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NOVA LAW REVIEW



LEO C. GOODWIN SYMPOSIUM

Tilting the Scales: The Changing Roles of Women in the Law and Legal Practice

Introduction: Inspiration, Anticipation, and Celebration:
The 10th Annual Leo Goodwin Lecture Series

*Stephanie Feldman Aleong
Olympia Duhart
linda f. harrison*

Directions in Sexual Harassment Law

Catharine A. MacKinnon

The Embodiment of Equal Justice Under the Law

Anita F. Hill

Women and Law: Challenging What Is Natural and Proper

The Honorable Deanell Reece Tacha

Freedom and Fear Post-9/11: Are We Again Fearing
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THE EMBODIMENT OF EQUAL JUSTICE UNDER THE LAW

ANITA F. HILL*

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I. INTRODUCTION

In 1991, when I testified before the Senate Judiciary Committee in the Clarence Thomas confirmation hearings, there were two women in the United States Senate.¹ Nationwide, as of 1997, 19% of seated federal judges were women.² Though the laws protecting against sexual harassment had been in place since the 1970s,³ a woman’s chance of winning a sexual harassment lawsuit was a longshot. The United States Supreme Court had heard only one such case.⁴ In the United States, women earned about seventy cents for each dollar a man earned.⁵

On October 15, 1991, Judge Thomas was confirmed as a justice to the nation’s highest court.⁶ Momentum from the hearings indicated that the issues I raised during the hearing were only of passing interest.⁷ Observers were equally certain that no woman would come forward with a sexual har-

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1. U.S. Senate, Art & History–Historical Minutes, “Year of the Woman” (Jan. 3, 1993), http://www.senate.gov/artandhistory/history/minute/year_of_the_woman.htm.

2. ABA, FACTS ABOUT WOMEN AND THE LAW 1 (1998), <http://www.abanet.org/media/factbooks/womenlaw.pdf>.

3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253–66 (1965).

4. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

5. Women’s Earnings as a Percentage of Men’s, 1951–2005, Infoplease.com, <http://www.infoplease.com/ipa/A0193820.html> (last visited Apr. 14, 2007).

6. *Senate Confirms Thomas, 52-48, Ending Week of Bitter Battle: ‘Time for Healing,’ Judge Says*, N.Y. TIMES, Oct. 16, 1991, at A1.

7. Julia Lawlor, *Thomas Battle Leaves Doubts in Workplace*, USA TODAY, Oct. 16, 1991, at B1.

assment complaint after viewing the Senate's treatment of the issue.⁸ In sum, analysts projected that my appearance before the Senate would have a chilling effect on women's voices.⁹ Fortunately, that projection was wrong. In the weeks following my testimony, open discussions of the hearings and the topic of sexual harassment began to reshape public opinion on a variety of gender-related issues.¹⁰

Since the events of 1991, I've had the opportunity to participate as a speaker in hundreds of public forums—some about the hearings, some about sexual harassment, and some about general racial and gender issues. In venues all over the country, as well as in Asia, Africa, and Europe, the hearings still resonate. Far from static, they've evolved and taken on significance as we face new issues of gender equality. The energy the hearings unleashed pushed the issue of sexual harassment far beyond its predicted limits and even beyond the numbers of complaints and amounts of monetary awards.¹¹ Today, sexual harassment is correctly viewed as an assault on women's rights to participate in the economic mainstream as equals to men.

Beyond the harassment issue, Justice Thomas's confirmation hearings evoked a new consciousness about gender equality in leadership.¹² We began to reexamine the role that women's rights play in shaping our society.¹³ We knew that women should take a more active role in fashioning public policy and deciding all the issues of the day, not just those that were seen as typical gender issues.

In 2006, there were seventy-one women in the United States House of Representatives and fourteen women in the United States Senate.¹⁴ Women's earnings improved to 80% of men's.¹⁵ Since the hearings, corporations have instituted anti-harassment policies and countless women have

8. *Id.*

9. *See id.*

10. Susan Deller Ross, *Sexual Harassment Law in the Aftermath of the Hill-Thomas Hearings*, in RACE, GENDER, AND POWER IN AMERICA 237–38 (Anita Faye Hill & Emma Coleman Jordan eds., 1995).

11. *Id.* at 237.

12. *See* Guy Gugliotta, *Year of the Woman Becomes Reality as Record Number Win Seats*, WASH. POST, Nov. 4, 1992, at A30.

13. *See* Gwen Ifill, *Female Lawmakers Wrestle with New Public Attitude on 'Women's' Issues*, N.Y. TIMES, Nov. 18, 1991, at B7; *see also* Geraldine A. Ferraro, *Women's Issues Are Now National Issues*, ST. LOUIS POST-DISPATCH, Nov. 3, 1992, at 3B.

14. MILDRED L. AMER, *Women in the United States Congress: 1917–2006*, CRS REPORT FOR CONGRESS 1 (updated Nov. 29, 2006), available at <http://www.senate.gov/reference/resources/pdf/RL30261.pdf>.

15. Molly Hennessy-Fiske, *Women Narrow Wage Gap as Men's Earnings Shrink*, DENVER POST, Dec. 4, 2006.

sought relief using these internal procedures.¹⁶ In 2006, 12,025 sexual harassment complaints were filed with the United States Equal Employment Opportunity Commission (EEOC).¹⁷ Likewise, 15.4% were filed by men.¹⁸ Monetary relief on those resolved by the EEOC without litigation totaled \$48.8 million.¹⁹

In the courts, women and men are filing sexual harassment complaints and winning unprecedented awards.²⁰ The United States Supreme Court has ruled in favor of numerous women in harassment suits and recognized that men who are harassed are equally entitled to sue under federal law.²¹ Currently, women make up over 20% of the federal judiciary figures; however, the percentage of people of color on the federal bench is less clear.²² These are, in fact, better numbers, but they are not good enough.

I argue that a society committed to equal justice under the law must demand a judiciary that embodies that belief. Professor Judith Resnik states the issue clearly: “In the contemporary world, where democratic commitments oblige equal access to power by persons of all colors whatever their identities, the composition of a judiciary—if all-white or all-male or all-upper class—becomes a problem of equality and legitimacy.”²³ Equality and legitimacy require that we increase the inclusiveness of today’s judiciary.

For decades, feminist legal scholars have asked how the law fails to take into account women’s experiences.²⁴ Critical race theorists have similarly asked how the “received tradition in law adversely affects people of

16. See Sherman M. Fridman, *Avoid Sexual Harassment Lawsuits: Sexual Harassment Lawsuits Can Hurt Any Firm’s Bottom Line*, <http://www.office.com/templates/page1.asp?docid=33> (last visited Apr. 14, 2007).

17. EEOC, *Sexual Harassment*, http://www.eeoc.gov/types/sexual_harassment.html (last visited Mar. 24, 2007).

18. *Id.*

19. *Id.*

20. See John Vering, *State Court Juries Continue Employee-Friendly Verdicts*, 16 MO. EMP. L. LETTER 1 (Apr. 2006) (reporting a \$6.8 million award in a sexual harassment complaint); see also *EEOC Wins Big in Chicago on Sexual Harassment Claim*, 8 EMP. PRAC. LIABILITY VERDICTS & SETTLEMENT, Jan. 1, 2007 (reporting a \$2.355 million award against an employer on behalf of three former employers).

21. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

22. See ABA COMM’N ON WOMEN IN THE PROFESSION, *CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY* 5 (2006); see generally Federal Judicial Center, *Biographical Directory of Federal Judges*, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Apr. 14, 2007).

23. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 597 (2005).

24. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

color not as individuals but as a group.”²⁵ Critical race theorists appropriately challenge us to consider “[w]hat would the legal landscape look like today if people of color were the decision-makers?”²⁶ The relevance of the “woman question” and the “race question” today is clear in light of the recent appointments of Chief Justice John Roberts and Justice Samuel Alito to the withdrawal of Harriet Miers’ name from consideration.²⁷ For the first time since Justice Ruth Bader Ginsburg took office in 1993, the United States Supreme Court had only one female justice.²⁸ The “race question” is similarly relevant. As we contemplate future judicial appointments, critical consideration must be given to the question of whether, in the twenty-first century, the judiciary will be a body that looks more like and reflects the perspectives of the population it serves, as well as engages in discussion about how we can get to a more representative judiciary.

Justice Sandra Day O’Connor’s appointment as the first woman on the United States Supreme Court was a historical event,²⁹ as was her resignation.³⁰ Her resignation was greeted with widespread public speculation about the gender of her replacement.³¹ Within days of Justice Sandra Day O’Connor’s resignation, a reporter asked me if her replacement should be a woman. My response was that the nominee’s respect for gender equality was more important than his or her gender—as though we had to choose between having a woman and having someone committed to gender equality. My sincere, but uninspired response barely masked my ambivalence about being asked whether Justice O’Connor’s replacement had to meet a gender litmus test. My perception was that behind the question was the idea that the O’Connor seat was the woman’s seat—just as many had assumed that the Thurgood Marshall years on the Court secured a seat for an African American.³² Few questioned what was behind such a presumption. The idea of

25. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 85 (1994).

26. *Id.* at 86.

27. See Anita F. Hill, *Why Harriet Miers Mattered*, MS. MAG., Winter 2006, available at <http://www.ms magazine.com/winter2006/miers.asp>.

28. See Bill Mears, *Reporter’s Notebook: Fun with Dick and Jane—and John*, CNN WASHINGTON BUREAU, Oct. 2, 2006, <http://www.cnn.com/2006/LAW/09/26/scotus.journal/index.html>.

29. See Nat’l Women’s Hall of Fame, *Women of the Hall: Sandra Day O’Connor*, 1995, <http://www.greatwomen.org/women.php?action=viewone&id=115> (last visited Apr. 14, 2007).

30. Adam Liptak, *O’Connor Leap Moved Women Up the Bench*, N.Y. TIMES, July 5, 2005, at A1.

31. See *id.*; Hill, *supra* note 27.

32. Talk of a “black seat” on the court began even before Justice Marshall announced his resignation. See Hal Riedl, Editorial, *Should Supreme Court Have a Black Seat?* ST. LOUIS

setting aside a seat for a woman evoked memories of past special protections for women that often resulted in measures that limited, rather than expanded, their opportunities. For me, the question hinted that a woman would only be chosen if she were given special consideration because the vacancy was left by a woman. Not even the Democrats on the Senate Judiciary Committee seemed to challenge the assumption.³³ None were asking that former Chief Justice William Rehnquist's replacement be a woman.³⁴ Few suggested that it be a woman of color. It was not hard to conclude that, except when a woman resigned, the likely nominee would be male, and the outcome suggests that it will likely be a white male.

With a total of nine seats at stake, simply setting aside Justice O'Connor's seat as a woman's seat seemed more likely to restrict women's interests than to advance them. Both historical experience and contemporary theory suggest that the key to women's advancement is not setting aside a single seat for women, but rejecting the practice of setting aside all the others for men.

The legal profession has come a long way from the time when the only choice for including women was to have special protections or set-asides. We have also moved beyond an era where we believed that we had to ignore the differences in women's and men's experiences in order to treat them equitably and offer meaningful inclusion. Despite the fact that in 2004 a majority (59%) of individuals between the ages of forty and fifty-seven (Baby Boomers) said that the Civil Rights Movement had a "Major Influence" on

POST-DISPATCH, Apr. 1, 1990, at 3B. Shortly after he announced his resignation, Justice Marshall advised that President George Bush not use race to justify "picking the wrong Negro and saying, 'I'm picking him because he's a Negro.'" Howard Fineman et al., *How Far Right*, NEWSWEEK, July 8, 1991, at 19. Although Justice Marshall expressed hope that the nominee would be "a Negro," according to reported accounts, "he did not think there should be a permanent black seat on the high court." Ethan Bronner, *Marshall to Retire from High Court*, BOSTON GLOBE, June 28, 1991, at 1. When President George Bush announced Judge Thomas's nomination, he rejected the suggestion that Thomas's race was a factor in his decision. John Harwood, *Bush Selects Black Judge for Supreme Court Seat*, ST. PETERSBURG TIMES, July 2, 1991, at 1A. "I don't think there should be a black seat on the court, or an ethnic seat." *Id.* Yet others urged that when President Bush selected Justice Thomas for the Court, he took race into account and reinforced the idea of a black seat. See Cynthia Tucker, Editorial, *Filling Court Vacancy: Playing Race Politics*, ATLANTA CONST., July 6, 1991, at A19.

33. See, e.g., Adam Nagourney, *Democrats Adopt O'Connor as Model for Bush Court Pick*, N.Y. TIMES, July 7, 2005, at A1; David D. Kirkpatrick, *Senate Democrats Are Shifting Focus from Roberts to Other Seat*, N.Y. TIMES, Sept. 9, 2005, at A16.

34. See Nagourney, *supra* note 33; Kirkpatrick, *supra* note 33.

their views about governance and politics,³⁵ the gender and racial make-up of the courts has changed only incrementally in the past twenty years.³⁶

I argue that for a variety of reasons with regard to substantive changes in the law as well as perceptions of fairness and the role the judiciary plays in our society, women judges do make a difference and that race, ethnic, and gender diversity should be the norm, not the exception. I also assert that judges, women, and people of color, are making a difference in a variety of ways, including legal reasoning and public engagement. I offer three examples: Madam Justice Bertha Wilson of the Supreme Court of Canada, Justice Sandra Day O'Connor of the United States Supreme Court, and Chief Justice Constance Baker Motley of the Second Circuit Court of Appeals. They are aided in doing so by the legal scholarship of feminist, critical race, and intersectionality legal theorists.

The “woman question” is not a new one, even with regard to judges.³⁷ However, in 1982, Madam Justice Bertha Wilson, the first woman to sit on the Supreme Court of Canada,³⁸ gave that question new prominence. The title of her widely publicized lecture posed the issue directly: *Will Women Judges Really Make a Difference?*³⁹ According to Madam Justice Wilson’s assessment, the life experiences of women and men cause them to think and approach the law and legal decision-making differently.⁴⁰

Madam Justice Wilson’s treatment of the question was presented at Osgoode Hall Law School and, not surprisingly, she approached the question as one approaches a legal issue.⁴¹ She carefully laid out her arguments for how the appointment of women to the bench would: 1) help “shatter stereotypes about the role of women in society that are held by male judges and lawyers, as well as by litigants, jurors, and witnesses;”⁴² 2) help preserve the public

35. Jeffrey Love, *Political Behavior and Values Across the Generations: A Summary of Selected Findings*, STRATEGIC ISSUES RESEARCH (AARP), July 2004, at 11, http://assets.aarp.org/rgcenter/general/politics_values.pdf.

36. Rorie Spill Solberg, *Court Size and Diversity on the Bench: The Ninth Circuit and Its Sisters*, 48 ARIZ. L. REV. 247, 248, 253 (2006).

37. See Barbara Allen Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 STAN. L. REV. 2143, 2145–46 (1993).

38. Mimi Liu, *A “Prophet With Honour”: An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L’Heureux-Dubé of the Supreme Court of Canada*, 25 QUEEN’S L.J. 417, 423 n.20 (2000); see The Honourable Madam Justice Bertha Wilson, *The Supreme Court of Canada*, http://www.scc-csc.gc.ca/AboutCourt/judges/wilson/index_e.asp (last visited Apr. 14, 2007).

39. Madam Justice Bertha Wilson, *Will Women Judges Really Make a Difference?* 28 OSGOODE HALL L.J. 507, 507 (1990).

40. *Id.* at 519–22.

41. *See id.* at 507.

42. *Id.* at 517.

trust by fostering perceptions of diverse representation in the judiciary;⁴³ 3) reduce problems for women counsel;⁴⁴ 4) alter “the process of judicial decision-making;”⁴⁵ and 5) reform legal doctrine, particularly in such areas as tort, criminal, and family law.⁴⁶

Madam Justice Wilson’s conclusions about women’s potential to change the law fell into two categories.⁴⁷ She first argued that the appointment of women judges would alter public perceptions.⁴⁸ In addition, she argued that the presence of women on the bench would modify law itself.⁴⁹ According to Madam Justice Wilson, the presence of women in the role of judicial decision-makers and leaders would change the way fellow judges, as well as lawyers and litigants, saw all women in the judicial process.⁵⁰ This, she concluded, would also change the behavior of women and men.⁵¹ So too, with more women as judges, the public at large would see the justice system as more representative of diversity and, presumably, more fair.⁵²

Madam Justice Wilson’s conclusions about women’s potential to change the substance and processes of the law proved to be the most controversial of her claims. She argued that because of their gendered experiences, women were more willing to contextualize the law and its processes than were men, who were more formalistic in their approach to decision-making.⁵³ These assertions drew fire from critics who challenged many of Madam Justice Wilson’s premises.⁵⁴ Her conclusions were understandably most offensive to those who view the law as gender, race, and class neutral, notwithstanding the different life experiences of women and men.⁵⁵ For those who believe in law’s neutrality, Madam Justice Wilson’s arguments raise the question of whether any effort to appoint more women is misguided if it is done for the sake of adding the female perspective.⁵⁶ For those with a particularly traditional view of the law, the appointment of women who are

43. *Id.* at 518.

44. Wilson, *supra* note 39, at 518–19.

45. *Id.* at 519.

46. *Id.* at 516.

47. *See id.* at 517–18.

48. *Id.*

49. Wilson, *supra* note 39, at 519.

50. *Id.* at 517.

51. *Id.* at 521–22.

52. *Id.* at 518.

53. *Id.* at 519–20.

54. *See* Robert E. Hawkins & Robert Martin, *Democracy, Judging and Bertha Wilson*, 41 MCGILL L.J. 1, 34 (1995).

55. *Id.* at 54.

56. *See id.* at 55.

perceived as particularly “feminist” in their approach to the law and decision-making remains very troublesome.⁵⁷

Canadian law professor Constance Backhouse chronicles the response to one such judge—Madam Justice Claire L’Heureux-Dubé, the second woman appointed to the Supreme Court of Canada.⁵⁸ Madam Justice L’Heureux-Dubé came under fire for the concurring opinion she wrote in *R. v. Ewanchuk*,⁵⁹ a criminal case involving the question of whether an alleged sexual assault was actually consensual sex.⁶⁰ Madam Justice L’Heureux-Dubé’s opinion concurred with the full Court’s decision to overturn the dismissal of the complaint and to enter a conviction of the defendant.⁶¹ The opinion also criticized her colleague, Justice John Wesley McClung, who voted to dismiss the conviction, suggesting that the complainant’s repeated “no”’s during the alleged attack were irrelevant.⁶² He also implied that a woman who had had a child out of wedlock, while living with a male partner, was not capable of refusing consent.⁶³ Madam Justice L’Heureux-Dubé’s opinion advised that judges should avoid the use of “language . . . which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.”⁶⁴ Even further, the opinion noted that judicial bias, such as that suggested in Justice McClung’s opinion, adversely affected a complainant’s ability “to rely on a system free from myths and stereotypes” and on a reasonable expectation of judicial impartiality.⁶⁵

Although her colleague, Justice Charles Doherty Gonthier, also signed the opinion, Madam Justice L’Heureux-Dubé received the brunt of the public criticism.⁶⁶ The first came in the form of a letter written by Justice McClung, which was published in a national newspaper, where he accused Madam Justice L’Heureux-Dubé of having a “feminist bias” and suggested that her interjection of “personal invective” into the law could be responsible “for the disparate (and growing) number of male suicides being reported in

57. See, e.g., Lynne Cohen, *Gender Irrelevant When Judging a Judge*, OTTAWA CITIZEN, June 2, 1998, at C4.

58. The Honourable Madam Justice Claire L’Heureux-Dubé, The Supreme Court of Canada, http://www.scc-csc.gc.ca/AboutCourt/judges/lheureux-dube/index_e.asp (last visited Apr. 14, 2007); Liu, *supra* note 38, at 423.

59. [1999] 1 S.C.R. 330 (Can.).

60. *Id.*

61. *Id.* at ¶ 68 (L’Heureux-Dubé, J., concurring).

62. *Id.* at ¶ 88–89.

63. *Id.* at ¶ 88.

64. *Ewanchuk*, [1999] 1 S.C.R. 330, ¶ 95.

65. *Id.*

66. Janice Tibbetts & Shawn Ohler, *Judges Clash Over Landmark Sex-Assault Ruling: No Definitely Means No*, NAT’L POST, Feb. 26, 1999, at A1.

[Quebec Province].”⁶⁷ In the public attacks that followed, lawyers and representatives from national organizations criticized Madam Justice L’Heureux-Dubé for feminist judicial activism.⁶⁸ Despite the criticism, Madam Justice L’Heureux-Dubé did not shy away from the feminist label.

Throughout their careers both Madam Justice L’Heureux-Dubé and Madam Justice Wilson expressed opinions that were characterized as feminist, although Madam Justice L’Heureux-Dubé came under particular scrutiny for challenging what she believed were sexist ideas.⁶⁹ While Madam Justice Wilson certainly received public criticism for raising the “woman question,” her willingness to do so may have had a notably positive effect.⁷⁰ At the time this article was written, of the nine justices on the Supreme Court of Canada, four were women.⁷¹ Three of the appointments came between 2002 and 2004.⁷² The Chief Justice of the Supreme Court of Canada is Madam Justice Beverley McLachlin.⁷³ In the context of advising President Bush on the appointment of women to the United States Supreme Court, Senator Patrick Leahy of Vermont pointed to the Supreme Court of Canada as an example of gender equity.⁷⁴ As many commentators have noted, the United States has much to learn about diversity on the bench from Canada’s highest court.⁷⁵ By raising the question in a convincing and reasoned manner, Madam Justice Wilson began a dialogue among the bar and the public at large. She urged change that may not have taken place but for her positions.

II. JUST HOW WILL WOMEN JUDGES MAKE A DIFFERENCE?

Scholars have identified several dominant theories employed by the United States Supreme Court in gender discrimination cases that are relevant to judicial appointments.⁷⁶ One involves difference theory.⁷⁷ Though

67. *Id.*

68. *Id.*

69. Justice Claire L’Heureux-Dubé, *Conversations on Equality*, 26 MAN. L.J. 273 (1999).

70. See Hawkins & Martin, *supra* note 54, at 1.

71. Supreme Court of Canada, Current Judges, http://www.scc-csc.gc.ca/aboutcourt/judges/curjudges_e.asp (last visited Apr. 14, 2007).

72. Supreme Court of Canada, Current and Former Puisne Judges, http://www.scc-csc.gc.ca/AboutCourt/judges/curformpuisne/index_e.asp (last visited Apr. 14, 2007).

73. Supreme Court of Canada, Current and Former Chief Justices, http://www.scc-csc.gc.ca/AboutCourt/judges/curformchief/index_e.asp (last visited Apr. 14, 2007).

74. Richard Foot, *Canadian Top Court Held as Example in U.S.*, THE GAZETTE, July 13, 2005, at A13.

75. Clare Dyer, *Law: Where Are the Women? Our Judges Are Still Overwhelmingly Male, White and Public School Educated*, THE GUARDIAN, July 8, 2003, at 16.

76. However, the United States Supreme Court has not incorporated difference theory in its jurisprudence. See generally Katharine T. Bartlett, Essay, *Gender Law*, 1 DUKE J. GENDER

Madam Justice Wilson relied on difference theory to support her position that women judges would change the law, a review of the research reveals no definitive evidence to confirm that reliance.⁷⁸ Empirical and anecdotal accounts do not conclusively establish the idea that individual women or women as a group judge differently than men. However, at least some research finds gender differences.⁷⁹ For example, political scientists Elaine Martin and Barry Pyle studied high courts in all fifty states, concluding that, in divorce decisions, “a judge’s gender [tended] to be the primary predictor of a judge’s vote.”⁸⁰ In addition, Brenda Kruse’s research has concluded that Justice Sandra Day O’Connor and Justice Ruth Bader Ginsburg are also influenced by their gendered experiences in deciding employment cases.⁸¹ However, empirical research testing the impact of race on judicial decision-making is inconclusive.⁸²

There is also considerable evidence that some male judges’ perspectives cause them to view women’s experiences very differently than women might.⁸³ Professor Shirley Wiegand has chronicled numerous examples that demonstrate a judge’s apparently limited vision.⁸⁴ One of her examples comes from the case that served as the basis for the 2005 movie *North Country*, a grim and painful, if sometimes fictionalized, account of sexual harassment at a mine in Minnesota.⁸⁵ The fictionalized version was apparently no

L. & POL’Y 1 (1994) [hereinafter Bartlett, *Gender Law*]. The primary theories relied on by the Court are: 1) separate spheres, which allows different treatment based on cultural expectations and biological differences; 2) formal equality, which requires that women and men be treated the same; and 3) substantive equality, which calls for rules such as affirmative action that can produce equality in results. *Id.* at 2–6; Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971–2002*, 10 CARDOZO WOMEN’S L.J. 501, 519–521 (2004).

77. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND THE AMERICAN LAW* 19, 20 (1990); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1282 (1987).

78. Wilson, *supra* note 39, at 522.

79. For an overview, see KATHERINE BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (4th ed., 2006).

80. Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOL. L. REV. 923, 923 (2005).

81. Brenda Kruse, Comment, *Women of the Highest Court: Does Gender Bias or Personal Life Experiences Influence Their Opinions?* 36 U. TOL. L. REV. 995, 1021 (2005).

82. Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 316 (2004).

83. Kruse, *supra* note 81, at 996.

84. See generally Shirley A. Wiegand, *Deception and Artifice: Thelma, Louise, and the Legal Hermeneutic*, 22 OKLA. CITY U. L. REV. 25 (1997).

85. *NORTH COUNTRY* (Warner Bros. Pictures 2005).

more grim and painful than the real experience the women faced in the mine or the hostility they faced because of the suit.⁸⁶ According to Wiegand, Judge Patrick McNulty's opinion:

[R]evealed that he could not understand why one woman

was fearful when a man who she said had exposed himself to her several years earlier began driving his truck in circles, over and over, around her work area. "This court has difficulty understanding why the appearance of a suspected flasher outside the building in which she was working . . . would cause great fear—of something—in a reasonable woman."

The judge also could not understand why a woman would fear rape simply because "a man who had repeatedly and crudely propositioned her suddenly lunged at her one night at work with his arms spread, only stopping when she began screaming."⁸⁷

Yet such decisions and other evidence of male bias do not establish sweeping gender differences in judging. And considerable evidence suggests that other factors, such as ideology, are better predictors than sex in accounting for judicial decisions.⁸⁸ So, for example, commentators who have looked specifically at Justice O'Connor's and Justice Ginsburg's voting records generally find that gender is not a compelling factor in their judging.⁸⁹

Unlike their Canadian counterpart, Madam Justice Bertha Wilson, both Justice O'Connor and Justice Ginsburg reject the notion that their gender guides their judicial decision-making.⁹⁰ In responding to questions of "whether women judges speak with a different voice," Justice O'Connor refers to the lack of "empirical evidence that gender differences lead to discernible differences in rendering judgments."⁹¹ Moreover, she warns that

86. Wiegand, *supra* note 84, at 46–47.

87. *Id.* at 47 (quoting Kirsten Downey Grimsley, *Judge Put Small Price on Pain; Damage Award Paled by Litigation Norms*, WASH. POST, Oct. 28, 1996, at A13.). It is worth noting that the trial judge who adopted this language was overturned on appeal some eleven months later. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1304 (8th Cir. 1997).

88. Farhang & Wawro, *supra* note 82, at 302–03.

89. *See, e.g.*, Tony Mauro, *O'Connor and Ginsburg: Together and Apart*, LEGAL TIMES, June 9, 2003, at 14. Mauro notes that Justice O'Connor and Justice Ginsburg voted for the same result approximately 75% of the time. *Id.* Justice O'Connor agreed with Justice Kennedy 83% of the time, while Justice Ginsburg agreed with Justice Breyer and Justice Souter in 94% of the decisions. *Id.*

90. *Id.*

91. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 190–91 (Craig Joyce ed., 2003).

such ideas may rely on troubling myths and stereotypes.⁹² Instead, she suggests that male and female judges alike should seek a collective wisdom gained through different struggles and different victories.⁹³

Justice Ginsburg draws on her experiences as a judge and as a law teacher to conclude that there is no discernible difference in the way women and men reason: “In class or in grading papers . . . and now in reading briefs and listening to [oral] arguments in court . . . , I have detected no reliable indicator of distinctly male or surely female thinking—or even penmanship.”⁹⁴

It is difficult to argue with these two women, in particular, about whether women judges speak with a different voice, especially given that there is no clear definition of what a “different voice” means. Moreover, difference theory is not without its feminist critics.⁹⁵ Some feminists advocate for gender equity under the theory of substantive equality.⁹⁶ Rather than look at whether a rule or law treats women and men the same or differently, substantive equality theory questions whether a law or rule has the effect of disadvantaging individuals due to their gender.⁹⁷ Thus, substantive equality frameworks acknowledge differences, but with the goal of eliminating or leveling them to encourage more equal outcomes.⁹⁸ Affirmative action and pay equity are the kinds of strategies that advocates of substantive equality support.⁹⁹

Instead of focusing on the question of whether men and women are different, non-subordination theory looks at what meaning society attributes to those differences.¹⁰⁰ Assuming that the consequences of male power are more significant than gender similarities or differences, non-subordination frameworks concentrate on eliminating power imbalances.¹⁰¹ According to the theory’s major proponent, Catharine A. MacKinnon:

[A] rule or practice is discriminatory . . . if it participates in the systemic social deprivation of one sex because of sex. The only question for litigation is whether the policy or practice in question

92. *Id.* at 192.

93. *Id.* at 193.

94. Justice Ruth Bader Ginsburg, *Remarks for California Women Lawyers, September 22, 1994*, 22 PEPP. L. REV. 1, 5 (1994) [hereinafter Ginsburg, *Remarks*].

95. See Bartlett, *Gender Law*, *supra* note 76, at 11–13.

96. *Id.* at 4–6.

97. *Id.* at 4.

98. *Id.*

99. See *id.*

100. Bartlett, *Gender Law*, *supra* note 76, at 6.

101. See *id.*

integrally contributes to the maintenance of an underclass or a deprived position because of gender status.¹⁰²

For example, under non-subordination theory, sexual harassment violates principles of equality and should be prohibited because it reinforces men's power over women.¹⁰³ The violation flows from the domination it supports—not the boorish, bad, or even assaultive behavior itself.¹⁰⁴

Despite the opportunities that difference and non-subordination theories offer for positive change, they are not without their feminist critics. Some commentators, Justice Ginsburg among them, argue that difference theory risks reinforcing gender-based stereotypes that perpetuate gender-based inequality.¹⁰⁵ By attempting to articulate an all-encompassing meta-narrative, both theories are criticized for denying class, racial, sexual orientation, and religious differences among women, making the experiences of white, middle-class women the model.¹⁰⁶ In addition to criticizing MacKinnon's theory on the grounds that it promotes what amounts to gender "essentialism," some feminists criticize Catharine MacKinnon for what they call "gender imperialism," namely the assumption that gender is the most important source of oppression.¹⁰⁷

Critical race theorists have similarly questioned the ways in which the "received tradition in law adversely affects people of color not as individuals but as a group."¹⁰⁸ Critical race theorists appropriately challenge us to consider: "What would the legal landscape look like today if people of color were the decision-makers?"¹⁰⁹ Critical race theorists point to similar modes of racial justice, including one based on ideas of racial pluralism, and another based on racial diversity.¹¹⁰ Moreover, they have a "vision of legal knowledge that includes the perspectives and experiences of oppressed people in the critique and reformulation of legal doctrine" and eschews the notion that law is value neutral.¹¹¹ But they too are susceptible to criticism by Black

102. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117 (1979).

103. *Id.*

104. *Id.*

105. Ginsburg, *Remarks*, *supra* note 94, at 4–5.

106. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585, 590 (1990); see also BARTLETT & RHODE, *supra* note 79, at 15.

107. See, e.g., Harris, *supra* note 106, at 585; Bartlett, *Gender Law*, *supra* note 76, at 16.

108. Brooks, *supra* note 25, at 85.

109. *Id.* at 86.

110. See *id.* at 92–93.

111. *Id.* at 96 (quoting Linda S. Greene, "Breaking Form", 44 *STAN. L. REV.* 909, 922 (1992)).

women and Latina scholars for racial essentialism and neglecting the role of class and gender in their analysis.

However, failure to reach a consensus about whether women and racial minority jurists reach different conclusions or even reason differently does not resolve the question of whether there should be more women on the bench. Whether women judges will make a difference is a larger question than whether women and men will reach different outcomes in particular cases. Whether women judges make a difference depends on the role that judges and judging play in our legal system and must take into account a variety of professional and community activities in which judges participate. As the research from various judicial task forces suggests, judging involves collegiality and a diverse bench enables members to influence each other.¹¹²

In addition, the role of a judge also has significance in terms of perceptions about representation. The face of judging, in an emblematic way, matters as a reflection of access to justice; the diversity of the bench affects public perceptions of fairness. Finally, diversity among judges is a reflection of how power is distributed in the justice system.

Political constituents in the United States rely on several forms of representation, including anticipatory representation, introspective representation, and surrogate representation.¹¹³ The concept of anticipatory representation is best explained by the idea that constituents in today's political climate make selections based on the achievement of specific outcomes rather than "policy preferences" of representatives.¹¹⁴ In the introspective representation model, representatives rely on "a set of principles and commitments that derive partly from their own ideals and partly from their commitment to the collective decisions of the party" in making decisions.¹¹⁵ Surrogate representation is a form of non-territorial representation.¹¹⁶ Thus, an individual without a certain characteristic or perspective may serve as a representative for "the interests and perspectives" of others with the same characteristic or perspective, "even when members of these groups do not constitute a large fraction of their constituents."¹¹⁷ Though typically applied to elected political officials, the ideas behind these forms of representation can be applied to the judiciary and can serve as a basis for arguing for greater diversity and inclu-

112. *See infra* notes 130–32.

113. Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 515 (2003).

114. *Id.* at 517 (citing R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 17 (1990)).

115. *Id.* at 521.

116. *Id.* at 522.

117. *Id.* at 523.

sion.¹¹⁸ As judicial selection becomes more openly ideological and political, it is time for a more open discussion about what representation can legitimately be sought in the courts. Yet, many of us are uncomfortable with aggressively pursuing diversity in the judiciary given the lack of confidence in, and outright discomfort with, the idea of different outcomes based on race and gender.

However, there are other reasons for supporting judicial diversity. I call the model which I would choose for including women and people of color on the bench the representative perspective frame. My model borrows ideas from both difference and non-subordination theories and attempts to address some of the criticisms of racial and gender essentialism and gender imperialism. As applied to the appointment of judges, my representative perspective theory rests on three premises: 1) that gender, racial, and ethnic experiences influence perspectives and worldviews, including one's sense of justice and how it should be achieved; 2) that the contribution of representative perspectives is substantial and reaffirms the promise of equality under the law by suggesting that all citizens have the chance to take part in democracy; and 3) that the failure to have a broad array of perspectives represented undermines judicial integrity and contributes to false ideas about intellect and competency.

III. JUSTICE O'CONNOR AND THE INCLUSIVE COURT

Theories of equality, as well as the law adopted by the United States Supreme Court in recent years, support greater inclusion in the judiciary. Despite the fact that Justice O'Connor has been labeled a conservative by some, and denies that her gender influences her reasoning, she has provided some important language to support the idea of greater gender inclusion on the judiciary.¹¹⁹

"A basic tenet of [feminist thinking] is that perspective matters . . . , [meaning] understanding women's life experiences requires a different lens" and a point of view that comes "from living life as a woman and developing [a gendered] consciousness."¹²⁰ Critical race theorists argue that people of color develop a race consciousness as well.¹²¹

118. See generally Mansbridge, *supra* note 113, at 521–27.

119. See Kruse, *supra* note 81, at 996–98.

120. Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes Justices More Liberal*, BOSTON REV. (Jan./Feb. 2006), available at <http://bostonreview.net/BR31.1/hansonbenforado.html>.

121. See *id.*; see also Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?* 18 HARV. BLACKLETTER L.J. 1, 20 (2002).

Perspectives and experiences may influence the outcome, but that influence is not limited to outcome in terms of which party prevails. It can have other influences on the overall direction the law takes. As Justice O'Connor stated in her concurring opinion in *J. E. B v. Alabama ex rel. T. B.*,¹²² a case which challenged the exclusion of women from juries, "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case Individuals are not expected to ignore as jurors what they know as men—or women."¹²³ The idea that perspective matters is not limited to feminist scholars or female jurists.¹²⁴ Jon Hanson and Adam Benforado made precisely that point in their recent *Boston Review* article, stating that "[m]ost legal scholars recognize that a judge's antecedent presumptions and perspectives often influence judicial decisions as much or more than her purported principles and precedents."¹²⁵ As noted earlier, gender is only one of the antecedents that influence judicial decisions and decision making; race, class, and sexual orientation, as well as previous areas of practice, are others.¹²⁶

Even conservative supporters of Justice Samuel Alito recognized the importance of a judge's perspective.¹²⁷ During his confirmation hearing, they argued that his experience as the son of an Italian immigrant father would be a positive influence on his ability to relate to the little guy in cases that might come before him as a United States Supreme Court Justice.¹²⁸ It is hard to imagine that the experience of being an immigrant's son could be any more influential than the experience of being a man is for now eight of the nine members of the Court.

In addressing whether women judges will make a difference, we also should not overlook the symbolic and representational role that members of the judiciary play. Beginning in the 1970s, the federal and state judicial systems launched initiatives on racial and gender bias.¹²⁹ To date, numerous states and members of the federal circuit courts have taken steps to respond to bias.¹³⁰ The need for responses is well documented in task force re-

122. 511 U.S. 127 (1994).

123. *Id.* at 149 (O'Connor, J., concurring).

124. *See* Hanson & Benforado, *supra* note 120.

125. *Id.*

126. *See supra* Part II.

127. *See* Hanson & Benforado, *supra* note 120.

128. *See* Patty Reinert, *Confirmation Hearings: Alito Vows No "Agenda"*, HOUSTON CHRON., Jan. 10, 2006, at 1.

129. *E.g.*, Equal Employment Opportunity Act, 42 U.S.C. § 2000e-8 (2000).

130. *See* Marcia Coyle, *How Deep Is the Pool for Supreme Court Picks?* FULTON COUNTY DAILY REPORT, Sept. 28, 2005.

ports.¹³¹ They found bias in a broad range of substantive areas such as family law, domestic violence, and criminal law, as well as in administrative areas such as the appointment and election of judges.¹³²

It is hard to deny, though perhaps impossible to measure, how bias against women and people of color undermines the integrity of the American judicial system. However, a measurement of the actual impact is not necessary. Justice O'Connor herself recognized that even the perception of bias injures the judicial system. As she wrote in the introduction to the Ninth Circuit Court of Appeals task force: "When people perceive . . . bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law."¹³³ Virtually all of the task forces concluded that at least some reforms were necessary to reduce the potential for gender bias and better serve the ultimate objective of equal justice under the law.¹³⁴ In particular, many of the task force reports advocate measures that will increase the number of women on the bench.¹³⁵ These reports cite the educational role women judges play with their male counterparts in addition to the greater public confidence in the judiciary that come from more diverse representation on the bench.¹³⁶

Given the history of gender and racial bias in our legal system, the overrepresentation of white, male perspectives on the United States Supreme Court undermines the integrity of the American judicial system. Law professor Lani Guinier has argued that United States Supreme Court appointments have carried important symbolic messages.¹³⁷ In *Grutter v. Bollinger*,¹³⁸ the Court affirmed, recognizing that a university had a compelling interest in a racially diverse student body.¹³⁹ Writing for the majority, Justice O'Connor concluded that for "legitimacy in the eyes of the citizenry, it is necessary that

131. See generally John H. Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 N.Y.U. ANN. SURV. AM. L. 117 (1997).

132. See, e.g., THE FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMM. (1990), reprinted in 22 CONN. L. REV. 733, 733 (1990) [hereinafter FEDERAL COURTS STUDY COMM.]; see Doyle et al., *supra* note 131, at 168–77; *Report of Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 687–704 (1993).

133. JUDGE DOROTHY W. NELSON, INTRODUCTION TO THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1993), reprinted in 67 S. CAL. L. REV. 731, 760 (1994).

134. See *id.* at 760–61.

135. See *id.*

136. *Id.*

137. See generally Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003).

138. 539 U.S. 306 (2003).

139. *Id.* at 333.

the path to leadership be visibly open to talented and [all] qualified individuals of every race and ethnicity.”¹⁴⁰ Professor Guinier argues that the same is said for leadership in the judiciary; and that it too must be open regardless of race, ethnicity, and gender.¹⁴¹ Professor Sylvia R. Lazos Vargas argues that the *Grutter* decision goes further and demands a critical mass of minority judges.¹⁴² The Court itself recognized in *J. E. B. v. Alabama* that exclusion of women and people of color from juries “causes harm to the litigants, the community, and the individual jurors” who are excluded.¹⁴³ Similarly, the failure to include diverse perspectives on the bench has an adverse impact on litigants, the community, and the underrepresented groups that are excluded.

Throughout this essay, I have been asking the “woman question.” How does the judicial selection process disadvantage women or disregard their experiences? Perhaps one way to answer that question is to ask the “man question.” How do the judicial selection process and unchallenged selection standards advantage typically white male experiences and perspectives? In this context it is important to note that most legal experts believe that there is an ample number of women and people of color who are qualified to sit on the Court.¹⁴⁴ Of course, that depends on how one determines qualifications. Much was made of Chief Justice John Roberts’ United States Supreme Court clerkship¹⁴⁵ and Justice Samuel Alito’s long experience on the federal bench,¹⁴⁶ in addition to both men’s Ivy League education and law review experiences.¹⁴⁷ But surely state court experience or other forms of service to the profession and to the public constitutes equally valuable qualifications. Had the qualities that Chief Justice Roberts and Justice Alito brought to the nomination process been the primary criteria in 1983, Justice O’Connor would not have been nominated to the Court.¹⁴⁸ Her distinguished service

140. *Id.* at 332.

141. See Guinier, *supra* note 137, at 175.

142. Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 143 (2004).

143. 511 U.S. 127, 140 (1994).

144. See Carl Tobias, *Fostering Balance on the Federal Courts*, 47 AM. U. L. REV. 935, 955–59 (1998); Coyle, *supra* note 130.

