposing the use of race in admissions in *Grutter v. Bollinger* was cited as evidence of such opposition by ten of the participants.[177] Seven of those ten expressed doubt regarding the bona fides of the law professors' stance as a principled one, but rather chalked the brief up to racial bias. Four of the participants expressed the view that some majority-group law faculty simply presume that African Americans are deficient—badly raised, poorly educated, insufficiently socialized, and so on. According to this line of reasoning, deficiency theories and notions justify a no-special-efforts (to appoint African-American faculty) stance—"they" are unworthy of and undeserving of special efforts. Moreover, eight of the ten participants referencing the brief asserted their belief that the views expressed in it are more widely held in the legal academy than the number of brief sponsors (two dozen or so) would suggest. All this said, as one participant observed:

> The number of whites on a particular law faculty willing to go on the record as opponents of diversity, even affirmative action to achieve it, is fortunately small.

In a similar vein, another participant observed,

> Most law schools seem to have open opponents to any affirmative action for diversity. While they cannot stop it, their campaigning against helps to limit efforts of that kind.

All of the participants seemed to believe that there is, or may be, a tendency on the part of majority-group law school faculty to develop a consensus about an "appropriate number" of African-American and faculty of color that, in effect, serves as a kind of quota for such faculty. All of the participants, then, acknowledged the omnipresence of the "tipping point" phenomenon. Once *HWLS*s reach their tolerable maximum number, they tend to "stand pat" vis-à-vis the number of African-American and faculty of color—though the acceptable maximum number may creep up over time.[178] In that regard, one participant told me,

> I was [the] first [African-American] on the faculty. When I was tenured I began to urge them to appoint more blacks to no avail; as time passed one began to be too few . . . . We now have three following [a] long struggle.

As long as a particular law school's faculty of color maximum or

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[177] *See generally* Brief for Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 164181.

[178] The maximum number and the minimum number may be the same—one. One might be the minimum and three might be the maximum. Where three is the maximum and one of three faculty members of color departs, hiring a (new) third faculty member of color would not be out of the question, but if all three remain—"we're not hiring!"

quota is filled, generating any interest in adding other African-American faculty or faculty of color, is a harder sell since, according to one participant, the school's "racial diversity 'mission' . . . has been accomplished." According to one participant,

> Law schools require or will accept one black and one brown professor. If the faculty of color quota is three the third can be black or brown. For many smaller enrollment law schools, *one* may well be the magic number for faculty of color; either one African-American or one Hispanic-American will suffice.

That said, according to another participant,

> If a black faculty candidate with a good record from a leading law school and with a STEM doctorate from a top-notch university, he or she will be hired unless they have a severe personality defect, quota or no quota.

There may also be a quota for those whose work focuses on the intersection of race and law. According to four of the participants, that number appears to be one or perhaps two at most, per institution. A participant who is a Critical Race Theorist explained:

> When it comes to race scholarship zero scholars seems no longer acceptable to many law schools. Once they have a scholar of race they seem to pass on additional ones. When I looked to move, I did not bother with schools that had faculty writing on race.

Notwithstanding an acknowledgement of some level of commitment to faculty racial diversity by *HWLSs*, participants had complaints about the appointment process. For example, it was pointed out by one-half of the participants, including those who had served on appointments committees, that the credentials of African Americans are scrutinized more carefully than the credentials of whites. Numbers of references being checked (more for African-American candidates) was cited as an example of how African-American candidates for law school faculty appointments are, in the words of one participant, "examined more thoroughly" than white candidates, regardless of the paper record. One participant pointed out this perception by way of analogy:

> The top ten percent of each class at Harvard Law School graduates *magna cum laude* as Barack Obama did. The place has a *summa* graduate only every three or four years. There has been only one female to graduate *summa* in the history of the place. I am a politics junkie and a student of American history. The academic performance of U.S. Presidents or even candidates are not the source of public disclosure until we have President Obama who probably has the most impressive

> set of academic credentials of any occupant of the White House. The Harvard Law School of Obama was exceptionally competitive for admission and for graduation with high honors. We've had Ivy League Presidents of the U.S. Franklin Roosevelt was Harvard College and Columbia Law, though I think I remember that he left law school before his graduation after he passed the bar. Anyway, in the old days, even the great schools were open admissions for the wealthy. The younger Bush was rejected for admission to law school and yet there was no public debate about it . . . . Only one President's academic credentials have been questioned even though the same President has the most impressive academic credentials of them all.

It does appear that for some faculty at *HWLS*s, to the extent that an African-American faculty candidate possesses all of the "right" credentials, the greater the incredulity. The participant who proclaimed "the better the paper, the greater the reference effort, it's almost as if they have to find something!" seemed to capture a view widely held among the participants. Two participants, who had been appointments committee members, reported that their committees requested transcripts from established African-American professors exploring lateral transfers longer after their graduation than is conventional.

Tenure-track law faculty appointments are ordinarily made to fill curricular needs. Law faculty members are hired to do very specialized work; aspirants need to know how to prepare for and obtain credibility as a specialist in particular areas of law, as well as how to convince the relevant market of their expertise and readiness to demonstrate such with scholarship. According to participants who discussed this phenomenon, prominent, well-connected majority-group law professors will encourage and assist their acolytes to "go the academic route"; they will offer advice and assistance with respect to developing a law review article, establishing connections with other faculty members, and serving as a research assistant. Further, connections may lead to a judicial clerkship or research fellowship; the latter is important because, in addition to helping secure a faculty appointment, pre-tenure-track publications do count towards tenure. One participant declared:

> Few of us get the best grade in a class of two-hundred, few of us are editor-in-chief of the law review or articles editor. Those are the students white professors establish relationships with.

All of the participants, some of whom had served on appointments committees, indicated that the weight accorded to faculty recommendations might disadvantage African-American faculty candidates at *HWLS*s. Strong positive comments by an established law professor about a former law student can carry great weight. Sharing his

experience in this regard, one participant recalled that:

> [E]veryone really at all the top-tier schools I talked to asked me for the names of faculty members they could call. At some schools I definitely got the impression that without the seal of approval by a professor or should I say white professor, my candidacy was going nowhere. Now I didn't know whether these schools placed the same emphasis on "who do you know" for white candidates. Once I found out what the deal was with "who do you know," I went back to my law school and reminded two profs. I had for seminars of my existence and interest in teaching. I then called schools I thought were considering me and told them that they might want to call the profs. I assume that happened because soon after my candidacies moved forward at two places resulting in offers.

This participant with sponsors would seem to be a fortunate exception, whose example suggests that faculty *imprimatur* may carry great weight for advancing a law faculty candidacy. A half-dozen participants suggested that it is more difficult for African Americans to secure supportive recommendations from majority-group faculty or to even have those faculty remember them.

It was the contention of ten participants that meaningful "sponsorship"/"mentoring" is not as readily available to African-American law students because the nation's culture does not promote closeness across racial lines. As one participant put it when referring to law school faculty mentors: "they (the mentors) choose themselves [as mentees]." One participant urged me to "think about the degrees of separation . . . I went to [a historically black college]. I had no comfort level with whites. Neither did some or most of the blacks in my [law school] class." No participant mentioned having a close or significant mentoring relationship with a white faculty member while in law school. On the other hand, six participants referred to majority-group law faculty having mentoring relationships with majority-group law students.

Moreover, ten of the participants honed in on what one called "a comparative advantage" in socialization for the legal professoriate enjoyed by those in the majority group. According to this line of thinking, generally speaking, majority-group candidates may appear to be readier for law faculty appointments because of their relatively more effective socialization for the position. Given the predominance in number of majority-group faculty, any faculty-nexus sourced socialization advantages were perceived by participants to be enjoyed disproportionately by majority-group students.

Being an editor on a law school's primary law review has traditionally provided those in the majority-group with an ideal vehicle for socialization for the legal professoriate. Legal scholarship is

commonly published in law reviews or journals; these periodicals contain articles that are edited and published by law students. Law is unique among academic disciplines in that law students—not professors—dominate the selection, editing, and publication of scholarly articles in the field. The most influential and prestigious of the student-led reviews or journals is each law school's primary law review, which usually carries only the law school's name (e.g., *Harvard Law Review*). All Tier I law schools[179] usually have one or more additional law reviews or journals (e.g., *Harvard Journal of Civil Rights and Civil Liberties*, *Harvard Journal of International Law*). Some law schools not in Tier I also have multiple student-commanded journals.

Competition is especially keen for membership on a law school's primary law review. Members thereof are usually chosen between the first and second years of law school on the basis of first-year grades or some combination of grades and the quality of a time-pressured research and writing exercise.[180] At larger-enrollment *HWLS*s,[181] only those students in the top five to ten percent (by first-year grade point average) may be invited to join the primary law review. The editorial positions on any law review (the positions that determine which articles will be published and how they will be edited) are customarily held by a quarter or less of the review's members.

Law review editors work directly in the editorial process with the authors of articles selected for publication. They operate in an academic milieu and are, relative to other law students, steeped in the law and its literature and hence make desirable candidates for tenure-track faculty appointments. Law review editors constitute a fraternity that provides invaluable contacts, support, patina, and socialization for the legal academy.[182] Given African Americans' historically conditioned deprivations and disadvantages, and the relative advantages of some of those in the majority group, top five to ten percent in class rank at an *HWLS* is not easily achieved. Thus, the system has resulted in few African-American law review members and, correspondingly, few African-American editors.

Today, primary law review membership does not appear to be as rare for African Americans as was formerly the case. Lest we forget, the President of the United States of America, Barack Obama, was initially world famous for being the first African-American president of the *Harvard Law Review*. Perhaps there are now a greater number of

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[179] *Best Law Schools: Ranked in 2013*, *supra* note 7.

[180] There are hundreds of other student-led secondary law reviews and journals. Grades may not be a significant factor, if a factor at all, in the membership selection process for these journals.

[181] Schools with 500 to 600 students per class.

[182] Primary law reviews at Tier I schools command the bulk of the articles produced by preeminient scholars. Such reviews have a larger in-print and subscription base; law firm libraries and court libraries often subscribe to the primary law reviews of top law schools, but not to the secondary journals. Therefore, secondary journals may not provide as rich an experience or carry the considerable cachet of a school's primary law review.

African-American law students with the kinds of enriched backgrounds that enable them to compete for primary law review membership. Additionally, some primary law reviews have now added diversity as a formal membership factor. Today there is a sprinkling of African-American "primary" law review editors, where formerly there were practically none, especially at Tier I law schools. Law firms and corporations, of course, pursue these highly sought after African-American law review editors, leaving only a share for academia.

In the last decade or so, some Tier I law schools have developed so-called "Emerging Scholar Programs." These are non-tenure track, two-year appointments that involve a reduced teaching load to allow appointees to concentrate on scholarship. These program years do not count for years allowed between appointment and a tenure decision. Indeed, it is contemplated that scholars' initial tenure-track appointments will be at a law school other than the program school. Such programs appear to be perfect vehicles for addressing legal professoriate socialization thought to be problematic for African Americans and members of other racial minority groups. However, as a majority (n=14) of the participants pointed out, the selection process for emerging scholars has largely replicated the traditional hierarchical (and favorable to those in the majority group) one that exists for tenure-track appointments at *HWLS*s. According to participants, these scholar programs have become a part of the lack-of-racial-diversity-in-the-legal-professoriate problem, when they could and should be part of the solution.

In discussing the relative lack of access to opportunities for legal academic socialization, eight participants referred to two African Americans who began their careers at Tier IV law schools who are now flourishing on the faculties of law schools ranked in the top five nationally. According to the participants, the raw talent of these African Americans was masked by their lack of legal-academy socialization, which had led to their initial appointments at lower-ranked law schools. One participant, with knowledge of the discussions at one *HWLS* about whether or not to hire one of these professors recalled, "the negative feedback about [the candidate] was more about [lack of] sophistication than capacity." Four of the participants pointed out that they did not believe any majority-group person had "moved up" in the legal academy as far as the two African Americans have. As noted by one participant, "we [African Americans] can get underplaced because we have not grasped the jargon, may not have an academic mien."

Over-dependence on laterals (i.e., those who are members of another law faculty), rather than those not yet professors, as a source for African-American faculty appointments was also thought by ten participants to be problematic for increasing African-American faculty presence in the legal academy. This approach was described as the "wait and see" strategy for the recruitment of African-American law faculty.

Under this approach, *HWLSs*—especially the top-ranked—virtually ignore the African-American want-to-be-law-professor pool, preferring instead to look exclusively at established faculty from lower-ranked schools. This results in some African Americans simply being lost to the legal professoriate: five participants volunteered that some African Americans will not join the legal professoriate if they have to start "low on the totem pole," or at least lower than they think they should.

Conventionally, lateral law faculty appointments are made only after a "look see" visit, which allows professor and institution to see if the change is desirable for both. All of this requires a full vetting, which can take time; a "look see" visit determination made during the Fall of 2014 would likely be for a Fall 2015 or even a Spring 2016 visit. Many Tier I law schools have a policy of not considering a permanent offer until the visitor has left the premises—to avoid awkwardness if a permanent offer is not forthcoming. It is not unusual, then, for an offer to come two years after the visit determination. Ordinarily, the offeree will be granted a meaningful period of time to decide whether to accept the new "permanent" position, effective beginning the following academic year; in other words, even a successful lateral law faculty transfer could easily take three years or more to complete. One participant apparently perceived mischief in what he called "diversity-stalling tactics" that he associated with lateral appointment approaches for faculty of color:

> [T]here is usually a lag time before a lateral for a "look see" visit [one to determine whether a "permanent" offer should be made] actually arrives. A lot of schools have rules against considering "look see" visitors until the visit is complete and they have returned to their home campus. Further, any courting process can easily be dragged out. At the end of the day, there may be no compelling reason for an established law professor to make a lateral move to X. So a law school can claim that they are actively trying to add to the racial diversity of the faculty with a campaign for a particular lateral that lasts three to four years during which [time] they are off the hook. Then the school can start the same process all over with another established African American or Mexican American professor who is unlikely to switch schools. Indeed, the dean sets the terms for offers and can make an unattractive offer that ensures that there will be no lateral move.

Eight participants pointed out that faculty of color hiring for any one law faculty is often put on hiatus until the lateral visit drama vis-à-vis one particular individual plays out. Hence, when the subject of faculty of color hiring comes up, the institutional response, according to one participant, is "we are considering [blank] who will be visiting in a couple of years." The implication: some *HWLSs* are incapable of considering more than one African American or person of color at a

time.[183]

While all too compatible with a ruse, some of these "look see" visits do result in permanent appointments of African Americans to the faculties of *HWLS*s. However, the evident heavy reliance on laterals by the top American law schools for African-American faculty appointments was lamented by participants, as reflected in the observation of one, "[t]he schools in the best position to invest in nurturing African-American faculty candidates are the very ones who refuse to invest." A couple of participants noted "a catch-22." Some law schools ranked lower than, say, thirty-five are passing on African-American candidates with promise, on the ground that these candidates will move to a higher-ranked school and, consequently, such appointments will represent a waste of institutional resources.

Most of the male (n=11) as well as most of the female participants (n=8) opined that African-American females have an advantage over African-American males in obtaining tenure-track faculty appointments at *HWLS*s. The often-referenced term "two-fer" was cited by fourteen of the participants to explain the advantage—one appointment addresses two pressure points (to hire women and to hire faculty of color). One participant's take on all of this was succinctly captured by "[t]hey don't really want either of us, so one is better than two." Four male and two female participants mentioned negative African-American male stereotypes to explain, at least in part, a perceived preference for African-American females. "The white males who decide appointments are more fearful of brothers," was the take of one of the male participants, which seemingly captured the view of others.

That said, three female participants identified what one called the "male bonding thing" as a circumstance that they perceived as favoring African-American males in faculty appointments at *HWLS*s. "Sports-talk" was a common referent for the presence of a confluence of interests that was thought to create a comfort zone across the racial divide—creating a positive atmosphere that could pave the way for a faculty appointment for an African American (male). This advantage was seen as significant because in the words of one participant, "white men decide who will be hired on to the faculty in American law schools."

2. Tenure

Tenure represents an important convention for increasing the numeric representation and successful long-term inclusion of African

[183] Suffice it to say, when any law school finds a member of another law faculty to be an attractive potential lateral hire, it is likely that other law schools will as well. Thus, it is not unheard of for one professor to spend three or four of six semesters "look-see" visiting. When this phenomenon involves a visitor of color, four or five schools may "claim" that professor or claim plausible deniability, if their commitment to faculty diversity is questioned.

Americans in the nation's legal professoriate, since the prerequisites of the position can make remaining in academia attractive. However, all of the participants perceived that there are problems, challenges, and circumstances that, if not unique, are more commonly found to be impediments for the achievement of tenure by African-American law professors.

Tenure policies and practices of *HWLS*s are implemented under specific notions of merit that may not hold up under an examination for racial fairness. That the current application of tenure's teaching, research/publishing, and service requirements may be unfair to some African Americans was a common refrain of participants.

All of the participants thought that teaching evaluations could be negatively impacted by conscious and unconscious anti-African-American bias. Evaluation scores are the principal measure of teaching effectiveness for tenure consideration at *HWLS*s. As one participant observed:

> We know that racial bias is pervasive. Yet, teaching evaluations of African Americans by white students are taken at face value. How fair is that? We know that white students hold African-American faculty in lower regard than they do white professors according to study after study. Universities claim to be about empirically-based truths. They have this truth but refuse to apply it. So currently the whole teaching component for tenure is awash in racism. Without an adjustment for bias, African Americans and probably Latino Americans are definitely being discriminated against in the tenure process.

While all agreed that teaching evaluation scores could incorporate bias, perceptions as to the effect differed amongst the participants. While some saw a serious impediment, others did not. There was a *de minimus* camp (i.e., the race/teaching evaluation dynamic has little effect) represented by the following observation of a participant:

> I could not agree more that teaching evaluations are racially biased. They are not biased enough to make a difference. It's not that we do not have racially biased students. We do but not that many. Scores will not be affected that much.

Thirteen of the participants indicated that they perceived that the scholarship of African Americans is subjected to extra scrutiny in the tenure process, when compared to the level of scrutiny given the scholarship of white candidates. Race-related scholarship, in particular, was perceived by these participants to be under a bright spotlight because of its challenge to the dominant group narrative about bias-free American law and legal institutions. As one participant put it:

> [I]f your research is on Japanese bias against Chinese, everyone in the tenure loop will give it a good reading. If your scholarship is about bias against blacks in American institutions—perhaps, universities—your work will be read, re-read and re-read again. It will be turned upside down.

Here again, not all of the participants were convinced of the existence of a race-scholarship evaluation dynamic that had much of an adverse effect on African Americans in the legal professoriate. For starters, of the eleven participants who did race-oriented work, only four were among the thirteen who perceived a heightened scrutiny for race-oriented scholarship, even though it was such work, in particular, that was perceived to be judged more harshly than other scholarship. Moreover, some participants who perceived extra scrutiny for race-oriented work discounted the impact of any closer examination of such scholarship. One participant offered: "I'm not saying they [majority-group faculty] do not scrutinize blacks in a special way . . . . I do not see evidence that any one is going out of their way to deny tenure to blacks."

American law schools commonly tout a service mission; it is one of the three tenure prongs. However, as one participant observed, "when you go for tenure review, community service counts for zip." Five participants indicated their belief that *HWLS*s are predisposed to mislead African-American faculty to believe that extraordinary service efforts will be rewarded at tenure, when in fact that is not the case. It follows then that any over-investment in service absorbs time that could be devoted to research and publishing—endeavors that are more valued in the tenure process.

One-half of the participants discussed the importance of understanding the institution's culture and politics as a prerequisite for a successful tenure run at an *HWLS*. Collectively, these twelve participants pointed out that *HWLS*s are built on what might be described as a "white cultural frame" and that cultural skills allow for deciphering the academic culture within which such institutions exist. By "cultural skills," participants appeared to be referring to the capacity to understand one's environment, what constitutes success therein, and how it is achieved. One participant may have captured the essence when observing, "You need to know what to say, who to say it to, how and when to say it." These participants explained that cultural skills help junior faculty members build a network of mentors who can provide support and guidance in the tenure process as it unfolds.

The mentoring referenced by participants is the provision of intellectual support for the teaching, research, and service agenda of untenured faculty through such assistance as critiquing teaching, reviewing and commenting on drafts, facilitating research relationships, being available for brainstorming ideas, and generally being available for advice. Participants who revealed that they had post-appointment

mentors, as well as those who did not, stressed their importance. A dozen participants described the many benefits that accrue to mentees, including information and advice regarding unwritten rules, institutional cultures, organizational politics, and how best to interact with particular colleagues. According to one participant,

> As a junior law faculty member you face a labyrinth—maybe a maze. You can get through it easier if you have a road map than if you rely on trial and error. A good mentor will provide you with a road map.

Three participants wondered aloud whether some African Americans who had been unsuccessful tenure candidates at *HWLS*s might have succeeded with meaningful mentoring. As one participant put it, when discussing a failed African-American tenure quest, "You can't help but wonder what difference a substantive mentoring program might have made." Were any of the failed African-American law faculty tenure quests due, in whole or part, to an over-investment in service?

The experience of one participant regarding his mentoring is instructive, as it shows help from colleagues across the racial divide with some extra effort:

> The mentoring program was to be worked out between the mentor and mentee. I was assigned a mentor that I could not relate to. He acted like he drew a short straw. By the end of my second year, I had had three short meetings with my mentor and no review of my progress. The previous two African-American candidacies had failed so I was worried. I was working on a [blank] article which was almost complete and a Critical Race Theory article that had a ways to go. There were no other African Americans on the faculty. I decided I needed at least one unofficial mentor or adviser if not two. I approached two colleagues I got along with. I approached them separately telling them that I thought I needed more help but was in a delicate situation. They both volunteered to help unofficially. They were great not only in marking up drafts but helping me with the institutional culture issues. I learned not to view the rest of my colleagues so warily. I have a cultural background, they have a cultural background. I wanted the unofficial help to be low key so I would not offend my official mentor. He figured it out or was told because he stepped up his game putting in quite a bit of time with me and came up with helpful insights I incorporated in my articles . . . . Forgive me but I do not believe the "nobody is helping me" excuse or explanation . . . . Even on the worst faculties there must be some white faculty interested in diversifying their faculty.

3. Gender

Although the female participants in the study recognized that there are gender-based attitudes and practices in place that disadvantage women in the legal academy, their narratives about such awareness were frequently cloaked within a discussion of race. Race, not gender, was the most prominent factor featured in the female participants' commentaries on life for African-American women faculty at *HWLS*s.

Six of the ten female participants indicated that law faculties viewed them, primarily, as African Americans, not women, some pointing out that women are much more commonplace on American law faculties. Only one female participant cited gender as being as important a factor as race in determining the experience of African-American female law professors. Not that the other female participants did not view gender as a significant demarcation; it just did not seem to take precedence in how they made meaning of their experience as law faculty members.

Eight female participants pointed out that their quest for professional respect was undermined by popular culture, which, in their view, often portrays the black woman in a negative light. These eight referred to images of black women in literature, the media, and so on, where they are often cast as "mammies," "Sapphires," and "hoochies." One-half of the female participants described feeling sexually objectified by some white male faculty, staff, students, and administrators—a phenomenon described by one participant as "the Jezebel thing." It appears that sexual objectification is an additional hazard African-American female professors may have to contend with.

As pointed out by one of the female participants in emphasizing the significance of African American-female intersectionality:

> It is way different for us [African-American female law professors]. This is my [blank] law school and not once have I had a dean of the law school or associate dean for academic affairs who was a woman. My fellow faculty members who were white women shared whiteness with the deans, fellow faculty member/members who were black men shared maleness . . . . During most of my [blank] years [in the legal academy] I have been the sole black woman faculty member . . . .

Some female participants felt that the combination of race and gender did not provide any common ground upon which to interact with white male faculty. It was pointed out that there are spaces where African-American males can interact informally with white male faculty—they can play poker, go to a ballgame, or simply share drinks. Female participants felt that the lack of any similar "common ground"

left them without shared reference points with their white male colleagues, increased the dissonance between them, and consequently made their institutional inclusion more difficult.

Moreover, half of the female participants asserted that given that African-American women professors are often the target of sexual objectification, they must maintain a reserve which, in turn, makes them appear aloof or distant from their majority-group male faculty, exacerbating connectedness challenges. As one female participant observed, "you are too friendly or not friendly enough, indeed you are [the b-word], you can't win."

All of the male participants opined that they thought gender biases served to increase the burdens or "black taxes" for African-American female law professors. Understandably, the male participants did not want to put too fine a point on the gender/race bias nexus imprint for female African-American law professors; they seemed to prefer to defer to the more-informed-by-experience perspectives of female members of the group. The female participants agreed with the male participants that adding "female" to "African-American" resulted in even more legal professoriate challenges to confront. However, for the most part, the female participants downplayed the importance of gender differences in the experiences of African-American legal academics, seemingly agreeing to a "race predominates" explanation of the experience of African-American legal academics, male and female.

4. To Be Dean

It is not clear from the participants' shared perspectives whether the position of dean of the law school is running away from African Americans or vice versa. Several participants suggested that one reason more African Americans are not law school deans lies in the fact that, generally speaking, the position is not attractive to them, just as it is not attractive to many majority-group law faculty. "Who wants to put up with what law deans have to put up with?" was a common refrain among participants.

It was pointed out by participants that they became professors, in part, to avoid all the things deans have to do. Most faculty members aspire to teach, research, write, and perhaps engage in related public service endeavors—not manage buildings, budgets, staff, student affairs, faculty relations, university relations, and alumni affairs. Moreover, participants described a "bright spotlight," "second guessing," and "bashing" as undesirable components of the job of dean.

Further, thirteen of the participants opined or suggested that a law school deanship might be more difficult and complicated for an African American. "Unreasonably high expectations" was a reason often cited or

implied by participants. This view is reflected in the following observation:

> Leadership expectations for African Americans are higher or they tend to be . . . . We have this irony. After the 2008 election, the expectations for Obama were sky high even among those who voted against him. When the cities started going broke, African Americans were, with white support, being elected mayor left and right. For whatever reasons people thought that African Americans could manage or succeed where others could not. The job of dean [like that of mayor] is a tough one. It is even harder for African Americans because of the heightened expectations. African Americans who might be dean just may wish to avoid the unrealistic expectations.

Another participant offered an additional thought about why a law deanship would be unattractive to potential African-American candidates by noting that, "[t]here is less tolerance for a black person making a mistake than for a white person making a mistake." Continuing, she observed, "black law professors do not get the benefit of the doubt as faculty members and therefore know that they will not get it if dean." As set forth by another participant,

> Since you are always a doormat for some in your law school community, you cannot emerge after years of that without being dented in ways that would be harmful for a dean candidacy . . . [t]he higher the rank of the law school, the more likely an internal candidate will be the dean. So you have to be unscathed locally, something that is hard for a black candidate to pull off.

According to five participants, a lack of interest among African Americans in becoming dean of the law school results from not seeing it as an option due to their race. No one on the faculty singles them out to suggest that they consider academic leadership or to encourage them to seek the deanship. In that respect one participant noted:

> The position of associate dean for academic affairs in the law school is a feeder for a deanship. Few African Americans have been appointed to the position at high ranked law schools . . . . [African-American associate deans] have had problems . . . taken flack . . . [faced] disrespect.

Seven participants stated or suggested that the faculty and university administration might think that an African-American dean might not sit well with wealthy alumni or generous benefactors. A couple of participants pointedly discussed how majority-group law faculty "arrogance," especially at top-ranked schools, prevents them from

accepting the notion that an African American will make a suitable dean. As one participant observed:

> White faculty members at the top twenty law schools believe that they are really special so the idea that they might have to look to a black man or woman for anything is just not something that they are comfortable with. In their heart of hearts they don't believe that a black person is on their level—which is what having a black dean signifies.

Another participant offered the following:

> It takes years for white law school faculty members to fully accept and fully include an African American as a colleague, especially at highly-ranked schools, given the arrogance of the faculties at those places. It takes time for them to get their arms around the idea that a black person is in their league, is equal to them, can be their colleague . . . . A black he or she as their leader? That will take more time to decide. Meanwhile the position is filled.

When I referenced the absence of African-American deans of the law school at law schools ranked near the top, "arrogance" was a word employed in the responses of approximately one-half of the participants. I note the following comment in this vein:

> We have an African-American President but no African American has been qualified to be dean of any of the leading law schools. President Obama will need a job in 2017. Let's see—President of the Harvard Law Review, *Magna*, graduate of the Harvard Law School, top notch teaching evaluations as Distinguished Lecturer, University of Chicago Law School, author of two books, President of the United States of America. I just want to hear the conversation about why he should not be approached to see if he is interested in being dean of the [delete] Law School.

5. Governance

When participants were asked to discuss their involvement in the governance of their law schools, their responses varied widely, though heavy involvement was rare. Indeed, only two participants described themselves as being heavily involved in their law schools' governance. "Low" and "no" dominated the involvement responses. A half-dozen participants did make a point of telling me that they maintained their franchise by voting on (though not participating in debate about) appointments and tenure, even if by proxy.

According to one participant, "black and brown faculty members" at the law school where she taught were largely consigned to committees related to people of color; one participant told me that her law school appeared to have "color-coded" faculty committee and other responsibilities. Three participants recalled having to fight to get on university or law school committees *not* related to racial minorities. Half of the participants expressed the belief that they, specifically, had, at some point in their legal academic careers, been excluded from certain committees or certain kinds of committees—those that play a meaningful role in school governance. Even participants not claiming to have been "ghettoized" stressed that African Americans are routinely excluded from the most important law school committees, such as appointments, tenure, budget and compensation, and governance and oversight.

In the words of one participant, who seemed to capture the feelings within the balance of the sample not claiming purposeful institutional exclusion or ghettoization: "I'm not really a part of what's happening around here. I'm literally not on any important committees." Indeed, this observation captures the picture painted by participants who reported that they were not involved in their law school's governance by their own choice. On the other hand, a half-dozen participants reported that at some point in their legal academic careers they had been urged, encouraged or entreated to participate in governance to a greater extent by deans or majority-group faculty.

Two participants called faculty and committee meetings "boring" wastes of time. Moreover, according to one participant, "the only views that count around here as those of white men"—a point essentially made by three other participants. For the more alienated participants, avoiding governance seemed to be a pillar in their plan to minimize unpleasantness by minimizing contact with those thought to be racist or racially insensitive.

Four participants made reference to the fact that some decisions at law schools may emerge from informal consensuses reached prior to formal adoption at official faculty meetings. They pointed out that the venues for this, such as coffee hours, lunches, dinners, and the like, may not include African Americans as readily as majority-group faculty members. The absence or paucity of transracial social relationships on some law faculties, then, may result in a relatively diminished role for African Americans in informal decision-making processes, where some school policies, programs, and practices are actually determined.

Most participants perceived that the appointments committee assignment can be complicated for African-American law professors. There was recognition that such an assignment presents an opportunity to play a role in increasing the number of African Americans/faculty of color on their specific faculty and, correspondingly, in the legal professoriate generally. As participants discussed, "encouraging," "educating," "brokering," "supporting," are all constructive roles that

African-American appointments committee members may play in increasing law faculty racial diversity.

On the other hand, nine of the participants discussed the role of African-American faculty in the law school appointments process in a way that suggested a keen awareness that they could be misused or, in the word of one, "played." That happens, according to one participant, in the following type of circumstance:

> You [African Americans] are put on [the] appointments [committee] to provide them [i.e., the faculty and administration] with cover. They are satisfied with their one or two [law faculty members of color] but it is not politically correct to announce we have all we want. So they go through the motions. Having an African American on appointments is part of the masquerade. It is supposed to indicate the institution's seriousness about adding faculty of color. Your presence legitimizes what is a public-relations campaign designed to give the appearance of commitment to increase the number of African Americans on the faculty where one does not exist. An African-American presence on the committee allows the chair to proclaim, "We could not identify any qualified candidates of color despite the best efforts of the appointments committee which included [put in the African-American or Hispanic-American's name]."

The word "charade" was employed by three of the participants in discussing the possibility of a "form over substance" response to increasing diversity in law faculty appointments. Four participants expressed a predisposition to decline to be on an appointments committee unless they were convinced that the committee was serious about a commitment to add African Americans (or faculty of color) to the faculty—a stance I sensed was shared by the balance of the nine who discussed concerns about appointments committee membership.

6. Compensation

One-quarter of the participants responded with "O.K.," "fine," "sufficient," or "no complaints" when discussing compensation. However, three-quarters of the participants were "dissatisfied" or "very dissatisfied" with their compensation, and explicitly or implicitly identified inequity between their compensation and that of their white colleagues as a source of disenchantment. The three-quarters appeared to be aggrieved, in large part, about being, in the words of one, "shut out when it comes to the 'good stuff' (i.e., opportunities for extra compensation with little additional effort)." In that regard, it was noted

that many law schools have created centers and programs whose law faculty directors are separately, and often handsomely, compensated for their executive services, which may be minimal in terms of time and effort. Half of the participants contended that African Americans only get such director and program head positions if black studies are involved—adding that, though centers are commonplace at colleges and universities, only a few elite law schools have centers or programs focused on race.

Further, nine participants referred to law schools having ditched largely lock step, seniority-based compensation schemes in favor of so-called "merit based" systems that permit favoritism since, as observed by a participant, "merit is in the eye of the beholder." One participant exclaimed, "The dean and the 'in group' decide merit. Where do you think that leaves us?" Moreover, basic law faculty compensation is now often overlaid with "special deals" consisting of the likes of housing allowances, children's tuition, extra retirement deposits, forgivable loans, enriched summer grants, flush research funds. One participant had the following, seemingly informed, and particularly scathing take on race and faculty compensation in the legal professoriate:

> In slavery, blacks got scraps from the table, which is what they get from law schools today. I have discussed salary and benefits with other African Americans at various law schools . . . . Extra compensation schemes have skewed total compensation in favor of white males. Here and at three other law schools that I have information on, only white males are known beneficiaries of the schemes. I am not sure who all is a beneficiary, for how much, because there is no transparency. I figured out who some of the beneficiaries are and my contacts at other law schools did also . . . all white males. Can you believe it?

Here again, no participant indicated that he was a special deal beneficiary. Indeed, one participant may have put a fine point on all this when she exclaimed, "there is absolutely nothing special about my deal." Moreover, the lack of transparency with respect to extra compensation schemes appeared to be a "sore point" for eight of the participants who mentioned or alluded to it. As one participant commented:

> I am going along thinking that I am doing O.K. compensation-wise. Salaries are published and I was only slightly behind [blank] who was in my class at [blank]. Then I found out that he was being paid under the table . . . . So, yes, I am unhappy about my compensation to put it mildly, especially the attempt to hide it.

Three participants volunteered that law schools try to mask the racial unfairness of their compensation schemes by publishing only the

base salaries and known compensation, like summer school teaching, but not the special deal payments, even though such are treated the same under U.S. tax laws. Participants noted that their findings are supported by freedom of information requests, which have uncovered such schemes at some public law schools.

Participants noted, as well, that directorships of symposia or sub-field speaker series, even when not offering direct compensation, can foster collaborations and reciprocations that may eventually result in direct compensation, not to mention immediate wining and dining "high on the hog." African Americans were perceived by participants to be largely excluded from these perks and others such as foreign travel, enriched research funds, and the like.

7. Coping

According to participants, the issue is not *whether HWLSs* marginalize African-American professors; that is a matter of observable fact. All of the participants acknowledged, generally, the existence of stereotyping and racism across the legal academy. According to the participants, that is not the question—the question, for them, is how African-American faculty handle race-related challenges. One participant's words resonate with the approach that many African-American law professors seem to have adopted: "remove yourself from 'toxic' environments"—a mantra from the study. Disengagement or, in the words of one participant, "maximum disengagement" appeared to be a common coping strategy.

All of the participants cited racism as a phenomenon with which African-American law professors are forced to contend. Generally speaking, unconscious racism was thought by participants to be omnipresent, in addition to some explicit racism by majority-group deans and faculty members. When I inquired about the source of these assumptions of racism, I drew a number of responses. A half-dozen participants fixed on the notion that there has not been a credible study for the existence of racism against African Americans that ended with a conclusion of nonexistence. A handful of participants cited the existence of raw racism on law school community blogospheres as proof of purposeful racism in law school communities.

Referring to this phenomenon, one participant observed,

> I have no doubt that these [blogosphere expressions of antipathy towards African Americans] are the sentiments of real law students. Blue-collar white supremacists do not know law school culture well enough to make the kind of comments found.

Another participant observed:

> Racial discrimination was the law in one-quarter of the country fifty years ago. It was tolerated by the other three-quarters of the nation. Today white people ask you to believe that it has been completely eradicated.

As one participant put it: "Given the racial history of this country, whites should be required to prove the absence of racism and discrimination and not vice-versa."

Although participants indicated that they were disturbed by racism, they did not express surprise that it would appear at their institutions. They presented it as just a challenge or occupational hazard in their work settings. Participants did not seem to favor racism-related grievance confrontation for a number of reasons. As pointed out by one participant:

> They [majority-group faculty and administrators] love to see you react because they can characterize it as overreaction. They can shift the focus to your behavior and not what drove you to react no matter how racist or provocative . . . I had to learn to bite my tongue. Confronting the subtle and unsubtle bias beyond recognizing it does no good because the institution is in denial. Nothing in it or about it is racist—that is the official line. That line will not change because you shout at someone and kick the trashcan out of frustration. All you have done is give them an excuse to write you up.

Some of the participants recognized that the professional, psychological, and emotional support they coveted was not going to be fulfilled within their law school communities. Consequently, they sought alternative venues for support and affirmation. Eight participants reported finding this support in other university units and departments (such as Ethnic and Gender Studies), while six cited a role for local African-American organizations in their fulfillment.

Eight of the participants discussed something akin to a resolve to ignore—rather than internalize—the negativity they encountered. Refusing to entertain others' marginalizing predispositions and dismissive attitudes, and not allowing "what others think of you to define how you view yourself," synthesizes the coping strategies employed by these eight participants. As one participant asked, "Can you ever satisfy the [Obama] birthers?" or as another exclaimed, "they are never going to accept you fully, get over it." Reflecting on perceived challenges faced by African Americans in the legal professoriate, one participant noted:

> A healthy self-awareness has helped me to cope with the challenges. I did not go to Choate [a highly select preparatory school located in Wallingford, CT], Princeton, or Yale Law.

> Just because others on the faculty did does not take away from the contributions I have made as professor. If people do not like how I got here well . . . .

One participant discussed employing a strategy that involved both resistance and compliance. "I do what I need to do to remain within our rules but no more. Beyond that I just do my own thing." This was a familiar refrain among participants who have adopted various ways of coping with the challenges they face as African-American faculty members at *HWLS*s, including studied avoidance of interactions with majority-group colleagues. Preeminent among the coping mechanisms employed by participants: "avoid as much as possible and ignore the rest."

8. Satisfaction

The conceptions of job satisfaction offered by the participants distinguished between aspects of their work over which they had control (intrinsic) and aspects of the environment in which their work was done and over which they had no control (extrinsic). There was a high degree of satisfaction with the former and mixed to more marked dissatisfaction with the latter.

None of my participants were entirely uncritical of the legal academy's treatment of African-American professors—or perhaps what African-American professors are likely to encounter, and some were substantially more critical than others. The question then is, why do African Americans remain in the legal academy's professoriate, though critical of the academy's treatment of them? Participants offered a number of explanations.

A majority of the participants (n=14) pointed to what one described as "the DNA explanation" —their personas are suited to what academic life offers. Solitariness, opportunity for subject matter focus, freedom to pursue ideas, independence, opportunity to write, and dominion over schedule, were all attributes of academic life cited favorably by participants. On the other hand, most of these same participants stated that they were unsuited to or not attracted to another kind of life, which might involve, for example, administrative tasks, office politics, the conduct of business, and cog-in-the-wheel operative status with dependencies and interdependencies. Four participants seemed to subscribe to the notion that, because legal academics are a highly self-selected group, people seldom want to leave the profession, largely because they would be unlikely to be happy elsewhere. Furthermore, the skills that one develops as an academic—teaching and theoretically directed research—are highly specialized and are not widely prized outside of an academic setting. As one participant pointed out, "I could

never recoup [elsewhere] the investment I have made to get tenure."

One participant explained his decision to stay in his position as professor of law:

> I have remained in the legal academy because there are aspects of faculty life that I find are highly desirable, like autonomy. There are just not a lot of situations where a black person who is not an entrepreneurial type can replicate the freedom and autonomy one has as a professor. I could hang out a shingle, the law office of [blank], be my own boss, be autonomous. I could but I do not want to spend my time negotiating my office lease, hiring secretaries, hooking up the electricity, buying malpractice insurance, chasing down people to make them my clients, chasing down my clients to get paid and so forth. That's just not me.

Job security was cited by three-quarters of the participants as a major reason why they would choose the legal professoriate all over again. As several explained, most career alternatives involve employment at-will, a circumstance participants believed to be more perilous for African Americans than those in the majority group. There was virtually unanimous recognition amongst the participants that most majority group-controlled institutions were similar with respect to white hegemony, and that, consequently, there would probably be little variation between the troubling racial dynamics at *HWLS*s and any other majority group-controlled institution. Fourteen participants stated that institutions of higher education are "less racist," "less hegemonic" (or "white hegemonic"), "less discriminatory," "not as racially insensitive" when compared to other majority-group controlled institutions in the nation.

Participants who spoke to the matter agreed that the likelihood of realizing some greater degree of inclusiveness at another randomly selected law school could not be guaranteed. In fact, the situation might be even worse at another law school. Based on my interviews with five participants who made a lateral move from one *HWLS* to another *HWLS*, it would seem that African Americans in the legal professoriate are inclined to change schools only after a thorough vetting convinces them that the racial climate will be better at the new venue. The story of one is representative:

> We [participant and spouse] looked the [new] situation over pretty well. Spoke with the African American at the law school plus one in the History Department on the main campus . . . . We visited a couple of schools as well as churches . . . . I am a [fraternity member] so I had some long discussions with two of the brothers who had moved to the area—you know about the racial climate and all . . . .

Their legal education usually means that participants have three alternative career venues—law firms, corporations, and government entities. They all spoke of finding the primary alternatives to legal academia to be unattractive. Participants offered some commentary on these alternatives. As for law firms, one participant provided this take:

> Every time I think that my choice of academia was the wrong one, my African-American friends in practice provide me with a reality check. The climate for us [African Americans] in law firms is not so good. We do not make partner, instead we become counsels. A few do [make partner] and may be sorry because they keep it [the partnership] only if they bring in business, which is hard for an African American . . . . We do not have the contacts. White partners lean on old friends to send them business. My old friends are African American. They are not high enough in companies and banks to influence legal services provider matters . . . .

None of the participants had anything good to say about life for African Americans in corporate America, either. One participant commented:

> I have black contacts in major large corporations and in smaller ones. They all complain to me about institutional racism, nothing that you can act on, it is all so subtle . . . . Life in corporations means a straight jacket . . . . If one of their bosses saw your dissertation on the desk of any of them they could kiss any thought of promotion goodbye . . . . At least, I can give voice to my complaints . . . . I appreciate the personal freedom.

Some participants reported having negative experiences in government employment or knowing of other African Americans who did. One participant had a very positive experience in government that is shared here because it, nonetheless, shows why the legal academy, with all of its challenges, remains at least relatively attractive to African Americans with legal educations. In this instance, job security and insecurity are the focus:

> I had a terrific [public sector] job as an aide to a political appointee. While I was not "in charge" [blank-who was "in charge"] typically followed my advice, I had real influence . . . [and] could see the difference I made. The salary was not great, the benefits were good—I got by. As they say, "it was all good." Then came the election. My man was out and so was I.

Government service, then, may not be an attractive career option for African-American lawyers because the positions in government with

clout, legal and non-legal, are political, not civil service. The good job may, as the quotation reflects, not survive the next election. The non-political jobs tend not to come with clout or decent salaries.

All the participants provided some indication that they understood that challenges, similar to those detailed in the study, are faced by African Americans at most American institutions. Despite the challenges, participants appeared to count institutions of higher education as among the most hospitable to them of all of the nation's majority-group controlled institutions.

Participants reflected an awareness, as well, that higher education offers great promise for serving as a fulcrum for societal changes that can improve the prospects for a more meaningful sharing by African Americans in the fruits America offers. Participants recognized that as law faculty members, African Americans can play a crucial role in making the promise of America come true for more African Americans and others who have realized little of it heretofore. In that respect one participant reported:

> I have the freedom and prestige to freelance into situations that allow me to make a contribution. For example, I am [reference-a civic office] and also [reference-a community leadership post]. The chance is there in two places for me to do some real good.

All of the participants appeared to share the view that life as a professor in the legal academy is on many levels as desirable a career option as is available to African-American lawyers. Notably, all of the participants answered "yes" to the question, "If you had it to do all over again would you choose a career in the legal professoriate?"

That observed, it should be noted that some participants pointed to specific cases of African-American law faculty voluntarily abandoning their tenured faculty positions because of their dissatisfaction with life in the academy, and those dissatisfactions were reported to be largely, if not entirely, race based. It is clear, then, that not all African-American lawyers have concluded that life as a legal academic is the worst career option for an African-American lawyer except all of the rest.[184]

[184] The study did not encompass an effort to capture the perspectives of tenured African-American law professors who voluntarily left the legal academy. The author is aware that some of these former professors moved to law firms, corporations, government, and non-legal careers.

D. Strategies for Redress

1. Organizational Change

With respect to my specific question about the viability of organizational change strategies for advancing African-American law faculty inclusion, six participants credited such strategies, in part, for any extant African-American law faculty presence at *HWLS*s. However, approximately two-thirds of the participants appeared to question whether the next stage—African-American parity in presence and parity in employment conditions in the legal professoriate—was within the reach of organizational change strategies based on any of the historic underlying rationale, such as diversity or remediation. Most of the participants thought that if more inclusiveness for African Americans in the legal professoriate is to be realized, new organizational strategies will be need to be implemented.

Participants rejected the notion that significant additional gains would be realized in African-American appointments and inclusion based on the current mindset of law school administrations and faculty. In other words, it was the perception of two-thirds of the participants that *HWLS*s have already given their response to African-American faculty appointments and conditions of employment and will not change course unless new imperatives require them to do so. As one participant put it, "as far as law schools are concerned, the African-American faculty ground has been gone over."

According to fourteen participants, any advances in the numbers and conditions for African-American legal academics will not be realized without some radical changes in the approaches of *HWLS*s to their inclusion. Two-thirds of the participants were of the view that, in light of the failure of law schools to meaningfully address African-American recruitment and inclusion, university-wide approaches should be embraced to address those challenges.

Eleven of the participants favorably discussed the university-wide institutionalization of African-American appointment and inclusion programs. Nine participants mentioned that incorporating such initiatives as part of the university's mission might advance more success in those areas. Participants cited frequent changes in university and law school administrations, in part, for what one participant described as "the failure to maintain strong inclusion programs." One participant chimed in with, "If policies and practices are institutionalized, people leaving won't throw a wrench into things."[185]

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[185] Participants perceived that some strategies could be particularly helpful, including a requirement that institutional requirements for African-American appointments and inclusion be clearly articulated by the university's president, be made part of the institution's strategic plan, and be

There was substantial sentiment among participants for more institutional compulsion to include unit level (i.e., law school) mandates to achieve African-American appointment and inclusion goals. According to a participant, "As long as no one's feet are held to the fire, the status quo on African-American appointments and conditions is unlikely to change." To answer critiques like this one, thirteen participants spoke of "accountability," including meaningful measurements and specific performance benchmarks. According to participant sentiment, inclusion performance reviews at the dean level should be required as well. Two-thirds of the participants declared that it would be appropriate for inclusion evaluations to positively or negatively impact salaries and bonuses.

Three-quarters of the participants had positive words for an institutionalized bonus fund that would pay deans and associate deans extra or that would be provided to units like law schools that met hard appointment and inclusion goals. However, three participants expressed the view that if diversity were really a part of the university or law school's mission, no one should be paid extra for doing their job. Participants were about equally divided over disincentives such as withholding funds to units and individuals like law deans and associate deans for academic affairs. Participants opposing the use of such a "stick" cited concerns about academic freedom. Six participants suggested that if inclusion goals were not met, the dean of the law school should be dismissed.

All of the participants indicated that *exclusion* redress efforts at some level should include not just African Americans, but Mexican Americans and Native Americans as well.[186] The consensus for having African Americans join with Mexican Americans and Native Americans seemed to stem from their perceived similar status in the legal academy. While no participant suggested that any identifiable group was as negatively impacted by race as African Americans, there was a recognition of the existence of enough experiential similarities to justify deemphasizing differences in favor of the clout garnered through greater numbers.

In that regard, participants seemed quite comfortable with leading with African Americans "and other persons of color" or African Americans "and other historically underrepresented groups" when responding to the study's interview protocol. These pairings were thought by participants to be helpful or not hurtful, especially if there were no diminished inclusion effort for African Americans. One participant observed,

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written into the relevant institutional documents.

[186] Some extended the net broader to include Puerto Ricans, international Hispanics, and international blacks. None thought collaboration with Asian Americans or Asians made sense, principally because it appears participants did not consider those of Asian decent to be underrepresented or discriminated against in the legal professoriate.

> Their [Mexican Americans'] experience is similar, not the same but similar . . . . Whites make the same negative assumptions basically . . . . Group stereotypes might differ . . . [but] the ultimate judgment is the same—neither belongs . . . . We should recognize our similar plights.

2. Litigation

I received varied responses to specific questions about the viability of litigation for advancing African-American law faculty inclusion. The threat of a Title VII disparate treatment case was perceived by one-quarter of the participants to be a promising tool for advancing African-American appointments to the legal professoriate and promoting favorable conditions of employment thereafter. The threat of claiming that the university or law school *intentionally* discriminated was perceived by this distinct minority as having leverage value.

No participant dismissed a litigation strategy outright, but a large percentage appeared to have doubts about the viability of litigation, though not all of that sentiment was expressed directly. In that regard, one participant observed:

> What we are talking about is more subtle, so disparate treatment will not always be something you can put your hands on, record . . . . There is some dumb stuff maybe. I see practices that might support an impact case.

Establishing causes of action under Title VII can be challenging. Procedural difficulties abound as well, as reflected in the following quote:

> The problem with litigation is [the] home court advantage the defendants will have . . . . The judge may be an alumnus of the law school or university or his wife or kids may . . . . The judge may be a friend of university officials, law [school] officials . . . . Procedural rulings can stop plaintiffs in their tracks.

Further, as one participant observed:

> Higher education units are tough to go against. Institutions tend to have enemies—banks, utilities, corporations, insurance—ones despised by little guy types that end up on juries—not schools . . . . Who in this community dislikes [the particular law school], only people rejected [for admission]. Since that would be disclosed, you have to win over twelve people who probably have a favorable opinion of [the particular law school].

Disparate impact litigation was perceived by thirteen of the participants as a potential tool for increasing the quantity of African-American law professors as well as positively influencing the quality of their experience after appointment. But it would perhaps be fair to conclude that participants did not view disparate impact litigation as a "magic elixir." Nonetheless, the threat of disparate impact litigation and the transparency regarding discriminatory practices and attitudes were viewed by one-half of the participants as potentially salutary. In other words, the evidence presented at a trial and the media coverage would be an airing of dirty laundry that could result in a public relations hit for the institution and its leaders. As one participant observed, "given the prevalence of 'good ole white boy' practices, like heavy reliance on faculty recommendations, in hiring cases, claiming disparate impact could be useful."

Eleven participants seemed to reject litigation in light of several factors. They pointed out that the likely mostly white jury cannot be vetted for racism under current rules. Prospective jurors in Title VII cases answer questionnaires that include only questions about relationships with the parties and past involvement in Title VII lawsuits. Additionally, as another participant pointed out, "academics are masters at obfuscating racism . . . . Even well-meaning whites that end up on juries won't appreciate or understand the subtleties of institutional racism."

Furthermore, as another participant pointed out, "because most institutions will have taken a range of affirmative steps to become racially diverse, they will never lose a suit based on racism charges." Apparently, according to participants, just going through the motions to appear to be committed to faculty racial diversity may provide a *HWLS* with a high degree of insulation from Title VII liability, given the expected lack of sophistication of the average juror regarding such matters.

3. Affirmative Action and Diversity Inclusion Programs

Participants were decidedly cool to anything called an *affirmative action program*—"too many negative connotations." Twenty participants perceived such a proposal to be "a bad idea." The question of one participant—"Why would we want to go there?"—was representative of the reaction I got. However, there was an articulate defense of programs styled as affirmative action:

> So many people see affirmative action programs and then negative attitudes about blacks. Truth is those negative attitudes have been around the four hundred years we've been here. The programs were installed for a reason, we were not

> making progress without them. These whites who know nothing about our history say "this is terrible." We forget that policing, firemanning, constructing, were all white until affirmative action.

This defense was offered by one of the participants who, after defending formal affirmative action programs, announced that he, too, thought that it was "a bad idea." The perception of the negativity associated with the term influenced most of those opposed to affirmative action programs to, alternatively, embrace appointment and inclusion programs for African Americans without the use of the term affirmative action, but with institutionalized goals and accountability—like the approach discussed, herein, under organizational change.