145. The Supreme Court of the United States, The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Mar. 25, 2007) [hereinafter Supreme Court Biographies].

146. *Id.*

147. The White House, Judicial Nominations, Chief Justice John G. Roberts, Jr., <http://www.whitehouse.gov/infocus/judicialnominees/roberts.html>, (last visited Mar. 24, 2007); The White House, Judicial Nominations, Justice Samuel A. Alito, <http://www.whitehouse.gov/infocus/judicialnominees/alito.html> (last visited Apr. 14, 2007).

148. Supreme Court Biographies, *supra* note 145.

makes clear that other, less traditional backgrounds are equally valuable. The judicial process, in fact and in appearance, is strengthened by members with diverse talents, backgrounds, and perspectives.¹⁴⁹

IV. JUDGE CONSTANCE BAKER MOTLEY: EMBRACING RACE AND GENDER

Will women judges make a difference? In fact, they already have. Madam Justice Bertha Wilson made a difference by raising the question and by unapologetically answering it in the affirmative.¹⁵⁰ An example of true leadership, her answer moved the discussion of women's inclusion in the judiciary forward in an unprecedented manner. Also, Justice Sandra Day O'Connor's legal opinions and public addresses provide language and ideas that legal scholars will continue to draw upon to support gender and racial inclusion in the courts. Other women judges provide similar inspiration. Judge Constance Baker Motley, the first African American woman selected for the federal judiciary, is a fitting example on which to close.¹⁵¹

In 1946, just out of Columbia Law School, Judge Motley began her legal career in New York as an attorney with what is now the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund.¹⁵² She was the sole female attorney among those who assisted Justice Thurgood Marshall in *Brown v. Board of Education*.¹⁵³ She also argued successfully in several higher education integration cases, including the integration of the University of Mississippi and the University of Alabama.¹⁵⁴ When President Lyndon B. Johnson appointed her to the bench in 1966, she had appeared before the United States Supreme Court ten times and won nine of those cases.¹⁵⁵ Her contributions to my appreciation of the role of judges is numerous, but perhaps her most famous decision came when she refused to excuse herself from a gender discrimination case involving an African American woman plaintiff.¹⁵⁶ In rejecting the defendants' claim that her general background and status as an African American female somehow

149. See, e.g., Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated"*, 39 AKRON L. REV. 373, 398 (2006).

150. See Wilson, *supra* note 39, at 517–22.

151. See Columbia University, C250 Celebrates Columbians Ahead of Their Time: Constance Baker Motley, http://c250.columbia.edu/c250_celebrates/remarkable_columbians/constance_motley.html (last visited Apr. 14, 2007).

152. *Id.*

153. 349 U.S. 294, 296 (1955).

154. Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 515 (2004).

155. See *id.* at 515.

156. See *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 2–4 (S.D.N.Y. 1975).

prejudiced her in the matter, Judge Motley noted that she was not the only member of the judiciary who possessed both race and gender:

It is beyond dispute that for much of my legal career I worked on behalf of blacks who suffered race discrimination. I am a woman, and before being elevated to the bench, was a woman lawyer. These obvious facts, however, clearly do not, *ipso facto*, indicate or even suggest [heightened] personal bias or prejudice Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case¹⁵⁷

To her credit, Judge Motley unapologetically embraced both her race and her gender as well as the wisdom she had gained through her particular struggles as a civil rights advocate.¹⁵⁸ In a tribute to Judge Motley before the American Bar Association, Justice Ruth Bader Ginsburg said of her,

I count it my great good fortune to be among the legions whose lives Judge Motley touched. She taught me and others of my generation that law and courts could become positive forces in achieving our nation's high aspiration—as carved above the entrance to the U.S. Supreme Court—Equal Justice under Law.¹⁵⁹

Judge Motley embodied our country's high aspirations in her role as lawyer as well as in her role as a jurist, making her an example for the public at large, practicing attorneys, and members of the judiciary. In addition to her personification of the high ideals of the United States Supreme Court, perhaps no one spoke more persuasively about the need for diversity in the judiciary than Judge Motley:

There is a need for more women and more minorities in the federal judiciary, but not because I think they bring something totally different to the bench than white men. I don't think women and minorities have a particular view on contract law that's totally different from white men. Rather, I believe that having more women and minorities in the federal judiciary—and the federal courts are a major part of the national government—builds confidence in the government. It makes people feel that the government is fair, in that it includes people from all segments of the population. It says

157. *Id.* at 4.

158. *See id.*

159. Justice Ruth Bader Ginsburg, *Tribute to Constance Baker Motley*, 32 HUM. RTS. 26, 26 (2005).

that the courts are fair, in that women, Blacks, Hispanics, Asians, and other minorities are included among the judges. It says that the court system is not an all-white male institution as it once was.¹⁶⁰

V. CONCLUSION

Madam Justice Wilson, and Justice O'Connor, like Judge Motley, are notable examples of how women judges, in different ways, make a difference. They give us a greater appreciation for having women as members of the judiciary and bring us further along the path of achieving a judiciary which reflects the equality principles we espouse and the legitimacy to which we aspire. The question of whether we will have the courage to follow their leadership remains.

160. Clark, *supra* note 154, at 518–19.

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GOODWIN INTRODUCTION

INSPIRATION, ANTICIPATION, AND CELEBRATION: THE 10TH ANNUAL LEO GOODWIN LECTURE SERIES

*TILTING THE SCALES: THE CHANGING ROLES OF WOMEN IN THE LAW AND LEGAL PRACTICE*¹

STEPHANIE FELDMAN ALEONG
OLYMPIA DUHART
linda f. harrison

INSPIRATION: WHY TALK ABOUT WOMEN AND THE LAW IN 2006?²

How does a law school choose a topic interesting enough and worthy of commemorating ten years of excellence and the support of a wonderful Foundation? We faced the daunting task of answering the dilemma when we began dreaming of taking on the challenge of planning the 10th Annual Leo Goodwin Lecture Series. With the resignation of the first female Supreme Court Justice, Sandra Day O'Connor in the summer of 2005,³ the death of noted feminist Betty Friedan in February of 2006,⁴ and the recognition that having three female law school professors all gathered together to take on this type of charge probably would not have happened just twenty years earlier; it would be fair to say that "women were on our minds."

1. The 10th Annual Goodwin Lecture Series was led by three co-chairs, Associate Dean and Professor linda f. harrison, Professor Stephanie Feldman Aleong, and Professor Olympia Duhart. We would like to extend warm gratitude and appreciation to the Leo Goodwin Foundation, Dean Joseph Harbaugh, and the entire Nova Southeastern University Shepard Broad Law Center community for making this series such a success.

2. This section was written by Professor Stephanie Feldman Aleong, Assistant Professor of Law and Director of the Masters of Science in Health Law Program at Nova Southeastern University, Shepard Broad Law Center. She is a graduate of Vanderbilt University School of Law, and received her undergraduate degree from Vanderbilt University.

3. William Branigin et al., *Supreme Court Justice O'Connor Resigns*, WASH. POST, July 1, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653.html>.

4. National Women's Hall of Fame, Women of the Hall: Betty Friedan, <http://www.greatwomen.org/women.php?action=viewone&id=62> (last visited May 24, 2007). Ms. Friedan died at the age of 85. *Id.* Her writings in FEMININE MYSTIQUE had global impact that is still felt today. *Id.*

From the first woman lawyer in America, Margaret Breed, who arrived in the colonies in 1638,⁵ to the hundreds of women law students currently enrolled in the law schools across the nation, women have changed the law. Women fought to have an equal voice in governance, turning their quest into a Nineteenth Amendment to the Constitution which gave women the right to vote in 1919.⁶ More than fifty years later, female attorney Sarah Weddington argued brilliantly before the Supreme Court to establish a Constitutional right of privacy, emanating from the penumbras of our Constitution and its litany of Amendments—documents drafted by men.⁷ In fact, the recognition of sexual harassment as a form of sexual discrimination prohibited by Title VII of the Civil Rights Act of 1964 only took root in this country's jurisprudence when Professor Catharine MacKinnon's writings and advocacy cried out for the Court's recognition of this truism.⁸ Other marginalized sections of society, facing discrimination based on race or sexual orientation, continue to draw their arguments for equality from the legal principles established by the feminist legal movement.⁹

While women seemed to be making great strides “on paper” to achieving equality in the pages of legal doctrine, women still labor on an unequal playing field in the legal profession. When considering how much improved women lawyers' status was in the 1990s compared to what their position had been in the 1980s, Cynthia Fuchs Epstein wrote, “[s]ide by side with these improvements in the status of women in the law, pockets of resistance to women's equality in the profession remained.”¹⁰ In 2006 not only had we seen that statement remain to be true in our own work experiences,¹¹ but the top stories of the day in the legal profession also reflected that gap.¹² Ac-

5. KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMEN LAWYER IN AMERICA: 1638 TO PRESENT* 3 (1986).

6. *The First Century, Women Who Led the Way*, <http://www.umsl.edu/services/library/womenstudies/1stcent.htm> (last visited May 24, 2007) (detailing contributions of female attorneys and other suffragettes in Missouri in their efforts to get access to the right to vote and social equality).

7. *Roe v. Wade*, 410 U.S. 113 (1973).

8. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

9. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 1–15 (2d ed. 2003) (describing “the five opening moves” of feminist legal theory and how that theory has given rise to critical race theory and the gay rights' movement).

10. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* ix (2d ed. 1993).

11. Professor Aleong was a prosecutor before becoming a professor; Professor Duhart was a reporter for *The Miami Herald*, a high school teacher, and an associate at a large law firm before becoming a professor; and Professor Harrison was also a prosecutor before becoming an academic.

12. A reporter for the *ABA Journal* examined the alarming trend of how women of color are fleeing large law firms because they are being overlooked and undervalued, Jill Schachner

knowledging and tackling the plain truth that entering the legal profession poses different constraints, dilemmas, and inequality, three female attorneys set out to advise new women lawyers on how to survive in the male-dominated profession.¹³ Certainly, we felt the topic of how women had changed the legal profession and how the profession continued to change the roles of women attorneys still was fertile ground to explore. So, we turned our attention to focus on the challenge and pleasure of deciding which scholars to invite to the law center to discuss the impact women have had on the law and legal profession and to outline what challenges lay ahead.

ANTICIPATION: BRINGING THE BEST AND THE BRIGHTEST¹⁴

They were our wish list.

In compiling a list of speakers to represent our Goodwin theme—*Tilting the Scales: The Changing Roles of Women in the Law and Legal Practice*—our goal was quite simple. Bring the best and the brightest.

In essence, we needed to bring women to the law center who could articulate the expansive view of women and the law we envisioned. We wanted to highlight the wide-sweeping relationship between women and the law. The speakers we selected needed to be the best in their respective fields to address women's impact on law, the influence of women on the judicial process, and the persistently disparate treatment of women by the law. We also wanted to take a fresh look at some of the contemporary legal issues facing women in the courtroom and beyond.

Hard work, we knew. Fortunately, our speakers made it all look easy. When discussing the development of sexual harassment law in the United States, the natural starting point is, of course, Catharine MacKinnon.¹⁵ The noted feminist and legal scholar has dedicated her life's work to using the lives of women to "cast a bright critical light on laws constructed by men."¹⁶

Chanen, *Early Exits*, ABA JOURNAL, Aug. 2006, at 33; the president of the NALP Foundation for Research and Education discussed the continuing occupational barriers and gender segregation women continued to face in the new millennium, Paula A. Patton, *Women Lawyers, Their Status, Influence and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173 (2005).

13. See generally LISA G. SHERMAN ET. AL, SISTERS-IN-LAW: AN UNCENSORED GUIDE FOR WOMEN PRACTICING LAW IN THE REAL WORLD (2004).

14. This section was written by Professor Olympia Duhart, Assistant Professor of Law, Nova Southeastern University, Shepard Broad Law Center. Professor Duhart received her J.D. from Nova Southeastern University and her B.A. from the University of Miami.

15. Professor MacKinnon is an Elizabeth A. Long Professor of Law at the University of Michigan and a long-term visitor at the University of Chicago.

16. CATHARINE MACKINNON, WOMEN'S LIVES, MEN'S LAWS 1 (2005).

Professor MacKinnon's pioneering analysis of sexual harassment as sex discrimination was adopted by the United States Supreme Court in 1986¹⁷ and has spread worldwide. Her work has transformed the working woman's world and set the stage for a global approach to anti-discrimination legislation. She has succeeded in pushing sex equality issues to the forefront of dialogues on topics ranging from hate propaganda to pornography. She has also, in several meaningful ways, transformed her theories into real-life results for the women around her.¹⁸ Professor MacKinnon also co-founded The Law Project of Equality Now, an international non-governmental organization to promote women's equality under international law. She launched our symposium with an informative, if somewhat sobering, examination of the current state of sexual harassment law. Professor MacKinnon traced how courts have secured and undermined civil rights in this area.¹⁹

Our next visitor was Anita Hill, the activist and writer who commanded the public eye in 1991 during the confirmation hearings for Supreme Court nominee Clarence Thomas. The Hill-Thomas hearing, by all accounts a watershed in American politics, gave a human face to the sexual harassment that continues to pervade American culture. More importantly, the Hill-Thomas hearing signaled the convergence of gender, race, and politics in a national forum. It also provided a pivotal impetus for the countless women who had struggled silently through sexual harassment; emboldened by the steady witness with unyielding resolve, other women emerged in an effort to confront sexual harassment head on.²⁰

A Yale Law School graduate born on a small farm in Oklahoma, Professor Hill has focused her career on civil rights, academics, and social policy. Her commentary has appeared in several major newspapers and magazines. She is also the author of *Speaking Truth to Power*,²¹ a biographical work. Currently on the faculty at the Heller Graduate School at Brandeis University, Professor Hill addressed the influence women have on the judici-

17. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 57 (1986).

18. Representing Bosnian women survivors of Serbian genocidal sexual atrocities, she won with co-counsel a damage award of \$745 million in August 2000 in *Kadic v. Karadzic*, which first recognized rape as an act of genocide. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996).

19. See *infra* pp. 225–36.

20. On the heels of her testimony, Professor Hill began receiving scores of letters a day from supporters, and some from critics. ANITA HILL, *SPEAKING TRUTH TO POWER* 4–5 (1997). “Many had experienced sexual harassment firsthand. Many more related to sexual harassment as a violation of basic human dignity. Some decried the way that politics had pervaded the judicial appointment process.” *Id.* at 5.

21. *Id.* at 1.

ary.²² Her visit to the law school was almost fifteen years to the day that she first garnered the national spotlight when she bravely shared her story with the world.

While Professor Hill addressed the value of women's impact on the judiciary, our third speaker, Judge Deanell Reece Tacha, literally brought the message to life. Appointed by President Ronald Reagan to the United States Court of Appeals for the Tenth Circuit in 1985, Judge Tacha became Chief Judge of the Tenth Circuit on January 1, 2001.²³ This native of Scandia, Kansas has had a remarkable career in both higher education and the federal judiciary.²⁴

Judge Tacha's resume reveals her accomplishments, but belies the difficult balancing act that often marked her journey as a married woman with children²⁵ on such an amazing trajectory. Among some of Judge Tacha's accomplishments: White House fellow, associate law school dean, Vice Chancellor for Academic Affairs, member of the U.S. Sentencing Commission, and national Trustee of the American Inns of Court Foundation.²⁶ With ease and amazing candor, Judge Tacha shared with the students her personal road from Kansas to the Federal Bench.²⁷ Significantly, she also shared the optimism that continues to fuel this affable Midwesterner who demonstrates that with dedication and drive you can, it seems, have it all.

Finally, we brought the struggle for women's rights full circle with our last guest, Nadine Strossen.²⁸ Professor Strossen has served as president of the American Civil Liberties Union (ACLU) since 1991.²⁹ She is the first woman to head the nation's largest and oldest civil liberties organization.³⁰

Twice named as one of "The 100 Most Influential Lawyers in America," Professor Strossen is a prolific writer and lecturer.³¹ Her work in the areas of constitutional law, civil liberties and international human rights is

22. See *infra* pp. 237–57.

23. Judge Deanell Reece Tacha, Biography, <http://www.ku.edu/about/tacha.shtml> (last visited May 24, 2007).

24. *Id.*

25. *Id.*

26. *Id.*

27. Judge Tacha is only one of three women who serve as Chief Judge for a federal circuit. See News Release: Administrative Office of the U.S. Courts, Funding and Electronic Access Top Judicial Conference Agenda (Mar. 16, 2004), http://www.uscourts.gov/Press_Releases/judconf031604.pdf.

28. Professor Strossen is Professor of Law at New York Law School.

29. American Civil Liberties Union: Nadine Strossen, President of the ACLU (Feb. 11, 2002), <http://www.aclu.org/about/staff/13278res20020211.html>.

30. *Id.*

31. *Id.*

unparalleled.³² As president of the ACLU, Professor Strossen has made more than 200 public presentations per year.³³ She carved out time to join us to share her examination of current legal obstacles for women. In the post-9/11 climate, the threat to civil liberties presents special concerns for women. Professor Strossen shared powerful cautionary tales with us that highlighted the need to refocus attention on the limitations that continue to characterize women and the law. Her presence—and the presence of similar trailblazers Tacha, Hill and MacKinnon—also reminded us of the boundless potential presented by women in the law.

For the 2006 Goodwin Symposium, our goal was simple; bring the best and the brightest. We got our wish list.

CELEBRATION: FOUR PHENOMENAL WOMEN, FOUR PHENOMENAL EVENINGS³⁴

Having secured four of the most important women in the American legal community to be scholars-in-residence at Nova Southeastern University to help us commemorate the 10th Annual Leo Goodwin Lecture Series elated us beyond belief. From the beginning, this series was about two things: the series itself and recognizing the Goodwin Foundation. The 10th anniversary of this event marked an important milestone, and we wanted to show the Foundation how important this series is to the life of the law school.³⁵ Clearly these Goodwin scholars would be able to represent to the Foundation this level of importance and our gratitude for its continued sponsorship.

We also had as our goal to set a new benchmark for the Goodwin series. We wanted to personally respond to the challenge the Foundation offered Nova to increase the visibility of this event.³⁶ The caliber of speakers we attracted made this task an easy one to fulfill.

32. *Id.*

33. *Id.*

34. This section was written by Associate Dean and Professor linda f. harrison. Dean harrison is associate dean of the Critical Skills Program at Nova Southeastern University, Shepard Broad Law Center. She is a graduate of American University Washington College of Law. Prof. harrison would like to thank Professors Aleong and Duhart for accepting her invitation to co-chair this year's Goodwin Lecture series with her.

35. During the last decade of Goodwin Symposiums, the law center has enjoyed the privilege of hosting such outstanding scholars as: Peter Irons; Ira Glasser; Michael Asimow; Oscar Arias Sanchez; Louis W. Sullivan; Anthony Lewis; David Boies; Mia Amor Motley; and Richard Pildes.

36. The Foundation's Board of Trustees wanted the Lecture Series to move beyond involving just the legal community of the law school to include the larger legal community in the tri-county area. For the first time, the Goodwin Lecture Series provided lawyers with the opportunity to earn Continuing Legal Education credit for attendance.

Each Goodwin scholar's appearance created much excitement and anticipation among the faculty and students at the law school. Early September brought Catharine MacKinnon. As word of her appearance spread, we were hopeful that we would be able to break attendance records and garner the attention of the legal community outside of the law school. We were not disappointed. The law school was filled to capacity.³⁷ We had the same response for additional speakers, Anita Hill, Judge Tacha, and Nadine Strossen. Professor MacKinnon's focus on the changing standards of Title VII litigation set an appropriate tone for our series.³⁸ Professor Hill illuminated the real impact women have on the judiciary by their inclusion on the bench in more than token numbers.³⁹ Judge Tacha demonstrated Professor Hill's premise in her insightful comments about how her presence has made a difference in specific ways. She also openly discussed the choices women in the law make vis-à-vis family obligations and how those choices impacted and guided her journey.⁴⁰ Lastly, Professor Strossen reminded us that the scales of change sometimes tilt against women as well as in their favor.⁴¹ Nonetheless, after each public lecture, the law school was filled with provocative conversation fueled by each scholar's remarks. This conversation carried into classrooms and faculty discussions. Each speaker taught in the Goodwin Seminar and participated in a faculty colloquium as part of their residence. The students enrolled in the Goodwin seminar openly engaged in these topics and were thrilled to have such guest lecturers of note.⁴²

Did we reach our goals? We think we did. At each presentation, every facet of the community was represented—the law school, the university, and the community at large. Beyond reaching lawyers and law students, these four phenomenal women attracted members of the community from all walks of life, some of whom had never before set foot in a law school.

Building on the fantastic legacy of the nine years that preceded us, we think we have set a new benchmark for the Goodwin Lecture Series. On behalf of all our colleagues at Nova Southeastern University, we express sincere gratitude to our scholars-in-residence, the law school administration, faculty and staff, our law students, and the members of the community who

37. For her presentation as well as for the others', we had several overflow video-feed rooms for the crowd.

38. *See infra* pp. 225–36.

39. *See infra* pp. 237–57.

40. *See infra* pp. 259–78.

41. *See infra* pp. 279–314.

42. Two of the student-authored scholarly papers produced as a result of this seminar are published in this journal. *See infra* pp. 339–53, 355–74.

helped make this 10th Anniversary of the Leo Goodwin Lecture Series a rousing success.

DIRECTIONS IN SEXUAL HARASSMENT LAW

CATHARINE A. MACKINNON*

The large arc of sexual harassment law, from thirty-years' distance, has been as much influenced by political events, and media coverage of those events, as by litigation and legislation. Particularly influential in crystallizing, shaping, and advancing legal developments in this area were the Hill-Thomas hearings in 1991 and the Clinton-Jones affair of the late 1990s. Both situations revolved around a crucial dynamic that sexual harassment law substantially strengthened: men with power—varying amounts but nonetheless substantial—being challenged for sexual mistreatment by women with less power, often far less. On my reading, the repercussions of those two events profoundly affected the trajectory of sexual harassment law in the United States.

My concern—you will decide if you agree—is that what Professor Hill's challenge did for the sexual harassment claim, the national and international consciousness that developed in the wake of those hearings,¹ is being partly reversed, surely undermined, by the Clinton and Jones events and their unrolling aftermath and undertow. Those who took courage from Professor Hill's example to challenge sexual power were discouraged by the treatment of Paula Jones and her claim. Those who experienced sexual harassment at least as serious as what Professor Hill said was done to her, especially women who identified with her and her experience—both her credibility in articulating the injury and its harm and the dignity and presence she brought to the process—even if they couldn't meet her standard, thought if she could go through that and survive it, they could too. Women wanted to be with her, on her side of the line. She inspired survivors with self-respect

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* Elizabeth A. Long, Professor of Law, University of Michigan Law School. Until giving the Goodwin Lecture, of which this is an edited transcript, I thought the notion of Southern hospitality was another overdone regional myth. Dean Linda F. Harrison and Professor Olympia Duhart gave my visit to Nova special warmth and substance, as did Dean Joseph Harbaugh, with his efficient and generous arrangements and beautiful Florida flowers, and the faculty and students as a whole, with their welcoming reception and intelligent engagement. The volume edited by Reva B. Siegel and me, *DIRECTIONS IN SEXUAL HARASSMENT LAW* (2004), celebrating the original publication of C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979), was very helpful in preparing for this lecture, as was research by Maureen Pettibone.

1. See *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 102d Cong., pt. 4, 36-41 (1991).

to complain in public about their own abuse. Thousands did; the claims at the Equal Employment Opportunity Commission (EEOC) and locally skyrocketed.² This happened even though Professor Hill did not say she was sexually harassed, the hearings were not a lawsuit, and Justice Clarence Thomas might be said to have won because he was placed on the Supreme Court by the Senate. By contrast, Paula Jones' claims against President Bill Clinton were an actual lawsuit for behavior that was termed sexual harassment.³ Many women saw that what was done to them at work was nowhere near as serious as what Paula Jones claimed Bill Clinton did to her. Although Clinton was eventually impeached, Paula Jones lost in that the courts told her the facts of her situation were legally insufficient to state a claim for hostile environment sexual harassment.

Will those who took heart from Professor Hill's challenge be disheartened by how the legal system and the media treated Paula Jones and give up before they even start fighting back? Has *Clinton v. Jones* made victims think they will not be treated as credible, will not be taken seriously, will not get relief? It would be small wonder if they did.⁴ At the very least, the issues framed by this concern, with others no less important but less noticed because they were not squarely invoked in these watershed experiences, have contributed to the social and legal image of what real sexual harassment looks like. This image has precursors and consequences.

Neither of these events would have produced the political firestorm they did, far less had the long-term impact they had, if sexual harassment had not previously been recognized as a legal claim. In 1976, Paulette Barnes, an African-American woman, first successfully claimed in an appellate court that being sexually harassed at work was a practice of sex-based discrimination.⁵ Mechelle Vinson, also an African-American woman, who said that she had been raped for two-and-a-half years by her supervisor,⁶ had her experience recognized as stating a claim for a sexual harassment hostile environment in violation of her rights as a woman to sex equality in the workplace by the U.S. Supreme Court a decade later.⁷ Without them, the term sexual harassment would likely not have existed; it would have had no legal

2. See EEOC, Harassment Charges, available at <http://www.eeoc.gov/stats/harassment.html> (last visited June 14, 2007).

3. *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998).

4. On why most sexual harassment is not reported, see Louise Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 119-21 (1995).

5. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

6. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

7. *Id.*

clout, even in the background. Recognition of unwelcome sexual pressure *because* one is a woman or a man, often a woman or a man of particular race or ethnicity or sexual orientation salient to the abuse, puts the treatment in a collective context, with ground, human rights resonance, and links to other forms of unequal treatment. Had sexual harassment not been framed as a form of sex-based discrimination—that is, as a violation of equality rights, situated on that more potent social, political, and legal level—neither event would have resonated politically and socially in the ways they did. Had these women and others not sued and won, it is doubtful that the Hill-Thomas hearings or the Clinton-Jones episode would have developed as they did, if indeed they had surfaced in public at all.

Equally evident, the idea of sexual harassment as sex discrimination did not exist until woman lawyers existed. As this legal claim continues to fight for its life as a sex equality claim rather than being made piecemeal into a tort or a crime, it is worth noting that both of these other approaches date from a time when not only were there no women lawyers; women were not even allowed to vote. Both tort and criminal approaches still tend not to be adapted to the realities of women's group inequality to men, yet continue to be attempted to be used to drag sexual harassment law back to a time before women had a voice in the legal system. Putting sexual harassment on legal equality ground—calling it in law what it is in life—continues to be important for principled and practical reasons alike. In reality, people *are* sexually harassed because they are women or men. Proof of their claims is facilitated by legal recognition of this fact at the point at which principle and practicality converge. Many of the developments in sexual harassment law's direction that are least favorable to plaintiffs are accordingly throwbacks or attempts to reroute the law backwards to a time when legal equality claims did not exist.

Both Hill-Thomas and Clinton-Jones centrally alleged hostile environments. The core of the account was that, due to unwanted sexual pressure or attention (Clinton-Jones also alleged physical contact), life at work was unequal; it was hostile and unbearable. What distinguishes the hostile environment cases is that no particular index of the job is disturbed: You still have the job, have not lost a promotion, have not been fired. Both settings were taken to pose the question of whether the alleged behavior was sufficiently serious to be illegal under existing legal standards for hostile environment sexual harassment. In this context, although Professor Hill did not sue, it is worth asking whether what she said Justice Clarence Thomas did to her was legally actionable. Did her allegations that she was pressured for dates, subjected to intrusive sexual discussions by her superior at work that included particularly humiliating graphic descriptions of pornography, state a hostile environment claim? At the time, her decision not to sue was well

taken. The hostile environment claim had barely been recognized—it was new, fragile, and untested.⁸ After her testimony and for a considerable period of time, however, and recognizing divergences between circuits and judges, in my view she would have had a colorable claim that her harassment was sufficiently sex-based and abusive to be actionable. I think her testimony had something to do with this change. During that period, a hostile environment did not have to be the years of rape that Mechelle Vinson was subjected to, for example.

Since the late 1990s, however, the abusiveness that hostile workplace environment cases are required to allege to survive summary judgment has observably become more extreme, generally speaking. In my view, whether cited or not (usually not), the Clinton-Jones affair has strongly contributed to this reversal of direction, although it had started before that ruling. Not only was then Governor Clinton said to say sexual things to Paula Jones and to have asked for a sexual interaction with her; he was also described as locking the door, engaging in indecent exposure, touching her thigh and neck, asking her to kiss his penis, and when she refused (“I’m not that kind of girl.”), suggesting she better keep this to herself. That single incident, as it has been termed, was found insufficiently severe to constitute a hostile working environment. One wonders, if he did each of these things on separate days, would that have been several incidents, hence potentially sufficient? Given that there is no severity meter out there to provide an objective standard of gravity, and no fixed number of incidents or density requirement to say how much or how often makes for pervasiveness, I think that that result, given the high visibility and strong salience of the case, has strongly contributed to the desensitized climate within which hostile environment cases are evaluated.

Thankfully, *Clinton v. Jones*⁹ did not make what I call “the and mistake,” common now in several circuits that requires sexual harassment be *both* severe *and* pervasive to constitute a hostile working environment.¹⁰ The United States Supreme Court, by contrast, has only required that it be *either* severe *or* pervasive.¹¹ The change from the disjunct to the conjunct substantially elevates the threshold and virtually precludes a single incident,

8. See Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 830 (2002) (citing *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) as “the closest controlling case in the D.C. Circuit”).

9. 990 F. Supp. 657 (E.D. Ark. 1998).

10. See, e.g., *Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005); *Hockman v. Westward Comm’n*, 407 F.3d 317, 326 (5th Cir. 2004) (citing *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874 (5th Cir. 1999)); *Singleton v. Dep’t of Corr. Educ.*, 115 Fed. App’x 119, 122 (4th Cir. 2004) (unpublished) (emphasis added).

11. *Harris v. Forklift Sys.*, 510 U.S. 17, 21–22 (1993).

regardless of severity, from being enough, even as the Supreme Court clearly permits a disjunctive standard. For examples of this problem: “the conduct [complained of], though boorish and offensive, is more comparable to the kind of rude behavior, teasing, and offhand comments that we have held are not sufficiently severe *and* pervasive to constitute actionable sexual harassment.”¹² At the same time, much judicial language has hastened to distinguish the “boorish” and “offensive” behavior in *Clinton* from abusive language and gender-related jokes that are considered actionable.¹³ More and more, courts seem to be asking whether behavior is bad enough by moral standards, or some meter in judges’ heads, requiring that harassment be worse and more frequent, rather than measuring the behavior by equality standards, asking whether the treatment is unequal on the basis of sex.

During the same period, the question of point of view entered the jurisprudence. We were told by the Supreme Court that the treatment alleged, to be a sexually harassing hostile environment, had to disturb the working place for the reasonable person.¹⁴ Why victims suddenly had to be reasonable was not explained. Not to say that they should be able to be unreasonable, but whether the victim is reasonable is the wrong question—whether their treatment is unequal is the question. Usually, it is perpetrators who have to be reasonable. After the reasonable victim requirement was invented, putting the victim on trial, much litigation followed concerning whose standards for reasonableness would control. Eventually, after several cases in the circuits explicitly turning on the issue,¹⁵ the Court appears to have more or less resolved it in dictum.¹⁶ In *Oncale v. Sundowner Offshore Services, Inc.*,¹⁷ in which a man accused several men of sexual aggression against him on an oil rig, the Supreme Court simply said that the perspective of a reasonable victim in the position of this particular victim was the perspective from which reasonableness would be assessed.¹⁸ This injected particularity of perspective into the assessment, bringing the inequality context into the cases.

My sense is that more and more aggression in working places is being found insufficiently severe to be actionable. Just to give you a flavor of a few of these: supervisor stroking a plaintiff’s leg on one occasion, grabbing her buttocks on a separate occasion, telling her he found her attractive, twice

12. *Singleton*, 115 Fed. App’x at 122 (emphasis added).

13. *See id.* at 122–23.

14. *See Harris*, 510 U.S. at 20.

15. *See, e.g.,* *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986).

16. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

17. *Id.* at 75.

18. *Id.* at 81.

asking her out on dates—not actionable;¹⁹ calling a subordinate a “dumb blonde,” placing “I love you signs” in the work area, asking her for dates, putting his hand on her shoulder and attempting to kiss her—not actionable;²⁰ making inappropriate sexual remarks, kissing the plaintiff repeatedly, touching the plaintiff and chasing her around a forest reserve—not actionable;²¹ employee attempting to kiss plaintiff, making lewd remarks about her appearance, following her around the office, giving unsolicited neck rubs, hand holding—insufficiently severe or pervasive;²² supervisor asking plaintiff about her interest in a romantic relationship, for a kiss, staring at her, and following her around—not actionable;²³ supervisor touching plaintiff’s breast and hair, kicking her in the buttocks, and making lewd remarks directed specifically at her—not actionable.²⁴ The general drift in these cases actually decided after *Hill and Thomas* and before *Clinton and Jones*—cases that, I think, would likely have been actionable in the late ’80s—also shows how mistaken the assertion is that sexual acts at work are readily found illegal just by virtue of being sexual. After a while, lawyers just won’t file these cases. And if your ultimate superior at work can then walk into your office any day and take out his penis and jump you, and that is not seen as severe, a lot of sexual aggression is acceptable at work.

The quid pro quo claim has been affected as well. In addition to a hostile environment, Paula Jones alleged a quid pro quo—an exchange of sex for something at the job, this for that, where the ‘this’ is the sex and the ‘that’ is the workplace benefit.²⁵ Although it was not well-argued, in my opinion, Paula Jones’ quid pro quo claim was that, had she accepted the sexual conditions that then Governor Bill Clinton imposed on her in that so-called single incident, she would have received favorable job consideration. She would not have been transferred to a position with no window, doing boring work that led nowhere, or no work at all, as she was after the incident. Support for her theory could have been found in Gennifer Flowers’ deposition, who said she had a sexual affair with Bill Clinton and her job was enhanced. The recognition of this kind of sexual harassment claim, the tacit quid pro quo, has gone nowhere since that case.

19. *Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 709 (7th Cir. 1995).

20. *Weiss v. Coca Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993).

21. *Saxton v. Am. Tel. & Tel.*, 10 F.3d 526, 534 (7th Cir. 1993).

22. *Stoeckel v. Emtl. Mgmt. Sys., Inc.*, 882 F. Supp. 1106, 1114 (D.D.C. 1995).

23. *Ballou v Univ. of Kan. Med. Ctr.*, 871 F. Supp. 1384, 1387 (D. Kan. 1994).

24. *Gearhart v. Eye Care Ctrs. of Am., Inc.*, 888 F. Supp. 814, 825 (S.D. Tex. 1995).

25. *Jones v. Clinton*, 990 F. Supp. 657, 664, 666 (E.D. Ark. 1998).

Indeed it eroded further since the ruling in Kim Ellerth's case in 1998.²⁶ Kim Ellerth was told by her superior, in the course of various intrusive sexual advances, verbal and physical, that "I [can] make . . . life . . . hard or . . . easy [for you] at Burlington."²⁷ She rejected him sexually and he made things hard for her at Burlington.²⁸ Again, the claim was not well-argued. The Supreme Court saw this situation not as a quid pro quo, but as a threat of a quid pro quo.²⁹ Unlamented by most commentators, *Ellerth* wrote submission cases out of the canon and eliminated what, at least since 1980s EEOC Guidelines,³⁰ has been a quid pro quo in itself. Saying if you deliver sexually, I will make life good for you at work, proposes a quid pro quo, i.e. it is a quid pro quo incident. Because the Supreme Court majority saw it as a threat that was not carried through on, not a threat that is harm in itself (even though it actually was, in addition, carried through upon) this kind of incident became either sufficiently severe or pervasive to constitute a hostile environment, or nothing. As a single incident, by Clinton-Jones standards, do you think it would be sufficiently severe? Again, the workplace was not measured by equality standards.

Ellerth was centrally litigated as an employer liability case. Once the fighting stopped in the mid-eighties over whether sexual harassment would be actionable as sex-based discrimination, and it was accepted that sexual harassment is an equality claim, the conflict shifted to whether, and by what standard, anybody was going to be held responsible for it. With discrimination law generally, say hiring, if you are not hired for a discriminatory reason, the company, not the person who does the hiring, is liable. Sexual harassment was initially treated that way too—like discrimination. Then liability for it started being called "vicarious liability," referring to something someone else did for which the employer was then arguably liable. Most discrimination does not occur on a majority vote of the Board of Directors, so virtually all discrimination, under a legal structure that does not yet permit individuals to be sued for discrimination, is for acts that someone in the company does, as the company. But it was with sexual harassment that this was considered "vicarious," rather than just liability, resulting in a whole separate set of employer liability standards only for harassment cases. In-

26. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

27. *Id.* at 748.

28. *Id.*

29. *Id.* at 751, 772.

30. See 29 C.F.R. § 1604.11 (2006). "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment . . ." *Id.*

stead of employer liability flowing directly from a finding of sexual harassment, as occurs with every other kind of discrimination, the upshot is that a person can be sexually harassed as a matter of law and no one will be held liable for it: back to sexual harassment as personal, as private, as individual.

In *Faragher*,³¹ the companion employer liability case to *Ellerth*, the Court did not explicitly distinguish between hostile environment and quid pro quo for employer liability purposes,³² as some earlier cases in lower courts and EEOC approaches did that had made employer liability automatic for quid pro quo and contingent for hostile environment. Instead, they distinguished between situations in which what they called a tangible job detriment occurred and when it did not. With sexual harassment where the target is not hired, is fired, is demoted, is paid less, is not promoted and so on, employer liability is assumed. Where there is no such tangible job loss, there are further hurdles for the plaintiff before the employer will be held liable, including an affirmative defense if the employee bringing the claim unreasonably failed to use available avenues of complaint. This *Faragher/Ellerth* approach builds on one view of the agency relation; that is, it comes from tort law. It supposes that, with hostile environment sexual harassment, it is not known if the employer is involved so a form of notice is built in. But it draws the identical line that distinguishes quid pro quo from hostile environment, just in different words, since the tangible job detriment is what distinguishes the quid pro quo from the hostile environment, least until constructive discharge occurs. Then the *Suders*³³ case treated constructive discharge as not a tangible employment action, even though the job is very tangibly lost.³⁴ The real issue is what employers are going to be considered to have actually done, hence be held responsible for. In this process, quid pro quo is made to be the real sexual harassment, for which employers are liable, and hostile environment without more, to be something less, even if workers lose their jobs because of it. With hostile environment, it is as if the Court sees the effect as not on work but just on her, when equality law is interested not only in the job but in equality for people in and at work.

Most of the cases that have received focused public attention have involved heterosexual harassment, producing little judicial theorizing of the connection between sexuality and gender in the “based on sex” dimension of these cases. They have largely contented themselves with asking, if it is sexual, what other than sex could it be based on? If this man is doing something sexual to this woman, if it has nothing to do with the fact that she is a woman

31. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

32. *See id.* at 788–92.

33. *Pa. State Police v. Suders*, 542 U.S. 129 (2004).

34. *See id.*

that is up to him to prove. Enter the presumption of heterosexuality, here to the benefit of the conclusion that sexual harassment is based on sex, which in fact is almost always is, even if it is not always heterosexual. Cases of harassment based on gender that is not sexual have rarely produced problems being recognized as actionable for that reason, although it has happened. Nonsexual gender-based harassment has been covered by the courts under Title VII³⁵ almost since its inception, although some courts are under the misimpression that if treatment of an employee is not sexual in the way it was in *Thomas-Hill* or *Clinton-Jones*, it is not covered, just as they sometimes do not recognize the severity of harassment when it is sexual. Usually the source of the problem is the lack of application of equality standards, not a more serious approach to gender-based treatment that is sexual than to gender-based treatment that is not sexual.

But the under-theorization of the sexuality-gender connection does produce difficulties in same-sex cases, where courts flail around trying to figure out how abusive treatment can be sex-based when it is not heterosexual. Where so-called bisexual harassment is alleged, equal opportunity sexual harassment imagined to be a defense to harassment being sex-based, courts have seen through the ruse. The man who calls himself “just a handsy guy”—saying he puts his hands all over everyone without regard to sex—is usually seen through handily. In few cases is the treatment actually equal. It is also usually based on the sex of the parties. In *Oncale*, the Supreme Court did understand that men attacking another man could be based on sex. Football player fanny-patting had to be protected at all costs from the perception that anything sexual is involved, however. Lower courts still tend to wrongly assimilate men-on-men claims to gay claims, whether or not those subject to the advances are gay, finding them not actionable, although some such claims have been allowed.³⁶ Many courts want to make such harassment sexual orientation harassment, rather than sex-based harassment, as if sexual orientation is not sex-based. If sexual orientation is not based on sex, what is it based on? Same-sex orientation is an orientation toward people of

35. Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-6 (2000).

36. Compare *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), and *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002), with *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), and *Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002). Under California state law, see *Mogilefsky v. Superior Court*, 26 Cal. Rptr. 2d 116 (Ct. App. 1993).

the same sex: it is based on sex. Perhaps this is too simple for courts to get their minds around, although, again, a few have.³⁷

Similarly, race-and-sex combined claims, although recognized, are often not treated appropriately. Many people are sexually harassed based on a combination of their race/ethnicity and sex. A lot of the most common epithets directed against women of color in particular are inseparably both race and sex-based. Many courts still disaggregate them, even though there are solid precedents in some circuits against that.³⁸ This problem reminds me of the approach to understanding the nature of life that begins with killing the frog: To see if there is inequality inside, cut it apart, dissect it, put the race here, the sex there. The method of answering the question eliminates the very thing it's asking about., then wonders why it doesn't find it. Plaintiffs often lose on both grounds because the inequality to which they were subjected inheres in the symbiotic inseparability of the two, something that does not appear, does not even exist, when they are separated.

In neither Clinton-Jones nor Hill-Thomas was it directly said that these men had a free speech right to say what they allegedly said. That did not pass the "straight face test." Here, the equality frame on the issue, as opposed to the First Amendment frame, has held up reasonably well. Pornography at work has, amazingly, been encompassed in sexual harassment prohibitions,³⁹ although the hostile environment standards mean that the pornography has had to be increasingly violent to get their attention. But the fact that pornography at work is seen as actionable inequality rather than protected speech is a major miracle, given that there are two First Amendments, one for adult pornography, which is protected almost entirely, and another for any other kind of speech that does harm, which is not axiomatically protected. What this has meant is that the only place in law that pornography is effectively able to be addressed is sexual harassment law, in the limited equality settings of work and school where it applies.

There have been a lot of increasingly close calls on this issue. The closest call yet is the case of Aamani Lyle.⁴⁰ A writer on *Friends*, Ms. Lyle is an African American woman who was hired to take notes at writers' meetings.

37. See, e.g., *Rene*, 305 F.3d at 1063–64; *Centola*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) (“[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.”).

38. See, e.g., *Lam v. Univ. of Haw.*, 40 F.3d 1551 (9th Cir. 1994); *Jefferies v. Harris County Cmty. Action Ass’n*, 615 F.2d 1025 (5th Cir. 1980).

39. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

40. *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211 (Cal. 2006). For prior excellent analysis, see *Aguilar v. Avis Rent A Car Systems, Inc.*, 980 P.2d 846 (Cal. 1999).

According to Warner Brothers' defense, the men who wrote *Friends* had to express sexual fantasies about the actresses by name, engage in simulated masturbation by gyrating in their chairs to get their creative juices flowing so they could think and write their episode. Warner Brothers termed theirs a "creative workplace," giving rise to an absolute First Amendment defense to this and all the other sexual language and abusive interaction to which Ms. Lyle was subjected. The Supreme Court of California held that the fact that this is a creative workplace had to be taken into account as part of the "totality of the circumstances" in which the sexual harassment claim is assessed under California law.⁴¹ Granted, the kind of workplace it is, is part of the totality of the circumstances, but whether that should permit it to be unequal is the question. The full-on First Amendment defense registered in a strong dissent. We have not heard the last of this defense, I suspect, under which there would be no equality standards for sexual treatment in "creative" workplaces.

So, in the last thirty years, the experience of sexual harassment has been named. Injuries have been given the status of a civil rights violation, raising the human status of its survivors. A lot of people who are subjected to unwanted sexual advances and propositions under unequal conditions feel able to express them more openly and are given some more public respect. A lot of women feel more valid and powerful when they turn down sex that they don't want in unequal settings. Where sex discrimination law applies—and there are many places it does not apply—there is often someone to go to, to complain. The law may respond, whether the person refuses a sexual bargain and resists the sexualized environment or complies with sexual demands they cannot avoid. But nothing in sexual harassment law's direction is addressing the facts that sexual harassment is still not actionable in a lot of places where it happens; that resistance to it is not safe and is far from costless; that women subjected to it are often not believed; and that perpetrators often protect one another. Institutions are often reluctant to take responsibility and are often absolved of liability—particularly when they can say that they were oblivious to what was going on, which is astonishing. See no evil, hear no evil, incur no liability. This encourages not knowing what is happening in one's own shop. Victims seldom receive the support they deserve. Even if complaining about sexual harassment can be more self-respecting than suffering with it in silence, complaining can be more injurious than trying to ignore it, which is what most women do.

There is a lot of hope as sexual harassment law has gone international. General Recommendation 19 of the CEDAW Committee in 1992 recognized

41. *Lyle*, 132 P.3d at 228–29.

sexual harassment at work as gender specific violence under the Convention on the Elimination of All Forms of Discrimination Against Women, with hostile work environment and retaliation claims.⁴² Many parts of the world are developing their own sexual harassment jurisprudence based on indigenous experience drawing on international developments, for example, the Supreme Court of India in the *Vishaka*⁴³ and *Chopra*⁴⁴ cases. In Japan, where sexual harassment began as a tort, it is now understood as sex-based.⁴⁵ In France, where it was originally a crime of quid pro quo only, the idea has morphed into *harcèlement morale*, a prohibition on anyone harassing anyone on any ground.⁴⁶ Israel has passed and applied a detailed civil code provision against sexual harassment.⁴⁷

But the biggest move in the history of this claim was taking the injury from the private to the public, from the personal to the legal, from just life to civil rights violation. That change, women lawyers both participated in and benefit from. For many individuals, women and many men, and for many dimensions of politics as a whole, that change has made all the difference in the world.

42. See generally Comm. on the Elimination of Discrimination Against Women (CEDAW), Violence Against Women, *General Recommendation 19*, U.N. Doc. A/47/38 (1992).

43. See generally *Vishaka v. State of Rajasthan* (1997) 6 S.C.C. 24 (India).

44. *Apparel Export Promotion Council v. Chopra*, (1999) 1 LRI 13 (India).

45. For tracing of this history, see Yukiko Tsunoda, *Sexual Harassment in Japan*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 618 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

46. Code Pénal [C. Pén.] art. 222-33-2 (Fr.) is the original provision. "Serious pressure" was added in 1997. *Id.* The provision was further modified to apply to coworkers as well as hierarchical superiors in 2002. *Harcèlement morale* was added at C. Trav., Art. L. 122-29 (Fr.).

47. Prevention of Sexual Harassment Law, 5758-1958 (1998) (Isr.).

THE EMBODIMENT OF EQUAL JUSTICE UNDER THE LAW

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I. INTRODUCTION

In 1991, when I testified before the Senate Judiciary Committee in the Clarence Thomas confirmation hearings, there were two women in the United States Senate.¹ Nationwide, as of 1997, 19% of seated federal judges were women.² Though the laws protecting against sexual harassment had been in place since the 1970s,³ a woman’s chance of winning a sexual harassment lawsuit was a longshot. The United States Supreme Court had heard only one such case.⁴ In the United States, women earned about seventy cents for each dollar a man earned.⁵

On October 15, 1991, Judge Thomas was confirmed as a justice to the nation’s highest court.⁶ Momentum from the hearings indicated that the issues I raised during the hearing were only of passing interest.⁷ Observers were equally certain that no woman would come forward with a sexual har-

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1. U.S. Senate, Art & History–Historical Minutes, “Year of the Woman” (Jan. 3, 1993), http://www.senate.gov/artandhistory/history/minute/year_of_the_woman.htm.

2. ABA, FACTS ABOUT WOMEN AND THE LAW 1 (1998), <http://www.abanet.org/media/factbooks/womenlaw.pdf>.

3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253–66 (1965).

4. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

5. Women’s Earnings as a Percentage of Men’s, 1951–2005, Infoplease.com, <http://www.infoplease.com/ipa/A0193820.html> (last visited Apr. 14, 2007).

6. *Senate Confirms Thomas, 52-48, Ending Week of Bitter Battle: ‘Time for Healing,’ Judge Says*, N.Y. TIMES, Oct. 16, 1991, at A1.

7. Julia Lawlor, *Thomas Battle Leaves Doubts in Workplace*, USA TODAY, Oct. 16, 1991, at B1.

assment complaint after viewing the Senate's treatment of the issue.⁸ In sum, analysts projected that my appearance before the Senate would have a chilling effect on women's voices.⁹ Fortunately, that projection was wrong. In the weeks following my testimony, open discussions of the hearings and the topic of sexual harassment began to reshape public opinion on a variety of gender-related issues.¹⁰

Since the events of 1991, I've had the opportunity to participate as a speaker in hundreds of public forums—some about the hearings, some about sexual harassment, and some about general racial and gender issues. In venues all over the country, as well as in Asia, Africa, and Europe, the hearings still resonate. Far from static, they've evolved and taken on significance as we face new issues of gender equality. The energy the hearings unleashed pushed the issue of sexual harassment far beyond its predicted limits and even beyond the numbers of complaints and amounts of monetary awards.¹¹ Today, sexual harassment is correctly viewed as an assault on women's rights to participate in the economic mainstream as equals to men.

Beyond the harassment issue, Justice Thomas's confirmation hearings evoked a new consciousness about gender equality in leadership.¹² We began to reexamine the role that women's rights play in shaping our society.¹³ We knew that women should take a more active role in fashioning public policy and deciding all the issues of the day, not just those that were seen as typical gender issues.

In 2006, there were seventy-one women in the United States House of Representatives and fourteen women in the United States Senate.¹⁴ Women's earnings improved to 80% of men's.¹⁵ Since the hearings, corporations have instituted anti-harassment policies and countless women have

8. *Id.*

9. *See id.*

10. Susan Deller Ross, *Sexual Harassment Law in the Aftermath of the Hill-Thomas Hearings*, in RACE, GENDER, AND POWER IN AMERICA 237–38 (Anita Faye Hill & Emma Coleman Jordan eds., 1995).

11. *Id.* at 237.

12. *See* Guy Gugliotta, *Year of the Woman Becomes Reality as Record Number Win Seats*, WASH. POST, Nov. 4, 1992, at A30.

13. *See* Gwen Ifill, *Female Lawmakers Wrestle with New Public Attitude on 'Women's' Issues*, N.Y. TIMES, Nov. 18, 1991, at B7; *see also* Geraldine A. Ferraro, *Women's Issues Are Now National Issues*, ST. LOUIS POST-DISPATCH, Nov. 3, 1992, at 3B.

14. MILDRED L. AMER, *Women in the United States Congress: 1917–2006*, CRS REPORT FOR CONGRESS 1 (updated Nov. 29, 2006), available at <http://www.senate.gov/reference/resources/pdf/RL30261.pdf>.

15. Molly Hennessy-Fiske, *Women Narrow Wage Gap as Men's Earnings Shrink*, DENVER POST, Dec. 4, 2006.

sought relief using these internal procedures.¹⁶ In 2006, 12,025 sexual harassment complaints were filed with the United States Equal Employment Opportunity Commission (EEOC).¹⁷ Likewise, 15.4% were filed by men.¹⁸ Monetary relief on those resolved by the EEOC without litigation totaled \$48.8 million.¹⁹

In the courts, women and men are filing sexual harassment complaints and winning unprecedented awards.²⁰ The United States Supreme Court has ruled in favor of numerous women in harassment suits and recognized that men who are harassed are equally entitled to sue under federal law.²¹ Currently, women make up over 20% of the federal judiciary figures; however, the percentage of people of color on the federal bench is less clear.²² These are, in fact, better numbers, but they are not good enough.

I argue that a society committed to equal justice under the law must demand a judiciary that embodies that belief. Professor Judith Resnik states the issue clearly: “In the contemporary world, where democratic commitments oblige equal access to power by persons of all colors whatever their identities, the composition of a judiciary—if all-white or all-male or all-upper class—becomes a problem of equality and legitimacy.”²³ Equality and legitimacy require that we increase the inclusiveness of today’s judiciary.

For decades, feminist legal scholars have asked how the law fails to take into account women’s experiences.²⁴ Critical race theorists have similarly asked how the “received tradition in law adversely affects people of

16. See Sherman M. Fridman, *Avoid Sexual Harassment Lawsuits: Sexual Harassment Lawsuits Can Hurt Any Firm’s Bottom Line*, <http://www.office.com/templates/page1.asp?docid=33> (last visited Apr. 14, 2007).

17. EEOC, *Sexual Harassment*, http://www.eeoc.gov/types/sexual_harassment.html (last visited Mar. 24, 2007).

18. *Id.*

19. *Id.*

20. See John Vering, *State Court Juries Continue Employee-Friendly Verdicts*, 16 MO. EMP. L. LETTER 1 (Apr. 2006) (reporting a \$6.8 million award in a sexual harassment complaint); see also *EEOC Wins Big in Chicago on Sexual Harassment Claim*, 8 EMP. PRAC. LIABILITY VERDICTS & SETTLEMENT, Jan. 1, 2007 (reporting a \$2.355 million award against an employer on behalf of three former employers).

21. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

22. See ABA COMM’N ON WOMEN IN THE PROFESSION, *CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY* 5 (2006); see generally Federal Judicial Center, *Biographical Directory of Federal Judges*, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Apr. 14, 2007).

23. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 597 (2005).

24. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

color not as individuals but as a group.”²⁵ Critical race theorists appropriately challenge us to consider “[w]hat would the legal landscape look like today if people of color were the decision-makers?”²⁶ The relevance of the “woman question” and the “race question” today is clear in light of the recent appointments of Chief Justice John Roberts and Justice Samuel Alito to the withdrawal of Harriet Miers’ name from consideration.²⁷ For the first time since Justice Ruth Bader Ginsburg took office in 1993, the United States Supreme Court had only one female justice.²⁸ The “race question” is similarly relevant. As we contemplate future judicial appointments, critical consideration must be given to the question of whether, in the twenty-first century, the judiciary will be a body that looks more like and reflects the perspectives of the population it serves, as well as engages in discussion about how we can get to a more representative judiciary.

Justice Sandra Day O’Connor’s appointment as the first woman on the United States Supreme Court was a historical event,²⁹ as was her resignation.³⁰ Her resignation was greeted with widespread public speculation about the gender of her replacement.³¹ Within days of Justice Sandra Day O’Connor’s resignation, a reporter asked me if her replacement should be a woman. My response was that the nominee’s respect for gender equality was more important than his or her gender—as though we had to choose between having a woman and having someone committed to gender equality. My sincere, but uninspired response barely masked my ambivalence about being asked whether Justice O’Connor’s replacement had to meet a gender litmus test. My perception was that behind the question was the idea that the O’Connor seat was the woman’s seat—just as many had assumed that the Thurgood Marshall years on the Court secured a seat for an African American.³² Few questioned what was behind such a presumption. The idea of

25. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 85 (1994).

26. *Id.* at 86.

27. See Anita F. Hill, *Why Harriet Miers Mattered*, MS. MAG., Winter 2006, available at <http://www.ms magazine.com/winter2006/miers.asp>.

28. See Bill Mears, *Reporter’s Notebook: Fun with Dick and Jane—and John*, CNN WASHINGTON BUREAU, Oct. 2, 2006, <http://www.cnn.com/2006/LAW/09/26/scotus.journal/index.html>.

29. See Nat’l Women’s Hall of Fame, *Women of the Hall: Sandra Day O’Connor*, 1995, <http://www.greatwomen.org/women.php?action=viewone&id=115> (last visited Apr. 14, 2007).

30. Adam Liptak, *O’Connor Leap Moved Women Up the Bench*, N.Y. TIMES, July 5, 2005, at A1.

31. See *id.*; Hill, *supra* note 27.

32. Talk of a “black seat” on the court began even before Justice Marshall announced his resignation. See Hal Riedl, Editorial, *Should Supreme Court Have a Black Seat?* ST. LOUIS

setting aside a seat for a woman evoked memories of past special protections for women that often resulted in measures that limited, rather than expanded, their opportunities. For me, the question hinted that a woman would only be chosen if she were given special consideration because the vacancy was left by a woman. Not even the Democrats on the Senate Judiciary Committee seemed to challenge the assumption.³³ None were asking that former Chief Justice William Rehnquist's replacement be a woman.³⁴ Few suggested that it be a woman of color. It was not hard to conclude that, except when a woman resigned, the likely nominee would be male, and the outcome suggests that it will likely be a white male.

With a total of nine seats at stake, simply setting aside Justice O'Connor's seat as a woman's seat seemed more likely to restrict women's interests than to advance them. Both historical experience and contemporary theory suggest that the key to women's advancement is not setting aside a single seat for women, but rejecting the practice of setting aside all the others for men.

The legal profession has come a long way from the time when the only choice for including women was to have special protections or set-asides. We have also moved beyond an era where we believed that we had to ignore the differences in women's and men's experiences in order to treat them equitably and offer meaningful inclusion. Despite the fact that in 2004 a majority (59%) of individuals between the ages of forty and fifty-seven (Baby Boomers) said that the Civil Rights Movement had a "Major Influence" on

POST-DISPATCH, Apr. 1, 1990, at 3B. Shortly after he announced his resignation, Justice Marshall advised that President George Bush not use race to justify "picking the wrong Negro and saying, 'I'm picking him because he's a Negro.'" Howard Fineman et al., *How Far Right*, NEWSWEEK, July 8, 1991, at 19. Although Justice Marshall expressed hope that the nominee would be "a Negro," according to reported accounts, "he did not think there should be a permanent black seat on the high court." Ethan Bronner, *Marshall to Retire from High Court*, BOSTON GLOBE, June 28, 1991, at 1. When President George Bush announced Judge Thomas's nomination, he rejected the suggestion that Thomas's race was a factor in his decision. John Harwood, *Bush Selects Black Judge for Supreme Court Seat*, ST. PETERSBURG TIMES, July 2, 1991, at 1A. "I don't think there should be a black seat on the court, or an ethnic seat." *Id.* Yet others urged that when President Bush selected Justice Thomas for the Court, he took race into account and reinforced the idea of a black seat. See Cynthia Tucker, Editorial, *Filling Court Vacancy: Playing Race Politics*, ATLANTA CONST., July 6, 1991, at A19.

33. See, e.g., Adam Nagourney, *Democrats Adopt O'Connor as Model for Bush Court Pick*, N.Y. TIMES, July 7, 2005, at A1; David D. Kirkpatrick, *Senate Democrats Are Shifting Focus from Roberts to Other Seat*, N.Y. TIMES, Sept. 9, 2005, at A16.

34. See Nagourney, *supra* note 33; Kirkpatrick, *supra* note 33.

their views about governance and politics,³⁵ the gender and racial make-up of the courts has changed only incrementally in the past twenty years.³⁶

I argue that for a variety of reasons with regard to substantive changes in the law as well as perceptions of fairness and the role the judiciary plays in our society, women judges do make a difference and that race, ethnic, and gender diversity should be the norm, not the exception. I also assert that judges, women, and people of color, are making a difference in a variety of ways, including legal reasoning and public engagement. I offer three examples: Madam Justice Bertha Wilson of the Supreme Court of Canada, Justice Sandra Day O'Connor of the United States Supreme Court, and Chief Justice Constance Baker Motley of the Second Circuit Court of Appeals. They are aided in doing so by the legal scholarship of feminist, critical race, and intersectionality legal theorists.

The “woman question” is not a new one, even with regard to judges.³⁷ However, in 1982, Madam Justice Bertha Wilson, the first woman to sit on the Supreme Court of Canada,³⁸ gave that question new prominence. The title of her widely publicized lecture posed the issue directly: *Will Women Judges Really Make a Difference?*³⁹ According to Madam Justice Wilson’s assessment, the life experiences of women and men cause them to think and approach the law and legal decision-making differently.⁴⁰

Madam Justice Wilson’s treatment of the question was presented at Osgoode Hall Law School and, not surprisingly, she approached the question as one approaches a legal issue.⁴¹ She carefully laid out her arguments for how the appointment of women to the bench would: 1) help “shatter stereotypes about the role of women in society that are held by male judges and lawyers, as well as by litigants, jurors, and witnesses;”⁴² 2) help preserve the public

35. Jeffrey Love, *Political Behavior and Values Across the Generations: A Summary of Selected Findings*, STRATEGIC ISSUES RESEARCH (AARP), July 2004, at 11, http://assets.aarp.org/rgcenter/general/politics_values.pdf.

36. Rorie Spill Solberg, *Court Size and Diversity on the Bench: The Ninth Circuit and Its Sisters*, 48 ARIZ. L. REV. 247, 248, 253 (2006).

37. See Barbara Allen Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 STAN. L. REV. 2143, 2145–46 (1993).

38. Mimi Liu, *A “Prophet With Honour”: An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L’Heureux-Dubé of the Supreme Court of Canada*, 25 QUEEN’S L.J. 417, 423 n.20 (2000); see The Honourable Madam Justice Bertha Wilson, *The Supreme Court of Canada*, http://www.scc-csc.gc.ca/AboutCourt/judges/wilson/index_e.asp (last visited Apr. 14, 2007).

39. Madam Justice Bertha Wilson, *Will Women Judges Really Make a Difference?* 28 OSGOODE HALL L.J. 507, 507 (1990).

40. *Id.* at 519–22.

41. See *id.* at 507.

42. *Id.* at 517.

trust by fostering perceptions of diverse representation in the judiciary;⁴³ 3) reduce problems for women counsel;⁴⁴ 4) alter “the process of judicial decision-making;”⁴⁵ and 5) reform legal doctrine, particularly in such areas as tort, criminal, and family law.⁴⁶

Madam Justice Wilson’s conclusions about women’s potential to change the law fell into two categories.⁴⁷ She first argued that the appointment of women judges would alter public perceptions.⁴⁸ In addition, she argued that the presence of women on the bench would modify law itself.⁴⁹ According to Madam Justice Wilson, the presence of women in the role of judicial decision-makers and leaders would change the way fellow judges, as well as lawyers and litigants, saw all women in the judicial process.⁵⁰ This, she concluded, would also change the behavior of women and men.⁵¹ So too, with more women as judges, the public at large would see the justice system as more representative of diversity and, presumably, more fair.⁵²

Madam Justice Wilson’s conclusions about women’s potential to change the substance and processes of the law proved to be the most controversial of her claims. She argued that because of their gendered experiences, women were more willing to contextualize the law and its processes than were men, who were more formalistic in their approach to decision-making.⁵³ These assertions drew fire from critics who challenged many of Madam Justice Wilson’s premises.⁵⁴ Her conclusions were understandably most offensive to those who view the law as gender, race, and class neutral, notwithstanding the different life experiences of women and men.⁵⁵ For those who believe in law’s neutrality, Madam Justice Wilson’s arguments raise the question of whether any effort to appoint more women is misguided if it is done for the sake of adding the female perspective.⁵⁶ For those with a particularly traditional view of the law, the appointment of women who are

43. *Id.* at 518.

44. Wilson, *supra* note 39, at 518–19.

45. *Id.* at 519.

46. *Id.* at 516.

47. *See id.* at 517–18.

48. *Id.*

49. Wilson, *supra* note 39, at 519.

50. *Id.* at 517.

51. *Id.* at 521–22.

52. *Id.* at 518.

53. *Id.* at 519–20.

54. *See* Robert E. Hawkins & Robert Martin, *Democracy, Judging and Bertha Wilson*, 41 MCGILL L.J. 1, 34 (1995).

55. *Id.* at 54.

56. *See id.* at 55.

perceived as particularly “feminist” in their approach to the law and decision-making remains very troublesome.⁵⁷

Canadian law professor Constance Backhouse chronicles the response to one such judge—Madam Justice Claire L’Heureux-Dubé, the second woman appointed to the Supreme Court of Canada.⁵⁸ Madam Justice L’Heureux-Dubé came under fire for the concurring opinion she wrote in *R. v. Ewanchuk*,⁵⁹ a criminal case involving the question of whether an alleged sexual assault was actually consensual sex.⁶⁰ Madam Justice L’Heureux-Dubé’s opinion concurred with the full Court’s decision to overturn the dismissal of the complaint and to enter a conviction of the defendant.⁶¹ The opinion also criticized her colleague, Justice John Wesley McClung, who voted to dismiss the conviction, suggesting that the complainant’s repeated “no”’s during the alleged attack were irrelevant.⁶² He also implied that a woman who had had a child out of wedlock, while living with a male partner, was not capable of refusing consent.⁶³ Madam Justice L’Heureux-Dubé’s opinion advised that judges should avoid the use of “language . . . which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.”⁶⁴ Even further, the opinion noted that judicial bias, such as that suggested in Justice McClung’s opinion, adversely affected a complainant’s ability “to rely on a system free from myths and stereotypes” and on a reasonable expectation of judicial impartiality.⁶⁵

Although her colleague, Justice Charles Doherty Gonthier, also signed the opinion, Madam Justice L’Heureux-Dubé received the brunt of the public criticism.⁶⁶ The first came in the form of a letter written by Justice McClung, which was published in a national newspaper, where he accused Madam Justice L’Heureux-Dubé of having a “feminist bias” and suggested that her interjection of “personal invective” into the law could be responsible “for the disparate (and growing) number of male suicides being reported in

57. See, e.g., Lynne Cohen, *Gender Irrelevant When Judging a Judge*, OTTAWA CITIZEN, June 2, 1998, at C4.

58. The Honourable Madam Justice Claire L’Heureux-Dubé, The Supreme Court of Canada, http://www.scc-csc.gc.ca/AboutCourt/judges/lheureux-dube/index_e.asp (last visited Apr. 14, 2007); Liu, *supra* note 38, at 423.

59. [1999] 1 S.C.R. 330 (Can.).

60. *Id.*

61. *Id.* at ¶ 68 (L’Heureux-Dubé, J., concurring).

62. *Id.* at ¶ 88–89.

63. *Id.* at ¶ 88.

64. *Ewanchuk*, [1999] 1 S.C.R. 330, ¶ 95.

65. *Id.*

66. Janice Tibbetts & Shawn Ohler, *Judges Clash Over Landmark Sex-Assault Ruling: No Definitely Means No*, NAT’L POST, Feb. 26, 1999, at A1.

[Quebec Province].”⁶⁷ In the public attacks that followed, lawyers and representatives from national organizations criticized Madam Justice L’Heureux-Dubé for feminist judicial activism.⁶⁸ Despite the criticism, Madam Justice L’Heureux-Dubé did not shy away from the feminist label.

Throughout their careers both Madam Justice L’Heureux-Dubé and Madam Justice Wilson expressed opinions that were characterized as feminist, although Madam Justice L’Heureux-Dubé came under particular scrutiny for challenging what she believed were sexist ideas.⁶⁹ While Madam Justice Wilson certainly received public criticism for raising the “woman question,” her willingness to do so may have had a notably positive effect.⁷⁰ At the time this article was written, of the nine justices on the Supreme Court of Canada, four were women.⁷¹ Three of the appointments came between 2002 and 2004.⁷² The Chief Justice of the Supreme Court of Canada is Madam Justice Beverley McLachlin.⁷³ In the context of advising President Bush on the appointment of women to the United States Supreme Court, Senator Patrick Leahy of Vermont pointed to the Supreme Court of Canada as an example of gender equity.⁷⁴ As many commentators have noted, the United States has much to learn about diversity on the bench from Canada’s highest court.⁷⁵ By raising the question in a convincing and reasoned manner, Madam Justice Wilson began a dialogue among the bar and the public at large. She urged change that may not have taken place but for her positions.

II. JUST HOW WILL WOMEN JUDGES MAKE A DIFFERENCE?

Scholars have identified several dominant theories employed by the United States Supreme Court in gender discrimination cases that are relevant to judicial appointments.⁷⁶ One involves difference theory.⁷⁷ Though

67. *Id.*

68. *Id.*

69. Justice Claire L’Heureux-Dubé, *Conversations on Equality*, 26 MAN. L.J. 273 (1999).

70. See Hawkins & Martin, *supra* note 54, at 1.

71. Supreme Court of Canada, Current Judges, http://www.scc-csc.gc.ca/aboutcourt/judges/curjudges_e.asp (last visited Apr. 14, 2007).

72. Supreme Court of Canada, Current and Former Puisne Judges, http://www.scc-csc.gc.ca/AboutCourt/judges/curformpuisne/index_e.asp (last visited Apr. 14, 2007).

73. Supreme Court of Canada, Current and Former Chief Justices, http://www.scc-csc.gc.ca/AboutCourt/judges/curformchief/index_e.asp (last visited Apr. 14, 2007).

74. Richard Foot, *Canadian Top Court Held as Example in U.S.*, THE GAZETTE, July 13, 2005, at A13.

75. Clare Dyer, *Law: Where Are the Women? Our Judges Are Still Overwhelmingly Male, White and Public School Educated*, THE GUARDIAN, July 8, 2003, at 16.

76. However, the United States Supreme Court has not incorporated difference theory in its jurisprudence. See generally Katharine T. Bartlett, Essay, *Gender Law*, 1 DUKE J. GENDER

Madam Justice Wilson relied on difference theory to support her position that women judges would change the law, a review of the research reveals no definitive evidence to confirm that reliance.⁷⁸ Empirical and anecdotal accounts do not conclusively establish the idea that individual women or women as a group judge differently than men. However, at least some research finds gender differences.⁷⁹ For example, political scientists Elaine Martin and Barry Pyle studied high courts in all fifty states, concluding that, in divorce decisions, “a judge’s gender [tended] to be the primary predictor of a judge’s vote.”⁸⁰ In addition, Brenda Kruse’s research has concluded that Justice Sandra Day O’Connor and Justice Ruth Bader Ginsburg are also influenced by their gendered experiences in deciding employment cases.⁸¹ However, empirical research testing the impact of race on judicial decision-making is inconclusive.⁸²

There is also considerable evidence that some male judges’ perspectives cause them to view women’s experiences very differently than women might.⁸³ Professor Shirley Wiegand has chronicled numerous examples that demonstrate a judge’s apparently limited vision.⁸⁴ One of her examples comes from the case that served as the basis for the 2005 movie *North Country*, a grim and painful, if sometimes fictionalized, account of sexual harassment at a mine in Minnesota.⁸⁵ The fictionalized version was apparently no

L. & POL’Y 1 (1994) [hereinafter Bartlett, *Gender Law*]. The primary theories relied on by the Court are: 1) separate spheres, which allows different treatment based on cultural expectations and biological differences; 2) formal equality, which requires that women and men be treated the same; and 3) substantive equality, which calls for rules such as affirmative action that can produce equality in results. *Id.* at 2–6; Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971–2002*, 10 CARDOZO WOMEN’S L.J. 501, 519–521 (2004).

77. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND THE AMERICAN LAW* 19, 20 (1990); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1282 (1987).

78. Wilson, *supra* note 39, at 522.

79. For an overview, see KATHERINE BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (4th ed., 2006).

80. Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 U. TOL. L. REV. 923, 923 (2005).

81. Brenda Kruse, Comment, *Women of the Highest Court: Does Gender Bias or Personal Life Experiences Influence Their Opinions?* 36 U. TOL. L. REV. 995, 1021 (2005).

82. Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 316 (2004).

83. Kruse, *supra* note 81, at 996.

84. See generally Shirley A. Wiegand, *Deception and Artifice: Thelma, Louise, and the Legal Hermeneutic*, 22 OKLA. CITY U. L. REV. 25 (1997).

85. *NORTH COUNTRY* (Warner Bros. Pictures 2005).

more grim and painful than the real experience the women faced in the mine or the hostility they faced because of the suit.⁸⁶ According to Wiegand, Judge Patrick McNulty's opinion:

[R]evealed that he could not understand why one woman

was fearful when a man who she said had exposed himself to her several years earlier began driving his truck in circles, over and over, around her work area. "This court has difficulty understanding why the appearance of a suspected flasher outside the building in which she was working . . . would cause great fear—of something—in a reasonable woman."

The judge also could not understand why a woman would fear rape simply because "a man who had repeatedly and crudely propositioned her suddenly lunged at her one night at work with his arms spread, only stopping when she began screaming."⁸⁷

Yet such decisions and other evidence of male bias do not establish sweeping gender differences in judging. And considerable evidence suggests that other factors, such as ideology, are better predictors than sex in accounting for judicial decisions.⁸⁸ So, for example, commentators who have looked specifically at Justice O'Connor's and Justice Ginsburg's voting records generally find that gender is not a compelling factor in their judging.⁸⁹

Unlike their Canadian counterpart, Madam Justice Bertha Wilson, both Justice O'Connor and Justice Ginsburg reject the notion that their gender guides their judicial decision-making.⁹⁰ In responding to questions of "whether women judges speak with a different voice," Justice O'Connor refers to the lack of "empirical evidence that gender differences lead to discernible differences in rendering judgments."⁹¹ Moreover, she warns that

86. Wiegand, *supra* note 84, at 46–47.

87. *Id.* at 47 (quoting Kirsten Downey Grimsley, *Judge Put Small Price on Pain; Damage Award Paled by Litigation Norms*, WASH. POST, Oct. 28, 1996, at A13.). It is worth noting that the trial judge who adopted this language was overturned on appeal some eleven months later. *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1304 (8th Cir. 1997).

88. Farhang & Wawro, *supra* note 82, at 302–03.

89. See, e.g., Tony Mauro, *O'Connor and Ginsburg: Together and Apart*, LEGAL TIMES, June 9, 2003, at 14. Mauro notes that Justice O'Connor and Justice Ginsburg voted for the same result approximately 75% of the time. *Id.* Justice O'Connor agreed with Justice Kennedy 83% of the time, while Justice Ginsburg agreed with Justice Breyer and Justice Souter in 94% of the decisions. *Id.*

90. *Id.*

91. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 190–91 (Craig Joyce ed., 2003).

such ideas may rely on troubling myths and stereotypes.⁹² Instead, she suggests that male and female judges alike should seek a collective wisdom gained through different struggles and different victories.⁹³

Justice Ginsburg draws on her experiences as a judge and as a law teacher to conclude that there is no discernible difference in the way women and men reason: “In class or in grading papers . . . and now in reading briefs and listening to [oral] arguments in court . . . , I have detected no reliable indicator of distinctly male or surely female thinking—or even penmanship.”⁹⁴

It is difficult to argue with these two women, in particular, about whether women judges speak with a different voice, especially given that there is no clear definition of what a “different voice” means. Moreover, difference theory is not without its feminist critics.⁹⁵ Some feminists advocate for gender equity under the theory of substantive equality.⁹⁶ Rather than look at whether a rule or law treats women and men the same or differently, substantive equality theory questions whether a law or rule has the effect of disadvantaging individuals due to their gender.⁹⁷ Thus, substantive equality frameworks acknowledge differences, but with the goal of eliminating or leveling them to encourage more equal outcomes.⁹⁸ Affirmative action and pay equity are the kinds of strategies that advocates of substantive equality support.⁹⁹

Instead of focusing on the question of whether men and women are different, non-subordination theory looks at what meaning society attributes to those differences.¹⁰⁰ Assuming that the consequences of male power are more significant than gender similarities or differences, non-subordination frameworks concentrate on eliminating power imbalances.¹⁰¹ According to the theory’s major proponent, Catharine A. MacKinnon:

[A] rule or practice is discriminatory . . . if it participates in the systemic social deprivation of one sex because of sex. The only question for litigation is whether the policy or practice in question

92. *Id.* at 192.

93. *Id.* at 193.

94. Justice Ruth Bader Ginsburg, *Remarks for California Women Lawyers, September 22, 1994*, 22 PEPP. L. REV. 1, 5 (1994) [hereinafter Ginsburg, *Remarks*].

95. See Bartlett, *Gender Law*, *supra* note 76, at 11–13.

96. *Id.* at 4–6.

97. *Id.* at 4.

98. *Id.*

99. See *id.*

100. Bartlett, *Gender Law*, *supra* note 76, at 6.

101. See *id.*

integrally contributes to the maintenance of an underclass or a deprived position because of gender status.¹⁰²

For example, under non-subordination theory, sexual harassment violates principles of equality and should be prohibited because it reinforces men's power over women.¹⁰³ The violation flows from the domination it supports—not the boorish, bad, or even assaultive behavior itself.¹⁰⁴

Despite the opportunities that difference and non-subordination theories offer for positive change, they are not without their feminist critics. Some commentators, Justice Ginsburg among them, argue that difference theory risks reinforcing gender-based stereotypes that perpetuate gender-based inequality.¹⁰⁵ By attempting to articulate an all-encompassing meta-narrative, both theories are criticized for denying class, racial, sexual orientation, and religious differences among women, making the experiences of white, middle-class women the model.¹⁰⁶ In addition to criticizing MacKinnon's theory on the grounds that it promotes what amounts to gender "essentialism," some feminists criticize Catharine MacKinnon for what they call "gender imperialism," namely the assumption that gender is the most important source of oppression.¹⁰⁷

Critical race theorists have similarly questioned the ways in which the "received tradition in law adversely affects people of color not as individuals but as a group."¹⁰⁸ Critical race theorists appropriately challenge us to consider: "What would the legal landscape look like today if people of color were the decision-makers?"¹⁰⁹ Critical race theorists point to similar modes of racial justice, including one based on ideas of racial pluralism, and another based on racial diversity.¹¹⁰ Moreover, they have a "vision of legal knowledge that includes the perspectives and experiences of oppressed people in the critique and reformulation of legal doctrine" and eschews the notion that law is value neutral.¹¹¹ But they too are susceptible to criticism by Black

102. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117 (1979).

103. *Id.*

104. *Id.*

105. Ginsburg, *Remarks*, *supra* note 94, at 4–5.

106. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585, 590 (1990); see also BARTLETT & RHODE, *supra* note 79, at 15.

107. See, e.g., Harris, *supra* note 106, at 585; Bartlett, *Gender Law*, *supra* note 76, at 16.

108. Brooks, *supra* note 25, at 85.

109. *Id.* at 86.

110. See *id.* at 92–93.

111. *Id.* at 96 (quoting Linda S. Greene, "Breaking Form", 44 *STAN. L. REV.* 909, 922 (1992)).

women and Latina scholars for racial essentialism and neglecting the role of class and gender in their analysis.

However, failure to reach a consensus about whether women and racial minority jurists reach different conclusions or even reason differently does not resolve the question of whether there should be more women on the bench. Whether women judges will make a difference is a larger question than whether women and men will reach different outcomes in particular cases. Whether women judges make a difference depends on the role that judges and judging play in our legal system and must take into account a variety of professional and community activities in which judges participate. As the research from various judicial task forces suggests, judging involves collegiality and a diverse bench enables members to influence each other.¹¹²

In addition, the role of a judge also has significance in terms of perceptions about representation. The face of judging, in an emblematic way, matters as a reflection of access to justice; the diversity of the bench affects public perceptions of fairness. Finally, diversity among judges is a reflection of how power is distributed in the justice system.

Political constituents in the United States rely on several forms of representation, including anticipatory representation, introspective representation, and surrogate representation.¹¹³ The concept of anticipatory representation is best explained by the idea that constituents in today's political climate make selections based on the achievement of specific outcomes rather than "policy preferences" of representatives.¹¹⁴ In the introspective representation model, representatives rely on "a set of principles and commitments that derive partly from their own ideals and partly from their commitment to the collective decisions of the party" in making decisions.¹¹⁵ Surrogate representation is a form of non-territorial representation.¹¹⁶ Thus, an individual without a certain characteristic or perspective may serve as a representative for "the interests and perspectives" of others with the same characteristic or perspective, "even when members of these groups do not constitute a large fraction of their constituents."¹¹⁷ Though typically applied to elected political officials, the ideas behind these forms of representation can be applied to the judiciary and can serve as a basis for arguing for greater diversity and inclu-

112. See *infra* notes 130–32.

113. Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 515 (2003).

114. *Id.* at 517 (citing R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 17 (1990)).

115. *Id.* at 521.

116. *Id.* at 522.

117. *Id.* at 523.

sion.¹¹⁸ As judicial selection becomes more openly ideological and political, it is time for a more open discussion about what representation can legitimately be sought in the courts. Yet, many of us are uncomfortable with aggressively pursuing diversity in the judiciary given the lack of confidence in, and outright discomfort with, the idea of different outcomes based on race and gender.

However, there are other reasons for supporting judicial diversity. I call the model which I would choose for including women and people of color on the bench the representative perspective frame. My model borrows ideas from both difference and non-subordination theories and attempts to address some of the criticisms of racial and gender essentialism and gender imperialism. As applied to the appointment of judges, my representative perspective theory rests on three premises: 1) that gender, racial, and ethnic experiences influence perspectives and worldviews, including one's sense of justice and how it should be achieved; 2) that the contribution of representative perspectives is substantial and reaffirms the promise of equality under the law by suggesting that all citizens have the chance to take part in democracy; and 3) that the failure to have a broad array of perspectives represented undermines judicial integrity and contributes to false ideas about intellect and competency.

III. JUSTICE O'CONNOR AND THE INCLUSIVE COURT

Theories of equality, as well as the law adopted by the United States Supreme Court in recent years, support greater inclusion in the judiciary. Despite the fact that Justice O'Connor has been labeled a conservative by some, and denies that her gender influences her reasoning, she has provided some important language to support the idea of greater gender inclusion on the judiciary.¹¹⁹

"A basic tenet of [feminist thinking] is that perspective matters . . . , [meaning] understanding women's life experiences requires a different lens" and a point of view that comes "from living life as a woman and developing [a gendered] consciousness."¹²⁰ Critical race theorists argue that people of color develop a race consciousness as well.¹²¹

118. See generally Mansbridge, *supra* note 113, at 521–27.

119. See Kruse, *supra* note 81, at 996–98.

120. Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes Justices More Liberal*, BOSTON REV. (Jan./Feb. 2006), available at <http://bostonreview.net/BR31.1/hansonbenforado.html>.

121. See *id.*; see also Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?* 18 HARV. BLACKLETTER L.J. 1, 20 (2002).

Perspectives and experiences may influence the outcome, but that influence is not limited to outcome in terms of which party prevails. It can have other influences on the overall direction the law takes. As Justice O'Connor stated in her concurring opinion in *J. E. B v. Alabama ex rel. T. B.*,¹²² a case which challenged the exclusion of women from juries, "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case Individuals are not expected to ignore as jurors what they know as men—or women."¹²³ The idea that perspective matters is not limited to feminist scholars or female jurists.¹²⁴ Jon Hanson and Adam Benforado made precisely that point in their recent *Boston Review* article, stating that "[m]ost legal scholars recognize that a judge's antecedent presumptions and perspectives often influence judicial decisions as much or more than her purported principles and precedents."¹²⁵ As noted earlier, gender is only one of the antecedents that influence judicial decisions and decision making; race, class, and sexual orientation, as well as previous areas of practice, are others.¹²⁶

Even conservative supporters of Justice Samuel Alito recognized the importance of a judge's perspective.¹²⁷ During his confirmation hearing, they argued that his experience as the son of an Italian immigrant father would be a positive influence on his ability to relate to the little guy in cases that might come before him as a United States Supreme Court Justice.¹²⁸ It is hard to imagine that the experience of being an immigrant's son could be any more influential than the experience of being a man is for now eight of the nine members of the Court.

In addressing whether women judges will make a difference, we also should not overlook the symbolic and representational role that members of the judiciary play. Beginning in the 1970s, the federal and state judicial systems launched initiatives on racial and gender bias.¹²⁹ To date, numerous states and members of the federal circuit courts have taken steps to respond to bias.¹³⁰ The need for responses is well documented in task force re-

122. 511 U.S. 127 (1994).

123. *Id.* at 149 (O'Connor, J., concurring).

124. *See* Hanson & Benforado, *supra* note 120.

125. *Id.*

126. *See supra* Part II.

127. *See* Hanson & Benforado, *supra* note 120.