All of the participants expressed some concern about the fact that because the diversity moniker is not limited to African Americans, it could take the focus away from the need to increase the number of tenured African-American law professors. In a similar vein, all of the participants expressed some level of concern about the potential impact on African-American faculty appointments of *HWLS*s that count sub-Saharan African and international black faculty to fill a "black quota." Moreover, according to participants, viewing African immigrants and domestic-born African Americans as one homogeneous people of African descent without recognizing the implications for higher education can be problematic.

Six participants urged mindfulness with respect to the inability of international black faculty to relate, as effectively as African-American faculty, to the needs and experiences of African-American students. The history of African Americans, including slavery, de jure segregation, and marked racial oppression were among the circumstances cited by the participants as providing a rationale for giving primacy to African Americans in law school faculty diversification. Paraphrasing "the old Negro spiritual," one participant observed that, "[n]obody knows the trouble we've seen."

IV. STUDY FINDINGS, OBSERVATIONS, SUMMARIES, CONTRASTS, AND COMPARISONS

A. Relationships

The aspects of relationships with administrators, faculty, staff, and students that were found to be discomforting to and the subject of complaint by participants, perhaps, have a great deal to do with being black in America. Much of what participants found objectionable is not unique to the legal professoriate. Indeed, according to the study,

participants seemed to perceive less racism or racial insensitivity in the academy than in most other American institutions. That said, as described in the relevant literature, some of those in the nation's majority racial group have a tendency to attribute certain negative, ethnocentric, or stereotypical characteristics to African Americans.[187] Such tendencies can influence the conduct of those in the majority group in myriad ways harmful to African Americans. The relevant empirical work is replete with evidence of such, but not a scintilla of scientific evidence to counter the notion of broad societal bias against African Americans. The study found that intra-legal academy relationships between African-American faculty and the academy's white constituents are often *colored*—the legal academy offers no respite from the race-in-America dynamic manifested in many ways that are disadvantageous to African Americans.

1. Deans

Based on my study, I conclude that the usual relationship between African-American law faculty and the dean and administration of *HWLS*s is nothing special and is largely utilitarian. That relationship is influenced by and reflects the faculty's particular *consensus* on faculty racial diversity. Generally speaking, there is no evidence from the study that *HWLS* deans expend their institutional political capital on African-American inclusion, be it on appointments, mentoring, governance, compensation, or whatever. Any advancements in the number of African-American law faculty or in the quality of their experience appear to begin with faculty. Any such efforts along these lines are seemingly only agreed to by deans, characteristically, not led by them.

However, relevant scholarship suggests that strong institutional leadership is required for the racial diversification and inclusion on faculties.[188] According to participants, however, leadership of that character is scarce at *HWLS*s. For example, it appears that while the convention is for associate deans for academic affairs to be included in a law school's decision-making loop, the few African-American associate deans at *HWLS*s, by and large, have been excluded—kept out of the loop. Indeed, participants familiar with the situations thought that the few African-American associate deanships for academic affairs had proven to

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[187] Lawrence, *supra* note 141, at 333–34.

[188] *See, e.g.*, Trower & Chait, *supra* note 30, at 36 ("People in powerful positions—professors, department chairs, faculty senate officers, deans, provosts, and presidents—are well-situated to articulate and perpetuate a university's prevalent culture"); Berrian, *supra* note 67, at 85–86 (suggesting that because the dissatisfaction and consequent turnover of African-American faculty is so complex, solutions require system-wide efforts from university administrators, who "are uniquely suited to address this problem by advancing institutional policies and guidance aimed at ensuring equity and fairness and fostering supportive working conditions for African-American faculty.").

be problematic because those associate deans had a diminished governance role compared to the previous and subsequent white occupants of the position. Further, it would seem to be essential for success and respect in the associate dean position for the holder thereof to have the full support of the dean, manifested by few, if any, countermands of the associate dean's decisions in her customary purview, such as teaching assignments. According to participants, such support has not been extended to the African-American associate deans for academic affairs. This majority-group dean to African-American associate dean interplay (or rather outerplay) surfaced in the study as a kind of *metaphor* for majority-group law deans' commitment, or rather lack of commitment, to meaningful institutional inclusion of African-American faculty.

2. Majority-Group Faculty

I found that there was a certain "coolness" if not "a freeze" in the relationships between some of my participants and their majority-group colleagues. This finding of a perceived disconnect between the participants and their majority-group colleagues is consistent with other research, which has found that African-American faculty routinely characterize themselves as socially and professionally disconnected from their institutions.[189] On the other hand, my study did find some solidly positive, though perhaps not overwhelmingly positive, cross-racial faculty relationships.

These positive transracial faculty relationships stand in contrast to literature supporting the proposition that faculty of color are outcasts on campuses of historically white institutions, receiving little or no social and emotional support from their white colleagues.[190] However, because few participants were positive about transracial law faculty collegiality, none were particularly enthusiastic and most were slightly to extremely negative—the study does not provide a counter-narrative to the overwhelming body of literature that describes strained intra-faculty relationships along racial lines. Finkelstein found that many black faculty did not feel close to their colleagues, and believed that they were not

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[189] *E.g.*, Aguirre et al., *supra* note 67, at 378–79; Martha Tack & Carol Patitu, *Faculty Job Satisfaction: Women and Minorities in Peril*, ASHE-ERIC HIGHER EDUC. REP. NO. 4. (The George Washington University, School of Education and Human Development 1992); TURNER & MYERS, *supra* note 59, at 103 (discussing how African Americans "express frustration at being at once very visible because of color . . . and at the same time being overlooked for not fitting others' view of the 'norm.'").

[190] *See, e.g.*, Johnsrud & Sadao, *supra* note 67, at 329–32 (explaining that white professorial culture tends to dominate academia); Berta Laden & Linda Hagedorn, *Job Satisfaction Among Faculty of Color in Academe: Individual Survivors or Institutional Transformers?*, 105 NEW DIRECTIONS FOR INSTITUTIONAL RES. 57, 59 (2000) (finding tokenism among minority faculty).

"regarded as part of the team."[191] Berta Laden and Linda Hagedorn observed that "faculty of color often face issues and barriers, such as low to nonexistent social and emotional support and heightened feelings of loneliness and isolation at a level much higher than that experienced by their white counterparts."[192] Turner and Myers found that a sense of collegiality and personal connectedness among faculty of color and white faculty was little improved over time spent at *HWCU*s.[193] Indeed, some scholars have asserted that African-American faculty have made considerably less progress than white women in terms of their acceptance by white male colleagues.[194] As for cross-racial collegiality among law faculty specifically, the Bell-Delgado study portrays a significant lack of it at *HWLS*s.[195]

3. Administrative Staff

The study found that relationships between African-American law faculty and majority-group administrative staff can be problematic. While this was not always the case, conflict appears often enough to be noteworthy as affecting the professional experience of the subject group. While some participants in the study cited majority-group staff as the source of disparate treatment for or disrespect of African-American law professors, others found such relations to be a non-issue with respect to how they experienced their professional lives.

The reports of some of the participants regarding disparate treatment by majority-group staff are consistent with the relevant research on the topic which has found that faculty of color were treated disparately by white staffers at predominately white institutions; this treatment can come in the form of covert behaviors, as well as blatant racially-inspired, disrespectful conduct.[196] This topic was not one pursued by Bell-Delgado.

There was an appreciation, by participants, of the fact that police

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[191] MARTIN J. FINKELSTEIN, THE AMERICAN ACADEMIC PROFESSION: A SYNTHESIS OF SOCIAL SCIENTIFIC INQUIRY SINCE WORLD WAR II 189 (1984).

[192] Laden & Hagedorn, *supra* note 190, at 58.

[193] *See, e.g.*, TURNER & MYERS, *supra* note 59, at 22, 24 (noting that "once hired, faculty of color continue to experience exclusion, isolation, alienation, and racism resulting in uncomfortable work environments in predominantly white university settings" and quoting an African-American administrator who describes having felt isolated "for a number of years.").

[194] *See* Lynn Collins, *Competition and Contact: The Dynamics Behind Resistance to Affirmative Action in Academe*, *in* CAREER STRATEGIES FOR WOMEN IN ACADEME: ARMING ATHENA 45, 65 (Lynn H. Collins et al. eds., 1998) (observing that ethnic minorities are typically given lesser-valued assignments with fewer resources than white women in regard to advisory roles and placement on committees).

[195] Delgado, *supra* note 9, at 359, 382.

[196] *See, e.g.*, Yolanda T. Moses, *Black Women in Academe: Issues and Strategies*, *in* BLACK WOMEN IN THE ACADEMY: PROMISES AND PERILS 23, 31 (Lois Benjamin ed., 1997) (reporting a questionnaire respondent's characterization of treatment by white staff as "callous, arrogant, and disrespectful.").

harassment of African Americans, well known in the larger society, is omnipresent in the form of disparate treatment by majority-group members of campus police forces. The academy's equivalent of "driving while black" was part of the participants' consciousnesses, both for those who had encounters with campus police and those who had not.

4. Students

The study's findings suggest that relationships between African-American law faculty and majority-group law students can also be a complicated one. The relevant literature from the academy tends to stress the problematic areas of the relationship, as does the Bell-Delgado study.[197] The participants, specifically, reported having experienced racism and racial insensitivity (both conscious and unconscious), though the perspectives regarding breadth and depth of such manifestations varied widely among the group. Racially disparate treatment by students was perceived to be more likely to occur in required courses and in courses largely approached from a theoretical focus, as opposed to those courses most apt to benefit from instructors informed by practice.

The perspective of some participants that majority-group students treat African-American faculty more harshly than white faculty appears to be consistent with the relevant research. For example, according to Mia Alexander-Snow, classroom incivility towards faculty of color may be rooted in racist tendencies.[198] Other studies show that students may consciously decide to resist professorial authority in reaction to the physical attributes of their instructors, such as height, weight, race, and gender.[199] However, students sometimes identify with a professor to the extent that a psychological closeness develops. This closeness may militate against student resistance to a professor; nevertheless, some majority-group law students are apparently unable to get past skin color sufficiently enough to permit identification with African-American professors.[200]

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[197] Delgado, *supra* note 9, at 359–61.

[198] Mia Alexander-Snow, *Dynamics of Gender, Ethnicity, and Race in Understanding Classroom Incivility*, 99 NEW DIRECTIONS FOR TEACHING & LEARNING 21, 21, 25–29 (2004) (exploring ways in which cultural perceptions and stereotypes lead to classroom incivility, demonstrated by—for example—late arrival, early departure, sarcastic remarks and gestures, side comments to other students, complaints, disagreements, or direct challenges to authority); *see also* Angela R. Ausbrooks et al., *Now You See It, Now You Don't: Faculty and Student Perceptions of Classroom Incivility in a Social Work Program*, 12 ADVANCES IN SOC. WORK 255, 269 (2011) (summarizing study results that suggest the race/ethnicity of faculty may increase classroom incivility).

[199] *See, e.g.*, Patricia Kearney & Timothy Plax, *Student Resistance to Control*, *in* POWER IN THE CLASSROOM: COMMUNICATION, CONTROL, AND CONCERN 85, 85–100 (Virginia P. Richmond & James C. McCroskey eds., 1992) (describing how students may evaluate, judge, and resist teachers based on individual variables and attributes, such as what the teacher says, does, or wears).

[200] *Id.*

While the study detected a substantial amount of participant disengagement—even studied avoidance—of governance and majority-group faculty, teaching and interacting with students did not appear to be viewed as warily, even by those who complained of majority-group student "problems." Indeed, teaching courses of their election appeared to be among the more positive academic experiences for most participants.

Participants did note that, in many cases, their students have expectations shaped by a general representation of the law that emphasizes impartiality. In the dominant law school narrative, law continues to be presented as impartial or neutral, and white law students have been socialized into accepting these premises. Consequently, they have the expectation that the law will be analyzed in their classrooms in the dominant group narrative, according to which the law is fair, objective, and pure. Issues of racial injustice in the legal system constitute a challenge to these assumptions.[201] The reality of pervasive injustice in the law and legal institutions might justifiably puncture the expectations of the law's impartiality[202] that majority-group students bring into the law school classroom. The study's findings indicate that African-American law professors avoid bringing up race-related and racial-justice issues in their courses at *HWLS*s; they limit those types of discussions to elective courses that are explicitly titled in order to avoid trouble with majority-group students.

However, if African-American (and other) faculty were allowed to more actively de-mythologize American law's "story" of racial impartiality, it could be an important step towards actually achieving a greater degree of impartiality in the nation's legal system.[203] It can be

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[201] For example, a case can be made for the proposition that American law and legal institutions have been built upon a racist foundation; for example, blacks count as three-fifths of a person under the U.S. Constitution. Moreover, American law and legal institutions continue to be racially insensitive, if not explicitly racist: people of color face more severe sentencing terms, including the death penalty; there are weaker statutory penalties for illegal drugs that are preferred by whites; and there is a mandatory waiting period before Title VII law suits can be filed.

[202] *Cf.* A.B.A. COMMISSION ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN FORTUNE 500 LEGAL DEPARTMENTS I (2012), http://apps.americanbar.org/abastore/products/books/abstracts/4920047%20exec%20summ_abs.pdf <http://perma.cc/J8J5-P8AX> (noting that the common depiction of the American legal system as objective and impartial is erroneous when it comes to women with careers in that system, particularly so if they are also minorities).

[203] *See, e.g.*, MARGARET M. ZAMUDIO ET AL., CRITICAL RACE THEORY MATTERS: EDUCATION AND IDEOLOGY 145–46 (2011) (". . . while including more in the mainstream story is important and necessary, it does not necessarily have much of an effect or foster critical thinking or a new awareness in most students if what is included is still told from a mainstream perspective or told in such a way that it is made to fit within a mainstream perspective. It may be even more detrimental because it may provide the illusion of progressiveness and inclusiveness when, in fact, that is not the reality. In turn, those who then believe they have that additional knowledge may be even less open to new perspectives or counter narratives thinking they know those points of view already"); *see also* Devon W. Carbado, *Race to the Bottom,* 49 UCLA L. REV. 1283, 1284–85 (2002) (noting that "a central claim of Critical Race Theory (*CRT*) is that antiracist politics and legal theory should be informed by the voices of people 'on the bottom' of discrimination").

Carbado points to a number of difficulties inherent in looking to the bottom, but argues that these are difficulties that should be exposed and confronted; majority scholars often emphasize such

argued that majority-group law students need to be acquainted with the racialized context of American law if American law, and the institutions that support it, are to promote greater racial justice and serve Americans of all ethnic backgrounds.

This goal could be advanced if law students were exposed to the ways in which American law and legal institutions historically and currently disparately impact African Americans and other minority ethnic groups. Currently, however, African-American law professors challenge the white hegemonic character of American law, in the classrooms at *HWLS*s, at their peril, since consequent negative student evaluations will likely be taken at face value by those in the majority group—with deleterious consequences for the professor.

B. Terms and Conditions

1. Appointments

Based on my study, it appears that *HWLS*s are committed to a racially diverse faculty (at some level) and to employing affirmative action (up to a point) to achieve it. According to the study's participant group, contemporary African-American law faculty appointment levels might very well be explained by several related theses—*CRT*, interest convergence, tipping points—that have effectively led to a quota for African-American and faculty of color at *HWLS*s. Participants suggest that *HWLS*s apparently waive that quota only when they have an opportunity to catch a candidate extraordinary in their view. There is some evidence that, over time, the ceiling can be raised; that is, various participants explained that they were the only faculty of color for years until another African American or other faculty member of color eventually joined them.

The study findings reflect the fact that the tipping point faculty-of-color-appointment thesis[204] is quite operative in today's *HWLS*s.[205] Indeed, participants seemed to view tipping-point predisposition as the major impediment to the efforts to further African-American inclusion at *HWLS*s. The study's findings on this matter are consistent with the lack of more inclusion progress noted by others.[206]

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difficulties in discounting the usefulness of the African-American narrative in favor of a more mainstream perspective. *See, e.g.*, Richard Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997 (deriding critical race theorists for "telling of stories" instead of using logical arguments and empirical data; accusing critical race theorists of being "terrible lumpers" who are guilty of ignoring differences within and among racial groups).

[204] Bell, *supra* note 129, at 324.

[205] Delgado, *supra* note 9, at 361.

[206] *Cf.* THOMPSON & LOUQUE, *supra* note 62, at 160–62 (describing the comments of several study participants who noted that, given the low numbers of African-American faculty, postsecondary

Some participants cited the undersupply of qualified candidates as a partial explanation for the paucity of African Americans on the faculties of *HWLS*s, an observation supported by other studies.[207] Pipeline issues, broadly defined, were cited—that is, majority-group members were perceived by the participants as having relatively enriched backgrounds, which makes competing for law faculty positions more difficult for African Americans. Participants pointed to factors such as inferior K–12 schools, college journeys negatively impacted by poor preparatory education, and relative lack of pre-faculty appointment and post-faculty appointment mentoring and related socialization opportunities, when discussing the challenges faced by African-American law faculty aspirants.[208]

The views gathered from my participants were consistent with the notion that African Americans, generally speaking, perceive that they have more challenges to contend with than majority-group members as they make their way through legal academia.[209] However, some of the study participants appeared to view their "rougher road" in the legal academy more as "aggravations" and "special challenges" than significant impediments to success—at least as measured by tenure. Unfortunately, there has been no study of those African Americans who were *unsuccessful* in their quest for a career in the legal professoriate. Consequently, we do not know if the study participants' "aggravations" and "special challenges" were impediments to success for those African Americans who failed in their tenure quests. Further, these "aggravations" and "special challenges" do appear to preclude a satisfactory institutional life as a faculty member for some African Americans at *HWLS*s, even after tenure is attained.

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institutions could show their commitment to those faculty by aggressively recruiting more).

[207] *E.g.*, Trower & Chait, *supra* note 30, at 35.

[208] *See* Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 945–46 (2004) (noting that while the court in *Brown* said "'it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,'" thousands of inner-city African-American youths suffer today from a lack of decent elementary and secondary education as the result of poverty, racially segregated housing, failed integration programs, and inadequate funding); *see also id.* at 946, 975 (recounting that African-American law professors who went to college in the 1950s and 1960s matriculated on campuses where they were "simply unwelcome," and suggesting that the post-*Brown* affirmative action programs aimed at advancing integration have failed to offer a complete solution, although they have provided more educational and employment opportunities for African Americans).

[209] EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 115 (2001); THOMPSON & LOUQUE, *supra* note 62, at 2; Dolores D. Bernal & Octavio Villalpando, *An Apartheid of Knowledge in Academia: The Struggle Over the "Legitimate" Knowledge of Faculty of Color*, 35 EQUITY & EXCELLENCE EDUC. 169, 170–71 (2002); Delgado, *supra* note 9, at 364–66; Turner, *supra* note 30, at 112–13.

2. *Tenure*

According to the study, it appears that some African Americans believe that they may experience the tenure process differently than do those in the majority-group because of differences in socialization, a finding reflected in recent literature.[210] As detailed herein, generally speaking, African-American tenure-track law professors do not enjoy a high level of systematic pre-tenure mentoring. The absence of *formal*, high quality mentoring programs did not appear to participants to be equally disadvantageous across the racial spectrum. That is because *informal* mentoring goes on somewhat more naturally for junior white faculty, according to the narrative subscribed to by most of my participants. Influential senior white faculty find themselves drawn to mentor junior faculty who remind them of themselves. For many senior white faculty, color will be more important than individual personal traits, and hence there is no common ground upon which to build a constructive and respectful mentor-mentee relationship across the racial divide.[211]

The stories of participants not having been systematically mentored prior to tenure tend to confirm the assertion of Turner and Myers that *HWCU*s provide minimal guidance and mentoring for faculty of color.[212] My study's findings that African Americans are not nurtured at *HWLS*s supports the claim of Victor Essien that *HWCU*s do very little after recruiting faculty of color to actually incorporate them into the institution's fabric.[213] According to the literature, many faculty of color lament the fact that they have received little or no significant mentoring from senior faculty colleagues.[214] The participants' emphasis on the

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[210] Barnes & Mertz, *supra* note 56, at 514 (professors of color view "the tenure process more negatively than do their white counterparts.").

[211] The difficulties of cross-cultural mentoring have been documented in the broader academy as well. *See, e.g.*, Juanita Johnson-Bailey & Ronald. M. Cervero, *Mentoring in Black and White: The Intricacies of Cross-Cultural Mentoring*, 12 MENTORING & TUTORING 7, 7 (2004) (describing issues routinely confronted by professors involved in cross-racial mentoring, including trust, racism, visibility, and risks pertinent to minority faculty, power and paternalism, benefit to mentor and mentee, and 'otherness'); *see* Christine A. Stanley & Yvonna S. Lincoln, *Cross-Race Faculty Mentoring*, 37 CHANGE 44, 46 (2005) (discussing the significant benefits of cross-racial mentor relationships and pointing to a lack of previous experience with racial minorities as a source of reluctance for white faculty to engage in such mentor relationships); *see also* IDA O. ABBOTT & RITA S. BOAGS, MINORITY CORPORATE COUNSEL ASS'N, MENTORING ACROSS DIFFERENCES: A GUIDE TO CROSS-GENDER AND CROSS-RACE MENTORING 6, *available at* http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=666, <http://perma.cc/9J5M-X398> (finding that minority lawyers who *want* mentors can find them by being "strategic and proactive" and that mentees who actively seek out mentors can find them across the racial and gender spectrum "to meet a variety of development needs."). *Contra* Marco J. Barker, *Cross-Cultural Mentoring in Institutional Contexts*, 58 NEGRO EDUC. REV. 85, 88 (2007) (asserting that "race is not a factor in professional development of junior Black faculty" but that race may be a factor in a mentee's "ability to address feelings of isolation").

[212] TURNER & MYERS, *supra* note 59, at 24–25.

[213] Victor Essien, *Visible and Invisible Barriers to the Incorporation of Faculty of Color in Predominantly White Law Schools*, 34 J. BLACK STUD. 63, 68–69 (2003).

[214] Stanley & Lincoln, *supra* note 211, at 46 (discussing the general assumption that "mentoring is

importance of mentoring is well supported by the relevant literature which indicates that it can be a key strategy to improving promotion and tenure rates as well as retaining faculty of color in *HWCUs*.[215]

Study participants also pointed to the white hegemonic nature of the tenure process at *HWLSs*. Trower and Chait suggest that "hierarchies of disciplines; gender- or race-based stereotypes; single-minded devotion to professional pursuits; and the relative value assigned to various elements of faculty work" are examples of dominant norms that often work against institutional efforts at creating more faculty racial diversity and retention.[216] An underpinning of the tenure process is the assumption that faculties are "neutral, apolitical bodies" that are unbiased, an assumption most of the participants rejected.

Moreover, participants perceived that race scholarship is often disrespected in the legal academy, and there is some support for those perceptions in the relevant literature.[217] That is, when the dominant group determines which scholarship is valued, epistemological racism may follow.[218] Under this notion, forms of scholarship that challenge the normative model—such as *CRT*—may be consciously or unconsciously trivialized.[219] Those who dismiss race scholarship often fail, however, to address certain characteristics peculiar to the oppression of African

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more beneficial when mentor and protégé are of the same gender and race or ethnicity, are in the same discipline, and share similar professional interests" and noting that majority faculty members are therefore "reluctant to mentor new faculty of color; few overtures toward faculty of color are made; and minority scholars feel keenly the absence of warm, constructive mentoring relationships").

[215] Stanley & Lincoln, *supra* note 211, at 47; Gloria D. Thomas & Carol Hollenshead, *Resisting From the Margins: The Coping Strategies of Black Women and Other Women of Color Faculty Members at a Research University*, 70 J. NEGRO EDUC. 166, 175 (2001) ("nonsupportive and unwelcoming institutional and organizational climates, the lack of respect from colleagues for their scholarship and research agendas, the unwritten rules by which they are expected to govern themselves in the academy, and the lack of mentoring they received during their academic careers."). *Cf.* ABBOTT & BOAGS *supra* note 211, at 8 ("Mentoring is considered instrumental in helping minority and women lawyers break through the glass ceiling. Having a mentor is essential for all lawyers' career advancement. It is especially important for women and minorities. The lack of adequate mentoring has held women and minority lawyers back from achieving professional success, and has led to high rates of career dissatisfaction and high rates of turnover."); *id.* at 9 (describing "mentoring functions" with minorities in the legal workplace to include: socialization, skills and confidence building, role-modeling, emotional support and reality checks, career advice, providing network contacts, and advocating for mentee's promotion).

[216] Trower & Chait, *supra* note 30, at 9.

[217] *See* Robert L. Hayman, Jr., *Race and Reason: The Assault on Critical Race Theory and the Truth About Inequality*, 16 NAT'L BLACK L.J. 1 (1999) (discussing the manner in which majority scholars have attempted to discredit critical race theorists and either undervalue or deny the value of their work, creating a culture of intolerance and exclusion for those who critically discuss issues of race).

[218] Villalpando & Bernal, *supra* note 62, at 253.

[219] For example, Judge Richard Posner of the Seventh Circuit has criticized affirmative action policies and the notion that African Americans should be represented on law school faculties in proportion to their numbers in the U.S. population. In support of his position, Posner asserts that the success of Jews and Asians is "a triumph of individualism and meritocracy" because they did not need "identity politics" to succeed. The problem with *CRT*, he argues, is that "it turns its back on the Western tradition of rational inquiry, forswearing analysis for narrative. Rather than marshal logical arguments and empirical data, critical race theorists tell stories—fictional, science-fictional, quasi-fictional, autobiographical, anecdotal—designed to expose the pervasive and debilitating racism of America today. By repudiating reasoned argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites." Posner, *supra* note 203, at 40, 42.

Americans, as well as the difficulty of collecting empirical data on a phenomenon as elusive as unconscious racism; they essentially dismiss race scholarship as radicalism.[220] The attitudes reflected in these criticisms are perhaps more telling than the content, and illustrate the difficulties African-American professors often face when they try to garner respect for their academy-related endeavors. Somewhat ironically, it is the inability or unwillingness of the majority-white legal academy to recognize and appreciate the African-American narrative that gives rise to the continuing relevance of race-oriented scholarship. On the other hand, some of the study's participants, including some who wrote on race, felt that their scholarship *was* respected by their majority-group peers, in contrast to the literature which holds that the scholarship of faculty of color are not accorded respect and recognition.[221]

3. Gender

The relevant literature notes that when female gender is joined with racial minority status in the professoriate, the resulting interlocking pressures compound the stress for female faculty of color.[222] However, all but one of the female participants seemed to account for the effects of race, more than gender, when interpreting their experiences in the legal professoriate. Furthermore, the female participants appeared to be mindful of the narrative which holds that African-American women are too central to the survival of their ethnic group to allow any diversion of attention away from that mission. A common refrain is that African-American women should be focused on their ethnic group and its liberation, and not join in any endeavors with white women.[223] As a result, it has been suggested that African-American women may be reluctant to address intersectional identities.[224]

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[220] *Id.* at 40 (dismissing *CRT* as "radical legal egalitarianism"); *see also* Alex Kozinski, *Bending the Law*, N.Y. TIMES, Nov. 2, 1997, http://www.nytimes.com/books/97/11/02/reviews/971102.02kosinst.html, <http://perma.cc/7PWL-3N7U> (describing how "the radical multiculturalists in the law schools have taken an ax to the foundations of traditional academic dialogue—things like objectivity, truth, merit, fairness and polite discourse.").

[221] *See generally* Adalberto Aguirre, Jr., *Academic Storytelling: A Critical Race Theory Story of Affirmative Action*, 43 SOC. PERSP. 319 (2000); TURNER & MYERS, *supra* note 59, at 94.

[222] *See, e.g.*, Alberta M. Gloria, *Searching for Congruity: Reflections of an Untenured Woman of Color*, *in* CAREER STRATEGIES FOR WOMEN IN ACADEME: ARMING ATHENA 36, 37 (Lynn H. Collins et al. eds., 1998) (describing the "additional roles and responsibilities for women faculty who represent a racial/ethnic minority" group because they are "asked to participate in the racial/ethnic minority *and* women's communities."); TURNER & MYERS, *supra* note 59, at 105–06 (describing various stress factors for female faculty of color to include: isolation and disrespect, being underemployed and overused, being torn between family and career, and being challenged).

[223] BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 1 (1981).

[224] *See, e.g.*, Johnnetta B. Cole, *Epilogue* to WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN-AMERICAN FEMINIST THOUGHT 549, 550 (Beverly Guy-Sheftall ed., 1995) ("Why is it that among so many contemporary African American women there is a dread of being called feminist? . . . fueled by media misrepresentations . . . black women, and indeed many women of color, assume that in order to be a feminist, one must put the struggle against racism after the struggle against

Some of the female participants did talk about being sexually objectified and cast in a negative light. In fact, African-American women have long been disparaged in popular culture as being non-intellectual, disagreeable, and immoral—a framework that impacts the professional lives of female African-American law faculty. Noted scholar bell hooks has observed, "[a]s Sapphires, black women were depicted as evil, treacherous, bitchy, stubborn, and hateful . . . ."[225] Myths about and portrayals of African-American women as Sapphire, Jezebel, Mammy, Welfare Queen, and Hoochie have served to demonize them and to create stereotypes that are not easily compatible with the notion of a life of the mind.[226] For many in the majority group, the words "black, female, and scholar" are incompatible. Hooks observes and writes about how African-American female intellectuals often have to contend with sexual objectification, and that in the social hierarchy, African-American women come last.[227]

4. To Be Dean

As for African Americans becoming law school deans, it is contended that because faculty of color often have their teaching discounted, their scholarship trivialized, and their service unfairly disrespected or disregarded, they never gain the kind of stature that can lead to a deanship. Moreover, African-American law faculty also tend not to be sufficiently institutionally integrated in ways that lead to membership in key law school decision-making bodies, which in turn, could showcase the kind of leadership ability which suggests deanship.[228] Deprived of such experiences, validation of a kind that suggests a person could be a future law school dean rarely comes to African Americans. Indeed, the experience most often leading to a deanship is that of associate dean for academic affairs. As previously discussed, herein, there is evidence that the post has rested uneasily upon African Americans at *HWLS*s.

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sexism. . . .").

[225] HOOKS, *supra* note 223, at 85.

[226] Patricia Hill Collins, *Gender, Black Feminism, and Black Political Economy*, 568 ANNALS AM. ACAD. POL. SOC. SCI. 41, 51–52 (2000); HOOKS, *supra* note 223, at 70; K. SUE JEWELL, FROM MAMMY TO MISS AMERICA AND BEYOND 16 (2002).

[227] HOOKS, *supra* note 223, at 51–52.

[228] *Cf.* Linda K. Johnsrud, *Women and Minority Faculty Experiences: Defining and Responding to Diverse Realities*, 50 NEW DIRECTIONS TEACHING LEARNING 3, at 6–7 (1993) (asserting that because female professors may not have the same access to professional networks as men do, they do not have the same "high levels of integration" that lead to "high levels of visibility" and consequently, higher career payoffs).

5. Governance

The study's findings paint the picture of marginalization of African-American faculty in governance at *HWLS*s. These findings are consistent with research that has found that faculty from racial minority groups are often excluded from and denied the right to participate in departmental, school, or university governance.[229] Aguirre et al. found that faculty of color were more likely than white faculty to report being denied the opportunity to participate fully in institutional governance.[230] They found instead that faculty of color were often used to play ghettoized roles only, including serving as "buffers in shielding institutional interests from the minority community."[231] These findings are consistent with the reports of some participants that they were channeled into black governance only. According to Bell-Delgado, while ghettoized roles and race-related committee assignments were routine for some minority law faculty, larger roles, in institutional affairs generally, were not.[232] Only two participants of the twenty-four in this study described themselves as heavily involved in institutional governance. In fact, overwhelmingly, participants reported little involvement or no involvement in institutional governance. This studied *disinvolvement* seemed clearly to be the disengaged's choice and a source of satisfaction, if only because involvement was viewed to be so demeaning and disconcerting.

One critique of *CRT* that may have some resonance with regard to the study is the notion that non-white racial groupings are not exactingly examined under the theory, for ways in which they may be contributing to their own plights.[233] The study results indicate that African-American law professors could be diminishing their impact and potential clout in the legal professoriate and beyond, by avoiding and disconnecting from law school and university governance. Critical Race Theorists advocate a sharing of power across the racial spectrum; they decry white hegemony. The "isolationism" encountered in the study is arguably at variance with the opposition to white hegemony. Furthermore, disengagement may limit the ability of African-American law faculty to press an agenda that could advance inclusion. It could be argued that their pre-disposition to disengage from school affairs and governance reflected in the study may, in turn, limit the ability of African-American law faculty to serve as mentors for African-American students and untenured faculty, as well as limit their ability to support African-American staff. On the other hand, the consequences of engagement may be so disabling to individual

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[229] FINKELSTEIN, *supra* note 191, at 186.
[230] Aguirre et al., *supra* note 67, at 377.
[231] *Id.* at 372.
[232] Delgado, *supra* note 9, at 364.
[233] *See, e.g.*, ROY L. BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA 102–03, 105 (2009).

African-American faculty members that further institutional engagement by them would not be possible consistent with their health and well-being.[234] Further, engagement may be so disabling that it would affect the non-law school lives of African-American faculty and limit their ability to serve and contribute in environments more welcoming to and supportive of them.

Moreover, as regrettable and deterring to inclusion as African-American law faculty disengagement may be, it has not developed in a vacuum—but rather in what are perceived to be racially hostile environments. If and when the institutional climates for African-American law faculty become more welcoming and genuinely inclusive, the disengagement described, herein, likely will diminish.

While Professors Bell and Delgado found that minority professors were forced to deal with "crushing loads of committee work and student counseling,"[235] none of the participants in this study offered a similar critique. Several participants admitted to a weariness as well as to a wariness about diversity-related committees primarily because such efforts, in their view, are for show only or, in any event, are unlikely to advance the African-American law-faculty inclusion cause, even if chartered in good faith. Based on my study, there appears to be little "join-committee" pressure on African-American law professors now, given participants' total silence on the point. As for student counseling, no study participant complained of student counseling burdens. Some participants referenced the counseling of students, but only in the context of the great pleasure they found in the role.

6. Compensation

According to the study, racial disparities in compensation are perceived by African-American law faculty to be broad and deep. The dissatisfaction of the participants with their relative compensation was marked, even profound. While some literature notes dissatisfaction about compensation among faculty of color in the academy, such literature does not reflect the breadth and depth of dissatisfactions revealed by the study. Bell-Delgado reflects only moderate dissatisfaction with compensation among the faculty of color they surveyed.[236] It should be pointed out, however, that there has been an exponential growth in "special deals" in the more than quarter century since Bell-Delgado and

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[234] CENTERS FOR DISEASE CONTROL AND PREVENTION, A CLOSER LOOK AT AFRICAN AMERICAN MEN AND HIGH BLOOD PRESSURE CONTROL: A REVIEW OF PSYCHOSOCIAL FACTORS AND SYSTEMS-LEVEL INTERVENTIONS (U.S. Dep't of Health and Human Serv., 2012), http://www.cdc.gov/bloodpressure/aa_sourcebook.htm (noting that African Americans are at significantly greater risk of having elevated blood pressure and related health issues).

[235] *Id.* at 352.

[236] Delgado, *supra* note 9, at 364.

seemingly, for the participants in the study, an exponential growth in compensation disparities along racial lines.

7. Satisfaction

Participants appeared to be happy with the intrinsic factors that are significant in the legal professoriate. They seemed happiest about job security; it seemed to be the key to their satisfaction and how they deal, in part, with their dissatisfaction.

Generally, participants expressed unhappiness with the extrinsic satisfaction factors—those factors having to do with the work environment, which professors cannot control. All of the participants acknowledged the omnipresence of at least some racism as a source of some degree of disparate treatment for African-American law professors. According to participants, appointment policies and practices, tenure criteria policies and processes, and salary- and benefits-determinations (broadly defined) function at *HWLS*s in ways that disadvantage African-American faculty and are markers of institutional racism. Results from priming studies and implicit bias research clearly suggest that African-American law professors likely encounter some racial bias in all phases of their professional lives at *HWLS*s.[237]

Redress of racial exclusion in predominantly white-American institutions is complicated and difficult; those in the majority group who control American institutions subscribe to the notion that they are not racially biased, though they may unconsciously be so. Empirical studies overwhelmingly demonstrate that a significant percentage in the majority-group hang on to some unconscious bias towards African Americans.[238] This bias is "created and reinforced in societal, institutional, and individual ideologies, practices, and behaviors."[239] Researchers have concluded that there is palpable racial discrimination in

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[237] *See, e.g.*, Gilliam & Iyengar, *supra* note 154, at 572 (finding that local news cultivates prejudice against minorities); Glaser & Knowles, *supra* note 152, at 171 (discussing implicit bias's effects on prejudicial attitudes).

[238] *See, e.g.*, John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 37 ADV. EXP. SOC. PSYCHOL. 1, 4 (2004) (concluding that the overwhelming majority of white Americans develop unconscious negative feelings about blacks resulting from "a range of normal cognitive, motivational, and sociocultural processes that promote intergroup biases"); Greenwald & Krieger, *supra* note 145, at 946 (discussing findings related to implicit bias); Bree Picower, *The Unexamined Whiteness of Teaching: How White Teachers Maintain and Enact Dominant Racial Ideologies*, 12 RACE & ETHNICITY EDUC. 197, 198 (2009) (concluding that some white Americans had a negative preconception towards blacks while being "blind not only to their own privileges but also to their group membership"). *See generally* Dean Cristal & Belinda Gimbert, *Racial Perceptions of Young Children: A Review of Literature Post-1999*, 36 EARLY CHILDHOOD EDUC. J. 201 (2008) (discussing a study that revealed high levels of ethnocentric bias and the development of in-group prejudice in children).

[239] Daniel Solórzano et al., *Racial Primes and Black Misandry on Historically White Campuses: Toward Critical Race Accountability in Educational Administration*, 43 EDUC. ADMIN. Q. 559, 559 (2007).

the academy and that "universities foster a negative campus racial climate by implicitly or explicitly endorsing such race-conscious actions."[240]

Participants discussed subtle or covert incidents of what the social science literature terms micro-aggression: a subtle verbal or non-verbal act of disregard or disrespect that emanates from beliefs about the inferiority of targeted groups.[241] Collectively, these micro-aggressions can negatively impact the experiences and fortunes of African-American law faculty. This contemporary form of racism can be particularly insidious, because it is typically cloaked by discussions of fairness, merit, individualism, and cultural norms.[242] Those on the receiving end of micro-aggression are often cited for their inability to conform to what are hegemonic norms with little consideration given to the fact that they have different backgrounds and experiences than those of the majority group.[243] Notwithstanding this context, participants persisted and survived their ordeals at *HWLS*s despite the racial dynamic. How great an impediment this dynamic poses for improving the number of African-American law faculty at *HWLS*s and improving the quality of their experience, once appointed, defies precision.

The dissatisfaction with the extrinsic factors at *HWLS*s was obviously not a deal killer as far as participants were concerned. There was a broad recognition of the reality that African Americans have to deal with unconscious racism and racial insensitivity that is obviously not peculiar to the legal academy. A majority-group member security guard may be more predisposed to interdict an African American than a white person, whether in a law school, in a law firm, at corporate headquarters, or in a government office building. Additionally, there are usually more mandatory aspects to a non-academic position than accompany a professorship: in positions in law firms, businesses, and government, if an African American's superior commands that she have lunch with a racially insensitive jerk, "no" may not be a practicable option. Participants seemed to derive some, if not great, comfort in being able to just say "no."

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[240] *Id.* at 560.

[241] Daniel Solórzano et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. NEGRO EDUC. 60, 60–61 (2000).

[242] *See generally* Dovidio & Gaertner, *supra* note 142, at 532–33; Dovidio & Gaertner, *supra* note 238, at 13.

[243] Solórzano et al., *supra* note 241, at 62 (suggesting that the very idea of self-fulfilling a stereotype may depress student test performance, thereby confirming that stereotype); *see also id.* at 69 (noting how microaggressions can make students feel self-doubt, frustration, isolated, discouraged, intimidated, and exhausted—the cumulative effects of which negatively impacted the students academic performance).

C. An Overview of Some Potential Strategies for Redress

1. Programmatic Change

Programmatic change strategies might promote greater inclusion for African-American faculty at *HWLS*s to the extent that they are strong enough to affect "thinking outside the box" (i.e., a school could consider adding another African American to the faculty, even though it already has one!).

It is unlikely, however, that the legal academy will materially broaden inclusion for African-American faculty so long as *HWLS*s adopt or allow: (i) tipping-point appointment policies for African Americans; (ii) reliance on "good ole white boy" networking for faculty appointments; (iii) slipshod and/or disparate-by-race pre-appointment and post-appointment faculty mentoring; (iv) exclusion of African-American faculty from membership on and especially chair of important committees; (v) negative overreaction to racially-biased evaluations and critiques by majority-group students; (vi) disdain of new techniques of scholarship that deconstruct the mythology of law's neutrality; (vii) indirect punishment, rather than reward, of professorial contributions to issues of importance to the African-American community through research, teaching, and service; (viii) disrespectful and biased treatment of African Americans by staff; and (ix) faculty compensation, benefit, and opportunity policies that result in great disparities between the races.[244] *HWLS*s will have to address the aforementioned policies, practices, and procedures if they are to change the racial dynamic that the study's participants found to be so excluding. On an individual level, greater sensitivity from majority-group faculty members to racist insults and slights may help to minimize the disconnect between African-American faculty and *HWLS*s and the majority-group faculty thereof.

Challenges for African Americans with respect to law faculty "pipeline" readiness was a much-considered topic in the study. There is no singular or proper career map to guide students toward a career in academic law. This lack of an explicit pathway, while challenging for all students who aspire to a career in academic law, may offer additional challenges for African-American and other students of color because of the accumulative disadvantages with which many of them must contend. Whether a legal academic career is an option and what a career in academic law embraces will likely be unknown to many law students.

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[244] Participants, generally speaking, appeared to take some care to not "lump" all majority-group law faculty as endorsers of the aforementioned practices of a racially excluding character. And this notion is inherent in participants' reports of some rapport with some majority-group faculty members.

For reasons discussed, herein, African-American law students and other students of color may be even less likely than majority-group students to know of the requirements of such a career and what to expect in a career as a legal academic.[245]

More proactive efforts to supply the law faculty "pipeline" might advance a law faculty inclusion agenda. Mentoring, role modeling, and pre-law school exposure programs have been employed as effective mechanisms for recruiting African Americans to law school as students.[246] Seemingly, then, it is reasonable to surmise that the current model that has worked to expose and assist the desires of African Americans to pursue law school could prove equally useful in developing and enhancing their interest in pursuing careers in academic law. An important finding of this study is that the participants believe—and all evidence suggests—that the pool of qualified African-American candidates for the legal professoriate remains relatively small.[247] It seems clear that insufficient emphasis is currently being placed on developing effective strategies for enhancing the opportunities of African Americans and other persons of color for law faculty careers. To be sure, the *AALS* has programs for newly minted, faculty of color tenure-track appointees.[248] To date, however, the *AALS* has not become involved in any pre-faculty appointment socialization efforts for potential law faculty aspirants of color. Currently, there are limited opportunities for learning about what a career in academic law entails outside of a mentoring relationship between law faculty member and law student.

The study suggests that greater efforts towards socialization for law faculty positions for African Americans may advance that cause. It could be suggested that (i) law schools should become more intentional and explicit in the recruitment of African-American law students (and other law students of color) into academic careers; (ii) African Americans' exposure to careers in academic law should begin relatively early in their law school journey; (iii) African Americans should be apprised of pathways to careers in academic law; and (iv) methods for facilitating the preparation of African Americans for careers in academic law should be developed and extended.

Introducing academic law through formal programming could point

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[245] *Cf.* ABBOTT & BOAGS, *supra* note 211, at 6 (noting that "[w]omen and minority associates in law firms expected to be promoted solely on merit . . . . Mentors corrected this belief by explaining that personal relationships and social involvement are also major factors in promotion decisions.").

[246] *See, e.g.*, Guiffrida, *supra* note 38, at 709; Anthony L. Antonio, *Faculty of Color Reconsidered: Reassessing Contributions to Scholarship*, 73 J. HIGHER EDUC. 582, 583 (2002); Schexnider, *supra* note 42, at 126–27.

[247] Redding, *supra* note 91.

[248] *See, e.g.*, *2012 Workshop for New Law School Teachers, Workshop for Pretenured People of Color Law School Teachers, Workshop for New Clinical Law School Teachers*, ASS'N AM. LAW SCH., https://memberaccess.aals.org/eweb/DynamicPage.aspx?Site=AALS&WebKey=dc7bcc88-2ec9-4e85-a054-fb7752844dfb&&RegPath=EventRegFees&REg_evt_key=79BF81A8-A476-4EED-A08A-2D8967E15741, <http://perma.cc/4QDD-98CF>; *Workshop for Pretenured Minority Law School Teachers June 17-18, 2009*, ASS'N AM. LAW SCH., http://www.aals.org/documents/2009minority/PretenuredMinorityLawTeachersBooklet2009.pdf, <http://perma.cc/HL32-XWX4>.

African-American law students, and other law students of color, to an academic career option relatively early in their legal educations. That is, an elective course specifically addressing academic law, and targeting students from groups that are underrepresented in the legal professoriate, should be created at the nation's top twenty-five law schools—these schools produce the majority of the professors at Tier I law schools. Additionally, the top twenty-five law schools should create law faculty–law student mentoring programs and develop workshops highlighting the preparation for, and benefits of, a career as a legal African-American academic. A Faculty of Color Development Institute sponsored by either or both the American Association of Law Schools and the American Bar Association might conduct workshops to cover topics such as: law faculty career paths, law faculty career expectations, legal research methodologies, and law faculty-related service opportunities.

2. Litigation

Title VII of the Civil Rights Act of 1964 is available, in theory, to redress difficulties experienced by African Americans in appointment to faculty positions and subsequent conditions of employment. Title VII was designed to combat employment discrimination based on race, gender, religion, and national origin in the nation's workplaces, including in academia.[249] Indeed, Title VII challenges were critical for the eventual racial integration of faculties of American colleges and universities.[250]

Lawsuits might be initiated by African-American faculty under Title VII based on racially-based disparate treatment or on policies, practices, and procedures which, though purported to be "neutral," have a racially disparate impact. The policy underpinnings of Title VII, and the threat of litigation thereunder, could be credited for spurring some progress in the racial diversification of American college and university faculties.[251]

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[249] AMY GAJDA, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION 57–58 (2009).

[250] *See, e.g.*, *id.* at 59–60 (noting that between 1971 and 1984, women and minority faculty won only 34 of 160 Title VII decisions that reached the merits, but that a 1989 Supreme Court decision marked a "turning point in judicial attitudes toward academic discrimination claims" under Title VII (citing Univ. of Pennsylvania v. E.E.O.C., 493 U.S. 182, 198–99 (1990)).

[251] *See, e.g.*, Harry F. Tepker Jr., *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L. REV. 1047, 1072 (discussing how the danger of litigation may deter universities from "candid and critical evaluations" of faculty to avoid Title VII suits, but noting also that "courts do not second-guess the schools on the substance of qualifications in a disparate treatment case; the courts search for discriminatory motive.").

a. Disparate Treatment

Disparate treatment cases can be brought pursuant to Title VII to address the appointment and conditions of employment for African Americans at *HWLS*s. In order to succeed in a disparate treatment claim under Title VII, a plaintiff must prove that the employer intentionally discriminated against or treated him less favorably because of age, race, color, religion, sex, or national origin.[252] Generally speaking, in a "garden variety" hiring case brought under a Title VII race-based disparate treatment theory, a plaintiff must prove: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that the position was filled by someone with lesser qualifications or the position remained open and the employer continued to seek to fill the position.[253]

Discrimination of the disparate treatment variety (requiring a showing of intent) *vis-à-vis* African-American faculty or faculty aspirants surely *may* exist at some American law schools. However, lawsuits based on a disparate treatment theory in an academic setting face a host of difficulties in both appointment and conditions of employment contexts.

For example, in a recent decision, the United States Court of Appeals for the Sixth Circuit held that an African-American professor at The Ohio State University failed to present a prima facie case of racial discrimination under a disparate treatment theory after he received a lower annual raise than other professors.[254] The amount of each faculty member's raise was determined by numerical scores in four categories: administrative work, scholarship, teaching, and service.[255] The numerical scores (with the exception of scores for student evaluations) were based on a subjective rating system, ranging from "no merit" to "extra merit" in each category.[256] Thereafter, each category was given a specified weight.[257] The professor argued that his teaching scores were low because he was developing a new course, for which he received no additional credit.[258] The court held that the professor failed to establish that "the evaluation criteria were applied to him differently than to non-African-American faculty."[259] It would be a simple matter to offer evidence that the formal application of the criteria themselves was uniform, given that each rating was converted to a numerical score. But

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[252] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 n.4 (1973).
[253] *Id.* at 802.
[254] Alexander v. Ohio State Univ. Coll. of Soc. Work, 429 Fed.App'x. 481, 487 (6th Cir. 2011).
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.* at 487–88.
[259] *Id.* at 488.

how can a plaintiff prove that the subjective scoring of categories—such as scholarship and service—was the product of intent to discriminate?

Discrimination lawsuits under Title VII may also be brought against an employer by a *class* of people making an allegation of systemic disparate treatment, known as "pattern and practice."[260] There are four class certification prerequisites: numerosity, commonality, typicality, and adequacy of representation.[261] In several pattern and practice cases, female faculty members have been certified as a class of employees university-wide.[262] If a significant portion of the African-American faculty in a state college and university system, especially in the most populous states, formed a class, they could surely generate one that was large enough to satisfy the numerosity requirements for class certification. Once certified, plaintiffs may present "statistical evidence, anecdotal evidence about the institution and its practices, and analysis of individual cases [i.e., the evidence of racial discrimination against some individuals in the class] to prove that the class is being discriminated against"[263]—but not so fast.

The Supreme Court's decision in *Wal-Mart Stores v. Dukes*[264] will likely present difficulty for plaintiffs who wish to suggest that the persistent underrepresentation of African Americans on university faculties—often demonstrable by statistical evidence—is an indication of systemic disparate treatment. In *Dukes,* a class of female employees brought suit against Wal-Mart alleging sex-based employment discrimination under a disparate treatment theory.[265] The Court held that statistical evidence, combined with a mere showing that discretionary policies resulted in sex-based disparities, is insufficient to prove disparate treatment of the class.[266] The Court clarified that, to obtain class standing, plaintiffs must identify specific discriminatory employment practices affecting each member of the class in order to tie the class members' claims together and establish commonality.[267] It

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[260] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977) (noting that pattern and pratice may be established "by a preponderance of the evidence that racial discrimination was the [defendant's] standard operating procedure, the regular rather than the unusual practice.").

[261] WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING 29 (3d ed. 1995). Specifically, (i) the plaintiffs must be so numerous and scattered that joining them in a non-class action is impractical; (ii) there are common questions amongst those joined as plaintiffs that the lawsuit must resolve; (iii) the representative parties must be able to advance the interests of the inactive members of the class; and (iv) the representative plaintiffs must not have interests antagonistic to the rest of the class.

[262] Chang v. Univ. of R.I., 107 F.R.D. 343, 344 (D.R.I. 1985); Coser v. Moore, 587 F. Supp. 572, 587 (E.D. N.Y. 1983), *aff'd* 739 F.2d 746 (2d Cir. 1984).

[263] ROBERT M. HENDRICKSON, THE COLLEGES, THEIR CONSTITUENCIES, AND THE COURTS 121 (2d ed. 1999).

[264] Wal-Mart Stores v. Dukes, 131 S. Ct. 2541 (2011).

[265] *Id.* at 2546.

[266] *Id.* at 2555 (holding that the regression analysis showing "statistically significant disparities between men and women at Wal-Mart" was "insufficient to establish respondents' theory" of disparate treatment).

[267] *Id.* at 2555–56.

could be especially problematic for plaintiff professors to make such a showing in the academy, given that appointment, tenure, and salary and benefits decisions are highly subjective, with multi-faceted criteria factoring in the decision-making process.[268] The academic unit differences with regard to all this are likely to heighten the class certification challenge.

Intentional discrimination, therefore, can be exceedingly difficult to show, regardless of whether the discrimination is systemic or on the part of an individual decision-maker. Moreover, given the subtlety of today's racial bias in the academy, lawsuits based on the disparate treatment theory will not address the most vexing racial discrimination challenges. Those challenges appear to lie in the subtle or unconscious racism that may have a deleterious effect on African-American faculty appointments and conditions of employment.

b. Disparate Impact

Unlike disparate treatment claims that focus on discriminatory *intent*, disparate impact claims focus on whether an employer's policies, practices, and procedures have a discriminatory effect on those in a particular group.[269] The Supreme Court has held that subjective or discretionary employment practices challenged as violating Title VII may be analyzed under the disparate impact approach.[270] A plaintiff can establish a prima facie case of disparate impact discrimination under Title VII by (i) identifying the specific employment, policy, practice, or procedure that is challenged in the claim; (ii) demonstrating that the challenged practice had a negative impact or effect on an identified protected group, which adversely affected their employment opportunities and/or conditions; and (iii) establishing a cause and effect link between the negative impact and the employment practice.[271] After the plaintiff makes such a showing, the burden shifts to the defendant to show that the disputed practice(s) is justified as a "business necessity"; the defendant must establish that no other options are practical.[272]

Disparate impact challenges to so-called "neutral" policies and practices likely have greater significance than disparate treatment

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[268] *See supra* Part II.C. (discussing the subjectivity of the appointment process); Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut An Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 10 (2006) (describing the nature of tenure decisions).

[269] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (describing the disparate impact standard).

[270] Wards Cove Packing v. Atonio, 490 U.S. 642, 646 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

[271] *Id.*

[272] *E.g.*, Hart, *supra* note 141, at 551 (describing the defendant's burden).

challenges for advancing the cause of African-American law faculty and faculty aspirants. Impediments to African-American law faculty appointment may reflect majority faculty choices and practices that are neither made in response to market forces, nor dictated by necessity.[273] Though there is no case law directly on point, some current law school practices and policies that impact minority faculty appointment and conditions of employment, such as practices tethered to the "good ole white boy" network,[274] might be challenged under the disparate impact theory. It can be noted that resort to that particular network is not a business necessity; a law faculty may be staffed without reliance on it.

Overarchingly, cognizance should be taken of the reality that in employment discrimination cases involving institutions of higher education, courts have generally been hostile to professors' claims of discrimination and often cite the "academic deference" doctrine to rule in favor of institutional defendants.[275] Courts have been reluctant to question university hiring, tenure, and promotion decisions because they involve "such a high level of discretion and depend upon so much specialized knowledge."[276] The existence of this tendency is backed by some empirical evidence: with respect to outcomes determined by the courts, one study found that academic plaintiffs prevailed on the merits, in employment discrimination cases, only 25% of the time,[277] while the plaintiff success rate for employment discrimination cases, in general, ranged from 41–57%, depending on the type of claim brought.[278] This result is confounding: academia is not the only field involving highly specialized skills and discretionary performance evaluations, yet institutions of higher education apparently are the only class of defendants whose denials of unlawful discrimination receive such a high degree of judicial deference.[279] These results cannot be explained by a lack of discrimination in higher education, as at least some courts have recognized that "[d]iscrimination . . . [in] education is as pervasive as discrimination in any other area . . . . [B]lack scholars have been generally relegated to all-black institutions or have been restricted to lesser academic positions."[280]

Instead, the disparity is more likely the result of courts' deference

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[273] *Id.* (suggesting that there are no otherwise *practical* reasons why African-American law faculty are not being appointed to *HWLSs*, leading one to surmise that white majority faculty are influening those appointments).

[274] These practices include a heavy reliance on recommendations from white faculty to other white faculty during appointments.

[275] Moss, *supra* note 268, at 2.

[276] *Id.* at 5.

[277] Barbara A. Lee, *Employment Discrimination in Higher Education*, 26 J.C. & U.L. 291, 292 (1999).

[278] *Id.* at 292 n.5.

[279] Moss, *supra* note 268, at 7 (citing examples from case law where industry defendants were not afforded judicial deference, including accounting, administrative law, law enforcement, engineering, computer programming, and hard sciences).

[280] *Id.* at 8 (citing Kunda v. Muhlenberg College, 621 F.2d 532, 550 (3d Cir. 1980)).

to highly subjective academic employment decisions. In a non-academic setting, subjective contentions (e.g., the candidate is not a good fit, the candidate lacks collegiality, etc.) would not, as readily, support an award of summary judgment, since such statements are not inconsistent with discriminatory motivations.[281] However, in the academic context, courts are seemingly more willing to grant summary judgment on the basis of institutional decision-makers' subjective determinations, citing the "academic deference" doctrine.[282] The United States Court of Appeals for the First Circuit has held that "an inference of discrimination can be derived from a showing that a university's given reasons for denying tenure to [a] plaintiff were 'obviously weak or implausible,' or that tenure standards for prevailing at the tenure decisions were 'manifestly unequally applied,'" with emphasis on the words *obviously* and *manifestly*.[283] How likely are plaintiffs to be able to make a prima facie showing against a law faculty, given the applicable standards and the courts' predisposition to academic decision-making deference? Denial of motion for summary judgment filed by college or university defendants appears to be the exception, rather than the norm.[284] It would seem, then,

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[281] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 231–32 (1989). The plaintiff in this case, Ms. Hopkins, was a senior manager at Price Waterhouse who claimed she was denied a promotion to partner as a consequence of the firm's sex stereotyping, which would constitute a violation of her rights under Title VII of the Civil Rights Act of 1964. *Id.* In support of her claim, Ms. Hopkins pointed to evidence that she was told by a male partner to "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry'" in order to increase her chances of being promoted. *Id.* at 235. In addition, other male partners had described her as "'macho'" and "'overcompensated for being a woman.'" *Id.* Ms. Hopkins was clearly qualified, but other members of the firm pointed to nondiscriminatory reasons for denying her promotion, such that "'she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.'" *Id.* The Supreme Court placed the initial burden on the plaintiff to show that impermissible considerations played a role in the employment decision. *Id.* at 246–47. The Court then shifted the burden to the employer to demonstrate, by a preponderance of the evidence, that it would have reached the same employment decision absent the impermissible motivations. *Id.* at 252–53.

[282] Moss, *supra* note 268, at 13–14.

[283] Brown v. Trustees of Boston Univ., 891 F.2d 337, 346 (1st Cir. 1989) (citing Kumar v. Board of Trustees, Univ. of Mass., 774 F.2d 1, 12 (1st Cir. 1985)).

[284] *Kumar*, 774 F.2d at 14; *see, e.g.*, Farrell v. Butler Univ., 421 F.3d 609, 611 (7th Cir. 2005) (affirming summary judgment against female university professor who failed to establish a prima facie disparate impact case based on gender discrimination although she was able to identify specific employment practices); Kayongo-Male v. S.D. State Univ., CIV 04-4172, 2007 WL 1558642, at *8 (D.S.D. May 25, 2007) (African-American professor failed to demonstrate that the university's merit-based compensation system had a significantly adverse impact on African Americans); Salkin v. Temple Univ., CIV.A. 05-6579, 2007 WL 1830577, at *7 (E.D. Pa. June 25, 2007) (noting that allegations of a "general pattern of harassment" directed towards faculty over the age of 40, rather than identification of specific practices, would not survive a motion for summary judgment under a disparate impact theory); Donnelly v. R.I. Bd. of Governors for Higher Educ., 110 F.3d 2, at 4 (1st Cir. 1997) (female faculty members failed to present a prima facie disparate impact case where the university's three-tier salary schedule resulted in lower compensation for faculty members in the female-dominated tiers and higher compensation for the male-dominated business tier); Naftchi v. N.Y. Univ., 14 F.Supp.2d 473, 487 (S.D. N.Y. 1998) (a professor's disparate discrimination claim with regard to the university's compensation policies did not survive summary judgment where faculty raises were determined by each faculty member's level of National Institute of Health funding, publications, and value of current research; finding the professor's disparate impact claims were not supported by relevant evidence). *But see* Kahn v. Fairfield Univ., 357 F. Supp. 2d 496, 506 (D. Conn. 2005) (finding that a hiring committee's description of plaintiff as "arrogant" about "her own agenda" could be construed as "positive, leadership traits" or

that professors of color are likely to prevail in only the most egregious and evident cases of discrimination.

Despite these difficulties, the disparate impact theory may have some meaningful viability. In response to a lawsuit based on disparate impact discrimination, American law schools may look inwardly and decide to make changes because of genuine concern about racial exclusion, may look outwardly and decide to make changes to limit adverse public relations, or both.

3. Affirmative Action Programs

There are few contemporary American institutions of higher education that would not claim that they embrace affirmative action, though what this means in practice will vary widely from institution to institution and even among departments in the same institution.

Affirmative action includes the elimination of identifiable, direct, and formal discriminatory policies and practices; additionally, it includes the removal of all impediments, however informal or subtle, that prevent access.[285] A more proactive form of affirmative action will put "a thumb on the scale," or give "a plus" to candidates who are from underrepresented groups and add to the institution's diversity.[286]

Is there a role for so-called *strong* (i.e., those with "hard" targets) affirmative action programs for increasing the number of African-American and other faculty of color in American law schools? For example, consider a law faculty resolution—*Fifty percent of all faculty appointments over the next five years shall be African American, Native American, or Hispanic American.*

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alternatively as "improper gender stereotypes.").

[285] *See, e.g.*, 29 C.F.R. § 1608.4(c) (2013) (guidelines for establishing affirmative action plans).

[286] *See, e.g.*, Derrick A. Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382, 2392 (1989) (presenting an allegory wherein a hypothetical recruitment policy was established to ensure that no less than ten percent of all faculty were minorities with the goals of inclusion and broadening the scope of scholarly inquiry); CHESLER ET AL., *supra* note 62, at 183 (noting that "[c]omprehensive changes altering racism [at a school] . . . require top leadership to make explicit and courageous decisions that commit the organization to major innovations."); DELGADO & STEFANCIC, *supra* note 120, at 131–32 (describing a kind of "third Reconstruction" whereby there is "progression toward power sharing and minority inclusion."). It is the case that referenda passed in several states have purported to ban race-based affirmative action in education and employment, even though the Supreme Court has ruled that some forms of it are not violative of the U.S. Constitution. *See, e.g.*, CAL. CONST. art I, § 31(a); WASH. REV. CODE § 49.60 (2013).

Ironically, there may be Constitutional problems with these referenda. Indeed, the state of Michigan referendum banning affirmative action, enacted after the *Grutter* case, was ruled to be unconstitutional by a federal appellate court, though the issue has yet to be settled. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary v. Regents of Univ. of Michigan, 701 F.3d 466 (6th Cir. 2012), *cert. granted sub nom.* Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013) (No. 12–682). In any event, while these referenda ban race-based admissions and hiring decisions, they do not appear to ban affirmative outreach programs designed to "gin up" applications from those in historically excluded groups. Significantly, these referenda do not prevent a searching removal of disparate impact barriers.

Strong formal *private* law school faculty affirmative action plans would not seem to be legally proscribed. In *United Steelworkers of America v. Weber*,[287] a white employee brought an action against his employer and union, challenging the legality of a plan for on-the-job training that mandated a one-for-one (majority/minority) quota for admission to the program.[288] The Supreme Court held that Title VII's prohibitions against racial discrimination do not condemn all private, voluntary, race-conscious affirmative action plans.[289] The program before the Court, which was collectively bargained for, reserved 50% of the openings in a craft training program for black employees until the percentage of black craft workers in the plant was commensurate with the percentage of blacks in the local labor force.[290] The Court concluded that the purposes of the plan fell within the area of discretion given to employers under Title VII.[291] The plan also received the Court's blessing because it did not unnecessarily trammel the interests of white employees (because only vacant jobs were in play), it was a temporary measure, and was not intended to maintain racial balance, but to eliminate a manifest racial imbalance.[292]

Would a *fifty percent plan* at a *public* law school be proscribed by law? It is the case that eight years after *Weber*, in *Johnson v. Transportation Agency*,[293] the Supreme Court endorsed a public agency's affirmative action plan.[294] In *Johnson*, a male employee, who was passed over for promotion in favor of a female employee, brought a Title VII suit against the county transportation agency.[295] The plan at issue provided that one-half of the promotions would go to women until rough gender parity across the workforce was established.[296] The Court upheld the affirmative action plan of the public agency, a plan that took the female employee's gender into account and promoted her over a male employee with a higher test score.[297] The Court found the employment decision was made pursuant to an affirmative action plan directing that sex and race be considered for the purpose of remedying underrepresentation of women and minorities in traditionally segregated job categories.[298] Further, the Court found that the plan did not unnecessarily trammel vested rights of male employees or create an absolute bar to their advancement.[299] The case established the principle

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[287] 443 U.S. 193 (1979).
[288] *Id.* at 197–98.
[289] *Id.* at 207.
[290] *Id.* at 197.
[291] *Id.* at 208.
[292] *Id.*
[293] 480 U.S. 616 (1987).
[294] *Id.* at 641–42.
[295] *Id.* at 619.
[296] *Id.* at 621–22.
[297] *Id.* at 641–42.
[298] *Id.* at 642.
[299] *Id.* at 630.

that affirmative action plans designed by governmental entities to address a lack of diversity are countenanced, when they offer the promise of eliminating vestiges of workplace inequality.[300] However, there was no challenge in *Johnson* under the U.S. Constitution's Equal Protection Clause. There was likely no such challenge because the suit targeted the application of gender preferences, which are only subject to *intermediate scrutiny* for constitutionality[301]—not the higher bar of *strict scrutiny* applied in racial preference cases.

The Supreme Court, of course, has addressed the issue of racial preferences in higher education in the context of student admissions. In *Gratz v. Bollinger*[302] a rejected, white, in-state applicant for admission to the University of Michigan filed a class action complaint alleging that the university's use of racial preferences, in undergraduate admissions, violated the Constitution's Equal Protection Clause.[303] In particular, the undergraduate admissions program employed a point system that *automatically* awarded a certain number of points to all African-American applicants and certain other applicants of color.[304] The Supreme Court agreed with petitioner that the university's admissions policy violated the Equal Protection Clause because the race-based admissions tool employed (the automatic points for racial minority applicants) was not as narrowly tailored as the Court's majority thought the Constitution demanded, even though it was implemented to achieve the compelling state interest in diversity in institutions of higher education.[305]

On the same day, the Supreme Court announced its decision in *Grutter v. Bollinger*.[306] In the *Grutter* case, white University of Michigan Law School applicants who were denied admission challenged the admissions policy of the Law School that allowed for the consideration of race in pursuit of student body racial diversity.[307] Plaintiffs asserted that the Law School's admissions practices violated their Equal Protection rights.[308] However, unlike the race-based points automatically awarded in the program examined in *Gratz*, the Law School's approach to racial minority admissions was focused on applicants as individuals, with race being but one admissions factor among many.[309] The Supreme Court found this distinction in the law school case to be critical. It agreed with the University of Michigan that its interest in a racially diverse law

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[300] *Id.* at 642.

[301] *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982) (describing what has come to be known as the intermediate scrutiny standard for gender-based claims).

[302] 539 U.S. 244 (2003).

[303] *Id.* at 249.

[304] *Id.* at 255.

[305] *Id.* at 275.

[306] 539 U.S. 306 (2003).

[307] *Id.* at 316–17.

[308] *Id.*

[309] *Id.* at 335–36.

school student body was indeed sufficiently compelling and further found that the Law School's approach was narrowly tailored enough to advance that interest.[310] In short, the Law School's approach passed constitutional muster because it was more individualized and holistic than the automatic points-based approach present in the *Gratz* case.[311] While *Gratz* and *Grutter* focused on student admissions, the analytic framework has obvious relevance and may be an important consideration for any law faculty affirmative action programs.

More recently, the University of Texas at Austin adopted an affirmative action program that allowed for an explicit consideration of race in order to increase its racial minority student enrollment.[312] Similar to the affirmative action program at issue in *Grutter*, the University of Texas did not assign a numerical value to race, but instead used race somewhat amorphously as one of many "plus factors" to be considered in evaluating applications for admission.[313] Abigail Fisher, a rejected white applicant, contended that the University of Texas violated the Equal Protection clause.[314] Ms. Fisher did not seek to overturn *Grutter*'s holding that student-body racial diversity was a compelling state interest that permitted some consideration of race among other factors. Instead, she contended, essentially, that the university's "Top Ten Percent" rule resulted in sufficient enough racial diversity to preclude the consideration of any race-based "plus factor" in admissions decisions for places in the freshman class not filled by the "Top Ten Percent" rule.[315] The United States District Court granted summary judgment to the university and the United States Court of Appeals for the Fifth Circuit affirmed, holding that federal courts were required by *Grutter* to grant considerable deference to the university's determination that its affirmative action program was narrowly tailored to achieve the compelling interest of maintaining a diverse student body.[316]

In its *Fisher v. University of Texas at Austin*[317] decision, the

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[310] *Id.* at 337.

[311] *Id.*

[312] Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 226 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

[313] *Id.* at 230 ("race is 'a meaningful factor that can make a difference in the evaluation of a student's application.'") (quoting Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 597-98 (W.D. Tex. 2009)).

[314] *Id.* at 217.

[315] *Id.* at 234. Beginning with the freshman class of 2014, the "Top Ten Percent" rule will operate to automatically admit only those high school seniors who graduate in the top 7 percent of their class. *Automatic Admission*, U. TEX. AUSTIN, http://bealonghorn.utexas.edu/freshmen/decisions/automatic-admission, <http://perma.cc/E9HZ-AR2W>. The "Top Ten Percent" rule works to increase diversity in Texas institutions of higher education in light of racial segregation in residential housing: "Residential segregation in the state's cities is high, so the majority of students attend schools that are highly racially segregated. Accordingly, accepting the top ten percent of high school graduates is an effective way for the racial makeup of admitted students to more closely mirror the racial makeup of high school graduates in the state." David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality,* 74 NOTRE DAME L. REV. 181, 187 (1998).

[316] *Id.* at 233.

[317] 133 S. Ct. 2411 (2013).

Supreme Court affirmed the fundamental holding of *Grutter* that in order to avoid an equal protection violation, an educational institution must (i) have a compelling interest in attaining a diverse student body and (ii) narrowly tailor any measures taken by the institution in pursuit of that interest.[318] Nevertheless, the Court remanded the case back to the Fifth Circuit, finding that by according seemingly automatic deference to the university's affirmative action program design, the Fifth Circuit had not correctly applied the "narrowly tailored" standard in determining whether the subject program satisfied the strict scrutiny test compelled by the Constitution.[319]

According to the Supreme Court, "any racial classification must meet strict scrutiny, for when government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'"[320] The Court noted in *Fisher* that while a university's determination to pursue a racially diverse student body should be considered an academic judgment to which courts should grant substantial deference, the *implementation* of those programs should not receive the same level of deference.[321] On this point, the Court made clear that it was for the judiciary, not the university, to ensure that "the means chosen to accomplish the [government's] asserted purpose [are] specifically and narrowly framed to accomplish that purpose."[322]

Generally speaking, faculty appointment decisions in public law schools would appear sufficiently individualized to withstand challenges under *Gratz* and *Grutter*. There are no hard measurables for initial law faculty appointments, which are based on future projected success with respect to tasks usually not previously engaged-in by candidates. The multi-variants involved in all law faculty appointments appear to be simply too great for a court to conclude that a member of the majority group should have been appointed instead of an African American, but for race. Ordinarily, law faculty appointments, then, would be unmeasurable for the existence of legally disqualifying affirmative action, given all the amorphous factors that constitute a decision to appoint and the courts' predisposition to defer to "academic judgments" made by institutions of higher education.

The *Fisher* decision would place a burden on a law school both to show that its implementation of a faculty affirmative action plan is narrowly tailored and to demonstrate the inadequacy of race-neutral alternatives.[323] Some commentators have gone so far as to conclude that

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[318] *Id.* at 2418.

[319] *Id.* at 2415.

[320] *Id.* at 2417 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298–99 (1978)).

[321] *Id.* at 2420.

[322] *Id.* (citing Grutter v. Bollinger, 539 U.S. 306, 2333 (2003)).

[323] Scott Warner et al., *The U.S. Supreme Court's Decision in Fisher v. University of Texas at Austin: What It Tells Us (and Doesn't Tell Us) About the Consideration of Race in College and*

Fisher represents "the inevitable death of affirmative action."[324] While such a conclusion may be an overstatement, just what renders an affirmative action program to be "narrowly tailored" remains elusive as a general proposition.

What does seem clear from extant jurisprudence is that race may not be the predominant factor in admissions decisions of public institutions of higher education (and by analogy, employment decisions, if courts make no distinction between the two). The public medical school affirmative action program—which designated a "hard" number of prescribed spaces for minority applicants in the incoming class—in *Regents of Univ. of California v. Bakke*[325] was ruled to be unconstitutional.[326] The principle that *some* race-based affirmative action practices in public university admissions can pass constitutional muster survived only in light of Justice Powell's opinion in which he acceptingly referred to Harvard College's use of race as a "plus" factor.[327] Harvard had no hard number for racial minority enrollment, or at least not one for public consumption.[328] Likewise, the challenged affirmative action plans of the public institutions challenged in *Grutter* and *Fisher* had no hard (number or percentage) targets.[329]

All this considered, public law schools can be expected to shy away from any program like the hypothetical *strong* plan (fifty percent ethnic minority appointments in a five-year span) considered herein. How could a public law school counter the argument that a plan with only *one* express imperative, a racial target, was a plan akin to those found by the Court to pass constitutional muster, if barely, because race was not arrogated to *ratio decidendi* status, but was one among many diversity-related factors considered?

Moreover, the decision of an American public institution of higher education to avoid the adoption of any strong formal affirmative action programs might be influenced not only by legal considerations, but by political factors as well. As Professor Lawrence Hinman notes, "[c]ertain programs, most notably strong affirmative action programs, have elicited great controversy and resentment. If there is a common ground here, it is probably to be found in searching for other means that promote the same goal with fewer liabilities."[330] Private law schools enjoy a relatively greater degree of insulation from political pressures.

It could be suggested, then, that plans, policies, and practices

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University Admissions and Other Contexts, 60 FED. LAW 48, 55 (2013).

[324] Michele Goodwin, *The Death of Affirmative Action?*, 2013 WIS. L. REV. 715, 715 (2013).

[325] 438 U.S. 265 (1978).

[326] *Id.* at 271, 275.

[327] *Id.* at 316–18.

[328] *Id.* at 316.

[329] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2416 (2013) (describing the relevant part of the policy as using race as "one of many 'plus factors'" in admissions); *Grutter v. Bollinger*, 539 U.S. 306, 316–17 (2003) (describing the policy as giving "weight" to diversity, including race or ethnicity, in admissions).

[330] HINMAN, *supra* note 137, at 266.

adopted pursuant to a resolution of the faculty of a *public* law school that declared the goal of pursuing diversity, but contained no explicit "hard" number, would be less problematic for the institution legally, and perhaps politically as well. Furthermore, such a resolution might influence institutional culture in ways supportive of increased inclusion for African-American faculty quantitatively and qualitatively.

In any event, it should perhaps be pointed out that the affirmative action that enjoys legal protection is based on the diversity rationale. The diversity rationale, which higher education advances as a basis for the consideration of race, can result in a commitment to African Americans lessened by international persons of color or by class or by geographic origin, or even by political philosophy—innumerable factors that may negatively impact access and inclusion for African Americans in institutions of higher education. Institutions, for example, may settle on a "diversity block" of a fixed percentage. To the extent other forms of diversity are included in the block, the spaces for African Americans will likely be shrunk. The African-American experience in America is different! Slavery and its collaterals (e.g., laws against teaching slaves to read), segregation, lack of employment opportunities, segregated project housing, poor schools, a biased criminal justice system, have left African Americans at the bottom of the well with respect to so many of the markers by which success in the nation is measured.[331]

Perhaps, African-American inclusion in the legal academy could be shored up by a broader embrace of the remedial rationale, in addition to diversity, to justify proactive policies and practices. The remedial rationale supports affirmative steps for African Americans based on American society's debt to the group in light of slavery, discrimination (de jure and de facto), and racial oppression. There is no indication that the courts are predisposed to embrace such an approach. Nevertheless, greater reliance on a remediation rationale could help strengthen support—add to the policy imperatives—for the notion that African-American interests in law faculty inclusion should not be subsumed and ignored under a broader diversity umbrella.

V. CONCLUSION

Participants' lived experiences and those observed vicariously resulted in findings that hopefully allow for a meaningful analysis of some aspects of the professional lives of African-American law professors at *HWLS*s.[332] The study was able to identify both challenges

[331] *See generally* BELL, *supra* note 72.

[332] Though qualitative and not quantitative in design, the study reached certain conclusions in light of the fact that the sentiments expressed were often shared by 20 to 24 (out of 24 participants), most often with zero contrary sentiment. Some recorded participant responses are small in number. In those instances, the responses were volunteered, not the result of systematic questioning. In no case

that African-American law faculty experience and some strategies that might be employed to address those challenges.

The participants shared stories that counter the *HWLS*s' narrative, according to which, they are committed to increasing the numbers of African-American faculty, and including them fully in institutional life. The counter-stories reveal that African-American law school faculty often perceive a quite different reality. Indeed, there appears to be a pervasive racial dynamic at *HWLS*s that negatively impacts the quality of institutional life for African-American professors. While there was virtual participant unanimity on that basic proposition, there were differences in perception regarding the severity of the negative impact. The negative impact of an omnipresent racial dynamic at *HWLS*s, described herein, appeared to be profound for some. To paraphrase for this participant segment "let's not meet at my office [for the study interview]—I don't go to the school unless it is absolutely necessary to do so." Contrastingly, I left some interviews feeling that the participants perceived the effect on them of the prevailing *HWLS* racial dynamic, which they acknowledged, to be just so much "water off a duck's back." And, perhaps not surprisingly, I could not put a "fine point" on the effect of the dynamic based on my interviews with other participants; however, that they perceived some effect seemed clear.

The influence of racial identity in the American legal professoriate is a phenomenon with boundless complexities. Is racial identity an impactful phenomenon with consequent negative influence on the institutional lives of African-American law professors *today* in ways suggested, for example, by the Bell-Delgado study and the "Derrick Bell Stanford episode"? That question is a fundamental underpinning of the study. Generally speaking, the answer is *yes*—"but it's complicated." An African American's experience as a legal academic likely will be impacted by his racial identity—some more than others. Some African-American law faculty may be consciously and/or unconsciously targeted for race-based *micro-aggressions* in ways that others are not, even on the same faculty. Such a reality could explain, at least in part, differences amongst the participant group with regard to how they made sense of the racial dynamic in the legal academy which they all acknowledged. Even those within the participant sub-group who appeared to minimize the effect of the racial dynamic on their institutional lives did not dismiss the phenomenon and its potential marked effect on the institutional lives of other African-American legal academics.

Professor Delgado concluded his article on the Bell-Delgado study by observing the "pain and stress" amongst that participant group.[333]

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are responses recorded without a report of all responses on point. So for example, when I note that four participants offered a particular perspective, it is not the case that twenty offered contrary perspectives. Indeed, if there was one contrary response, it is presented.

[333] Delgado, *supra* note 9, at 369.

More than a quarter of a century after Bell-Delgado, the author is compelled, as well, to observe the "pain and stress" described sufficiently enough in breadth and depth by those in his participant group to be notable. Such findings can continue to be expected without a demonstrably greater commitment by *HWLS*s to the full institutional inclusion of African-American law professors than is currently evident.

APPENDIX

Questionnaire administered to study participants about the appointment of and conditions of employment for tenured African-American law professors at historically white law schools.

1. a. How would you characterize the legal academy's current interest in African-American faculty appointments? In your view, has the predisposition changed over time?

   b. Do you perceive problems, challenges, and/or circumstances that, if not unique, are more commonly impediments for African Americans seeking appointment to tenure-track professorships at American law schools?

   c. What are the problems, challenges, and/or circumstances?

   d. Do you have a feel for whether they have changed over time?

2. How would describe the pre-tenure to tenure efforts of your school?

3. a. How would you characterize the legal academy's current interest in improving conditions of employment for African-American law professors?

   b. Are there problems, challenges, and/or circumstances that, if not unique, are more common for African-American law professors that negatively affect the conditions of employment for law professors of color?

   c. What are the problems, challenges, and/or circumstances?

   d. Do you have a feel for whether they have changed over time?

4. Are African-American law professors likely to have experiences that differ from white professors with regard to:

   a. relations with colleagues —

   b. relations with students —

   c. relations with staff —

   d. participation in institutional governance —

   e. support for scholarship —

f. prospects for such leadership posts as Dean, Associate Dean, Appointments Chair, Curriculum Chair, etc. —

5. a. Do you have a view or views about why or the causes of the disparate treatment accorded African-American law faculty?

b. Do African-American law professors have to contend with conscious (explicit) and/or subconscious (implicit) racism of a kind and nature that negatively affects their experience in the legal academy?

c. A majority of the Bell-Delgado study (1986–1987) participants characterized their institutions as being racist or subtly racist, whereas only 12.2% of participants characterized their institutions as nonracist. Would you care to characterize your present institution with regard to its climate—racist, subtly racist, or nonracist?

d. Would you be surprised by a reprise of the Derrick Bell/Stanford episode in the legal academy today?

e. Does Critical Race Theory and/or interest group convergence resonate with you as explanation for the progress/lack of progress of African-American professors in the legal academy?

6. a. [If applicable] Having identified problems, challenges and/or circumstances that impede appointments of African-American faculty at American law schools and/or negatively affect the employment conditions of those appointed, can you recommend viable strategies or approaches to combat the impediments and increase the number of African-American appointments to tenure-track positions and/or improve their conditions of employment?

b. Would affirmative action plans be effective in increasing the number of African-American appointed to tenure-track positions at American law school faculties? Why/why not?

c. Can organizational culture change help increase African-American appointments to law faculty and/or improve the conditions of employment for African-American law professors? How? Who would lead such a change—the Board, the President, the Dean, the faculty, students?

7. Is a litigation strategy a viable approach to improving the conditions of employment for African-American faculty at American law schools? Why/why not?

8. Do you have perceptions about the appointment of and conditions of employment for African-American law professors, we have not discussed, that you feel are important?

9. While my emphasis is on perspectives, I am interested in actual experiences as well. Have you had personal experiences [other than the one(s) you already shared] that might help me better understand the phenomena I am investigating?

10. Why do African Americans remain in the legal academy?

11. Are African-American law professors fairly compensated?

12. If you had it to do all over again, would you choose the legal academy as a career destination?

Has the South Changed? *Shelby County* and the Expansion of the Voter ID Battlefield

Anthony J. Gaughan*

ABSTRACT

In June 2013, a sharply divided United States Supreme Court struck down the preclearance formula of Section 4(b) of the Voting Rights Act (VRA), a provision that placed the South and other jurisdictions with a history of racial discrimination in voting under special federal scrutiny. The immediate effect of the Court's ruling in Shelby County v. Holder *is an expansion of the voter identification (Voter ID) battlefield to the South. In the four years before the ruling, the United States Department of Justice (DOJ) used the VRA's Section 5 preclearance provisions to block Voter ID laws in southern states. But with the preclearance requirements effectively voided by Shelby County, election officials across the South have resumed efforts to implement Voter ID laws.*

A very real fear now exists that the expansion of Voter ID laws to the South will lead to minority disenfranchisement and a retreat from the historic progress achieved by the VRA. The long history of election law "reforms" leading to minority disenfranchisement makes such fears quite reasonable. Moreover, the fact that Voter ID laws have been enacted by legislatures across the country in highly divisive fashion through party-line votes deepens the suspicion that malignant motives lurk behind such laws. If the spread of Voter ID laws results in minority disenfranchisement in the South, Shelby County will go down in history as one of the Supreme Court's worst decisions.

*This Article contends, however, that there is reason for cautious optimism that the post-*Shelby County *expansion of Voter ID laws will not undermine minority voting rights in the South in the long run. First, Section 2 of the VRA—which prohibits racially-discriminatory election*

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laws—was unaffected by the Shelby County *ruling and thus remains in full force. Second, the South already has experience with Voter ID laws, and in the years since implementation, minority turnout in southern Voter ID states has gone up, not down. That paradoxical outcome is the direct result of the controversy that surrounds such laws. Indeed, Voter ID laws have the unintentionally progressive effect of provoking a backlash among minority voters that consistently leads to higher minority turnout rates. Moreover, although racism clearly remains present in the South as well as in the nation as a whole, truly historic change is underway in the racial dynamics of southern politics. The South's demographics are changing at such an accelerating rate that politicians who appear hostile to minority voting rights will increasingly find themselves in political jeopardy as minorities make up an ever larger share of the southern electorate. For all of these reasons, there is reason for cautious optimism that Voter ID laws will not represent a long-term setback to the cause of minority voting rights in the South.*

I. INTRODUCTION

In the June 2013 case of *Shelby County v. Holder*,[1] the United States Supreme Court struck down the preclearance formula of the Voting Rights Act of 1965 (VRA).[2] The Court's ruling will have a major

[1] Shelby Cnty. v. Holder, 133 S.Ct. 2612 (2013).

[2] *Id.* at 2632; *see also* Voting Rights Act of 1965, § 4(b), 42 U.S.C. § 1971 (2006) (creating a formula to determine which states and political subdivisions fall under the preclearance provision); *id.* § 1973b(b) (describing the preclearance formula).

impact on election procedures in the South.[3] Section 5 of the VRA bars states and political subdivisions with a history of racial discrimination in elections from changing voting procedures without prior approval by the United States Department of Justice (DOJ) or the United States District Court for the District of Columbia.[4] Section 4(b) creates a formula to determine which states and political subdivisions fall under the preclearance provision.[5] Since the VRA's adoption in 1965, the preclearance formula had placed most southern states under special federal scrutiny for all election law changes.[6]

The Supreme Court's ruling in *Shelby County*, however, brings the preclearance era to an end. By invalidating the formula in Section 4(b), the Court rendered the preclearance provisions of Section 5 unenforceable.[7]

The case turned on a single question: Have the racial dynamics of southern politics fundamentally changed for the better since the VRA's adoption in 1965? The justices split 5–4 on that question.[8] The majority held that that the preclearance formula of Section 4(b) no longer accurately reflected the state of race relations in the covered jurisdictions—most of which were in the South—and was therefore unconstitutional.[9] Writing for the majority, Justice Roberts observed that since the VRA's adoption, "voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African Americans attained political office in record numbers."[10] The majority concluded, "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[11]

The immediate effect of the Court's ruling in *Shelby County* is an expansion of the voter identification (Voter ID) battlefield to the South and other jurisdictions with a past history of racial discrimination in

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[3] For purposes of this article, the term "South" refers to the 11 former Confederate states. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia were the 11 former Confederate states. *The Civil War*, PBS, http://www.pbs.org/civilwar/war/map1.html, <http://perma.cc/P64V-5SUR>.

[4] 42 U.S.C. § 1973c(a).

[5] *Id.* § 1973b(b).

[6] *See Civil Rights Division Section 5 Resource Guide*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_5/about.php, <http://perma.cc/ZX9J-2FAL> ("Application of [the preclearance] formula resulted in the following states becoming, in their entirety, 'covered jurisdictions': Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia . . . In addition, certain political subdivisions (usually counties) in four other states (Arizona, Hawaii, Idaho, and North Carolina[)] were covered.").

[7] Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES, June 25, 2013, http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html, <http://perma.cc/D46L-3ABL>.

[8] *Shelby Cnty.*,133 S.Ct. at 2617–18, 2631–32.

[9] *Id.* at 2631.

[10] *Id.* at 2628–29.

[11] *Id.* at 2631.

voting.[12] Voter ID laws impose strict voter registration rules that require voters to produce proof of their identity, citizenship, and residency.[13] Thus far, over thirty states across the country have passed some form of Voter ID laws, and several require voters to display photo identification in order to cast a valid ballot.[14] Since 2010, the DOJ has used the VRA's Section 5 preclearance provisions to challenge several southern states' voting laws—including those of South Carolina, North Carolina, Mississippi, Georgia, Texas, and Louisiana.[15] But with the preclearance formula voided by *Shelby County*, election officials across the South have now resumed efforts to implement Voter ID laws.[16]

This Article examines the consequences of the Voter ID controversy's return to the South. A very real fear exists that the spread of Voter ID laws across the region will lead to minority disenfranchisement and a retreat from the historic progress achieved by the VRA. The long history of election law "reforms" that led to minority disenfranchisement makes such fears quite reasonable. Moreover, the fact that Voter ID laws have been enacted by legislatures across the country in highly divisive fashion by party-line votes deepens the suspicion that malignant motives lurk behind such laws. If the spread of Voter ID laws results in minority disenfranchisement in the South, *Shelby County* will go down in history as one of the Supreme Court's worst decisions.

This Article contends, however, that there is reason for cautious optimism that the post-*Shelby County* expansion of Voter ID laws will not undermine minority voting rights or political participation in the South in the long run. First, Section 2 of the VRA—which prohibits racially-discriminatory election laws—was unaffected by the *Shelby*

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[12] *See* Devlin Bartlett, *Holder Targets Texas in New Voting-Rights Push*, WALL ST. J., July 25, 2013, http://online.wsj.com/article/SB10001424127887324110404578627692123727574.html?KEYWORDS=shelby+county, <http://perma.cc/DL84-MCP7> (stating that the DOJ will likely target the historically covered jurisdictions of South Carolina, North Carolina, Texas, and Alaska in legal strategy); Sari Horwitz, *Justice Department to Challenge States' Voting Laws*, WASH. POST, July 25, 2013, http://articles.washingtonpost.com/2013-07-25/politics/40861557_1_voting-rights-act-voting-laws-civil-rights-groups, <http://perma.cc/YW2W-2DBJ> (noting that the DOJ will likely sue North Carolina if the state passes a new Voter ID law).

[13] Elspeth Reeve, *As States Rush to Restrict Voting Rights, Justice Ginsburg Says I Told You So*, ATLANTIC WIRE, July 26, 2013, http://www.theatlanticwire.com/politics/2013/07/ginsburg-says-i-told-you-so-voting-rights-act/67655/, <http://perma.cc/8U4D-6NTH> (detailing new voter registration and voting requirements in Florida, North Carolina, and Texas); *see* Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES, July 5, 2013, http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html, <http://perma.cc/5NWP-L9BN> (noting state passage of "laws requiring voters to show photo identification, reducing early voting and making registration more difficult.").

[14] *Voter ID: State Requirements*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx#Legislation, <http://perma.cc/PX49-ZFD3>.

[15] *Timeline: A History of the Voting Rights Act, 2010 to Present*, ACLU, https://www.aclu.org/timeline-history-voting-rights-act, <http://perma.cc/AE9K-U6DL>.

[16] *See, e.g.*, *Justice Department to Sue Texas Over Voter ID Law*, CBS NEWS, Aug. 22, 2013, http://www.cbsnews.com/ 8301-250_162-57599728/justice-department-to-sue-texas-over-voter-id-law/, <http://perma.cc/A83E-3ZK6> (stating that after the passage of new voter ID laws, Governor of Texas Rick Perry stated that, "we will continue to defend the integrity of our elections" against the Justice Department).

County ruling and thus remains in full force. Second, the South already has experience with Voter ID laws, and in the years since implementation, minority turnout in southern Voter ID states has gone up, not down. That paradoxical outcome is the direct result of the controversy that surrounds such laws. Indeed, Voter ID laws have the unintentionally progressive effect of provoking a backlash among minority voters that consistently leads to higher minority turnout rates. Moreover, although racism clearly remains present in the South as well as in the nation as a whole, truly historic change is underway in the racial dynamics of southern politics. The South's demographics are changing at such an accelerating rate that politicians who appear hostile to minority voting rights will increasingly find themselves in political jeopardy as minorities make up an ever larger share of the southern electorate. For all of these reasons, there is reason for cautious optimism that Voter ID laws will not represent a long-term setback to the cause of minority voting rights in the South.

II. THE VOTING RIGHTS ACT OF 1965

Congress first enacted the VRA in 1965.[17] The VRA sought to enforce in the South the Fifteenth Amendment to the Constitution, an amendment that white southerners had systematically violated for nearly a century.[18] Adopted in 1870, the Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[19] The Amendment expressly grants Congress the "power to enforce this article by appropriate legislation."[20]

The Fifteenth Amendment was part of a trilogy of Civil War and Reconstruction amendments that transformed the constitutional landscape of American race relations.[21] The Thirteenth Amendment abolished slavery, and the Fourteenth Amendment enshrined civil rights in the Constitution, declaring, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

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[17] ROBERT MANN, THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS 475 (1996).

[18] Daniel McCool, *Meaningful Votes*, *in* THE MOST FUNDAMENTAL RIGHT: CONTRASTING PERSPECTIVES ON THE VOTING RIGHTS ACT 3, 3–4 (Daniel McCool ed., 2012).

[19] U.S. CONST. amend. XV, § 1.

[20] *Id.* § 2.

[21] *See generally, e.g.*, GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA (2006); WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2001).

the equal protection of the laws."[22]

But the federal government's efforts to enforce the Fifteenth Amendment in the post-Civil War South quickly came under ferocious assault by southern whites.[23] For generations after the Civil War, the vast majority of African Americans were Republicans, while the Democratic Party held sway among the great majority of southern whites.[24] White southerners viewed African-American civil rights as a dual threat to the region's white supremacist racial order and its Democrat-dominated political order.[25] To preserve their power, white southerners launched a murderous onslaught against black southerners. As the historian Alexander Keyssar explains, "Acting as the military, or paramilitary, arm of the Democratic Party, organizations such as the Ku Klux Klan mounted violent campaigns against blacks who sought to vote or hold office, as well as their white Republican allies."[26] For example, in Colfax, Louisiana in April 1873, a disputed county election resulted in the murder of seventy-one black Republicans by white Democrats.[27]

In addition to employing terroristic violence, white southerners also waged a relentless campaign of election fraud and disenfranchisement to subvert the democratic process and ensure Democratic control over the region's political order.[28] Democratic-controlled legislatures across the former Confederate states enacted poll taxes, literacy tests, and other fraudulent election laws specifically designed to disenfranchise black voters and keep the Republican Party out of power in the South.[29] As the historian William Gillette has observed, "What the southern Democrats could not accomplish by means of the rifle, the whip, the rope, the torch, and the knife, they attempted by means of [election] fraud, threat,

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[22] U.S. CONST. amend. XIII; U.S. CONST. XIV, § 1.

[23] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, 590 (1988) ("[I]n the Deep South, where electoral fraud was widespread and the threat of violence hung most heavily over the black community, the Republican party crumbled after 1877. Here . . . . blacks saw their political rights progressively eroded."); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 106 (2000) (White supremacists "sought to drive the Republicans from power and elect Democrats. . . . Limiting black voting therefore was a means to a precise end."); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 11–12 (2004).

[24] MICHAEL K. FAUNTROY, REPUBLICANS AND THE BLACK VOTE 25, 45, 48 (2007) ("Within a century, the Republicans went from near monopoly support from African Americans to near unanimous rejection."); DEWEY W. GRANTHAM, THE LIFE AND DEATH OF THE SOLID SOUTH: A POLITICAL HISTORY xi–xii, 2, 9 tbl.1, 23, 76 grph.2, 152 tbl.4 (1988); KLARMAN, *supra* note 23, at 111 ("In the 1934 congressional elections, a majority of blacks voted Democratic for the first time.").

[25] FONER, *supra* note 23, at 603 ("the Civil War generation of white Southerners was always likely to view the Republican party as an alien embodiment of wartime defeat and black equality").

[26] KEYSSAR, *supra* note 23, at 105–06.

[27] WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869–1879, 115–16 (1982).

[28] *Id.* at 37–48; KEYSSAR, *supra* note 23, at 105–06.

[29] GRANTHAM, *supra* note 24, at 10–11 ("Republicans also encountered fraud and intimidation, as well as discriminatory election officials and harshly punitive election laws"); MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908, 1–2 (2001) ("[E]ach state in the former Confederacy set in motion complicated and hazardous electoral movements aimed at removing large numbers of its eligible voters"); RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 132 (2010).

bribery, or trickery."[30] Although the United States Supreme Court began to strike down segregationist election laws in the 1920s, southern Democrats manufactured new election laws to undermine the Court's rulings and defy the Fifteenth Amendment.[31] In the early 1960s, African-American voter registration trailed white voter registration by approximately 50% in Alabama, Mississippi, and Louisiana.[32] Accordingly, the Civil Rights Movement demanded that the federal government enforce the voting rights of African Americans in the South.[33]

In 1965, Congress finally acted. The VRA represented Congress's belated effort to end racially-discriminatory election laws.[34] As the Supreme Court in *Shelby County* noted, the VRA was enacted "to address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'"[35] The VRA established a comprehensive strategy for ending and preventing racial discrimination in voting. Section 2 bars the states from imposing election laws that "deny or abridge the right of any citizen of the United States to vote on account of race or color."[36] Section 3 authorized the Attorney General to "enforce the guarantees of the [F]ifteenth [A]mendment" by filing suit in federal court to block racially discriminatory election laws.[37] The VRA also expressly prohibited poll taxes, literacy tests, and other tactics that white southerners historically used to disenfranchise black voters.[38]

The cornerstone of the VRA is the preclearance formula of Section 4(b) and the prior approval requirement of Section 5. The two sections work in tandem. Section 4(b) creates a formula to identify jurisdictions that engage in racial discrimination in voting.[39] If there is discrimination under the 4(b) formula, then Section 5 requires election officials in the affected jurisdiction to secure prior approval from the DOJ before

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[30] GILLETTE, *supra* note 27, at 37–38.

[31] KEYSSAR, *supra* note 23, at 247–49; *see, e.g.*, S. C. v. Katzenbach, 383 U.S. 301, 310–12 (1966) (outlining discriminatory administration of voting qualifications); Terry v. Adams, 345 U.S. 461, 469 (1953) (striking down all-white primary); Smith v. Allwright, 321 U.S. 649, 658 (1944) (describing history of Nixon v. Herndon); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (discussing that color cannot be made the basis of a statutory classification affecting the right to vote).

[32] Shelby Cnty. v. Holder, 133 S.Ct. 2612, 2624–25 (2013).

[33] ROBERT WEISBROT, FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT 136 (1990) ("It remained for civil rights leaders to solidify popular opinion in favor of rapid federal action on the voting rights issue").

[34] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, *available at* http://library.clerk.house.gov/reference-files/PPL_089_110_VotingRightsAct_1965.pdf, <http://perma.cc/DP8R-L5SB> (stating in the title of the VRA that it is an "Act to enforce the fifteenth amendment to the Constitution of the United States.").

[35] *Shelby Cnty.*, 133 S.Ct. at 2618 (quoting *Katzenbach*, 383 U.S. at 309).

[36] Voting Rights Act of 1965 § 2.

[37] *Id.* § 3.

[38] *Id.* §§ 4(b), 4(c).

[39] *Id.* § 4(b).

making any changes to voting procedures.[40] Historically, the covered jurisdictions included all or part of nine southern states, plus Alaska, Arizona, and certain jurisdictions in California, New York, South Dakota, and Michigan.[41] The preclearance formula was designed to focus on jurisdictions in which less than 50% of eligible racial minorities were registered to vote in 1964.[42]

Under the leadership of President Lyndon B. Johnson, the VRA passed the House and Senate in 1965 with large bipartisan majorities.[43] Senate Republicans voted 30–2 in favor of the VRA, and House Republicans voted 111–23 in favor.[44] Senate Democrats voted 47–16 in favor of the VRA, and House Democrats voted 221–62 in favor.[45] The bipartisan nature of the VRA reflected a national commitment to ending white southerners' long history of racial discrimination in voting.[46]

The VRA was immediately successful. Under the preclearance formula, the VRA covered all or part of nine southern states: Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia.[47] Mississippi, the state in which three civil rights workers were brutally murdered in 1964, provided a striking example.[48] In a span of twenty-four months, African-American voter registration in Mississippi rose from 7% in 1964 to approximately 60% in 1966.[49] Similar gains occurred throughout the region.[50] As the historian James Patterson observed, the VRA achieved its goal "to guarantee long-disfranchised black Americans the rights to register and vote. This end the law accomplished brilliantly, thanks in large part to vigorous and

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[40] *Id.* § 5.

[41] *Civil Rights Division Section 5 Resource Guide*, *supra* note 6; *see also* Chris Cillizza, *What the Supreme Court's Voting Rights Act Decision Means for Politics*, WASH. POST (June 25, 2013, 11:51 AM), http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/25/what-the-voting-rights-act-decision-means-for-politics/, <http://perma.cc/ZX69-G46C> (showing a map of covered and partially covered jurisdictions).

[42] 42 U.S.C. § 1973b(b) (2006).

[43] ROBERT DALLEK, FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES 220–21 (1998); *see* MANN, *supra* note 17, at 462–63 ("Thirty Republicans joined forty-seven Democrats in support of the bill . . . ." and "the House overwhelmingly passed the voting rights bill . . . By a vote of 333-85.").

[44] *To Pass H.R. 6400, The 1965 Voting Rights Act*, GOVTRACK.US, http://www.govtrack.us/congress/votes/89-1965/h87, <http://perma.cc/443-GWGY>; *To Pass S. 1564, The Voting Rights Act of 1965*, GOVTRACK.US, http://www.govtrack.us/congress/votes/89-1965/s78, <http://perma.cc/HL7B-TU95>.

[45] *Id.*

[46] Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960–1990*, 5 U. PA. J. CONST. L. 665, 665 (2003).

[47] *Civil Rights Division Section 5 Resource Guide*, *supra* note 6 (Section 5 did not cover two southern states: Arkansas and Tennessee); *see* Cillizza, *supra* note 41 (showing a map of covered jurisdictions that excludes Tennessee and Arkansas).

[48] BRUCE WATSON, FREEDOM SUMMER: THE SAVAGE SEASON OF 1964 THAT MADE MISSISSIPPI BURN AND MADE AMERICA A DEMOCRACY 270–71 (2011).

[49] ABIGAIL THERNSTROM, VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS 6 (2009); *see also* David C. Colby, *The Voting Rights Act and Black Registration in Mississippi*, 16 PUBLIUS 123, 129–30 (1986) (providing similar statistics for 1965 and 1968 in Mississippi).

[50] Shelby Cnty. v. Holder, 133 S.Ct. 2612, 2634 (2013) (Ginsburg, J., dissenting); DALLEK, *supra* note 43, at 220.

unyielding federal oversight."[51]

III. CHALLENGES TO THE VOTING RIGHTS ACT: FROM *KATZENBACH* TO *SHELBY COUNTY*

For over forty-five years, the VRA withstood the numerous legal challenges brought against it.[52] For example, one year after the VRA's adoption, South Carolina challenged the VRA's constitutionality in the Supreme Court case of *South Carolina v. Katzenbach*.[53] South Carolina claimed, *inter alia*, that the VRA violated a constitutional principle of state equality by singling out certain states for special federal supervision.[54] South Carolina also claimed that the Act impaired the separation of powers by using legislation to deem southern states in violation of the Fifteenth Amendment, rather than allowing the federal courts to make that determination.[55]

In an 8–1 decision, the Supreme Court decisively rejected South Carolina's arguments, ruling that the VRA's provisions were a constitutionally "valid means for carrying out the commands of the Fifteenth Amendment."[56] The Court noted that the VRA's coverage formula focused on jurisdictions with minority voter registration rates far below the national average.[57] The coverage formula's approach impressed the Court as "rational in both practice and theory."[58] Writing for the majority, Chief Justice Warren concluded, "[h]opefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live."[59]

One of the most telling aspects of *Katzenbach* was the regional identity of the states that chose to file amicus briefs in support of South Carolina. Reflecting the national importance of the issue, the Supreme Court invited all states to file friend of the court briefs, and twenty-six did so.[60] Twenty-one northern and western states filed in support of the VRA, and five southern states filed in opposition to it: Alabama, Georgia, Louisiana, Mississippi, and Virginia.[61] The amicus briefs revealed that opposition to the VRA was concentrated exclusively among

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[51] JAMES T. PATTERSON, GRANT EXPECTATIONS: THE UNITED STATES, 1945–1974, 587 (1996).

[52] *See* McCrary, *supra* note 46, at 691 (noting that "[t]he Department [of Justice's] procedures for enforcing Section 5 were also the subject of numerous unsuccessful court challenges during the 1970s").

[53] South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966).

[54] *Id.* at 323.

[55] *Id.* at 323.

[56] *Id.* at 338.

[57] *Id.* at 330.

[58] *Id.*

[59] *Id.* at 337.

[60] *Id.* at 307 n.2.

[61] *Id.* at 308 n.2.

attorneys general from former Confederate states. The uniquely southern nature of state government opposition to the VRA could hardly have been more apparent.

Four decades later, a huge bipartisan majority in both the House and the Senate reauthorized the VRA in 2006.[62] The House passed the reauthorization by a margin of 390–33 and the Senate passed it 98–0.[63] Every southern senator voted in favor of the VRA's reauthorization.[64] President George W. Bush, a Texas Republican, signed the reauthorization into law in July 2006.[65] In signing the VRA's reauthorization, President Bush declared, "[m]y administration will vigorously enforce the provisions of this law, and we will defend it in court."[66]

But the executive and legislative branches' bipartisan endorsement of the VRA no longer impressed the Supreme Court. The first sign of trouble came in 2009; in the case of *Northwest Austin Municipal Utility District No. One v. Holder* (*NAMUDO*),[67] a Texas municipal utility district sought a "bail out" exemption from Section 5.[68] The district was subject to Section 5 despite the lack of evidence of racial discrimination in the district's elections.[69] In the process of seeking the exemption, the district also challenged the constitutionality of Section 5.[70] Although the Supreme Court declined to hear the constitutional challenge, it made a point of noting that the "evil that [Section] 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than [thirty-five] years old, and there is considerable evidence that it fails to account for current political conditions."[71]

In *Shelby County v. Holder*, the majority made good on its warning in *NAMUDO*. The June 2013 decision, however, was far from unanimous. *Shelby County* divided the justices 5–4 and revealed two sharply conflicting perspectives as to how much the South has changed since 1965.[72] In the majority's view, the VRA's preclearance formula no

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[62] J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEXAS L. REV. 667, 761–63 (2008).