128. *See* Patty Reinert, *Confirmation Hearings: Alito Vows No "Agenda"*, HOUSTON CHRON., Jan. 10, 2006, at 1.

129. *E.g.*, Equal Employment Opportunity Act, 42 U.S.C. § 2000e-8 (2000).

130. *See* Marcia Coyle, *How Deep Is the Pool for Supreme Court Picks?* FULTON COUNTY DAILY REPORT, Sept. 28, 2005.

ports.¹³¹ They found bias in a broad range of substantive areas such as family law, domestic violence, and criminal law, as well as in administrative areas such as the appointment and election of judges.¹³²

It is hard to deny, though perhaps impossible to measure, how bias against women and people of color undermines the integrity of the American judicial system. However, a measurement of the actual impact is not necessary. Justice O'Connor herself recognized that even the perception of bias injures the judicial system. As she wrote in the introduction to the Ninth Circuit Court of Appeals task force: "When people perceive . . . bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law."¹³³ Virtually all of the task forces concluded that at least some reforms were necessary to reduce the potential for gender bias and better serve the ultimate objective of equal justice under the law.¹³⁴ In particular, many of the task force reports advocate measures that will increase the number of women on the bench.¹³⁵ These reports cite the educational role women judges play with their male counterparts in addition to the greater public confidence in the judiciary that come from more diverse representation on the bench.¹³⁶

Given the history of gender and racial bias in our legal system, the overrepresentation of white, male perspectives on the United States Supreme Court undermines the integrity of the American judicial system. Law professor Lani Guinier has argued that United States Supreme Court appointments have carried important symbolic messages.¹³⁷ In *Grutter v. Bollinger*,¹³⁸ the Court affirmed, recognizing that a university had a compelling interest in a racially diverse student body.¹³⁹ Writing for the majority, Justice O'Connor concluded that for "legitimacy in the eyes of the citizenry, it is necessary that

131. See generally John H. Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 N.Y.U. ANN. SURV. AM. L. 117 (1997).

132. See, e.g., THE FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMM. (1990), reprinted in 22 CONN. L. REV. 733, 733 (1990) [hereinafter FEDERAL COURTS STUDY COMM.]; see Doyle et al., *supra* note 131, at 168–77; *Report of Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 687–704 (1993).

133. JUDGE DOROTHY W. NELSON, INTRODUCTION TO THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1993), reprinted in 67 S. CAL. L. REV. 731, 760 (1994).

134. See *id.* at 760–61.

135. See *id.*

136. *Id.*

137. See generally Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003).

138. 539 U.S. 306 (2003).

139. *Id.* at 333.

the path to leadership be visibly open to talented and [all] qualified individuals of every race and ethnicity.”¹⁴⁰ Professor Guinier argues that the same is said for leadership in the judiciary; and that it too must be open regardless of race, ethnicity, and gender.¹⁴¹ Professor Sylvia R. Lazos Vargas argues that the *Grutter* decision goes further and demands a critical mass of minority judges.¹⁴² The Court itself recognized in *J. E. B. v. Alabama* that exclusion of women and people of color from juries “causes harm to the litigants, the community, and the individual jurors” who are excluded.¹⁴³ Similarly, the failure to include diverse perspectives on the bench has an adverse impact on litigants, the community, and the underrepresented groups that are excluded.

Throughout this essay, I have been asking the “woman question.” How does the judicial selection process disadvantage women or disregard their experiences? Perhaps one way to answer that question is to ask the “man question.” How do the judicial selection process and unchallenged selection standards advantage typically white male experiences and perspectives? In this context it is important to note that most legal experts believe that there is an ample number of women and people of color who are qualified to sit on the Court.¹⁴⁴ Of course, that depends on how one determines qualifications. Much was made of Chief Justice John Roberts’ United States Supreme Court clerkship¹⁴⁵ and Justice Samuel Alito’s long experience on the federal bench,¹⁴⁶ in addition to both men’s Ivy League education and law review experiences.¹⁴⁷ But surely state court experience or other forms of service to the profession and to the public constitutes equally valuable qualifications. Had the qualities that Chief Justice Roberts and Justice Alito brought to the nomination process been the primary criteria in 1983, Justice O’Connor would not have been nominated to the Court.¹⁴⁸ Her distinguished service

140. *Id.* at 332.

141. See Guinier, *supra* note 137, at 175.

142. Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 143 (2004).

143. 511 U.S. 127, 140 (1994).

144. See Carl Tobias, *Fostering Balance on the Federal Courts*, 47 AM. U. L. REV. 935, 955–59 (1998); Coyle, *supra* note 130.

145. The Supreme Court of the United States, The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Mar. 25, 2007) [hereinafter Supreme Court Biographies].

146. *Id.*

147. The White House, Judicial Nominations, Chief Justice John G. Roberts, Jr., <http://www.whitehouse.gov/infocus/judicialnominees/roberts.html>, (last visited Mar. 24, 2007); The White House, Judicial Nominations, Justice Samuel A. Alito, <http://www.whitehouse.gov/infocus/judicialnominees/alito.html> (last visited Apr. 14, 2007).

148. Supreme Court Biographies, *supra* note 145.

makes clear that other, less traditional backgrounds are equally valuable. The judicial process, in fact and in appearance, is strengthened by members with diverse talents, backgrounds, and perspectives.¹⁴⁹

IV. JUDGE CONSTANCE BAKER MOTLEY: EMBRACING RACE AND GENDER

Will women judges make a difference? In fact, they already have. Madam Justice Bertha Wilson made a difference by raising the question and by unapologetically answering it in the affirmative.¹⁵⁰ An example of true leadership, her answer moved the discussion of women's inclusion in the judiciary forward in an unprecedented manner. Also, Justice Sandra Day O'Connor's legal opinions and public addresses provide language and ideas that legal scholars will continue to draw upon to support gender and racial inclusion in the courts. Other women judges provide similar inspiration. Judge Constance Baker Motley, the first African American woman selected for the federal judiciary, is a fitting example on which to close.¹⁵¹

In 1946, just out of Columbia Law School, Judge Motley began her legal career in New York as an attorney with what is now the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund.¹⁵² She was the sole female attorney among those who assisted Justice Thurgood Marshall in *Brown v. Board of Education*.¹⁵³ She also argued successfully in several higher education integration cases, including the integration of the University of Mississippi and the University of Alabama.¹⁵⁴ When President Lyndon B. Johnson appointed her to the bench in 1966, she had appeared before the United States Supreme Court ten times and won nine of those cases.¹⁵⁵ Her contributions to my appreciation of the role of judges is numerous, but perhaps her most famous decision came when she refused to excuse herself from a gender discrimination case involving an African American woman plaintiff.¹⁵⁶ In rejecting the defendants' claim that her general background and status as an African American female somehow

149. See, e.g., Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated"*, 39 AKRON L. REV. 373, 398 (2006).

150. See Wilson, *supra* note 39, at 517–22.

151. See Columbia University, C250 Celebrates Columbians Ahead of Their Time: Constance Baker Motley, http://c250.columbia.edu/c250_celebrates/remarkable_columbians/constance_motley.html (last visited Apr. 14, 2007).

152. *Id.*

153. 349 U.S. 294, 296 (1955).

154. Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 515 (2004).

155. See *id.* at 515.

156. See *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 2–4 (S.D.N.Y. 1975).

prejudiced her in the matter, Judge Motley noted that she was not the only member of the judiciary who possessed both race and gender:

It is beyond dispute that for much of my legal career I worked on behalf of blacks who suffered race discrimination. I am a woman, and before being elevated to the bench, was a woman lawyer. These obvious facts, however, clearly do not, *ipso facto*, indicate or even suggest [heightened] personal bias or prejudice Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case¹⁵⁷

To her credit, Judge Motley unapologetically embraced both her race and her gender as well as the wisdom she had gained through her particular struggles as a civil rights advocate.¹⁵⁸ In a tribute to Judge Motley before the American Bar Association, Justice Ruth Bader Ginsburg said of her,

I count it my great good fortune to be among the legions whose lives Judge Motley touched. She taught me and others of my generation that law and courts could become positive forces in achieving our nation's high aspiration—as carved above the entrance to the U.S. Supreme Court—Equal Justice under Law.¹⁵⁹

Judge Motley embodied our country's high aspirations in her role as lawyer as well as in her role as a jurist, making her an example for the public at large, practicing attorneys, and members of the judiciary. In addition to her personification of the high ideals of the United States Supreme Court, perhaps no one spoke more persuasively about the need for diversity in the judiciary than Judge Motley:

There is a need for more women and more minorities in the federal judiciary, but not because I think they bring something totally different to the bench than white men. I don't think women and minorities have a particular view on contract law that's totally different from white men. Rather, I believe that having more women and minorities in the federal judiciary—and the federal courts are a major part of the national government—builds confidence in the government. It makes people feel that the government is fair, in that it includes people from all segments of the population. It says

157. *Id.* at 4.

158. *See id.*

159. Justice Ruth Bader Ginsburg, *Tribute to Constance Baker Motley*, 32 HUM. RTS. 26, 26 (2005).

that the courts are fair, in that women, Blacks, Hispanics, Asians, and other minorities are included among the judges. It says that the court system is not an all-white male institution as it once was.¹⁶⁰

V. CONCLUSION

Madam Justice Wilson, and Justice O'Connor, like Judge Motley, are notable examples of how women judges, in different ways, make a difference. They give us a greater appreciation for having women as members of the judiciary and bring us further along the path of achieving a judiciary which reflects the equality principles we espouse and the legitimacy to which we aspire. The question of whether we will have the courage to follow their leadership remains.

160. Clark, *supra* note 154, at 518–19.

WOMEN AND LAW: CHALLENGING WHAT IS NATURAL AND PROPER *

THE HONORABLE DEANELL REECE TACHA⁺

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In 1872, United States Supreme Court Justice Joseph Bradley offered the following rationale for why Illinois could properly refuse Myra Bradwell a license to practice law:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life

. . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.¹

Myra Bradwell, like countless women before and after her, had to challenge not only the laws of the state,² but also the laws of history and society, laws that seemed natural and universal—in Justice Bradley's words, the "law of the Creator."³ In tracing the place of women in the legal profession, we

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1. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141–42 (1872) (Bradley, J., concurring).

2. Within five years after state courts denied law licenses to women, including Bradwell, state and federal legislatures began authorizing admission. DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 23 (1989) [hereinafter RHODE, *JUSTICE AND GENDER*]. "[F]ive women lawyers . . . were practicing in the United States" in 1870, but they numbered just over a thousand by the turn of the century as twenty states admitted women to their bars. *Id.*

3. *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring).

are, therefore, talking about more than strictly legal change. Changes in our laws and public policies are part of the larger struggle to change the way we think and how we relate to one another in our everyday lives. Moreover, while women in the legal profession have not always agreed on the role law can and should play in this larger struggle, they have historically agreed that law is an important element in the struggle for social equality.

In light of Justice Bradley's remarks, we should not be surprised that women have recognized law as a powerful force, shaping the reality of their everyday lives. Myra Bradwell was denied a license to practice law because, in Justice Bradley's words, she "had no legal existence separate from her husband, who was regarded as her head and representative in the social state."⁴ Without a legally recognized separate identity, she could not form contracts on her own. The law reflected the belief that a woman belonged in the private sphere of home and family; she simply had no place in public life. Indeed, this rigid notion of private and public spheres, of separate spheres for women and men, is at the heart of women's experiences of subordination. And the story of women and law over the last century is largely the story of women's many challenges to entrenched notions of what is public and what is private and how the law should understand this distinction or, perhaps more accurately, what role the law should play in breaking down this distinction.⁵

The brief historical overview in the first part of this essay highlights women's impact on the law and legal profession. In particular, it traces how, once women gained access to and recognition under the law, they began contesting the law from the inside by transforming its underlying assumptions and using it as a tool for broader social change. Because of their efforts, gender stereotypes and assumptions that once seemed "natural" and universal are no longer acceptable bases for our laws. We now aspire to construct laws and institutions more representative of the diverse society in which we live. Moreover, as I argue in the second part of the essay, as lawyers and judges, we should draw upon our diversity and resist the temptation to replace old generalizations with new ones. That is, rather than asking how a distinctly "female" presence, or voice, has changed the legal profession and the judiciary, we should ask how the legal profession can better recognize and incorporate the range of styles women have to offer. By embracing our differences, rather than seeking a unified voice, we honor the contributions of generations of women activists and scholars.

4. *Id.*

5. *See infra* Section I.

I. WOMEN'S IMPACT ON THE LAW: BREAKING DOWN STEREOTYPES, CREATING POSSIBILITIES

Before women could use the law as a force for change, they had to fight it on its own terms. In other words, they sought to be recognized under the law in the same way men were. The Equal Rights Amendment (ERA) was first proposed by the National Women's Party in 1921.⁶ To the extent the law reinforced the idea that women had no place in public life, the ERA was designed to change this by guaranteeing their equal access—for example, their rights to control property, to contract, to sue, and to serve on juries.⁷ In the 1960s, building on the civil rights movement, women continued this fight for formal equality, a fight that resulted in landmark legislation: the Equal Pay Act of 1963⁸ and Title VII,⁹ which prohibit discrimination by employers on the basis of sex. In addition, once the laws were enacted, women made sure they were implemented. For example, when the Equal Employment Opportunity Commission (EEOC) failed to enforce Title VII, women formed the National Organization of Women to monitor the agency and advocate for serious enforcement of claims.¹⁰

Because of women's efforts, the law finally began to recognize women as equal members of public society. Of course, formal changes in the law did not translate into immediate social change. Statistics from then and now illustrate how slowly change occurs. Fewer than 5% of lawyers were women in the 1960s¹¹ and fewer than 2% of all law professors were women.¹² Despite the fact that law schools began abandoning their male-only admissions policies in the 1970s, only 13% of lawyers were women in 1984.¹³ Today,

6. Jo Freeman, *Social Revolution and the ERA*, 3 SOC. F. 145, 145 (1988) [hereinafter Freeman, *Social Revolution*]; see also RHODE, JUSTICE AND GENDER, *supra* note 2, at 35 (noting that advocates of the amendment introduced a version of it in every congressional session from 1923 to 1972).

7. Freeman, *Social Revolution*, *supra* note 6, at 145.

8. 29 U.S.C. § 206(d) (2000).

9. Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000h-6 (2000).

10. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 198 (1989–90); see also Jo Freeman, *From Suffrage to Women's Liberation: Feminism in Twentieth-Century America*, in WOMEN: A FEMINIST PERSPECTIVE 513 (Jo Freeman ed., 5th ed. 1995).

11. *Different Voices, Different Choices? The Impact of More Women Lawyers and Judges on the Justice System*, 74 JUDICATURE 138, 140 tbl.2 (1990) [hereinafter *Different Voices*].

12. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 219 tbl.12.1 (2d ed. 1993).

13. *Id.* at 220–21; *Different Voices*, *supra* note 11, at 138.

women make up only about 30% of the profession.¹⁴ Although the percentage of female judges in the federal judiciary doubled in the 1990s, today, women make up only about 24% of the federal bench.¹⁵ And by recent estimates, only about 29% of the judges on state courts of last resort are women.¹⁶ In addition, although women now make up more than half of entering law school classes, only about 20% of full law professors are women,¹⁷ and a little over 17% of law firm partners are women.¹⁸ The numbers are even less encouraging for women of color, who constitute only 5% of the total number of full law professors.¹⁹ As recently as 2005, “81% of [minority female associates had left] their law firms within five years of being hired.”²⁰

Yet, even in small numbers, women lawyers and law professors have had an enormous impact on formal laws and their enforcement. Beginning in 1971, with Ruth Bader Ginsburg’s United States Supreme Court victory in *Reed v. Reed*,²¹ women lawyers successfully challenged discriminatory laws and practices on equal protection grounds. It is quite fitting that, twenty-five years later, Justice Ginsburg would author the opinion in *United States v. Virginia*,²² emphasizing that—in her words—“generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them

14. DEBORAH L. RHODE, ABA COMM’N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 13 (2001) [hereinafter RHODE, UNFINISHED AGENDA].

15. See ABA Comm’n on Women in the Profession, A Current Glance at Women in the Law 2006 4, <http://www.abanet.org/women/CurrentGlanceStatistics2006.pdf> [hereinafter Current Glance at Women in the Law]; see also Kate Zernike, *Pool of Female Judges Has Boomed in 24 Years*, N.Y. TIMES, Oct. 29, 2005, at A10 (recognizing that 24% is a notable increase from 6% in 1981 when Justice Sandra Day O’Connor was nominated by President Ronald Reagan).

16. Current Glance at Women in the Law, *supra* note 15, at 4; see also Lynn Hecht Scharf, *Not from Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953, 954–56 (2004) (discussing the number of women in the federal and state judiciaries).

17. RHODE, UNFINISHED AGENDA, *supra* note 14, at 13, 27.

18. Current Glance at Women in the Law, *supra* note 15, at 2.

19. RHODE, UNFINISHED AGENDA, *supra* note 14, at 27.

20. Paulette Brown & Cathy Fleming, ‘Invisible’ Attorneys Seek Notice, THE NAT’L L.J., Oct. 23, 2006, available at <http://www.eapdlaw.com/newsstand/detail.aspx?news=742> (click on “PDF & Printable Article” hyperlink); see also ABA COMM’N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 9 (2006), <http://www.abanet.org/women/VisibleInvisibility-ExecSummary.pdf> (providing an in-depth study of the experiences of women of color in private law firms).

21. 404 U.S. 71 (1971).

22. 518 U.S. 515 (1996).

outside the average description.”²³ Indeed, estimates of what was considered appropriate for most women are what prompted Justice Bradley to conclude that women’s exclusion from public life followed from the natural law of the creator.

But women in the early 1970s challenged this assumption. Building on the approach used in race discrimination cases, they argued that laws should not distinguish between men and women who are similarly situated.²⁴ At that time, plenty of state laws included sex-specific distinctions, which the Supreme Court had routinely upheld. For example, in 1961, in *Hoyt v. Florida*,²⁵ the Court upheld a state statute excluding women from juror rolls, unless they specifically asked to be included.²⁶ But in 1971, the Court changed its approach in *Reed*.²⁷ Persuaded by Ruth Bader Ginsburg and other attorneys working for the ACLU’s Women’s Rights Project, the Court struck down an Idaho statute that gave preference to men over women as administrators of estates.²⁸ Idaho justified the distinction as a reasonable means of resolving a tie between two individuals equally qualified by their relationship to the decedent.²⁹ The state argued that men should be preferred because they generally have more business experience than women.³⁰ The Court rejected this argument, describing the male preference as “the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause” of the Constitution.³¹

Other United States Supreme Court victories followed the *Reed* decision. But although the Court struck down many sex-specific distinctions on equal protection grounds, it did not adopt the approach advanced by women’s rights activists and litigators. Women had argued that the courts should apply a standard of strict scrutiny, the same level of scrutiny already applied to classifications based on race and the toughest test under the Constitution’s Equal Protection Clause.³² But in light of the far-reaching impli-

23. *Id.* at 550 (emphasis in original).

24. See generally Serena Mayeri, Note, “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045 (2001) (discussing the historical emergence and development of the analogy to race in feminist thought and activism).

25. 368 U.S. 57 (1961).

26. *Id.* at 69.

27. *Reed v. Reed*, 404 U.S. 71 (1971).

28. *Id.* at 77.

29. Brief for Respondent at 12, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

30. *Reed*, 404 U.S. at 76.

31. *Id.* at 76.

32. See generally RHODE, JUSTICE AND GENDER, *supra* note 2, at 86–92 (discussing the United States Supreme Court’s “search for standards” in cases involving sex-based classifications).

cations of this kind of test—for example, how could women’s exclusion from the draft survive?—the Court stopped short of strict scrutiny.³³ When women’s rights activists realized the Court would not adopt this stringent test, they made a strategic choice to focus on contesting sex-based classifications that disadvantaged *men*.³⁴ They hoped this strategy would steadily weaken the stereotypes and generalizations that made women second-class citizens.³⁵

The strategy resulted in some success. For example, in *Craig v. Boren*,³⁶ the Court struck down an Oklahoma statute prohibiting the “sale of 3.2% beer to males under the age of 21 and to [women] under the age of 18.”³⁷ The Court also invalidated social security laws that treated widows more favorably than widowers.³⁸ It held that alimony after divorce should be awarded on a gender-neutral basis.³⁹ And it struck down a state statute excluding men from a state-supported nursing school.⁴⁰

Largely because of these early efforts, law was transformed into a strategic tool for undermining long-held stereotypes and assumptions regarding sex. Law is, however, an imperfect tool. As a product of history and social context, it is undoubtedly lopsided. Guarantees of formal equality could not erase the law’s foundations in male-centered assumptions and standards, such as the division of the public from the private.⁴¹ For years, laws had

33. *Id.*

34. MARGARET A. BERGER, *LITIGATION ON BEHALF OF WOMEN: A REVIEW FOR THE FORD FOUNDATION* 18–19 (1980).

35. *Id.* at 19.

36. 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny standard for sex classifications).

37. *Id.* at 191–92.

38. *Califano v. Goldfarb*, 430 U.S. 199, 201–02, 217 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637–39, 653 (1975).

39. *Orr v. Orr*, 440 U.S. 268, 270–71, 283 (1979).

40. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 719, 723 (1982). The Court did, however, uphold some distinctions compensating women for historical disadvantage. See *Califano v. Webster*, 430 U.S. 313, 315–16 (1977) (upholding social security provisions allowing women to exclude three more low-earning years than men when calculating base-period income); *Schlesinger v. Ballard*, 419 U.S. 498, 508–10 (1975); *Kahn v. Shevin*, 416 U.S. 351, 352, 355–56 (1974) (upholding state statute giving widows a \$500 annual exemption in property taxes).

41. See Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 847–48 (2000) (noting that “attacking the public/private line has been one of the primary concerns (if not *the* primary concern) of feminist legal theorizing for over two decades” and arguing that the distinction has continued value for feminist theory). These critiques of the public-private dichotomy are part of a larger body of literature discussing how seemingly neutral and universal legal concepts subordinate women. See, e.g., Fran-

governed the public sphere and treated the private sphere of home and family as inviolate.

Formal equality, the idea that women should be treated the same as men, therefore, created the illusion of choice for many women. It granted women access to the legal profession without ensuring a workplace free of sexual harassment. It mandated that the state affirmatively treat women the same as men, guaranteeing them equal protection of the laws, without extending the reach of the law into the private sphere where women frequently endured sexual and physical violence. It prohibited discrimination in employment, but did not recognize different treatment of pregnant women as sex-based discrimination. After a long, hard fight for access to the public sphere, women realized that the rigid separation of public and private had itself to be challenged—a critique that resonates in the 1970s slogan “the personal is political.”⁴²

As feminist scholars and activists in the 1970s and 1980s turned their attention to the reality of women’s private lives, they focused especially on the ways in which women’s lives differed from men’s. Some feminists celebrated this difference, often credited to women’s experiences as mothers and caretakers, and argued that society should recognize women’s “different voice” as equal rather than inferior to the male voice.⁴³ Others argued that women’s difference was a result of the underlying structural imbalance in power between men and women in society.⁴⁴ Differences in this view are a result of men’s dominance, not women’s inherent nature, a perspective reflected in Catharine MacKinnon’s frequently quoted statement: “Women value care because men have valued us according to the care we give them.”⁴⁵

ces E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

42. For further discussion of the public-private distinction, see Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281 (S.I. Benn & G.F. Gaus eds., 1983); *Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289, 1289–1608 (1982).

43. See, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 613–616 (1986); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39, 63 (1985); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 173–74 (1982).

44. See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1376–80 (1986); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986).

45. MACKINNON, FEMINISM UNMODIFIED, *supra* note 44, at 39.

Professor MacKinnon's "inequality approach" to sex discrimination was particularly influential.⁴⁶ It called into question the idea that laws should treat men and women the same, that is, as if they are similarly situated. In her landmark book, *Sexual Harassment of Working Women*, Professor MacKinnon argues that the "only question for litigation is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status."⁴⁷ This approach to sex discrimination and its application to employment practices helped lead to the Supreme Court's recognition of sexual harassment as a violation of Title VII in *Meritor Savings Bank, FSB v. Vinson*.⁴⁸ Following the consensus of the appellate courts and the EEOC, the Supreme Court held that sexual harassment creating a hostile work environment violates Title VII, even when the victim does not suffer an economic injury.⁴⁹

About the time *Meritor* was decided in the 1980s, women were also engaged in legal battles to decide how the law should handle the fact that only women give birth to children.⁵⁰ In 1974, in *Geduldig v. Aiello*,⁵¹ the Supreme Court upheld, under the Equal Protection Clause, a California statute excluding pregnancy from its list of covered disabilities.⁵² According to the Court, the statute did not exclude any individual on the basis of sex; rather, it simply did not cover a particular disability (i.e., pregnancy) that affects some but not all women.⁵³ A couple years after *Geduldig*, the Court followed the same reasoning in deciding a case under Title VII.⁵⁴ Congress disagreed,

46. In addition to Professor MacKinnon, many other feminist theorists and scholars influenced legal practice and helped inspire political change. See generally Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 *FORDHAM L. REV.* 249 (1998) (discussing the interrelated nature of feminist theory and practice).

47. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117–18 (1979).

48. 477 U.S. 57 (1986).

49. *Id.* at 67–68. In addition to changing employment laws, feminists advocated the reform of criminal laws (for example, rape and domestic violence laws) that failed to redress women's injuries. See generally RHODE, *JUSTICE AND GENDER*, *supra* note 2, at 237–52. These legal changes chipped away at the standards and assumptions that placed sexuality and sexual conduct outside the reach of the law as something private and personal and therefore not actionable. See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 *HASTINGS L.J.* 557, 558 (2006) (discussing feminist critique of the public-private dichotomy and its significance to the domestic violence movement).

50. See generally Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 325 (1985).

51. 417 U.S. 484 (1974).

52. See *id.* at 495–97.

53. *Id.*

54. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976).

however, and overturned this decision by enacting the Pregnancy Discrimination Act (PDA), an amendment to Title VII that makes discrimination on the basis of pregnancy unlawful sex discrimination.⁵⁵ Although feminists in the 1980s agreed that pregnant women deserve protection under the law, they disagreed about how the law should approach the issue.⁵⁶ While some feminists argued that pregnancy should be treated like any other disability (an equal treatment approach), others pushed for laws that would give pregnant women special benefits (a special treatment approach).⁵⁷

In one important Supreme Court case,⁵⁸ feminists actually argued both in favor of and against a California statute requiring that employers provide leave to employees disabled by pregnancy, but not to employees disabled for other reasons.⁵⁹ The statute was challenged as contrary to the PDA, which requires that pregnancy be treated like other temporary disabilities in the employment context.⁶⁰ Some feminists argued that the statute was preempted by the PDA;⁶¹ others argued that the statute should be upheld as long as employers are required to provide the same leave to other temporarily disabled employees;⁶² and a third group argued that the statute should stand because it enables women to exercise their procreative rights on equal terms with men.⁶³ In the end, the Court held that the PDA was intended to prohibit discrimination against pregnancy, not prevent states from enacting laws that benefit pregnant workers.⁶⁴ It did not, therefore, preempt the California statute, and employers did not have to extend the same benefits to other disabled employees.⁶⁵

55. 42 U.S.C. § 2000e(k) (2000).

56. See RHODE, JUSTICE AND GENDER, *supra* note 2, at 38–46.

57. *Id.* This debate over sameness versus difference did not begin in the 1980s. It has a long history. For example, throughout the first part of the twentieth century, feminists fought both for and against labor legislation that treated women differently from men (e.g., by restricting the number of hours they could work). *Id.*

58. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (feminist scholars and groups filed three different amicus briefs).

59. *Id.* at 290–92.

60. *Id.* at 292–94 (Stevens, J., concurring).

61. See Brief for ACLU et al. as Amici Curiae Supporting Respondent at 48–49, Ca. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494), 1986 WL 728369.

62. Brief for the Nat'l Org. for Women et al. as Amici Curiae Supporting Respondent at 11, Ca. Fed. Sav. & Loan Ass'n v. Guerra, Inc. 479 U.S. 272 (1987) (No. 85-494), 1986 WL 728368.

63. Brief for the Coal. for Reprod. Equal. in the Workplace et al. as Amici Curiae for Respondent at 35–36, Ca. Fed. Sav. & Loan Ass'n v. Guerra, Inc., 479 U.S. 272 (1987) (No. 85-494), 1986 WL 728372.

64. Guerra, 479 U.S. at 287.

65. *Id.* at 292.

Not surprisingly, the Court's decision did not settle the larger issue. Feminists continued to debate how the law should treat men and women in contexts where they are inescapably different.⁶⁶ Although this debate is frequently described as a disagreement that weakened the women's movement, we could also understand it as a logical step in the struggle to further social equality. After all, how could women be heard as lawyers, activists, and law professors without the openings provided by formal equality? Once women gained access to legal institutions, they could more easily critique them. We should not be surprised that they offered different critiques.

Of course, the debate regarding women's difference was not really new. As soon as women began fighting for legal change, they began disagreeing over how the law could improve the quality of women's lives. Even as the National Women's Party advocated the Equal Rights Amendment, other women's organizations vigorously opposed it, fearing it would mean the end of protective labor laws that set maximum hours and wages and governed working conditions for women.⁶⁷ While ERA advocates argued such laws were paternalistic mechanisms used to deny women desirable jobs and the pay they deserved, proponents of protective legislation argued that laws should recognize the reality of women's everyday lives—as mothers and caretakers of home and family.⁶⁸ In their view, treating women and men as “similarly situated” was a fiction that ignored the ways in which women's lives were undeniably different.⁶⁹ In particular, they argued that motherhood deserved special protection.⁷⁰

The Supreme Court embraced a similar view of motherhood for many years.⁷¹ According to the Court, women's childbearing responsibilities not only placed them at a disadvantage, but also made them the proper wards of the public interest and, therefore, the state.⁷² In 1908, the Court reasoned: “[T]he physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”⁷³ Even as the civil rights movement was underway in the 1960s, the Court was still

66. See generally RHODE, JUSTICE AND GENDER, *supra* note 2.

67. See Freeman, *Social Revolution*, *supra* note 6, at 145. Women's groups opposed the addition of “sex” to Title VII for the same reasons. See JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 233–34 (1991).

68. See RHODE, JUSTICE AND GENDER, *supra* note 2, at 35–37.

69. See *id.* at 37.

70. *Id.*

71. See *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

72. *Id.*

73. *Id.* (upholding as constitutional protective labor laws limiting the working hours of women).

referring to the “special responsibilities” women have “as the center of home and family life.”⁷⁴

While proponents of formal equality eventually won the battle over protective legislation, the critique of liberal equality continued.⁷⁵ The idea that the law should enable individuals to pursue their own, self-interested choices on equal terms *assumes* that individuals enjoy the same freedom to choose. But our choices are undoubtedly constrained by a range of factors, over which we have little control—for example, our gender, our race, and our socioeconomic circumstances.⁷⁶ Formal equality has helped some women, while failing to address the needs of others.⁷⁷

Indeed, as contemporary feminist theorists have emphasized, accounts of women’s experiences are all too frequently based on the experiences of white middle-class women.⁷⁸ These accounts can ignore the ways in which some women are subjected to multiple forms of discrimination, as well as the ways in which some women participate in the subordination of other women. For example, formal equality may give a relatively privileged white woman access to professional employment opportunities, while doing very little for the woman she hires to care for her home and children.⁷⁹ Hence, the crucial question is: How do women use their collective strength to continue fighting for an egalitarian society, while at the same time recognizing the diversity of women’s experiences?

I think diversity can actually be our collective strength. Once we leave behind the rigid view of a world divided between essential categories of “woman” and “man” and recognize the messy reality in all its diversity, we

74. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding a state statute permitting, but not requiring, women to serve on juries).

75. See, e.g., Frances E. Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984). Not all feminists, however, rejected the liberal rights discourse. Some theorists articulated feminist approaches to the liberal discourse of individual rights. See, e.g., Christine A. Littleton, *Equality Across Difference: A Place for Rights Discourse*, 3 WIS. WOMEN’S L.J. 189 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). For an overview of three generations of feminist thought, see Adelaide H. Villmoare, *Feminist Jurisprudence and Political Vision*, 24 LAW & SOC. INQUIRY 443 (1999).

76. See Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 438 (1990).

77. See Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30, 36 (2005) (arguing that the “master narratives” surrounding work and family (e.g., family leave policies) leave out the interests of less privileged women).

78. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

79. Albiston, *supra* note 77, at 36–37.

may be in a better position to attack the underlying structures that further inequality—that is, to question Law, with a capital L, or what Justice Bradley called the “law of the Creator.”⁸⁰ In truth, this has always been the real target. The debate regarding difference reflected in the disagreement over equal versus special treatment is really a debate about short-term solutions. Fortunately, most of us agree on the long-term goal, and thankfully, we do seem closer to that goal today than we were when I began my legal career.

Rather than using the law to protect women so that they are able to carry out their domestic duties, our Supreme Court now speaks in terms of the law as a remedial and forward-looking device.⁸¹ Recently, in discussing the virtues of the Family and Medical Leave Act (FMLA),⁸² which gives both men and women the right to family and medical leave in some cases, Chief Justice Rehnquist explained how gender stereotypes contribute to social inequality.⁸³ Writing for the majority, Chief Justice Rehnquist stated:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.⁸⁴

These words leave little doubt that women have made significant progress. There is nothing natural about a woman’s historically inferior position, and consequently, the law should break down rather than build up stereotypes. It is a tool in the larger struggle to give individuals more choices in how they order their lives. As Deborah Rhode explains, we should empower individuals and improve the quality of life for both women and men: “Our priority should be to empower women as well as men to re-

80. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

81. *See, e.g., Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that state employees may sue the states for failure to comply with the FMLA).

82. *See Family and Medical Leave Act of 1993*, 29 U.S.C. §§ 2601, 2611-2619, 2631-2636, 2651-2654 (2000).

83. *See Nev. Dep’t of Human Res.*, 538 U.S. at 736.

84. *Id.*

shape the institutions that are shaping them. At issue is not simply equality between the sexes, but the quality of life for both of them.”⁸⁵

II. WOMEN’S IMPACT ON THE JUDICIARY: SHARED STORIES, DIFFERENT VOICES

After a century of tireless advocacy and remarkable change, generalizations about women are no longer accepted as legitimate foundations for our laws or legal theories. But although we have rejected gender stereotypes as an appropriate basis for our laws and institutions, empirical studies have continued to focus on the possibility of difference by asking whether women think differently or speak in a “different voice.”⁸⁶ Scientists continue to ask whether women and men are hardwired differently.⁸⁷ And studies in the social sciences frequently look for evidence of this theoretical difference—

85. RHODE, JUSTICE AND GENDER, *supra* note 2, at 320. Nowhere is this desire for a better quality of life more apparent than in the daily struggle to balance work and family. Largely because of the efforts of women in the legal profession, the FMLA is a reality. It requires employers with more than fifty employees to give both men and women equal amounts (twelve weeks) of unpaid leave for specified family and medical reasons. *See* 29 U.S.C. §§ 2611-2612 (2000). Moreover, there is growing evidence that women are right about the need for this gender-neutral law governing the work-family balance. *E.g.*, CATALYST, WORKPLACE FLEXIBILITY ISN’T JUST A WOMAN’S ISSUE 1 (Aug. 2003), <http://www.catalystwomen.org/files/view/Workplace%20Flexibility%20Isn't%20Just%20a%20Women's%20Issue.pdf>. Recent studies report that men and women alike desire more flexible work options. *Id.* For instance, 92% of United States workers report that they do not have enough flexibility to take care of personal responsibilities, such as caring for sick children or parents. GEO. UNIV. LAW CTR., MEETING THE NEEDS OF TODAY’S FAMILIES: THE ROLE OF WORKPLACE FLEXIBILITY 6, http://www.law.georgetown.edu/workplaceflexibility2010/documents/FF_BW_FI_Fact.pdf (last visited Mar. 25, 2007). Unfortunately, many workers are still not covered by laws, such as the FMLA, or by employment policies guaranteeing leave. *Id.* For example, only 30% of workers are covered by policies allowing them to take time off to care for sick children. *Id.*

Men and women also express the same desire to work fewer hours. *See* CATALYST, *supra* at 1. Dissatisfaction with work-life balance is particularly prevalent in the legal profession. *Id.* A 2003 study reported that two-thirds of law graduates, both men and women, said they have difficulty balancing their personal and professional lives. *Id.* This is particularly true of young lawyers in large firms. *See* BRIAN MELENDEZ, ABA YOUNG LAWYERS DIVISION SURVEY: CAREER SATISFACTION, http://www.abanet.org/yld/satisfaction_800.doc (last visited May 25, 2007). A 2000 ABA study found that nearly 81% of the young lawyers in these firms might consider leaving their firms. *Id.* Although the legal profession has helped create the conditions for change, as an institution, the profession itself is very resistant to change. One of the most pressing questions for the profession today is whether it will lead or follow in meeting demands for a work environment that recognizes both women and men as individuals with personal and family responsibilities.

86. *See generally supra* note 85 and accompanying text.

87. *See, e.g.*, LOUANN BRIZENDINE, THE FEMALE BRAIN 1–9 (2006).

for example, do women in the judiciary decide cases differently from men?⁸⁸ The best answer to this question is that we do not know because the studies, as a whole, are inconclusive.⁸⁹ More important, however, are the implications of these studies. In my view, we should be asking why we continue to pose this question.

I am not suggesting that we stop paying attention to how many women are serving as members of state and federal judiciaries. If we are to be a representative democracy, our governmental institutions must reflect the diverse membership of our society, and we should work especially toward ensuring access for members of historically excluded groups, such as women and racial minorities. We should also encourage the changes diversity inevitably brings. Women in the judiciary have certainly had a positive effect on society in general and the legal profession specifically.⁹⁰ For example, their presence has encouraged young women to pursue legal careers, and they have raised awareness of gender bias in the court system.⁹¹ Indeed, in my experience, the presence of women in judicial roles has raised awareness within the judiciary concerning the subtle, but powerful, implications of lan-

88. See, e.g., Sarah Westergren, Note, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689 (2004); Linda S. Maule, *A Different Voice: The Feminine Jurisprudence of the Minnesota State Supreme Court*, 9 BUFF. WOMEN'S L.J. 295 (2001); Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205 (2000); see also Theresa M. Beiner, *Female Judging*, 36 U. TOL. L. REV. 821, 821 nn.2–9 (2005) (citing studies by social scientists).

89. See Heather Elliott, *The Difference Women Judges Make: Stare Decisis, Norms of Collegiality, and "Feminine Jurisprudence" A Research Proposal*, 16 WIS. WOMEN'S L.J. 41, 43–44 (2001). There is, however, some support for difference in sex discrimination cases. Beiner, *supra* note 88, at 824 (citing John Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting in the U.S. Court of Appeals*, 67 JUDICATURE 165, 171–72 (1983); and Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Court of Appeals, 1981-1996* (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author)).

90. See generally Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487 (2004) (providing history of the first women federal judges and discussing the social significance of women judges).

91. See Hope Viner Samborn, *Gender Bias in the Courts: Working Toward Change*, PERSP., Winter/Spring 2002, at 4, 6, available at <http://www.abanet.org/women/perspectives/PSPGenderBias2.pdf>. The National Association of Women Judges has supported programs to educate judges about gender bias in decision-making and courtroom interaction and suggest ways to further gender fairness. *Id.* In addition, the International Association of Women Judges sponsored a program that provided training to more than 600 judges and other professionals on the application of international and regional human rights conventions in cases involving discrimination or violence against women. See International Association of Women Judges, <http://www.iawj.org/what/jep.asp> (last visited Apr. 9, 2007) (describing the "Jurisprudence of Equality Program").

guage and the use of particular words in judicial writing. More than once, as a member of an appellate panel, I have requested very minor changes in opinion language to avoid disparaging sex-based connotations. Thus, the involvement of women in the judicial process certainly has some effect, although it is often invisible to litigants and the public.

In addition, women clearly have different experiences to draw upon from their male colleagues. As Justice O'Connor often notes, after graduating at the top of her law school class, she was offered a job as a legal secretary,⁹² an experience her male peers did not share. I, like all women lawyers of my generation, have similar stories, such as the time a partner at a law school interview said to me: "Deanell, you have a very good record, but don't you know that you have to be better than the men to get hired?" After law school, I ran into similar barriers. For example, when I returned to Kansas after working in securities law in Washington, I discovered that a respected Kansas corporation was seeking an attorney to assist the general counsel as the company embarked upon some securities transactions. The company's offices were in a small town within driving distance of where I planned to live. I doubted then, and doubt today, that anyone else with my level of experience was interested in that position. After two very positive interview days, I never heard another word from the company, not even a rejection letter. Many years later, I heard—through a rumor mill—that I was not hired because of concerns about a woman accompanying company officials to New York to prepare for the public offering. I have no idea whether this is true, but it was, at the very least, a plausible explanation in the minds of some individuals. Unfortunately, many women in the legal profession have similar stories to tell.

In light of these stories, it is no surprise that 81% of the women judges surveyed in a 1990 study said sex discrimination was a problem, but none of the male judges identified it as a problem.⁹³ Women have experienced their gender in ways men have not, and these experiences no doubt influence how they see the world. But does this mean women think or reason in a distinctly feminine way? The fact that the empirical studies are inconclusive does not mean we have yet to find the answer. The answer may simply be that we cannot generalize about sex differences. And, I would add, we should not. This is dangerous business.

To see how it is dangerous, just consider the implications of a conclusive answer. What if a study concludes that women on average do in fact

92. Justice Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1549 (1991).

93. Elaine Martin, *Men and Women on the Bench: Vive La Difference?* 73 JUDICATURE 204, 207 (1990).

decide cases differently from men? This begs the question of *why* women decide cases differently. The typical answer—one grounded in both feminist theories of cultural difference and anti-feminist theories of difference—is that women reason from an ethic of care and connectedness, rather than an abstract and hierarchical logic of rules.⁹⁴ That is, women value obligation and responsibility over rights and rules, and they care more about preserving relationships than playing by the rules.⁹⁵

Responding to these theories of difference, many women have cautioned that a view of women as caring and men as rational sounds very much like the myth of “true womanhood” used to perpetuate women’s inferior status.⁹⁶ Generalizations about the way women are and think have been used throughout history to exclude women from the law and other professions. And this continues to be a danger today. We all remember the controversy surrounding the remarks of Harvard’s president almost two years ago.⁹⁷ He suggested that the lack of women in the hard sciences may be a result of intrinsic differences between women and men.⁹⁸ Many people expressed concern that the notion of intrinsic differences could be used to explain and excuse women’s absence from the sciences.⁹⁹ In other words, generalizations about difference threaten to close more doors than they open. Moreover, they simply do not hold true in reality. We can always find exceptions.