[63] Sarah A. Binder, *Reading Congressional Tea Leaves from the 2006 Renewal of the Voting Rights Act*, BROOKINGS INST. (July 1, 2013), http://www.brookings.edu/research/opinions/2013/07/01-2006-renewal-voting-rights-act-binder, <http://perma.cc/Z7RB-QEPA>.

[64] *U.S. Senate Roll Call Votes 109th Congress—2nd Session*, U.S. SENATE (July 20, 2006), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212, <http://perma.cc/DE29-WNQT>.

[65] *President Bush Signs Voting Rights Act Reauthorization and Amendments Act of 2006*, WHITE HOUSE (July 27, 2006, 9:34 AM), http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727.html, <http://perma.cc/CM5T-SEY3>.

[66] *Id.*

[67] 557 U.S. 193 (2009).

[68] *Id.* at 196–97 (describing the bailout as a "provision [that] allows the release of a 'political subdivision' from the preclearance requirements if certain rigorous conditions are met.").

[69] *Id.* at 200.

[70] *Id.* at 197.

[71] *Id.* at 203.

[72] *See* Shelby Cnty. v. Holder, 133 S.Ct. 2612, 2531 (2013) ("today's statistics tell an entirely

longer reflected "'current political conditions'" in the South and other covered jurisdictions.[73] Writing for the majority, Chief Justice Roberts observed that the 4(b) preclearance formula was "based on decades-old data and eradicated practices."[74] He noted that minority "voter registration and turnout numbers in the covered States have risen dramatically in the years since" the VRA's adoption.[75] The majority concluded that the record failed to show "anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."[76]

The majority acknowledged that the South's history of slavery, segregation, and disenfranchisement justified the enactment of the VRA in 1965.[77] But Chief Justice Roberts rejected the notion that the divergent histories of the North and South continued to be relevant in 2013.[78] "Today," he emphasized, "the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were."[79] Roberts cited two small towns as examples of southern racial progress: Selma, Alabama, and Philadelphia, Mississippi.[80] Both have a grim history of white supremacist violence and oppression.[81] Alabama state troopers brutalized civil rights marchers in Selma in 1965, and local whites murdered three civil rights workers in Philadelphia in 1964.[82] The Chief Justice noted, however, that today both cities have African-American mayors.[83] In the majority's view, the lesson was clear: "Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides."[84] The majority asserted that it was "irrational for Congress to distinguish between States in such a fundamental way based on [forty]-year-old data, when today's statistics tell an entirely different story."[85]

Accordingly, the Court held that the outdated nature of the preclearance formula rendered Section 4(b) unconstitutional. Chief

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different story"); *see id.* at 2651(Ginsburg, J., dissenting) (suggesting that VRA's success was a result of the preclearance formula while arguing that new voting barriers exist).

[73] *Id.* at 2628 (majority opinion).

[74] *Id.* at 2627.

[75] *Id.*

[76] *Id.* at 2629.

[77] *Id.* at 2628 ("The Court invoked that history—rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966.").

[78] *Id.* at 2628 (observing that the "comparison between the States in 1965 . . . reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African–Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. . . . But history did not end in 1965.").

[79] *Id.*

[80] *Id.* at 2626.

[81] *Id.*

[82] WEISBROT, *supra* note 33, at 113, 136–39.

[83] *Shelby Cnty.*, 133 S.Ct. at 2626.

[84] *Id.* at 2626.

[85] *Id.* at 2630–31.

Justice Roberts declared that Congress's "failure to act leaves us today with no choice but to declare [Section] 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance."[86] The Fifteenth Amendment, he added, "is not designed to punish for the past; its purpose is to ensure a better future."[87] The majority concluded that if Congress "is to divide the States[,]" it "must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."[88]

The four dissenting Justices viewed the South in strikingly different terms than the majority. Writing for the dissent, Justice Ginsburg noted that when Congress reauthorized the VRA in 2006, it concluded that "the scourge of discrimination was not yet extirpated" in the covered jurisdictions.[89] The dissenters focused on two issues in particular: the risk of "backsliding" from the VRA's gains, and the persistence of racial discrimination.[90] The South's history of racism particularly concerned the dissenters.[91] Justice Ginsburg emphasized that "[c]onsideration of this long history, still in living memory, was altogether appropriate."[92]

Although the dissenting Justices conceded that "conditions in the South have impressively improved since passage of the Voting Rights Act," they warned that "eliminating preclearance would risk loss of the gains that had been made."[93] The dissent rejected the notion that increases in voter registration and turnout represented a sufficient standard by which to judge the South's progress.[94] They placed particular importance on the fact that the DOJ had blocked over 700 proposed election law changes in the covered jurisdictions during the twenty-four years preceding the 2006 VRA reauthorization.[95] In her dissent, Justice Ginsburg also noted that a 2006 report to Congress determined that "racial discrimination in voting remains 'concentrated in the jurisdictions singled out for preclearance.'"[96] Finally, the dissenting Justices pointed out that a 2010 FBI investigation revealed that some white state legislators in Alabama had sought to discourage African-American voter turnout in a statewide gambling referendum.[97]

Shelby County divided the nation just as it did the Justices. Many Democratic congressional leaders condemned the decision, while

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[86] *Id.* at 2631.
[87] *Id.* at 2629.
[88] *Id.*
[89] *Id.* at 2632 (Ginsburg, J., dissenting).
[90] *Id.* at 2632–34.
[91] *Id.* at 2642 (stating that "there is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting.").
[92] *Id.*
[93] *Id.*
[94] *See id.* at 2644 (criticizing the majority for relying "on increases in voter registration and turnout as if that were the whole story").
[95] *Id.* at 2639.
[96] *Id.* at 2643.
[97] *Id.* at 2647.

Republican officials either praised it or were silent in response to the Shelby County decision.[98] John Lewis, a Georgia congressman and a leading figure in the Civil Rights Movement, declared, "What the Supreme Court did was to put a dagger in the very heart of the Voting Rights Act of 1965."[99] President Barack Obama observed that he was "deeply disappointed" with the Court's decision, which he described as a setback for "efforts to end voting discrimination."[100] In contrast, Mike Hubbard, the Republican Speaker of the Alabama House of Representatives, hailed the ruling: "Today's ruling clearly states that our constitutional rights as Alabamians take precedence over the wants and whims of liberal Justice Department bureaucrats in Washington, D.C."[101]

The controversy was not limited to elected officials. Andrew Cohen of the *Atlantic Monthly* magazine lamented,

> The primary winners [of the *Shelby County* ruling] are vote suppressors in those many jurisdictions covered by Section 5, the politicians, lobbyists and activists who have in the past few years endorsed and enacted restrictive new voting laws in dozens of states. The legal burden now will be shifted from these partisans to the people whose votes they seek to suppress.[102]

Conversely, the political scientist Abigail Thernstrom asserted, "[Chief] Justice Roberts's opinion for the court is a celebration of the Voting Rights Act—and of a nation that made it work and outgrew its most-radical provisions."[103]

IV. THE BATTLE OVER VOTER ID LAWS

Thus, as a direct consequence of *Shelby County*, the battle over

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[98] Julie Hirschfeld Davis, *Congress Split Leaves Voting Rights Law Future Uncertain*, BLOOMBERG NEWS, June 25, 2013, http://www.bloomberg.com/news/2013-06-25/leahy-plans-immediate-action-on-voting-rights-ruling.html, <http://perma.cc/D5VR-2CTE>.

[99] Jeff Zeleny, *John Lewis: Court's Decision Puts 'Dagger in Heart of Voting Rights Act,'* ABC NEWS (June 25, 2013, 12:16 PM), http://abcnews.go.com/blogs/politics/2013/06/courts-decision-puts-dagger-in-heart-of-voting-rights-act/, <http://perma.cc/F2CB-XTVL>.

[100] *Statement by the President on the Supreme Court Ruling on Shelby County v. Holder*, WHITE HOUSE, June 25, 2013, http://www.whitehouse.gov/the-press-office/2013/06/25/statement-president-supreme-court-ruling-shelby-county-v-holder, <http://perma.cc/NME9-EPNH>.

[101] Brandon Moseley, *Alabama Republican Leaders Respond to Supreme Court Decision*, ALA. POL. REP., Aug. 21, 2013, http://www.alreporter.com/archives/2013-june.html?start=15, <http://perma.cc/J5P7-N42U>.

[102] Andrew Cohen, *On Voting Rights, a Decision as Lamentable as Plessy or Dred Scott*, ATLANTIC MONTHLY (June 25, 2013, 1:05 PM), http://www.theatlantic.com/national/archive/2013/06/on-voting-rights-a-decision-as-lamentable-as-plessy-or-dred-scott/276455/, <http://perma.cc/6YCB-N7DP>.

[103] Abigail Thernstrom, *A Vindication of the Voting Rights Act*, WALL ST. J., June 26, 2013, http://online.wsj.com/article/SB10001424127887323873904578569453308090298.html?KEYWORDS=abigail+thernstrom, <http://perma.cc/9Q2U-HAAT>.

Voter ID laws has now returned to the South, a region with a long and painful history of racial discrimination in voting.

However, the Voter ID phenomenon is national, not regional, in nature.[104] Polls consistently find that a large majority of Americans nationwide support Voter ID laws, including those that require voters to show photo identification.[105] For example, a July 2012 *Washington Post* poll found that 74% of Americans support a requirement that all voters show photo identification.[106] At present, over thirty states across the nation have Voter ID laws, and three states have enacted but not implemented Voter ID laws.[107] Four states strictly require voters to produce photo identification before casting a valid ballot: Indiana, Kansas, Tennessee, and Georgia.[108] In those four states, if a voter fails to arrive at the polls with photo identification, the voter may cast a provisional ballot but must return later with photo identification so that the ballot may be counted.[109]

The Supreme Court has upheld the constitutionality of Voter ID laws, including those that require voters to produce photo identification.[110] In the 2008 case of *Crawford v. Marion County Election Board*,[111] the Supreme Court affirmed the constitutionality of an Indiana state law that, among other things, required voters to show photo identification before casting a valid ballot.[112] Writing for the majority, Justice Stevens held that Indiana had a "valid interest in protecting 'the integrity and reliability of the electoral process.'"[113]

The overall popularity of Voter ID laws, and the Supreme Court's support for them, should not obscure the partisan and racial divisions the laws engender. Views of the Voter ID issue correlate directly with partisan affiliation.[114] The best example is found in the state legislatures that have enacted Voter ID laws in party-line votes. For example, in the ten states that adopted Voter ID laws in the 2005–07 period, more than 95% of Republican legislators overall voted for the laws, whereas barely

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[104] *Voter ID: State Requirements*, *supra* note 14.

[105] Tim Mak, *Poll: 70% Back Voter ID Laws*, POLITICO (Apr. 18, 2012), http://www.politico.com/news/stories/0412/75300.html, <http://perma.cc/DUY8-J233>.

[106] Michael Brandon & Jon Cohen, *Poll: Voter ID Laws Have Support of a Majority of Americans*, WASH. POST, Aug. 11, 2012, http://articles.washingtonpost.com/2012-08-11/politics/35492005_1_voter-id-laws-voter-suppression-voter-fraud, <http://perma.cc/X87C-RAG4>; *Poll Results*, WASH. POST, Aug. 13, 2012, http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2012/08/12/National-Politics/Polling/question_6226.xml?uuid=Nd4PSOTWEeGXOe75nF-yhQ, <http://perma.cc/Z78Y-AXV3>.

[107] *Voter ID: State Requirements*, *supra* note 14.

[108] *Id.*

[109] *Id.*

[110] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 185–86, 204 (2008).

[111] 553 U.S. 181 (2008).

[112] *Id.*

[113] *Id.* at 204 (citing Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983)).

[114] *See* Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 187 (2009) ("The debate over voter ID laws is highly partisan. Many Democrats argue against the laws on the grounds of voter access, while many Republicans raise the issue of voter fraud and 'ballot integrity.'")

2% of Democratic legislators voted for them.[115] The Indiana Voter ID law that the Supreme Court ruled on in *Crawford* was passed with the support of 100% of Republicans and no Democrats in the state legislature.[116]

Indiana's experience is not unusual. At the national level, the two parties have diametrically opposing views of the issue. Republicans advocate Voter ID laws as necessary to protect the integrity of the state and federal election process.[117] The 2012 Republican National Committee Platform endorsed "legislation to require photo identification for voting and to prevent election fraud, particularly with regard to registration and absentee ballots."[118] The RNC platform defended Voter ID laws as a necessary measure to protect "against a significant and growing form of voter fraud."[119] In contrast, Democrats deride Voter ID laws as thinly veiled attempts at voter suppression.[120] The 2012 Democratic National Committee Platform warned that Voter ID laws "disproportionately burden young voters, people of color, low-income families, people with disabilities, and the elderly," and further declared that "we refuse to allow the use of political pretexts to disenfranchise American citizens."[121]

The Voter ID controversy also gives rise to a racial divide. Today, America's two major political parties are increasingly polarized along racial lines.[122] The 2012 presidential election starkly illustrated the extent of that polarization. According to the Roper Center for Public Opinion Research at the University of Connecticut, 59% of white Americans voted for Mitt Romney, the Republican candidate, whereas 93% of African Americans, 71% of Latino Americans, and 73% of Asian Americans voted for President Barack Obama, the Democratic

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[115] RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 43 (2012).

[116] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 203 (2008).

[117] Charlie Savage, *U.S. Is Suing in Texas Cases Over Voting by Minorities*, N.Y. TIMES, Aug. 22, 2013, http://www.nytimes.com/2013/08/23/us/politics/justice-dept-moves-to-protect-minority-voters-in-texas.html, <http://perma.cc/7ELA-9M4W>.

[118] COMM. ON ARRANGEMENTS FOR THE 2012 REPUBLICAN NAT'L COMM., 2012 WE BELIEVE IN AMERICA: REPUBLICAN PLATFORM 11 (2012), *available at* http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf, <http://perma.cc/WBJ2-ZB8X>.

[119] *Id.*

[120] Savage, *supra* note 117 (stating "Democrats say the restrictions on voting are intended to reduce turnout by legitimate voters who are minorities, students, poor or members of other heavily Democratic groups."); Ian Urbina, *Panel Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007, http://www.nytimes.com/2007/04/11/washington/11voters.html, <http://perma.cc/RGW7-L2DJ>; *see also* Jamie Self, *U.S. Rep. Clyburn Calls for Sweeping Election Reforms*, STATE, Jan. 29, 2013, http://www.thestate.com/2013/01/29/2609113/us-rep-clyburn-calls-for-sweeping.html, <http://perma.cc/ELX3-9FTN> (noting individual congressional Democrats' criticisms of Voter ID laws).

[121] MOVING AMERICA FORWARD, DEMOCRATIC NATIONAL COMMITTEE PLATFORM 18 (2012), *available at* http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf, <http://perma.cc/7PQD-H6TP>.

[122] Ronald Brownstein, *Americans Are Once Again Divided by Race*, NAT'L J., July 25, 2013, http://www.nationaljournal.com/columns/political-connections/americans-are-once-again-divided-by-race-20130725.

candidate.[123] Moreover, the 2012 results reflected a growing trend in American presidential elections. Republican presidential candidates won a majority of white voters in 2000, 2004, and 2008, whereas Democratic presidential candidates won a majority of minority voters in each of those elections.[124] The last time a presidential candidate carried the support of both white voters and minority voters was Bill Clinton in 1996.[125]

Congressional elections also reflect the growing trend of racial polarization in partisan affiliations. A study by David Wasserman of the Cook Political Report concluded that although the nation's white population has declined from 69% to 64% since 2000, the average percentage of whites in Republican House districts has grown from 73% to 75%.[126] Conversely, the average percentage of whites in Democratic House districts has dropped to 51%.[127] As the political analyst Charlie Cook notes, "while the country continues to grow more racially diverse, the average Republican district continues to get even whiter."[128] Likewise, a 2013 study by *National Journal* concluded that 80% of House Republicans represent districts in which the percentage of white voters exceeds the national average, whereas 64% of House Democrats represent districts in which the percentage of non-white voters exceeds the national average.[129] The authors of the *National Journal* study concluded,

> In Congress, as in the presidential race, the two parties are supported by electoral coalitions increasingly divided not only by ideology but also by race. Each side's congressional caucus is now rooted in places that differ enormously from the other side's, in their demographic composition, cultural values, and attitudes toward government. It's becoming more difficult to bridge those differences.[130]

Voter ID laws thus engender profound suspicion and distrust among many Democrats and minority voters. Studies indicate that Voter ID laws run a risk of disproportionately impacting minority and Democratic voters.[131] For example, one study found that in the thirty

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[123] *US Elections: How Groups Voted in 2012*, ROPER CTR. FOR PUB. OP. RES., http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_12.html, <http://perma.cc/PC8P-5ZBY>.

[124] *U.S. Presidential Election Center: 2012 Demographics*, GALLUP, http://www.gallup.com/poll/154559/us-presidential-election-center.aspx, <http://perma.cc/QH2-66XG>.

[125] *Id.*

[126] Charlie Cook, *The GOP Keeps Getting Whiter*, NAT'L J., March 14, 2013, http://www.nationaljournal.com/columns/cook-report/the-gop-keeps-getting-whiter-20130314.

[127] *Id.*

[128] *Id.*

[129] Ronald Brownstein & Scott Bland, *It's Not Just Partisanship That Divides Congress*, NAT'L J., May 30, 2013, http://www.nationaljournal.com/magazine/it-s-not-just-partisanship-that-divides-congress-20130110.

[130] *Id.*

[131] *See* Matt A. Barreto et al., *The Disproportionate Impacts of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POLITICAL SCIENCE & POLITICS 111, 114 (2009),

states that had voter ID laws in effect in the 2012 election, 65.2% of minority youth were asked to show identification, compared to 50.8% of white youth.[132] Historical experience confirms such fears. Throughout American history, voter registration "reforms" have often had a disfranchising effect for some voters.[133] As the historian Alexander Keyssar points out, there are many instances in American history in which

> particular groups lost political rights that they once had possessed: women in New Jersey in the early nineteenth century; blacks in the mid-Atlantic states before 1860 and in the South after 1890; naturalized Irish immigrants during the Know-Nothing period; aliens in some states in the late nineteenth century; men and women who were on public relief in Maine in the 1930s; prison inmates in Massachusetts in 2000; and countless citizens who suddenly found themselves confronted with new residency requirements or registration rules.[134]

Most important of all, Republican legislatures have adopted Voter ID laws in straight party-line votes at a time when Republicans increasingly depend on a shrinking base of white voters.[135] Thus, the *New York Times* reflected the view of many critics when it claimed that Voter ID laws are "supported by Republican lawmakers trying to suppress Democratic votes."[136]

Amid this tense atmosphere of partisan distrust and racial polarization, the *Shelby County* ruling thrusts the South—a region with a

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available at http://faculty.washington.edu/mbarreto/papers/PS_VoterID.pdf, <http://perma.cc/QD59-5ME9> (finding that "[r]egistered voters in Indiana who identify as Republicans were more likely to have proper ID credentials than those who identified as Democrats."); Cathy J. Cohen & John C. Rogowski, *Black and Latino Youth Disproportionately Affected by Voter Identification Laws in the 2012 Election*, BLACK YOUTH PROJECT (Feb. 28, 2013), http://research.blackyouthproject.com/files/2013/03/voter-ID-laws-feb28.pdf, <http://perma.cc/UH5Z-BE77> (finding that young minorities were disproportionately affected by voter ID laws); Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, BRENNAN CTR. FOR JUST. (July 18, 2012), http://www.brennancenter.org/publication/challenge-obtaining-voter-identification, <http://perma.cc/9W95-UUAK> (finding that "1.2 million eligible black voters and 500,000 eligible Hispanic voters live more than 10 miles from their nearest ID-issuing office open more than two days a week. People of color are more likely to be disenfranchised by these laws since they are less likely to have photo ID than the general population.").

[132] Cohen & Rogowski, *supra* note 131 (also finding that Latino youths were significantly more affected by voter ID laws than white youths).

[133] KEYSSAR, *supra* note 23, at 103–04, 297.

[134] *Id.* at 297.

[135] *See* Andrew Cohen, *How Voter ID Laws Are Being Used to Disenfranchise Minorities and the Poor*, ATLANTIC, Mar. 16, 2012, http://www.theatlantic.com/politics/archive/2012/03/how-voter-id-laws-are-being-used-to-disenfranchise-minorities-and-the-poor/254572/, <http://perma.cc/3R7V-3ZRZ> (noting that in thirty years, nonwhite voters will outnumber white voters); Cook, *supra* note 126 ("In 2000, House Republicans represented 59[%] of all white U.S. residents and 40[%] of all nonwhite residents. But today, they represent 63[%]of all whites and just 38[%] of all nonwhites.").

[136] Editorial, *The Fight for Voting Rights, 50 Years Later*, N.Y. TIMES, Aug. 27, 2013, http://www.nytimes.com/2013/08/28/opinion/the-fight-for-voting-rights-50-years-later.html, <http://perma.cc/PWP6-GDVC>.

notorious history of racial discrimination in voting—into the center of the Voter ID storm. The South's own recent experience with Voter ID laws underscores the partisan nature of the Voter ID battle. In 2005, the Republican Bush Administration approved a Voter ID law in Georgia, a jurisdiction covered by Section 5.[137] Three other southern states—Florida, Louisiana, and Tennessee—have also passed and implemented Voter ID laws that require photo identification.[138] But after the Democratic Obama Administration took office in 2009, it refused to approve new Voter ID laws in southern states and other covered jurisdictions.[139]

The *Shelby County* ruling has brought the Voter ID battle back to the South. Within twenty-four hours of the Court's decision in *Shelby County*, elections officials in five southern states—Texas, Mississippi, Virginia, South Carolina, and Alabama—indicated that they would move forward with Voter ID laws previously blocked by the DOJ.[140] North Carolina soon joined them by passing a Voter ID law of its own.[141] In celebration of the Court's ruling in *Shelby County*, Texas Attorney General Greg Abbott proclaimed that "'(U.S. Attorney General) Eric Holder can no longer deny Voter ID in Texas.'"[142]

The Texas Attorney General spoke too soon. In July 2013, Attorney General Holder condemned *Shelby County* as a "deeply disappointing—and flawed—decision" and announced that the DOJ would use other VRA provisions in an effort to block jurisdictions around the country from implementing laws "that may hamper . . . voting rights."[143] The DOJ is expected to look closely at voting procedures in North Carolina and South Carolina, in addition to its actions in Texas.[144] In August 2013, the DOJ filed suit to block Texas from implementing Voter ID.[145] The

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[137] Ralph K.M. Haurwitz, *Rejection of South Carolina Voter ID Law May Put Texas' Law on Shakier Ground*, AUSTIN AM.-STATESMAN, Dec. 24, 2011, http://www.statesman.com/news/news/state-regional-govt-politics/rejection-of-south-carolina-voter-id-law-may-put-t/nRjFr/, <http://perma.cc/Z5D-LJZ8> ("Georgia's law was approved by President George W. Bush's Justice Department"); Ryan J. Reilly, *Breaking: Justice Department Blocks South Carolina's Voter ID Law*, TALKING POINTS MEMO (Dec. 23, 2011), http://talkingpointsmemo.com/muckraker/breaking-justice-department-blocks-south-carolina-s-voter-id-law?ref=fpa, <http://perma.cc/P4Q5-4KN9>.

[138] *Voter ID: State Requirements*, *supra* note 14.

[139] *Civil Rights Division Section 5 Resource Guide*, *supra* note 6.

[140] Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, PBS (June 26, 2013, 2:58 PM), http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/with-voting-rights-act-out-states-push-voter-id-laws/, <http://perma.cc/KKC8-FBFA>; Cooper, *supra* note 13.

[141] Dahlia Lithwick, *What's the Matter With North Carolina?*, SLATE (July 24, 2013, 11:20AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/north_carolina_s_voter_id_law_is_the_worst_in_the_country.html, <http://perma.cc/7KNV-XDLK>.

[142] Bill Barrow, *Southern States Promise Quick Action on Election Laws*, SEATTLE TIMES (June 26, 2013, 2:00 PM), http://seattletimes.com/html/politics/2021269221_apusvotingrightsthesouth.html, <http://perma.cc/U3UJ-5VT9>.

[143] Eric Holder, Attorney General, Remarks at the National Urban League Annual Conference (July 25, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130725.html, <http://perma.cc/45TX-YG6U>.

[144] Bartlett, *supra* note 12; *see* Horwitz, *supra* note 12 (noting that the DOJ may sue North Carolina if it passes a new Voter ID law).

[145] *Justice Department to File New Lawsuit Against State of Texas Over Voter I.D. Law*, U.S. DEP'T

DOJ's lawsuit invokes VRA Section 2, which prohibits laws intended to "deny[] or abridge[] the right to vote on account of race, color, or membership in a language minority group."[146] In explaining the DOJ's action, Attorney General Holder declared that it would be the department's first action of many in response to the Shelby County decision: "'My colleagues and I are determined to use every tool at our disposal,'" he said, "'to stand against such discrimination wherever it is found.'"[147]

The fate of the DOJ's efforts to block the spread of Voter ID laws remains to be seen. In light of the national prominence of the issue and the high stakes involved, the DOJ's campaign to block Voter ID laws in Texas and other southern states seems certain to end in the U.S. Supreme Court. In response to the DOJ's August 2013 suit, Texas Attorney General Greg Abbott struck a defiant note, declaring, "Eric Holder's outrageous claim that voter ID is a racist plot to disenfranchise minority voters is gutter politics and is offensive to the overwhelming majority of Texans of all races who support this ballot integrity measure."[148]

The Supreme Court's 2008 decision upholding Voter ID laws in the *Crawford* case—as well as the *Shelby County* decision itself—indicate that a narrow majority of the Court does not believe that Voter ID laws violate the VRA. Consequently, it seems reasonable to assume that Attorney General Holder's efforts to block Voter ID laws in the South likely face an uphill battle in the Supreme Court.

If the DOJ's efforts fail, *Shelby County* has cleared the way for Voter ID laws to spread across the South. The critical question, therefore, is the impact of such laws on minority voting rights in the South. Will the VRA's tremendous gains be lost? The answer to that question ultimately rests on a closely related question: Has the South really changed?

V. THE CASE FOR CAUTIOUS OPTIMISM

Any assessment of the future of minority voting rights in the South in a post-*Shelby County* world should begin with three points.

JUST. (Aug. 22, 2013), http://www.justice.gov/opa/pr/2013/August/13-ag-952.html, <http://perma.cc/6XU5-QER7>.

[146] *Id.*

[147] Adam Liptak & Charles Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. TIMES, July 25, 2013, http://www.nytimes.com/2013/07/26/us/holder-wants-texas-to-clear-voting-changes-with-the-us.html?hp, <http://perma.cc/577X-WNXX>.

[148] *Attorney General Abbott Statement on DOJ Lawsuits Challenging Texas Voter ID and Redistricting Laws*, TEX. OFF. ATT'Y GEN., Aug. 22, 2013, https://www.oag.state.tx.us/oagnews/release.php?id=4507, <http://perma.cc/9XUR-Q2NK>; *see also* Gromer Jeffers, Jr., *Dallas County Taxpayers Funding Both Sides in Voter ID Fight*, DALL. MORNING NEWS, Aug. 27, 2013, http://www.dallasnews.com/news/columnists/gromer-jeffers-jr/20130826-dallas-county-taxpayers-funding-both-sides-in-texas-voter-id-fight.ece, <http://perma.cc/7A92-QCA8> (detailing Abbott's public response to the *Shelby* ruling).

First, the Supreme Court's *Shelby County* ruling only affects the VRA's preclearance provisions. It does not affect the Act's other provisions. Consequently, Section 2, which prohibits racially discriminatory election laws, remains in full force.[149] Section 2 of the VRA provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.[150]

The Supreme Court in *Shelby County* expressly emphasized the continuing vitality of Section 2. In the majority opinion, Chief Justice Roberts declared: "Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2 [of the VRA]."[151]

Furthermore, Section 2 serves as the basis of the DOJ's efforts to block implementation of the Texas and North Carolina Voter ID laws.[152] Some observers have expressed skepticism that Section 2 will be an effective means to preemptively block Voter ID laws, since the text of such laws make no mention of race.[153] That may well be the case, but Section 2 at least provides the DOJ with an additional tool to battle efforts to undermine minority voting rights.[154]

Second, regardless of what one thinks of Voter ID laws, racial discrimination clearly remains a significant factor in southern states, and some manifestations of that discrimination remain distinctive to the region. For example, until July 2000, South Carolina flew the Confederate battle flag above its state capitol dome, and today continues to display the flag in a position of honor on the state capitol grounds.[155]

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[149] *Section 2 of the Voting Rights Act*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php, <http://perma.cc/5VYQ-9KAF>.

[150] 42 U.S.C. § 1973(a) (2006).

[151] Shelby Cnty. v. Holder, 133 S.Ct. 2612, 2631 (2013).

[152] Reid J. Epstein, *DOJ to File Suit Against Texas over Voter ID Law*, POLITICO (Aug. 23, 2013, 8:51 AM), http://www.politico.com/story/2013/08/justice-department-voting-rights-act-texas-95804.html, <http://perma.cc/X2G4-AF5C>; Nicholas Stephanopoulos, *The Future of the Voting Rights Act*, SLATE (Oct. 22, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/section_2_of_the_voting_rights_act_is_more_effective_than_expected_new_research.html, <http://perma.cc/L2H8-F3HK>.

[153] Richard L. Hasen, *Supreme Error*, SLATE (Aug. 19, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/north_carolina_s_speedy_vote_suppression_tactics_show_exactly_why_the_voting.html, <http://perma.cc/CB8A-787L>.

[154] Eric Posner & Nicholas Stephanopoulos, *Don't Worry About the Voting Rights Act: If the Supreme Court Strikes Down Part of It, Black and Hispanic Voters Will Be Just Fine*, SLATE (Nov. 20, 2012), http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/11/supreme_court_and_section_5_of_the_voting_rights_act_it_s_ok_to_strike_it.html, <http://perma.cc/E6LP-6GCW>.

[155] David Slade & Jeff Hartsell, *Confederate Flag Controversy and NAACP Boycott Resurface Amid Talk of Football Bowl Game in Charleston*, POST & COURIER (Aug. 11, 2013, 2:00 PM), http://www.postandcourier.com/article/20130810/PC16/130819917, <http://perma.cc/9C24-ZR4L>.

South Carolina is not alone. The Mississippi state flag still includes the Confederate battle emblem.[156] As Carol Moseley Braun, the first African-American female U.S. Senator, observed in 1993, "Everybody knows what the Confederacy stands for . . . when we see the Confederate symbols hauled out, everybody knows what that means."[157] Senator Moseley's words remain just as true today, twenty years later. The fact that two southern state governments—both of which are funded in no small part by the tax dollars of African Americans—would continue to display prominently the Confederate battle flag in the year 2013 demonstrates that some aspects of racial discrimination in America still have distinctly southern features.

Third, it is equally true that racial discrimination remains disturbingly prevalent in the nation as a whole. It may take more subtle forms than flying the Confederate battle flag, but the discriminatory effects of racism outside the South are just as tangible. For example, a 2004 study of employers in Boston and Chicago found that job applicants with "African-American sounding" names received 50% fewer interviews than applicants with identical credentials but "white-sounding" names.[158] Boston and Chicago, it should be noted, are major *northern* cities, not southern cities. The economic implications of such discrimination are enormous. According to the Pew Research Center, since the 1950s the unemployment rate among blacks has consistently been doubled that of whites.[159] For example, as of July 2013, the unemployment rate among white Americans was 6.6%, whereas it was 12.6% among black Americans.[160] The employer study results, which implied that employers use race as a factor when reviewing resumes, suggest racism is a significant factor in the divergent unemployment rates nationwide.[161] Moreover, as the study shows, the problem of racial discrimination is a national issue, one that adversely affects minorities in major northern cities as well as southern cities.

Ultimately, therefore, the question is not whether the South has put racial discrimination behind it. Clearly, neither the South, nor the nation as a whole, has erased the scourge of racism. But in the context of *Shelby County*, the critical question is whether the expansion of Voter ID laws will lead to minority disenfranchisement, as has so often occurred in the

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[156] *Mississippi's Flag: Not As Simple As It Looks*, ECONOMIST, Apr. 19, 2001, http://www.economist.com/node/581584, <http://perma.cc/QWN9-E4H5>.

[157] JOHN M. COSKI, THE CONFEDERATE BATTLE FLAG: AMERICA'S MOST EMBATTLED EMBLEM, vii. (2005).

[158] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

[159] Drew DeSilver, *Black Unemployment Rate Is Consistently Twice That of Whites*, PEW RES. CTR. (Aug. 21, 2013), http://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/, <http://perma.cc/NHV9-BDHZ>.

[160] *Id.*

[161] Bertrand & Mullainathan, *supra* note 158, at 1006 (stating, "[s]o our results must imply that employers use race as a factor when reviewing resumes, which matches the legal definition of discrimination.").

region's past. The South's long history of racism, combined with the ongoing racial polarization of the nation's politics as a whole, provide cause for serious concern.

Nevertheless, recent developments provide support for cautious optimism regarding the future of minority voting rights and political participation in the South, even in a post-*Shelby County* world. The South's recent history shows that it is far from a foregone conclusion that Voter ID laws will lead to minority disenfranchisement. In fact, the South has paradoxically experienced an *increase* in minority turnout in states with Voter ID laws.[162] Moreover, when Voter ID laws are viewed in the broader context of southern race relations as whole, there is compelling empirical data that indicates a major change in the racial dynamics of southern politics is well underway.[163] Indeed, the evidence strongly suggests that the South is changing for the better. Consequently, as explained in greater detail below, there is reason for optimism that the rapid increase in the South's minority population and a growing trend toward improved race relations will, in the long run, overcome the negative effects that Voter ID laws have in the short run.

A. The Effect of Voter ID Laws on Voter Turnout Before *Shelby County*

To assess the potential impact of Voter ID laws post-*Shelby County*, it is critical to examine the experience of Voter ID laws in the South pre-*Shelby County*. Empirical data reveals that Voter ID laws in the South have thus far not had the negative impact on minority voter turnout that many opponents feared. In fact, the 2012 presidential election provided striking evidence that Voter ID laws have provoked a backlash against such laws. That backlash has led directly to increased minority voter turnout. Ironically, therefore, the controversy over Voter ID laws ultimately had a paradoxically beneficial impact on minority political participation in 2012. Although the authors of Voter ID laws certainly do not deserve credit for that development, it is worth keeping in mind when assessing the future of minority voter participation in the South in an age of Voter ID laws.

1. The Experience of Voter ID Laws in the South

Lost in the controversy over *Shelby County* is the fact that four

[162] *See infra* Part V.A.
[163] *See infra* Part V.B.

southern states already have Voter ID laws.[164] Florida, Georgia, Louisiana, and Tennessee adopted Voter ID laws prior to 2009, before the Obama administration began using Section 5 to block such laws.[165] Accordingly, there is already a significant body of empirical data regarding the impact of Voter ID laws on minority political participation in the South. Florida, Georgia, and Tennessee require voters to produce photo identification before casting a valid ballot.[166] Louisiana requires voters without photo identification to sign an affidavit and provide other forms of identification that confirm the voter's identity.[167]

The experience of those four states is highly instructive. Despite the photo identification requirement, Florida, Georgia, Louisiana, and Tennessee experienced high minority voter turnout rates in 2012.[168] According to the Census Bureau, during the 2012 election, Latinos led Florida with a 62.2% turnout rate, followed by a turnout rate of 61.9% among white voters and 57.6% among black voters.[169] In the 2012 elections in Georgia, African Americans led the state with a 65% turnout rate, followed by 62% of whites and 47.8% of Latino voters.[170] In Louisiana, black voter turnout in 2012 was 69.5%, while white voter turnout was 65.2%.[171] Finally, in Tennessee, the Latino voter turnout rate was 62.3%, the black voter turnout rate was 61.1%, and the white voter turnout rate was 54.7%.[172] The overall trend in the four states was clear: black and/or Latino voter turnout exceeded white voter turnout in each of the four southern Voter ID states in 2012.[173]

The 2012 results are consistent with other recent elections in the South. Georgia provides a case in point. In 2005, Georgia adopted its strict Voter ID law, which requires voters to present photo identification

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[164] On the use of Section 5 prior to the Obama Administration, *see* Rick Pildes & DanTokaji, *What Did VRA Preclearance Actually Do? The Gap Between Perception and Reality*, ELECTION L. BLOG (Aug. 19, 2013, 4:39 AM), http://electionlawblog.org/?p=54521, <http://perma.cc/XW82-BKV4>.

[165] Alth, *supra* note 114, at 187 n.17, 195 n.94 (detailing Voter ID laws in Georgia and Louisiana); Linda Greenhouse, *In a 6-to-3 Vote, Justices Uphold a Voter ID Law*, N.Y. TIMES, Apr. 29, 2008, http://www.nytimes.com/2008/04/29/washington/29scotus.html, <http://perma.cc/6FFR-RN9A> (noting that as of 2008, seven states, including Florida and Georgia, required photo identification to vote); Aviva Shen, *Study: In 2008, Voter ID Laws Blocked 1200 Votes in Two States Alone*, THINK PROGRESS (July 9, 2012), http://thinkprogress.org/justice/2012/07/09/512656/study-in-2008-voter-id-laws-blocked-1200-votes-in-two-states-alone/, <http://perma.cc/A8S6-WGLV> (noting the effect of voter ID laws in Tennessee during the 2008 election).

[166] *Voter ID: State Requirements*, *supra* note 14.

[167] *Id.*

[168] *Voting and Registration in the Election of November 2012, Table 4b (Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2012)*, BUREAU OF THE CENSUS, U.S. DEP'T COM., http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html, <http://perma.cc/S7ZT-R9ZR> [hereinafter *Voting and Registration in The Election of November 2012*].

[169] *Id.*

[170] *Id.*

[171] *Id.* The Census Bureau lacked data regarding the voter turnout rate among Latino citizens in Louisiana.

[172] *Id.*

[173] *Id.*

before casting a valid ballot.[174] Yet, following the law's implementation, African-American voter turnout *increased* by over 40%, whereas white turnout increased by only 12%.[175] Moreover, the Voter ID law resulted in only a small percentage of discounted ballots. A 2012 *Atlanta Journal Constitution* investigation of statewide voting patterns concluded that out of 13.6 million votes cast in Georgia since November 2008, the state's new Voter ID law only disqualified 1,586 Georgians for failure to produce a photo ID after casting a provisional ballot.[176] The *Journal Constitution* concluded that claims made both by supporters and opponents of the state's Voter ID law were "overblown."[177]

Likewise, an academic study of Georgia's experience with Voter ID regulations found that the law had no disproportionate impact on racial minorities.[178] In 2012, M.V. Hood and Charles S. Bullock, political scientists at the University of Georgia, examined the impact of Georgia's 2006 Voter ID law on turnout by comparing the state's 2004 and 2008 elections.[179] Importantly, Hood and Bullock did find a suppressive effect for voters lacking photo identification, but it was quite small.[180] They concluded that only 0.4% of voters were disqualified by the Voter ID law.[181] Most remarkable of all, the study revealed that to the extent the law suppressed any voters, it had a larger suppressive effect on white voters than minority voters.[182] The Hood-Bullock study concluded that the state's Voter ID law did not "disproportionately affect racial or ethnic minority groups;" instead, "white Georgians were actually the most likely to be affected by the new law."[183]

As a cautionary note, it must be observed that studies of elections outside the South have found different results. For example, a study of the Indiana Voter ID law's impact on the 2008 election did find a suppressive effect on minority voter turnout in Indiana.[184] Other studies of the 2004 and 2008 elections have reached inconsistent and

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[174] M.V. Hood, III & Charles S. Bullock, III, *Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute*, 12 ST. POL. & POL. Q. 394, 394 (2012).

[175] Shannon McCaffrey, *Despite Voter ID Law, Minority Turnout Up in Georgia*, ATLANTA J. CONST., Sept. 3, 2012, http://www.ajc.com/news/news/despite-voter-id-law-minority-turnout-up-in-georgi/nR2bx/, <http://perma.cc/HNN2-LNCF>; *see also* Michael Barone, *A Key to Obama's Victory: Increasing Turnout in Previously Noncontested States*, U.S. NEWS, Dec. 9, 2008, http://www.usnews.com/opinion/blogs/barone/2008/12/09/a-key-to-obamas-victory-increasing-turnout-in-previously-noncontested-states, <http://perma.cc/Y5A9-KBQM> (noting black voter turnout has increased despite Voter ID laws); Hans A. von Spakovsky, *Lessons from the Voter ID Experience in Georgia*, HERITAGE FOUND. (Mar. 19, 2012), http://www.heritage.org/research/reports/2012/03/lessons-from-the-voter-id-experience-in-georgia, <http://perma.cc/8U5Z-9ZWA> (noting black voter turnout has increased despite Voter ID laws).

[176] McCaffrey, *supra* note 175.

[177] *Id.*

[178] Hood & Bullock, *supra* note 174, at 399, 409.

[179] *Id.* at 399–400.

[180] *Id.* at 409.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] Baretto et al., *supra* note 131, at 114.

contradictory results, some finding a suppressive effect on minority turnout and some finding no suppressive effect.[185] At best, the impact of Voter ID laws on the 2004, 2006, and 2008 elections remains inconclusive. As the political scientists Jason Mycoff, Michael Wagner, and David Wilson have observed, "The early evidence paints an incomplete picture, consisting of some qualified claims that states with stricter voter identification laws negatively, albeit marginally, affect turnout, while other reports find that these effects are too small to be of practical concern."[186]

The additional data provided by the 2012 election results will undoubtedly be scrutinized for years to come by political scientists and election law specialists. But, in the meantime, it seems reasonable to draw two tentative conclusions, at least in the context of the *Shelby County* decision. First, whatever scholars ultimately determine about the impact of Voter ID laws on jurisdictions outside the South, the Hood-Bullock study would certainly suggest that Georgia—a state highly representative of the region as a whole[187]—seems to have escaped the feared negative impact of Voter ID laws on minority turnout. Indeed, Georgia's 2012 voter turnout strongly confirms the Hood-Bullock findings regarding the 2004–2008 period. Black voter registration in Georgia increased in 2012 by 6% from 2008 and Latino registration increased by 36%.[188] Meanwhile, white voter registration *fell* during the same time period.[189]

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[185] *See, e.g.*, DAVID B. MUHLHAUSEN & KERI WEBER SIKICH, NEW ANALYSIS SHOWS VOTER IDENTIFICATION LAWS DO NOT REDUCE TURNOUT 2 (Heritage Ctr. for Data Analysis ed., 2007), *available at* http://www.heritage.org/research/reports/2007/09/new-analysis-shows-voter-identification-laws-do-not-reduce-turnout, <http://perma.cc/7LCX-BS3L> (finding that "[c]ontrolling for factors that influence voter turn-out, voter identification laws largely do not have the claimed negative impact on voter turnout based on state-to-state comparisons."); Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: POL. SCI. & POL. 127, 129 (2009) (finding that "Voter ID does not appear to present a significant barrier to voting."); Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION LAW J. 85, 85 (2009) (concluding that the study's "data and tools are not up to the task of making a compelling statistical argument for an effect" of Voter ID laws on voter suppression); Timothy Vercellotti & David Anderson, *Voter-Identification Requirements and the Learning Curve*; 42 PS: POL. SCI. & POL. 117, 117 (2009) (finding evidence of a "possible learning curve" for "only one group of voters—Hispanics"); R. Michael Alvarez et al., *The Effect of Voter Identification Laws on Turnout* 19–20 (CalTech/MIT Voting Technology Project, VTP Working Paper No. 57, 2007), *available at* http://vote.caltech.edu/sites/default/files/vtp_wp57.pdf, <http://perma.cc/8HUP-MSLG> (finding that "there is evidence to support the claim that the most restrictive forms of voter identification requirements do lead to lower levels of participation by registered voters[, but] no evidence to support the hypothesis that this effect is more profound for nonwhite registered voters, controlling for other variables.").

[186] Jason D. Mycoff et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?* 42 PS: POL. SCI. & POL. 121, 121 (2009).

[187] *See* Karen Cox, *A New Southern Strategy*, N.Y. TIMES, Nov. 17, 2012, http://www.nytimes.com/2012/11/18/opinion/sunday/a-new-southern-strategy.html?_r=0, <http://perma.cc/3M33-DU2N> (describing how Georgia and other Southern states are being electorally transformed).

[188] Douglas A. Blackmon, *Republicans Face Unexpected Challenges in Coastal South Amid Shrinking White Vote*, WASH. POST, Nov. 24, 2012, http://articles.washingtonpost.com/2012-11-24/politics/35511999_1_white-students-white-voters-black-voters, <http://perma.cc/F456-5V7J>.

[189] *Id.*

Second, the remarkably high 2012 minority turnout levels in all four southern Voter ID states—Florida, Georgia, Louisiana, and Tennessee—would preliminarily suggest that the Hood-Bullock study's findings may apply generally to Voter ID's impact on minority turnout in the South as a whole.[190] The fact that black turnout, Latino turnout, or both exceeded white turnout in each of the four Voter ID states in the South is a very promising sign that the fears of a disproportionate and negative impact on minority voter turnout will not materialize.

2. The Backlash Against Voter ID Laws Nationally

Another reason for optimism is less measurable, but no less important. There is circumstantial evidence that a backlash against Voter ID laws at least partially accounts for the significant increase in African-American and Latino voter turnout.[191]

The implementation of Voter ID laws is a fairly recent phenomenon.[192] The Voter ID wave began in 2001, following the controversial 2000 presidential election.[193] By 2012, twenty-four state legislatures had adopted Voter ID laws.[194] Nevertheless, African-American voter turnout rates have risen from 53% in 1996 to 66% in 2012.[195] This creates a fascinating paradox: the remarkable increase in black voter turnout occurred during the era of Voter ID laws, which critics claim seek to suppress minority votes. What explains this paradox?

Although the evidence is far from conclusive and much work remains to be done on the question, there is reason to believe that the controversy over Voter ID laws has produced a backlash effect. Polling expert Nate Silver predicted the possibility of just such an effect prior to the 2012 election. In July 2012, Silver observed that Voter ID laws can "serve as a rallying point for the party bases. So although the direct effects of these laws are likely negative for Democrats, it wouldn't take that much in terms of increased base voter engagement—and increased voter conscientiousness about their registration status—to mitigate

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[190] *Voting and Registration in the Election of November 2012*, *supra* note 168.

[191] Ari Berman, *How the GOP's War on Voting Backfired*, NATION (Nov. 8, 2012, 2:24 PM), http://www.thenation.com/blog/171146/gops-failed-voter-suppression-strategy#, <http://perma.cc/5AN7-KJFL>.

[192] *Voter ID: State Requirements*, *supra* note 14.

[193] *Id.*; *see, e.g.*, Patricia Zengerle, *Will Election 2012 Be Another Florida 2000?*, REUTERS, June 8, 2012, http://blogs.reuters.com/talesfromthetrail/2012/06/08/will-election-2012-be-another-florida-2000/, <http://perma.cc/XYK5-7QXS> (stating that controversies surrounded the 2000 election).

[194] *Voter ID: State Requirements*, *supra* note 14.

[195] David Lauter, *Census Illustrates U.S. Electoral Shift; In November, Black Voters Turned Out At a Higher Rate than White Voters, Data Show. It's a First.*, L.A. TIMES, May 9, 2013, at A10, *available at* 2013 WLNR 11346083.

them."[196]

The results on Election Day 2012 confirmed Silver's hypothesis. For the first time in American history, black voter turnout exceeded white voter turnout; black voter turnout was 66.2% in 2012, and white voter turnout was 64.1%.[197] While African-American support for President Obama unquestionably contributed to the historic result,[198] President Obama was also on the ballot in 2008, when the black turnout rate was 65%, slightly lower than the 66.2% black turnout rate of 2012.[199]

A crucial difference between the two presidential elections was the prominence of the Voter ID issue in 2012.[200] Indeed, according to those directly involved in minority voter turnout efforts, the backlash that Nate Silver forecasted clearly played a significant role in the 2012 turnout numbers. NAACP President Benjamin Todd Jealous—a sharp critic of Voter ID laws—observed of the 2012 election, "Black turnout set records this year despite record attempts to suppress the black vote."[201] He credited the Obama campaign's get-out-the-vote drive for the high rate of minority voter turnout in 2012.[202] Likewise, Jotaka Eaddy, the senior director of voting rights at the NAACP, concluded that a backlash against Voter ID laws contributed to the historic level of minority voter turnout in the 2012 elections.[203] Eaddy predicted that the backlash against Voter ID laws would continue to drive minority turnout, noting that "[a] lot of people will go to the polls with this issue in the forefront

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[196] Nate Silver, *Measuring the Effects of Voter Identification Laws*, N.Y. TIMES (July 15, 2012, 9:28 AM), http://fivethirtyeight.blogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws/?_r=0, <http://perma.cc/55Y8-Q4LR>.

[197] Lauter, *supra* note 195.

[198] *2008 Election Turnout Hit 40-Year High*, CBSNEWS.COM (June 18, 2009, 4:33 PM), http://www.cbsnews.com/2100-250_162-4670319.html, <http://perma.cc/4D5S-2W8A>; Mary McGuirt, *Young Black Turnout a Record in 2008 Election*, ABC NEWS, July 21, 2009, http://abcnews.go.com/Politics/story?id=8140030, <http://perma.cc/W98E-NU5K>.

[199] Carol Morello, *Higher Black Voting Rates in 2008 Mostly Occurred in South, Report Says*, WASH. POST, May 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/05/12/AR2010051204687.html, <http://perma.cc/YV8J-ZNP5>; Jason L. Riley, *Blacks, Voter ID and the Census*, WALL ST. J., May 9, 2013, http://online.wsj.com/article/SB10001424127887323744604578473133787967750.html, <http://perma.cc/X4G9-E5LV>; Allison Terry, *In a First, Black Voter Turnout Surpassed White Turnout in 2012*, CHRISTIAN SCI. MONITOR, Apr. 29, 2013, http://www.csmonitor.com/USA/USA-Update/2013/0429/In-a-first-black-voter-turnout-surpassed-white-turnout-in-2012, <http://perma.cc/6CR7-C3JR>.

[200] Halimah Abdullah, *As Election Day Nears, Voter ID Laws Still Worry Some, Encourage Others*, CNN (Oct. 12, 2012, 5:51 PM), http://www.cnn.com/2012/10/12/politics/voter-laws-update, <http://perma.cc/EA2H-UD82>.

[201] Terry, *supra* note 199.

[202] Maxime Fischer-Zernin, *Voter ID Laws: GOP Voter Suppression Efforts Drove High Black Turnout Rates Against Them*, POLICYMIC, May 31, 2013, http://www.policymic.com/articles/45345/voter-id-laws-gop-voter-suppression-efforts-drove-high-black-turnout-rates-against-them, <http://perma.cc/6CYJ-KZMG> (stating that "[m]any are suggesting that this groundbreaking black representation in the election comes not despite, but rather because of GOP efforts to increase voter restrictions leading up to the 2012 election").

[203] Beth Reinhard, *Democrats Using Voting Rights Issues to Protect Senate Majority*, NAT'L J., Aug. 1, 2013, http://www.nationaljournal.com/politics/democrats-using-voting-rights-issues-to-protect-senate-majority-20130801.

of their minds."[204]

Many political analysts agree. As John Nichols of *The Nation* observed, a backlash against Voter ID spurred minority voter registration drives in battleground states across the country, including the Midwest and the South.[205] Similarly, MSNBC political commentator and minority voting rights activist Al Sharpton observed:

> From the tours we did in [twenty-two] states, it became clear to us that many blacks that were apathetic and indifferent became outraged and energized when they realized that [Republicans] were changing the rules in the middle of the game, in terms of voter ID laws, ending 'souls to the polls.' So what was just another election, even though it dealt with the re-election of the first black president, took on a new dimension when they realized that they were implementing the disenfranchisement of black voters.[206]

As *The National Journal* has observed, the backlash will continue to have effects in future elections, noting: "Without President Obama's name on the ballot, Democrats and civil rights leaders increasingly view voting rights as a rallying cry that could boost minority participation in key midterm Senate races in 2014."[207] In short, the backlash against Voter ID laws demonstrates that minority voter turnout has proven to be highly resilient at both the national and regional levels. In the nation as a whole, as well as within the South, minority voters exceeded white turnout in 2012 despite the fact that over half the states had adopted Voter ID laws. That provides significant grounds for optimism about the future of minority political participation in the post-*Shelby County* South.

But there is still more reason for cautious optimism. A region long dominated by the white majority population is rapidly becoming the most diverse part of the United States, and at the same time, the South is showing clear signs of major racial progress. Accordingly, there is more cause for hope about the South's future than at any time in the region's history.

B. Evidence of Social Change in the South

The South is in the middle of historic change. A growing body of

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[204] *Id.*

[205] John Nichols, *How Voter Backlash Against Voter Suppression Is Changing Our Politics*, NATION (April 29, 2013, 3:16 PM), http://www.thenation.com/blog/174095/how-voter-backlash-against-voter-suppression-changing-our-politics#, <http://perma.cc/796K-UFZS>.

[206] Joy Ann-Reid, *How Voter Suppression Backfired on the GOP*, GRIO, (Nov. 8, 2012, 5:27 PM), http://thegrio.com/2012/11/08/how-voter-suppression-backfired-on-the-gop/2/, <http://perma.cc/BU6M-MFQ9>.