In fact, studies that find some support for a difference in male and female judging also show how frequently men and women agree. For exam-

94. See, e.g., Menkel-Meadow, *supra* note 43, at 47–48; Sherry, *supra* note 43, at 543; see also Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988) (exploring the ways in which feminist theory may inform the tradition of judging).

95. For a discussion and critique of the idea of “gender-based styles of lawyering,” see Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992). Cahn argues for a contextual approach leading to a feminist, rather than feminine, lawyering process. *Id.* at 1039–42. Instead of labeling style by gender, she encourages feminist theory to examine different styles to gain insights that can be used to challenge dominant practices and create new approaches to lawyering. See *id.*

96. See, e.g., O’Connor, *supra* note 92, at 1553. Over two centuries ago, Mary Wollstonecraft eloquently warned against this view of women’s nature: “It would be an endless task to trace the variety of meanness, cares, and sorrows into which women are plunged by the prevailing opinion that they were created rather to feel than reason, and that all the power they obtain must be obtained by their charms and weakness.” MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS 50 (1792), available at http://olldownload.libertyfund.org/EBooks/Wollstonecraft_0730.pdf.

97. See Sam Dillon & Sara Rimer, *No Break in the Storm over Harvard President’s Words*, N.Y. TIMES, Jan. 19, 2005, at A14.

98. See *id.*

99. *Id.*

ple, a 1993 study of appellate judges found that “[m]ore than 63% of the votes cast by women supported” plaintiffs’ discrimination claims, while 46% of the men’s votes favored plaintiffs.¹⁰⁰ This is a statistically significant difference, showing some support for the theory that women decide discrimination cases differently from men.¹⁰¹ But this can be misleading. What about the nearly 37% of the female votes cast against discrimination claims and the 46% of the male votes cast in favor of such claims?¹⁰² Significant numbers of men and women cast votes not predicted by the theory, leaving us to wonder why the statistically significant difference matters. We have rejected stereotypes and generalizations as proper foundations for the law. So, what would we do if we did find some empirical support for these stereotypes?

Real or not, generalizations always exclude some people. We know this because, for every generalization, we can think of a story—our own or someone else’s—that undermines it. Interestingly, although feminist legal theory contains many different viewpoints and approaches, scholars and activists have shared a belief in the power of narrative for some time.¹⁰³ From the consciousness-raising efforts of the 1970s to contemporary postmodern critiques, feminists have recognized the power of storytelling.¹⁰⁴ Stories validate individual experience. They help us understand the concrete reality of individuals’ lives. Moreover, they help us make connections. These connections are formed when we hear elements of own experience in the stories of others. But they are also formed when we hear stories that are radically different from our own experience. They help us realize the diversity of human experience and encourage us to see the world from a different perspective.¹⁰⁵

100. Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131 (1993).

101. *See id.*

102. *See id.*

103. *See* Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 948–49 (2006); Linda E. Fisher, *I Know It When I See It, or What Makes Scholarship Feminist: A Cautionary Tale*, 12 COLUM. J. GENDER & L. 439, 439–40 (2003); Jean C. Love, *Commentary: The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER RACE & JUST. 87, 87 (1998); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 973 (1991); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863–67 (1990); Patricia Williams, *On Being the Object of Property*, 14 SIGNS: J. WOMEN CUL. SOC. 5 (1988).

104. *See* Bartlett, *supra* note 103, at 863–67; Abrams, *supra* note 103, at 973.

105. Instead of abstract generalizations, our difference is what we have in common: “The human universal becomes difference itself. Difference is what we most fundamentally have in common.” Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 32 (1986) (describing feminist view).

As a woman and a judge, I have quite a collection of stories that would likely resonate with other women, as well as stories that demonstrate how we sometimes experience things differently. I have often referred to these stories as “W” stories, stories that are unique to my experience as a woman.¹⁰⁶ For example, I often tell the story of the first day that the Tenth Circuit had an all-female panel for oral argument.¹⁰⁷ The reports in the press were comical for their non-newsworthiness. The press reported comments, such as “they were very well prepared,” and “they asked good questions.” On a lighter note, I will never forget the quizzical look on the face of one of my very bright male law clerks one Halloween morning when my children were young, as he said with some puzzlement: “I think I may work for the only federal judge in the nation who stayed up all night to make a costume for a child!” His reaction was likely grounded in gendered stereotypes and assumptions, but I always chuckle about the incident. (By the way, sewing a very furry costume made my day job look easy!) Even a lighthearted anecdote, such as this, illustrates how stereotypes pervade our everyday interactions. But generalizing about women or men, in the judiciary or anywhere else, is often misleading and almost always fails to capture the varied nuances and dimensions of human experience and interests.

When I tell these stories, I hope they speak to the experiences of some women, but I also hope they inspire some listeners to try to see the world from a standpoint unlike their own. We learn a great deal from other people’s stories. This is, in fact, what law students come to understand as they learn the law by reading cases based on people’s experiences,¹⁰⁸ and they think about how the law should resolve hypothetical controversies. Similarly, judging is an exercise in listening to stories. Judges attempt to see the world from many different perspectives.¹⁰⁹ Indeed, we *expect* each judge to try to transcend his or her own views and experiences in order to understand the perspectives of others.

In short, we are better served by stories than by generalizations. The more we expand our limited perspectives, the better lawyers, teachers, and judges we will be. We should learn from the feminist tradition of connecting

106. Deanell Reece Tacha, “W” Stories: *Women in Leadership Positions in the Judiciary*, 97 W. VA. L. REV. 683 (1995).

107. See, e.g., *id.* at 700.

108. See Love, *supra* note 103, at 88.

109. Katharine Bartlett argues that feminist theory should encourage “the effort to extend one’s limited perspective . . . I cannot transcend my perspective; by definition, whatever perspective I currently have limits my view. But I can improve my perspective by stretching my imagination to identify and understand the perspectives of others.” Bartlett, *supra* note 103, at 881–82.

to each other through our real-life stories, without adopting one story as representative of us all. This is, after all, how our laws have come to disavow many stereotypes and generalizations—through individual stories (i.e., cases) that challenge our views of what is natural and universal. In the end, it seems we gain little, and risk a great deal, by continuing to ask whether certain stereotypes hold true in practice. Instead, we should follow the example of Myra Bradwell and countless other women, who have worked to create a society of possibilities, rather than categorical limitations.

III. CONCLUSION

So, after decades of legal change, what can we say about the impact of women on the law? When asked about women's impact on politics, Florence Ellinwood Allen, the first woman appointed to an Article III court, replied:

You can hardly judge women's effect on politics merely from the action of individual women officeholders. We don't judge men's effect on politics in such a manner. And it will take a long time for women's effect on politics to register so that we may properly appraise it. But the constant filtering into the home of information about government, through mothers now as well as fathers, is making itself felt.¹¹⁰

Similarly, we may conclude that we can hardly judge women's impact on the law, as lawyers, judges, and teachers, by looking at individual acts. But we can have faith that women's presence in the profession is making itself felt. Women have challenged what seemed natural and universal; indeed, they have questioned what was once touted as Law, with a capital "L," the notion that women are "unfit" for public life and that public laws ought not to meddle in the private space women are destined to inhabit. In doing so, women have used the law to help create the conditions necessary for broader social change.

It is this ardent commitment to a more inclusive vision of society that has left its mark and inspired a new generation of women lawyers to continue breaking down rigid categories and untenable assumptions. As a student of society and culture, Margaret Mead eloquently captured the promise of a society able to transcend these limiting social constructions: "If we are to achieve a richer culture, rich in contrasting values, we must recognize the whole gamut of human potentialities, and so weave a less arbitrary social

110. N.R. Howard, *Miss Allen Talks of Women's Gains*, N.Y. TIMES, Mar. 25, 1934, available at <http://womenslegalhistory.stanford.edu/articles/howard.htm>.

fabric, one in which each diverse human gift will find a fitting place.”¹¹¹ Women in the legal profession have moved us closer to this goal by exposing what once appeared natural and proper as arbitrary and indefensible and by insisting we work toward a society in which diverse human gifts may indeed flourish.

111. MARGARET MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* (1935).

FREEDOM AND FEAR POST-9/11: ARE WE AGAIN FEARING WITCHES AND BURNING WOMEN?*

NADINE STROSSEN⁺

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* This essay is based on the lecture Professor Strossen delivered at Nova Southeastern University, Shepard Broad Law Center on November 13, 2006, as part of the Tenth Annual Leo Goodwin, Sr. Lecture Series, on the theme of *Tilting the Scales: The Changing Roles of Women in the Law and Legal Practice*.

+ Professor of Law, New York Law School; President, American Civil Liberties Union (ACLU). Professor Strossen thanks Lenora Lapidus, Director of the ACLU Women’s Rights Project, for several ideas that are incorporated in this article, and also for all the valiant work that she and her Women’s Rights Project colleagues perform, some of which this article describes. She thanks her colleagues at the ACLU’s Florida affiliate for their important work, some of which this article describes. She also thanks Howard Simon, the Florida affiliate’s Executive Director, and Randall Marshall, its Legal Director, for the information they provided about this work. For valuable assistance with the research and drafting of footnotes for this article, Professor Strossen gratefully acknowledges her Chief Aide, Steven Cunningham (New York Law School ’99), her Assistant Danica Rue (New York Law School ’09), her Research Assistants Corey Callahan (New York Law School ’09), David Ofenloch (New York Law School ’07), and Trisha Olson (New York Law School ’08), and the *Nova Law Review* editors. They bear most of the credit and the responsibility for the footnotes.

I. INTRODUCTION

I am honored to participate in this important lecture series, and I would like to thank everyone at Nova Southeastern University's Shepard Broad Law Center who has worked to organize it. I would especially like to thank Associate Dean Linda F. Harrison,¹ my main contact at the Shepard Broad Law Center, who has been exceptionally helpful and hospitable. I would also like to thank the co-chairs of the lecture series, Professor Stephanie Aleong and Professor Olympia Duhart.

I would also like to thank Leo Goodwin, Sr. and his family for their generous endowment of this lecture series. Since the subject of this year's Goodwin Lecture series focuses on women and our accomplishments, I want to provide just a bit of information about the major woman in Leo Goodwin's life and career—his wife, Lillian—to complement the interesting information about him that your program contains.² According to the website of the company they founded, the Government Employees Insurance Corporation (GEICO): "Lillian Goodwin worked alongside her husband to launch the company and took an active role in virtually all aspects of the early operation."³ The history section of the GEICO website refers to "the Goodwins"—Lillian as well as Leo—as the company's founders.⁴ As it notes, "the Goodwins . . . in the mid-1930s—while the Great Depression was still in full fury—took a calculated risk to start up what has become one of the most successful and highly respected companies in the nation."⁵ At that time, when it was extremely unusual for women to be actively engaged in leadership positions in the business world,⁶ Lillian, "a bookkeeper by profession," not only "took on the [new company's] accounting tasks but also worked to underwrite policies, set rates, issue policies and market . . . insurance to GEICO's target customers, federal employees and . . . top . . . non-commissioned Military officers."⁷ In short, along with her husband Leo, Lillian Goodwin was a remarkable business pioneer and leader in her own right.⁸

1. Associate Dean Linda F. Harrison prefers her name to be spelled with lowercase letters.

2. See GEICO History, <http://www.geico.com/about/background/geicoHistory.htm> (last visited May 15, 2007) [hereinafter GEICO History].

3. *Id.*

4. *Id.*

5. *Id.*

6. See Deborah L. Rhode, *Justice and Gender: Sex Discrimination and the Law* 30–31 (1989) (noting the negative view of working women prior to World War II, and the general notion that marriage was more lucrative).

7. GEICO History, *supra* note 2.

8. See *id.*

I was invited to address what I consider to be the single most important, overarching civil liberties threat we all face:⁹ the extent to which the government has unduly played upon understandable fears of terrorism post-9/11, to unjustifiably expand its powers in ways that violate not only core constitutional checks and balances,¹⁰ but also individual rights.¹¹ These overreaching measures have undermined the rights of everyone in this country, including those of us who are not even suspected of any crime at all, let alone terrorism.¹² Additionally, consistent with the Goodwin Lectures' theme, I will stress the adverse impact on women in particular.

Before I turn to those issues, though, since I am a New Yorker who is always happy to be here in your fair state of Florida, I want to tell you one of my favorite stories about both of our states. In keeping with the Goodwin Lectures' theme, it involves women, specifically four women who are driving across the United States, one each from Florida, New York, Idaho, and Nebraska. Shortly after the trip begins, the woman from Idaho starts pulling potatoes from her bag and throwing them out the window. When the others ask her why she is doing that she says: "We have so many of these darn things in Idaho, I'm just sick of looking at them!" A moment later, the

9. I have previously addressed these issues in the following publications: Nadine Strossen, *Terrorism's Toll on Civil Liberties*, in *THE TRAUMA OF TERRORISM: SHARING KNOWLEDGE AND SHARED CARE, AN INTERNATIONAL HANDBOOK* 365 (Yael Danieli et al. eds., 2005); Nadine Strossen, Presentation, *Free Speech in Wartime*, 36 *RUTGERS L.J.* 927 (2005) [hereinafter Strossen, Presentation, *Free Speech in Wartime*]; Nadine Strossen, *Safety and Freedom: Common Concerns for Conservatives, Libertarians, and Civil Libertarians*, 29 *HARV. J.L. & PUB. POL'Y* 73 (2005) [hereinafter Strossen, *Safety and Freedom*]; Nadine Strossen, Keynote Address, *The Society of American Archivists 68th Annual Meeting* (Aug. 5, 2004), <http://www.archivists.org/conference/boston2004/strossen.asp>; Nadine Strossen, *Suspected Terrorists One and All: Reclaiming Our Civil Liberties in Coalition*, 2 *SEATTLE J. SOC. JUST.* 15 (2003); Nadine Strossen, *Preserving Safety and Freedom Post 9-11*, 3 *J. INST. JUST. & INT'L STUD.* 1 (2003); Nadine Strossen, *Maintaining Human Rights in a Time of Terrorism: A Case Study in the Value of Legal Scholarship in Shaping Law and Public Policy*, 19 *N.Y.L. SCH. J. HUM. RTS.* 3 (2003); Nadine Strossen, *Conservatives and Liberals Unite to Conserve Liberty and Security, in IT'S A FREE COUNTRY: PERSONAL FREEDOM IN AMERICA AFTER SEPTEMBER 11* (Danny Goldberg et al. eds., 2003).

10. See GENE HEALY & TIMOTHY LYNCH, *POWER SURGE: THE CONSTITUTIONAL RECORD OF GEORGE W. BUSH 1* (2006), available at www.cato.org/pubs/wtpapers/powersurge_healy_lynch.pdf.

11. See *United States of America: Five Years on 'The Dark Side': A Look Back at 'War on Terror' Detentions*, AMNESTY INT'L, Dec. 13, 2006, at 1, available at [http://web.amnesty.org/library/pdf/AMR511952006ENGLISH/\\$File/AMR5119506.pdf](http://web.amnesty.org/library/pdf/AMR511952006ENGLISH/$File/AMR5119506.pdf); Human Rights Watch, *The Wrong Lessons from September 11* (Sept. 9, 2006), <http://hrw.org/english/docs/2006/09/09/usint14163.htm>; Press Release, Human Rights First, *Human Rights First Statement on the Fifth Anniversary of September 11* (Sept. 8, 2006), <http://www.humanrightsfirst.org/media/usls/2006/statement/257>.

12. See, e.g., HEALY & LYNCH, *supra* note 10, at 22–23.

woman from Nebraska starts pulling ears of corn from her bag and tossing them out the window. When the others ask her why she is doing that, she says: “We have so many of these darn things in Nebraska, I’m just sick of looking at them!” Inspired by these two other passengers, the Florida woman opens the car door and tosses out . . . the New York woman!¹³

II. THE MUTUALLY REINFORCING RELATIONSHIP BETWEEN NATIONAL SECURITY AND CIVIL LIBERTIES

The title of my speech is drawn from a famous line in a famous concurring opinion by the great former United States Supreme Court Justice Louis Brandeis.¹⁴ The case involved—notably for this year’s Goodwin Lectures’ theme—a woman who had been convicted of terrorism merely for exercising her First Amendment rights to advocate peaceful political reform.¹⁵ In the fearful, scapegoating climate of the post-World War I “Red Scare” (1918-21), Anita Whitney was convicted of violating a law that made it a crime to “aid[] and abet[] . . . terrorism as a means of accomplishing . . . political change.”¹⁶

Justice Brandeis wrote a separate opinion, rejecting the majority’s view that suppressing Anita Whitney’s freedoms was justified because it would advance national security.¹⁷ A central passage from this important opinion applies fully to our current, post-9/11 climate which is likewise fearful and scapegoating:

Fear of serious injury cannot alone justify suppression of [freedom]. Men feared witches and burnt women

Those who won our independence by revolution were not cowards They did not exalt order at the cost of liberty. [They were] courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government.¹⁸

13. The author gratefully acknowledges the source of this joke, as well as many others that lighten her life: The Honorable Alex Kozinski, Judge on the Ninth Circuit Court of Appeals.

14. *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

15. *See id.* Whitney “testified that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose . . . to violate any known law.” *Id.* at 366.

16. California Criminal Syndicalism Act of 1919, CAL. PENAL CODE § 11401 (West 2000) (repealed 1991).

17. *See Whitney*, 274 U.S. at 379 (Brandeis, J., concurring).

18. *Id.* at 376–77.

Indeed, as Justice Brandeis explained, suppressing the freedoms of Ms. Whitney and other government critics could actually undermine security. Let me quote one more excerpt from this enduringly important opinion that stresses this key point, so significant in our post-9/11 world. While Justice Brandeis focuses on the First Amendment freedoms that were directly at issue in that case, his general point—that undermining rights also undermines security—applies fully to all freedoms, and at all times, including the present.¹⁹ As he declared:

Those who won our independence believed . . . liberty to be the secret of happiness and courage to be the secret of liberty They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; . . . that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies²⁰

In short, Justice Brandeis reminds us that in our democracy, the “F” word that should be our guiding spirit is not “fear,” but rather, “freedom.”²¹ That is precisely the theme that the ACLU has stressed ever since the 9/11 attacks in our “Safe and Free” campaign.²² As that name underscores, consistent with Justice Brandeis’s world view, and contrary to too much current political rhetoric, national security, and civil liberties are not inherently antagonistic; to the contrary, they are mutually reinforcing.²³

Justice Brandeis’s passage explains why protecting First Amendment freedoms promotes national security.²⁴ The very same constitutional principles that guarantee individual liberty also promote national security.²⁵ As another example of this mutually reinforcing relationship between safety and freedom, consider the fundamental Fourth Amendment principle that is at stake in so many post-9/11 programs: The government may not invade anyone’s freedom or privacy without individualized suspicion—a particular reason to believe that a particular person poses a threat.²⁶ The Fourth Amend-

19. *See id.*

20. *Id.* at 375.

21. *Id.* at 377.

22. *See, e.g.,* Anthony D. Romero, ACLU Insists on Need to Be Safe and Free (Feb. 6, 2002), <http://www.aclu.org/natsec/emergpowers/14390prs20020206.html>.

23. *See, e.g., Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

24. *Id.* at 375.

25. *See id.*

26. *See* U.S. CONST. amend IV.

ment bars dragnet surveillance measures that sweep through broad groups of people.²⁷

Of course, the Fourth Amendment's individualized suspicion requirement protects individual liberty. Specifically, it protects each of us from government surveillance based on group stereotyping and guilt by association.²⁸ Moreover, this individualized suspicion requirement also promotes national security. It channels our government's resources—in other words, our precious tax dollars—in the most strategic, effective way, toward those persons who actually pose a threat. Precisely for this reason, experts in national security and counter-intelligence, as well as civil libertarians, have opposed many of the post-9/11 measures that involve mass surveillance.²⁹ In short, these measures are the worst of both worlds: they make all of us less free, yet they do not make any of us safer.

One important example of the many doubly-flawed post-9/11 mass surveillance measures is the domestic spying program by the super-secret National Security Agency (NSA).³⁰ A federal judge struck down the program in 2006, in the landmark lawsuit entitled *American Civil Liberties Union v. National Security Agency*,³¹ I'm proud to say! I should also note, in keeping with this, that Judge Anna Diggs Taylor wrote the opinion for the Sixth Circuit Court of Appeals.³²

The NSA domestic spying program has been sweeping in countless e-mails and phone calls of American citizens who are not suspected of any illegal activity, let alone terrorism.³³ Therefore, the program's harshest crit-

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

27. See, e.g., *Davis v. Mississippi*, 394 U.S. 721, 723–25 (1969) (suspects were wrongfully detained by police merely because of the color of their skin).

28. See *id.* at 726.

29. See, e.g., Press Release, ACLU, ACLU Applauds Local Police Departments for Refusing to Join in Justice Department "Dragnet", (Mar. 4, 2002), <http://www.aclu.org/police/gen/14530res20020304.html>. It cites "jurisdictions in Detroit, MI; Portland, Hillsboro, and Corvallis, OR; Richardson and Austin, TX; and San Francisco and San Jose, CA" that have raised objections to requests from the Justice Department to conduct "dragnet investigation[s] of 5,000 immigrants, saying that the police should not be asked to ignore basic legal procedures or to use ethnic and racial origin as the basis for suspicion." *Id.*

30. See *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

31. See *id.*

32. *Id.*; see also *Judge Shaped by Civil Rights Era*, CHI. TRIB., Aug. 18, 2006, at 26.

33. See generally *ACLU*, 438 F. Supp. 2d at 773–75.

ics include FBI agents.³⁴ The agents complain about the huge amount of time they have been wasting in tracking down the thousands of completely innocent Americans whose communications have been swept up in this NSA fishing expedition.³⁵

This same dual flaw infects the even more sweeping secret surveillance program that *USA Today* revealed in 2006,³⁶ which the ACLU is also challenging across the country,³⁷ including right here in Florida.³⁸ The disclosure reveals that the Bush administration's measures apparently³⁹ seek to collect data about all phone and online communications from all of the United States telephone companies about all of their customers.⁴⁰ The government asserts that it is using these massive customer calling records for "data-mining," looking for patterns of calls according to certain mathematical formulas that, it says, might point to suspected terrorists.⁴¹ However, this whole data-mining approach has been denounced as "junk science" by prominent experts in mathematics and computer science.⁴² For example, this perspective was stressed by Jonathan David Farley, who was not only a mathematics professor at Harvard University, but is also a science fellow at Stanford University's Center for International Security and Cooperation.⁴³ As he wrote: "[T]he National Security Agency's entire spying program

34. See, e.g., Lowell Bergman et al., *Spy Agency Data After Sept. 11 Led F.B.I. to Dead Ends*, N.Y. TIMES, Jan. 17, 2006, at A1.

35. See *id.* "F.B.I. officials repeatedly complained to the spy agency that the unfiltered information was swamping investigators" and said that "the torrent of tips led them to few potential terrorists inside the country they did not know of from other sources and diverted agents from counterterrorism work they viewed as more productive." *Id.*

36. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at A1.

37. See generally *ACLU*, 438 F. Supp. 2d at 754; *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005); *ACLU, Safe and Free: Secrecy*, <http://www.aclu.org/safefree/secrecy/index.html> (last visited May 15, 2007).

38. Press Release, *ACLU, ACLU of Florida Joins National Lawsuit to Uncover Details of Pentagon Surveillance of Law-Abiding Americans*, (June 14, 2006), http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=1931.

39. I include the qualifying word "apparently" since the clandestine nature of this program, as well as conflicting government statements about it in the wake of the *USA Today* disclosure, have obscured its precise nature. See *A Note to Our Readers*, USA TODAY, June 30, 2006, at A2; Frank Ahrens & Howard Kurtz, *USA Today Says It Can't Prove Key Points in Phone Records Story*, STAR-LEDGER, July 2, 2006, at 16.

40. Cauley, *supra* note 36.

41. See, e.g., *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 355 F. Supp. 2d 98, 99 (D.D.C. 2004).

42. See *CPSR: CPSR Signs ACLU Letter Supporting 132*, Oct. 23, 2005, <http://www.cpsr.org/issues/privacy/support132>; see also Jonathan David Farley, *The N.S.A.'s Math Problem*, N.Y. TIMES, May 16, 2006, at A25.

43. *Id.*

seems to be based on a false assumption: that you can work out who might be a terrorist based on calling patterns Guilt by association is not just bad law, it's [also] bad mathematics."⁴⁴

The NSA domestic spying and data-mining programs, as well as many other post-9/11 surveillance programs, are overly broad dragnets or fishing expeditions. Thus, by definition, they are doubly flawed: they sweep in too much information about too many innocent people, and they make it harder to hone in on the dangerous ones. As one ACLU critic memorably put it: "You don't look for a needle in a haystack by adding more hay to the pile!"⁴⁵

The progressively disturbing revelations about the government's increasingly pervasive forms of secret, unauthorized domestic surveillance were well captured in an editorial cartoon by Darrin Bell in *Candorville* shortly after the May 2006 *USA Today* revelation about the telephone companies' collusion in government data-mining.⁴⁶ It starts in 2004, when civil libertarians were objecting to the drastically reduced warrant requirements for electronic surveillance under the USA PATRIOT Act.⁴⁷ It then goes on to 2005, when the *New York Times* broke the story about the completely warrantless NSA electronic surveillance,⁴⁸ and then on to 2006, when *USA Today* broke the story about the telephone companies' wholesale turnover of customer data to the NSA.⁴⁹ The cartoon strip shows a man watching TV, listening to a Bush administration official.⁵⁰ Every quote in this strip is actually an exact quote from either the president himself or another top official. In 2004, the official says: "We're not spying on anyone's phone calls without a warrant. Trust us."⁵¹ In 2005, the official says: "OK, [we are] spying on calls without getting warrants, but it's only a few terrorist suspects. Trust

44. *Id.*

45. See Barry Steinhardt, Dir. of ACLU Tech. & Liberty Program, Testimony on Government Data Mining, House Gov't Reform Subcomm. on Tech., Info. Policy, Intergovernmental Relations & the Census (May 20, 2003), <http://www.aclu.org/safefree/general/17262leg20030520.html>; Ken Clark, *Cherish Our Rights*, PITTSBURGH POST-GAZETTE, May 18, 2006, at B6 ("[T]he government is looking for a needle in a haystack while piling more hay on the stack.").

46. See Cartoonist Group, *Candorville* by Darrin Bell, <http://www.cartoonistgroup.com/store/add.php?iid=13791> (last visited May 15, 2007).

47. See, e.g., ACLU, Reform the Patriot Act, The Sun Also Sets: Understanding the Patriot Act "Sunsets", <http://action.aclu.org/reformthepatriotact/sunsets.html> (last visited May 15, 2007) [hereinafter ACLU, Reform the Patriot Act]; see also USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

48. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

49. See Cauley, *supra* note 36.

50. Cartoonist Group, *supra* note 46.

51. *Id.*

us.”⁵² In 2006, the official says: “OK, [we are] spying on every single phone call made by almost everyone in America, but we’re not actually listening to the calls. Trust us.”⁵³ This brings to mind the old saying: “Fool me once, shame on you. Fool me twice, shame on me!”

Former United States Supreme Court Justice Louis Brandeis, whose eloquent words were quoted in the title of this article, also warned against the “trust us” rationale for ceding power to government officials to restrict individual liberty, no matter how well-intentioned the officials might appear.⁵⁴ His justly famous words ring particularly prophetic in the post-9/11 context: “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”⁵⁵

The Bush administration maintains that its exercise of unilateral powers and its restrictions on individual rights are somehow justified in the “War on Terror.”⁵⁶ But these claims are flawed on both factual and legal grounds. As a matter of fact, as I have already indicated, various national security experts maintain that many of the overreaching, rights-repressing post-9/11 measures do not actually advance national security.⁵⁷ Conversely, many measures that will actually advance national security are completely consistent with civil liberties. That is true, for instance, of most of the specific proposals that were made by the bipartisan 9/11 Commission,⁵⁸ including such mundane but essential measures as: updating the FBI’s antiquated computer system,⁵⁹ hiring more interpreters for the pertinent languages,⁶⁰ and ending the bureaucratic turf battles between various agencies.⁶¹

52. *Id.*

53. *Id.*

54. *See* *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

55. *Id.*

56. *See* JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 205 (2006). John Yoo was an Assistant Attorney General with the Department of Justice’s Office of Legal Counsel from 2001–2003. *Id.* at 19.

57. *See generally* RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* (2004); BRUCE SCHNEIER, *BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN UNCERTAIN WORLD* (2003).

58. *See generally* THE 9/11 COMMISSION REPORT (July 22, 2004), available at <http://www.9-11commission.gov/report/911Report.pdf>; accord U.S. S. SELECT COMM. ON INTELLIGENCE & U.S. H. PERMANENT SELECT COMM. ON INTELLIGENCE, JOINT INQUIRY INTO INTELLIGENCE COMMUNITY ACTIVITIES BEFORE AND AFTER THE TERRORIST ATTACKS OF SEPT. 11, 2001, S. REP. NO. 107-351, at 1–2 (2d Sess. 2002).

59. THE 9/11 COMMISSION REPORT, *supra* note 58, at 427.

60. *Id.* at 426.

61. *See id.* at 400.

III. THE BUSH ADMINISTRATION'S POST-9/11 ABUSES OF POWER, WHICH HAVE BEEN CONDEMNED BY IDEOLOGICALLY DIVERSE JUDGES AND OTHER LEGAL EXPERTS

Now let me summarize the bottom-line legal flaw in the Bush administration's position: Neither the pertinent statutes,⁶² nor the United States Constitution, contain any blanket exception for national security emergencies of the sort that President Bush and proponents of his broadly-viewed executive power are reading into them.⁶³ Therefore, the ACLU has brought various lawsuits to challenge many post-9/11 civil liberties violations, and many judges, across the ideological spectrum, have ruled in their favor.⁶⁴

The administration's overreaching has earned two unusual repudiations from the United States Supreme Court in two cases it has decided on point: *Hamdi v. Rumsfeld*⁶⁵ and *Hamdan v. Rumsfeld*.⁶⁶ Most of the Justices who ruled in these cases are conservative republicans who were appointed by conservative republican presidents. Moreover, most of them have very broad views of presidential power.⁶⁷ Therefore, it is really noteworthy that even they have rebuffed the administration's claims of unilateral, unchecked power in the "War on Terror." That underscores how extreme these claims are. Specifically, the Court rejected the administration's claimed power to imprison anyone—even an American citizen—forever, without access to a lawyer or a court.⁶⁸ The Court also rejected the administration's claimed power to try non-citizens before military commissions that violate the minimal fundamental fairness principles in the Geneva Conventions⁶⁹—and our

62. See, e.g., USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1998) (codified as amended 55 U.S.C. § 552 (2000)); Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862 (2000).

63. See, e.g., Elizabeth Drew, *Power Grab*, 53 N.Y. REV. OF BOOKS 11, June 22, 2006, available at <http://www.nybooks.com/articles/19092?email>; Nat Hentoff, *Don't Ask, Don't Tell*, THE VILLAGE VOICE, Jan. 27, 2006, available at <http://www.villagevoice.com/news/0605,hentoff,71946,6.html>.

64. See, e.g., ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006); Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

65. 542 U.S. 507 (2004).

66. No. 05-184, slip op. at 1 (U.S. June 29, 2006).

67. See Bernard Schwartz, *A Decade of Administrative Law: 1987-1996*, 32 TULSA L.J. 493, 552 (1997) (noting the Rehnquist Court's deference to presidential power); Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1, 2 (1994) (claiming that the Rehnquist Court showed a disturbing pattern of reflexive deference to presidential power in foreign affairs).

68. *Hamdi*, 542 U.S. at 509.

69. See *Hamdan*, No. 05-184, slip op. at 49.

own Constitution⁷⁰—thus endangering members of our own military when they are captured by our enemies.⁷¹

In *Hamdi*, the United States Supreme Court's first decision considering the executive branch's power in the "War on Terror," the Court strongly condemned the Bush administration's post-9/11 overreaching in general.⁷² Significantly for this Goodwin Lecture series' theme, the Court's plurality opinion was written by none other than Justice Sandra Day O'Connor, who is, of course, the Court's first female Justice.⁷³ Her forceful language not only rebuffed the administration's specific overreaching at issue in that case, but it also signaled the unconstitutionality of many other post-9/11 measures.⁷⁴ In fact, Justice O'Connor's opinion has been widely cited and quoted in many later lower court decisions in which the ACLU and others have successfully challenged many other abuses.⁷⁵ These abuses range from warrantless, suspicion-less searches of library records under the USA PATRIOT Act,⁷⁶ to invasions of the free speech and privacy rights of people who are just peacefully protesting government policies.⁷⁷ Justice O'Connor condemned the administration's efforts to "condense power into a single branch of government," and she eloquently declared that "a state of war is not a

70. *See id.* at 38.

71. *See, e.g.,* Julian E. Barnes, *The Guantanamo Decision: Military Fought to Abide by War Rules*, L.A. TIMES, June 30, 2006, at A1.

"We argued that this would come back to haunt us and it would taint the military justice system," said retired Rear Adm. Donald Guter, the Navy's top uniformed lawyer when "military commission" trials for Guantanamo Bay detainees were first proposed in 2001. "We were warning that you would have to be careful to provide basic protections."

Id.; *see also* Mark Mazzetti & Neil A. Lewis, *Military Lawyers Caught in Middle on Tribunals*, N.Y. TIMES, Sept. 16, 2006, at A1 ("The top uniformed Marine lawyer, Brig. Gen. James C. Walker, said in his testimony that no civilized country ought to deny defendants the right to see evidence against them and that the United States 'should not be the first.'"); Charlie Savage, *Military Lawyers See Limits on Trial Input*, BOSTON GLOBE, Aug. 27, 2006, at A1 ("Most military lawyers strongly oppose allowing secret evidence, arguing that such a plan would probably violate the Geneva Conventions and create a precedent for enemies of the United States to use show-trials for captured Americans.").

72. *See Hamdi*, 542 U.S. at 535–38.

73. *Id.*

74. *See id.*

75. *See, e.g.,* Doe v. Ashcroft, 334 F. Supp. 2d 471, 477 (S.D.N.Y. 2004); United States v. Al-Arian, 329 F. Supp. 2d 1294, 1297 (M.D. Fla. 2004) ("[I]n 'our most challenging and uncertain moments . . . we must preserve our commitment at home to the principles for which we fight abroad.'" (quoting *Hamdi*, 542 U.S. at 532)).

76. *See, e.g.,* Doe v. Gonzales, 386 F. Supp. 2d 66, 76 (D. Conn. 2005), *dismissed as moot*, 449 F.3d 415 (2d Cir. 2006).

77. *See, e.g.,* ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 771 (E.D. Mich. 2006); Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006).

blank check for the president when it comes to the rights of the Nation's citizens."⁷⁸

Despite this emphatic United States Supreme Court ruling, the Bush administration has continued to act precisely as if the "War on Terror" is indeed a blank check for the president to ignore not only the constitutional rights of the Nation's citizens, but also the constitutional powers of the other branches of our national government. Indeed, when Attorney General Alberto Gonzales testified before the Senate to defend the NSA's warrantless domestic spying in 2006, he refused to recognize that there was anything the president could not do in the name of national security.⁷⁹

In opposition to that limitless concept of executive power, I would like to quote one of the constitutional scholars who also testified before the Senate on this issue. His name is Bruce Fein, and he is a conservative republican who served in both the Nixon and Reagan administrations.⁸⁰ Again, I am stressing the important theme that critiques of the Bush administration's overreaching come from across the political and ideological spectrum. In Bruce Fein's words:

The theory invoked by the president [in an attempt] to justify [the NSA domestic spying] . . . would equally justify mail openings, burglaries, torture or internment camps, all in the name of gathering foreign intelligence Unless rebuked, it will lie

78. *Hamdi*, 542 U.S. at 536.

79. See Dana Milbank, *In Quizzing a Reticent Gonzales, Senators Encounter a Power Shortage*, WASH. POST, Feb. 7, 2006, at A2. Gonzales was asked whether "President Bush, invoking his 'inherent powers' under the Constitution, also authorized warrantless eavesdropping on domestic calls, opening of Americans' mail and e-mail, and searches of their homes and offices?" *Id.* The Attorney General responded, "I am not comfortable going down the road of saying yes or no as to what the president has or has not authorized." *Id.* (quoting Attorney General Gonzales). See also Nat Hentoff, *Nominee Gonzales Speaks for Himself, Sort of*, TULSA WORLD, Jan. 25, 2005, at A15.

Sen. Russ Feingold, D-Wis., asked Gonzales whether the president has "the authority to authorize violations of the criminal law under duly enacted statutes (by Congress) simply because he's commander in chief?"

Gonzales [replied]: "To the extent that there is a decision made to ignore a statute, I consider that a very significant decision, and one that I would personally be involved with...with a great deal of care and seriousness."

"Well," Feingold said, "that sounds to me like the president still remains above the law."

When [Senator] Kennedy asked the same question, Gonzales said it was "a very, very difficult question."

Id.

80. See Charles Babington & Dan Eggen, *Gonzales Seeks to Clarify Testimony on Spying*, WASH. POST, Mar. 1, 2006, at A8 (describing Bruce Fein as "a government lawyer in the Nixon, Carter, and Reagan administrations"); see also Brian Gilmore, *A Conservative for Impeachment*, PROGRESSIVE, Dec. 2006, at 23.

around like a loaded weapon, ready to be used by any [president] who claims an urgent need.⁸¹

Indeed, the Bush administration has insisted on its power to pursue some of the very policies that Bruce Fein deplored, including torture,⁸² despite international⁸³ and United States law⁸⁴ that absolutely outlaws it under any circumstances.⁸⁵ In the Fall of 2006, the ACLU held its nationwide membership conference in Washington, D.C.⁸⁶ The ACLU's Executive Director, Anthony Romero, gave a stirring opening address, and I especially loved one of his lines after he had described some of President George W. Bush's abuses of power. Romero then denounced President Bush as: "that son of a . . . Bush!"⁸⁷

IV. THE NON-PARTISAN NATURE OF CIVIL LIBERTIES VIOLATIONS INCLUDING VIOLATIONS DURING THE CURRENT "WAR ON TERROR," AND OTHER NATIONAL CRISES

Before I level any more criticism at particular positions that the Bush administration has taken, I want to stress that the ACLU always has been staunchly non-partisan, never endorsing or opposing officials, but rather,

81. Jim Malone, *VOA News: Congress, Legal Scholars Debate U.S. Domestic Spying*, U.S. FED. NEWS SERV., Mar. 1, 2006.

82. Leon Panetta, *A Republic . . . If You Can Keep It*, MONTEREY COUNTY HERALD, July 9, 2006, available at <http://www.panettainstitute.org/Commentaries/070906.htm>. "Bruce Fein . . . said that Addington and other [p]residential legal advisors had 'staked out powers that are a universe beyond any other administration . . . [with the] ability to collect intelligence, to open mail, to commit torture, to use electronic surveillance.'" *Id.*

83. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (ratified by the United States, Oct. 21, 1994).

On 3 June 1994, the Secretary-General received a communication from the Government of the United States of America requesting, in compliance with a condition set forth by the Senate of the United States of America, in giving advice and consent to the ratification of the Convention, and in contemplation of the deposit of an instrument of ratification of the Convention by the Government of the United States of America, that a notification should be made to all present and prospective ratifying Parties to the Convention to the effect that: "...nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

Id. at n.12 (alteration in original).

84. 18 U.S.C. §§ 2340A, 2441 (2000).

85. *See id.*

86. ACLU 2006 Membership Conference, <http://action.aclu.org/conference/agenda.html> (last visited May 15, 2007).

87. Anthony D. Romero, ACLU Executive Dir., Keynote Address at the 2006 ACLU Membership Conference (Oct. 16, 2006), audio available at <http://action.aclu.org/conference/webcasts.html#oct15>.

criticizing or praising each official's position on particular issues.⁸⁸ Throughout history, presidents have consistently earned criticism for unjustifiably invading freedoms in the name of national security. This has been true regardless of who was president, or what his political party was. Accordingly, I keep telling my liberal friends that they should not disproportionately demonize President Bush and former Attorney General John Ashcroft, who was a special lightning rod for critics. That is because, alas, President Bush's and Attorney General Ashcroft's actions are typical of what all presidents and all attorneys general have done in response to all national security crises.

After all, prior to 9/11, the worst terrorist attack on United States soil was the 1995 Oklahoma City bombing, and former President Bill Clinton and former Attorney General Janet Reno reacted much the same way that George W. Bush and John Ashcroft did after 9/11. President Clinton and Attorney General Reno pressured Congress to pass an "anti-terrorism" law⁸⁹ that, in fact, extended far beyond terrorism and indeed undermined vital freedoms even for people not suspected of any crime at all.⁹⁰

Just as civil liberties violations cross party lines, the same is true for civil liberties support.⁹¹ Many members of Congress, both Republicans and Democrats, have deplored the many unilateral post-9/11 rights-repressive actions by the Executive Branch.⁹²

Additionally, we have also seen strong bipartisan critiques of overreaching congressional measures, including provisions in the USA PATRIOT Act,⁹³ which was rushed through Congress and signed by the president just forty-five days after the terrorist attacks, with almost no hearings and almost no debate, under enormous pressure from the Bush administration.⁹⁴ One of the strongest congressional critics of the USA PATRIOT Act is actually a member of the House Republican Leadership—Alaska Congressman Don

88. See generally WOODY KLEIN, *LIBERTIES LOST: THE ENDANGERED LEGACY OF THE ACLU* (2006); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES* (2d ed., So. Ill. Univ. Press 1999) (1990).

89. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

90. See, e.g., Nadine Strossen, *Speech and Privacy*, in *THE RULE OF LAW IN THE WAKE OF CLINTON* (Roger Pilon ed., 2000).

91. See Press Release, ACLU, *ACLU Joins Conservatives to Restore Freedoms Lost Under Patriot Act: "Patriots to Restore Checks and Balances" Hopes to Shape National Dialogue* (Mar. 22, 2005), <http://www.aclu.org/SafeandFree/general/17577prs20050322.html.cfm?ID=17798&c=206> [hereinafter ACLU Press Release, ACLU Joins Conservatives].

92. *Id.*

93. See, e.g., Strossen, *Safety and Freedom*, *supra* note 9, at 79–80.

94. Bob Egelko, *FBI May Check People's Reading Habits*, HOUS. CHRON., June 30, 2002, at 12.

Young.⁹⁵ Consider his extremely harsh condemnation of that law: “Worst act we ever passed Everybody voted for it, but it was stupid. It was . . . ‘emotional voting.’”⁹⁶ Some USA PATRIOT Act provisions were even questioned by the chairman of President Bush’s re-election campaign, Mark Racicot, former chairman of the Republican National Committee.⁹⁷

The ACLU’s “Safe and Free” allies have included conservative citizens’ groups and officials such as the American Conservative Union, Americans for Tax Reform, Phyllis Schlafly’s Eagle Forum, and major gunowners’ organizations.⁹⁸ Wayne LaPierre of the National Rifle Association (NRA) explained to NRA members why they should support the ACLU’s “Safe and Free” campaign, despite their enthusiastic support for President Bush on gun rights and other issues.⁹⁹ He said:

Maybe you think that with President George W. Bush in the White House, everything is safe. You think you can put aside your principles, just this once, to be a loyal conservative.

. . . .

. . . But if we, as conservatives, don’t stand up for these fundamental truths, who will?

Never accept the idea that surrendering freedom—any freedom—is the price of feeling safe.¹⁰⁰

In the same vein, we have also heard strikingly strong criticisms from the so-called “Religious Right,” conservative Christians who campaigned for John Ashcroft’s appointment as Attorney General because they agree with his views on abortion and gay rights.¹⁰¹ Yet they still have decried the new investigative guidelines Attorney General Ashcroft issued after the terrorist attacks, which allow surveillance and infiltration of religious and political groups without any suspicion whatsoever.¹⁰² For example, the former head

95. See Rick Montgomery, *Federal Patriot Act Meets with Grass-Roots Resistance*, KAN. CITY STAR, May 19, 2003 at A1.

96. *Id.*

97. See Audrey Hudson, *Kerry Criticized on Patriot Act: Cheney Says Democrat’s Original Stance ‘Was Right’*, WASH. TIMES, June 2, 2004, at A07.

98. See ACLU Press Release, *ACLU Joins Conservatives*, *supra* note 91.

99. Wayne LaPierre, NRA, *The Conservative Political Action Conference: Frightened or Free?* (Feb. 2002), <http://www.nrahq.org/transcripts/cpac0202.asp>.

100. *Id.*

101. See Neil A. Lewis, *Ashcroft’s Terrorism Policies Dismay Some Conservatives*, N.Y. TIMES, July 24, 2002, at A1.

102. *Id.*; see also JOHN ASHCROFT, *THE ATTORNEY GENERAL’S GUIDELINES FOR FBI NATIONAL SECURITY INVESTIGATIONS AND FOREIGN INTELLIGENCE COLLECTION* (Oct. 31, 2003), available at <http://www.fas.org/irp/agency/doj/fbi/nsiguidelines.pdf>.

of the Family Research Council, Ken Connor, said: “‘It’s important that we [religious] conservatives maintain a high degree of vigilance We need to ask ourselves . . . [h]ow would our groups fare under these new rules?’”¹⁰³

The extraordinarily diverse critics of the government’s post-9/11 overreaching have included: prominent republican officials and conservative citizens’ groups; experts with enormous experience in national security, counter-intelligence, and law enforcement; leaders of the business community; and groups that never before have taken public positions on these kinds of issues—the United States Chamber of Commerce, the National Association of Manufacturers, the National Association of Realtors, the Financial Services Roundtable, and—of special significance in this law school forum—the Association of Corporate Counsel.¹⁰⁴ On October 4, 2005, these organizations wrote to Senator Arlen Specter, Chairman of the Senate Judiciary Committee, to call for cutbacks on the USA PATRIOT Act’s expansion of the government’s power to obtain “voluminous and often sensitive records from American businesses, without judicial oversight or other meaningful checks on the government’s power.”¹⁰⁵ These organizations objected to the USA PATRIOT Act’s invasions of the confidentiality rights of business entities themselves, as well as the Act’s invasions of the privacy rights of the entities’ customers.¹⁰⁶ As they wrote to Senator Specter:

[T]he rights of businesses to confidential files—records about our customers or our employees, as well as our trade secrets and other proprietary information—can too easily be obtained . . . under . . . the Patriot Act

. . . . Reforming the Patriot Act is an important step to ensure that powerful law enforcement tools are focused on those who would do us harm and that privacy rights and business[] interests are protected¹⁰⁷

I can sum up my points about all of the unjustified, unconstitutional post-9/11 measures by quoting a couple satiric, but apt, definitions from the *Nation Magazine’s* dictionary of current political terminology. Here are its two definitions for USA PATRIOT Act: “1. The pre-emptive strike on

103. Lewis, *supra* note 101.

104. Letter from Ass’n of Corp. Counsel et al. to Arlen Specter, Chairman, Senate Judiciary Comm. (Oct. 4, 2005), available at <http://www.ala.org/ala/washoff/WOissues/civilliberties/theusapatriotact/BusgrpLtr04oct05.pdf>.

105. *Id.*

106. *Id.*

107. *Id.*

American freedoms to prevent the terrorists from destroying them first. 2. The elimination of one of the reasons why they hate us.”¹⁰⁸ In the same vein, here is how the *Nation's* dictionary defines 9/11: “Tragedy used to justify any administration policy.”¹⁰⁹

V. GENERAL CONSTITUTIONAL PRINCIPLES THAT GOVERN CIVIL LIBERTIES DURING A NATIONAL SECURITY CRISIS

For details about the many specific post-9/11 issues and cases, I urge you to visit the ACLU's website.¹¹⁰ It is a treasure trove of information, including all of the pertinent statutes, court rulings, and lawyers' briefs. Now I will lay out the general constitutional principles that govern civil liberties in a time of a national security crisis—the general standards that we apply in assessing any specific post-9/11 measure.

As to individual rights in the context of national emergencies, the United States Constitution contains only one express limitation on just one right in solely two specified types of national emergencies.¹¹¹ The “Suspension Clause” empowers Congress to suspend the writ of habeas corpus, the time-honored procedure for challenging government detention.¹¹² Further, the “Suspension Clause” strictly limits Congress' suspension power to “Cases of Rebellion or Invasion,” and even in such cases it permits suspension of the writ only when “the public Safety may require it.”¹¹³

Beyond the strictly limited circumstances in which the Constitution authorizes Congress to suspend the writ of habeas corpus, the Constitution provides no textual warrant for any further limits on rights when the national security may be in peril. In that key respect, it is distinguishable from both the constitutions of many other countries¹¹⁴ and from regional and international human rights treaties.¹¹⁵

In short, the Framers of the United States Constitution deliberately rejected a general provision of more government power and fewer individual

108. Katrina vanden Heuvel, *Dictionary of Republicanisms*, THE NATION, Dec. 12, 2005, at 23.

109. *Id.*

110. <http://www.aclu.org>.

111. See U.S. CONST. art. I, § 9, cl. 2.

112. *Id.* “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” *Id.*

113. *Id.* (emphasis added).

114. See, e.g., NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM, CASES AND MATERIALS* (2003).

115. See, e.g., HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (2d ed. 2000).

rights, in any national security or other emergency. This key point has been stressed by important United States Supreme Court opinions arising from various emergencies throughout United States history, from the Civil War¹¹⁶ to the Korean War.¹¹⁷ For example, in 1934, the Court declared:

[W]e must consider the relation of emergency to constitutional power

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power . . . and its limitations of . . . power . . . were determined in the light of emergency and they are not altered by emergency.¹¹⁸

This same crucial point was stressed, specifically in the post-9/11 context, by United States Supreme Court Justice Antonin Scalia, in his opinion in the *Hamdi* case.¹¹⁹ Of all the Court's post-9/11 opinions, Justice Scalia's opinion in that case most strongly condemned the Bush administration's claims of executive power and most strongly supported individual constitutional rights. Notably, that opinion was joined by Justice John Paul Stevens.¹²⁰ I say "notably" because Justice Stevens is the Court's most outspoken liberal, whereas Justice Scalia is its most outspoken conservative.

116. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866).

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of [the] government.

Id.

117. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649–50 (1952) (Jackson, J., concurring).

The appeal . . . that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work

Id.

118. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425–26 (1934).

119. *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting). "The Suspension Clause was by design a safety valve, the Constitution's only 'express provision for exercise of extraordinary authority because of a crisis.'" *Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 650 (Jackson, J., concurring)).

120. *Id.* at 554.

In sum, apart from the writ of habeas corpus, the Constitution affords the same strong protection to individual rights during national crises as at any other time. For example, the government's many post-9/11 restrictions on First Amendment freedoms of speech, press, and association are still presumptively unconstitutional, even during a national emergency.¹²¹ The United States Supreme Court resoundingly reaffirmed this core constitutional principle in the famous "Pentagon Papers Case" in 1971, while the United States was engaged in the Vietnam War.¹²² The Nixon administration claimed that publication of the Pentagon Papers—the government's secret study of United States' involvement in Vietnam—would endanger many American lives, as well as national security.¹²³ Yet, the Court rejected this claim, because the government did not satisfy its heavy constitutional burden of proof under the strict scrutiny standard.¹²⁴ Under that standard, any rights-restricting measure is presumptively unconstitutional and the government can overcome that presumption only by proving that the restriction is necessary to promote a purpose of compelling importance.¹²⁵

The government can easily satisfy the compelling purpose prong of this strict scrutiny standard for any post-9/11 measure; of course, protecting national security meets that test. But it is much harder for the government to satisfy the second prong of strict scrutiny, by proving that the measure is necessary or, as the United States Supreme Court often phrases it, that the measure is the least restrictive alternative. In other words, if the government could promote national security through alternative means, which are less restrictive of fundamental rights, then it must do so.¹²⁶

It really does maximize security, with the minimal feasible cost to liberty. Not only is this the very same analysis that the United States Supreme Court uses as a matter of constitutional law, strict judicial scrutiny, but it also reflects just plain common sense. After all, why should we give up our free-

121. See, e.g., Strossen, Presentation, *Free Speech in Wartime*, supra note 9, at 930. See generally ACLU, FREEDOM UNDER FIRE: DISSSENT IN POST-9/11 AMERICA (May 2003).

122. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

123. Brief for the United States at 3, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (Nos. 1873 & 1885). The government "now seeks to bar only the publication of a relatively small number of documents whose disclosure would pose a 'grave and immediate danger to the security of the United States.'" *Id.* at 3. "[P]ublication of the Defense Department studies would pose a serious danger to the armed forces." *Id.* at 18.

124. *N.Y. Times Co.*, 403 U.S. at 714.

125. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 534–55, 761–889 (2d ed. 2002) (describing the various levels of scrutiny applied by courts to restrictions on fundamental rights).

126. See *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (articulating the least restrictive alternative test).

dom if we do not gain security in return? Or, could we gain as much security without giving up as much freedom?

In short, the general constitutional standard for assessing rights restrictions, including during times of war and other national emergencies, is also a sensible policy analysis. It is the very standard that was unanimously endorsed by the bipartisan 9/11 Commission, which was chaired by New Jersey's former Governor Tom Kean, a republican, and co-chaired by former Indiana Congressman Lee Hamilton, a democrat.¹²⁷

Applying this sensible and constitutional test to the myriad post-9/11 policies that have been implemented or proposed, many have passed scrutiny, and hence, have not been opposed by the ACLU or our many diverse allies. For example, of the over 150 provisions in the USA PATRIOT Act, the ACLU and our allies have criticized only about twenty.¹²⁸ Moreover, even as to those provisions, we have not advocated repeal, but rather, reform: revisions that would preserve the core of the powers the government says it needs to protect our lives, but subject to judicial review, Congressional oversight, and other limits to bring them back in line with constitutional checks and balances.¹²⁹

This constrained and constructive criticism hardly warrants the charges of "hysteria,"¹³⁰ and even treason,¹³¹ that John Ashcroft leveled at his civil libertarian critics while he was Attorney General. Specifically, he said that we "only aid terrorists . . . [and] give ammunition to America's enemies."¹³²

127. See THE 9/11 COMMISSION REPORT, *supra* note 58, at xi.

Recommendation: The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of the powers to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.

Id. at 394–95.

128. See, e.g., ACLU, Reform the Patriot Act, *supra* note 47.

129. ACLU, The Patriot Act: Where it Stands, <http://action.aclu.org/reformthepatriotact/whereitstands.html> (last visited May 15, 2007).

130. Curt Anderson, *Ashcroft Slams Critics' 'Hysteria'*, CBS NEWS.COM, Sept. 16, 2003, <http://www.cbsnews.com/stories/2003/09/18/national/main573894.shtml>.

131. See Elisabeth Bumiller, *Ashcroft Quits Top Justice Post*, N.Y. TIMES, Nov. 10, 2004.

132. *Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (Dec. 6, 2001) (testimony of Attorney General John Ashcroft), available at www.usdoj.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm.

We need honest, reasoned debate; not fearmongering. To those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil.

I say “we” advisedly, since Attorney General John Ashcroft made that accusation when he testified before the Senate Judiciary Committee several years ago, and Yours Truly had testified shortly before him!¹³³ This reminds me of a headline in one of my favorite publications, *The Onion*. This particular headline read: “Bush Asks Congress for \$30 Billion to Help Fight War on Criticism.”¹³⁴ In the same vein, another *Onion* headline warned: “Revised Patriot Act Will Make It Illegal to Read [Original] Patriot Act.”¹³⁵ Well, most members of Congress would not have to worry, since they have admitted that they did not even read the USA PATRIOT Act before voting for it!¹³⁶

VI. POST-9/11 CONCERNS SPECIFICALLY REGARDING WOMEN

For the remainder of this article, in keeping with the theme of this year’s Goodwin Lecture Series, I am going to discuss some post-9/11 concerns specifically regarding women. These concerns have been the focus of much of the ACLU’s work in the past five years, not only by our staff members who have been working on our “Safe and Free” campaign, but also by our Women’s Rights Project, which was founded by Justice Ruth Bader Ginsburg in 1972.¹³⁷

Let me first list a half dozen of the major ways in which the civil liberties of women, in particular, have been affected post-9/11. I will then elaborate on a couple of these:

First, Muslim women have been subjected to discriminatory, harassing treatment based solely on their religious attire.¹³⁸

Second, certain immigrant women, as well as their families and communities, have suffered devastating consequences as a result of the unwar-

Id.

133. *Dep’t of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the H. Comm. on the Judiciary*, 107th Cong. (Dec. 4, 2001) (testimony of Nadine Strossen, President, ACLU), available at http://judiciary.senate.gov/print_testimony.cfm?id=128&wit_id=83.

134. *Bush Asks Congress for \$30 Billion to Help Fight War on Criticism*, THE ONION, July 2, 2003, <http://www.theonion.com/content/node/28954>.

135. *Revised Patriot Act Will Make It Illegal to Read Patriot Act*, THE ONION, Sept. 17, 2003, <http://www.theonion.com/content/node/32312>.

136. See generally Declan McCullagh, *Congress Plans Scrutiny of Patriot Act*, CNET NEWS.COM, May 9, 2005, http://news.com.com/Congress+plans+scrutiny+of+Patriot+Act/2100-1028_3-5700986.html (noting that many members of Congress did not read the initial enacted version of the USA PATRIOT Act).

137. See, e.g., SHANTI HUBBARD, ACLU WOMEN’S RIGHTS PROJECT, ANNUAL REPORT 2005, available at <http://www.aclu.org/pdfs/wrpannualreport2005.pdf>.

138. See *infra* part VII.

ranted mass detentions and deportations of the men in their lives, based on ethnic and religious profiling. The ACLU documented these problems in a report issued in 2004, *Worlds Apart: How Deporting Immigrants after 9/11 Tore Families Apart and Shattered Communities*.¹³⁹ The ACLU also has pursued various legal remedies for these violations not only in the United States,¹⁴⁰ but also before the United Nation's Special Working Group on Arbitrary Detention, in Geneva.¹⁴¹

Third, as a result of the post-9/11 crackdowns on immigrants in general, female victims of domestic violence and other crimes in immigrant communities are now chilled in their efforts to seek safety, due to greater likelihood that they, or their family members, will face deportation.¹⁴²

Fourth, similarly, immigrant women workers who face exploitation, discrimination, and sexual abuse on the job have been deterred from reporting these violations, and hence are increasingly preyed upon.¹⁴³ The ACLU detailed these problems in a complaint filed with the Inter-American Commission on Human Rights in 2006,¹⁴⁴ since they violate international human rights standards that bind the United States.

Fifth, one of the many problems resulting from the expanded police powers that have flourished since 9/11 is the migration of those methods to non-terrorism-related law enforcement, including drug law enforcement.¹⁴⁵

139. ACLU, *WORLDS APART: HOW DEPORTING IMMIGRANTS AFTER 9/11 TORE FAMILIES APART AND SHATTERED COMMUNITIES* (Dec. 2004), available at <http://www.aclu.org/FilesPDFs/worldsapart.pdf>.

140. See, e.g., *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002).

141. See, e.g., *Petition to the United Nations Working Group on Arbitrary Detention*, Jan. 27, 2004, available at <http://aclu.org/FilesPDFs/complaint.final.012704.pdf> (submitted on behalf of certain immigrants detained by the United States in connection with its investigation into the events of 9/11); see also ACLU, *AMERICA'S DISAPPEARED: SEEKING INTERNATIONAL JUSTICE FOR IMMIGRANTS DETAINED AFTER SEPTEMBER 11 (2004)*, available at <http://www.aclu.org/FilesPDFs/un%20report.pdf>.

142. See, e.g., Norman Miller, *Newcomers to U.S. Hesitant to Report Domestic Abuse*, BOSTON HERALD, May 27, 2006, at 80; Fernando Quintero, *Immigrants Often Silent on Family Violence*, ROCKY MTN. NEWS, Sept. 2, 2006, at 19A; Amanda Keim, *Battered Immigrants Fear Police As Much As Husbands*, L.A. TIMES, Oct. 16, 2005, at A18.

143. See *infra* part VIII.

144. ACLU et al., *Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America*, Inter-Am. C.H.R. (Nov. 1, 2006), available at http://www.aclu.org/images/asset_upload_file946_27232.pdf; see also Press Release, ACLU, *Undocumented Workers Bring Plea for Non-Discrimination to Human Rights Body* (Nov. 1, 2006), <http://www.aclu.org/immigrants/discrim/27235prs20061101.html>.

145. ACLU, *CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 16* (2005), available at http://www.aclu.org/images/asset_upload_file393_23513.pdf.

As a result, the number of women in prison has skyrocketed and their children are often left parentless, to flounder in the foster care system.¹⁴⁶ The ACLU Women's Rights Project documented these devastating problems in a 2005 report, *Caught in the Net: The Impact of Drug Policies on Women and Families*.¹⁴⁷

Sixth, many of the key post-9/11 players on all issues—including plaintiffs,¹⁴⁸ lawyers,¹⁴⁹ government officials,¹⁵⁰ whistleblowers,¹⁵¹ judges,¹⁵² and

146. *Id.* at 49–50.

147. *Id.*

148. See *Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft*, 459 F. Supp. 2d 592 (E.D. Mich. 2006) (plaintiffs included several organizations that either are headed by women and/or work for women's rights); *Gordon v. FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005) (plaintiff was Rebecca A. Gordon); *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004) (plaintiff was Sibel Edmonds); *ACORN v. Philadelphia*, No. 03-4312 (E.D. Pa. May 6, 2004) (plaintiff was the National Organization for Women); *Complaint, Am. Friends Serv. Comm. v. Dep't of Def.*, No. 06-2529, (E.D. Pa. Mar. 19, 2007) (plaintiffs included several organizations that are headed by women and/or work for women's rights).

149. Prominent female lawyers handling major post-9/11 lawsuits include: Kate Martin, Director of the Center for National Security Studies who played a key role in, among others, the challenge to government secrecy of the names of post-9/11 detainees, see *Center for National Security Studies v. U.S. Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002); Barbara Olshansky, Assistant Legal Director for the Center for Constitutional Rights, represented Guantanamo Bay detainees in *Rasul v. Bush*, which held that detainees held at the Guantanamo Bay facility could challenge their incarceration in federal court, *Rasul v. Bush*, 542 U.S. 466 (2004); Ann Beeson, Associate Legal Director of the ACLU, was the lead counsel on many important challenges to the government's post-9/11 overreaching, including the NSA lawsuit and USA PATRIOT Act challenges, ACLU, Ann Beeson, Associate Legal Director, <http://www.aclu.org/safefree/resources/17310res20030415.html> (last visited May 15, 2007); and Donna Newman represented Jose Padilla—the citizen who has been imprisoned as an alleged “enemy combatant” whose case went to the United States Supreme Court, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

150. E.g., Condoleezza Rice was Secretary of State, and former National Security Advisor, Valerie E. Caproni, was General Counsel for the FBI. Federal Bureau of Investigation: FBI Executives—Valerie E. Caproni, <http://www.fbi.gov/libref/executives/caproni.htm> (last visited May 15, 2007). Elizabeth Redman is Assistant Inspector General for Investigations and has held this position at the Department of Homeland Security since the inception of the Office of Inspector General in March 2003. Dep't of Homeland Security, Office of Inspector Gen., *Semiannual Report to Cong.* 4, *available at* http://www.dhs.gov/xoig/assets/semiannlrpts/OIG_Fall_2003_SAR.pdf. Jamie Gorelick held key positions in the Clinton administration and was the only female member of the bipartisan 9/11 Commission. *The 9/11 Commission*, ONLINE NEWSHOUR WITH JIM LEHRER, Mar. 24, 2004, *available at* http://www.pbs.org/newshour/bb/terrorism/jan-june04/911commission_3-24.html. Ms. Gorelick received lots of press because some administration officials tried to blame her, when she had been in the Clinton Justice Department, for what they saw as legal obstacles to sharing of terrorism-related intelligence information between the FBI and CIA. *Id.*; see also Adam Nagourney & Eric Lichtblau, *Evaluating the 9/11 Hearings' Winners and*

journalists¹⁵³—have been women. Consider, for example, the critical roles

Losers, N.Y. TIMES, Apr. 18, 2004, at 1.23. The blame that was placed on Ms. Gorelick's editorials in the *New York Times* and other leading publications. See generally *id.*

151. Coleen Rowley, who as Chief Legal Advisor for the FBI, wrote a paper detailing how the FBI mishandled intelligence pre-9/11 and subsequently testified in front of the 9/11 Commission. Press Release, ACLU, Famous FBI Whistleblower to Speak (Apr. 7, 2005), <http://aclu-ia.org/news.asp?ID=17>. Sibel Edmonds founded the National Security Whistleblowers Coalition. Nat'l Security Whistleblowers Coalition—Staff, http://www.nswbc.org/nswbc_staff.htm (last visited May 15, 2007). Jesselyn Radack worked for the FBI and was fired because of whistleblowing. Jesselyn Radack, My Story, <http://www.patriotictruthteller.net/mystory.html> (last visited May 15, 2007). Ms. Radack wrote a book titled *The Canary in the Coal Mine: Blowing the Whistle in the Case of "American Taliban" John Walker Lindh*. *Id.* The book is about her experience, actions, and her point of view. *Id.*

152. Justice Sandra Day O'Connor, was "the first woman named to the [United States] Supreme Court." National Women's Hall of Fame, Women of the Hall: Sandra Day O'Connor, <http://www.greatwomen.org/women.php?action=viewone&id=115> (last visited May 15, 2007). Judge Anna Diggs Taylor "became the first black woman judge to be appointed to the United States District Court for the Eastern District of Michigan." Michigan Supreme Court Historical Society, Anna Diggs Taylor, <http://www.micourthistory.org/resources/women-and-law/taylor.php> (last visited May 15, 2007). Colleen Kollar-Kotelly was appointed to serve as a judge for the United States Foreign Intelligence Surveillance Court. United States District Court for the District of Columbia: Judge Colleen Kollar-Kotelly, <http://www.dcd.uscourts.gov/kotelly-bio.html> (last visited Mar. 25, 2007). Judge Shira A. Scheindlin, a judge in the United States District Court for the Southern District of New York, issued an important decision concerning the material witness statute in the case concerning Osama Awadallah, a Jordanian-born student who was charged with making false statements at a grand jury proceeding. Press Release, ACLU, Government Cannot Use Material Witness Statute to Detain People, ACLU Tells Appeals Court (Nov. 22, 2002), http://www.aclu.org/safefree/general/17113prs20021122.html?s_src=RSS. Judge Denise Page Hood, a judge in the United States District Court for the Eastern District of Michigan, ruled on the ACLU's challenge regarding Section 215 of the USA PATRIOT Act. Press Release, ACLU, PATRIOT Act Fears Are Stifling Free Speech, ACLU Says in Challenge to Law (Nov. 3, 2003), <http://www.aclu.org/safefree/patriot/18418prs20031103.html>. The lead plaintiff in the ACLU's lawsuit was the Muslim Community Association of Ann Arbor. *Id.* Sixth, there was Judge Gladys Kessler, judge in the United States District Court for the District of Columbia, who ruled on the 9/11 *Committee on National Security Systems v. Department of Justice* criminal case, which "ordered the Justice Department to produce the names of all detainees and their lawyers within 15 days." Human Rights First, September 11th, 2001 and the Courts, http://www.humanrightsfirst.org/us_law/loss/cases/court_cases.htm (last visited May 15, 2007). Finally, Judge Gladys Kessler, sitting on the same court, "issued a blunt indictment of the Bush administration's legal handling of prisoners at the Guantanamo Bay Naval Base in Cuba." Carol D. Leoning, *A Judge's Sharp Opinion*, WASH. POST, Dec. 4, 2006, at A17.

153. Dana Priest received a Pulitzer Prize for breaking the story about the secret CIA prisons. *Dana Priest: 2006 Pulitzer Prize Winner in Category of Beat Reporting*, WASHINGTONPOST.COM, Jan. 2, 2005, <http://www.washingtonpost.com/wp-dyn/content/linkset/2006/04/17/LI2006041700530.html>. Leslie Cauley broke the story about the NSA's domestic spying. Cauley, *supra* note 36. Paisley Dodds received the Hugh M. Hefner First Amendment Award in 2006 for her coverage of Guantanamo Bay. U. Chi. Law

that have been played by women from judges such as Justice Sandra Day O'Connor and Judge Anna Diggs Taylor—whose key roles I have already noted, to courageous FBI whistleblower, Coleen Rowley—whom *Time Magazine* hailed as a “Person of the Year” in 2002,¹⁵⁴ to the members of the Raging Grannies—women of a certain age who have been ACLU clients in important cases all over the country helping us to challenge the government’s post-9/11 surveillance of citizens who are simply exercising their First Amendment rights of peaceful protest.¹⁵⁵ Given the longstanding, ongoing stereotypes and discrimination that women have faced in many areas, and given the glass ceilings that women have faced in the national security arena in particular,¹⁵⁶ we should be cognizant of these many women who have played key roles in keeping us safe and free.

As I just noted, the Pentagon and other government agencies have been spying on citizens all over the country who are simply exercising First Amendment rights, but who are treated like terrorists just because they dare to dissent from certain government policies. To underscore that point, let me cite one current example from right here in Fort Lauderdale. The ACLU recently obtained government documents through one of their lawsuits, detailing massive surveillance of a peaceful protest that had been planned by the Broward Anti-War Coalition during the Fort Lauderdale Air & Sea Show.¹⁵⁷ The many government agencies that collected information about

School, Playboy Foundation Announces Winners of 2006 Hugh M. Hefner First Amendment Awards, (May 11, 2006), <http://www.law.uchicago.edu/stone-award.html>. Lucy Dalglish was executive director of the Reporters Committee for Freedom of the Press. Reporters Committee for Freedom of the Press, The Reporters Committee for Freedom of the Press: A Short History, <http://www.rcfp.org/about.html> (last visited May 15, 2007). Ms. Dalglish advocated for embattled reporters post-9/11. *Id.*

154. Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002, at 32; *see also* Edmonds v. Dep’t of Justice, 323 F. Supp. 2d 65, 67 (D.D.C. 2004). “Sibel Edmonds [is] a Turkish-American woman [who] was hired as [an FBI] translator . . . shortly after the terrorist attacks of September 11, 2001 because of her knowledge of Middle Eastern languages,” and was subsequently “fired in retaliation for reporting security breaches and possible espionage within the Bureau.” Press Release, ACLU, *Sibel Edmonds v. Department of Justice: A Patriot Silenced, Fighting to Keep America Safe* (Sept. 26, 2005), <http://www.aclu.org/scotus/2005/19950prs20050926.html>; *see also* David Rose, *An Inconvenient Patriot*, VANITY FAIR, Sept. 2005, at 264.

155. *See* Anemona Hartocollis, *With ‘Grannies’ in the Dock, a Sitting Judge Will Squirm*, N.Y. TIMES, Apr. 27, 2006, at B1.

156. *See* Jo Kadlecsek, *Chipping at a Political Glass Ceiling*, COLUM. U. REC., Mar. 26, 2004, at 5, available at http://www.columbia.edu/cu/record/archives/vol29/vol29_iss12/Pg.5-2912.pdf.

157. Press Release, ACLU, *Pentagon Documents Uncovered by ACLU Shed New Light on Surveillance of Florida Peace Activists* (Oct. 12, 2006), http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=2169.

this event include: the Department of Defense, the Joint Terrorism Task Force, the United States Army Recruiting Command, and the Miami-Dade Police Department.¹⁵⁸ Moreover, the collected information has been stored in a military anti-terrorism database.¹⁵⁹ According to the government's records, the dangerous activities planned by this allegedly terrorist Broward Anti-War group include "guerrilla theater and other forms of subversive propaganda."¹⁶⁰ Sadly, our government appears to be confusing guerrilla theater with guerrilla war!

Now, let me briefly expand on a couple of the post-9/11 issues specifically affecting women. I will start with the most visible one, arising from the religious attire that some Muslim women choose to wear, thus being visibly identified as members of a group that has borne a disproportionate brunt of unjustified post-9/11 measures.

VII. POST-9/11 DISCRIMINATION AGAINST WOMEN WHO ARE VISIBLY IDENTIFIABLE AS MUSLIM THROUGH THEIR RELIGIOUS ATTIRE

Let me provide some background context for this issue. Prior to 9/11, the ACLU and many diverse allies had made enormous headway in our "Campaign Against Racial Profiling,"¹⁶¹ to the extent that even President George W. Bush¹⁶² and his first Attorney General, John Ashcroft,¹⁶³ had promised to halt such policies as arresting people for "'Driving While Black.'"¹⁶⁴ However, after 9/11 we suddenly saw widespread support for

158. *Id.*

159. *Id.*

160. *Id.*

161. See ACLU, Racial Profiling: Old and New, <http://www.aclu.org/racialjustice/racial-profiling/index.html> (last visited May 15, 2007); see Press Release, ACLU, ACLU Wins National Public Relations Award for Campaign to End Racial Profiling (June 9, 2000), <http://www.aclu.org/racialjustice/racialprofiling/15948prs20000609.html> [hereinafter ACLU Press Release, ACLU Wins National Public Relations Award].

162. Press Release, ACLU, ACLU Applauds Introduction of 'End Racial Profiling Act' as ACLU Releases Report on Racial Profiling (Feb. 26, 2004), <http://www.aclu.org/safefree/general/17018prs20040226.html>. "On February 27, 2001, President Bush told a joint session of Congress that racial profiling 'is wrong and we will end it in America.'" *Id.*

163. Press Release, ACLU, ACLU Applauds Ashcroft Move on Racial Profiling: Calls on Attorney General to Examine Other Racial Justice Issues (Mar. 1, 2001), <http://www.aclu.org/racialjustice/racialprofiling/15833prs20010301.html>. "In a letter sent to the chairman and ranking member of the Senate Judiciary Committee, Ashcroft called on Congress to consider racial profiling legislation within six months. If Congress does not act, Ashcroft said, he would instruct the Justice Department to begin its own study of available data." *Id.*

164. ACLU Press Release, ACLU Wins National Public Relations Award, *supra* note 161.

this very same demographic profiling, although targeting different people.¹⁶⁵ Again, the government has been targeting too many people, based not on what they have done, but only on who they are. The very hardest hit have been young, Muslim immigrant men from the Middle East or South Asia.¹⁶⁶ Based on profiling, they have been subjected to unjustified surveillance, interrogation, detention, incarceration, and deportation.¹⁶⁷

This post-9/11 profiling—along with all demographic profiling—violates individual rights, since it substitutes discriminatory stereotypes and guilt by association for individualized suspicion.¹⁶⁸ Therefore, it is not surprising that civil libertarians have criticized it on principled grounds.¹⁶⁹ You might be surprised, though, to learn that counter-terrorism experts also have criticized such profiling on pragmatic grounds, from a national security perspective.¹⁷⁰ This concern was raised, for instance, by a group of senior United States intelligence specialists, in a memorandum sent to law enforcement agencies worldwide, shortly after 9/11.¹⁷¹ The memo warned that looking for someone who fits a demographic profile is just not as useful as looking for someone who acts suspiciously.¹⁷² Indeed, the memo even suggests that over-reliance on profiles might be one of the reasons for our government's tragic failure to prevent the 9/11 attacks.¹⁷³ More recently, U.S. intelligence agencies have expressed mounting concern that future terrorist attacks may well involve Al Qaeda members from Asia or Africa, expressly to elude the ethnic profiles that U.S. personnel have been using.¹⁷⁴ In short, this

165. See, e.g., Henry Weinstein et al., *Racial Profiling Seems Inevitable in Terror Climate*, SEATTLE TIMES, Sept. 25, 2001, at A9; Jeff Jacoby, *Frisking the Innocent*, BOSTON GLOBE, June 20, 2002, at A15.

166. See *id.*

167. Council on American-Islamic Relations (CAIR), *The Status of Muslim Civil Rights in the United States 2002: Stereotypes & Civil Liberties: Executive Summary*, <http://www.cair-net.org/asp/execsum2002.asp> (last visited May 15, 2007). See generally LAWYER COMMITTEE FOR HUMAN RIGHTS, *Immigrants, Refugees, and Minorities, in ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES* 30–106 (2003).

168. See generally ACLU, *SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11* (2004), available at <http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf>.

169. See generally *id.*

170. See *id.* at 3–4.

171. *Id.* at 3.

172. *Id.*

173. See generally Bill Dedman, *Memo Warns Against Use of Profiling as Defense*, BOSTON GLOBE, Oct. 12, 2001, at A27. See generally Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003).

174. *Protecting Dr. King's Legacy: Justice and Liberty in the Wake of September 11th: Forum on National Security and the Constitution Before Congressman John Conyers* (Jan. 24,

demographic profiling is one of many post-9/11 measures that suffer from the dual flaw I noted earlier: it does decrease liberty, but it does not increase security.

Muslim men certainly have endured extreme profiling tactics, including the sweeping post-9/11 arrests and incommunicado incarcerations that were strongly denounced even by the Justice Department's own Inspector General.¹⁷⁵ Through such measures, Muslim men certainly have suffered serious discriminatory rights violations post-9/11.¹⁷⁶ However, Muslim women are more readily identifiable, as adherents of Islam, when they choose to wear traditional religious attire, such as the headscarf or hijab. Hence, post-9/11, throughout the United States, there have been dramatic increases in reported incidents of discrimination and harassment, not only against Muslims in general, but also against Muslim women in particular. The *New York Times* described this pattern in a recent article.¹⁷⁷ It said:

Before Sept. 11, Muslim women who wore head scarves in the United States were often viewed as vaguely exotic. The terrorist attacks abruptly changed that, transforming the head scarf, for many people, into a symbol of something dangerous, and marking the women who wear them as among the most obvious targets . . .

2002) (testimony of Nadine Strossen, President, ACLU), available at <http://www.aclu.org/natsec/emergpowers/12473leg20020124.html#6>.

175. GLENN A. FINE, U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 70 (Apr. 2003), available at <http://www.fas.org/irp/agency/doj/oig/detainees.pdf> ("[w]e criticize the indiscriminate and haphazard manner in which the labels of 'high interest,' 'of interest,' or 'of undetermined interest' were applied to many aliens who had no connection to terrorism."). See generally GLENN A. FINE, U.S. DEP'T OF JUSTICE, ANALYSIS OF THE SECOND RESPONSE BY THE DEP'T OF JUSTICE TO RECOMMENDATIONS IN THE OFFICE OF THE INSPECTOR GENERAL'S JUNE 2003 REPORT ON THE TREATMENT OF SEPTEMBER 11 DETAINEES (Jan. 2004), available at <http://www.usdoj.gov/oig/special/0401/final.pdf>; Press Release, ACLU, ACLU Files Complaint with United Nations in Geneva Seeking Justice for Immigrants Detained and Deported After 9/11 (Jan. 27, 2004), <http://www.aclu.org/safefree/general/16908prs20040127.html>.

176. See, e.g., Stuart Taylor, Jr., *Congress Should Investigate Ashcroft's Detentions*, 34 NAT'L J. 1536 (2002).

Despite the unprecedented secrecy imposed by Attorney General John Ashcroft, evidence has mounted that [since 9/11] his Justice Department has put hundreds of harmless Muslim men from abroad behind bars for far too long, treated many of them worse than convicted criminals, and arguably violated their constitutional rights—all without finding enough evidence to charge a single one . . . with a terrorist crime.

Id.

177. Neil MacFarquhar, *A Simple Scarf, But Meaning Much More Than Faith*, N.Y. TIMES, Sept. 8, 2006, at A22.

Muslim . . . women . . . who wear head scarves . . . say they face widespread discrimination in their careers and in their daily lives.¹⁷⁸

Since 9/11, the ACLU has defended many visibly self-identified Muslim women, who wear headscarves or other religious attire, against various adverse actions. For example, the ACLU of Nebraska recently successfully settled a lawsuit against the city of Omaha, which barred Muslim women from going to city swimming pools just because of their religious attire.¹⁷⁹ The ACLU's client, Lubna Hussein, wanted to go to a pool to watch her small daughters while they swam.¹⁸⁰ She did not want to swim herself.¹⁸¹ Nonetheless, the city barred her from going to the pool unless she wore a bathing suit, even though that would violate her religious belief of uncovering her body in such a public place.¹⁸² When the city agreed to change its policy in response to the ACLU's lawsuit, Lubna Hussein's reaction underscored that what was at stake was not only the welfare of her own daughters but also her own equal status, and that of other Muslim women, as full members of the community. As she said, "I am so pleased at this change in policy My little girls have been waiting for a chance to try out the water slides and they'll finally get the opportunity [now]. We're happy to feel like part of the community again."¹⁸³

The ACLU has also represented American Muslim women who have been forced to remove their hijabs in front of male security personnel at airports and other facilities without any basis for suspecting them of carrying contraband, even though this violates their core religious beliefs.¹⁸⁴ This has happened even when these women have begged to go to private rooms to be searched by female security personnel.¹⁸⁵ One of the clients in this category is Samar Kaukab, who was subjected to this degrading treatment, violating her religious freedom, at Chicago's O'Hare Airport shortly after the 9/11

178. *Id.*

179. See Press Release, ACLU, City of Omaha and ACLU of Nebraska Announce Settlement in Lawsuit over Muslim Women Barred from Public Pool (Feb. 18, 2005), <http://www.aclu.org/religion/discrim/16248prs20050218.html>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Press Release, ACLU, ACLU of Illinois Challenges Ethnic and Religious Bias in Strip Search of Muslim Woman at O'Hare International Airport (Jan. 16, 2002), <http://www.aclu.org/racialjustice/racialprofiling/15783prs20020116.html> [hereinafter ACLU Press Release, ACLU of Illinois Challenges Ethnic and Religious Bias].

185. *Id.*

attacks.¹⁸⁶ Samar Kaukab was a twenty-two-year-old American citizen, living in Ohio.¹⁸⁷ Ironically, Ms. Kaukab was passing through the airport en route home from a conference of the VISTA program, Volunteers in Service to America.¹⁸⁸ I say this was ironic, since the treatment she experienced was counter to the core American values of fairness and equality. As she said: “I felt as though the security personnel had singled me out because I didn’t belong, wasn’t trusted and wouldn’t be welcomed in my own country.”¹⁸⁹

Another example is Cynthia Rhouni, who was forced to remove her headscarf in front of male prison officials and male prisoners as a precondition for entering the Columbia Correctional Institution in Madison, Wisconsin, where she was taking her son to visit his father, an inmate there.¹⁹⁰ “Ms. Rhouni explained that she wears the headscarf for religious reasons and offered to remove it in the presence of a female guard,” who could ascertain that she was not using it to conceal any weapons or contraband.¹⁹¹ When prison officials still refused to accommodate Ms. Rhouni’s request, she removed her headscarf because she believed it was necessary for her son, who was having problems in school, to see his father.¹⁹² She felt humiliated and guilty because she had to enter the prison visiting area, in the presence of the male prisoners and guards, without the headscarf.¹⁹³ As she said: “I felt naked. I felt I disgraced my family and my religion.”¹⁹⁴ She sought religious counseling to come to terms with this forced violation of her beliefs.¹⁹⁵ A day after the ACLU filed a lawsuit on Ms. Rhouni’s behalf, the Wisconsin Corrections Secretary announced that he was ordering the Department’s staff to change its policies to respect the religious freedom of visitors such as Ms. Rhouni.¹⁹⁶ Her attorney said that Ms. Rhouni was “very, very pleased” to

186. *Id.*

187. *Id.*

188. *Id.*

189. ACLU Press Release, ACLU of Illinois Challenges Ethnic and Religious Bias, *supra* note 184 (quoting Samar Kaukab).

190. Press Release, ACLU, Muslim Woman Sues Prison for Forcing Her to Remove Headscarf in Front of Male Guards and Prisoners (May 25, 2005), http://www.aclu-wi.org/wisconsin/religious_liberty/20050525rhounipressrelease.shtml [hereinafter ACLU Press Release, Muslim Woman Sues Prison]; see *Muslim Woman Sues Over Head Scarf Ban*, CHI. TRIB., May 26, 2005, at 20.