[207] Reinhard, *supra* note 203.

empirical evidence and academic studies demonstrate that southern race relations have now moved well within the national mainstream. As will be discussed below, in several areas, including minority voter turnout, urban desegregation, and minority educational attainment, the South leads the nation.[208] Equally important, the South is rapidly becoming more diverse than the rest of the United States. In fact, the South today has the fastest-growing African-American and Latino populations in the United States.[209]

Therefore, there is compelling support for the idea that that the diversification of southern racial demographics will further accelerate social change and racial progress in the South. As the South grows more diverse, minority political participation will likely become an even larger feature of the southern political landscape. Indeed, the positive social change underway in the region today is likely to prove far more important and far more lasting than the short-term impact of Voter ID laws.

1. The Improved Racial Dynamics of the South

The voter registration numbers that the majority relied upon in *Shelby County* are a good place to start the discussion of the future impact of voter ID laws. In the nation as a whole, overall voter turnout was 61.8% in 2012.[210] African-American turnout reached 66.2%, exceeding the national average by more than four percentage points.[211] The gap between white and black turnout was most pronounced in the South. In the 2012 elections, African-American turnout exceeded white turnout in eight of the eleven former Confederate states.[212] Along with the mid-western state of Wisconsin, the southern states of Mississippi and North Carolina led the nation in African-American voter turnout in 2012.[213] Most remarkable of all, African-American turnout in VRA states *exceeded* African-American turnout in the rest of the nation.[214]

The results in 2012 represented the culmination of years of increased African-American turnout in the South. In 2000, 56% of

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[208] *See infra* Part V.B.1.

[209] *See infra* Part V.B.2.

[210] BUREAU OF THE CENSUS, U.S. DEP'T OF COM., THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS) 1 (2013), http://www.census.gov/prod/2013pubs/p20-568.pdf, < http://perma.cc/F3AL-UMDS>.

[211] *Id.* at 3.

[212] *Id.* at 9 (noting that the former confederate states that had African-American turnout that exceeded white turnout were: South Carolina, Mississippi, Florida, Alabama, Georgia, Virginia, Tennessee, and North Carolina. The three that did not were Texas, Arkansas, and Louisiana.).

[213] Philip Bump, *A State by State Look at the Record Black Turnout in 2012*, ATLANTIC WIRE, May 9, 2012, http://www.theatlanticwire.com/politics/2013/05/black-turnout-2012-state-by-state-maps/65053/, <http://perma.cc/U43K-XS42>.

[214] *Id.*

African Americans voted in southern states;[215] that figure rose to 59% in 2004 and 66% in 2008.[216] The growth in African-American turnout in the South was the largest in the nation.[217] Enthusiasm for Barack Obama, the nation's first African-American president, spurred an increase in African-American voter turnout in 2008—in fact, African Americans had the highest voter turnout in the 18–24 age category that year.[218] But it is noteworthy that the trend of increasing African-American turnout in the South began in the years prior to Obama's first presidential campaign. This trend mirrored a nationwide development, as a 2013 Census Bureau report revealed, "The 2012 increase in voting among blacks continues what has been a long-term trend: since 1996, turnout rates have risen 13 percentage points to the highest levels of any recent presidential election."[219]

But will these changes endure in a post-*Shelby County* world, particularly one in which Voter ID laws spread across the South? There are reasons to believe the answer is yes.

Along with high minority voter turnout rates, the voting behavior of white southerners shows signs of a significant change. Indeed, recent elections suggest white southern voters, even in the Deep South, will now vote for minority candidates, something unthinkable just a generation ago.

Nationwide white voters have shown far more willingness to vote for minority candidates than at any time before in the nation's history. President Barack Obama is of course the foremost example of that development. But, so too are a growing number of governors and senators who have won election in states with overwhelmingly white majority populations. For example, in 2006 Deval Patrick became the first African American ever elected governor of Massachusetts, a state that is over 80% white.[220] In October 2013 Cory Booker became New Jersey's first African-American senator.[221] New Jersey's population is 69% white.[222]

The South is following that trend. For example, today Louisiana and South Carolina have governors of South Asian heritage, Bobby Jindal and Nikki Haley, both of whom are Republicans, which means

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[215] BUREAU OF THE CENSUS, U.S. DEP'T OF COM., VOTING AND REGISTRATION IN THE ELECTION OF 2000, at 7 tbl.B (2002), http://www.census.gov/prod/2002pubs/p20-542.pdf, <http://perma.cc/N8U-PCHG>.

[216] Morello, *supra* note 199.

[217] *Id.*

[218] *2008 Election Turnout Hit 40-Year High*, *supra* note 198; McGuirt, *supra* note 198.

[219] *Blacks Voted at a Higher Rate Than Whites in 2012 Election — A First, Census Bureau Reports*, BUREAU OF THE CENSUS, U.S. DEP'T COM. (May 8, 2013), http://www.census.gov/newsroom/releases/archives/voting/cb13-84.html, <http://perma.cc/Y7PT-NU44>.

[220] MICHAEL BARONE & CHUCK MCCUTCHEON, THE ALMANAC OF AMERICAN POLITICS 2014: THE SENATORS, THE REPRESENTATIVES, AND THE GOVERNORS 810, 807 (2013).

[221] Sean Sullivan, *Cory Booker Wins Senate Race*, WASH. POST, (Oct. 16, 2013, 9:41 PM), http://www.washingtonpost.com/blogs/post-politics/wp/2013/10/16/cory-booker-wins-new-jersey-senate-race/, <http://perma.cc/55QX-ELTL>.

[222] BARONE & MCCUTCHEON, *supra* note 220, at 1070.

their base of support is overwhelmingly found among southern white voters.[223] Jindal, in particular, has received strong support at the ballot box. In his reelection bid in 2011, Jindal won with 66% of the vote.[224] Moreover, in 2012, South Carolinian Tim Scott became the seventh African American ever to serve in the United States Senate.[225] Although Scott was appointed to the Senate to fill a vacancy, the year prior, he was the first African American elected as a congressman from South Carolina in over 100 years. [226] Of Scott's election to the House, *National Journal* observed, "His race appeared to be a non-issue for the district's voters, about 70% of whom are white."[227] In the 2010 Republican House primary election, Scott defeated fellow Republican Paul Thurmond, the son of former South Carolina segregationist Senator Strom Thurmond, in a 68% to 32% landslide.[228] Two years later, Scott won reelection to the House with 62% of the vote.[229] Furthermore, Latino candidates have also had recent success winning statewide elections in ex-Confederate states. In 2010, Marco Rubio, the son of Cuban immigrants, was elected to the United States Senate from Florida.[230] In 2012, Ted Cruz, also the son of a Cuban immigrant, was elected to the United States Senate from Texas.[231]

Recent presidential elections also provide evidence of a historic change in the region's political dynamics. For example, in 2008, Barack Obama, the nation's first African-American president, won the popular vote in Florida, Virginia, and North Carolina.[232] He became the first Democratic candidate to win Virginia since 1964, North Carolina since

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[223] Kasie Hunt, *Nikki Haley Makes History*, POLITICO, June 23, 2010, http://www.politico.com/news/stories/0610/38893.html, <http://perma.cc/K7DH-64PU> (noting Haley's primary win against a fellow Republican, given South Carolina's "conservative heritage"); Andrew Walden, *Bobby Jindal and the 'Southern Strategy'*, AM.THINKER, Oct. 29, 2007, http://www.americanthinker.com/2007/10/bobby_jindal_and_the_southern.html, <http://perma.cc/5KV7-BQXX> (noting that Jindal's election was the first time the support of white Southern voters had propelled a non-white governor into office).

[224] Associated Press, *La. Gov. Bobby Jindal Wins Re-election*, USA TODAY, Oct. 23, 2011, http://usatoday30.usatoday.com/news/washington/story/2011-10-23/bobby-jindal-reelected/50875244/1, <http://perma.cc/93FG-MLYX>.

[225] Robert Behre, *U.S. Sen. Tim Scott Makes First Speech on Senate Floor*, POST & COURIER, July 8, 2013, http://www.postandcourier.com/article/20130708/PC16/130709530/1009/us-sen-tim-scott-makes-maiden-senate-speech-today&source=RSS, <http://perma.cc/6UXL-5F49>.

[226] Katharine Seeyle, *S. Carolina Candidate Shrugs Off History's Lure*, N.Y. TIMES, June 25, 2010, http://www.nytimes.com/2010/06/26/us/politics/26scott.html, <http://perma.cc/7U8Q-2EEF>; Ben Terris, *House GOP Favorite Tim Scott Is Ready For What Comes Next*, NAT'L J., May 29, 2013, http://www.nationaljournal.com/magazine/house-gop-favorite-tim-scott-is-ready-for-what-comes-next-20120329, <http://perma.cc/YA68-N5F8>.

[227] *Who is Tim Scott?*, NAT'L J., Dec. 17, 2012, http://www.nationaljournal.com/thenextamerica/politics/who-is-tim-scott-20121217.

[228] Scott Wong, *Tim Scott to Succeed Jim DeMint in Senate*, POLITICO, Dec. 17, 2012, http://www.politico.com/story/2012/12/tim-scott-to-succeed-demint-in-senate-85169.html, <http://perma.cc/8UQG-KVDH>.

[229] *Statewide Results*, S.C. STATE ELECTION COMM'N, http://www.enr-scvotes.org/SC/42513/116143/en/summary.html, <http://perma.cc/AGN-4B5S>.

[230] BARONE & MCCUTCHEON, *supra* note 220, at 376.

[231] *Id.* at 1575.

[232] Laurence W. Moreland & Robert P. Steed, *The South and Presidential Elections*, *in* THE OXFORD HANDBOOK OF SOUTHERN POLITICS 470, 480 (Charles S. Bullock III & Mark J. Rozell eds., 2012).

1976, and Florida since 1996.[233]

It is important to note that Obama carried a smaller percentage of the white vote in the South than he did in the rest of the country. In 2008, Obama won the support of less than one-third of white southerners, whereas he carried about 43% of white voters nationwide.[234] However, the same has been true of every Democratic presidential candidate for the last generation.[235] What is more remarkable is the fact that Obama won more support from white southerners than did the white Democratic candidate who ran for president four years before him: John Kerry.[236] For example, in all but three of the ex-Confederate states, Obama won a larger share of the white vote than Democratic presidential candidate John Kerry did in 2004.[237] Obama was also the first non-southern Democratic presidential candidate to carry a southern state since 1960.[238]

The 2008 Democratic presidential primaries offered further evidence of southern progress. As the historian James Cobb notes, "generally Obama ran at or slightly better than his poll-based projections among white Democrats in the South, while frequently falling short of those numbers in primaries outside the region."[239] For example, in the 2008 Democratic primaries, Obama carried 44% of white Democrats in Texas and 43% in Georgia, but only 37% in Pennsylvania.[240]

Notably, in the 2012 elections, President Obama once again carried Virginia and Florida, and only narrowly lost North Carolina, 50.6% to 48.4%.[241] Moreover, in 2012 Obama became the first Democratic presidential candidate since Franklin Roosevelt in the 1940s to win Virginia in consecutive presidential elections.[242] Obama also had a stronger showing in the southeastern coastal states than any Democratic presidential candidate since Jimmy Carter in 1976.[243] As the *Washington Post* observed, in the 2012 election "[t]he nation's first black president

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[233] *Presidential Elections Data*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/elections.php, <http://perma.cc/6FAA-7CUN>; *see also* Bob Moser, *The End of the Solid South*, AM. PROSPECT (June 4, 2013), http://prospect.org/article/end-solid-south, <http://perma.cc/4ZYZ-ALEM> (discussing impacts of the voter shifts in Virginia and North Carolina).

[234] JAMES C. COBB, THE SOUTH AND AMERICA SINCE WORLD WAR II 308 (2011).

[235] DAVID LUBLIN, THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE 35 (2004); Campbell Robertson, *White Democrats Lose More Ground in South*, N.Y. TIMES, Nov. 6, 2010, http://www.nytimes.com/2010/11/07/us/07south.html?pagewanted=all&_r=0, <http://perma.cc/6UCU-NPG2>.

[236] COBB, *supra* note 234, at 304–305.

[237] *Id.* at 304.

[238] Charles S. Bullock III, *Introduction: Southern Politics in the Twenty-first Century*, *in* THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS 1, 4 (Charles S. Bullock III & Mark J. Rozell eds., 4th ed. 2010).

[239] COBB, *supra* note 234, at 303.

[240] *Id.*

[241] *2012 Presidential Election*, POLITICO (Nov. 29, 2012, 3:59 PM), http://www.politico.com/2012-election/map/#/President/2012, <http://perma.cc/9EVS-PZL4>.

[242] *Obama Wins Presidential Vote in Va., Md., DC*, NBC4 WASH. (Nov. 7, 2012, 11:22 AM), http://www.nbcwashington.com/news/local/Election-Day-Polling-Places-2012.html, <http://perma.cc/V3FB-ZJLJ>.

[243] Blackmon, *supra* note 188.

finished more strongly in the [southeast] region than any other Democratic nominee in three decades, underscoring a fresh challenge for Republicans who rely on southern whites as their base of national support."[244]

The South's political transformation finds further confirmation from sweeping social changes in the region. One of the most noteworthy changes is demographic in nature: African Americans are returning to the South. In the first half of the twentieth century, approximately five million African Americans migrated to the North from the South.[245] But in the 1970s the trend slowly began to reverse itself and, in recent decades, African-American migration to the South has far exceeded that of any other region.[246] As the *New York Times* noted in 2011, "[t]he percentage of blacks leaving big cities in the East and in the Midwest and heading to the South is now at the highest levels in decades."[247] In fact, according to federal census data, 17% of African-American migrants to the South came from New York State alone.[248] As a percentage of the African-American population nationwide, the South's black population today is at its highest level in half a century.[249] The trend is accelerating: the South's share of African-American population growth rose from 50% in the 1970s to 75% by 2010.[250] Moreover, the demographics of the population returning to the South tend toward financially successful black retirees and well-educated young people, with one in four recent black migrants to the South holding a college degree.[251] In short, these migrants have the financial and educational opportunities to choose where to live, and they are increasingly choosing to live in the South.

One reason may be the South today is now less racially segregated than the North. Since the 1990s, national studies have shown that many southern cities are less segregated than northern cities.[252] The University of Michigan's Population Studies Center found that the ten most segregated cities in the United States were all located in the North.[253]

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[244] *Id.*

[245] Alferdteen Harrison, *Preface*, *in* BLACK EXODUS: THE GREAT MIGRATION FROM THE AMERICAN SOUTH vii, vii (Alferdteen Harrison ed. 1991).

[246] COBB, *supra* note 234, at 190–91.

[247] Dan Bilefsky, *For New Life, Blacks in City Head to South*, N.Y. TIMES, June 21, 2011, http://www.nytimes.com/2011/06/22/nyregion/many-black-new-yorkers-are-moving-to-the-south.html?pagewanted=all, <http://perma.cc/9LK3-DFPS>.

[248] *Id.*

[249] Associated Press, *Census Estimates Show More U.S. Blacks Moving South*, USA TODAY, Feb. 15, 2011, http://usatoday30.usatoday.com/news/nation/census/2011-02-15-census-black-migration_N.htm, <http://perma.cc/4VTG-PBQB>; Sabrina Tavernise & Robert Gobeloff, *Many U.S. Blacks Moving to South, Reversing Trend*, N.Y. TIMES, Mar. 24, 2011, http://www.nytimes.com/2011/03/25/us/25south.html?pagewanted=all&_r=0,<http://perma.cc/YX4G-25PJ>.

[250] Tavernise & Gobeloff, *supra* note 249.

[251] *Id.*; Blackmon, *supra* note 188.

[252] COBB, *supra* note 234, at 193.

[253] WILLIAM H. FREY & DOWELL MYERS, RACIAL SEGREGATION IN U.S. METROPOLITAN AREAS AND CITIES, 1990–2000, at 39 (Univ. of Mich., Population Stud. Ctr. 2005), *available at* http://www.frey-demographer.org/reports/R-2005-2_RacialSegragationTrends.pdf (noting that the ten cities are: Gary, Detroit, New York, Milwauke-Waukesha, Chicago, Newark, Flint, Buffalo-

Direct comparisons of northern and southern cities are even more striking. For example, 40% of Virginia Beach's population lives in integrated neighborhoods, whereas only 13% of Boston's population lives in integrated neighborhoods.[254]

Educational disparities are also decreasing in southern states when compared to northern ones.[255] In 2009, a United States Department of Education study revealed "that black students in all but two southern states now posted higher scores on standardized math and reading tests than black students in either Wisconsin or California."[256] Moreover, as Professor James Cobb has noted, "The gap between black and white students' scores was smaller in Alabama and Mississippi than in Connecticut or Illinois and well below the national average across the region."[257] What makes such studies even more remarkable is the fact that only fifty years ago segregated schools dominated the southern landscape.

Equally noteworthy is the increasingly favorable view of the South among African Americans who live in the region.[258] In the mid-1960s, surveys indicated that only 55% of southern blacks had a "warm" view of the South; in the years since, that figure has steadily risen.[259] A University of North Carolina study of polling data from the 1991–2001 period found that black southerners self-identify as "southern" at rates equal to or greater than southern whites.[260]

Most striking of all, a 2007 nationwide survey by the Pew Research Center and National Public Radio found that 69% of southern blacks reported being "very satisfied" with their current circumstances, which was more than 10% higher than African Americans in the rest of the country.[261] The study's authors concluded, "In general, blacks who live in southern states are more satisfied with their lives than are blacks who live in other regions."[262]

Even the Confederate battle flag is under increasing criticism by

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Niagara Falls, Cleveland-Lorain-Elyria, and Nassau-Suffolk).

[254] COBB, *supra* note 234, at 193 (stating that "nearly a third of [the population of] Charlotte, Nashville, Jacksonville, and Memphis fell into the 25-30 percent range" of living in integrated neighborhoods. This is compared with "14 percent in Philadelphia and 13% in Boston, not to speak of New York City at 4 percent. Not all southern cities came out so well; two-thirds of white Atlantans lived on blocks that were more than 80 percent white, but then so did 93 percent of whites in Pittsburgh and 87 percent in Providence, Rhode Island.").

[255] *Id.* at 193–94.

[256] *Id.* at 193.

[257] *Id.* at 193–94.

[258] *Id.* at 262.

[259] *Id.* at 261; Merle Black & John Shelton Reed, *Blacks and Southerners: A Research Note*, 44 J. POL. 165,166 (1982).

[260] Jay Reeves, *Southern Identity; Many Blacks Proud to be Southerners, Despite Region's Racist History*, FLA. TIMES UNION, Nov. 24, 2005, http://jacksonville.com/apnews/stories/112405/D8E2KI3O7.shtml, <http://perma.cc/U4V2-E2WF>.

[261] COBB, *supra* note 234, at 272.

[262] PEW RES. CTR., BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS 26 (2007), http://www.pewsocialtrends.org/files/2010/10/Race-2007.pdf, <http://perma.cc/ZZF9-44S2>.

southern whites. The University of Mississippi has banned the display of the Confederate battle flag—once a staple at football games—at all university-sponsored athletic events.[263] Georgia removed the Confederate emblem from its state flag in 2003.[264] South Carolina head football coach Steve Spurrier has called on the state legislature to remove the battle flag from the state capitol grounds.[265] Spurrier explained that waving the Confederate battle flag "was embarrassing to me and I know embarrassing to our state."[266] He added, "I realize I'm not supposed to get in the political arena as a football coach, but if anybody were ever to ask me about that damn Confederate flag, I would say we need to get rid of it."[267]

All of this evidence suggests improvements in the state of race relations in the South, as well as the tremendous progress made in minority voting rights and minority political participation in the region. But that evidence, in turn, leads to the next crucial question: Will Voter ID laws unravel the progress the South has made? As it happens, there is evidence that is directly responsive to that question: the South's changing racial demographics.

2. The South's Changing Racial Demographics

The final reason for optimism is demographics. At a time when minorities represent a growing percentage of the electorate nationwide, any party or candidate who appears hostile to minority voting rights will face growing political peril. Nowhere is that more true than in the eleven states of the old Confederacy.

Indeed, the most dramatic change in American politics today is demographic in nature. As the *Los Angeles Times* recently observed, "The Latino and Asian share of the U.S. electorate is all but certain to continue to grow because of the rising number of voting-age citizens in those groups."[268] For instance, a 2013 Pew Research Center study revealed that Latinos currently make up 17% of the nation's population as whole, but they constitute 24% of the population under age

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[263] Associated Press, *Chancellor Wants Song Halted*, ESPN.com (Nov. 10, 2009, 8:52 PM), http://sports.espn.go.com/ncf/news/story?id=4643111, <http://perma.cc/WFZ5-QDTW> (referring to the "decades-long practice of fans' carrying the flag" at Ole Miss athletic games); *Court Upholds Ban On Confederate Flag*, N.Y. TIMES, Aug. 20, 2000, http://www.nytimes.com/2000/08/20/us/national-news-briefs-court-upholds-ban-on-confederate-flag.html, <http://perma.cc/B3EV-9V7Z>.

[264] ARNOLD FLEISCHMANN & CAROL PIERANNUNZIT, POLITICS IN GEORGIA 96 (2d ed. 2007).

[265] *Spurrier Says It's Time to Lower the Flag*, WASH. POST, Apr. 15, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/04/14/AR2007041401304.html, <http://perma.cc/55KJ-SECV>.

[266] Associated Press, *Spurrier: Flag should come down from S.C. Statehouse*, ESPN.com, Apr. 16, 2007, http://sports.espn.go.com/ncf/news/story?id=2837735, <http://perma.cc/KZ4C-F6GM>.

[267] *Id.*

[268] Lauter, *supra* note 195.

eighteen.[269] The political implications are sweeping. According to the Pew study, minorities made up 26% of the electorate in 2012, but they will constitute 37% of the electorate by 2020.[270]

The change is happening even faster in the South than it is in the rest of the country.[271] The South has the fastest growing African-American and Latino populations in the country.[272] In fact, the black population of the South has grown faster than the white population in ten of the eleven southern states over the last ten years.[273] Likewise, in Texas, Latinos constituted 49% of newborn children in 2010, according to the 2010 federal census.[274] The 2010 census also revealed that Georgia's Latino population "nearly doubled between 2000 and 2010."[275] Furthermore, Virginia and North Carolina provide two examples of this demographic change. According to the 2010 census, Virginia and North Carolina both saw their white population decline from 72% to 65%, while the overall population of both states increased by 1 million and 1.5 million, respectively, during the first decade of the twenty-first century as a result of migration from other states and a high minority birthrate.[276]

The South's changing racial dynamics are particularly dangerous for the Republican Party, which advocates the very Voter ID laws that so deeply alienate minority voters.[277] According to Scott Keeter, the chief pollster at the Pew Research Center, changing racial dynamics in the South have made the region "a ticking time bomb for Republicans."[278] Indeed, the growing minority population in the South is beginning to move many states toward the Democratic column for the first time in decades.[279] Some predict that the political changes will be even more sweeping in the years ahead, as a growing minority population

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[269] *Id.*

[270] *Id.*

[271] Jonathan Martin, *Beyond Black and White, New Force Reshapes the South*, N.Y. TIMES, June 25, 2013, http://www.nytimes.com/2013/06/26/us/politics/new-face-of-south-rises-as-an-extralegal-force.html, <http://perma.cc/9592-H7YU>.

[272] *Id.* (finding that "[t]he states with the highest growth in the Latino population over the last decade are in the South, which is also absorbing an influx of people of all races moving in from other parts of the country"); *see* Haya El Nasser, *Census: Hispanic, Asian Populations Soar*, USA TODAY, Mar. 25, 2011, http://usatoday30.usatoday.com/news/nation/census/2011-03-24-hispanics-census_N.htm, <http://perma.cc/TA74-HUQH> (stating that the census indicates that "For the first time, [Hispanics] increased faster than blacks and whites in the South. Hispanics doubled in South Carolina, North Carolina, Kentucky, Tennessee, Alabama, Mississippi and Arkansas").

[273] Blackmon, *supra* note 188 (noting that "[i]n every Southern state except Louisiana, the population of African Americans grew substantially faster than that of whites over the past decade").

[274] Moser, *supra* note 233.

[275] Martin, *supra* note 271.

[276] Bill Barrow, *As Demographics Change, an End to the Solid South*, HUFFINGTON POST (Aug. 20, 2012, 3:07 AM), http://www.huffingtonpost.com/2012/08/20/no-longer-a-solid-south_n_1810536.html, <http://perma.cc/38EA-72R9>.

[277] *See* HASEN, *supra* note 115 (describing overwhelming Republican legislator support for Voter ID laws).

[278] Moser, *supra* note 233.

[279] Barrow, *supra* note 276 (describing the changing demographics of the South and noting that, for example, Virginia, whose population is now half transient or immigrant, went Democratic in the 2008 presidential election for the first time since 1964).

transforms the politics of once solidly-Republican states such as Georgia and Texas.[280]

In August 2013, retired General Colin Powell, a Republican who served as the first black chairman of the Joint Chiefs of Staff, bluntly warned the GOP that Voter ID laws have backfired. In a speech in North Carolina, Powell observed that Voter ID laws profoundly alienate and offend minority voters, and thus "immediately turn off a voting block the Republican Party needs."[281] He emphasized the point that Voter ID laws and similar policies "do not build on the base"; they "just turn[] people away."[282]

Consequently, as Congressman David Price of North Carolina—a former political science professor at Duke University—recently observed, "All the voter suppression measures in the world aren't going to be enough to eventually stem this rising tide [of minority voters]."[283] Similarly, Georgia Democratic State Representative Stacey Abrams has warned that southern politicians who seek to restrict minority voting rights "risk permanently alienating a population that will eventually be able to take its revenge" as minority voters represent a rapidly growing share of the Georgia electorate.[284]

The Republican Party is beginning to take notice. In a remarkable report issued by the Republican National Committee after the 2012 election, the party leaders warned, "If we want ethnic minority voters to support Republicans, we have to engage them and show our sincerity."[285] Under the caption "America Looks Different," the report warned Republicans that the white share of the national electorate fell from 88% in 1980 to 72% in 2012.[286] The report concluded: "The pervasive mentality of writing off blocks of states or demographic votes for the

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[280] Robert Schlesinger, Opinion, *The Next Swing States: Arizona, Georgia, and Texas*, U.S. NEWS, Apr. 12, 2012, http://www.usnews.com/opinion/blogs/robert-schlesinger/2012/04/12/the-next-swing-states-arizona-georgia-and-texas, <http://perma.cc/M47R-5JVJ>; *see America's Minorities Becoming A Majority*, CBS MIAMI, June 13, 2013, http://miami.cbslocal.com/2013/06/13/americas-minorities-becoming-a-majority/, <http://perma.cc/G9JD-U259> (noting that six counties became majority-minority in 2012: four in Texas, one in Oklahoma, and one in North Carolina); Micah Cohen, *Can Democrats Turn Texas and Arizona Blue?*, N.Y. TIMES, Mar. 1, 2013, http://fivethirtyeight.blogs.nytimes.com/2013/03/01/can-democrats-turn-texas-and-arizona-blue-by-2016/, <http://perma.cc/WMG5-S2FG> (noting that "Obama won re-election comfortably in 2012 without Texas and Arizona, and in many critical swing states, the demographic trend is still moving—slowly—away from the G.O.P.").

[281] *Powell: Voter ID Law Punishes Minorities, Hurts Republicans*, UNITED PRESS INT'L (Aug. 23, 2013, 1:10 PM), http://www.upi.com/Top_News/US/2013/08/22/Powell-Voter-ID-law-punishes-minorities-hurts-Republicans/UPI-13891377191454/, <http://perma.cc/P7LL-L6F3>.

[282] John Murawski & John Frank, *Colin Powell Slams NC's New Voting Law in Speech*, NEWS OBSERVER, Aug. 22, 2013, http://www.newsobserver.com/2013/08/22/3128072/colin-powell-slams-ncs-new-voting.html, <http://perma.cc/N26L-5VEU>.

[283] Martin, *supra* note 271; *Congressman David E. Price: About David*, U.S. HOUSE OF REPRESENTATIVES, http://price.house.gov/about-david/, <http://perma.cc/YQ3P-3X3P>.

[284] Martin, *supra* note 271.

[285] REPUBLICAN NAT'L COMM., GROWTH AND OPPORTUNITY PROJECT 7 (2013), *available at* http://growthopp.gop.com/RNC_Growth_Opportunity_Book_2013.pdf, <http://perma.cc/STV6-V6HP>.

[286] *Id.* at 7.

Republican Party must be completely forgotten. The Republican Party must compete on every playing field."[287]

The growing influence of minority voters has already changed the South, and will change it even more dramatically in the years ahead. By any measure, the South is in the middle of a historic demographic shift and the political ramifications are immense. As Arturo Vargas, executive director of the National Association of Latino Elected and Appointed Officials, points out: "The South is going to start looking more like California eventually."[288]

VI. CONCLUSION

In 1965 Congress enacted the Voting Rights Act to ensure that African Americans and other minorities could exercise their constitutional right to vote. In the years since the VRA's adoption, major advances have been made in minority political participation across the nation. Nothing demonstrated that fact more clearly than the 2012 presidential election, which marked the first time in history that African-American turnout exceeded white turnout.[289]

The 2012 election also reflected the remarkable changes that have occurred in the racial dynamics of southern politics. In 1965, the VRA specifically targeted the South because of the extraordinarily low level of African-American voter registration in southern states. However, by 2012, black turnout in the South exceeded white turnout in eight of the eleven ex-Confederate states.[290]

Understandably, therefore, the Supreme Court's decision in *Shelby County* has raised serious concern that the progress made in the South since 1965 could be lost. In particular, *Shelby County* has thrust the South into the forefront of the national debate over Voter ID laws.

Nevertheless, for the reasons outlined in this article, there is a basis for cautious optimism that the expansion of Voter ID laws across the South will not result in widespread minority disenfranchisement in the long run. Voter ID laws will not stop the historic demographic and social changes underway in the South that are transforming the racial dynamics of the region's politics. Consequently, the evidence suggests that the influence of minority voters on southern elections will grow, not recede, in the years ahead, notwithstanding the adoption of Voter ID laws. Indeed, there is compelling reason to conclude that demographic and social change will ultimately play a far larger role in shaping the southern political landscape than Voter ID laws ever will.

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[287] *Id.* at 12.

[288] Martin, *supra* note 271.

[289] Lauter, *supra* note 195.

[290] BUREAU OF THE CENSUS, *supra* note 210, at 9.

Notes

Fighting the Good Fight Without Facts or Favor: The Need to Reform Juvenile Disciplinary Seclusion in Texas's Juvenile Facilities

By Catherine McCulloch*

* This Note is dedicated to everyone who advocates for juvenile justice. Particular thanks to all of the organizations and individuals who advocated for the reform of juvenile disciplinary seclusion during Texas's 83rd legislative session, including: The American Civil Liberties Union (Texas), The American Civil Liberties Union (National), Texas Criminal Justice Coalition, Disability Rights Texas, Texas Interfaith Center for Public Policy, National Alliance on Mental Illness (Texas), and Senator Van de Putte's Office.

I. INTRODUCTION

Across the Lone Star State, youth are held in seclusion in juvenile detention facilities. In Texas, children in juvenile detention facilities can be held in seclusion in excess of twenty-four hours for low-level behavioral offenses such as "horseplay."[1] Current law permits this overuse of disciplinary seclusion, which is particularly concerning because experts, including the American Academy of Child and Adolescent Psychiatry, have concluded that prolonged periods of seclusion can lead to depression, anxiety, and psychosis in youth.[2] Recalling thirty-six hours spent in seclusion in a juvenile detention center in Travis County, Pete Garanzuay described his experience: "When you're in a room by yourself, you're not doing nothing . . . . Thinking about the bad things in life over and over again, just replaying it in your head."[3] Considering the particular developmental vulnerabilities of youth, children should not be placed in seclusion for prolonged periods unless absolutely necessary.

Texas needs legislative reform to address the problematic use of disciplinary seclusion in juvenile detention facilities. The costs of disciplinary seclusion are large and the benefits of reform are nationally recognized. However, history teaches us that legislative reform in Texas will not come easily. In Texas's 83rd legislative session, a model bill, Senate Bill (S.B.) 1517, addressed the problematic use of disciplinary seclusion in juvenile detention facilities. The bill inevitably failed in the face of stark opposition. Stricter policies need to be put in place to safeguard the mental health of juveniles held in disciplinary seclusion in Texas, but when and what form reform will take is unknown.

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[1] *Major Rule Violations by County*, on file with TEX. J. C.L. & C.R., *available at* http://www.utexas.edu/law/journals/tjclcr/permanent/2013FallMajorRuleViolationsbyCounty.pdf, <http://perma.cc/R67R-N5BT>.

[2] Jeff Mitchell & Christopher Varley, *Isolation and Restraint in Juvenile Correctional Facilities*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 251, 252–55 (1990); *see* Letter from Ralph F. Boyd, Jr., Assistant Att'y Gen., to Parris N. Glendening, Governor of Md. (2002), *available at* http://www.justice.gov/crt/about/spl/documents/baltimore_findings_let.php, <http://perma.cc/5RMM-ETZV> (finding that juveniles may experience paranoia, anxiety and depression after short periods of isolation).

[3] Michael Brick, *Thousands of Texas Juvenile Offenders Held in Solitary Confinement*, LUBBOCK AVALANCHE-J. (April 22, 2013, 11:00 PM), http://lubbockonline.com/texas/2013-04-23/thousands-texas-juvenile-offenders-held-solitary-confinement#.UaKkQbvLhfU, <http://perma.cc/LLK7-BDSA>.

II. A BRIEF HISTORY OF JUVENILE SECLUSION IN TEXAS

In the early years of the Texas Youth Commission, now the Texas Juvenile Justice Department (TJJD), inhumane conditions in juvenile facilities were common. In the 1973 *Morales v. Turman*[4] decision, the U.S. District Court for the Eastern District of Texas found a "widespread practice of beating, slapping, kicking, and otherwise physically abusing juvenile inmates" in many juvenile facilities.[5] The *Morales* decision helped establish the first national standards for juvenile justice and corrections.[6] Following the decision, Texas made a number of changes, including prohibiting corporal punishment.[7]

TJJD has come a long way since *Morales,* but youth held in Texas's juvenile facilities continue to experience similar inhumane conditions. In 2007, for example, there was a public sex scandal involving youth in Texas's juvenile facilities.[8] As a result of the scandal, legislators passed bills aimed at overhauling the corrupt juvenile justice system.[9] Despite the current abuse of disciplinary seclusion in Texas, the practice has not reached the level of a public scandal; for this reason, the Texas legislature has been unmotivated to pass substantive reform. Furthermore, because of a lack of transparency in the juvenile disciplinary seclusion apparatus, advocates have had no way of knowing whether and to what extent similar misconduct surrounds juvenile seclusion—making it difficult to overcome the stark opposition to reform.

III. THE PROBLEM WITH CURRENT LAW

Current law provides guidelines for the appropriate use of disciplinary seclusion in juvenile detention facilities. Juvenile detention facilities include post-detention, pre-adjudication, and short-term detention facilities.[10] Chapter 343 of the Texas Administrative Code

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[4] 364 F. Supp. 166 (E.D. Tex. 1973).

[5] *Id.* at 173.

[6] TEX. YOUTH COMM'N, A BRIEF HISTORY OF THE TEXAS YOUTH COMMISSION: FROM THE ROOTS OF TEXAS JUVENILE JUSTICE TO THE PRESENT 2 (2009), *available at* http://www.lb5.uscourts.gov/ArchivedURLs/Files/08-70042(1).pdf, <http://perma.cc/FVY4-5FHE>.

[7] *Id.*

[8] *See* Sylvia Moreno, *In Texas, Scandal Rock Juvenile Justice System*, WASH. POST, Apr. 5, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/04/04/AR2007040402400.html, <http://perma.cc/7M7Y-8TX9> (describing a litany of scandals at Texas juvenile detention facilities).

[9] Enrique Rangel, *Texas Juvenile Justice System: Sex-Abuse Scandal Spurred Positive Changes*, AMARILLO GLOBE NEWS, Dec. 17, 2012, http://amarillo.com/news/local-news/2012-12-16/scandal-spurred-positive-changes, <http://perma.cc/JE3J-5KZZ>.

[10] *See generally* 37 TEX. ADMIN. CODE §§ 343, 351 (2013).

(TAC), in compliance with the Texas Family Code,[11] governs standards for discipline in pre-adjudication detention and post-detention correction facilities.[12] A different chapter of TAC, chapter 351, controls the discipline of juveniles held in short-term detention facilities.[13] However, because chapter 351 of TAC does not provide any guidelines on the use or the reporting of disciplinary seclusion in short-term detention facilities, this type of facility will not be discussed in this Note.

Chapter 343 of TAC defines disciplinary seclusion as "[t]he separation of a resident from other residents for disciplinary reasons, and the placement of the resident alone in an area from which egress is prevented for more than 90 minutes."[14] Officials can only use disciplinary seclusion when a resident violates a major rule or "poses an imminent physical threat to self or others."[15] TAC defines major rule violations as "serious behavior against persons or property and behavior that poses a serious threat to institutional order and safety."[16]

Under TAC, each facility creates its own disciplinary rules, including a list of major rule violations.[17] Therefore, facilities have the discretion to determine what conduct justifies the use of seclusions that have the potential of lasting for days.[18] Finally, juvenile facilities must report the total number of disciplinary seclusions to the TJJD.[19] Though TAC may appear to provide sufficiently structured guidelines for disciplinary seclusion, vagueness in the law and lack of transparency gives juvenile facilities the discretion to create disciplinary rules that are contrary to the intent of Texas law, that are contrary to the rehabilitative goals of the juvenile justice system, that are unconstitutionally vague, and that do not serve a legitimate purpose.

Current law permits facilities to use disciplinary seclusion for purposes outside the intent of the law. For instance, some counties define the following conduct as constituting a "major rule violation": "disrespectful behavior toward staff," "disrupting the group," "manipulating staff," and "horseplay."[20] However, a plain reading of TAC's definition of "major rule violation" brings these activities outside the scope of the legislative intent. The definition of "major rule violation" encompasses only high-level behavioral offenses; a commonsense interpretation of the term "horseplay" cannot include the type of high-level behavioral offense described in TAC's definition of

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[11] *See* TEX. FAM. CODE ANN. § 51.12 (2013) (listing the conditions of detention of juveniles).
[12] ADMIN. § 343.
[13] *Id.* § 351.
[14] *Id.* § 343.100(11).
[15] *Id.* § 343.288(a).
[16] *Id.* § 343.274(1).
[17] *Id.* § 343.274.
[18] *See id.* § 343.274 (2013) (allowing each "facility" to develop and implement a written resident discipline plan, including seclusion); *id.* § 343.288(c).
[19] *Id.* § 343.214 (6).
[20] *Major Rule Violations by County*, *supra* note 1.

"major rule violation."[21] A plain reading of TAC shows that disciplinary seclusion should only be used when necessary.[22] In allowing juvenile facilities discretion to determine what conduct qualifies as a major rule violation, the law effectively permits disciplinary seclusion to be used for arbitrary reasons.

The overuse of disciplinary seclusion is also contrary to the juvenile justice system's goal of rehabilitation—a goal that TJJD has explicitly named among its priorities.[23] Describing the psychological effects of placing juveniles in long periods of seclusion, Dr. Craig Haney, U.C. Santa Cruz psychology professor, stated "[y]ou're basically taking someone who's in the process of finding out who they are and twisting their psyche in a way that will make it very, very difficult for them to ever recover."[24] Some courts, including the court in *Morales,* have also found that the practice of placing juveniles in seclusion for prolonged periods can be anti-rehabilitative.[25] Given the malleability of an adolescent's brain development, juveniles may be particularly amenable to change and rehabilitation as they grow older.[26]

Moreover, some disciplinary rules in juvenile facilities are unconstitutionally vague. First, the Fourteenth Amendment requires that prison rules and regulations be sufficiently clear so as to place inmates on notice of what conduct is prohibited.[27] In the 1980s, the Fifth Circuit in *Ruiz v. Estelle*[28] upheld the district court's determination that specific Texas Department of Corrections disciplinary rules, such as those prohibiting "general agitation," "disrespectful attitude," and "laziness" were unconstitutionally vague.[29] Similarly, certain major rule violations currently implemented by juvenile facilities, including "disrespectful behavior toward staff,"[30] are unconstitutionally vague as they do not sufficiently define what conduct is prohibited. Because these rules are vague, they are open to the subjective interpretation of the guards at

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[21] *See* ADMIN. § 343.274 (defining major rule violations as those constituting "serious behavior against persons or property and behavior that poses a serious threat to institutional order and safety").

[22] *Id.* § 343.274 (1).

[23] TEXAS JUVENILE JUSTICE DEP'T, STRATEGIC PLAN 2013–2017, at 19 (2012), *available at* https://www.tjjd.texas.gov/publications/reports/TJJD%20Strategic%20Plan%20-%20FINAL%20-%20JULY%202012.pdf, <http://perma.cc/7ST-YJ2D>; 12 TEX. HUM. RES. CODE § 201.002(2)(d) (West 2013).

[24] Matt Olsen, *Kids in the Hole—Juvenile Offenders*, 67 PROGRESSIVE 26, 27 (2003).

[25] *See* Morales v. Turman, 364 F. Supp. 166, 174 (E.D. Tex. 1973) (holding that "placing inmates in solitary confinement or secured facilities, in the absence of any legislative or administrative limitation on the duration and intensity of the confinement and subject only to the unfettered discretion of correctional officers, constitutes cruel and unusual punishment"); Inmates of Boys' Training Sch. v. Affleck, 346 F. Supp. 1354, 1366–67 (D.R.I. 1972) (describing solitary confinement as an inevitable road to a juvenile's destruction).

[26] *See generally* LAURENCE STEINBERG ET AL., *The Study of Development Psychopathology in Adolescence: Integrating Affective Neuroscience with the Study of Context*, *in* 2 DEVELOPMENTAL PSYCHOL. 710 (2d ed. 2006).

[27] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[28] 666 F.2d 854 (5th Cir. 1982).

[29] *Id.* at 862, 869.

[30] *Major Rule Violations by County*, *supra* note 1.

juvenile facilities. Therefore, facilities are permitted to create rules that are contrary to the intent of the law, and these rules are so vague that they can be easily interpreted to encompass almost any behavior. TAC gives facilities too much discretion, and some facilities have abused the discretion in violation of the Constitution. The extent of that abuse is unknown to the general public due to a lack of transparency.

Finally, prolonged periods of seclusion serve little legitimate purpose. The First Circuit held in *Santana v. Collazo*[31] that juvenile detention facilities in Puerto Rico "failed to meet the[] burden of showing a legitimate interest in confining juveniles in isolation for as long as twenty days."[32] In its analysis, the court relied on the opinion of experts that "isolation for longer than a few hours serves no legitimate therapeutic or disciplinary purpose and is unnecessary to prevent harm unless a juvenile is severely emotionally disturbed."[33] Ultimately, the court acknowledged that there may be times when prolonged periods of seclusion are necessary.[34] While periods of seclusion may be necessary for a facility to maintain order, no legitimate purpose is served when disciplinary seclusions is used for low-level behavioral offenses. Prolonged periods of seclusion should only be used when absolutely necessary considering the anti-rehabilitative effect of the practice and the fact that the practice serves little legitimate purpose.

Increased transparency would help prevent the abuse and overuse of disciplinary seclusion in Texas that arises from the discretion given to disciplinary facilities in defining "major rule violations" and the vagueness of the related statutory definitions. New reporting requirements have recently been instituted in Texas; however these requirements are minimal and data have yet to be implemented.[35] Just as transparency could have prevented the type of abuse that was the subject of *Morales*[36] in the 1970s and the sex scandal in 2007, transparency can be essential to ensuring that juvenile seclusion is administered sparingly and appropriately.[37] Considering the public interest in knowing what is happening to youth in juvenile facilities coupled with the heightened potential for abuse when a facility is allowed to operate under a cloak of obscurity, greater transparency is needed.

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[31] 793 F.2d 41 (1st Cir. 1986).

[32] *Id.* at 48.

[33] *Id.* at 43; *see also id.* at 47 (citing as a question for remand the need for expert testimony from the defendant challenging plaintiff's testimony that "isolation of juveniles for longer than a few hours, *under any conditions*, is not reasonably related to any institution's legitimate objectives.").

[34] *Id.* at 46 (refraining from substituting the court's judgment for that of experts and correction officials charged with maintaining order and security).

[35] *See* S.B. 1003, 83d Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01003F.htm, <http://perma.cc/4JYC-K3U5> (providing for the collection of data on the length of seclusion for juveniles and their access to mental and health services during that time); *see also infra* Part V.B.2.a.

[36] *See* Morales v. Turman, 364 F. Supp. 166, 173, 176 (E.D. Tex. 1973) (describing the abuse in detail and ordering relief).

[37] Moreno, *supra* note 8.

IV. THE COST OF DISCIPLINARY SECLUSION AND THE BENEFITS OF REFORM

A. Psychological Harm

Current law does not adequately protect the mental health of juveniles placed in disciplinary seclusion, and it permits the overuse of prolonged periods of disciplinary seclusion.

Considering the psychological harm of seclusion, stricter policies are needed to safeguard the mental health of juveniles held in disciplinary seclusion. Both courts and studies have found that solitary confinement not only exacerbates mental illness in the already mentally ill, but also causes psychological harm to individuals without any known mental illnesses.[38]

Disciplinary seclusion is particularly harmful to juveniles with mental illnesses. In *Ruiz*, the Southern Federal District Court of Texas held that placing the mentally ill in solitary confinement "whose illness can only be exacerbated by the depravity of their confinement" violated the Eighth Amendment.[39] Solitary confinement is generally understood as prolonged periods, an average of twenty-three hours per day, of social isolation in a restricted environment.[40] Current Texas law allows officials to place juveniles with mental illnesses in disciplinary seclusion for periods in excess of twenty-four hours.[41]

Juveniles without any known mental illnesses are also at high risk of suffering from the adverse effects of disciplinary seclusion. In *Madrid v. Gomez*,[42] the U.S. District Court for the Northern District of California found that inmates who are at an unreasonably high risk of suffering serious mental illness, as well as mentally ill inmates, were especially vulnerable populations, and on that basis held that solitary confinement constituted cruel and unusual punishment for those two categories of inmates.[43] According to mental health experts, juveniles may be at a high risk of suffering from the psychiatric consequences of prolonged or even short periods of seclusion.[44] Furthermore, the typical onset for many

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[38] *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 913-15 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001) (noting that administrative segregation can cause severe psychological harm and aggravate already existing mental illnesses); Mitchell & Varley, *supra* note 2, at 252–53.

[39] *Ruiz*, 37 F. Supp. 2d at 915.

[40] *See* CHASE RIVELAND, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 5 (1999) (describing solitary confinement as "locking an inmate in an isolated cell for an average of twenty-three hours per day with limited human interaction, little constructive activity, and an environment that assures maximum control over the individual").

[41] 37 TEX. ADMIN. CODE § 343.288(c) (2013).

[42] 889 F. Supp. 1146 (N.D. Cal. 1995).

[43] *Id.* at 1267.

[44] *See* Mitchell & Varley, *supra* note 2, at 252–53 (suggesting that young people may be more vulnerable to the detrimental effects of isolation).

neuropsychiatric illnesses, such as schizophrenia, is late adolescence or early twenties.[45] Under current Texas law, officials must observe juveniles held in disciplinary seclusion at random intervals, not to exceed fifteen minutes.[46] However, the law does not require any assessment, evaluation, or counseling to determine whether the juvenile is facing any adverse mental health consequences as a result of the seclusion.

In fact, juveniles held in seclusion are more likely to commit suicide. The court in *Indiana Protection and Advocacy Services Commission v. Commissioner, Indiana Department of Corrections*,[47] a recent decision by the U.S. District Court for the Southern District of Indiana, held that subjecting persons with mental illnesses to solitary confinement violated the Eighth Amendment.[48] The court relied on findings that solitary confinement is associated with a disproportionately higher number of prisoner suicides than the number of suicides committed by prisoners in the general prison population.[49] A 2009 U.S. Department of Justice study on suicides by incarcerated juveniles found that juveniles held in behavioral seclusion committed nearly half the suicides analyzed.[50] Despite the high rate of suicides amongst youth held in seclusion, current Texas law allows for the overuse of disciplinary seclusion. In 2013, Texas youth experienced more than 36,000 disciplinary seclusions in county juvenile facilities.[51] Thousands of these seclusions lasted longer than twenty-four hours.[52] Because of the correlation between seclusion and suicide, disciplinary seclusion should be used infrequently, and protective policies should be enacted.

B. The Financial Cost of Disciplinary Seclusion

In addition to its psychological costs, disciplinary seclusion creates an additional financial burden on the state due to housing costs, potential litigation, and increased recidivism. Limiting the use of disciplinary seclusion will result in significant cost-savings for Texas.

Based on the costly housing and security requirements necessary for solitary confinement of persons in adult prisons and jails, it is

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[45] Nitin Gogtay et al., *Age of Onset of Schizophrenia: Perspectives from Neuroimaging Studies*, 37 SCHIZOPHRENIA BULL., 504, 504–05 (2011).

[46] ADMIN. § 343.288.

[47] No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012).

[48] *Id.* at *23.

[49] *Id.* at *15–16.

[50] LINDSAY M. HAYES, U.S. DEP'T OF JUSTICE, NAT'L CTR. ON INSTS. AND ALTS., JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY 18 (2009), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/213691.pdf, <http://perma.cc/RU4X-YRC9>.

[51] *Number of Disciplinary Seclusions by County*, on file with TEX. J. C.L. & C.R., *available at* http://www.utexas.edu/law/journals/tjclcr/permanent/2013FallNumberofDisciplinarySeclusionsbyCounty.pdf, <http://perma.cc/G4HJ-BCDK>.

[52] *Id.*

possible that disciplinary seclusion in Texas's juvenile detention facilities—whose costs have not yet been studied—is a more costly option than housing inmates in the general population. Administrative segregation, which is a type of solitary confinement, may be a good indicator of the cost of disciplinary seclusion. In 2002, the cost of housing a prisoner in the general population in a Texas prison was $42.46 per day.[53] By contrast, the cost of housing a prisoner in administrative segregation was 45% higher, at $61.63 per day.[54] Evidence from Mississippi affirms the cost saving benefits of limiting the use of disciplinary seclusion; since 2007, the state has reduced the number of prisoners held in segregation from nearly 1,300 to 335, which has resulted in approximately $5.6 million in savings per year.[55]

Additionally, the relationship between disciplinary seclusion and recidivism may create long-term costs for the state. A 2006 report by the Commission on Safety and Abuse in America's Prisons described a study that found that solitary confinement was related to higher than average recidivism rates.[56] The study, conducted in Washington, tracked 8,000 former prisoners who were released in 1997 and 1998 and analyzed their rates of re-arrest.[57] It concluded that individuals who were released directly after being held in isolation had a recidivism rate of 64%, whereas those who had been subject to isolation but who had been held in the general prison population directly prior to being released had a recidivism rate of 41%.[58] Thus, not only is the practice of solitary confinement initially more expensive, but it creates additional consequences that have serious financial implications into the future.

Finally, limiting the use of disciplinary seclusion and creating tighter regulations could save the state of Texas money by avoiding the type of litigation discussed in the following section.[59] Increased regulation would reduce the need for litigation to clarify statutory

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[53] JULIE HOOK & NANCY ARRIGONA, CRIMINAL JUSTICE POLICY COUNCIL, MANGOS TO MANGOS: COMPARING THE OPERATIONAL COSTS OF JUVENILE AND ADULT CORRECTIONAL PROGRAMS IN TEXAS 12 (2003), *available at* http://www.lbb.state.tx.us/Public_Safety_Criminal_Justice/Reports/2003cpd.pdf, <http://perma.cc/RTQ2-697Y>.

[54] *Id.* at 34.

[55] Michael Jacobson, Dir., Vera Inst. of Justice, *Reassessing Solitary Confinement: Written Testimony Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 6 (June 19, 2012), *available at* http://www.vera.org/sites/default/files/resources/downloads/michael-jacobson-testimony-on-solitary-confinement-2012.pdf, <http://perma.cc/9KC4-W3VV>.

[56] JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, THE COMM'N ON SAFETY AND ABUSE IN AM.'S PRISONS, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 55 (2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf, <http://perma.cc/9YC5-8S7S> (citing DAVID LOVELL & CLARK JOHNSON, FELONY AND VIOLENT RECIDIVISM AMONG SUPERMAX PRISON INMATES IN WASHINGTON STATE: A PILOT STUDY (2004), *available at* http://www.son.washington.edu/faculty/fac-page-files/Lovell-SupermaxRecidivism-4-19-04.pdf, <http://perma.cc/W3CK-L6AY>).

[57] *Id.*

[58] *Id.*

[59] *See infra* text accompanying note 71.

ambiguities related to disciplinary seclusion.

C. National Trends

There is a national trend of treating juveniles more like children and less like adults. This includes the trend of rethinking the use of juvenile disciplinary seclusion.