191. ACLU Press Release, Muslim Woman Sues Prison, *supra* note 190.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Kevin Murphy, *Headscarves OK at Prisons*, MADISON CAP. TIMES, May 27, 2005, at 4A.

learn of this announcement, and “a little proud of herself for making a stand and having it make an impact so quickly.”¹⁹⁷

While I could cite many other examples of this pervasive problem,¹⁹⁸ I will confine myself to two more involving women from your own state of Florida. One is Dena al-Atassi, a student at the University of Central Florida, where she chairs the Florida chapter of the Muslim Students Association.¹⁹⁹ She was featured in a recent *New York Times* article about post-9/11 discrimination faced by American Muslim women.²⁰⁰ Ms. Atassi was born to a Syrian father and an American mother.²⁰¹ While she was a teenager, she spent three years in Syria.²⁰² According to the article, she thought “that veiled women showed a self-confidence lacking among American women, who seemed . . . to be trying to transform themselves into a Barbie-doll ideal.”²⁰³ In her words: “I would meet women who were not attractive by Western standards . . . and when I told them, ‘You look beautiful,’ they would say, ‘I know, thank God.’ They really believe it. The veil facilitates inner strength, a greater feeling of self-esteem.”²⁰⁴

At age sixteen, Ms. Atassi decided to begin wearing a head scarf, along with a floor-length trench coat.²⁰⁵ About a year later, she was passing through an airport for the first time after the 9/11 attacks.²⁰⁶ “[S]ecurity screeners singled her out, questioned her, and made her remove her coat.”²⁰⁷ “Feeling violated, . . . she tore off her scarf in a bathroom and wept.”²⁰⁸ She said: “I had gained such a strong relationship with God that I didn’t want to

197. *Id.*

198. See Dan Herbeck, *Muslim-Americans Held at Border Lose Suit*, BUFF. NEWS, Dec. 23, 2005, at D1; see also *Tabbaa v. Chertoff*, No. 05-CV-5825, 2005 WL 3531828 at *1 (W.D.N.Y. Dec. 22, 2005). New York Civil Liberties Union brought a lawsuit on behalf of some young American Muslim women, as well as their families, who were detained for more than six hours, frisked, photographed, and fingerprinted when returning to the United States from Canada, just because they had attended an Islamic conference in Toronto. *Id.* They were prevented from contacting attorneys, family members, or the news media to tell them about this unwarranted detention; border patrol agents even confiscated their cell phones. Press Release, ACLU, *Homeland Security Violates Civil Rights of Muslim American Citizens* (Apr. 20, 2005), <http://www.aclu.org/safefree/general/17512prs20050420.html>.

199. See MacFarquhar, *supra* note 177.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. MacFarquhar, *supra* note 177.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

do anything to distance myself from him, and I felt like I was doing just that.”²⁰⁹

The second Florida Muslim woman I want to mention is Sulthaana Freeman, of Winter Park. The ACLU represented her in challenging the state’s post-9/11 requirement that she had to remove her face veil, a niqab, to get a driver’s license.²¹⁰ Ms. Freeman, a U.S. citizen who is a stay-at-home mother of two young children, has explained her decision to wear the niqab as follows: “The niqab is part of who I am Embracing the niqab was a very personal choice, and I thank Allah for the protection it has afforded me in life, as a woman of faith.”²¹¹ Shortly after Mrs. Freeman moved to Florida from Illinois in February 2001, she had no problem getting a Florida driver’s license with a photograph in which she wore her niqab.²¹² She had previously had an Illinois driver’s license with the face veil, since Illinois is one of at least fifteen states whose driver’s license requirements explicitly exempt people with religious objections to photographs.²¹³ Likewise, courts in other states have held that drivers’ licenses must be issued to people with religious objections to the usual photographic requirements.²¹⁴ For example, some Christians believe that photographs violate the Second Commandment’s prohibition on graven images,²¹⁵ and some Native Americans believe that photographs steal their souls.²¹⁶

It was only after the 9/11 attacks that the Florida Department of Highway Safety sent Mrs. Freeman a letter telling her that she needed a full-facial

209. MacFarquhar, *supra* note 177.

210. Freeman v. Dep’t of Highway Safety & Motor Vehicles, 924 So. 2d 48 (Fla. 5th Dist. Ct. App. 2006).

211. Press Release, ACLU, ACLU Asks Florida Court to Reinstate Suspended Driver’s License of Muslim Woman Forced to Remove Her Face Veil (May 27, 2003), <http://www.aclu.org/religion/gen/16218prs20030527.html> [hereinafter ACLU Press Release, ACLU Asks Florida Court to Reinstate Suspended Driver’s License].

212. *Id.*

213. *Id.*

214. See Appellant’s Initial Brief at 3, Freeman, 924 So. 2d at 48 (No. 02-2828).

215. See Ontario Consultants on Religious Tolerance, The Ten Commandments, Implications of the Second Commandment, http://www.religioustolerance.org/chr_10cj.htm (last visited May 15, 2007); Craig W. Booth, *Second Commandment Issues—Art, Plays, Movies of Jesus (Make No Graven Images, or, Make No Idols?)*, THEFAITHFULWORD.ORG (2004), <http://www.thefaithfulword.org/secondcommandment.html>; see also Ali Eteraz, Christian Women Refuses License Pic Versus Muslim Woman Doing Same (Oct. 19, 2006), <http://eteraz.wordpress.com/2006/10/19/christian-women-refuses-license-pic-versus-muslim-woman-doing-same>.

216. See, e.g., William Bobos, *The Bleeding Edge Premiere Column: The Art of Stealing Souls*, WEDDING PHOTOGRAPHY DIRECTORY, <http://www.weddingphotographydirectory.com/wedding-photo/for-wedding-photographers/bleeding-edge-column/art-of-stealing-souls.aspx> (last visited May 15, 2007).

photograph on her driver's license.²¹⁷ When she declined, her license was revoked.²¹⁸ This was done despite the fact that she offered to submit her fingerprints, and other identifying documents, such as her birth certificate and Social Security card.²¹⁹

Florida also persisted in demanding a full-facial photograph from Mrs. Freeman, despite the fact that it had issued 800,000 temporary licenses or permits in the past five years, without any photographs at all, to individuals in various categories.²²⁰ For example, Florida issues driving permits without any photographs to convicted drunk drivers who have had their licenses revoked, to people who failed their eye exams, and to those who failed their written license exams.²²¹ These facts make it clear that Mrs. Freeman's license was revoked not because she was a security threat or unsafe driver, but only because of discriminatory stereotypes.

VIII. THE INCREASED VULNERABILITY OF IMMIGRANT WOMEN WORKERS TO ECONOMIC EXPLOITATION AND SEXUAL ABUSE RESULTING FROM THE STEPPED-UP POST-9/11 ANIMUS AGAINST IMMIGRANTS IN GENERAL

In my limited remaining time, let me comment briefly on one more of the post-9/11 issues especially affecting women: the increased vulnerability of immigrant women workers to economic exploitation and sexual abuse resulting from the stepped-up animus against immigrants in general. This is a long American tradition,²²² going back to the very first national security crisis, when we feared French influences and passed the now-discredited Alien and Sedition Act.²²³ This anti-immigrant tradition also infused the World War I era "Red Scare" atmosphere that fueled the law under which Anita Whitney was convicted, leading to Justice Brandeis's eloquent dissent that I quoted earlier.²²⁴

In that same tradition, since 9/11, immigrant women workers have been more vulnerable than ever. Protecting their rights has been a major focus of

217. Appellant's Initial Brief at 5, *Freeman*, 924 So. 2d at 48 (No. 02-2828).

218. *Id.* at 5, 7.

219. *Id.* at 11-12, 32 n.27.

220. *Id.* at 10.

221. ACLU Press Release, ACLU Asks Florida Court to Reinstate Suspended Driver's License, *supra* note 211.

222. See generally DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003).

223. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.").

224. See *supra* text accompanying notes 15-23.

the ACLU's Women's Rights Project.²²⁵ This is one of several areas where the ACLU has been able to make innovative use of the burgeoning new international human rights guarantees and forums,²²⁶ for example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,²²⁷ which went into effect in 2003, and the U.N. Special Rapporteur on Migrant Workers.

In addition to invoking these international human rights remedies, the ACLU's many other strategies for seeking broader protections for immigrant women workers include lawsuits on behalf of individual women against particular employers.²²⁸ These lawsuits seek not only to secure justice for the specific women who are plaintiffs in the cases, but also to send the general message that employers cannot exploit their immigrant women workers with impunity.²²⁹ Most recently, in the fall of 2006, a jury in New York awarded substantial compensatory and punitive damages to three Latina immigrant workers who were assaulted and sexually harassed by a Manhattan employer.²³⁰ Likewise, a couple months before that, the ACLU Women's Rights Project settled a federal lawsuit against a restaurant in New Jersey by Chinese waitresses who had been subjected to physical and emotional abuse and who had been paid only \$120 per month for nearly 300 hours of work,²³¹ which comes to only forty cents per hour.

The ACLU's Women's Rights Project highlighted this work on behalf of immigrant women workers in its latest annual report, which was dedicated to Justice Ruth Bader Ginsburg in honor of her twenty-fifth anniversary as a federal judge.²³² Justice Ginsburg has strongly encouraged this work.²³³ In

225. See generally HUBBARD, *supra* note 137.

226. See generally ACLU Human Rights Project, <http://www.aclu.org/intlhumanrights/index.html> (last visited May 15, 2007).

227. See generally INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (1990), *available at* <http://www.ohchr.org/english/law/pdf/cmw.pdf>.

228. See, e.g., Press Release, ACLU, Jury Sides with Women Workers, ACLU in Harassment Case (Sept. 29, 2006), <http://www.aclu.org/womensrights/employ/26966prs20060929.html> [hereinafter ACLU Press Release, Jury Sides with Women Workers]; Press Release, ACLU, New Jersey Chinese Restaurant Settles Waitress Exploitation Lawsuit Brought by ACLU (May 2, 2006) <http://www.aclu.org/womensrights/employ/25392prs20060502.html> [hereinafter ACLU Press Release, New Jersey Chinese Restaurant Settles Waitress Exploitation Lawsuit].

229. See, e.g., *id.*

230. ACLU Press Release, Jury Sides with Women Workers, *supra* note 228.

231. ACLU Press Release, New Jersey Chinese Restaurant Settles Waitress Exploitation Lawsuit, *supra* note 228.

232. See HUBBARD, *supra* note 137, at v.

233. See *id.*

her gracious thank-you note to her successor, the Project's current Director, Justice Ginsburg said that our immigrant working women clients are "the most vulnerable . . . women . . . too long forgotten [and] ignored."²³⁴

IX. CONCLUSION

I would like to conclude with two pertinent statements from two United States Supreme Court Justices. In the spirit of the Goodwin Lectures, I will quote the first two women to have graced the United States Supreme Court bench throughout its history, Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg.

The very first United States Supreme Court Justice to speak publicly after the 9/11 attacks was Justice O'Connor.²³⁵ Making an appearance at New York University Law School that had been scheduled before the terrorist attacks, she stressed the special role that all of us in the legal profession must play in our new post-9/11 world.²³⁶ In words that seemed prescient at the time, and that have proven to be so in the intervening years, she said that we lawyers "will help define how to maintain a fair and a just society with a strong rule of law at a time when many are more concerned with safety and . . . vengeance."²³⁷

More recently, Justice Ginsburg was being honored for her towering contributions to women's rights.²³⁸ After her opening remarks, someone in the audience asked her if people's rights are endangered by the domestic war on terrorism.²³⁹ In response, she stressed that "an active public" had made the difference in ensuring women's rights.²⁴⁰ In other words, she was saying the reduction in gender discrimination, to which she signally contributed through her pioneering litigation as the Founding Director of the ACLU's Women's Rights Project, ultimately depended on engagement by "We the People," to quote the Constitution's first three words.²⁴¹ As in all law reform movements, many initiatives come from the citizenry, including legislative

234. *Id.* at vii.

235. Linda Greenhouse, *In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

236. *See id.*

237. *Id.*

238. Gina Holland, *Ginsburg: Don't Be Apathetic About Loss of Freedom*, CAPITOL HILL BLUE, Jan. 30, 2004, http://www.capitolhillblue.com/news/publish/What_Price_Freedom_22/Ginsburg_Don_t_Be_Apathetic_About_Loss_of_Freedom_3986_printer.shtml.

239. *Id.*

240. *Id.*

241. *Id.*; *see also* U.S. CONST. pmb1.

reforms and constitutional amendments.²⁴² Moreover, even litigation victories are only meaningful if engaged members of the public are aware of, and exercise, their newly recognized rights.²⁴³

Justice Ginsburg then drew an analogy between this aspect of the women's rights movement and the current context of post-9/11 civil liberties.²⁴⁴ In her words: "On important issues, like the balance between liberty and security, if the public doesn't care, then the security side is going to outweigh the other."²⁴⁵ But "[t]hat would change," she said, "if people come forward and say we are proud to live in the USA, a land that has been more free, and we want to keep it that way."²⁴⁶

In short, to combine the wisdom of our first two female Justices, we members of the legal profession all have a special opportunity—and responsibility—to come forward, as both lawyers and citizens, to uphold the rule of law that has kept our great country both safe and free.

242. See generally ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 564 (Harvard Univ. Press 1954) (1941).

243. See *id.* at 564 ("In the long run, the public gets just as much freedom of speech as it really wants.").

244. See Holland, *supra* note 238.

245. *Id.*

246. *Id.*

HEROES, LAWYERS, AND WRITERS—A REVIEW OF TWO SCHIAVO BOOKS

LOIS SHEPHERD*

FIGHTING FOR DEAR LIFE, BY DAVID GIBBS

Can a good lawyer also be a good person? Professors of legal ethics often challenge their students with this question. After all, lawyers successfully defend child predators and have the convictions of known killers thrown out. They persuade jurors to believe plausible stories that in their hearts the lawyers know are not true. There are also times when lawyers bring honorable witnesses on the stand to tears.

David Gibbs, the lawyer who assisted the parents of Terri Schiavo from 2003 to 2005 in achieving passage of special state and federal legislation aimed at preventing the removal of her feeding tube, wants readers to know that he is not only a good lawyer—he tells us that opposing counsel, George Felos, offered him the compliment: “[I]f I ever need to get something passed by the United States Congress, I’ll know who to call.”¹—but also that he is a good person. When he was a student at Duke University School of Law, a law professor once chided him about getting too passionate about his client’s position in a mock trial exercise.² The professor said he should be able to disconnect from the process, so that if he had to, he could “go to court and argue for the other side.”³ But Gibbs tells us that he cannot do that because he has to believe he’s “on the side of truth.”⁴ In his view, God called him to try to save Terri Schiavo’s life.⁵

The fact that Gibbs sees himself as a hero in the Schiavo controversy is probably the book’s central downfall. But it is also the reason that students of the *Schiavo* case might find the book worth taking a look at because it offers an insight into the motivations of the conservative forces that propelled the *Schiavo* case forward to become the most litigated and publicized end-of-life decision-making case in the United States, and probably in the world.

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1. DAVID GIBBS WITH BOB DEMOSS, *FIGHTING FOR DEAR LIFE* 153 (2006).

2. *Id.* at 70.

3. *Id.*

4. *Id.*

5. *See id.*

The *Schiavo* case revealed a country confused and divided about essential issues involving life, death, disability, family relationships, basic human care, dignity, and choice. Within the case, there are several central and troubling questions about: 1) the certainty of medical diagnosis—a trial court had determined on the basis of expert testimony that Terri was in a permanent vegetative state while others disputed that diagnosis;⁶ 2) the rights of family members to weigh in on decisions about continuation or discontinuation of life support—Terri’s husband, Michael Schiavo, sought the removal of her feeding tube eight years after her collapse while Terri’s parents, Mary and Bob Schindler, fought its removal;⁷ 3) whether feeding tubes should be understood differently than ventilators when their removal is considered;⁸ and 4) how much weight should be given to oral, informal statements made by individuals about the kinds of existences they would find intolerable and worse than death.⁹

These and similar questions plague thoughtful judges, legislators, scholars, even—and especially—people facing their own difficult decisions regarding their own or family members’ lives, who search for, if not the “right” answers, the “better” answers.

David Gibbs stands in contrast to those who struggle with what is right and wrong. His “divine appointment”—in his own words—provides him with unwavering conviction that forces of evil were at work to remove Terri Schiavo’s feeding tube.¹⁰ There is no doubt in his mind that Terri Schiavo was conscious—he tells us she kissed her parents, cried, attempted to talk and, in fact, “jabber[ed]” at him.¹¹ His associate, Barbara Weller, came before the media in the last days of Terri’s life, following removal of her feeding tube, claiming that Terri had said “Ahhhhhhh” and then “Waaaaaaa” in answer to Weller’s plea to say she wanted to live in order to save her own life.¹² Gibbs reports that Weller told him on the phone that Terri could not say more because “[y]ou know, Terri can’t say consonants.”¹³

Gibbs is unlikely to find many new believers of this version of the Schiavo story. The overwhelming evidence from well-known neurologists who examined Terri and from health care providers who cared for her on a daily basis for over many years supported the diagnosis of permanent vegeta-

6. See GIBBS, *supra* note 1, at 26–27, 57, 59–66, 129–30.

7. See *id.* at 56–58, 93, 144–46.

8. See *id.* at 105, 239–40.

9. See *id.* at 108–112.

10. *Id.* at 37–38.

11. GIBBS, *supra* note 1, at 22–23, 26.

12. *Id.* at 124–26

13. *Id.* at 125.

tive state; ultimately, her autopsy results were also consistent with that diagnosis.¹⁴ Even if his claim at the beginning of the book that Terri “recognized people, enjoyed the company of her family and struggled to communicate”¹⁵ might catch any reader’s attention—for it is true that only a few people actually got to spend time with her and observe her condition for themselves—his credibility is quickly lost as he reveals his bias about other issues.

One easily uncovered misrepresentation, for example, is his assertion that Michael Schiavo took advantage of a law passed by the Florida legislature in 1997 that made it possible to remove artificial nutrition and hydration.¹⁶ Without passage of such a law, he implies, Terri’s feeding tube would have remained in place.¹⁷ He tells us to “[k]eep in mind that Terri seemed to be the ‘test case’ for this new law . . . George Felos used it for the first time at [Michael’s trial in] 2000 to allow the court to condemn Terri to death.”¹⁸ In fact, in 1990, in the well-known *In re Browning*¹⁹ case, the Supreme Court of Florida established the right to refuse artificial nutrition and hydration.²⁰ At that time, the court’s opinion acknowledged the already existing consensus among courts nationwide on this issue, recognizing that “[c]ourts overwhelmingly have held that a person may refuse or remove artificial life-support, whether supplying oxygen by a mechanical respirator or supplying food and water through a feeding tube.”²¹

As a lawyer involved in the *Schiavo* case, Gibbs has to know the *Browning* case backwards and forwards—yet he repeatedly misrepresents the law of Florida and, more generally, the law throughout the nation. Readers cannot know for sure what he saw in Terri’s hospital room or what transpired in conversations that Gibbs was privy to. However, we can read the *Browning* case and the *Florida Statutes* to check his descriptions of them. When a lawyer is bold as to misrepresent the law, he is clearly not trying to convince certain readers. His audience is narrow. He’s preaching, as they say, to the choir (and he does preach in the last twenty pages or so—just outright preaching, complete with Bible verse).

14. See *id.* at 20–24, 191–99. For an unbiased and accurate rendering of the facts of the Schiavo controversy, see WILLIAM H. COLBY, UNPLUGGED: RECLAIMING OUR RIGHT TO DIE IN AMERICA (2006), which is also reviewed in this article. Colby discusses the evidence of Terri’s medical condition on pages 14-25 and 47-53.

15. GIBBS, *supra* note 1, at 26.

16. *Id.* at 42.

17. See *id.*

18. *Id.*

19. 568 So. 2d 4 (Fla. 1990).

20. *Id.* at 11–12 (recognizing state constitutional rights to refuse medical treatment on behalf of incompetent patients).

21. *Id.*

But as I said above, there's something to the Gibbs book that is of interest to a greater circle of readers. It is this "hero thing." The most telling part of the book is not in the slanting of facts, the innuendos about the wrongdoing of others, or even in his claim to altruism.²² (For example, Gibbs deliberately gives the impression that his law firm represented the Schindlers for no legal fee. This statement is disputed by Jon Eisenberg's book, which includes a tax return showing contributions to the Gibbs Law Firm of almost two million dollars during 2003 from the Christian Law Association.²³ Eisenburg ties the contributions to representation in the *Schiavo* case.)²⁴

Below is an excerpt from the passage that I find most incredible and most revealing. It is not enough for Gibbs to be a crusader; in order to be a true hero, he must be threatened by actual physical harm as he stands up for what is right. At this point in the book, he describes—with the moment-by-moment drama more often found in a "B" suspense novel—a courtroom drama scene in which a law enforcement officer approached his table before proceedings began, for reasons then unknown to Gibbs:

The officer appeared at my side. He placed his left hand on the table, palm down, and then leaned in close as if preparing to offer an insider stock tip. He cleared his throat. In a low, commanding tone he spoke three words.

"Don't turn around."

"Excuse me?" I said, matching his muted voice.

I noticed his eyes were focused somewhere over my shoulder on an unseen point of interest behind me. "Mr. Gibbs, I need to ask you to avoid making any sudden moves that would draw attention to us. Do you understand?"²⁵

Following that, we get the play-by-play of Gibbs's learning that a suspicious man had entered the courtroom, was sitting in the last row, and appeared focused on his every move.²⁶ Gibbs describes entering a reverie of sorts, wondering if his wife and children had come to court to watch him—were they safe?²⁷ (They hadn't actually come.) He tells us, "Suddenly, I found myself fighting not only for Terri's life, but potentially for the lives of

22. See generally, GIBBS, *supra* note 1. Gibbs wonders whether Michael abused Terri, eventually resulting in her collapse. *Id.* at 196.

23. JON B. EISENBERG, USING TERRI: THE RELIGIOUS RIGHT'S CONSPIRACY TO TAKE AWAY OUR RIGHTS 235 (2005).

24. *Id.* at 103–04 (disputing Gibbs's statements to the media that he received nothing for work on the *Schiavo* case).

25. GIBBS, *supra* note 1, at 85.

26. *Id.* at 86.

27. *Id.* at 87.

those around me.”²⁸ While the scene is drawn out over a good five pages, it turns out that the man dressed too warmly for Florida in a heavy, black trench coat does nothing at all to threaten anyone.²⁹ But Gibbs credits “the presence of the marshals and the power of prayer” for an afternoon in the courtroom that passes without incident.³⁰

In light of the many *actual* death threats received by Judge George Greer, who presided over the trial court proceedings relating to the feeding tube’s removal,³¹ the passage is almost bizarre. In these later stages of the courtroom battle over Terri Schiavo, Judge Greer was under the protection of bodyguards.³² As bizarre as Gibbs’s retelling of this part of the story is, it reveals something important about the perspectives and motivations of the people who sought or participated in achieving extraordinary special legislation to try to prevent removal of Terri’s feeding tube.

In March 2005, over Palm Sunday weekend, the United States Senate and House of Representatives passed a bill to allow the Schindlers to seek federal review of the *Schiavo* case.³³ An earlier attempt on the part of House committees to stop removal of Terri’s feeding tube through the issuance of subpoenas for her testimony had failed when Judge Greer refused to allow the subpoenas to unseat his order for discontinuance of artificial nutrition and hydration.³⁴ When it became clear that the congressional subpoenas had failed and Terri’s feeding tube was removed, the Schindlers’ bill was pushed forward.³⁵ While many congressional representatives had already left town for the Easter break, many returned to cast their vote.³⁶ President George W. Bush cut short a vacation in Crawford, Texas to return to Washington so that he could sign the bill immediately after it passed—which, because of rules of Congress, could not occur until a little after midnight on Sunday.³⁷ The tactic ultimately failed when the federal court refused to order the reinsertion of Terri’s feeding tube because it determined that the Schindlers were unlikely to succeed on the merits of their claim that Terri’s case had received inadequate process in the state courts.³⁸

28. *Id.*

29. *Id.* at 88.

30. GIBBS, *supra* note 1, at 88.

31. See David Sommer & Adam Emerson, *Judge Greer Evokes Admiration, Anger*, TAMPA TRIB., Mar. 27, 2005, at 1.

32. *Id.*

33. See COLBY, *supra* note 14, at 37–41.

34. *Id.* at 38–39.

35. *Id.* at 39.

36. *Id.*

37. *Id.* at 39–40.

38. COLBY, *supra* note 14, at 40–41.

Conservative legislators would later take some heat for their involvement in a single individual's case over the question of life support.³⁹ Surveys of the American public revealed that a majority of Americans did not approve of the federal government's actions in the case.⁴⁰ According to one CBS News poll conducted in March 2005, 82% of those surveyed believed that Congress and President Bush should stay out of the Terri Schiavo dispute.⁴¹ Bill Frist, then majority leader in the Senate and also a Harvard-educated doctor, may have ruined his chances of a run for the White House in 2008 in part because of his diagnosis of Terri Schiavo on the floor of the Senate, for which he was widely criticized.⁴²

Did Republican politicians simply miscalculate the political gain to be made from championing Terri's "right to life?" At the time, people generally perceived that political motivation drove the congressional and executive actions. A CBS News poll asked Americans about the motivations of Congress in passing the bill to require federal review of the case; 74% thought the bill was passed to advance a political agenda.⁴³ Only 13% indicated that they believed Congress really cared about what happened in the case.⁴⁴ There was some evidence to support this view, most prominently a "smoking gun" memo that was eventually traced to personnel in Senator Mel Martinez's office.⁴⁵ That memo identified the *Schiavo* case as one that will have the "pro-life base . . . excited that the Senate is debating this important issue" and is a "great political issue" that "is a tough issue for Democrats."⁴⁶

Gibbs sees the motivations differently. He thinks that rather than pursuing political agendas (and miscalculating), conservative political leaders *sacrificed* their political ambitions in order to do what was right:

Having spoken with so many of the legislators myself—both Democrat and Republican—during the heat of the floor debate, I could tell this was one of those decisions where political ambi-

39. See, e.g., David Espo, *Frist Abandons '08 Presidential Bid*, DAILY BREEZE, Nov. 30, 2006, at A7.

40. *Poll: Keep Feeding Tube Out*, CBS NEWS.COM, Mar. 23, 2005, <http://www.cbsnews.com/stories/2005/03/23/opinion/polls/main682674.shtml>.

41. *Id.*

42. See Spencer S. Hsu & Hamil R. Harris, *Schiavo Vote Tied to Law, Religion*, WASH. POST, Mar. 24, 2005, at B01; see also Espo, *supra* note 39.

43. *Political Fallout over Schiavo*, CBS NEWS.COM, Mar. 23, 2005, <http://www.cbsnews.com/stories/2005/03/23/politics/main682619.shtml>.

44. *Id.*

45. EISENBERG, *supra* note 23, at app. fig. 4.

46. *Id.*

tions, in most cases, took a back seat to trying to do the right thing just because it was the right thing.⁴⁷

Gibbs's own portrayal of himself as heroic crusader for Terri's life, willing to work for free, (but not really) a potential target for delusional, angry protestors, (again, not really) and divinely appointed, (really?) makes this reader wonder if Gibbs is not right about the motivations of at least some of the political leaders he worked with in the Schiavo matter. Perhaps politicians were not just motivated by potential political gain when they jumped into the fray of the *Schiavo* case. Could a portion of them have been seeking redemption rather than votes? More importantly, which is more dangerous?

UNPLUGGED: RECLAIMING OUR RIGHT TO DIE IN AMERICA, BY WILLIAM H. COLBY

Attorney William Colby, the author of *Unplugged*, argued before the United States Supreme Court on behalf of Nancy Cruzan's right to die in the famous 1990 case that is often credited with establishing a constitutional right to refuse life-sustaining treatment.⁴⁸ He writes an entirely different kind of book than Gibbs. The difference goes deeper than the fact that Colby was not involved in the *Schiavo* case and, therefore, is more objective than Gibbs. The difference also goes deeper than the fact that in *Cruzan v. Missouri Department of Health*,⁴⁹ Colby represented "the other side," arguing in favor of the removal of a feeding tube from a patient in a permanent vegetative state.⁵⁰

The great difference, to Colby's credit, is that in *Unplugged*, Colby recognizes the difficulty of knowing—as individuals and as a society—what is the right thing to do in these kinds of cases. At the very beginning of the book, he tells readers that when television producers, in preparation for his appearances as an expert in the *Schiavo* case, asked him, "Which side are you on?" He answered, to their perplexity, "Neither."⁵¹ Moreover, he tells us that he has been on both sides of these kinds of disputes. Some of the

47. GIBBS, *supra* note 1, at 157.

48. *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990).

49. *Id.*

50. For an example of the kind of excellent writing that an attorney in an end-of-life dispute can produce, readers should take a look at WILLIAM H. COLBY, *LONG GOODBYE: THE DEATHS OF NANCY CRUZAN* (2002). It is riveting, dramatic, and accessible—while at the same time, informative and probing of the ethical and legal issues involved in these kinds of cases.

51. COLBY, *supra* note 14, at 3.

families he has represented have sought removal of treatment, while others have fought to keep it in place when medical professionals thought it futile.⁵²

Gibbs actually figures briefly in the book, in an episode that highlights the difference between these two lawyers and writers. Colby tells us about a last-ditch federal court hearing that took place about a week after the third and final removal of Terri Schiavo's feeding tube:

When the Schindlers' lawyer, David Gibbs, who is also the President of the Christian Law Association, called Michael Schiavo a "murderer," Judge Whitemore cut him off. "That's the emotional aspect of this case, and the rhetoric that does not influence this court. We have to follow the rule of law and that's what will be applied," said the judge.⁵³

Colby lets the exchange speak for itself.

This, to a large extent, is Colby's way in *Unplugged*. He provides interesting detail, keeps the narrative lively, but is also accurate in his very useful presentation of the facts of the *Schiavo* case, especially its complicated legal history. Taking readers through that legal history is not an easy task. Between the time of Terri Schiavo's collapse and the removal of her feeding tube, fifteen years elapsed. Except for the first two years, the remainder of that time involved some sort of legal dispute, including the medical malpractice case that Michael Schiavo brought against Terri's doctors for failing to diagnose the condition that led to her cardiac arrest⁵⁴ (which a jury determined was bulimia, even though there was neither definitive physical proof that Terri was bulimic nor had anyone ever witnessed her engaging in the binge and purge cycle of bulimics); various attempts on the part of the Terri's parents, Mary and Robert Schindler, to remove Michael as guardian for Terri;⁵⁵ and most importantly, Michael Schiavo's petition to remove Terri's feeding tube, and all of the subsequent legal repercussions of that successful petition.⁵⁶ The case went to the Florida District Court of Appeals four different times,⁵⁷ and the Supreme Court of Florida ultimately struck down as unconstitutional the statute known as "Terri's Law," the special Florida legislation allowing Governor Bush to order the reinsertion of her

52. *Id.* at 4.

53. *Id.* at 43.

54. *Id.* at 49.

55. *Id.* at 14.

56. COLBY, *supra* note 14, at 4.

57. *Id.* at 31.

feeding tube.⁵⁸ The federal courts were eventually called in by special federal legislation, but swiftly got back out.⁵⁹

Colby explains this history in clear, objective terms, and is brief enough, leaving room to discuss some of the issues of the case, but is not so scaled back that readers feel uninformed about the legal mechanics of what went on. The book then discusses the technological advances that have brought us to the ethical and legal uncertainty in which we now live, and will likely face as we or our family members die. Here he provides useful historical details—how the living will was born from a law review article,⁶⁰ how the criteria for diagnosing brain death emerged from the needs of human organ transplantation,⁶¹ and how the condition of permanent vegetative state is a result of “almost successful technology”, in the words of one doctor, because the patient’s breathing is restored, but the damaged brain cannot be healed.⁶² Colby is at his best in these explanations, as he successfully weaves together cultural history, personalities, and medical advances to reveal how we got to where we are, which he sums up neatly, stating: “[T]he time of nature taking its course for the seriously ill in America is over.”⁶³

For most readers, *Unplugged* will hit the right balance between description and analysis. Especially for those readers unfamiliar with the rich literature on end-of-life decision-making, the book will educate and challenge their thinking about the issues in the *Schiavo* case and other end-of-life controversies, like physician-assisted suicide. For scholars in the field, the book is somewhat less captivating, but still useful. Colby does not offer much in terms of in-depth analysis or new insights for the future direction of end-of-life law, ethics, or practice. His primary recommendation for individuals is that they talk to their family members about what they want. His primary recommendation for society is that we continue talking through these issues. He does champion the hospice movement, but then, it’s hard not to.

Yet, Colby does have a gift for pointing out or recalling details that even those of us in the field should ponder more closely—such as the fact that “[t]he public never saw a [photograph] of Karen Ann Quinlan after her accident.”⁶⁴ Instead, the public saw—and we still see today when the case is discussed—her black and white high school yearbook photo.⁶⁵ Sketch artists

58. *Id.* at 36–37.

59. *Id.* at 39–41.

60. *Id.* at 81.

61. See COLBY, *supra* note 14, at 74.

62. See *id.* at 66.

63. *Id.* at 103.

64. *Id.* at 71.

65. *Id.*

for newspapers at the time drew her as a “Sleeping Beauty.”⁶⁶ In contrast, when the public saw pictures of Nancy Cruzan and Terri Schiavo, they saw the young women *after* their vegetative state had persisted for several years. It was only then that the public could truly begin to grapple with what the condition meant. To me, the reminder of this part of Karen’s story makes me think about the significance of the face in human relationships and wonder what more we might learn about it.

Colby also brings up the issue of hand-feeding and whether it might be rejected on the basis of autonomy.⁶⁷ For example, what should caregivers do if someone’s living will states that, in the event of advanced dementia, caregivers are not to “place food or water in my mouth. Instead, place it on my bed table. If I feed myself, I live another day; if I do not, I will die and that is fine?”⁶⁸ The issue of hand-feeding is ripe for serious consideration, not only for what it might reveal about patients’ rights to reject hand-feeding, but what it might reveal about tube feeding as well. Again, Colby does not tackle these issues because that is not the book’s aim; but he does raise them.

Generally, the book is a highly readable, informative distillation of the history and current status of end-of-life law and ethics, with a sharp eye on where the issues remain thorny and unresolved. Moreover, the book is compassionate. Colby writes with clear awareness of the anguish health care providers and families experience when faced with decisions at the end of life. Colby is no hero trying to ride in with all the answers, but he is a good lawyer and a good writer. It is those qualities that make this volume one well worth reading.

66. COLBY, *supra* note 14, at 71.

67. *Id.* at 135.

68. William A. Hensel, *My Living Will: A Piece of My Mind*, 275(8) JAMA 588 (1996). In justifying his reasoning, Colby quotes Dr. William Hensel’s essay. COLBY, *supra* note 14, at 133.

HURRICANE KATRINA AND COLLECTIVE IDENTITY: SEEING THROUGH A “HER-STORICAL LENS”

DELESO ALFORD WASHINGTON*

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THE HURRICANE THIS TIME¹

She-

She was named, by those who do not see;
The counterclockwise motion of shout and dance-
the release of all that ails both you and me.

She-

She was blamed for her power and might;
Swelled up from generations living in despair-
Over-flowing with no evidence of planning or insight.

She-

She was gendered by the historical design of many,
Marginalized in an Utopian “color-blind” society
Starving for an intersectional existence in the so-called land of plenty.

* J.D., Southern University Law Center, Baton Rouge, LA; LL.M., Georgetown University Law Center, Washington, D.C. This article is written in memory of my grandmother Queen Ann Terry and dedicated to the life and journey of Ms. Milvirtha Hendricks amongst the countless other stories of forced movement—both during and after Hurricane Katrina—that were not televised. I would like to thank the administration, faculty, staff and my first year class (Sections C and F) at Barry University School of Law for their support and encouragement. I would also like to thank my research assistant Nicole V. Johnson for her work ethic. I am grateful for the opportunity to have served on the panel entitled, *Hurricane Katrina: What Have We Learnt?* alongside Olympia Duhart and Rachel Van Cleave at the 2006 Society of American Law Teachers (SALT) Conference. Special thanks to Reginald Oh and Arthur Lee Harris, Esq. for their insightful comments; the *Nova Law Review* editorial board for their support; and my family for their patience.

1. An original, previously unpublished poem written by the author.

She-

She was called the culprit who wreaked havoc on land to both property and man,

But the water rose and then the levee broke—

Now who will STAND?

Stand

Stand in the shadow of righteousness

Stand UP

Stand UP;

Swell

Swell with the power of purpose

Swell UP

Swell UP;

Rise

Rise above the walls of silence

Rise UP

Rise UP;

STAND, SWELL and RISE with the

SPIRIT of our ancestors blowing

in the hurricane winds . . . THIS TIME

I. INTRODUCTION

As a native of Louisiana, born and raised in Shreveport, I attended college and law school in Baton Rouge. I, like so many others, experienced Hurricane Katrina through the radio and news media. I watched in utter disbelief as the New Orleans Convention Center and the Superdome (home of the “Bayou Classic,” the rival football game between my alma mater, the Southern University Jaguars and my husband’s alma mater, the Grambling State University Tigers)² became overcrowded with people once again—not attending a football game this time, but being watched nonetheless, as they engaged in a struggle to survive amongst chaos, confusion, and despair.

New Orleans is the home of my family members, friends, and associates. It is the bed of Louisiana culture. I knew that New Orleans was located below sea level and the levees were built to prevent that which occurred— heavy flooding resulting in the loss of lives and property. I knew about the construction of New Orleans’ man-made levees as well as the possibility of

2. State Farm Bayou Classic, The History of the Bayou Classic, http://www.statefarmbayouclassic.com/history_theevent.shtml (last visited June 14, 2007).

watching the hand of God through natural acts of heavy thunderstorms, floods, and hurricanes. However, as I watched the faces of the people, those very familiar faces who looked a lot like myself, my mother, my father, my brother, my sister, my grandmother, my grandfather, my uncle, my aunts, my cousins, my husband, and my children, I was overcome with chaos, confusion, and despair of a secondary nature (the helpless television-watching kind). I called my uncle living in New Orleans—only to be relieved for him to answer the phone and assure me that he was packing his car to leave New Orleans and join his wife in Lake Charles to “wait the storm out.” And then I remembered a saying that I heard often when loved ones were departing from one another. One person would say, “Alright, see you later,” and the response would be “Alright . . . if the creek don’t rise and the levee don’t break.” Hearing this parting gesture as a child, I was often confused because growing up in “North” Louisiana, I did not fully realize the constant threat that my beloved New Orleans lived under, or more precisely, lived with. But the elders knew, and it had become ingrained in their memory through experience and sustained in the oral tradition through expression. It is my belief that the “saying,” based on past knowledge, was more of a question of “when” it would happen and not “if” it was possible.

In this article, I will address the disaster of Hurricane Katrina from a Critical Race Feminist³ perspective by exploring collective identity.⁴ I will suggest a critical analysis of Hurricane Katrina that requires the use of a “her-storical lens”⁵ in order to see “who” and “what” the print and news media disseminated to the public during its onslaught when “[t]he past [came]

3. See Deleso Alford Washington, “*Every Shut Eye, Ain’t Sleep*”: Exploring the Impact of Crack Cocaine Sentencing and the Illusion of Reproductive Rights for Black Women from a Critical Race Feminist Perspective, 13 AM. U. J. GENDER SOC. POL’Y & L. 123, 126–27 (2005).

[A] Critical Race Feminist Perspective is definitive, yet expansive. It is definitive in that its genesis is rooted in critical legal studies and critical race theory The expansiveness of CRF is evidenced by the utilization of critical race theorists’ technique of storytelling and narrative analysis to construct alternative social realities.

Id. (internal quotations omitted); see also Darren Lenard Hutchinson, *Foreword: Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1207 (2004) (noting that “[s]everal Critical Race Theorists have utilized narratives in their research, personal or otherwise, and have urged legal theorists to incorporate narrative as a legitimate methodological tool”); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., 1995); Richard Delgado, *Critical Legal Studies and the Realities of Race: Does the Fundamental Contradiction Have a Corollary?* 23 HARV. C.R.-C.L. REV. 407 (1988).

4. See *infra* Part III.

5. See Washington, *supra* note 3, at 128 (explaining that “[t]he ‘her-storical’ lens enhances one’s ability to see a continuum of race, class, and gender abuse from the past to the present”).

back,”⁶ as it did in what is commonly referred to as the Great Flood of 1927.⁷ Another example of a recurring “past” lies in the African American particularized experience during the legally sanctioned U.S. slavery regime.⁸ This resulted in the dismantling of families and the ultimate search to reunite with loved ones post-Civil War, as seen again during the aftermath of Hurricane Katrina.⁹ The familiar parting gesture mentioned earlier suggests a desire to see one another again, but realistically acknowledges that the desire is dependent upon circumstances of natural and man-made¹⁰ barricades, which exemplify yet another saying post-Hurricane Katrina—“Past as Prologue.”¹¹

6. *The Past Comes Back*, in *KATRINA: WHY IT BECAME A MAN-MADE DISASTER; WHERE IT COULD HAPPEN NEXT* 72 (National Geographic special ed.) (Chris Johns ed., 2005) (referencing the “Great Flood of 1927 [heralded as] [o]ne of the worst natural disasters in U.S. history . . . likely [to have] killed more than a thousand people, cost hundreds of millions of dollars in damages, and displaced almost a million people—nearly one percent of the population”). History documents that:

[s]ome of the destruction during the flood was man-made. Hoping to divert water from New Orleans, engineers dynamited a hole in a levee The resulting gush of water invaded marshlands below the city, displacing 10,000 people A human flood followed the one caused by nature. African Americans began to migrate northward, never to return south.