National trends indicate that society has changed the way it views youth. The 1980s through the mid-1990s marked an era of increased criminalization of adolescent behavior. Juveniles were viewed as dangerous "superpredators" who deserved to be treated as adults and locked up.[60] Legislatures in nearly every state passed "adult crime, adult time" statutes, including waiver laws that allowed the prosecution of juveniles in adult criminal courts.[61]

However, the pendulum has started to swing back towards a more rehabilitative and less punitive model. Recent Supreme Court precedent emphasizes the need for a more rehabilitative system for juveniles, noting that there is a fundamental difference between juveniles and adults; in a recent line of U.S. Supreme Court decisions, including *Roper v. Simmons*,[62] *Graham v. Florida*,[63] and *Miller v. Alabama*,[64] the Court concluded that certain forms of punishments and sentencing schemes are unconstitutional when applied to juveniles.[65] The Court based these decisions on the understanding—driven by science and social science—that youth are fundamentally different from adults due to juveniles' capacity for change and rehabilitation, their lack of sense of responsibility, and their susceptibility to external pressures.[66]

States have started enacting legislation to reverse the increased criminalization of adolescent behavior. A growing number of states,

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[60] BARRY FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 208 (1999) (discussing laws that require juveniles to be tried in adult courts and the demonization of youth).

[61] Patrick Griffin et al., *Prevention, Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, JUV. OFFENDERS AND VICTIMS: NAT'L REP. SERIES BULL.1, 2–3 (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf, <http://perma.cc/L8Y5-NPJZ>.

[62] 543 U.S. 551 (2005).

[63] 560 U.S. 48 (2010).

[64] 132 S. Ct. 2455 (2012).

[65] *Miller*, 132 S. Ct. at 2475 (holding sentencing schemes that mandate life without possibility of parole violated the Eight Amendment as applied to juveniles); *Graham*, 560 U.S. at 74 (holding sentencing juvenile non-homicide offenders to life without parole violated the Eighth Amendment); *Roper*, 543 U.S. at 578 (holding sentencing juveniles to death violated the Eighth Amendment).

[66] *See Graham*, 560 U.S. at 68 (citing Brief for American Medical Association et al. as Amici Curiae 16–24; Brief for American Psychological Association et al. as Amici Curiae 22–27) (describing juvenile developmental psychology); *see also Miller*, 132 S. Ct. at 2468 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."); *Roper*, 543 U.S. at 569–70 (noting that juveniles cannot be categorized among the worst offenders because juveniles, in contrast to adults, lack a sense of responsibility, are vulnerable to external forces, and have a personality traits that are not fixed).

including Texas, have enacted legislation permitting youth accused of adult crimes to be detained in juvenile facilities, pending trial.[67] Other states have expanded their juvenile court jurisdiction and have raised the minimum age to try youths as adults.[68]

As part of this movement, states in the U.S. are taking steps to reform policies and practices restricting the use of solitary confinement. As of October 2010, 198 juvenile facilities across twenty-eight states have implemented a "best practices" program—Performance-based Standards—from the Council of Juvenile Correctional Administrators.[69] The standards state that juveniles should only be isolated to protect themselves and others from harm, and they further state that isolation "should be brief and supervised."[70]

For the facilities in the United States that have not changed policies and practices on their own, lawsuits have resulted in settlements limiting the use of prolonged periods of juvenile disciplinary seclusion. In the past decade, several lawsuits have ended in settlement agreements that restrict the amount of time a juvenile can be placed in seclusion, and one lawsuit resulted in a settlement agreement requiring mental health counseling for juveniles housed in isolation.[71] Though these lawsuits ended in settlement agreements, and it is well understood that cases are settled for a myriad of reasons, they nevertheless indicate that the justice system is making changes to how youth are treated. These settlements are part of the big picture—a trend in the direction of reducing and restricting juvenile seclusion.

Furthermore, parties to international human rights treaties as well as human rights experts support the trend in rethinking the use of prolonged periods of juvenile disciplinary seclusion. The United Nations Committee on the Rights of the Child, the treaty body that monitors

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[67] CAL. WELF. & INST. CODE §§ 207–208 (West 2006); H.B. 12-1139, 68th Gen. Assemb., 2d Reg. Sess. (Colo. 2012); S.B. 1209, 82nd Leg., Reg. Sess. (Tex. 2011); S.B. 1169, 2009–2010 Gen. Assemb., Reg. Sess. (Penn. 2010); S.B. 259, 2010 Gen. Assemb., Reg. Sess. (Va. 2010).

[68] CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 29–40 (2011), *available at* http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf, <http://perma.cc/JX6D-QPYS>.

[69] COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, PERFORMANCE-BASED STANDARDS: SAFETY AND ACCOUNTABILITY FOR JUVENILE CORRECTIONS AND DETENTION FACILITIES 2 (2011), *available at* http://www.in.gov/idoc/dys/files/PbS_InfoPacket.pdf, <http://perma.cc/4P47-HE3K>.

[70] COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, PERFORMANCE-BASED STANDARDS: REDUCING ISOLATION AND ROOM CONFINEMENT 2 (2012), *available at* http://pbstandards.org/uploads/documents/PbS_Reducing_Isolation_Room_Confinement_201209.pdf, <http://perma.cc/Q4AY-BEHM>.

[71] David Crary, *Solitary Confinement for Youths Should be Banned, Makes Juveniles 'Go Crazy': Human Rights Watch*, HUFFINGTON POST (Oct. 10, 2012), http://www.huffingtonpost.com/2012/10/10/solitary-confinement-for-youths-banned_n_1954848.html, <http://perma.cc/A38U-RN8Z> (listing settlement agreements over the past several years, including: Mississippi's lawsuit settlement with an agreement to stop placing minors in solitary confinement for more than 20 hours at a time; Montana's lawsuit settlement with an agreement to regulate the amount of time juveniles could be placed in isolation without a top-level review of the case; and West Virginia's Division of Juvenile Services partial lawsuit settlement with an agreement that young offenders should not be isolated as often and should be assessed by a counselor).

compliance with the United Nations Convention on the Rights of the Child, has recommended a strict limitation of juvenile solitary confinement.[72] Similarly, the United Nations Committee Against Torture, the treaty body that monitors compliance with the United Nations Convention Against Torture (ratified by the United States in 1994), has further called for the eventual abolition of solitary confinement.[73] These international opinions against juvenile solitary confinement support the current trends in the United States of restricting the use of juvenile seclusion.

Nationally, society no longer sees juveniles as "super predators"; rather, society expects juveniles to be treated more leniently than adults in the criminal system. By limiting the anti-rehabilitative practice of disciplinary seclusion, Texas would align itself with domestic and international legal trends.

V. LEGISLATIVE REFORM IN TEXAS

A. The 82nd and 83rd Sessions: In Search of a Legislative Model

In the 82nd legislative session,[74] held in 2011, the only two proposed bills addressing seclusion or segregation in detention facilities were House Bill (H.B.) 3764, "relating to the reporting of certain information regarding inmates and the use of administrative segregation by the Texas Department of Criminal Justice" (TDCJ),[75] and H.B. 3761, "relating to the treatment of and services provided to certain inmates in the custody of the [TDCJ]," including those held in administrative segregation.[76] Neither bill passed.[77]

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[72] U.N. Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child, ¶ 41, U.N. Doc. CRC/C/15/Add.151 (July 10, 2001) (recommending that children not be "subject to solitary confinement, unless it is in their best interest and subject to court review").

[73] U.N. Comm. Against Torture, Consideration of Reps. Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, ¶ 14, U.N. Doc. CAT/C/DNK/CO/5 (July 16, 2007).

[74] Texas's legislature is only in session every two years. TEX. GOV'T CODE § 301.001 (2013).

[75] House Committee Report, H.B. 3764, 82d Leg., Reg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB03764H.htm, <http://perma.cc/C9CL-XZ3U>.

[76] H.B. 3761, 82d Leg., Reg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB03761I.htm, <http://perma.cc/3HGN-C43M>.

[77] *See History, H.B. 3764, 82d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB3764, <http://perma.cc/K9C6-25P5> (demonstrating that H.B. 3764 did not advance past the House Committee on Corrections); *History, H.B. 3761, 82d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB3761, <http://perma.cc/8LPP-D2QQ> (demonstrating that House Bill 3761 died in the House Committee on Corrections).

In the 83rd legislative session, held in 2013, several bills relating to the use of seclusion or segregation in prisons, jails, and juvenile facilities were proposed. Although the rise in seclusion and segregation related bills may have reflected legislators' increasing interest in the subject, other tactical considerations also impacted the numerosity. Legislators and advocates working to secure legislative reform adopted a "don't put all of your eggs in one basket" strategy and worked to introduce several different approaches to the issue carried in bills by different authors. This tactic resulted in the passage of one bill—S.B. 1003.[78]

Among the proposed bills in the 83rd legislative session, H.B. 686 and companion bill S.B. 1802 would have required TDCJ to do a report on the use of administrative segregation in state prisons.[79] Neither bill advanced out of committee: H.B. 686 died in the House Committee on Corrections,[80] and S.B. 1802 died in the Senate Committee on Criminal Justice.[81] S.B. 1357, which would have regulated the use of administrative segregation in county jails, faced a similar fate, dying in the Senate Committee on Criminal Justice.[82]

H.B. 1266 and companion bill S.B. 1003 called for the independent third party review of seclusion practices in Texas.[83] S.B. 1003 was amended to contain a provision pertaining to data collection regarding disciplinary seclusion in juvenile facilities (potentially in anticipation of S.B. 1517's failure).[84] Although H.B. 1266 made it out of committee and was sent to Calendars,[85] it did not advance further.[86] S.B. 1003 passed

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[78] *See* S.B. 1003, 83d Leg., Reg. Sess., *supra* note 35.

[79] H.B. 686, 83d Leg., Reg. Sess. (Tex. 2013), http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/HB00686I.htm, <http://perma.cc/7BUK-DYQU>; S.B. 1802, 83d Leg., Reg. Sess. (Tex. 2013), http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01802I.htm, <http://perma.cc/Y5UT-AM6U>.

[80] *History, H.B. 686, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB686, <http://perma.cc/DN9-FV4S>.

[81] *History, S.B. 1802, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1802, <http://perma.cc/5ZMG-X9ZD>.

[82] *See History, S.B. 1357, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1802, <http://perma.cc/9KZM-AETU> (proposing to address the "use of administrative segregation or seclusion in county jails"); *History, S.B. 1357, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1357, <http://perma.cc/V82U-CFZJ> (noting that the bill died in the Senate Committee on Criminal Justice).

[83] *See* H.B. 1266, 83d Leg., Reg. Sess. (Tex. 2013), http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/HB01266I.htm, <http://perma.cc/YD97-JVAD> (proposing the creation of an "Adult and Juvenile Administrative Segregation Task Force"); S.B. 1003, 83d Leg., Reg. Sess., *supra* note 35 (proposing the appointment of "an independent third party to conduct a review of facilities").

[84] *See* Senate Committee Report, S.B. 1003, 83d Leg., Reg. Sess. (Tex. 2013), http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01003S.htm, <http://perma.cc/89RB-3QB2> (adding provisions requiring an independent third party to review, among other things, the access to mental and health services that detention facilities provide to adults and juveniles in seclusion, the number of adults and juveniles in seclusion who are "referred to mental health professionals," and the average length of seclusion for adults and juveniles).

[85] A "calendar" is a "list of bills or resolutions that is scheduled or eligible to be taken up for consideration on a specified date by the members of a chamber." *C*, GUIDE TO TEX. LEGIS. INFO.: GLOSSARY, http://www.tlc.state.tx.us/gtli/glossary/glossaryc.html, <http://perma.cc/6V6H-2V6H>.

[86] *History, H.B. 1266, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.

the Senate and proceeded to the House.[87] On May 6, 2013, the bill was issued a $127,854 fiscal note, thereby damaging its potential to pass.[88] Despite all odds, on June14, 2013, it was signed into law.[89]

S.B. 1517, authored by Senator Leticia Van de Putte, was a finely tailored bill that only affected the use of disciplinary seclusion in juvenile facilities.[90] As this paper will discuss, it passed the Senate Committee on Criminal Justice, but was unable to advance past the House Committee on Corrections.[91]

The failure of so many bills might indicate that the legislature is unwilling to regulate the disciplinary practices of prisons, jails, and juvenile facilities. However, the passage of S.B. 1003 may have been an indication that the legislature is only unwilling to pass substantive legislation without having access to additional data.[92] The passage of S.B. 1003 and the data collection it entails may pave the way for legislation similar to S.B. 1517 to gain more traction in the next legislative session.

B. S.B. 1517: Fighting the Good Fight Without Facts or Favor

On March 8, 2013, Democratic Senator Leticia Van de Putte introduced S.B. 1517, which was referred to the Senate Committee on Criminal Justice.[93] Several subsequent drafts were introduced in an attempt to compromise with county facilities, which were opposed to the bill.[94] Though the author of the bill attempted to appease the county facilities, often to the detriment of the bill's objectives, the attempted compromise was not enough to get the bill passed.[95]

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us/BillLookup/History.aspx?LegSess=83R&Bill=HB1266, <http://perma.cc/XRR3-M5M3>.

[87] *History, S.B. 1003, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1003, <http://perma.cc/3CGY-L4BV> [hereinafter *History, S.B. 1003*].

[88] *Legislative Budget Brd., Fiscal Note, S.B. 1003, 83d Leg., Reg. Sess. (Tex. 2013)*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/tlodocs/83R/fiscalnotes/html/SB01003E.htm, <http://perma.cc/H82J-MGZ8>.

[89] *History, S.B. 1003*, *supra* note 87.

[90] S.B. 1517, 83d Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01517I.htm, <http://perma.cc/7P8A-ML56> [hereinafter S.B. 1517].

[91] *History, S.B. 1517, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1517, <http://perma.cc/W85-KUBW> [hereinafter *History, S.B. 1517*].

[92] *See* S.B. 1003, 83d Leg., Reg. Sess., *supra* note 35 (requiring an independent third party to review statistics and collect data on the length of seclusion for juveniles and their access to mental and health services during that time).

[93] *History, S.B. 1517*, *supra* note 91.

[94] *Text, S.B. 1517, 83d Leg., Reg. Sess.*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=83R&Bill=SB1517, <http://perma.cc/7FS8-2PK2>.

[95] *See infra* Part V.B.1.

1. From S.B. 1517 to C.S.S.B. 1517: A Long and Futile Compromise

In response to the juvenile facilities' opposition to the bill, Senator Leticia Van de Putte's office drafted a five-page proposed committee substitute (proposed C.S.S.B. 1517), to address some of the opposition from county juvenile facilities.[96] This proposed substitute was presented to the Senate Committee on Criminal Justice at a public hearing on April 23, 2013.[97]

Despite the attempt to appease county officials, the proposed C.S.S.B. 1517 continued to face strong opposition at the hearing.[98] During the hearing, Senator Van de Putte, who sensed that the bill faced substantial obstacles, asked the probation officers testifying in opposition to the bill whether they were opposed to the data collection portion of the bill.[99] The officers unanimously responded that they had no problem with the reporting requirement.[100]

After the public hearing, Senator Van de Putte offered a committee substitute (C.S.S.B. 1517), which appeared to have been drafted as a direct reaction to the concerns that the county facilities expressed at the hearing.[101] C.S.S.B. 1517 gutted all of the substantive changes that the proposed C.S.S.B. would have required regarding the manner in which facilities were currently using disciplinary seclusion.[102] In apparent response to the feedback from the probation officers, the only thing left of the proposed C.S.S.B. 1517 in C.S.S.B. 1517 was the data collection requirement.[103]

Ultimately, the engrossed version of S.B. 1517 was substantially

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[96] Proposed Committee Substitute for S.B.1517, 83d Leg., Reg. Sess. (Tex. 2013), on file with TEX. J. C.L. & C.R., *available at* http://www.utexas.edu/law/journals/tjclcr/permanent/2013FallProposedCSSB1517.pdf, <http://perma.cc/8C3S-SD44> [hereinafter Proposed C.S.S.B. 1517]. A "committee substitute" is a "complete, new bill or resolution recommended by a committee in lieu of the original measure. A committee will report a committee substitute rather than a bill with a large number of individual amendments when the committee wishes to make a substantial number of changes to the original measure. The committee substitute must contain the same subject matter as the original measure." *C*, *supra* note 85.

[97] *Hearing on S.B. 1517 Before the S. Comm. on Criminal Justice*, 83d Leg., Reg. Sess. (Apr. 23, 2013), *available at* http://www.senate.state.tx.us/75r/senate/commit/c590/c590.htm, <http://perma.cc/7ULW-KBY7> [hereinafter *Hearing on S.B. 1517*].

[98] *Id.*

[99] *Id.* (statement of Sen. Leticia Van de Putte, Member, S.).

[100] *Hearing on S.B. 1517*, *supra* note 97.

[101] Committee Substitute S.B. 1517, 83d Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01517S.htm, <http://perma.cc/TQ42-FTEG> [hereinafter C.S.S.B. 1517].

[102] *Compare* Proposed C.S.S.B. 1517, *supra* note 96 (providing that "[a] child placed in or committed to a juvenile facility may not be placed in disciplinary seclusion for longer than a four-hour period unless the child is placed in disciplinary seclusion as a result of assault, escape or attempted escape from the facility, sexual misconduct, possession of contraband, or inciting riot" and that "[a] child placed in disciplinary seclusion for longer than a one-hour period must receive counseling from staff"), *with* C.S.S.B. 1517, *supra* note 101 (removing these sections and maintaining only the data collection requirements for juvenile facilities).

[103] *Id.*

the same as C.S.S.B. 1517, except for the addition of an amendment from Senator Van de Putte that clarified the definition of "disciplinary seclusion" and "juvenile facility."[104] Although the engrossed bill passed the Senate, it died in the House after being placed on the General State Calendar.[105] Although the county facilities did not oppose the final bill's data collection requirement, it nonetheless failed because of proponents' inability to combat the stark opposition they faced.

2. S.B. 1517: A Model Bill Surrounded by Controversy

Of the many bills addressing the use of seclusion and segregation in prisons, jails, and juvenile facilities, S.B. 1517 was a model bill. In the introduced and the proposed C.S.S.B. versions of the bill, the bill addressed a very specific type of seclusion, "disciplinary seclusion," and it proposed a very simple and very important resolution: forbidding the use of disciplinary seclusion in excess of 4 hours unless absolutely necessary and adding safeguards to protect the mental health of juveniles.[106] This section discusses the model provisions of S.B. 1517 in its introduced and proposed C.S.S.B. forms, and analyzes why the provisions ultimately failed.

a. Making the Disciplinary Rules Legitimate, Unambiguous, and Transparent

The first two versions of Van de Putte's bill—the introduced S.B. 1517 and the proposed C.S.S.B. 1517—created statewide standards governing the use of disciplinary seclusion in excess of four hours, stricter administrative approval requirements, and policies to promote transparency about the use of disciplinary seclusion.[107] Together, these standards would have cured disciplinary rules from being vague and arbitrary.

First, by defining the behavior eligible for disciplinary seclusion, both the introduced S.B. 1517 and the proposed C.S.S.B. 1517 would have eliminated the use of prolonged periods of disciplinary seclusion for minor offenses and would have required that the disciplinary rules used to justify prolonged periods of seclusion be sufficiently clear.[108] In the

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[104] Engrossed, S.B. 1517, 83d Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01517E.htm, <http://perma.cc/ES92-G5MB>.

[105] *S.B. 1517, History*, *supra* note 91.

[106] S.B. 1517, *supra* note 90; Proposed C.S.S.B. 1517, *supra* note 96.

[107] *Id.*

[108] *See* S.B. 1517, *supra* note 90 (providing that "[a] child placed in or committed to a juvenile facility may not be placed in disciplinary seclusion for longer than a four-hour period unless the

introduced bill, disciplinary seclusion in excess of four hours was only permitted as an institutional response to assault, escape, or attempted escape—significantly reducing the categories of behavior currently eligible for prolonged periods of disciplinary seclusion.[109] This provision was drastically changed in the proposed C.S.S.B. 1517, which allowed disciplinary seclusion in excess of four hours as an institutional response to assault, sexual misconduct, escape, attempted escape, possession of contraband, and inciting a riot.[110] The proposed C.S.S.B. 1517 also provided definitions for these violations.[111] The new categories were based on Harris County's list of major rule violations, and were defined based on the Texas Penal Code.[112] Neither bill sought to redefine "major rule violation"; rather, the bills limited the justifications that facilities could use for prolonged periods of seclusion. According to a staffer in Senator Van de Putte's office, the broadening of the definition between the two versions of the bill was made in response to opposition from county juvenile facilities.[113]

County officials argued that juvenile-facilities officials require discretion to tailor the rules so as to meet the needs of each facility's population. At the April 23, 2013, public hearing, county officials stated that the bill ignored the reality of running juvenile facilities and gave too much credence to the "opinions of outsiders."[114] Mark Williams, Tom Green County's chief probation officer, claimed that "the people that don't work with the kids are the ones that really like this bill . . . the ones that work with the kids are the ones that do not."[115] County officials alleged that limiting the instances of disciplinary seclusion to four hours would not be sufficient to make an impression on juveniles.[116] Given that the bill ultimately failed, this argument appears to have been convincing to the legislators, potentially because they also fell into this category of "outsiders."

Second, the proposed C.S.S.B. 1517 required a facility administrator to approve seclusions in excess of four hours—a sharp reduction from the current law's allowance for seclusion without

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child is placed in disciplinary seclusion as a result of an assault or an escape or attempted escape from the facility"); Proposed C.S.S.B. 1517, *supra* note 96 (providing that "[a] child placed in or committed to a juvenile facility may not be placed in disciplinary seclusion for longer than a four-hour period unless the child is placed in disciplinary seclusion as a result of assault, escape or attempted escape from the facility, sexual misconduct, possession of contraband, or inciting riot").

[109] *Compare* S.B. 1517, *supra* note 90, *with* 37 TEX. ADMIN. CODE § 343 (2013) (defining the "major rule violations" that permit the use of disciplinary seclusion).

[110] Proposed C.S.S.B. 1517, *supra* note 96.

[111] *Id.*

[112] *Id.*; Conversation between Catherine McCulloch and Staffer, Sen. Leticia Van de Putte's Office, Austin, Tex. (April 5, 2013) [hereinafter Conversation between McCulloch and Staffer].

[113] Conversation between McCulloch and Staffer, *supra* note 112.

[114] Patrick Michels, *Advocates, Officers Spar Over Solitary Confinement for Youth*, TEX. OBSERVER, Apr. 24, 2013, http://www.texasobserver.org/advocates-officers-spar-over-solitary-confinement-for-youth/, <http://perma.cc/9SQX-X4D7>.

[115] *Id.*

[116] *Id.*

approval up to twenty-four hours.[117] By requiring facility administrators to expedite the review of a guard's decision to hold a juvenile in disciplinary seclusion, this provision would have created an additional obstacle to the abuse and overuse of prolonged periods of disciplinary seclusion.

Third, though C.S.S.B. 1517 eliminated much of the substance of the original version of S.B. 1517, both versions required more transparency from juvenile facilities regarding the use of disciplinary seclusion. The introduced bill would have required juvenile facilities to report to TJJD the duration and reason for each juvenile held in disciplinary seclusion,[118] whereas the proposed C.S.S.B. 1517 required the facilities to report to TJJD and make public the number of disciplinary seclusions, categorizing them as being in excess of ninety minutes but less than twenty-four hours, in excess of twenty-four hours but less than forty-eight hours, or in excess of forty-eight hours.[119] According to a staffer in Senator Van de Putte's office, the change between the two versions of the bill was the result of a threatened fiscal note.[120]

The proposed C.S.S.B. 1517 was therefore an attempt to compromise between county facility officials, who opposed a profound change to the use of seclusion, and the original bill, which would have significantly restricted the manner in which the counties could have used disciplinary seclusion. Although this compromise was a major concession to the counties, it ultimately failed because proponents lacked the data to demonstrate—to county officials and to the legislators—that the practice of disciplinary seclusion is overused and abused. Although the original bill tried to rectify this problem, the proposed C.S.S.B. 1517 removed the requirement of reporting the *reason* why an individual was held in disciplinary seclusion.[121] In the future, additional data produced by S.B. 1003 on the frequency and circumstances under which disciplinary seclusion is used in Texas may allow legislators to make informed decisions on reforming disciplinary seclusion.[122]

b. Reducing the Psychological Harm to Juveniles in Disciplinary Seclusion

Though no version of S.B. 1517 prohibited placing the mentally ill in disciplinary seclusion, both the introduced S.B. 1517 and the proposed

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[117] *Compare* S.B. 1517, *supra* note 90, *with* 37 TEX. ADMIN. CODE § 343.288(c) (2013).

[118] S.B. 1517, *supra* note 90.

[119] Proposed C.S.S.B. 1517, *supra* note 96.

[120] Conversation between McCulloch and Staffer, *supra* note 112.

[121] Proposed C.S.S.B. 1517, *supra* note 96.

[122] *See* S.B. 1003, 83d Leg., Reg. Sess., *supra* note 35 (providing for the collection of data on the length of seclusion for juveniles and their access to mental and health services during that time).

C.S.S.B. 1517 would have put stricter policies in place to safeguard the mental health of juveniles held in disciplinary seclusion. Additionally, these versions of S.B. 1517 would have reduced the use of prolonged periods of disciplinary seclusion in Texas, thereby decreasing the number of youth at risk for experiencing psychological harm.[123]

As a safeguard to mental health, the proposed C.S.S.B. 1517 required consultation with a mental health professional prior to the authorization of any seclusion of a resident with a known serious mental illness beyond a ten hour period, rather than current law's twenty-four hour period requirement.[124] Requiring a more expedient consultation with a mental health professional would have decreased the potential for psychological harm for mentally ill juveniles.

Additionally, both versions of the bill required assessment for disciplinary seclusion, although the proposed C.S.S.B. 1517 reduced those requirements. The introduced S.B. 1517 required that "a child placed in disciplinary seclusion for longer than a one-hour period must complete a therapeutic self-analysis assignment."[125] Instead, in lieu of the self-analysis assignment, the proposed C.S.S.B. 1517 required that juveniles held in disciplinary seclusion receive counseling from "staff" after one hour of seclusion.[126] According to a staffer in Senator Van de Putte's office, this was the result of county officials voicing safety concerns surrounding giving a child a writing utensil.[127] However, there were indications that the county facilities saw this as too heavy of a burden on their resources, as the therapeutic self-analysis might require them to hire more mental health personnel.[128] Ultimately, this compromise weakened the bill's ability to achieve the objective of safeguarding a juvenile's mental health, as the proposed C.S.S.B. only required a staff member—and not a mental health professional—to counsel juveniles held in disciplinary seclusion.[129]

The limited public data describing the conditions of disciplinary seclusion put proponents of the bill at a disadvantage when trying to articulate the psychological harm that juveniles suffer in such confinement. At the April 23, 2013, public hearing, proponents of the bill who testified, namely representatives of non-profit organizations,[130] used the phrase "solitary confinement" interchangeably with disciplinary seclusion.[131] Opponents of the bill who testified, namely county

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[123] *See supra* Part IV.A.

[124] Proposed C.S.S.B. 1517, *supra* note 96.

[125] S.B. 1517, *supra* note 90.

[126] Proposed C.S.S.B. 1517, *supra* note 96.

[127] Conversation between McCulloch and Staffer, *supra* note 112.

[128] *Id.*

[129] Proposed C.S.S.B. 1517, *supra* note 96.

[130] Witness List, 83d Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/witlistbill/html/SB01517S.htm, <http://perma.cc/QY5F-52LJ> [hereinafter Witness List].

[131] *Hearing on S.B. 1517*, *supra* note 97.

probation officers,[132] rejected this comparison, and argued that disciplinary seclusion in juvenile facilities is nothing like "solitary confinement,"[133] a term associated with super-maximum security prisons.[134] Since little public information exists on the conditions of disciplinary seclusion in Texas, proponents of S.B. 1517 struggled to counter the opponents' assertion. The proponents therefore attempted to address the opponents' lack of knowledge on this issue by offering the testimony of an individual who had been held in disciplinary seclusion as a juvenile.[135] Some senators dismissed this testimony and attempted to discredit the witness by focusing on his past indiscretions that led to his incarceration.[136]

Despite scientific evidence to the contrary, some Texas legislators do not view youth in the juvenile justice system as children. During the April 23, 2013, public hearing, some members of the Criminal Justice Committee expressed bias against youth in the juvenile justice system. Senator Charles Schwertner asked a witness testifying in favor of S.B. 1517: "How would you define 'juvenile'?"[137] When the witness responded that a juvenile is an individual under the age of eighteen, Senator Charles Schwertner pressed the witness: "So you're telling me that a seventeen year-old, 200-pound male is a child?"[138] Senator Leticia Van de Putte, author of the bill, responded that developmentally, seventeen year-olds are still children.[139] Senator Charles Schwertner's image of a 200-pound, seventeen year-old person ignores the developmental differences between juvenile and adults. Similarly, in 2012 Senator John Whitmire, Chair of the Criminal Justice Committee, used the phrase "hug a thug," to refer to measures that were lenient towards youth in the juvenile justice system.[140] Some Texas legislators view youth in the juvenile justice system as dangerous criminals; it is this bias that prevents these legislators from acknowledging the scientific research regarding the developmental differences between juveniles and adults. As discussed in Part IV.C, most of the country, including the U.S. Supreme Court, has started to treat juveniles in the justice system more like children and less like adults.[141] In order to achieve successful legislative reform in the area of disciplinary seclusion, Texas legislators

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[132] Witness List, *supra* note 130.

[133] *Hearing on S.B. 1517*, *supra* note 97.

[134] *See generally* DANIEL P. MEARS, URBAN INST., EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS (2006), *available at* http://www.urban.org/UploadedPDF/411326_supermax_prisons.pdf, <http://perma.cc/WDM8-Z7NN>.

[135] *Hearing on S.B. 1517*, *supra* note 97 (statement of Witness Pete Garanzuay, Texas Network of Youth Servs.).

[136] *Id.* (statement of Sen. John Whitmire, Chair, S. Comm. on Criminal Justice).

[137] *Id.* (statement of Sen. Charles Schwertner, Member, S. Comm. on Criminal Justice).

[138] *Id.*

[139] *Id.* (statement of Sen. Leticia Van de Putte, Member, S.).

[140] Mike Ward, *Juvenile Justice Officials Disagree on Reopening Waco-Area Lockup*, AUSTIN AM.-STATESMAN, May 24, 2012, http://www.statesman.com/news/news/state-regional-govt-politics/juvenile-justice-officials-disagree-on-reopening-w/nRn2d/, <http://perma.cc/BAQ2-RNHX>.

[141] *See supra* Part IV.C.

must make a more reasoned consideration of the science involving this population.

c. Final Arguments in the Debate: Reducing Cost & Aligning Texas with National Trends

Although unattached to particular provisions in the bill, two final arguments were important parts of the debate: reducing the cost of seclusion and aligning Texas with national trends. First, although data from adult prisons points to the unnecessary expense of solitary confinement, Texas lacks similar data regarding the cost of disciplinary seclusion in juvenile facilities. As a result, proponents of the bill faced difficulties demonstrating the cost-saving advantages of a restriction on the use of disciplinary seclusion.

At the April 23, 2013, public hearing, county juvenile facility officials asserted that disciplinary seclusion is necessary to control inmates' behavior in juvenile facilities.[142] Proponents argued that the bill, if passed, would only *limit* prolonged periods of disciplinary seclusion.[143] Therefore, officials would still be able to use short periods of disciplinary seclusion for low-level behavioral offenses and prolonged periods of disciplinary seclusion when necessary. Furthermore, research has shown a correlation between the use of solitary confinement and levels of violence and other behavioral problems within penal systems.[144] In Mississippi, there was a reduction in prisoner-on-prisoner violence and prisoner-on-staff violence as a result of limiting the use of administrative segregation.[145] However, the arguments of the county officials were yet again more convincing to the legislators because of their practical experience working with youth in juvenile facilities.

Second, S.B. 1517 would have put Texas in line with national trends because it would have required juvenile facilities to discipline juveniles in a way that would have taken into account their age and developmental vulnerabilities. The introduced S.B. 1517 and the proposed C.S.S.B. 1517 required that "[t]he board shall review . . . and incorporate best practices."[146] This provision would have ensured that Texas would not only be on par with other states, but that Texas would be an exemplary state.

However, some Texas legislators continue to view juveniles in the justice system as hardened criminals. The argument that rethinking the use of disciplinary seclusion puts Texas in line with national trends may

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[142] *Hearing on S.B. 1517*, *supra* note 97.

[143] *Id.*

[144] *See generally* Holly Miller & Glenn Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 CRIM. BEHAV. & MENTAL HEALTH 85 (1997).

[145] Jacobson, *supra* note 55.

[146] Proposed C.S.S.B. 1517, supra note 96; S.B. 1517, *supra* note 90.

not have been convincing for a state that prides itself on its unique character.

VI. CONCLUSION

Considering the harmful effects of juvenile disciplinary seclusion and the potential for facilities to abuse the practice, legislative reform is necessary. While legislation is clearly the answer, the path to reform remains a question. Must there be another lawsuit like *Morales* to highlight the issue?[147] Must there be another sex scandal, like the one in 2007, to move legislators to action?[148] Although the 83rd legislative session did not result in meaningful legislative reform, the S.B. 1517 saga exposed the main weaknesses of the legislative campaign to reform juvenile seclusion in Texas: 1) a lack of substantive data; and 2) opposition from detention facilities. However, there are cures to these two ills. First, the 83rd legislative session did yield a bill, S.B. 1003, which requires improved data collection and allows for an independent third party review of seclusion in juvenile facilities. This bill might produce some of the needed data to effectuate the arguments made regarding S.B. 1517. Second, in anticipation of the next legislative session and to communicate why the benefits of reform outweigh the potential cost to detention facilities, proponents can build relationships with the facilities, garner their support, and find a facility willing to represent itself as the model of reform. Texas must send its anti-rehabilitative juvenile justice policy to the history books, and ensure that it moves forward with the nation to protect juvenile mental health in a way that comports with American constitutional values.

[147] Morales v. Turman, 364 F. Supp. 166, 173 (E.D. Tex. 1973).
[148] Moreno, *supra* note 8.

Confronting the Fear of "Too Much Justice":[1] The Need for a Texas Racial Justice Act

Caitlin Naidoff*

ABSTRACT

Texas should enact a Racial Justice Act. The Supreme Court has acknowledged the constitutional framework's inability to adequately address racial discrimination in the application of the death penalty. Instead, the Court encouraged legislatures to respond to this racial injustice. North Carolina responded with the North Carolina Racial Justice Act (RJA). Texas should follow North Carolina's lead and pass an RJA. Texas shares with North Carolina similar empirical, historical, and anecdotal evidence of racial injustice in capital sentencing, evidencing the same need for reform that led North Carolina to pass an RJA. Yet, interest convergence in Texas suggests Texas' political will to effect reform exceeds North Carolina's political will and could, therefore, withstand the kind of opposition that led to the repeal of North Carolina's RJA. Moreover, Texas' longstanding political will against abolition efforts weighs in favor of passing an RJA because there is little fear that reform could further entrench the death penalty in Texas to a meaningful degree.

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[1] This phrase is taken from Justice Brennan's dissent from *McCleskey v. Kemp*, in which Brennan criticizes the majority's refusal to allow capital defendants to introduce statistical evidence of racial discrimination to challenge their death sentences. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) ("The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice.").

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I. INTRODUCTION

> *When our criminal justice system was formed, African Americans were enslaved. Our system of justice is still healing from the lingering effects of slavery and Jim Crow. In emerging from this painful history, it is more comfortable to rest on the status quo and be satisfied with the progress already made. But the RJA calls upon the justice system to do more. The legislature has charged the Court with the challenge of continuing our progress away from the past.*[2]

In January 2013, Craig Watkins announced he would push for Texas to pass a Racial Justice Act (TX-RJA).[3] The TX-RJA would be based on a similar North Carolina law that allowed defendants to present statistical and other evidence that race was a "significant factor" in the decision either to charge the defendant with a capital offense, or to sentence the defendant to death.[4] As Watkins explained,

> Throughout history, race has unfortunately played a part, an ugly part, in our criminal justice system . . . . This is an opportunity for us to address not only the past, and those individuals who are still being affected by the disparities in treatment, but also in looking forward to make sure that we don't have those same disparities in our criminal justice system.[5]

Watkins's role as the Dallas County District Attorney makes his support for a TX-RJA particularly significant.

It would be unexpected for the typical elected prosecutor—in Texas, of all places—to advocate for a measure historically supported by the capital defense bar and liberal advocates. However, Watkins is an atypical D.A. His administration's work to exonerate wrongly convicted defendants, largely through DNA testing, has earned him national

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[2] Order Granting Motions for Appropriate Relief at *2–3, North Carolina v. Golphin et al., Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079, (N.C. Sup. Ct. Dec. 13, 2012) [hereinafter Golphin et al. Order of Relief], *available at* http://www.law.msu.edu/racial-justice/Golphin-et-al-RJA-Order.pdf, <http://perma.cc/5WML-9AY2>.

[3] Scott Goldstein, *Dallas DA Craig Watkins to Push for Law Allowing Appeals Based on Racial Factors*, DALL. MORNING NEWS, Jan. 22, 2013, http://www.dallasnews.com/news/community-news/dallas/headlines/20130121-dallas-da-craig-watkins-to-push-for-law-allowing-appeals-based-on-racial-factors.ece <http://perma.cc/6HFC-7LUE>.

[4] *Id.*

[5] *Id.*

acclaim.[6] More significantly, Texas is atypical. In 2012, racial minorities comprised 89% of those sentenced to death in Texas—compared to 60% nationwide.[7] Studies suggest that these disparities are the result of sentencing patterns based on the race of defendants and victims involved, rather than either the heinousness of the crimes or other characteristics deemed appropriate in capital sentencing.[8] Additional research shows that racial bias may also affect the process of selecting capital juries, resulting in a lack of minority representation that contributes to the disparities and potential discrimination in sentencing.[9]

North Carolina, plagued by analogous evidence of past and present racial discrimination, developed legislation aimed at addressing racial bias in its capital sentencing scheme.[10] In both North Carolina and Texas, empirical studies of capital sentencing have revealed stark racial disparities that indicate that the death penalty is applied in an arbitrary manner.[11] Just as in North Carolina, capital punishment in Texas is marked by a long history of racial bias, and there is evidence to suggest that such bias persists today.[12] Furthermore, support from unlikely sources in Texas suggests that the political will to effect reform could withstand the kind of opposition that led to the repeal of the NC-RJA.[13]

This Note suggests that there is a sufficient basis and need for an RJA in Texas. Part II provides contextual background regarding litigation efforts to address racially biased capital sentencing. Part III discusses the conception of the NC-RJA as a legislative fix for this problem. Part IV examines historical, statistical, and anecdotal evidence of racial bias in North Carolina and Texas—illustrating that these states are similarly situated in their need for an RJA. Part V assesses the RJA proposals set forth during the 2013 Texas Legislative session and proposes a TX-RJA. Finally, Part VI addresses critics who (a) doubt the viability and impact of a TX-RJA, given the repeal of the NC-RJA, and (b) contend that reform efforts only entrench the death penalty and forestall or impede its abolition.

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[6] *Id.* (highlighting Watkins' push for DNA testing in the 2012 N.J. legislature); *e.g.*, Molly Hennessy-Fiske, *Dallas County District Attorney a Hero to the Wrongfully Convicted*, L.A. TIMES, May 8, 2012, http://articles.latimes.com/print/2012/may/08/nation/la-na-dallas-district-attorney-20120509 <http://perma.cc/NU3V-JFFM> (noting Watkins' stance on N.J. DNA bill); *60 Minutes: Freed from Conviction* (CBS television broadcast May 4, 2008), http://www.cbsnews.com/video/watch/?id=4069405n <http://perma.cc/VU5H-6XRB> (interviewing Watkins' on his position for DNA exoneration).

[7] *RACE: Dallas District Attorney Supports Racial Justice Act for Texas*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/race-dallas-district-attorney-supports-racial-justice-act-texas, <http://perma.cc/N9KW-2CJH>.

[8] *See infra* Part II.B.2.

[9] *Id.*

[10] *See* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2113 (2010) (discussing the impetus for the NC-RJA and describing its functionality).

[11] *See infra* Part IV.

[12] *See infra* Part IV.

[13] *See infra* Part V.

II. BACKGROUND: RACE AND THE DEATH PENALTY

A. Background: "Just" Theory and the Death Penalty

Some theorists suggest that racial disparities have no bearing on the justness of the death penalty.[14] This argument relies on the premise that all defendants found guilty of a death-eligible offense deserve the death penalty.[15] If a convicted defendant does not receive the death penalty, it is merely because the decisionmaker has been lenient.[16] Therefore, the influence of race on the administration of capital punishment only impacts the likelihood of leniency—which a convicted defendant does not deserve—and does nothing to alter the fact that defendants who *are* sentenced to death deserve that fate.[17] By this reasoning, there is no injustice done to the defendant justly condemned to death, merely because an unrelated defendant escaped the gallows. Other scholars counter that punishment's moral legitimacy depends on the moral legitimacy of the punishing institution.[18] Under this framework, a just punishment requires "a particular form of treatment, for a particular reason, *from* a particular authority."[19] Accordingly, "[i]f the harm that the person receives does not satisfy these requirements . . . then the punishment is unjust."[20] That is to say: if a punishment involves improper treatment, is administered for an improper reason, or the authority imposing the treatment is compromised, then the punishment is morally illegitimate.

Supreme Court jurisprudence supports this latter tripartite conception of justice, but the Court has left it to the states to ensure these principles are properly enforced.

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[14] Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era,* 50 HOUS. L. REV. 131, 152 (2012) (citing Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV.1662, 1663 (1986)).

[15] *Id.*

[16] *See id.* (describing the "mere incarceration" of a defendant convicted of murder as the injustice).

[17] *Id.*

[18] *Id.* (citing Daniel McDermott, *A Retributivist Argument Against Capital Punishment*, 32 J. SOC. PHIL. 317, 322 (2001)); *see also* Bryan Stevenson, *Close to Death: Reflections on Capital Punishment in America*, *in* DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 97 (Beau and Cassell ed. 2004) ("Ultimately, the moral question surrounding capital punishment in America has less to do with whether those convicted of violent crime deserve to die than with whether state and federal governments deserve to kill those whom it has imprisoned.").

[19] Phillips, *supra* note 14, at 152.

[20] *Id.*

B. Background: Supreme Court Jurisprudence on Procedural Protections Against Racial Biases That Result in Unjust Punishment

For several decades, the NAACP's Legal Defense Fund (LDF) waged a systematic Supreme Court campaign in an effort to demonstrate the death penalty violates the Eighth Amendment. Primarily, LDF suggested that the death penalty is unconstitutional if judges and juries apply it arbitrarily.[21] Moreover, LDF presented evidence indicating that "if any basis [could] be discerned for the selection of these few to be sentenced to die, it [wa]s the constitutionally impermissible basis of race."[22]

In each of the following cases,[23] the LDF offered "[e]vidence of caste discrimination and capricious inequality," suggesting that the application of the death penalty was not only arbitrary, but discriminatory.[24] As this evidence developed over the course of decades of litigation, it included two primary components. First, the evidence demonstrated that the application of the death penalty was influenced by the race of defendants,[25] suggesting decision makers were more willing to impose this extreme punishment on African Americans. Second, the evidence demonstrated that the application of the death penalty was influenced by the race of victims,[26] suggesting that decision-makers tended to consider white victims to be more worthy of the retributive justice theoretically offered by executing their accused assailants. The Court responded by condemning the arbitrary application of the death penalty, but not the death penalty itself, and requiring that states develop procedural protections to safeguard against arbitrariness.[27] Although LDF later returned to the Court with substantial statistical evidence that these procedural protections do not, in fact, ensure just punishment, the

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[21] Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey,* 39 COLUM. HUM. RTS. L. REV. 34, 40 (2007).

[22] Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

[23] In *Furman*, LDF attorneys Jack Greenberg—Director-Counsel of LDF—and Anthony G. Amsterdam were listed in the case as attorneys for two of the three petitioners. 408 U.S. at 238. In *Gregg v. Georgia* and *Batson v. Kentucky*, the LDF submitted Amici Curiae Briefs supporting the petitioners. *See generally* Brief for Batson as Amici Curiae Supporting Petitioner, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263), 1984 WL 565907; Brief for Gregg as Amici Curiae Supporting Petitioner, Gregg v. Georgia, 428 U.S. 153 (1976) (No. 74-6257), 1976 WL 178715. In *McCleskey v. Kemp*, LDF attorney John Charles Boger argued the cause for petitioner. 481 U.S. 279, 282 (1987).

[24] *See* Amsterdam, *supra* note 21, at 41 (citing Brief for Petitioner at *15–18, Aikens v. California, 406 U.S. 813 (1972) (No. 68-5027), 1971 WL 134168) ("[T]he point [of this evidence] being that the death penalty would not enjoy even the limited acceptance that it has if it were not visited almost exclusively upon poor and powerless pariahs.").

[25] *McCleskey*, 481 U.S. at 287.

[26] *Id.*

[27] Amsterdam, *supra* note 21, at 41. ("Henceforth, the Court appeared to be saying, States that chose to retain the death penalty would have to provide sentencing standards that were sufficiently detailed, clear, and objective to assure regular, even-handed results.") (citations omitted).

Court declined to articulate any further requirements.[28]

The cases described below demonstrate: (1) the Supreme Court's condemnation of a death penalty applied at least arbitrarily, if not discriminatorily,[29] (2) its call for procedural protections to ensure against arbitrariness[30] and racial discrimination,[31] and (3) its rejection of a constitutional argument based on statistical evidence that current procedural protections are ineffective at guarding against arbitrariness and racial discrimination.[32] Accordingly, the following cases demonstrate the need for states to develop mechanisms for addressing discrimination through legislation such as RJAs.

1. Furman v. Georgia *and* Gregg v. Georgia*: The Court Requires Procedural Protections*

In *Furman v. Georgia*,[33] the LDF argued that prosecutors, judges, and juries applied the death penalty arbitrarily, in violation of the Eighth Amendment.[34] The LDF's argument centered around the principle that "the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."[35] Justices Stewart, Marshall, Brennan, Douglas, and White wrote separately, but all condemned the arbitrary application of the death penalty.[36] A generally accepted doctrinal rule

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[28] *Id.* at 43–45 (2007); *McCleskey*, 481 U.S. at 297. The Baldus study, which was used the *McClesky* case, demonstrated that a defendant convicted of killing a white victim had 430% higher chance of being sentenced to death than if a defendant had been convicted of killing a black victim. Beau Breslin & David R. Karp, *Debating Death: Critical Issues in Capital Punishment*, *in* CRITICAL ISSUES IN CRIME AND JUSTICE 310 (Albert R. Roberts ed., 2003). Nevertheless, the Court held that this evidence was insufficient to find McCleskey's death sentence a violation of the 14th Amendment's Equal Protection Clause or the 8th Amendment's Cruel and Unusual Punishment Clause. *McClesky*, 481 U.S. at 292, 306.

[29] Furman v. Georgia, 408 U.S. 240, 310 (1972); *see also* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 6 (2007) ("Indeed, the Justices' concern that the death penalty was being selectively applied . . . figured prominently in their decision to override" the death penalty).

[30] Gregg v. Georgia, 428 U.S. 153, 192–95 (1976).

[31] Batson v. Kentucky, 476 U.S. 79, 99 (1986).

[32] McCleskey v. Kemp, 481 U.S. 279, 308, 311–12, 319 (1987).

[33] 408 U.S. 240 (1972).

[34] Brief for Petitioner at *11, *Furman*, 408 U.S. 238 (No. 71-5003), 1971 WL 134167 (referring and citing to the Brief for Petitioner in *Aikens v. California*, which sets out the statistical evidence); Brief for Aikens as Amici Curiae Supporting Petitioner at *33, Aikens v. California, 404 U.S. 812 (1971) (Nos. 68-5027, 69-6003, 69-5030, 69-5031), 1971 WL 134169.

[35] *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (emphasis added).

[36] *See id.* at 310 (Stewart, J., concurring) ("My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race") (citing concurring opinion of Justices Douglas and Marshall); *id.* at 305 (Brennan, J., concurring) ("Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily"); *id.* at 313 (White, J., concurring) ("the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in

emerged from *Furman*: states must either develop "clear and objective standards that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death'" or forego use of the death penalty entirely.[37]

While many believed this to be the moment at which America embraced abolition, the Court's prescription has not been meaningfully enforced.[38] Just four years after *Furman*, the Court in *Gregg v. Georgia*[39] suggested that legislatures could improve the consistency and fairness of the death penalty, stating: "[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."[40] Specifically, the Court held that jury sentencing must be guided by "clear and objective" standards.[41]

In so doing, the Court rejected Gregg's claims that these standards could not cure the arbitrariness allowed by discretion at several stages of the death penalty process.[42] For example, Gregg pointed to the prosecutor's "unfettered authority to select those whom he wishes to prosecute for capital offenses and to plea bargain with them," the jury's option "to convict a defendant of a lesser included offense . . . even if the evidence would support a capital verdict," and a pardoning authority's ability to commute a death sentence.[43] The Court's foreclosure of this argument was situated comfortably among other decisions, wherein courts upheld statutory schemes that "contained even palpably illusory sentencing standards," which, in practice, "left juries free to make life-or-death decisions in the same unregulated, ad hoc manner that they had before Furman."[44]

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which it is not.").

[37] Amsterdam, *supra* note 21, at 41 n.27 (citing Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion); Lewis v. Jeffers, 497 U.S. 764, 774–75 (1990); Arave v. Creech, 507 U.S. 463, 470–71 (1993)).

[38] *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 416–17 (1995) (the "current doctrine prohibits imposition of the death penalty for crimes other than murder, but places no other meaningful limits on death eligibility."). Capital sentencing statutes that afford unguided discretion are problematic not just because they allow for sentencing decisions to be made in an ad hoc manner, but also because they allow for such decisions to be impacted by racial bias. *See, e.g.*, Sheri Lynn Johnson, *Race and Capital Punishment, in* BEYOND REPAIR? AMERICA'S DEATH PENALTY 140 (Stephen P. Garvey ed., 2003) (describing the nature of the court's individualization requirement as infusing opportunity for racial bias to operate in the system).

[39] Gregg v. Georgia, 428 U.S. 153 (1976).

[40] *Id.* at 195; Amsterdam, *supra* note 21 at 41 n.28 (explaining the Court's evaluation of various state statutes to determine whether they accorded proper procedural protections).

[41] *Gregg*, 428 U.S. at 198 (1976); *see also* Baze v. Rees, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) ("Our decisions in [*Gregg*] upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application identified by Justice Douglas' opinion in *Furman*.").

[42] *Gregg*, 428 U.S. at 199 (1976).

[43] *Id.*

[44] Amsterdam, *supra* note 21, at 41.

2. Batson v. Kentucky: *The Court Prohibits Explicit Racial Bias*

The Supreme Court has developed other mechanisms aimed at guarding against the arbitrary application of the death penalty. Along with procedures for guiding jury discretion, the Court has acknowledged the need to prevent racially biased jury selection. Even apart from the capital context, the Court has long accepted that the systematic exclusion of African Americans from serving on juries is "at war with our basic concepts of a democratic society and representative government."[45] It was in a 1986 capital case, however, that the Court first recognized the way in which persistent prosecutorial efforts to select racially homogenous juries contributes to such exclusion,[46] and developed a method for challenging race-based peremptory strikes.

In *Batson v. Kentucky*,[47] the Court provided a burden-shifting framework for cases challenging the prosecutor's peremptory strikes.[48] Under *Batson*, a defendant may challenge the prosecutor's peremptory strikes exerted only in his own case.[49] First, the defendant must establish membership in a "cognizable racial group" and demonstrate that the prosecutor peremptorily struck venire members of his race.[50] Second, the defendant may rely on the fact that the peremptory challenge process permits "those to discriminate who are of a mind to discriminate."[51] Third, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen . . . on account of their race."[52] The burden then shifts to the State to provide a race-neutral explanation for her strikes.[53] Unfortunately, to the extent that *Batson* offered a promise of addressing racially biased jury selection practices, "more than twenty-five years

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[45] Smith v. State of Texas, 311 U.S. 128, 130 (1940) ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."); *see also* Barbara O'Brien & Catherine M. Grosso, *Beyond Batson's Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623, 1625 (2013) ("The U.S. Supreme Court has grappled with the pernicious role of race in jury selection repeatedly since at least 1880.") (citing Batson v. Kentucky, 476 U.S. 79 (1986); Casteneda v. Partida, 430 U.S. 482 (1977); Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522, 698 (1975); Swain v. Alabama, 380 U.S. 202 (1965); Glasser v. United States, 315 U.S. 60, 86 (1942); Strauder v. West Virginia, 100 U.S. 303 (1880)).

[46] O'Brien & Grosso, *supra* note 45, at 1625 n.1 (citing EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14–27 (2010), *available at* http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf, <http://perma.cc/DT98-R5XP>).

[47] 476 U.S. 79 (1986).

[48] *Id.* at 96.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

[53] *Id.* at 97.

later, a widespread consensus has emerged among judges, practitioners, and academics that this method is 'indeterminate, unprincipled, and generally ineffective.'"[54]

3. McCleskey v. Kemp: *The Court is Paralyzed by the "Fear of Too Much Justice"*

With years of evidence demonstrating that Georgia's procedural protections were ineffective at protecting defendants from an arbitrary application of the death penalty, LDF litigators returned to the Court.[55] In *McCleskey v. Kemp*,[56] the LDF introduced robust statistical evidence demonstrating that the standards promulgated by post-*Furman* statutes "produced a pattern of results explainable on no ground other than race."[57]

The principal witness at McCleskey's federal habeas hearing was Professor David C. Baldus, a national expert on legal statistics.[58] Baldus and his associates analyzed capital sentencing data using "a wide variety of procedures, including cross-tabular comparisons, weighted and unweighted least-squares regressions, logistic regressions, index methods, [and] cohort studies."[59] Baldus concluded that even "after taking into account most legitimate reasons for sentencing distinctions, the odds of receiving a death sentence were still more than 4.3 times greater for those whose victims were white than for those whose victims were black."[60] More specifically, he found that "at Mr. McCleskey's level of aggravation the average white victim case has approximately a [20%] higher risk of receiving a death sentence than a similarly situated black victim case."[61] The data also demonstrated that cases involving black defendants and white victims were "significantly more likely" to result in death sentences.[62]

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[54] O'Brien & Grosso, *supra* note 45, at 1625 (quoting David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases As Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425, 1425 (2011)). The impact of the *Batson* decision will be discussed throughout the remainder of this Note.

[55] Amsterdam, *supra* note 21, at 43.

[56] 481 U.S. 279 (1987).

[57] Amsterdam, *supra* note 21, at 43; *see also* Brief for Petitioner at *9–16, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811) [hereinafter *McCleskey* Brief for Petitioner] ("The studies drew from a remarkable variety of official records on Georgia defendants convicted of murder and voluntary manslaughter, to which Professor Baldus obtained access through the cooperation of the Georgia Supreme Court, the Georgia Board of Pardons and Paroles, and other state agencies. These records included not only trial transcripts and appellate briefs but also detailed parole board records, prison files, police reports and other official documents.").

[58] *McCleskey* Brief for Petitioner, *supra* note 57, at *7–8.

[59] *Id.* at *68.

[60] *Id.* at *14.

[61] *Id.* at *85.

[62] *Id.* at *15–16.

The Court did not find these statistics constitutionally relevant.[63] Despite the overwhelming evidence of racially-motivated capital sentencing, the Court held that the Equal Protection Clause affords relief only if a claimant is able to prove that "the decisionmakers in *his* case acted with discriminatory purpose."[64] According to the Court, statistics—even when analyzed at a high level of scientific certainty—do nothing to illustrate the subjective intent of individual actors in a *particular* case.[65]

This reasoning was surprising in light of the Court's willingness to consider statistical evidence of disparate impact as at least relevant (if not determinative) in other contexts.[66] However, Justice Powell denied that the *McCleskey* decision departed from relevant precedent, and claimed that the death penalty context is "fundamentally different."[67] He noted that capital juries are "properly selected," that the State in a capital case has "no practical opportunity to rebut" the statistical evidence presented, and that "implementation of [criminal] laws necessarily requires discretionary judgment."[68] He cautioned that "[t]he Eighth Amendment is not limited in application to capital punishment, but applies to all penalties"; thus an acceptance of the "claim that racial bias has impermissibly tainted the capital sentencing decision," could result in "similar claims as to other types of penalty."[69] Justice Brennan, dissenting, criticized the Court's "fear of too much justice."[70]

Justice Powell later expressed regret for the *McCleskey* decision,[71] and Justices Stevens, Blackmun, and Breyer have respectively cited the Baldus study as valid evidence of racial discrimination in the death penalty.[72] However, the *McCleskey* Court did provide one source of hope: while dismissing the constitutional implications of the Baldus study, it encouraged legislatures to consider such evidence.[73]

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[63] McCleskey v. Kemp, 481 U.S. 279, 292 (1987).

[64] *Id.*

[65] *Id.* at 292–93.

[66] *Id.* at 293–94 (acknowledging that the Court "ha[d] accepted statistical disparities as proof of an equal protection violation" and "ha[d] accepted statistics in the form of multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964." (citing Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266 (1977); Bazemore v. Friday, 478 U.S. 385, 400–401 (1986) (Brennan, J., concurring in part))).

[67] *Id.* at 294.

[68] *Id.* at 296–97.

[69] *Id.* at 314–15 (citations omitted).

[70] *Id.* at 339. The *McCleskey* decision has been widely written about and criticized. *See, e.g.*, Samuel R. Gross, *David Baldus and the Legacy of McCleskey v. Kemp*, 97 IOWA L. REV. 1905, 1917–18 (2012) (noting that the case has been compared to Dred Scott v. Sandford, 60 U.S. 393 (1857), Plessy v. Ferguson, 163 U.S. 537 (1896), and Korematsu v. United States, 323 U.S. 214 (1944)); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1388–89 (1988).

[71] Gross, *supra* note 70, at 1918 (citing JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994) (revealing that, when asked if he could change one decision, Justice Powell cited *McCleskey*)).

[72] *Id.* at 1920.

[73] *McCleskey*, 481 U.S. at 319 (noting that it is the duty of elected bodies "to respond to the will and consequently the moral values of the people") (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)). In fact, the results of the study have since been affirmed by

In 1990, the Congressional Black Caucus introduced the Racial Justice Act, a "modest piece of legislation intended to ferret out race discrimination in the application of the death penalty."[74] Although the United States House of Representatives passed the Act in both 1990 and 1994 through omnibus crime bills, the Act never made it out of conference with the Senate.[75] The opposition contended that passage of the Act "would amount to [an] abolition of the death penalty."[76]

III. THE NORTH CAROLINA RACIAL JUSTICE ACT: THE ORIGIN AND PURPOSE OF RJAS

In 2009, the North Carolina state legislature crafted the first robust statutory answer to *McCleskey*'s call to action.[77] The North Carolina Racial Justice Act (NC-RJA) allowed defendants to appeal their capital sentences based on statistical and historical evidence of racial discrimination in the imposition of the death penalty.[78] The Act also expanded admissible evidence regarding peremptory strikes beyond that allowed by the *Batson* framework.[79] Under *Batson*, a defendant may only challenge the peremptory strikes exerted in his own case by the prosecutor, and the prosecutor may respond by providing a race-neutral response for the strike.[80] In contrast, the NC-RJA allowed for systemic analyses of strike patterns and practices in a given jurisdiction.[81] The legislation thus recognized that "[t]he tool of race neutrality cannot address discrimination that is based on unconscious stereotypes and emotional distance, and it is an especially poor tool in areas, such as

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several subsequent analyses, including a report by the United States General Accounting Office (GAO). *See* U.S. GEN. ACCT. OFF., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), *available at* http://www.gao.gov/assets/220/212180.pdf, <http://perma.cc/WR4V-VXAH> (reviewing twenty-eight post-Furman studies based on twenty-three different data sets).

[74] Don Edwards & John Conyers, Jr., *The Racial Justice Act—A Simple Matter of Justice*, 20 U. DAYTON L. REV. 699, 700 (1995); Gross, *supra* note 70, at 1918.

[75] Gross, *supra* note 70, at 1918.

[76] *Id.* at 1918 n.74 (citing Daniel E. Lungren & Mark L. Krotoski, *The Racial Justice Act of 1994—Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 U. DAYTON L. REV. 655, 655 (1995)).

[77] Barbara O'Brien & Catherine M. Grosso, *Confronting Race: How A Confluence of Social Movements Convinced North Carolina to Go Where the McCleskey Court Wouldn't*, 2011 MICH. ST. L. REV. 463, 464 (2011) ("North Carolina was only the second state to pass legislation in response to the McCleskey decision despite numerous local and federal efforts to pass a racial justice act. Kentucky passed similar legislation in 1998, but the Kentucky law provides for only an almost fatally narrow claim. In this respect, North Carolina stands alone in providing capital defendants a strong claim for relief based on statistical evidence . . . ." (citations omitted)).

[78] O'Brien & Grosso, *supra* note 45, at 1633.

[79] *Id.* at 1634 ("[T]he RJA treads new ground by expressly recognizing the importance of analyzing the role of race in decision making across cases . . . . This broadened scope of a potential [RJA] claim distinguishes it from a typical Batson claim.").

[80] Batson v. Kentucky, 476 U.S. 79, 96 (1986).

[81] *Id.*

capital sentencing, where the decision at issue is multifaceted and indeterminate."[82] Essentially, the NC-RJA used "*McCleskey's* requirement of proof of subjective racial animus . . . as a sword, to pry open and expose the magnitude of the culture of racism that produces the ubiquitous outcome of race-based differentials in capital sentencing."[83] The legislation accepted the *McCleskey* Court's challenge to: (a) uncover the horrific abuses of justice that have plagued the capital punishment system since its inception, (b) document these abuses through empirical and historical analysis, and (c) insert these findings into court records and the public domain.[84]

The NC-RJA was intended to ensure that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race."[85] To achieve this objective, the law allowed defendants to present a broad range of evidence that race was a "significant factor" in the decision to seek or impose a death sentence.[86] As under *McCleskey* and *Batson*, a defendant could introduce evidence that a decision-maker in his case acted with discriminatory intent.[87] However, in contrast to *McCleskey* and *Batson*, a defendant could additionally introduce evidence of systemic bias in the general time and place that defendant was sentenced.[88]

Under the NC-RJA, claimants could rely on "statistical evidence" as well as "other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system."[89] If a defendant made an initial threshold showing that "race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed," then the burden would shift to the prosecution to rebut the inference of discrimination.[90] In rebuttal, the prosecution had the opportunity to show that "the disparate impact demonstrated by the defendant resulted from any statutorily authorized factor" since such factors "may correlate with race and thereby eliminate significance of the apparent impact of race in producing that disparate impact."[91]

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[82] Johnson, *supra* note 38, at 143.

[83] Amsterdam, *supra* note 21, at 50–51.

[84] *Id.*

[85] N.C. GEN. STAT. § 15A-2010 (2012) (repealed 2013).

[86] *See* § 15A-2011(b) (repealed 2013) (listing potential evidentiary sources as including statistical evidence from the jurisdiction that delivered the sentence, and sworn testimony as to race's impact upon choice to seek the death penalty, rate of conviction, and juror selection).

[87] *See, e.g.*, Golphin et al. Order of Relief, *supra* note 2, at *3 (granting relief on defendants' race-based jury selection claim primarily "based on the words and deeds of the prosecutors . . . in [d]efendants' cases.").

[88] *See, e.g.*, *id.* at *5 (noting the relevance of defendants' statistical evidence).

[89] § 15A-2011(a) (repealed 2013).

[90] § 15A-2012(a) (repealed 2013); *see also* Kotch & Mosteller, *supra* note 10, at 2115 (describing the burden shifting process).

[91] Kotch & Mosteller, *supra* note 10, at 2119.

Professors Seth Kotch and Robert Mosteller of the University of North Carolina-Chapel Hill have comprehensively analyzed the legislative motivation for passing the RJA and its unique features.[92] Although Kentucky passed similar legislation in 1992,[93] Kotch and Mosteller demonstrate that the Kentucky RJA (KY-RJA) is more limited in scope and has not had much impact.[94] For example, the KY-RJA applies only to the charging decision, while the NC-RJA allowed claimants to challenge both the charging and sentencing decisions.[95] Additionally, defendants challenging their sentences under the KY-RJA must state "with particularity how . . . racial considerations played a significant part in the decision to seek a death sentence in his or her case."[96] Kotch and Mosteller remind that the KY-RJA language mirrors the *McCleskey* requirement that a defendant be able to prove that "the decisionmakers [sic] in *his* case acted with discriminatory purpose."[97]

Contrastingly, the NC-RJA's particularity provision required that a defendant merely demonstrate that race is a "significant factor" in a given geographic area rather than in his individual case.[98] North Carolina lawmakers conscientiously chose this distinguished requirement, seeking to go beyond what was already permissible under *McCleskey*.[99] As one legislator explicitly acknowledged:

> The *McCleskey* decision . . . specifically directed that if states wanted to provide this additional protection and [allow the use of statistics to] prove racial discrimination, then they could do it. . . . Race discrimination is very hard to prove. Rarely, particularly in today's time, do people outright say, 'I am doing this because of the color of your skin.' Imagine if our civil rights act that was passed in '64 said that the only way that you can prove race discrimination is [through] an admission by the person engaging in racial discrimination. We would have had very little change in our society and culture in

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[92] *See generally id.*

[93] *See id.* at 2117 n.380 (citing KY. REV. STAT. ANN. §§ 532-300 to 309 (West 1998)) (describing the KY-RJA).

[94] *Id.* at 2117 n.381 (describing the limitations of the Kentucky Act, and comparing the provisions with that of the NC-RJA).

[95] *Id.* at 2131 (*comparing* KY. REV. STAT. ANN. § 532-300(2) (allowing for claims based only on charging decision), *with* N.C. GEN. STAT. §§ 15A-2010 (repealed 2013) (allowing for claims based on charging decision or sentencing) & 15A-2011(a) (repealed 2013) (allowing for claims based on charging or sentencing).

[96] *Id.* at 2116–18 (citing KY. REV. STAT. ANN. § 532-300(4) (West 2008)).

[97] *Id.* at 2117 n.380 (citing *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (emphasis added)).

[98] *Id.* at 2116–18 (citing N.C. GEN. STAT. §§ 15A-2010 & 15A-2011(a) (2012) (repealed 2013)). Additionally, the Kentucky Act requires proof by clear and convincing evidence, while the NC-RJA imposes a preponderance standard. *Compare* KY. REV. STAT. ANN. § 532- 300(5), *with* N.C. GEN. STAT. § 15A-2011(c) (repealed 2013).

[99] Kotch & Mosteller, *supra* note 10, at 2112 ("The legislature understood that it was creating a different system of proof than that prescribed by *McCleskey*, explicitly accepting the Court's invitation to legislatures to act because they, rather than the United States Supreme Court, are best able to judge how statistical studies should be used in regulating the death penalty.").

> terms of the hiring practices. What we did in the civil rights act in '64 is said, 'In addition to using direct evidence in proving discrimination, you could use statistics.' And [that is], in fact, what we did, and there's a parallel to what we're doing in this bill.[100]

In 2012—immediately after the first successful appeal under the NC-RJA—the North Carolina legislature amended the Act, attacking its most effective provisions.[101] The amended version of the Act: (1) limited the timeframe that could be considered with regard to each defendant,[102] (2) required the defendant to waive any objection to a sentence of life without the possibility of parole,[103] (3) limited the introduction of evidence to the county or prosecutorial district level,[104] (4) eliminated consideration of the race of the victim in defendants' arguments,[105] and (5) specified that statistical evidence *alone* was not sufficient to establish that race was a significant factor.[106]

In June 2013, the NC-RJA was repealed.[107] The legislature's swift response to the impact of its own earlier reform measure illustrates the difficulty of enacting reform in states committed to the use of the death penalty.[108] Specifically, it raises questions regarding the political and sociological factors that may facilitate lasting reform, and whether the NC-RJA can still be considered a success.

This Note returns to these questions in Part VI. Part IV compares

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[100] *Id.* at 2112–2113 (citing Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009)). Kotch and Mosteller note that Sen. Berger was "responding in opposition to an amendment offered by Senator Phil Berger to limit the use of statistical evidence as set out in *McCleskey*." *Id.* at 2113 n.360.

[101] Initially, admissible evidence included any which demonstrated that: (1) race of the defendant affected the charging or sentencing decision; (2) race of the victim affected the charging or sentencing decision; and/or (3) race influenced prosecutorial decisions to exercise peremptory challenges during jury selection. An Act to Amend Death Penalty Procedures, 2012 N.C. Sess. Laws (2012), *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/HTML/S416v6.html, <http://perma.cc/5XHC-BJGB>.

[102] *Id.* (amending § 15A-2011(a) to allow for evidence from "10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence").

[103] *Id.* (adding § 15A-2011(a)(1)).

[104] *Id.* The 2009 version of the Act allowed for state-level statistical examinations, in addition to county-level and district-level examinations. The 2012 version allowed only examinations of evidence from the county and/or prosecutorial district in which defendant was sentenced.

[105] N.C. GEN. STAT. § 15A-2011(d).

[106] *Id.* § 15A-2011(e).

[107] Cassandra Stubbs, *In the Battle of Racial Bias vs. Racial Justice in North Carolina, Governor Insists on Bias*, ACLU CAPITAL PUNISHMENT PROJECT, https://www.aclu.org/blog/capital-punishment-racial-justice/battle-racial-bias-vs-racial-justice-north-carolina-governor, <http://perma.cc/FRJ9-76X7>.

[108] *Id.* ("It is clear that the law was removed because of its successes: four North Carolina death row inmates had prevailed in showing systemic discrimination across North Carolina and in their own cases. Using the law, these defendants had uncovered evidence that prosecutors made racially derogatory notes during jury selection and discriminated against large numbers of African American prospective jurors."); *see also* Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEXAS L. REV. 1869, 1870–71 (2006) (discussing the difference between symbolic death penalty states that do not frequently sentence individuals to death and those which regularly carry out death sentences).

the empirical, historical and anecdotal evidence of racial injustice in capital sentencing in North Carolina and Texas. Part V describes the TX-RJA Proposals in the 2013 Texas Legislative Session, and advocates a particular TX-RJA embodiment. Part VI then returns to these questions and argues that—in light of the evidence in Parts IV and V, as well as additional evidence offered in Part VI—a TX-RJA would likely be both viable and impactful, despite the NC-RJA's repeal.

IV. RACIAL BIAS AND CAPITAL PUNISHMENT IN NORTH CAROLINA AND TEXAS

North Carolina and Texas have a shared history of racial discrimination, rich with compelling evidence that today's system is not untainted by its past. This shared reality, which made the RJA appropriate in North Carolina, renders it similarly appropriate in Texas.

A. North Carolina

1. Admitting Historical and Statistical Evidence of Racial Bias Under the North Carolina Racial Justice Act

In *North Carolina v. Robinson*,[109] the first case brought under the NC-RJA, Judge Gregory Weeks of Cumberland County Superior Court interpreted the statute in light of its legislative history. He noted that the "General Assembly was aware of both *Batson* and *McCleskey* when it enacted the RJA and therefore did not write the RJA as a mere recapitulation of existing constitutional case law."[110] He also observed that, unlike in other direct discrimination-based legal theories, "the words intentional, racial animus, or any similar references to calculation or forethought on the part of prosecutors do not appear anywhere in the text of any RJA provision."[111] Similarly, with regard to jury selection, he held that the NC-RJA "does not require that the defendant show that the prosecutor's decisions resulted in any specific final jury composition," but rather only that the strikes were influenced by race.[112]

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[109] North Carolina v. Robinson, No. 91 CRS 23143 (N.C. Sup. Ct. Apr. 20, 2012).

[110] Order Granting Motion for Appropriate Relief at *36, *Robinson*, No. 91 CRS 23143 (N.C. Sup. Ct. Apr. 20, 2012) [hereinafter Robinson Order of Relief], *available at* http://www.aclu.org/files/assets/marcus_robinson_order.pdf, <http://perma.cc/G3CB-DV5P> (reminding that *McClesky* explicitly invited "legislatures to pass their own remedies to race discrimination in capital cases," especially remedies which would include "permitting the use of statistics" in sentencing challenges).

[111] *Id.* at *34.

[112] *Id.* at *40–41.

Because the NC-RJA did not require proof of discriminatory intent, claimants could present evidence that would likely not be considered probative—and thus excluded or accorded little weight—under *McCleskey*.[113] Accordingly, Judge Weeks considered Marcus Robinson's extensive record demonstrating racial bias in North Carolina capital sentencing and ordered relief. In the next three cases brought in front of Judge Weeks, he considered the appellants' claims under both the *original* NC-RJA, and the NC-RJA *as amended* in 2012.[114] Even under the limited 2012 version of the NC-RJA, Judge Weeks ordered relief for all appellants.[115]

Significantly, the NC-RJA opened the courthouse door to evidence of racial bias that—while perhaps generally accepted or well known—had thus far been considered generally irrelevant in the context of capital appeals. Through the NC-RJA, the appellants in these cases were able to introduce a vast record that would not otherwise be considered probative.[116] It was this evidence that led Judge Weeks to conclude, "[R]ace, not reservations about the death penalty, not connections to the criminal justice system, but race, drives prosecution decisions about which citizens may participate in one of the most important and visible aspects of democratic government."[117]

By providing a judicial forum for historical and statistical evidence of racial bias in capital sentencing, the NC-RJA offered "hope that acknowledgment of the ugly truth of race discrimination revealed by Defendants' evidence is the first step in creating a system of justice that is free from the pernicious influence of race, a system that truly lives up to our ideal of equal justice under the law."[118]

2. *History of Race and the Death Penalty in North Carolina*

As Seth Kotch and Robert Mosteller note in their historical examination of race and the death penalty in North Carolina, the state's first recorded execution took place when the state was still a colony.[119]

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[113] O'Brien & Grosso, *supra* note 77, at 499 ("A claimant operating under the McCleskey framework would have to assert evidence of discrimination specific to his or her own case.").

[114] Golphin et al. Order of Relief, *supra* note 2, at *2–3.

[115] *Id.* at *2.

[116] *See, e.g.*, O'Brien & Grosso, *supra* note 77, at 499–500 ("When problematic findings about the system do come to light, it is generally through academic publications, which can be dismissed as smoke and mirrors. Under the RJA, however, this kind of evidence is presented and tested in court. Findings of bias may not be dismissed summarily or ignored, but must be tested and rebutted with specificity. This process—even if it does not result in relief for the litigant—serves an important function by bringing this evidence into the public's consciousness." (citations omitted)).

[117] Golphin et al. Order of Relief, *supra* note 2, at *4.

[118] *Id.* at *6.

[119] Kotch & Mosteller, *supra* note 10, at 2038.

From its inception through emancipation, capital punishment was an integral part of the slave-master power dynamic.[120] While "a slave owner could not be punished for a physical assault against his slave,"[121] his power to punish "did not formally include the right to execute."[122] As a result, the death penalty served not only as "the required legal method of executing slaves but also the ultimate method for slave owners to enforce slave discipline."[123] Importantly, during this time, all-white juries imposed the death penalty primarily on black slaves.[124]

After Emancipation, the use of the death penalty remained intertwined with racial discrimination, even through the late nineteenth century, when the state centralized all executions from the county level.[125] When North Carolina assumed administrative control over the death penalty from the counties, it failed to change this dynamic. From 1868–1910, 74% of the 160 people executed in North Carolina were African-American.[126] This failure powerfully illustrates the way in which North Carolina's capital punishment system is bound to its legacy of slavery.[127]

The influence of race—both the victim's race and the defendant's race—on death sentencing in North Carolina persisted into the twentieth century.[128] Disparities in death sentencing were particularly pronounced for the crimes of rape and burglary, suggesting the influence of racial stereotypes regarding black criminality.[129] Trial records and newspaper accounts from this time period reveal rushed trials marked by explicit racial animus.[130] One newspaper, for example, described a black defendant as "short, squat, thick-bodied, and with the face of a gorilla."[131] In stark juxtaposition, media coverage of the executions involving white defendants—convicted of similarly horrendous crimes—was comparatively constrained.[132] The functional absence of minority

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[120] *Id.*

[121] *Id.* at 2047 (citing State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829)).

[122] *Id.*

[123] *Id.* at 2048.

[124] *Id.* at 2044 n.44 ("It is difficult to know how many, if any, African Americans served on juries trying capital cases before the end of slavery because of the potential service of free blacks living in the state. However, because the free black population in the state was very small, ranging from less than 1% of the state's population in 1790 to a little more than 3% in 1860, a substantial presence by blacks on capital juries is not a realistic possibility.").

[125] *Id.* at 2054.

[126] *Id.* (noting that percentage of black people in the population never exceeded 38% during this period).

[127] *Id.*

[128] *Id.* at 2056 (noting that, from 1910 to 1961, "78% of those executed were African American and 80% were minorities.").

[129] *Id.* at 2068; *see also id.* at 2066–68 (discussing the racially-charged dynamics regarding these crimes in the South during this period).

[130] *See id.* at 2056–64 (discussing several examples of such trials).

[131] *Id.* at 2068–69 (2010) (citing *John Goss Dies Admitting Crime*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 8, 1925, at 9).

[132] The same newspaper that provided the above-mentioned account of a black defendant contrastingly described a white defendant sentenced to death for raping a ten-year-old girl as "straight and calm" and "a nice-looking fellow." *Id.* at 2069 (citing Charles Craven, *State Finally*

jurors no doubt exacerbated the racial hostility of these cases.[133] Even after the Court more aggressively enforced inclusive juries, these legal gains were not necessarily implemented.[134]

Additionally, from emancipation through the 1940s, lynchings were a prominent feature of life in North Carolina. Lynchings mirrored—and, at times, outnumbered—executions.[135] While lynching is sometimes conceptualized as a form of vigilantism,[136] sociologist David Garland suggests that "public torture lynchings"—characterized by mass mobs, publicity, ritual, abnormal cruelty, and large crowds[137]—were not simply the work of private citizens operating outside of the law.[138] Rather, lynchings were observed, supported, and perpetuated by community leaders and local law enforcement—giving the practice of lynchings a gloss of state sanction.[139] Accordingly, lynchings in the American South functioned as a "mode of racial repression . . . that deliberately adopted the forms and rituals of criminal punishment."[140]

Granting relief for Marcus Robinson, Judge Weeks acknowledged the relevance of North Carolina's history with respect to racial bias in the state's contemporary capital punishment system.[141] Statistical evidence further illustrates the endurance of these historical trends today.

Claims Life of Guilford County Rapist, NEWS & OBSERVER (Raleigh, N.C.), July 22, 1950, at 1).

[133] *Id.* at 2038 (observing that "except briefly during Reconstruction, jury participation by African Americans was negligible" into the twentieth century).

[134] Robinson Order of Relief, *supra* note 110, at *113.

[135] Kotch & Mosteller, *supra* note 10, at 2053.

[136] *E.g.*, FRANK E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 89–118 (2003) (discussing vigilantism's intersection with historical lynchings and modern capital punishment).

[137] David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 803 (2005) (citing W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA 1880–1930 (1993)) (describing variants of lynching behavior, and noting that public torture lynchings were characterized by mass mobs, publicity, ritual, abnormal cruelty, and large crowds).

[138] *Id.* at 797–98 ("[L]ynchings are usually omitted from that history and sociology [because they are] regarded not as legal punishments but as unofficial conduct . . . [and] arbitrary racial violence."); *see also, e.g.*, Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS TO THE KILLING STATE 96, 99–106 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (describing the racial underpinnings of capital punishment in the eighteenth and nineteenth century South); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 22–23 (2002) (discussing various motivations for lynchings).

[139] Garland, *supra* note 137, at 797–98.

[140] *Id.* at 798. Indeed, evidence from North Carolina supports Garland's conception of lynchings as criminal punishment rather than extra-legal deviance. For example, records show that local law enforcement officers sometimes spared black men from lynching in North Carolina specifically in order to impose a state-sanctioned execution. Kotch & Mosteller, *supra* note 10, at 2063–64.

[141] Robinson Order of Relief, supra note 110, at *112–115 (citing as relevant factors in ordering relief: North Carolina prosecutors' resistance to selecting black people as jurors in capital cases, the history of the racially-biased application of the death penalty, and the unique relationship between the death penalty and lynching); *see also* Transcript of Record Vol. IV at 845–52, 857–63, North Carolina v. Robinson, No. 91 CRS 23143 (N.C. Sup. Ct. Apr. 20, 2012) [hereinafter Transcript of Record: Bryan Stevenson], *available at* https://www.aclu.org/files/assets/transcript_robinson_rjahearing.pdf, <http://perma.cc/L54Z-N4QZ> (testimony of Bryan Stevenson).

3. *Statistical Evidence of Current Racial Bias in North Carolina Capital Punishment*

Marcus Robinson's NC-RJA claim relied in part on statistical analysis conducted by Barbara O'Brien and Catherine M. Grosso at the Michigan State University College of Law.[142] Their study analyzed peremptory challenges in North Carolina capital cases between 1990 and 2010.[143] Grosso and O'Brien found that black qualified jurors consistently faced a significantly higher risk of strike than all other qualified jurors.[144] The findings remained statistically significant "even when controlling for characteristics frequently cited by prosecutors [as race-neutral reasons] to strike potential jurors, including death penalty views, criminal background, employment, marital status, [and] hardship . . . ."[145]

As a rebuttal, the state used what it referred to as a "*Batson* methodology . . . to determine the best possible race-neutral reason for the peremptory strikes of every African-American venire member in the 173 cases" examined by the MSU study.[146] This entailed "asking prosecutors . . . involved in the selection of jurors to provide those race-neutral reasons."[147] There are obvious weaknesses in this approach. First, it did not allow for open-ended responses, and was instead set up to produce only race-neutral explanations.[148] Second, expert witness Bryan Stevenson testified that these tactics, when employed in the context of a *Batson* challenge, simply demonstrate an effort on the part of prosecutors to conceal racial bias by developing acceptable-sounding rationales for exclusion.[149] Rather than demonstrating that the strikes were, in fact,

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[142] O'Brien & Grosso, *supra* note 45, at 1634.

[143] Robinson Order of Relief, *supra* note 110, at *59–60 (noting that of the 166 cases statewide that included at least one black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members); *see also* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Capital Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1557 n.101 (2011) (presenting the study findings).

[144] Grosso & O'Brien, *supra* note 143, at 1548 ("Of the 166 cases that included at least one black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members."); *see also* Robinson Order of Relief, *supra* note 110, at *60 (noting the court's acceptance of these figures as findings in Robinson's case).

[145] Golphin et al. Order of Relief, *supra* note 2, at *5; *see also* Grosso & O'Brien, *supra* note 143, at 1546–1548 (discussing methods for reliability testing). When broken down into geographical units, these findings held true in all but four counties, and in all but one prosecutorial district. Robinson Order of Relief, *supra* note 110, at *62–65.

[146] Robinson Order of Relief, *supra* note 110, at *120.

[147] *Id.* When the trial attorneys were unavailable, the District Attorney's office appointed reviewers to read through the trial transcript and provide their assessment of the race neutral reason for the strike. *Id.*

[148] *Id.* at *121.

[149] Transcript of Record: Bryan Stevenson, *supra* note 141, at 865 ("One of the ways it was manifest was that lawyers would get together and actually come up with ways to conceal racial bias by developing reasons that were going to be deemed race-neutral and, therefore, acceptable to reviewing courts, and in training materials, we saw a good bit of evidence of that. We saw that in states all across the country where lawyers were saying, Here's how you get around a Batson

justifiable, the state's rebuttal served to demonstrate the ease of providing pretextual race-neutral explanations for racially discriminatory behavior and, accordingly, the need for an RJA.[150]

Judge Weeks held that "Robinson introduced a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection throughout North Carolina" and that this evidence was not substantially rebutted by the State.[151] He added that this evidence not only required relief in Robinson's case, but also "should serve as a clear signal of the need for reform in capital jury selection proceedings in the future."[152] Three additional claimants cited the MSU study to challenge sentences under the amended NC-RJA.[153] Even under the amended NC-RJA's temporal and geographic limitations, the Court found that prosecutors struck black venire members "at double the rate they struck other potential jurors," in capital cases.[154]

4. Other Evidence of Current Racial Bias in North Carolina Capital Punishment

The NC-RJA also allowed claimants to introduce evidence regarding the "the words and deeds of the prosecutors involved in Defendants' cases."[155] The initial NC-RJA claimants, for example, offered "handwritten pretrial notes about black potential jurors, as well as evidence that prosecutors strongly favored black jurors in two racially charged murder trials with black victims."[156] As stated by Judge Weeks, the notes described "the relative merits of North Carolina citizens and prospective jurors in racially-charged terms, and constitute unmistakable evidence of the prominent role race played in the State's jury selection strategy."[157] Furthermore, defendants presented evidence that prosecutors were trained to provide pretextual race-neutral justifications for striking black jurors.[158] This training, titled *Top Gun II*, was held by the North

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objection.").

[150] *See* Cassandra Stubbs, *Sweeping Ruling about Racial Bias in Capital Jury Selection Shows the Need for Sweeping Reforms*, ACLU BLOG RIGHTS (Dec. 17, 2012, 2:47 PM), https://www.aclu.org/blog/capital-punishment-racial-justice/sweeping-ruling-about-racial-bias-capital-jury-selection, <http://perma.cc/VG62-H93V> ("These cases provided an unprecedented examination of the role of race in capital jury selection. By comparing evidence across cases, Weeks was able to peel away layers of pretext and subterfuge that have for too long concealed the role of race. This kind of close and unflinching investigation lives up to part of the promise of the Racial Justice Act.").

[151] Robinson Order of Relief, *supra* note 110, at *3.

[152] *Id.*

[153] O'Brien & Grosso, *supra* note 45, at 1627 n.21.

[154] Golphin et al. Order of Relief, *supra* note 2, at *5.

[155] *Id.* at *3.

[156] O'Brien & Grosso, *supra* note 45, at 1633 n.49 (quoting Golphin et al. Order of Relief, *supra* note 2, at *51–52).

[157] Golphin et al. Order of Relief, *supra* note 2, at *3.

[158] Robinson Order of Relief, *supra* note 110, at *156.

Carolina Conference of District Attorneys, and it included a seminar regarding race discrimination in jury selection.[159] Tellingly, the training did not discuss how to avoid discrimination in jury selection, but rather "how to avoid a finding of a *Batson* violation in case of an objection by opposing counsel."[160] The court found overwhelming evidence that one prosecutor—who was personally involved in all four cases granting relief under the NC-RJA—relied on this "cheat sheet" during jury selection.[161]

B. Texas

1. History of Race and the Death Penalty in Texas

Texas has a long history of racial discrimination. In 1866, it was one of the first states to develop legislation mandating racial segregation.[162] The policy did not last through Reconstruction, but it set the stage for the eventual establishment of the Jim Crow system in the state.[163] For a time, at the turn of the century, the Texas state government was "almost completely under the domination of the [Ku Klux] Klan."[164]

As in North Carolina, Texas has a profound history of lynching that relates to its history of capital punishment.[165] As Bryan Stevenson aptly summarizes: "The tolerance of racial bias in the modern death penalty era, placed within the context of this troubling history, represents a serious threat to anti-discrimination reforms and equal justice in America."[166]

As abovementioned, David Garland has suggested that public torture lynchings were not simply homicides marked by racial animosity, but rather "represented and understood by most actors and commentators" as "collective criminal punishments."[167] Despite the

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[159] *Id.*

[160] *Id.* (listing as justifications: (1) Inappropriate Dress; (2) Physical Appearance; (3) Age; (4) Attitude; (5) Body Language; (6) Rehabilitated Jurors; (7) Juror Responses; (8) Communication Difficulties; (9) Unrevealed Criminal History; and (10) Any other sign of defiance, sympathy with the defendant, or antagonism to the State).

[161] *See id.* at *157 n.361 (noting that evidence of the prosecutor's reliance on the cheat sheet was apparent).

[162] C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW 23–24 (2nd ed. 1966).

[163] *Id.* at 117.

[164] *Id.* at 116.

[165] States in which lynchings were frequent a century ago are much more likely to execute today, and both North Carolina and Texas are in this category. ZIMRING, *supra* note 136, at 95 tbl.5.1.

[166] Stevenson, *supra* note 18, at 94.

[167] Garland, *supra* note 137, at 795; *id.* at 828 ("To interpret these public torture lynchings as a summary form of criminal punishment . . . is not to miss their role in racial repression—it is to focus more precisely on the nature of an institution through which that repression was, for a while, sustained."); *see also supra* Part IV.A.2. Garland acknowledges the counter argument that "[l]ynching is not punishment" but rather "racial aggression." *Id.* at 828 (citing Oliver Cox, *Lynching and the Status Quo*, 14 J. OF NEGRO EDUC. 576, 576–88 (1944) (arguing that lynching is

heinous and brutal nature of public torture killings, certain features of these events suggest that they were orchestrated and enacted with a sense of legitimacy. For example, "lynch mobs conducted themselves in ways that resembled official public executions" through the use of processions, public squares, raised platforms, and compelled confessions.[168] Additionally, every single one of the public torture lynchings covered by *The New York Times* "involved allegations of serious crimes for which the death penalty was legally available."[169] Through these rituals and retributive narratives, participants viewed public torture lynchings as legitimate acts of punishment.[170]

Texas holds the disgraceful distinction of having hosted the first public torture lynching, which took place in 1893.[171] While other forms of lynching "occurred prior to the 1890s, the killing [of Henry Smith in Paris, Texas] inaugurated a new kind of event" in which:

> A black suspect would be named following reports that a respectable white person had been raped or murdered. Lurid accounts of the crime would circulate. A posse of the victim's relatives and townspeople would chase down the suspect or, if he or she was already in custody, the crowd would seize the suspect from law officers.[172]

Then, "members of the crowd would torment and physically abuse the dying man."[173]

Historical records from Texas illustrate the extent to which public torture lynchings were both normalized and intertwined with the function of capital punishment. For example, one postcard from 1910 includes the following inscription: "Well John-This is a token of a great day we had in Dallas, March 3rd, a negro was hung for an assault on a three year old girl. I saw this on my noon hour. I was very much in the bunch. You can see the Negro hanging on a telephone pole."[174] Another, from 1916, displays a photograph of the "charred, barely recognizable, corpse of [a man] suspended from a utility pole in Robinson, Texas" and includes the message, "This is the Barbecue we had last night my picture is to the left with a cross over it your son Joe."[175] Far from being reprimanded by

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not punishment, but racial aggression)).

[168] Garland, *supra* note 137, at 813 (describing the lynching rituals and noting that they most closely resembled anachronistic executions).

[169] *Id.* at 811 n.26 (describing his method and findings, and acknowledging that the *Times* did not report all incidents of public torture lynchings).

[170] *Id.* at 828 ("[Public torture lynchings] operated as an occasion for the socially approved expression of racist sentiment and for public displays of racial dominance. And unlike white race riots or unprovoked acts of racial violence . . . public lynchings could claim to be a legitimate expression of popular justice, and summon large crowds to attest to the power of this claim.").

[171] *Id.* at 804.

[172] *Id.* (citations omitted).

[173] *Id.* at 805.

[174] *Id.* at 794 (citing JAMES ALLEN, WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA *(2000))*.

[175] *Id.*

state courts, these individuals were lauded by officials.[176] One Texas judge, rendering his determination following a public-torture-lynch burning, stated, "I find that the deceased came to his just death at the hands of the incensed and outraged feelings of the best people in the United States . . . . The evidence, as well as the confession of guilt by the deceased, shows that his punishment was fully merited and commendable."[177] It was not as if Texas towns and counties lacked effective law enforcement, but rather citizens and officials at times favored public torture lynching instead.[178]

Since the dismantling of Jim Crow, Texas has remained at the forefront of efforts to oppose integration. It is one of nine states that was subject to the Section 5 preclearance requirement of the Voting Rights Act, which was intended to police jurisdictions that have demonstrated "systematic resistance to the Fifteenth Amendment."[179] For Texas, such resistance has included the institution of a poll tax[180] and the use of race-based gerrymandering.[181] After the Supreme Court decided *Brown v. Board of Education*,[182] the Governor of Texas explicitly attempted to avoid compliance, and efforts to integrate Texas schools were met with violence.[183] Of course, like North Carolina and the country at large, Texas underwent tremendous change as its discriminatory history was confronted by the legal, political, and social challenges of the Civil Rights Movement.[184] However, as demonstrated by the statistical and

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[176] *See, e.g., id.* at 810 (suggesting that local law officers applauded these crimes because lynching were not viewed as a violation of the social moral code).

[177] *Id.* at 806 n.19.

[178] *Id.* at 798 ("Public torture lynchings were a preferred alternative to 'official' justice, not a necessary substitute for it"). One *New York Times* columnist commented on this phenomenon in Corsicana, Texas: "Corsicana, it must be remembered, is no frontier hamlet, but a prosperous and progressive city, a railway center of some importance, with many and varied manufacturing interests and equipped with all the facilities of civilization, including those for the prompt and vigorous execution of legal justice." *Id.* at 815 n.34 (quoting N.Y. TIMES, Mar. 15, 1901 at 8).

[179] South Carolina v. Katzenbach, 383 U.S. 301, 327–28 (1966); *History of Federal Voting Rights Laws*, DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php, <http://perma.cc/N7AK-CFT7>. In June of 2013 the Supreme Court invalidated Section 5 of the Voting Rights Act, holding that its preclearance formula was not narrowly tailored to current needs. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013). Justice Ginsburg, dissenting, specifically cited actions taken by the state of Texas in contending that Congress was justified in its determination "racial discrimination in voting in covered jurisdictions [remained] serious and pervasive." *Id.* at 2640–41 (Ginsburg, J., dissenting) ("In 2006, this Court found that Texas' attempt to redraw a congressional district to reduce the strength of Latino voters bore 'the mark of intentional discrimination that could give rise to an equal protection violation,' and ordered the district redrawn in compliance with the VRA. In response, Texas sought to undermine this Court's order by curtailing early voting in the district, but was blocked by an action to enforce the § 5 preclearance requirement.") (citations omitted).

[180] WOODWARD, *supra* note 162, at 84; *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding that poll taxes are unconstitutional).

[181] Gerrymandering in Dallas and Bexar Counties was eventually struck down by the Supreme Court. White v. Regester, 412 U.S. 755, 769–770 (1973).

[182] 347 U.S. 483 (1954).

[183] WOODWARD, *supra* note 162, at 162.

[184] Because of its large Latino population, Texas was actually the site of innovative efforts to move "beyond the black-white dichotomy which dominated racial dynamics in the East and South." Quintard Taylor, *"Justice Is Slow but Sure": The Civil Rights Movement in the West: 1950–1970*, 5

anecdotal evidence outlined below, race continues to influence capital sentencing in the state.

2. *Statistical Evidence of Current Racial Bias in Texas Capital Punishment*

a. Statewide

Texas, like North Carolina, is an "executing state."[185] Unlike "symbolic state[s]," which issue death sentences but rarely carry them out, "[i]n states such as Texas, 'counsel are less likely to file substantial briefs' and 'reviewing courts are less likely to hold hearings' such that "the whole legal process is likely to be 'nasty, brutish, and short.'"[186]

Texas was one of the first states to successfully reinstate the death penalty in the post-*Furman* era.[187] Since 1976, "sixteen states have not sentenced anyone to death."[188] Seventeen additional states have "executed fewer than ten people."[189] In contrast, Texas is among three states that have "performed executions at a rate significantly in excess of two per year," and has sentenced the most people to death of any state.[190] Empirical studies of capital sentencing in Texas reveal patterns similar to those that emerged in North Carolina.

Several statistical examinations of Texas have demonstrated "disparities based on the race of the victim" that indicate a pattern of discriminatory sentencing.[191] These disparities persist even when

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NEV. L.J. 84, 89 (2004); *see also* MARIO T. GARCIA, MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY AND IDENTITY, 1930–1960, at 46–59 (1989).

[185] DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 42 (2010) (noting that AL, AR, AK, DE, FL, GA, LA, MO, NC, OK, SC, TX, and VA are executing states). The term "executing state" comes from an analysis by Carol and Jordan Steiker regarding regional variations in the use of the death penalty. The Steikers divide the United States into "three sorts of jurisdictions: states without the death penalty by law ('abolitionist states'), states with the death penalty but insignificant numbers of executions ('symbolic states'), and states with both the death penalty in law and in practice—states actively carrying out executions ('executing states')." Steiker & Steiker, *supra* note 108, 1870–71.

[186] GARLAND, *supra* note 185, at 203 (citing Steiker & Steiker, *supra* note 108, 1915–16).

[187] Jurek v. Texas, 428 U.S. 262, 276 (1976) (upholding the Texas death penalty statute).

[188] Virginia and Oklahoma are the other two states in this category. Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 237 (2012) (citing Frank R. Baumgartner, *The North Carolina Database of U.S. Executions*, U.N.C. CHAPEL HILL, DEP'T POL. SCI., http://www.unc.edu/~fbaum/Innocence/executions.htm, <http://perma.cc/J7XV-CL6Z>).

[189] *Id.*

[190] *Id.*

[191] Deon Brock et. al., *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender*, 28 AM. J. CRIM. L. 43, 70 (2000) ("Across the state, and within each of the major jurisdictions . . . the prevalence and consistency of disparities based on the race of the victim indicate a pattern of arbitrary sentencing. These findings are consistent with other studies performed in Texas.").

controlling for the seriousness of the offense,[192] and these hold true both across the state and within each of the major jurisdictions.[193] From 2007–2012, "nearly 75% of all death sentences in Texas [were] imposed on people of color."[194] One study, conducted by the Texas Defender Service (TDS) in 2007 demonstrated that "23% of all Texas murder victims were black men," yet only 0.4% of executions resulted from cases involving black male victims.[195] In stark contrast, the study found that 0.8% of all Texas murder victims were white women, yet 34.2% of executions resulted from cases involving white female victims.[196]

Additionally, TDS found that "capital juries are far 'whiter' than the communities from which they are selected."[197] TDS also published statements from several former prosecutors who admitted to witnessing race-based peremptory challenges in Texas capital cases, even in the post-*Batson* era.[198] Indeed, the Supreme Court has repeatedly recognized—and criticized—jury selection practices of Texas prosecutors.[199] Put simply, in Texas, "non-whites are for the most part excluded from the process of assessing a punishment that is disproportionately visited upon them. African-American Texans are the least likely to serve on capital juries, but the most likely to be condemned to die."[200]

However, while most executions occur in Texas, most of Texas is non-executing. "Of Texas' 254 counties, 136 have never sent a single offender to death row."[201] Harris and Dallas counties are particularly noteworthy. Of all counties in Texas—and, indeed, in the United States—Harris County has imposed the most death sentences in the modern era of capital punishment.[202] As Scott Phillips observed in his article analyzing racial disparities in the county's capital sentencing practices, "if Harris County were a state it would rank second in

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[192] *Id.* at 68–69 (noting that the amount of disparity decreases as the level of seriousness increases, but that the disparity exists nonetheless).

[193] *Id.* at 70.

[194] TEXAS COALITION TO ABOLISH THE DEATH PENALTY, TEXAS DEATH PENALTY DEVELOPMENTS IN 2012, at 2 (2012) [hereinafter TEX. COALITION TO ABOLISH THE DP], *available at* http://www.tcadp.org/TexasDeathPenaltyDevelopments2012.pdf, <http://perma.cc/QNF7-575B>.

[195] TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 52 (2007) [hereinafter TEX. DEFENDER SERVICE], *available at* http://www.deathpenaltyinfo.org/node/402, <http://perma.cc/VK7E-ENF9> (conceding that the data is from 1998, but noting that the results are still indicative of the racial disparities that have traditionally existed in the state).

[196] *Id.*

[197] *Id.* at 54–59.

[198] Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 79 n.105 (2009) (citing TEX. DEFENDER SERVICE, *supra* note 195, at 54–59; *Ex parte* Brandley, 781 S.W.2d. 886, 926 (Tex. Crim. App. 1989)).

[199] *Id.* at 78 n.99 (noting that Smith v. Texas, 311 U.S. 128, 132 (1940), Batson v. Kentucky, 476 U.S. 79 (1986), Miller-El v. Dretke, 545 U.S. 231 (2005), were all Supreme Court decisions regarding the constitutional implications of jury discrimination, and all involved Texas state courts).

[200] TEX. DEFENDER SERVICE, *supra* note 195.

[201] *Texas,* DEATH PENALTY INFO. CTR. (Nov. 30, 2013, 3:06 PM), http://www.deathpenaltyinfo.org/texas-1, <http://perma.cc/K8EN-UK77>.

[202] *See id.*

executions, after Texas."[203] Recent data demonstrate the persistence of county-level disparities, but also a geographic shift in which Harris County is no longer the leader.[204] Since 2002, "more than half of death sentences" in Texas came from Dallas County.[205] These county-level disparities suggest a potential arbitrariness in capital sentencing, since there is no reason to believe that a handful of counties would produce the vast majority of death-worthy offenders. Furthermore, a county-level analysis can perhaps provide a more nuanced understanding of how and why Texas employs the death penalty. [206] Below I examine statistical evidence with respect to these two most active counties in the state.

b. Harris County

In Harris County, "12 of the last 13 defendants sentenced to death [were] African-American," and one was Hispanic.[207] Professor Scott Phillips from the University of Denver has conducted two studies examining racial disparities in death sentencing in Harris County. Phillips first focused on the end of Johnny Holmes's tenure as Harris County District Attorney, examining "504 defendants indicted for capital murder in Harris County from 1992 to 1999."[208] He found that (1) death was more likely "to be imposed against black defendants than white defendants," and (2) death was also more likely "to be imposed on behalf of white victims than black victims."[209] Phillips next examined the years 2001 to 2008, when Charles Rosenthal served as District Attorney. The study considered the "roster of death sentences attributable to the Rosenthal administration" against the backdrop of "death-eligible crimes" from the same period, and "compare[d] the racial distribution" of each.[210]

Phillips found race of victim to be a predictive factor in capital sentencing.[211] Among the cases resulting in a death sentence, "white

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[203] Phillips, *supra* note 14, at 133.

[204] TEX. COALITION TO ABOLISH THE DP, *supra* note 194, at 1–2.

[205] *Id.* at 1 (noting specifically that the Dallas-Fort Worth Metroplex is the site of death sentencing in the county). This shift warrants further observation. This Note accepts the data and uses both Harris and Dallas counties as focal points of the analysis.

[206] Because jury decision-making is a valuable indicator of how citizens feel about the death penalty, generally, and juries are drawn from "the county where the offense occurred," county-level analysis illuminates support for the death penalty in a *particular* jurisdiction because it avoids attributing that support to citizens in other counties. Smith, *supra* note 188, at 228.

[207] TEX. COALITION TO ABOLISH THE DP, *supra* note 194, at 2.

[208] Phillips, *supra* note 14, at 133.

[209] *Id.* at 134.

[210] *Id.*; *see also id.* at 138–139 (discussing methodology).

211 Phillips used Supplementary Homicide Reports to determine the number of death-eligible offenses, by coding the homicides according to whether or not they implicated a statutory aggravator. Id. at 142–144 (explaining methodology). He acknowledged that, although "the SHR data do not include information on all the aggravators in the Texas capital murder statute . . . the SHR data do include the small number of aggravators that account for almost all death sentences in

victims [we]re overrepresented,"[212] "Hispanic victims [we]re underrepresented,"[213] and "black victims [we]re at parity."[214] When he took into account the proportion of death-eligible crimes, Phillips found a more pronounced disparity: while "a mere 5% of the death-eligible crimes include[d] a white female victim . . . 27% of the cases resulting in a death sentence include[d] a white female victim."[215] Thus, Harris County "imposed [death sentences] on behalf of white female victims at more than 5 times the rate one would expect" of a race and gender-blind system and "imposed [death sentences] on behalf of white male victims at almost two times the rate one would expect in a neutral system."[216]

A closer examination demonstrated that this disparity further supports the evidence discussed above regarding the race of victims. That is, white defendants more often kill white victims and consequently were more frequently sentenced to death for doing so.[217]

> Holding the race of the victim constant . . . whites who killed whites were sentenced to death at 2.5 times the rate one would expect in a neutral system[218] . . . and minorities who killed whites . . . were sentenced to death at 2.3 times the rate one would expect in a neutral system.[219]

In short, "[a]nyone who kills a white victim [in Harris County] has an elevated chance of being sentenced to death."[220]

Phillips acknowledged the possibility that white victims—"particularly, white female victims"—might be more frequently killed in a more "heinous" manner than other victims, thus providing a "race-neutral explanation" for the disparity in sentencing rates.[221] However, when he examined the data he found that the opposite is true: "the chance of being killed in the most gruesome crimes . . . was markedly higher for minority victims."[222] While 15% of minority victims were killed in crimes marked by three or more statutory aggravators,

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the state, and come closer to defining the universe of death-eligible crimes in Texas than any other publicly available data source." Id. at 143.

[212] *Id.* at 145 ("20% of the death-eligible crimes include a white victim, compared to 50% of the cases resulting in a death sentence").

[213] *Id.* ("39% compared to 20%").

[214] *Id.* at 145 ("38% compared to 33%").

[215] *Id.*

[216] *Id.* ("15% of the death-eligible crimes include a white male victim, versus 27% of the cases resulting in a death sentence").

[217] *Id.* at 147 ("Thus, the apparent bias against white defendants is illusory" and "the true bias occurs on behalf of white victims. Anyone who kills a white victim has an elevated chance of being sentenced to death, and white defendants are simply more likely to do so than minority defendants.").

[218] *Id.* at 147 ("8% of the death-eligible crimes compared to 20% of the cases resulting in a death sentence").

[219] *Id.* ("13% compared to 30%").

[220] *Id.*

[221] *Id.*

[222] *Id.* at 148.

only 10% of white victims and 4% of white female victims were killed in crimes involving these circumstances.[223] Therefore, the heinousness does not explain the disparities discussed above and, on the contrary, "[d]eath sentences were more likely to be imposed on behalf of white victims, and particularly white female victims, despite the fact that minority victims were more likely to be killed in the most egregious crimes."[224]

While it might seem counterintuitive that a capital defendant—who may be white—should be able to rest an appeal on race-of-victim sentencing disparities, it is important to reiterate that race is an impermissible consideration in the application of the death penalty. If two white defendants "are both guilty of heinous murders involving similar aggravating and mitigating circumstances, their culpability and thus 'deathworthiness' should not differ based on the race of their victim."[225] To the extent that the decision to seek or impose death is influenced by the race of the victim involved, the state has (1) violated defendant's right to a justly imposed, proportional punishment,[226] and (2) suggested that race is a relevant to the valuation of a human life.[227]

c. Dallas County

Two of the Supreme Court's seminal cases on the proper use of peremptory challenges—*Batson v. Kentucky* and *Miller-El v. Dretke*[228]—explicitly named Dallas County as guilty of using race-based jury selection practices.[229] In *Batson*, the court considered an extensive investigation conducted by the *Dallas Morning News* regarding race-based jury selection in Dallas County.[230] The investigation revealed that "only 2.8% of the jurors on capital murder cases were Black and prosecutors used peremptory challenges to strike an amazing 92% of Black jurors."[231] The investigation also revealed that the Dallas County D.A. "used a handbook for jury selection that encouraged prosecutors to eliminate 'any member of a minority group."[232] Concurring in *Batson*,

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[223] *Id.*

[224] *Id.* at 148.

[225] Maxine Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 BERKELEY J. CRIM. L. 29, 34 (2007) (arguing this point in the context of a black and white defendant).

[226] *See supra* Part II (explaining how the victim's race influences the state's decision to seek the death penalty).

[227] Kotch & Mosteller, *supra* note 10, at 2121 ("Another rationale for invalidation of the death sentence where there is disparate impact regarding victims is the undervaluation of African American lives and the unfairness visited on the African American community when the murder of one of its members is denigrated, a result of lesser punishment based on the victim's race.").

[228] 545 U.S. 231 (2005).

[229] Price, *supra* note 198, at 79 (discussing Texas courts' involvement in *Batson* and *Miller-El*).

[230] *Id.* at 78–79.

[231] *Id.*

[232] *Id.* at 71 n.62 (citing Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection:*

Justice Marshall cited the handbook as illustrative of the need for a judicial remedy for race-based peremptory strikes.[233]

Nine years later, in *Miller-El*, the Court heard the case of a habeas petitioner who alleged that prosecutors in his case struck 10 of 11 qualified black venire members during jury selection.[234] *Batson* was decided while his initial appeal was pending, and the case was remanded.[235] On remand, the trial court found no *Batson* violation and the Texas Court of Criminal Appeals affirmed.[236] The Supreme Court reversed, persuaded not only by the "bare statistics" but also by a comparative juror analysis that demonstrated black jurors were struck from the venire for having characteristics that were equally present in white jurors who were kept.[237] The Court held that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination."[238] The Court also "urg[ed] lower courts to look at broader practices during the jury selection,"[239] and noted that "*Batson* hearings, without significant investigation . . . often fail . . . [to] prevent[] discrimination."[240] The *Miller-El* opinion suggested that *Batson* challenges require "an analysis of the cultural context in which the strikes occur," and cannot be silenced simply by the provision of purportedly race-neutral explanations for a strike.[241]

In addition to providing interpretive guidance to lower courts and "add[ing] some muscularity to the *Batson* analysis,"[242] the *Miller-El* opinion illustrates Dallas County's historical use of race-based jury selection. For example, the Court noted that Dallas prosecutors employed a practice known as the "jury shuffle," in which they would shuffle the

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Prosecutors routinely bar blacks, DALL. MORNING NEWS, Mar. 9, 1986, at 1A, *available at* 1986 WLNR 1683009). Price also notes that "[a]n earlier jury-selection treatise circulated in the same county instructed prosecutors: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" *Id.* (citing Tompkins v. State, 774 S.W.2d 195, 203 (Tex. Crim. App. 1987)).

[233] Batson v. Kentucky, 476 U.S. 79, 104 (1986); *see also* Price, *supra* note 198, at 70–71 ("Justice Marshall pointed to several examples where defendants attempted to mount such claims. In one instance, the defendant presented evidence that in a single year prosecutors in Dallas County, Texas, struck 405 out of 467 Black jurors with peremptory challenges.").

[234] Miller-El v. Dretke, 545 U.S. 231, 240–41 (2005) ("Out of 20 black members of the 108-person venire panel for Miller–El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution.").

[235] *Id.* at 236.

[236] *Id.* at 236.

[237] *Id.* at 241.

[238] *Id.*

[239] Price, *supra* note 198, at 71; *see also Miller-El*, 545 U.S. at 253 ("The case for discrimination goes beyond these comparisons to include broader patterns of practice during the jury selection.").

[240] Price, *supra* note 198, at 79–80.

[241] *Id.* at 80 (citing *Miller-El*, 545 U.S. at 252–66) ("These include, for instance, the racist history and practices of the Dallas County District Attorney, a comparative analysis of differences in treatment between those jurors seated and those removed—for instance, a comparison of Blacks and Whites in the venire—and attention to what is physically taking place in the courtroom—for instance, jury shuffles.").

[242] Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359, 1369 (2012).

cards bearing the names of veniremembers when black veniremembers were seated at the front of the panel—ostensibly in an effort to avoid having to question and, thus, seat them.[243] The state offered no race-neutral reason for the shuffling, and thus did not rebut the inference of discriminatory intent.[244]

Additionally, the Court described problematic questioning practices employed by Dallas County prosecutors. Review of the record revealed that "prosecutors gave a bland description of the death penalty to 94% of white venire panel members" before asking whether the venire members supported the death penalty but used a "graphic script" to describe the death penalty to 53% of the black venire members before inquiring whether they supported the punishment.[245] The state justified the disparate questioning by suggesting "that use of the graphic script turned not on a panelist's race but on expressed ambivalence about the death penalty in the preliminary questionnaire."[246] However, the record demonstrated that the graphic script was used more frequently with black-venire members even when controlling for ambivalence about the death penalty.[247]

The *Dallas Morning News* subsequently revisited its examination of jury strikes in the post-*Batson* Era.[248] The journalists controlled for non-racial characteristics of jurors and found that race-based jury selection persists.[249] More specifically, the journalists found that prosecutors in Dallas County excluded eligible black jurors at twice the rate they rejected eligible white jurors, and that being black was the most important personal trait affecting which jurors prosecutors rejected.[250]

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[243] *Miller-El*, 545 U.S. at 254. "Texas law permits either side to shuffle the cards to rearrange the order in which they are questioned. Members seated in the back may escape *voir dire,* for those not questioned by the end of each week are dismissed." *Id.* at 253.

See also Price, *supra* note 198, at 80–81 ("What is relevant is that . . . the trial court permits, the prosecutors request, and everyone participates in literally moving the entire panel around the courtroom in an attempt to consistently position Blacks for exclusion. The whole performance pivots around the state's desire to exclude Blacks rather than to select a fair jury.").

[244] *Miller-El*, 545 U.S. at 254–55.

[245] *Id.* at 255–56 (noting that prosecutors gave 6% of white venire panel members a "graphic script.").

[246] *Id.* at 256.

[247] *Id.* at 260 (noting that 30% of non-blacks whose questionnaires expressed ambivalence or opposition received the graphic script, while 86% of black venire-members who expressed ambivalence or opposition received the graphic script); *see also* Price, *supra* note 198, at 81–82 ("Prosecutors frequently offer ambivalence about the death penalty on the part of African American members of the venire as a race neutral reason for use of peremptory strikes . . . . However, in Miller-El the Court found this reason did not fit the facts of the case, given that Black jurors were more likely to hear the latter 'graphic' statement about the death penalty than Whites regardless of their opinion on the death penalty.").

[248] Price, *supra* note 198, at 79 n.102 (citing Steve McGonigle et al., *Jurors Race a Focal Point for Defense: Rival Lawyers Reject Whites at a Higher Rate*, DALL. MORNING NEWS, Jan. 24, 2006).

[249] McGonigle et al., *supra* note 248.

[250] Grosso & O'Brien, *supra* note 143, at 1539–40 (citing Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, but Analysis Shows They Are More Likely To Reject Black Jurors*, DALL. MORNING NEWS, Aug. 21, 2005, at 1A, *available at* 2005 WLNR 24658335 (additional citations omitted)).

3. *Other Evidence of Current Racial Bias in Texas Capital Punishment*

As in North Carolina, "numbers do not tell the entire story" with regard to race and the death penalty in Texas.[251] Several case examples poignantly illustrate the way in which racial bias has affected the Texas criminal justice system. Capital defendants affected by the scenarios discussed below—and undoubtedly similar scenarios that remain undiscovered—deserve a means of legal recourse.

a. Charles Rosenthal

In 2008, Harris County District Attorney Charles Rosenthal[252] "was forced out of office in a scandal that included racist e-mails found on his computer."[253] Along with his statistical investigation of capital sentencing in Harris County, Scott Phillips examined media reports regarding the scandal, and the culture of the District Attorney's office under Rosenthal. One e-mail included the title "Fatal Overdose" and depicted a black man "lying dead on a sidewalk next to slices of watermelon and a bucket of chicken."[254] Another "suggested that former President Bill Clinton was like a black man because he 'played the saxophone, smoked marijuana and receives a check from the government each month.'"[255] Unsurprisingly, media investigations indicate that these racist sentiments pervaded the District Attorney's office during Rosenthal's tenure.[256] Black prosecutors described "being passed over for promotions." White prosecutors spoke condescendingly to black prosecutors and "subject[ed them] to racist (and sexist) remarks."[257] Even when such comments were not directed at black prosecutors, they promulgated a sentiment of white superiority throughout the office. For example, black prosecutors reported that "Hurricane Katrina evacuees were referred to as NFLs—'N[iggers] from Louisiana.'"[258] Furthermore, there was a sense that these racist behaviors had to be protected by a

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[251] Phillips, *supra* note 14, at 150.

[252] *See supra* Part IV.B.2.b.

[253] Phillips, *supra* note 14, at 151; *see also, e.g.*, Ted Oberg, *Why Rosenthal Had to Turn Over E-mail* (Jan. 31, 2008), http://abclocal.go.com/ktrk/story?section=news/in_focus&id=5926157, <http://perma.cc/QC2C-M7K3> (noting that the records were subpoenaed by a federal judge in a case regarding Rosenthal's failure to investigate an incident of potential police misconduct).

[254] Phillips, *supra* note 14, at 151 (citing Leslie Casimir, *Black Leaders Urge Rosenthal to Step Down*, HOUS. CHRON., Jan. 12, 2008, at A1).

[255] *Id.*

[256] *Id.*

[257] *Id.* Phillips notes, for example, "[o]ne young prosecutor was working in a poorly lit room when a senior prosecutor walked in and said: 'All I see is eyes and teeth. You need to turn the light on, girl.'" *Id.*

[258] *Id.*

code of silence: "[w]hen asked if the office would have been open to a diversity council . . . one black prosecutor responded [that] '[i]f you were to even mention that concept in our office, they would look at you like you had (expletive) on your face.'"[259]

According to the Supreme Court's directive that the death penalty not be imposed on the "constitutionally impermissible basis of race,"[260] these revelations should prompt an inquiry into whether Texas can constitutionally execute individuals who were prosecuted by District Attorneys that operated in (or perpetuated) this problematic environment.[261]

b. Exonerations

Texas ranks third in the country for number of death-row exonerations, behind only Illinois—which has already abolished the death penalty—and Florida.[262] In fall 2010, Texas took center stage in the national discussion of death and innocence, after it freed Anthony Graves. Graves was an innocent man, who spent 18 years in prison—12 of which were on death row.[263] He was "convicted of assisting Robert Earl Carter," who was executed in 2000 for allegedly committing multiple murders.[264] Ultimately, Carter admitted that Graves had nothing to do with the crimes and "[t]wo weeks before his death, he provided a sworn statement" to that effect. [265] "[M]inutes before his death [he repeated]: 'Anthony Graves had nothing to do with it. . . . I lied on him in court.'"[266] Although the Burleson County District Attorney did not believe Carter,[267] the Fifth Circuit overturned Graves' conviction in 2006, finding that "prosecutors elicited false statements from two witnesses and withheld two [potentially exculpatory] statements."[268] Prosecutors attempted to retry the case but, after extensive investigation, eventually conceded that they found "'not one piece of credible evidence that links Anthony Graves to the commission of this capital murder.'"[269]

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[259] *Id.*

[260] Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J. concurring).

[261] Phillips, *supra* note 14, at 151–52.

[262] *Innocence and the Death Penalty,* DEATH PENALTY INFO. CTR. (Nov. 30, 2013, 3:06 PM), http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st, <http://perma.cc/DQQ6-8V4Q>.

[263] Brian Rogers, *Texas Sets Man Free From Death Row*, HOUS. CHRON. (Oct. 27, 2010), http://www.chron.com/news/houston-texas/article/Texas-sets-man-free-from-death-row-1619337.php, <http://perma.cc/L35N-5TZL>.

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.* (quoting former Harris County assistant district attorney, and special prosecutor in the Graves case, Kelly Siegler).

Graves's case and others led *Texas Monthly* "to call for a moratorium on executions in the state, explaining, 'Five times in the past seven years we've learned about a person wrongly convicted and taken off death row or a person convicted on bogus forensic science—and executed.'"[270]

For all of the cases of innocence that have been documented in Texas, we will never know how many have gone undiscovered. For example, "[i]n 2006, the *Chicago Tribune* published a three-part investigative series about the case of Carlos De Luna, who was executed in Texas in 1989,"[271] for the murder of a store clerk in Corpus Christi.[272] The paper discovered that another man, Carlos Hernandez, "bragged to several people that someone else was on death row for a crime that he had committed" and that he had committed a nearly identical crime after De Luna was executed.[273] De Luna had "claimed from the start that another man named Carlos" committed the murder, but "the lead prosecutor told the jury that Carlos Hernandez was a 'phantom' of DeLuna's imagination."[274] After De Luna was executed, five people revealed that they personally heard Hernandez confess to the crime.[275]

Death Penalty litigation expert James Liebman recently led a team of Columbia Law students in a comprehensive study of evidence from the case. This evidence included "law enforcement files, crime photographs, court records, newspaper and television reports (including videotapes, and notes, transcripts, and a number of videotapes of interviews)."[276] They found that DeLuna's conviction rested on a "single, nighttime, cross-ethnic eyewitness identification with no corroborating forensic evidence."[277] Furthermore, they uncovered evidence that police

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[270] Tim Murphy, *Rick Perry's 235th Execution Won't Come Yet,* MOTHER JONES (Sept. 2, 2011), http://www.motherjones.com/mojo/2011/09/rick-perry-death-penalty-duane-buck, <http://perma.cc/CW67-S6XS>.

[271] Juan Roberto Melendez, *Presumed Guilty: A Death Row Exoneree Shares His Story of Supreme Injustice and Reflections on the Death Penalty*, 41 TEX. TECH L. REV. 1, 11 (2008) (citing Steve Mills & Maurice Possley, *A Phantom, or the Killer?*, CHI. TRIB., Jun. 26, 2006, at C1, *available at* 2006 WLNR 11036659; Maurice Possley & Steve Mills, *Did One Man Die for Another Man's Crime? The Secret That Wasn't*, CHI. TRIB., Jun. 27, 2006, at C1, *available at* 2006 WLNR 11106679; Maurice Possley & Steve Mills, *'I Didn't Do It. But I Know Who Did': New Evidence Suggests a 1989 Execution in Texas Was a Case of Mistaken Identity*, CHI. TRIB., Jun. 25, 2006, at C20, *available at* 2006 WLNR 10990963).

[272] *Press Releases: 2012 Archives: Columbia Law School Investigation Uncovers New Evidence Suggesting Texas Executed Innocent Man*, COLUM. L. SCH. (May 15, 2012), http://www.law.columbia.edu/media_inquiries/news_events/2012/may2012/the-wrong-carlos, <http://perma.cc/US2W-WQCL> [hereinafter: *Investigation Uncovers New Evidence*].

[273] Melendez, *supra* note 271, at 11.

[274] *Investigation Uncovers New Evidence*, *supra* note 272.

[275] Melendez, *supra* note 271, at 11 (citing Possley & Mills, *Did One Man Die for Another Man's Crime? The Secret That Wasn't*, *supra* note 271).

[276] James S. Liebman et al., *Los Tocayos Carlos*, 3 COLUM. HUM. RTS. L. REV. 711, 716 (2012). This article is part of The Columbia Human Rights Law Review's issue publishing the investigation and its results.

[277] *Investigation Uncovers New Evidence*, *supra* note 272. Cross-ethnic witness identification has been widely discredited as error-prone and unreliable. *See, e.g.*, Derek Simmonsen, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044, 1053 (2011) ("Numerous experiments have shown that people have an easier time identifying people of their own race and tend to make false identifications

and prosecutors knew of Hernandez at the time of the trial, but suppressed relevant evidence.[278] Liebman released one such piece of evidence: an audiotape showing "that police chased another man who matched Hernandez's (but not DeLuna's) description for 30 minutes immediately following the crime."[279]

As Liebman noted, "Sadly, DeLuna's story is not unique."[280] An investigation by the *Houston Chronicle* suggests that Ruben Cantu—who was executed in 1993 and was a 17 year old with no previous convictions when the crime occurred—was innocent.[281] The evidence is particularly compelling in light of its sources: Cantu's co-defendant, the lone eyewitness/alleged victim, and the prosecutor. First, Cantu's co-defendant later "signed a sworn affidavit saying he allowed his friend to be falsely accused."[282] Second, "the lone eyewitness, the man who survived the shooting . . . recanted" his earlier testimony condemning Cantu, explaining that he was "sure that the person who shot him was not Cantu, but he felt pressured by police to identify the boy as the killer."[283] Finally, the "San Antonio prosecutor who authorized the death penalty" in the case has also since conceded that Cantu may have been innocent.[284] These potential innocence claims suggest that it is a serious possibility that the Texas death penalty is faulty and in need of reform—or, if impervious to reform efforts, abolition.

c. Duane Buck

Duane Buck was tried for capital murder and sentenced to death by a jury in Harris County.[285] Texas' death penalty statute requires prosecutors to demonstrate that "there is a probability that the defendant would commit criminal acts of violence that would constitute a

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more often when identifying people of other races.") (citation omitted); David E. Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction*, 23 CRIM. JUST. 4, 4 (2008) ("Approximately three-quarters of the more than 200 wrongful convictions in the United States overturned through DNA testing resulted from eyewitness misidentifications. Of that 77 percent, where race is known, 48 percent of the cases involved cross-racial eyewitness identifications." (citation omitted)).

[278] *Investigation Uncovers New Evidence*, *supra* note 272.

[279] *Id.*

[280] *Id.*

[281] Lise Olsen, *Did Texas Execute an Innocent Man?*, HOUS. CHRON, Nov. 20, 2005, http://www.chron.com/news/houston-texas/article/Did-Texas-execute-an-innocent-man-1559704.php, <http://perma.cc/SQ85-2HCF>; *see also* Melendez, *supra* note 271, at 11 (discussing Cantu's case).

[282] *Id.*

[283] *Id.*

[284] Melendez, *supra* note 271, at 11 (citing Kim Cobb, *Cantu DA's New Views Get a Tough Reception in Texas: Now an Ardent Foe of the Death Penalty, He Weaves Past into Message*, HOUS. CHRON., Jan. 30, 2007, at A1, *available at* 2007 WLNR 1809747).

[285] Buck v. Thaler, 132 S. Ct. 32, 33 (2011), *reh'g denied*, 132 S. Ct. 1085 (2012).

continuing threat to society." [286] If a jury does not find that the defendant poses a future danger to society, the jury cannot impose the death penalty.[287] In Buck's case, the jury's finding was supported by the presentation of what the United States Supreme Court later called "bizarre and objectionable testimony" by an expert witness, Dr. Walter Quijano.[288] Dr. Quijano testified that Buck *himself*, "if given a noncapital sentence, would not present a danger to society," but that black people "are statistically more likely than the average person to engage in crime."[289] Dr. Quijano testified in several other capital cases, in which defendants were accorded relief. [290]

The Supreme Court, while acknowledging the problematic nature of Quijano's testimony, ultimately denied Buck's petition for certiorari.[291] The Court explained that if, as in previous cases that were granted relief, the *prosecution* had introduced Quijano's testimony, then the testimony "would provide a basis for reversal."[292] In Buck's case, however, Dr. Quijano testified regarding future dangerousness in response to *defense* questioning.[293] In her dissent, Justice Sotomayor, joined by Justice Kagan, contended that the state's argument on this point was "misleading,"[294] and that, in fact, Buck's case was not the only one in which Dr. Quijano testified on behalf of the defense rather than the prosecution.[295]

Justice Sotomayor discussed the several other capital cases in which Dr. Quijano testified and defendants were accorded relief.[296] For example, when Victor Hugo Saldano challenged Quijano's testimony in a petition to the U.S. Supreme Court, "the State of Texas confessed error," acknowledging that "'the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process.'"[297] The State also conceded that "the infusion of race as a factor for the jury to weigh in making its determination violated [Saldano's] constitutional right to be sentenced without regard to the

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[286] TEX. CRIM. PROC. CODE ANN. § 37.071(b) (West 2011).

[287] *Id.* § 37.071(b) & (g); *see also Duane Buck: Sentenced to Death Because He is Black*, NAACP (Dec. 5, 2012), http://www.naacpldf.org/case-issue/duane-buck-sentenced-death-because-he-black, <http://perma.cc/E997-PNLW> ("Under Texas' death penalty statute, prosecutors must demonstrate a defendant's 'future dangerousness' and juries may impose a death sentence only if they find that the defendant poses such a future danger.").

[288] *Buck*, 132 S. Ct. at 33.

[289] *Id.*

[290] *Id.* at 36 (Sotomayor, J., dissenting).

[291] *Id.* at 33, 35.

[292] *Id.* at 33. Even though the prosecutor in the case cross-examined Quijano specifically regarding the correlation between race and future dangerousness, the Court concluded that "the colloquy did not go beyond what defense counsel had already elicited on direct examination." *Id.* at 34.

[293] *Id.* at 33.

[294] *Id.* at 35.

[295] *Id.* at 37 (Sotomayor, J., dissenting) ("Like Buck, the defendants in both *Blue* and *Alba* called Quijano to the stand.")

[296] *Id.* at 36.

[297] *Id.*

color of his skin." [298] The Supreme Court "granted Saldano's petition, vacated the judgment, and remanded."[299]

Soon after Saldano's case, "the then-attorney general [now Senator] of Texas [John Cornyn] announced publicly that he had identified six cases" in which Quijano testified "that race should be a factor for the jury to consider" in making its sentencing determination.[300] Quijano served as a witness for the prosecution in four of the cases.[301] In the remaining two, "the defense called Quijano, but the prosecution was the first to elicit race-related testimony from him."[302] In all six cases, including Buck's, "the prosecution invited the jury to consider race as a factor in sentencing, [a]nd, in all six cases, the defendant was sentenced to death."[303] In all but one of the cases, "the State confessed error and did not raise procedural defenses to the defendants' federal habeas petitions."[304] Buck was the only defendant to be denied this modicum of justice.[305] Justice Sotomayor chastised the Court for denying "review of a death sentence marred by racial overtones and a record compromised by misleading remarks and omissions made by the State of Texas."[306]

Buck's attorneys are continuing the fight to keep him alive, and they have received support from unlikely sources. One of Mr. Buck's trial prosecutors, former Harris County Assistant District Attorney Linda Geffin, has voiced her opposition to Mr. Buck's execution, as has the surviving victim, Phyllis Taylor.[307] The data collected by Scott Phillips regarding racially disparate capital sentencing practices in Harris

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[298] *Id.* (citing Response to Pet. for Cert. at 7–8, Saldano v. Texas, 530 U.S. 1212 (2000) (No. 99-8119) 1999).

[299] *Id.* (citing *Saldano*, 530 U.S. 1212).

[300] *Id.* (citing Doc. 27-5 of Record at 30, Buck v. Thaler, No. 4:04-cv-03965 (S.D. Tex. 2004)).

[301] *Id.* (citing Gonzales v. Cockrell, No. 99-7, 2 (W.D. Tex. Dec. 19, 2002); Broxton v. Johnson, No. 00-1034 (S.D. Tex. Mar. 28, 2001); Garcia v. Johnson, No. 99-134 (E.D. Tex. Sept. 7, 2000); *Saldano*, 530 U.S. 1212); *see also* Press Release, Office of the Attorney General, Statement from Attorney General John Cornyn Regarding Death Penalty Cases (June 9, 2000), *available at* https://www.oag.state.tx.us/newspubs/newsarchive/2000/20000609death.htm, <http://perma.cc/B8K9-GMG7>.

[302] *Buck*, 132 S. Ct. at 36 (Sotomayor, J., dissenting) (citing Alba v. Johnson, 232 F.3d 208 (5th Cir. 2000) (referring to a table); Blue v. Johnson, No. 99-0350 (S.D. Tex. Sept. 29, 2000).

[303] *Buck*, 132 S. Ct. at 36.

[304] *Id.*

[305] *Id.* at 36 (citing Buck v. Thaler, No. 11-70025, 2011 WL 4067164, at *8 n.41 (5th Cir. Sept. 14, 2011) (noting that the Court of Appeals for the Fifth Circuit noted that the State provided no reason for distinguishing Buck's case from the others)).

[306] *Id.* at 35.

[307] Press Release, NAACP, New Research: Harris County District Attorney's Office Was Three Times More Likely to Seek Death for African Americans Like Duane Buck (Mar. 13, 2013), *available at* http://www.naacpldf.org/press-release/new-research-harris-county-district-attorneys-office-was-three-times-more-likely-seek, <http://perma.cc/X9QZ-36P8>; *see also* Charles J. Ogletree, Jr., *Condemned to Die Because He's Black*, N.Y. TIMES (Jul. 31, 2013), http://www.nytimes.com/2013/08/01/opinion/condemned-to-die-because-hes-black.html?_r=0, <http://perma.cc/MLG3-YUQM> ("More than 100 prominent individuals from Texas and around the country—including a former Texas governor, Mark W. White Jr., and other elected officials, former judges and prosecutors, civil rights leaders, members of the clergy, past presidents of the American Bar Association—have called for a new, fair sentencing hearing. So have more than 50,000 people who have petitioned the Harris County district attorney.").

County,[308] was provided to expert witness and criminology professor Ray Pasternoster, "to examine the influence of [Mr. Buck's] race in [his] capital murder case.[309] Pasternoster analyzed the data using a logistic regression equation, including twenty-one explanatory variables, in order to narrow the field of cases to those most similar to that of Duane Buck.[310] Pasternoster then examined the impact of race within this universe of cases. He found: (1) "the Harris County District Attorney's Office was *over three times more likely to seek the death penalty against African-American defendants*" than against similarly-situated white defendants, and (2) "Harris County juries were *twice as likely*" *to impose death sentences on black defendants* than to impose death sentences on similarly situated white defendants.[311]

4. Implications of Evidence

"Despite the history" of racism in Texas and the "well-documented discriminatory practices of its agents," there has been little recourse for defendants affected by use of race-based peremptory strikes.[312] In a 2009 study, Professor Melynda Price examined cases from the Texas Court of Criminal Appeals (CCA) in the twenty years following the *Batson* decision.[313] She found that the CCA rarely afforded Texas capital defendants relief based on the improper consideration of race during jury selection.[314] Price examined *Batson* challenges, recording the supposedly race-neutral justifications for the strikes that prosecutors proffered in response to the challenge, any first person statements from venire-members made during the course of *voir dire*, and all objections made by defense counsel.[315]

Price's study demonstrates how the availability of ostensibly

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[308] *See supra* Part IV.B.2.b.

[309] RAY PASTERNOSTER, RACIAL DISPARITY IN THE CASE OF DUANE EDWARD BUCK 1–2 (2012), *available at* http://www.naacpldf.org/files/case_issue/Duane%20Buck-FINAL%20Signed%20Paternoster%20Report%20%2800032221%29.PDF, <http://perma.cc/V4UW-KSBV>.

[310] Unlike the study conducted by Professor Phillips, which examined the impact of race on cases at an aggregate level, the study presented in Buck's appeal asks the more specific question of whether the race of the defendant affected cases similar to Duane Buck's case. *See id.* at 2–3 (listing variables and explaining methodology).

[311] Press Release, NAACP, Former Governor, Former Prosecutor, Civil Rights Leaders, and Other Prominent Individuals Offer Testimony in Favor of Texas Racial Justice Act (Apr. 16, 2013), *available at* http://www.naacpldf.org/press-release/former-governor-former-prosecutor-civil-rights-leaders-and-other-prominent-individuals, <http://perma.cc/L8TA-AZDV>; *see also* PASTERNOSTER, *supra* note 309, at 6.

[312] Price, *supra* note 198, at 78.

[313] *Id.* at 84 (noting that she focuses on the CCA because (1) it was the court responsible for directly applying *Batson* and *Miller-El* at the state level; (2) the high number of capital cases in Texas allowed for a larger sample size, and (3) she wanted to examine cases that would be followed by other state courts).

[314] *Id.* at 78.

[315] *Id.* at 85 (explaining that judges are absent from the analysis because they are "limited in their ability to referee claims of Batson discrimination").

race-neutral, yet potentially pretextual, justifications renders the *Batson* regime ineffective in deterring race-based peremptory strikes. For example, she found that prosecutors frequently struck black venire-members from Texas juries due to their views about the death penalty.[316] While this justification is facially race-neutral, Price examined the black venire-members' statements that prompted the strike, and deconstructed the complex ways in which these purported anti-death penalty views correlated with race.[317] Some black venire-members, for instance, expressed ambivalence about the death penalty because they were concerned it would be applied in a racially discriminatory manner.[318] Striking a venire-member for such views would be legitimate if these views prevented the juror from even considering the death penalty; however, such strikes would be illegitimate if such views expressed only hesitancy and not opposition.[319] Given the collective history and experience of black Americans and the death penalty, such ambivalence cannot be considered race-neutral[320] and, moreover, does not necessarily indicate the level of opposition required for a strike.[321] Because "the procedures created in *Batson* do not adequately disentangle this historical and experiential mix," death penalty views "can be a proxy" for race in the use of peremptory challenges.[322]

Price also found that prosecutors provided contradictory reasons for exerting peremptory challenges against black venire-members. For example, prosecutors removed black venire-members "who expressed

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[316] *See id.* at 86 (describing findings regarding racially influenced peremptory strikes in Texas cases, drawn from records of capital cases from the Texas Court of Criminal Appeals).

[317] *Id.* (noting that the responses of black jurors across all cases fell into at least one of two categories: death penalty views and familiarity with the defendant).

[318] *Id.*

[319] Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (holding that venire-members cannot be struck "for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"). Price also notes that, "[d]ue to high levels of religiosity among African Americans, political views are often expressed in religious language" that might trigger strikes in cases where such views, if expressed as policy preferences, would be considered acceptable. Price, *supra* note 198, at 86–88.

[320] Price, *supra* note 198, at 95 ("If one adds negative interactions with the state through law enforcement—from racially motivated traffic stops to more serious interactions like the imposition of the death penalty—the resonance of such cases orients African Americans to a particular understanding of their relationship to the state. The removal of African Americans for [these reasons] is, most arguably, not race neutral."); *see also* Robinson Order of Relief, *supra* note 110, at *2–3 ("The rationale that the State can justify the striking of African-American venire members based upon the belief that past discrimination might affect their present ability to be fair . . . would necessarily mean that African-Americans, as a group, will continue to be discriminated against in the future.").

[321] For example, the MSU report used in the Robinson case found that, in North Carolina, "if you are not black and have a death penalty reservation, you're much more acceptable to the state." Transcript of Record Vol. XIII at 2–3, North Carolina v. Robinson, No. 91 CRS 23143 (N.C. Sup. Ct. Apr. 20, 2012), *available at* https://www.aclu.org/files/assets/transcript_robinson_rjahearing.pdf, <http://perma.cc/V8F5-XX84> (closing argument by Jay Ferguson).

[322] Price also found that Texas prosecutors frequently cited familiarity with the criminal justice system as a race-neutral explanation for peremptory strikes of black veniremembers. "As levels of incarceration continue to increase among African Americans," there is a danger that this rationale may be pretextual. Price, *supra* note 198, at 86–88.

general opposition to the death penalty,"[323] as well as black venire-members "who supported the death penalty."[324] Prosecutors removed black venire-members who had an "ambivalent relationship with the State," including those who "had uneasy feelings about law enforcement or the criminal justice system," even if these venire-members simultaneously expressed gratitude "to the police for putting their lives on the line to protect the public."[325] These contradictions provide further support for Price's concerns about pretext.

Post-*Batson* peremptory strike practices in Texas demonstrate the inadequacy of currently-available measures for preventing racial bias in jury selection. As the Supreme Court recognized in *Miller-El*, the complexity of determining whether a race-neutral justification is actually pretextual requires a context-specific inquiry that *Batson* methodology simply does not provide. [326] In contrast, an RJA would invite this kind of contextual inquiry by explicitly calling for the presentation of statistical and other evidence that might support a litigant's claim of racial bias.[327]

V. A PROPOSED TEXAS RACIAL JUSTICE ACT

As discussed above, the Supreme Court has made clear that arguments regarding the racially discriminatory application of the death penalty "are best presented to the legislative bodies."[328] According to the Court, "[l]egislatures . . . are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."[329] Accordingly, the Texas legislature has a duty to acknowledge and

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[323] *Id.* at 88 (noting prosecutors included in this group one veniremember who said he was unable to assess future dangerousness, and another who was unwilling to impose the death penalty in the case of a "nontriggerman").

[324] *Id.* at 88–89 (describing one venireman who stated his support for the death penalty but also expressed some uncertainty about particular characteristics of the defendant, another who supported the death penalty, but felt the prosecutor was too eager, and another who said that he did not believe in the death penalty but could follow the law).

[325] *Id.* at 89.

[326] *Id.* at 79–80 ("Miller-El also shows that Batson hearings, without significant investigation and motivation by the lower courts, often fail in their purpose of preventing discrimination, while succeeding in permitting unconstitutional death sentences. Miller-El calls for analysis of the cultural context in which the strikes occur.") (citing Miller-El v. Dretke, 545 U.S. 231, 252–66 (2005)); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 359–60 (1987); *supra* Part IV.B.3.

[327] In fact, the RJA has served this very purpose in North Carolina. *See, e.g.*, Order Granting Motions for Appropriate Relief at 4–5, North Carolina v. Golphin, Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079 (N.C. Sup. Ct., Dec. 13, 2012), *available at* http://www.law.msu.edu/racial-justice/Golphin-et-al-RJA-Order.pdf, <http://perma.cc/E4QC-LP4A> (considering evidence of differential treatment of white and black venire-members, the county's "history of discrimination in jury selection, and the role of unconscious bias in decision-making," in addition to evidence of discriminatory intent).

[328] McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

[329] *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 186 (1976)).

address the statistical, historical, and anecdotal evidence of racial discrimination the state's capital sentencing scheme.

In 2013, the Texas legislature considered several RJA proposals. All proposals would have allowed capital appeals based on claims that race was a significant factor in the decision to seek or impose a death sentence.[330] This is a core purpose of RJAs. Accordingly, this Note's proposed TX-RJA would also allow capital appeals based on claims that race was a significant factor in the decision to seek or impose a death sentence. However, beyond that core purpose, each TX-RJA proposed before the Texas legislature was severely deficient, given the evidence presented in this Note.

While one version of the bill would have required RJA claimants to waive any objection to a sentence of life without parole,[331] all others did not.[332] The evidence in this Note suggests racial discrimination infects both the guilt and sentencing phases of death penalty cases in Texas.[333] Defendants affected by such racial bias may have varying levels of culpability, including innocence.[334] A TX-RJA should not require appellants to accept a sentence of life without parole, but rather should allow for case-by-case determination of appropriate relief.

Notably, the NC-RJA—as originally enacted—allowed for consideration of racial bias with regard to jury selection, the defendant's race, and the victim's race.[335] As amended, however, the NC-RJA did not allow for consideration of racial bias with regard to the victim's race.[336] As discussed above, statistical studies suggest that race-of-victim exerts more influence than race-of-defendant in capital sentencing.[337] The TX-RJA should allow for all evidence that is probative of racial bias in the system. Therefore, in line with the NC-RJA—as originally enacted—this Note's proposed TX-RJA would reflect the information provided by current empirical studies by allowing for consideration of racial bias with regard to the victim's race.

VI. ADDRESSING POSSIBLE CRITICISM

Despite the similarities between North Carolina and Texas

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[330] Maurice Chammah, *Panel Debates Death Penalty Cases, Race Considerations*, TEX. TRIB. (Apr. 16, 2013), http://www.texastribune.org/2013/04/16/lawmakers-discuss-race-testimony-death-penalty-cas, <http://perma.cc/BBF7-EKBX>.

[331] *Id.* (citing the version introduced by Representative Senfronia Thompson of Houston). This is true of the NC-RJA as amended in 2012, but not as originally enacted. *See supra* Part III.

[332] Chammah, *supra* note 330 (citing the version introduced by state Rep. Eric Johnson and state Sen. Royce West, both Dallas Democrats).

[333] *See supra* Part III.

[334] *See supra* Part III.

[335] *See supra* Part III.

[336] *See supra* Part III.

[337] *See, e.g.*, *supra* Part II.B.

evidencing a need for a TX-RJA, advocating a TX-RJA faces two likely counter-arguments. The first argument is that the repeal of the NC-RJA puts the viability and impact of a TX-RJA in doubt. The second argument is that passing a TX-RJA is inadvisable because reform efforts help legitimize and entrench the capital punishment scheme, potentially forestalling or impeding abolition. Section A tackles the former argument; section B tackles the latter.

A. The Viability and Impact of a Texas Racial Justice Act, Given the North Carolina Racial Justice Act Repeal

Advocates of reform in Texas should not be deterred by the eventual repeal of the NC- RJA. First, unlikely coalitions are forming in Texas, suggesting the possibility of reform despite the repeal of the NC-RJA. Furthermore, there are several reasons to consider the NC-RJA a success, notwithstanding its eventual repeal.

1. A Texas Racial Justice Act Would Likely be Viable

Barbara O'Brien and Catherine M. Grosso conducted the statistical studies that served as the primary empirical evidence relied upon in the first cases heard under the NC-RJA.[338] They suggest that the passage of the NC-RJA was preceded neither by any dramatic change in political composition of the legislature, nor by sudden proliferation of new evidence. Instead, the NC-RJA was preceded by the convergence of several movement leaders—namely "legislators, civil rights advocates, and death penalty reformers"—who were able to "forge a common path."[339] O'Brien and Grosso also observed that, "[i]n the ten years preceding the passage of the [NC-]RJA, six high-profile exonerations took place in North Carolina, including those of five death row inmates."[340] Regardless of the public or legislative willingness to consider issues of race, stories of exonerations "created a competing narrative, putting a human face and a 'there but for the grace of God go I' element to the statistics."[341] Thus, these exoneration stories may have propelled the movement advocating for the NC-RJA.[342]

The factors that facilitated reform in North Carolina are present—and arguably stronger—in Texas. Supporters of the TX-RJA are drawn

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[338] *See* O'Brien & Grosso, *supra* note 77; Grosso & O'Brien, *supra* note 143; O'Brien & Grosso, *supra* note 45.
[339] O'Brien & Grosso, *supra* note 77, at 476; *see also id.* at 477–88.
[340] *Id.* at 490.
[341] *Id.* at 494.
[342] *Id.* at 488.

from unlikely communities extending beyond death penalty reformers and civil rights advocates. For example, former Texas Governor Mark White supports a TX-RJA, even though he oversaw nineteen executions during his tenure and is "a longtime supporter of [the death penalty]."[343] He testified before the Texas state legislature, proclaiming his belief "that if we are going to carry out the ultimate punishment, we must do everything in our power to make the system fair. . . . We must make sure that racial discrimination does not poison our death penalty decision-making."[344] Additionally, several prosecutors have publicly criticized death sentencing in both specific cases and generally across the State.[345] In particular, the Dallas County District Attorney is at the forefront of efforts to pass an RJA.[346] Finally, exonerations—not a new phenomenon in Texas—are being publicized by local and national media outlets,[347] raising awareness of the problematic flaws that pervade the current system.

2. *A Texas Racial Justice Act Would Likely Have a Substantial Impact*

In light of the NC-RJA's powerful impact during its short tenure,[348] the NC-RJA's repeal must be understood not as a sign of its failure, but rather as a sign of its success. In signing the repeal bill, Governor McCrory said that he was removing "procedural roadblocks" that were impeding the death penalty.[349] These so-called roadblocks were the procedural safeguards that the NC-RJA put in place to ensure that death sentences in North Carolina were *free of racial bias*. Moreover, these

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[343] *An Act Relating to Prohibiting Seeking or Imposing the Death Penalty on the Basis of a Person's Race: Hearing on H.B. 2458 Before the H. Criminal Jurisprudence Comm.*, 83d Leg., Reg. Sess. (Tex. 2013) (statement of Mark White, Governor of Texas) [hereinafter *H.B. 2458 Hearing*], *available at* http://www.naacpldf.org/files/case_issue/Governor%20Mark%20White%20RJA%20Testimony.pdf, <http://perma.cc/87FK-35SN>.

[344] *Id.*

[345] *See, e.g.*, *H.B. 2458 Hearing*, *supra* note 343 (statement of Linda Geffen, Former Harris County Assistant District Attorney), *available at* http://www.naacpldf.org/files/case_issue/Linda%20Geffin%20RJA%20Testimony.pdf, <http://perma.cc/C2E3-UFQJ> (criticizing the death penalty); Goldstein, *supra* note 3 (unveiling Dallas prosecutor Craig Watkins' criticism of the death penalty); Press Release, Office of the Attorney General, Statement from Attorney General John Cornyn Regarding Death Penalty Cases (June 9, 2000), *available at* https://www.oag.state.tx.us/newspubs/newsarchive/2000/20000609death.htm, <http://perma.cc/SMG-6HRH> (criticizing the death penalty).

[346] Goldstein, *supra* note 3.

[347] *See, e.g.*, Brian Grissom et. al., *Texas Among Top 3 States in Total Exonerations*, TEX. TRIB., May 21, 2012, http://www.texastribune.org/2012/05/21/texas-among-top-3-states-exonerations/, <http://perma.cc/E475-2GBF>; Scott Horton, *In Texas, 41 Exonerations from DNA Evidence in 9 Years*, HARPER'S MAG. BLOG (Jan. 5, 2011, 4:18 PM), http://harpers.org/blog/2011/01/in-texas-41-exonerations-from-dna-evidence-in-9-years/, <http://perma.cc/5H6W-P2A4>.

[348] *See supra* Parts IV.A.3 & 4.

[349] *North Carolina Repeals Racial Justice Act*, EQUAL JUSTICE INITIATIVE (June 5, 2012), http://eji.org/node/784, <http://perma.cc/SN3V-WQ9D>.

so-called roadblocks resulted in a judicial determination that four defendants were sentenced to death because their cases were *infected by racial bias*.[350] To the extent that the NC-RJA slowed the flow of executions in the state, it did so because there were credible claims that the death penalty was, in fact, being imposed in an unconstitutional manner.[351]

B. Enacting a Texas Racial Justice Act, Despite Concern that a Texas Racial Justice Act Could Entrench the Death Penalty and Forestall or Impede Abolition

Critics may suggest that reform efforts help legitimize and entrench the capital punishment scheme, potentially prolonging or impeding abolition. However, a TX-RJA is unlikely to meaningfully increase the incline of a Texas abolition movement's uphill battle. Moreover, a TX-RJA might actually facilitate abolition. Lastly, even if a TX-RJA does not facilitate abolition, there are still compelling reasons it should be considered.

It is valid to consider the possibility that a TX-RJA could legitimize the death penalty and impede any momentum for abolition.[352] However, political and sociological factors in Texas suggest that abolition is not an otherwise readily-obtainable goal, which would be appreciably slowed by a TX-RJA. In the United States, when "executing" states have abolished the death penalty, there have generally been extraordinary circumstances involved. For example, the recent success of the Illinois abolition campaign has been described as "heavily dependent on serendipity."[353] The California campaign mobilized significant support for repeal and revealed a closer split on the issue among the electorate than ever before, and still was unsuccessful.[354]

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[350] "Two of the four defendants who received relief under the RJA argued on appeal that the state violated Batson in their trials but did not receive relief," suggesting that these defendants had cognizable racial discrimination claims that would not have been addressed absent the RJA. O'Brien & Grosso, *supra* note 45, at 1636 n.69 (citing State v. Augustine, 616 S.E.2d 515, 522 (N.C. 2005); State v. Golphin, 533 S.E.2d 168, 215 (N.C. 2000)).

[351] *See* Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (noting that race is an "impermissible basis" of a death sentence); *see also* O'Brien & Grosso, *supra* note 45, at 1634 (remarking that more than 150 capital defendants challenged their sentences under the RJA by citing Grosso and O'Brien's study on racial disparities in jury selection).

[352] *See* Steiker & Steiker, *supra* note 38, at 360 ("[T]he Supreme Court's Eighth Amendment jurisprudence, originally promoted by self-consciously abolitionist litigators and advanced by reformist members of the Court, not only has failed to meet its purported goal of rationalizing the imposition of the death penalty, but also may have helped to stabilize and entrench the practice of capital punishment in the United States.").

[353] Rob Warden, *How and Why Illinois Abolished the Death Penalty*, 30 LAW & INEQ. 245, 285 (2012).

[354] DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2012: YEAR END REPORT (2012), *available at* http://deathpenaltyinfo.org/documents/2012YearEnd.pdf (noting that 48% of the electorate supported repeal of capital punishment, as opposed to only 29% of the public who voted against expanding the death penalty in 1978).

In contrast, mobilization for abolition in Texas is far less advanced. The frequency with which Texas sentences defendants to death suggests that the political climate is one in which the fight for abolition would be difficult.[355] The Texas Democratic Party endorsed the abolition of the death penalty for the first time in June of 2012.[356] Yet, Governor Perry has executed more people than any other governor in the history of the United States.[357] Even if the Texas legislature were to vote for abolition—an unlikely event in itself—there is little reason to believe that Governor Perry would forego an opportunity to veto the measure.[358]

There is also the possibility that a TX-RJA might actually foster an abolition movement. A TX-RJA could create a space to talk about race and criminal justice both in the community and in the courtroom, thereby potentially facilitating abolition. By compelling the state to directly address historical and sociological evidence of racial injustice, a TX-RJA would insert this information into court records that are publically accessible, and available for citation in future cases.[359] With each sentence that is overturned, the Act would draw attention to the fact that the state has been sending people to the execution chamber based on race.[360] As exemplified by other abolition campaigns, this kind of attention can be instrumental in winning public—and, as a result, political—support for ending the death penalty.[361] Indeed, a survey

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[355] *See* Steiker & Steiker, *supra* note 108, at 1910 (suggesting that political affiliation—as evaluated according to political culture, political economy of executions, and legal culture—might account for the differences between symbolic and executing states); *see also* Editorial, *With Death Penalty Bans Gaining Steam, What's Next for Texas?*, DALL. MORNING NEWS (Mar. 20, 2013), http://www.dallasnews.com/opinion/editorials/20130320-editorial-with-death-penalty-bans-gaining-steam-whats-next-for-texas.ece, <http://perma.cc/XDS4-MQXS> (commenting on Maryland's abolition of the death penalty by noting that Maryland is "political worlds away from GOP-held Texas, where support for capital punishment has traditionally been stronger than the nation's.").

[356] "The new Death Penalty section of the platform cites wrongful convictions, evidence of wrongful executions, and the disproportionate application to the poor and minorities as part of the call to abolish the death penalty." TEX. COALITION TO ABOLISH THE DP, *supra* note 194, at 11–12 (citing TEX. DEMOCRATIC PARTY, 2012 TEXAS DEMOCRATIC PARTY PLATFORM (2012), *available at* http://www.txdemocrats.org/pdf/2012-platform.pdf).

[357] Governor Perry's tenure has been marked by quite emphatic support for the death penalty. In July 2012, he "ignored public pleas from President Barack Obama, the Mexican government, and the United Nations and went forward with the execution of a Mexican national who had never been properly informed of his rights following his arrest. Perry has also drawn criticism for his involvement in the execution of Cameron Todd Willingham, who was executed for murdering his two children via arson. Forensic scientists later found no evidence of arson, and when a state commission was on the verge of concluding that the case had been wrongly decided, Perry replaced three of its members." Murphy, *supra* note 270.

[358] For example, when running for President in 2012, Governor Perry commented that he thinks the Texas death penalty process "works just fine." Sophia Rosenbaum, *Texas Carries Out Landmark 500th Execution*, NBC NEWS (June 26, 2013), http://usnews.nbcnews.com/_news/2013/06/26/19152294-texas-carries-out-landmark-500th-execution, <http://perma.cc/N5GM-38RD>.

[359] *See, e.g.*, *Robinson* Order of Relief, *supra* note 110, at *2–3 ("When our criminal justice system was formed, African Americans were enslaved. Our system of justice is still healing from the lingering effects of slavery and Jim Crow. In emerging from this painful history, it is more comfortable to rest on the status quo and be satisfied with the progress already made. But the RJA calls upon the justice system to do more. The legislature has charged the Court with the challenge of continuing our progress away from the past.").

[360] *Id.*

[361] Warden, *supra* note 353, at 248.

conducted in February 2013 indicated that a majority of North Carolina residents would support replacing the death penalty with life without parole, subject to certain conditions.[362]

Regardless of whether a TX-RJA directly fosters abolition, there are compelling reasons it should be adopted. First, a TX-RJA's abovementioned public court records and public awareness may also deter prosecutorial misconduct.[363] The successes of initial cases brought under the Act—and, presumably, the embarrassment resulting from the implication that Texas prosecutors have obstructed the candor and integrity of the court—could discourage the exercise of race-based peremptory strikes in the future.[364]

Second, abolition advocates should not underestimate the expressive value in confronting modes of racial oppression. As Critical Race Theorist Derrick Bell articulated, "We yearn that our civil rights work will be crowned with success, but what we really want—want even more than success—is meaning."[365] Even if a Racial Justice Act does not directly facilitate abolition, there is meaning in an effort that explicitly aims to dismantle white supremacy,[366] and this meaning should not be disregarded without due consideration.

A final compelling reason that a TX-RJA should be adopted lies in the viable means of relief for capital defendants. In only two short years, four defendants in North Carolina were removed from death row after challenging their sentences under the NC-RJA.[367] For some, adoption of a TX-RJA is a matter of life and death.

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[362] *Public Opinion: Strong Majority of North Carolinians Prefer Life Without Parole Over the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/public-opinion-strong-majority-north-carolinians-prefer-life-without-parole-over-death-penalty, <http://perma.cc/PP9Q-KRYL> (noting that "68% of respondents would support replacing the death penalty with LWOP if the offender had to work and pay restitution to the victim's family," 63% would support repeal "if the money saved was redirected to effective crime fighting tools," and 55% would support repeal "if the money saved was redirected to solving cold cases and assisting victims of crime").

[363] One would expect the successes of the initial cases brought under the Act—and, presumably, the embarrassment resulting from the implication that North Carolina prosecutors have obstructed the candor and integrity of the court—to discourage the exercise of race-based peremptory strikes in the future. Though a plausible hypothesis, initial examination of this kind of ex ante effect reveals mixed results. Interestingly, O'Brien and Grosso's examination of post-RJA cases demonstrates that the reduction in race-based peremptory strikes "occurred primarily in cases with white defendants." O'Brien & Grosso, *supra* note 45, at 1637. Due to the "relatively small number of post-RJA cases," these findings are only "preliminary." *Id.* However, this study may suggest that the original version of the Act (which allows evidence of disparities relating to the race of the victim) as opposed to the amended Act (which does not) might be more effective.

[364] *Id.*

[365] Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 586 (1993).

[366] *Id.* at 585–86.

[367] O'Brien & Grosso, *supra* note 45, at 1636 n.69 ("Two of the four defendants who received relief under the RJA argued on appeal that the state violated Batson in their trials but did not receive relief," suggesting that these defendants had cognizable racial discrimination claims that would not have been addressed absent the RJA (citing State v. Augustine, 616 S.E.2d 515, 522 (N.C. 2005); State v. Golphin, 533 S.E.2d 168, 215 (N.C. 2000)).

VII. CONCLUSION

States have been paralyzed by the "fear of too much justice"[368] for too long. Given the historical, statistical, and anecdotal evidence that death sentences in Texas are influenced by race, Texas should adopt a Racial Justice Act similar to that which North Carolina passed in 2009. Meaningful reform must address disparities based on the defendant's race, the victim's race, and race-based peremptory strikes. Despite the discouraging evidence discussed in this Note, with the passage of a TX-RJA we may "hope that acknowledgment of the ugly truth of race discrimination revealed by [d]efendants' evidence is the first step in creating a system of justice that is free from the pernicious influence of race, a system that truly lives up to our ideal of equal justice under the law."[369]

[368] McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

[369] North Carolina v. Golphin et al., Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079, at *6 (Cumberland Cnty. Super. Ct., Dec. 13, 2012), *available at* http://www.law.msu.edu/racial-justice/Golphin-et-al-RJA-Order.pdf, <http://perma.cc/Z44H-8UCW>.