Id. at 72. See generally JOHN M. BARRY, *RIISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA* (1997); Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 *DEPAUL L. REV.* 251, 270 (2003) (asserting that the great flood of 1927 “led to a landmark piece of legislation, the 1928 Flood Control Act”).

7. Friedman & Thompson, *supra* note 6, at 269; see also MICHAEL ERIC DYSON, *Great Migrations? in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 75 (David Dante Troutt ed., 2006) [hereinafter DYSON, *Great Migrations?*].

8. See generally DYSON, *Great Migrations? supra* note 7, at 75; Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803–1865*, 24 *S.U. L. REV.* 145 (1997) (detailing the status of enslaved Africans in Louisiana); Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 *CAL. L. REV.* 907 (2006) (reviewing MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003)) [hereinafter Harris, *Whitewashing Race*].

9. *KATRINA: STORIES OF RESCUE, RECOVERY AND REBUILDING IN THE EYE OF THE STORM* 80–84 (Susan M. Moyer ed., 2005) (detailing the desperation of family members attempting to locate each other post Hurricane Katrina—with the repeated question on missing evacuees website being “Where are you?”).

10. John P. Manard, Jr., et al., *Katrina’s Tort Litigation: An Imperfect Storm*, 20 *NAT. RESOURCES & ENV’T* 31, 31 (2006) (quoting Pennsylvania Governor Gifford Pinchot’s declaration regarding the Great Flood of 1927, that “[t]his isn’t a natural disaster. It’s a man-made disaster,” referring to the Army Corps of Engineers, who had overall responsibility with respect to the flood protection system’s flawed river control policies).

11. See Symposium, *Through the Eye of Katrina: The Past as Prologue?* Univ. of S. Ala., Dep’t of History, <http://www.southalabama.edu/history/katrina>; Lower Ninth Ward Neighborhood Snapshot, Greater New Orleans Community Data Center,

II. HURRICANE KATRINA AND GEOGRAPHY

The Hurricane Katrina narrative will be recorded in history as one of America's greatest televised natural tragedies. According to Critical Race Feminist scholar, Adrien K. Wing, "narratives aid in exposing the reality of racism and validate the experiences of people of color."¹² As Professor L. Darnell Weeden put it, "the news media [gave] us information and insight into the tragedies behind Katrina during the critical first week of this disaster by personifying an American failure."¹³ We, the public, the listening, watching, helping, praying, sitting, and vicariously experiencing audience, bore witness to the Hurricane Katrina narrative culminating into a "barrage of images in newspapers and on television [that] tested the nation's collective sense of reality"¹⁴ to identify with the characters in the narrative as victims. Despite this fact, during the wake of Hurricane Katrina, the news media ascribed a refugee's identity to the victims and thereby exercised its power to control the level of connection that the viewing public could have with the evacuees.¹⁵

Michael Eric Dyson vividly describes the Hurricane Katrina narrative as follows:

<http://gnocdc.org/orleans/8/22/snapshot.html> (last visited June 14, 2007) (Another example of the "Past as Prologue" can be seen in September of 1965 when Hurricane Betsey struck New Orleans leaving eighty percent of the Lower Ninth Ward district under water.). See generally IVOR VAN HEERDEN & MIKE BRYAN, *THE STORM: WHAT WENT WRONG AND WHY DURING HURRICANE KATRINA* (2006).

12. See Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gangs and Critical Race Feminism*, 11 *LA RAZA* L.J. 1, 3 (1999) (explaining that "[c]ritical race feminism draws from critical legal studies the idea of deconstruction along with the critical analysis of the traditional legal canon").

13. L. Darnell Weeden, *Hurricane Katrina: First Amendment Censorship and the News Media*, 31 *T. MARSHALL L. REV.* 479, 480 (2006). This article provides a critical examination of the role of the news media during Hurricane Katrina. *Id.*

14. MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER 1* (2006) [hereinafter DYSON, *COME HELL OR HIGH WATER*]; Kathleen A. Bergin, *Witness*, 31 *T. MARSHALL L. REV.* 531, 535 (2006) (providing an eyewitness essay which concludes that "race, sex, and class played a role in the government's failure to adequately predict, prevent, and respond to this risk of sexualized violence during Katrina").

15. DYSON, *COME HELL OR HIGH WATER*, *supra* note 14, at 176 (suggesting that the media's act of framing the evacuees at first as refugees caused denunciations by black leaders because it seemed to deny that black folk were citizens of the nation); see ADRIEN KATHERINE WING, *From Wrongs to Rights: Hurricane Katrina from a Global Prospective*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 134 (David Dante Trout ed., 2006) (explaining that under international law the evacuees were erroneously referred to as refugees because they did not flee outside their national boundaries). Professor Wing cautions that the proper designation of the evacuees as "internally displaced persons" is important since it has implications for what laws might apply. *Id.*

[M]en and women wading chest-deep in water—when they weren't floating or drowning in the toxic whirlpool the streets of New Orleans had become. When the waters subsided, there were dead bodies strewn on curbsides and wrapped in blankets by fellow sufferers, who provided the perished their only dignity. There were unseemly collages of people silently dying from hunger and thirst—and of folk writhing in pain, or quickly collapsing under the weight of missed medicine for diabetes, high blood pressure, or heart trouble. Photo snaps and film shots captured legions of men and women huddling in groups or hugging corners, crying in wild-eyed desperation for help, for any help, from somebody, anybody, who would listen to their unanswered pleas.¹⁶

It is without a doubt that the print and televised news media played an integral role in shaping the public sentiment as to the known and unknown “geography” of New Orleans.¹⁷ John P. Manard, Jr. et al. succinctly provide context for the physical geography of New Orleans:

Much of New Orleans sits below sea level. It is bounded on the south by the Mississippi River and on the north by Lake Pontchartrain. To the east is marshland and then the Gulf of Mexico. Running in a north/south direction from the river to the lake, separating New Orleans into eastern and western sections, is the Industrial Canal. The eastern portion of the city is surrounded by two sets of levees and floodwalls (a northern area and a southern area), while the western part of the city is surrounded by a separate set of levees and floodwalls. A “floodwall” in this context is generally what would appear to a layman as a levee, topped with a concrete wall, several feet tall. The concrete wall is poured on top of metal sheet piling that is driven into the ground through the center of the underlying levee. Radiating out to the east from the Industrial Canal are two navigational waterways, the Intracoastal Waterway (separates eastern New Orleans into northern and southern sections) and the Mississippi River Gulf Outlet. Thus, there were three separate leveed pockets. Each flooded for a separate reason.¹⁸

The aforementioned geographical description of New Orleans is limited to the confinements of a traditional understanding of geography in terms of

16. DYSON, COME HELL OR HIGH WATER, *supra* note 14, at 1.

17. See, e.g., Weeden, *supra* note 13, at 479–80 (detailing an “incredible symbol of neglect” in the circumstances involving the death of ninety-one year-old, wheelchair bound, Mrs. Ethel Mayo Freeman whose “lifeless body stayed in [the] wheelchair at the New Orleans Convention Center for almost four days”).

18. Manard, Jr. et al., *supra* note 10, at 34.

locale. However, Critical Race Theory scholar, Reginald Oh, extends the notion of geography “[t]o examine and deconstruct the ‘spaces and places’ of a narrative” into a two-part inquiry: “First, a critical analysis examine[s] the geographic scale or setting of a narrative.”¹⁹ Oh suggests that this inquiry poses the two questions: “[W]here does the story take place? . . . [W]here else could [the story] have taken place?”²⁰ Secondly, Oh proposes that “a critical analysis could examine the movement of people within the spaces . . . in which the narrative unfolds.”²¹ According to Oh, the second inquiry focuses upon an understanding of the geographic significance of where people are located because “people’s location at any given time and place can help to disrupt and deconstruct the plot of a legal narrative.”²² This inquiry essentially asks in-depth questions about the “characters,” such as: Where are they from? “Where are they now? How did they get from there to here?”²³

In an effort to critically examine the Hurricane Katrina narrative and its geography through the utilization of Oh’s two-prong query, it should be taken into account that the selected narratives of Hurricane Katrina disseminated by the print and news media served not only as attempts to tell the story presented as seen by the news reporter/photographer/syndicated writer/commentator, etc., but also invariably unpacked a historical legacy of “how power operates through and in spaces and places.”²⁴ For instance, by critically examining the space that was heavily populated with black people in New Orleans’ Lower Ninth Ward, referred to as the “Lower Nine,”²⁵ with the degree of devastation sustained both pre- and post-Hurricane Katrina, the reality of the connection between geographical location and race is significant. The truth behind the post-Hurricane Katrina mantra echoed by the people most affected, “It’s the levees stupid”²⁶ sheds an undeniable light on the

19. Reginald Oh, *Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305, 1316 (2004).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Oh, *supra* note 19, at 1315–16.

25. David Dante Troutt, *Many Thousands Gone, Again*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 1, 12 (David Dante Troutt ed. 2006). Troutt categorizes the Lower Ninth as being symptomatic of the geographical isolation on which concentrated poverty feeds. *See id.*

26. Interview with Mitchell F. Crusto, Professor of Law, Loyola University (New Orleans) (Jan. 3, 2007) (interview conducted during the Association of American Law Schools (AALS) 2007 Annual Meeting). For a visual depiction of the mantra, see <http://www.levees.org/downloads/commission.pdf> (man holding a placard with the words, “It’s the levees stupid”).

man-made quality of the disaster. On July 10, 2006, the U.S. Army Corps of Engineers²⁷ issued a nine-volume draft report consisting of 6,113 pages to Congress which acknowledges that “the levees it built had flaws in their design, construction and maintenance of the 350-mile levee system.”²⁸

The greatest impact of the “flaws” by the Army Corp of Engineers fall squarely within an intersecting geographical location of “spaces and places” which is overwhelmingly raced.²⁹ According to Mollyann Brodie, Vice President of Public Opinion and Media Research for the Kaiser Family Foundation,³⁰ “[w]hites were hit hard, too, but blacks were disproportionately living in areas that were most flooded And even before Katrina hit, there were gaps between blacks and whites.”³¹ Democratic Party Chairman, Howard Dean, called for the nation to confront the ““ugly truth that

27. See *History of the Lake Pontchartrain and Vicinity Hurricane Protection Project*, Testimony Before the S. Comm. on Env't & Pub. Works, 109th Cong. (2006) (statement of Ann Mittal, Dir. Natural Res. & Env't, GAO) Mittal stated in part, the purpose and history of the Lake Pontchartrain and Vicinity Flood Control Project:

Congress first authorized construction of the Lake Pontchartrain and Vicinity, Louisiana Hurricane Project in the Flood Control Act of 1965 to provide hurricane protection to areas around the lake in the parishes of Orleans, Jefferson, St. Bernard, and St. Charles. Although federally authorized, it was a joint federal, state, and local effort with the federal government paying 70 percent of the costs and the state and local interests paying 30 percent. The Corps was responsible for project design and construction and local interests were responsible for maintenance of levees and flood controls.

Id.

28. Diane Grassi, *New Orleans Remains Problematic for Army Corp of Engineers*, MICHNEWS.COM, July 20, 2006, http://www.michnews.com/artman/publish/article_13493.shtml; Jeremy Caplan, *Katrina Mea Culpa*, TIME.COM, June 4, 2006, <http://www.time.com/printout/0,8816,1200756,00.html>; John Schwartz, *Army Corps Admits Flaw in New Orleans Levees*, N.Y. TIMES, June 1, 2006.

29. See, e.g., Peter Whoriskey, *Katrina Hit Blacks Harder Than Whites, Study Finds*, WASH. POST, May 10, 2007, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/09/AR2007050902556.html>.

30. See generally, Giving Voice to the People of New Orleans: The Kaiser Post-Katrina Baseline Survey, <http://www.kff.org/kaiserpolls/pomr051007pkg.cfm> (last visited June 14, 2007). The Kaiser Family Foundation study was conducted by:

a team of 41 interviewers [who] visited 456 randomly selected census areas, documented the physical condition of nearly 17,000 housing locations and completed interviews with 1,504 randomly chosen adults living in the four parishes between September and November 2006. The survey's margin of sampling error is plus or minus four percentage points.

Id.

31. Whoriskey, *supra* note 29 (quoting Mollyann Brodie, Vice President of Public Opinion and Media Research, Kaiser Family Foundation); see also Michael Grunwald & Susan B. Glasser, WASH. POST, Sept. 21, 2005, at A01, available at <http://levees.org/research/sources/Washingtonpost1.htm> (noting that engineers at Louisiana State University's Hurricane Center agree that 'Katrina's initial surge from the southeast overwhelmed floodwalls along the New Orleans Industrial Canal, flooding the city's Lower Ninth Ward as well as St. Bernard Parish).

skin color, age, and economics played a deadly role in who survived [Hurricane Katrina] and who did not.”³² According to the Center for Popular Economics (CPE) staff economist John J. Fitzgerald:

No other levee breach in the [United States] has caused such a level of destruction or such an extensive evacuation. Flooding did most of the damage that was done to life and property. The principal victims of the flooding were the poor. Some rich folks lost money, but the poor lost their lives and their homes. The skin color of the victims is striking. They are almost all black and brown folks. They are primarily African-American. New Orleans, like the rest of the South, has continued to color-code its poor.³³

The answer to Oh’s inquiry of “where else could it have taken place?”³⁴ will depend on the audiences’ inclination to imagine a “color-blind”³⁵ frame. A “color-blind” frame would allow one to deny the undeniable sea of black faces clamoring to survive, waiting for somebody to see that assistance was required. Oh’s second inquiry, which explores the movement of the people as the narrative unfolds, would benefit from the use of “her-storical lens”³⁶

32. Dean: *Race Played Role in Katrina Toll*, MSNBC.COM, Sept. 8, 2005, <http://www.msnbc.msn.com/id/9247380/print/1/displaymode/1098> (quoting Howard Dean).

33. John J. Fitzgerald, *Race, Class and Katrina*, ECON-ATROCITY BULLETIN, Sept. 14, 2005 (on file with *Nova Law Review*).

The statistics on New Orleans are informative. The U.S. Census Bureau estimates that in 2004, New Orleans’ population was 20.0% white and 67.9% black. Additionally, New Orleans has a poverty rate of 38%—among the highest in the United States. The 2000 census revealed that 27% of New Orleans households, amounting to approximately 120,000 people, were without privately owned transportation.

Id.

34. Oh, *supra* note 19, at 1316.

35. See CHERYL I. HARRIS & DEVON W. CARBADO, *Loot or Find: Fact or Frame? in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 87, 91 (David Dante Troutt ed., 2006) (*defining* color-blindness as the belief that “race is *not* a factor in how we make sense of the world”). For an in depth discussion of the “colorblind” framework and the idea of race and racial framing, see Harris, *Whitewashing Race*, *supra* note 8; PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* 3–16 (1998); see generally Taunya Lovell Banks, *Race Talk: Patricia J. Williams’ Seeing a Color-Bind Future: The Paradox of Race*, 20 B.C. THIRD WORLD L.J. 183 (2000); see also Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483 (2003); Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135 (1996).

36. Washington *supra* note 3; see also Pamela Bridgewater, *Introduction to a Symposium Celebrating the Twentieth Anniversary of the Feminism and Legal Theory Project*, 13 AM. U. J. GENDER SOC. POL’Y & L. 1, 4 (2005) (noting that the concept of “her-storical lens” [is] a feminist device which views historical moments).

as a tool to critically examine the often overlooked issue of black women's lives' both pre- and post-Katrina.

From a Critical Race Feminist perspective, I will add another inquiry that will be addressed in Part IV: Do outsiders (those who reside in a "space and place" other than the character in the narrative) "see" the collective identity of the character or identify with the symbol surrounding the character?

More precisely put, as to the Hurricane Katrina narrative with a "her-storical lens", did the media "see" the elderly black woman photographed with the American flag quilt over her head and shoulders?³⁷ This inquiry suggests that there is a need to construct an alternative social reality in order to adequately address a legacy of movement at the behest of the government.

III. IDENTITY AND COLLECTIVE IDENTITY

The contextualization of identity³⁸ and collective identity³⁹ are paramount when critically examining the Hurricane Katrina narrative. Professor Wendy B. Scott put it best when she surmised that:

Clearly Hurricane Katrina was an act of God in nature and by law. But not only did Hurricane Katrina give God a stage, it revealed the multiple failures of man—failure to build adequate levee protection for a city, and a region, that is anywhere from 6-12 feet below sea level in a sinking swamp; failure to provide a way of escape during the evacuation for the most vulnerable of our citizens,

37. See photograph by Eric Gay, AP, World Wide Photos, *on the jacket of AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* (David Dante Troutt ed., 2006); see also photograph by Alan Chin, GAMMA, Jonathan Alter, *The Other America*, NEWSWEEK, Sept. 19, 2005, at 42. The photograph's caption reads, "Left Behind: An elderly woman awaits evacuation. TV dislikes images of the poor, but they were omnipresent during the coverage of Katrina." *Id.*

38. See generally Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 502 (2006) (observing that "a claim of personal Whiteness is tantamount to a claim of being innocent of Blackness"); Martha Minnow, *Not Only For Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 669 (1996) (noting that "[p]ersonal testimony about oppression displaces analysis of social structures that produce and maintain it."); Angela P. Harris, *Foreward: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 210 (1996) (noting that "identity is always contextual" as identified by Mary Coombs' as a general proposition about identity).

39. See generally Jerome McCristal Culp, Jr., *The Woody Allen Blues: "Identity Politics", Race, and the Law*, 51 FLA. L. REV. 511 (1999) (exploring whether "the racial politics of the country—a belief in a notion of community, citizen and law . . . despite . . . best efforts, [includes] Black people inside . . . definitions of citizenship").

the poor, the elderly, the children and the differently-abled; and failure to respect the dignity and safety of those in distress.⁴⁰

The identity of the most vulnerable during Hurricane Katrina revealed that issues of “space,” “place,” and multiple intersections of being, including race, class, gender, and age, are determinative in evaluating the degree to which one experiences the narrative.⁴¹ The tendency to self-identify with a group that is viewed as similar and to disassociate with a group viewed as otherwise is well-established. For example, the highly contested “finding” of food by a white couple and the “looting” of food by a black male were presented as facts to a narrative,⁴² but historically linked to perceptions of race and pathology.⁴³ The viewer’s notion of “citizens” surviving during a national disaster is contextual at best. A Critical Race Feminist approach mandates a critique of the other side of commentary that is unspoken, particularly as to the fate of black women and their bodies during Hurricane Katrina. As Kathleen A. Bergin points out, “[g]overnment officials inexcusably failed to anticipate and prevent hurricane related sexual violence throughout the evacuation and sheltering process”⁴⁴ against black women and girls historically not given the benefit of “victim” status.⁴⁵ Cheryl I. Harris and Devon W. Carbado remind us of both the historical and “her-storical” identities that no doubt set the stage for “[t]he frames of law and order and black criminality [which] influenced both the exaggeration (overreporting) and the marginalization (underreporting) of violent crimes” perpetuated against black women.⁴⁶ The utilization of a “her-storical lens” will aid the audience to see the unspoken as it relates to the “who” and “what” the print and news media disseminated to the public during the wake and aftermath of Hurricane Katrina.

IV. IDENTITY AND SYMBOLS

The devastating images of people and destruction during the wake of Hurricane Katrina were seemingly limitless. However, there is a photograph

40. Wendy B. Scott, Lecture, *From an Act of God to the Failure of Man: Hurricane Katrina and the Economic Recovery of New Orleans*, 51 VILL. L. REV. 581, 581 (2006).

41. See Debra Lyn Bassett, *Distancing Rural Poverty*, 13 GEO. J. ON POVERTY L. & POL’Y 3, 4 (2006) (examining how rural poverty is often discriminated against in light of America’s tendency to focus on the urban rather than the rural poverty).

42. HARRIS & CARBADO, *supra* note 35, at 89.

43. See Bassett, *supra* note 40, at 4.

44. Bergin, *supra* note 14, at 554.

45. HARRIS & CARBADO, *supra* note 35, at 100.

46. *Id.* at 101.

of an elderly black woman tightly gripping an American flag quilt around her arms.⁴⁷ I witnessed this photograph in magazines and on television. It will be explored in light of the notion of collective identity and the media's act of imputing identity.

From a Critical Race Feminist perspective, I tend to see multiple intersections of being first, and then experience the whole message. However, the Associated Press photographer captured a being—and their collective identity—as clothed in the symbol of an American flag quilt.⁴⁸ According to Kenji Yoshino:

Symbols are “socially rooted and socially supported” in a way that individual stories are not; they are by their nature aggregations of desires and meanings that exist within a community. . . . Many symbols, such as the American flag, derive their ability to draw together communities of adherents precisely because they do not force believers to articulate what it is about the symbol that draws them together. Such an articulation doubtless would fracture an otherwise unified community, for the over-determined signifier of the flag accommodates both the nationalism of the xenophobe (America is not like other countries) and the pluralism of the liberal (America is like all other countries).⁴⁹

The Hurricane Katrina narrative of a black elderly woman draped with an American flag quilt effectively silenced her collective identity and spoke volumes to the power of a nationally recognized symbol woven tightly in the psyche of all things American that inherently stand for “freedom” and “justice.”⁵⁰ However, through the utilization of a “her-historical lens”, the “space” and “place” of Ms. Milvirtha Hendricks’ narrative are explored beyond the

47. Pellom McDaniels III, *Caught in the Act: Seeing Photography as a Window to Reality*, 1 HYPHENATION 1, 32 (2006), available at <http://www.emory.edu/HypheNation/Caught%20in%20the%20Act.pdf>.

48. *See id.*

49. *See* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1770 (1996) (citations omitted).

50. *See* Michelle Burford, *The Tale of a Photograph*, ESSENCE, Dec. 2006, at 142 (photograph of Ms. Milvirtha Hendricks by Associated Press photographer). The column reads, “The Tale of a Photograph: We all saw the photo of the elderly woman draped in an American flag . . . [W]e tell the story behind the picture.” *Id.* *See also* Culp, Jr., *supra* note 39, at 514 (noting that “when we speak of an American identity definitionally, we cannot describe in law and social policy such an identity in a way that includes the ‘other’”).

photograph captured by the Associated Press photographer as she, among others, waited for justice outside of the New Orleans Convention Center.⁵¹

Her story: Ms. Milvirtha Hendricks moved to New Orleans from Mississippi in 1945 with her now deceased husband.⁵² She is the mother of seven children, three of which resided in New Orleans before Hurricane Katrina.⁵³ During Hurricane Katrina, Ms. Hendricks and her daughter, Beverly, fled from her home in the Lower Ninth Ward to her son's two-story house in East New Orleans.⁵⁴ On August 30, 2005, a Coast Guard boat removed Ms. Hendricks, her sister Vivian, and daughter Beverly from the house as they pushed through contaminated water to reach dry ground.⁵⁵ After a brief stay in a shelter, they were moved to the Convention Center.⁵⁶ Ms. Hendricks' daughter Beverly draped the American flag-printed quilt around her mother's frail arms, and the news media memorialized Ms. Hendricks' narrative.⁵⁷ Ms. Hendricks' daughter, Terry, saw her mother's photo on CNN.⁵⁸

As of December 2006, Ms. Hendricks has no memory of the hurricane due to a "downward spiral toward dementia."⁵⁹ She now has moved to Texas to live with her daughter.⁶⁰

Ms. Hendricks' Hurricane Katrina narrative has no end. She is quoted as saying, "I really don't know why this happened, but every day I thank God for taking care of me. It's only because of Him that I made it through alive."⁶¹

Ms. Milvirtha Hendricks is a testament to faith beyond facts or memory. She embodies a collective identity of black women whose geographical "space" and "place" has been navigated by an African American history of migration, both voluntary and forced—one that cannot be captured in a photo while draped in a symbol of freedom and justice after experiencing the truth of this Nation's failure to timely exercise either—once again.

51. See *id.*; see also Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (arguing for the adoption of policies based on what the author refers to as "Racial Realism" which requires the acknowledgment that black people will never gain full equality in this country).

52. *Id.*

53. *Id.*

54. *Id.*

55. Burford, *supra* note 50.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Burford, *supra* note 50.

61. *Id.*

In conclusion, there is an obligation to see the disaster of Hurricane Katrina through a “her-storical lens” so that history shall not be re-cast and memories co-opted by symbols. It is up to those willing to stand up, rise, and swell with the moral conscience necessary to impact the lives of those devastated by the storm; those who will remain resilient in seeking true justice for the Katrina victims and not a mere symbolic representation.⁶²

I hope that this article serves as a necessary step in acknowledging the importance of analyzing narratives from a Critical Race Feminist perspective in order to emphasize an alternative social reality beyond symbolism which purports to convey messages of freedom and justice without “seeing” the collective identity deeply embedded in our historical and her-storical legacies.

62. See generally Mitchell F. Crusto, *The Katrina Fund: Repairing Breaches in Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. 329 (2006) (arguing for a “Katrina Homeowners Compensation Fund to be modeled after the September 11th Fund, which would constitute a federal bailout program to compensate uninsured and under-insured homeowners”); Cain Burdeau, *Army Corps Hit With New Katrina Lawsuit*, FOXNEWS.COM, Feb. 8, 2007, <http://www.foxnews.com/wires/2007Feb08/0,4670,KatrinaFloodLawsuit,00.html> (Federal Judge allowed a team of trial lawyers led by Joseph Bruno to proceed charging the Corps liable for the flooding of eastern New Orleans and suburban St. Bernard Parish by waters from the Mississippi River-Gulf Outlet, a navigation channel known locally as Mr. Go.).

ABOLISHING CAPITAL PUNISHMENT: A FEMINIST OUTLOOK AND COMPARATIVE ANALYSIS OF THE DEATH PENALTY USING EQUAL PROTECTION AND GENDER DISCRIMINATION LAW

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I. INTRODUCTION

The law has historically treated women differently than men.¹ One area in which women continue to receive preferential treatment is capital punishment.² Even though women commit one out of eight homicides,³ only 2.1% of them receive the death penalty at trial, and only 1.4% are currently on

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1. See, e.g., Sheila J. Kuehl, *Why a Women's Law Journal / Law Center Experience: Episode XV / The Sequel / The Movie / Film at 11:00*, 1 *UCLA WOMEN'S L.J.* 11, 12 (1991).

2. Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 *OHIO N.U. L. REV.* 581, 582 (2000). See also Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 *AM. U.J. GENDER SOC. POL'Y & L.* 427, 431 (2000). Joan Howarth characterizes capital jurisprudence as a "hidden battleground of gender." Joan Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 *WIS. L. REV.* 1345, 1347 (1994).

3. Rapaport, *supra* note 2, at 582.

death row.⁴ Further, only 1.1% of female death row inmates are actually executed.⁵ In addition, of the 157 death sentences imposed on women since 1973, only forty-nine of them remain in effect.⁶ On the other hand, 1018 men have been executed since 1976, and there are currently 3309 men on death row.⁷ Because women on death row receive preferential treatment to the detriment and, ultimately, the demise of male death row inmates, capital punishment should be abolished.⁸

This article will address the death penalty of female offenders in terms of Martha Chamallas's three stages of feminist legal theory. Part II of this article will define the three stages of feminist legal theory: the Equality Stage, the Difference Stage, and the Diversity Stage. Part III will analyze the death penalty for women according to the three theories in order to determine whether capital punishment is compatible with feminist legal theory. This section will reveal that the three stages of feminist legal theory do not entirely correlate with the pattern of female executions. In addition, Part III will offer suggestions as to why feminist legal theory can or cannot explain the disparities in capital sentencing. Part IV is a comparative analysis of the death penalty utilizing equal rights and discrimination law with respect to women's equality within the three stages. Part V will discuss the possible comeback of the Equality Stage as a result of the recent female executions.

4. Victor L. Streib, *Death Penalty for Female Offenders, January 1, 1973, Through June 30, 2006* 3, http://www.law.onu.edu/faculty_staff/faculty_profiles/FemDeath-June2006.pdf [hereinafter Streib, *Death Penalty*]. Murderers rarely receive death sentences and capital punishment has been on the decline since 1999. See Rapaport, *supra* note 2, at 582; see also Death Penalty Information Center, *Facts About the Death Penalty*, <http://www.deathpenaltyinfo.org/FactSheet.pdf> (last visited Mar. 29, 2007).

5. Streib, *Death Penalty*, *supra* note 4, at 9. Mitigating factors such as the defendant's background, character, and past criminal history result in the female defendant's clemency from execution. See 18 U.S.C. § 3592(a)(5), (8) (2000).

6. Streib, *Death Penalty*, *supra* note 4, at 9. This means that 59% of women who received death sentences after the death penalty was reinstated had their sentences commuted or reversed by the judiciary. Rapaport, *supra* note 2, at 584. However, at the end of 1998, about one third of all death row inmates receiving death sentences between 1973–98 had their sentences reversed by the courts. *Id.*

7. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., *DEATH ROW U.S.A.: SUMMER 2006*, 1, 10, http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Summer_2006.pdf [hereinafter *DEATH ROW U.S.A.*].

8. Capital punishment also discriminates against blacks and often captures the innocent. Death Penalty Information Center, *History of the Death Penalty, Part II*, <http://www.deathpenaltyinfo.org/article.php?scid=15&did=411> (last visited Mar. 29, 2007) [hereinafter *History of the Death Penalty, Part II*]. Amnesty International is also an advocate of abolishing the death penalty. Amnesty International, *The Death Penalty*, <http://web.amnesty.org/pages/deathpenalty-index-eng> [hereinafter *Amnesty International, The Death Penalty*] (last visited Mar. 29, 2007).

Finally, Part VI will summarize and conclude that the death penalty should be abolished due to its disparate effect of punishing more death-eligible men than death-eligible women.

II. DEFINING THE THREE STAGES OF FEMINIST LEGAL THEORY

Chamallas based her feminist legal theory stages—the Equality Stage of the 1970s, the Difference Stage of the 1980s, and the Diversity Stage of the 1990s—on Patricia A. Cain’s demarcation lines.⁹ The three stages of feminist legal theory are used to “make sense of the diverse and sometimes contradictory arguments of feminist scholarship.”¹⁰ In the Equality Stage, feminist legal theorists saw women and men as similar beings; thus, feminist theorists advocated that women should be subjected to and protected by the same laws as men.¹¹ In contrast, feminist theorists in the Difference Stage emphasized the differences between women and men, thereby advocating for particularized treatment of the two sexes.¹² Finally, the Diversity Stage saw women, as a group, as having distinct and unique personalities.¹³ This stage emerged because certain groups of women, such as women of color and lesbians, were being discriminated against.¹⁴

III. INTEGRATING THE THREE STAGES WITH FEMALE DEATH SENTENCES

Currently, there are forty-nine women on death row in the United States.¹⁵ Since 1976, 1018 male executions occurred,¹⁶ whereas only eleven

9. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 15 n.1 (2d ed. 2003). Stage One occurred in the late 1960s and it advocated women’s equality—“that women should be treated the same as men.” Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN’S L.J. 191, 199 (1989–90). Stage Two of Cain’s feminist theory highlighted the differences between men and women. *Id.* at 199–200. Women were seen as having a “different voice” and laws should reflect women’s dissimilarities. *Id.* at 200. Stage Three is the Postmodernist theory. *Id.* at 204. Postmodern feminist theory reflects the idea that every person has a “subjective, concrete, and particular” view of life marked by personal experiences. *Id.*

10. CHAMALLAS, *supra* note 9, at 16.

11. *Id.*

12. *Id.* at 17.

13. *Id.* at 19.

14. *See id.*

15. Streib, *Death Penalty*, *supra* note 4, at 9.

16. DEATH ROW U.S.A., *supra* note 7, at 10.

women were executed.¹⁷ Even though women commit death-eligible crimes,¹⁸ judges, jurors, and governors spare their lives for various reasons.¹⁹ Because the gender gap is devastatingly prevalent in capital punishment, it is difficult to reconcile the number of female executions with the three stages of feminist legal theory.²⁰ The subsequent sections will explain the compatibility of feminist legal theory with capital punishment.

A. *The Equality Stage*

For the purposes of this article, the Equality Stage will incorporate the executions of the 1960s and the 1970s because the women's movement of the 1960s also emphasized the equality of women.²¹ Another reason these two decades are grouped together is because executions were at an all-time low due to the abolishment of capital punishment during this time period.²²

The Equality Stage saw few executions for both men and women.²³ Although both men and women sat on death row in the 1960s and 1970s,²⁴ only one female execution occurred during the 1960s,²⁵ and no female executions

17. Death Penalty Information Center, *Women and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=230&scid=24#facts> (last visited Mar. 29, 2007).

18. Melinda E. O'Neil, Note, *The Gender Gap Argument: Exploring the Disparity of Sentencing Women to Death*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213, 218–19 (1999). When women kill, they often kill their loved ones, including their children. Streib, *Death Penalty*, *supra* note 4, at 10; Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 WIS. WOMEN'S L.J. 283, 301 (1996). However, states often characterize capital crimes as felony murder or homicide by and against strangers, as opposed to domestic homicide. Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609, 615 (2006) [hereinafter Streib, *Rare and Inconsistent*]. Therefore, female murderers rarely receive death sentences because states do not consider domestic homicide as deserving of capital punishment. *Id.*

19. See O'Neil, *supra* note 18, at 218–19. Decision-makers mitigate female death sentences because they believe that more women than men are capable of rehabilitation, they view women as “childlike” and victims of abuse, and women often do not have violent pasts. *Id.* at 218, 232; Rapaport, *supra* note 2, at 583.

20. See generally Streib, *Death Penalty*, *supra* note 4, at 7–8.

21. See Cain, *supra* note 9, at 198.

22. History of the Death Penalty, Part II, *supra* note 8.

23. See Samuel R. Gross, *Still Unfair, Still Arbitrary—But Do We Care?* 26 OHIO N.U. L. REV. 517, 519 (2000).

24. See Streib, *Death Penalty*, *supra* note 4, at 4. Approximately twenty-two death sentences were imposed on women in the 1970s. *Id.*

25. *Id.* at 7–8. California executed Elizabeth Ann Duncan on August 8, 1962 for conspiracy to commit murder. Death Penalty Information Center, *Executions in the U.S. 1608–1987: The Espy File, Executions by Date*, <http://www.deathpenaltyinfo.org/ESPYdate.pdf> 602 (last visited Mar. 29, 2007) [hereinafter *Executions in the U.S.*].

took place in the 1970s.²⁶ In contrast, 192 men were executed in the 1960s and three men were executed during the 1970s.²⁷ Relatively speaking, very few executions occurred during this time period because public opinion on the death penalty shifted towards disapproval.²⁸ During this stage, the United States Supreme Court vigorously faced the constitutionality of the death penalty:

The 1960s and 1970s saw several challenges to the imposition of the death penalty, including challenges involving disproportionality of the punishment to the crime committed, the state of mind of the defendant at the time of the crime, the age of the offender, the mental capacity of the offender, and the race of the offender.²⁹

Moreover, the judicial invalidation of the death penalty took place in 1972 with the United States Supreme Court's decision of *Furman v. Georgia*.³⁰ Although the death penalty was reinstated in 1976, no executions, male or female, occurred that year.³¹ The first execution after the reinstatement of the death penalty took place in 1977.³²

Chamallas characterizes the Equality Stage as emphasizing the similarity of women and men.³³ Legal feminists during this period maintained that laws protecting women only served to "restrict women's lives to the home and family."³⁴ Women gained much ground in the political arena during this time.³⁵ Nonetheless, in terms of capital punishment, decision-makers did not see women and men as equals during the Equality Stage, as only one female was executed for her capital crime.³⁶ Theoretically speaking, equality theo-

26. See Streib, *Death Penalty*, *supra* note 4, at 7–8.

27. See Executions in the U.S., *supra* note 25, at 596–604.

28. See Gross, *supra* note 23, at 517. "The last execution in this period was in 1967; and there were none from 1968 until 1977." *Id.* at 519. However, public approval of the death penalty increased in the late 1970s. *Id.* at 521.

29. Shapiro, *supra* note 2, at 439.

30. 408 U.S. 238 (1972) (per curiam). Although the United States Supreme Court found that many states' death penalty statutes violated the Eighth and Fourteenth Amendments of the United States Constitution, the Court left the door open for states to rewrite their death penalty statutes to comply with the *Furman* decision. See History of the Death Penalty, Part II, *supra* note 8.

31. History of the Death Penalty, Part II, *supra* note 8; Executions in the U.S., *supra* note 25, at 604.

32. History of the Death Penalty, Part II, *supra* note 8. Utah executed Gary Gilmore on January 17, 1977. DEATH ROW U.S.A., *supra* note 7, at 12.

33. CHAMALLAS, *supra* note 9, at 16.

34. *Id.*

35. See *id.* at 17.

36. See Streib, *Death Penalty*, *supra* note 4, at 7–8.

rists would have liked to see comparable treatment of women and men for similar crimes.³⁷ Ultimately, however, the gender gap prevented the equal treatment of women and men.³⁸ Nonetheless, the constitutional challenges that arose in the 1960s and 1970s, causing the number of overall executions to drop, helps to reconcile the fact that only one female execution took place during this period.³⁹

B. *The Difference Stage*

In contrast to the Equality Stage, legal feminists during the Difference Stage embraced the differences between women and men.⁴⁰ In the 1980s, difference theorists analyzed gender differences in terms of “cultural attitudes, ideology, socialization, [and] organizational structures.”⁴¹ Accordingly, since women were thought to value human relationships and possess positive values such as compassion and understanding,⁴² in theory, female executions during the Difference Stage should have been the lowest out of the three stages. However, the number of female executions in the Difference Stage is the same as in the Equality Stage—one female execution.⁴³ Nonetheless, the sole female execution complements the feminist legal theory espoused during this time.⁴⁴ In all likelihood, the female execution of the Equality Stage matches the single female execution of the Difference Stage due to the overall sentiment towards capital punishment during the Equality Stage.⁴⁵ As such, feminist legal theory can draw a parallel with capital punishment after all.

C. *The Diversity Stage*

Because the Diversity Stage highlights the differences amongst women, the number of female executions during the 1990s should theoretically fall

37. See generally CHAMALLAS, *supra* note 9, at 16.

38. See generally *id.* at 17.

39. See Streib, *Death Penalty*, *supra* note 4, at 7–8.

40. CHAMALLAS, *supra* note 9, at 17–18.

41. *Id.* at 18. Chamallas states that in order for women to be treated as equals, we should change social norms by accounting for the differences between men and women. *Id.*

42. *Id.* at 19.

43. See Streib, *Death Penalty*, *supra* note 4, at 8. North Carolina executed Velma Barfield in 1984 for murder. Executions in the U.S., *supra* note 25, at 605. One hundred and seventeen males were executed during this timeframe. See DEATH ROW U.S.A., *supra* note 7, at 12–14.

44. See CHAMALLAS, *supra* note 9, at 17–18.

45. See History of the Death Penalty, Part II, *supra* note 8.

between the number of female executions during the Equality Stage and the number during the Difference Stage.⁴⁶ However, since the number of female executions during the Equality and Difference Stages is despairingly low, the two female executions that did occur during the Diversity Stage merely equal the total amount of executions that took place during the previous two periods combined.⁴⁷

In theory, the Diversity theorists would have liked for capital decision-makers to see the differences amongst women instead of viewing all women as a “weaker, submissive, dependent, and more passive sex.”⁴⁸ Capital punishment may have turned out differently if the decision-makers recognized that not all women possess the same character traits.⁴⁹ For example, after serving ten years of her twenty-year sentence for murdering her eleven-month-old daughter, the parole board released Guinevere Garcia from prison.⁵⁰ However, after her release, to obtain money for alcohol, she went to her ex-husband’s house with a .357 Magnum and killed him.⁵¹ The jury sentenced Garcia to death, but Jim Edgar, the governor of Illinois, granted Garcia clemency because he did not think that Garcia was the “worst of the worst.”⁵² Although Governor Edgar denied granting clemency to Garcia based on her gender, Garcia was as death-eligible as any other felony murderer with a violent criminal history.⁵³

Between 1973 and 1999, 129 women were sentenced to death, but only two executions occurred during the Diversity Stage.⁵⁴ Then again, more women received capital sentences during this stage than the previous stages.⁵⁵ In addition, the public disapproval of capital punishment during the Equality Stage most likely caused the lack of correspondence of executions with feminist legal theory for this time period.⁵⁶ Although the two executions do not entirely correlate with the Diversity theory, the fact that more

46. See CHAMALLAS, *supra* note 9, at 19–20.

47. In 1998, Florida executed Judias Buenoano and Texas executed Karla Faye Tucker. Streib, *Death Penalty*, *supra* note 4, at 7–8.

48. O’Neil, *supra* note 18, at 218.

49. See *id.*

50. *Id.* at 219.

51. *Id.*; see Schmall, *supra* note 18, at 295.

52. O’Neil, *supra* note 18, at 219–20.

53. See *id.* Guin Garcia most likely escaped death because the governor sympathized with her tumultuous past. See Schmall, *supra* note 18, at 289. As an infant, Guin saw her mother commit suicide. *Id.* at 293–94. As a child, her uncle raped her, and as a teenager, Guin became a pregnant drug addict. *Id.* at 294.

54. Streib, *Death Penalty*, *supra* note 4, at 4, 7.

55. *Id.* at 4. During the 1980s, fifty-one women received death sentences, whereas during the 1990s fifty-six women received death sentences. *Id.*

56. See generally *id.*

executions occurred in this stage than in the previous stages may indicate that female executions are becoming less deplorable.⁵⁷

IV. COMPARATIVE ANALYSIS

During the latter part of the Equality Stage, the women's movement won a big battle in the courts with the judicial recognition of sexual harassment.⁵⁸ In addition, the Equal Pay Act of 1963, which prohibited employers from engaging in pay discrimination on the basis of sex, also occurred during this stage.⁵⁹ Like the 1960s and 1970s, the women's movement in the 1980s flourished.⁶⁰ During the 1980s, the National Organization for Women vehemently sought ratification of the Equal Rights Amendment and fell only six votes short of ratification.⁶¹ Further, in 1981 Congress decided to celebrate women's history by establishing the National Women's History Week, which later expanded to the National Women's History Month in 1987.⁶² In addition, the Difference Stage saw an increase of women in undergraduate and graduate studies.⁶³ The 1990s saw the enactment of the Family Medical Leave Act, which allows most federal employees up to twelve weeks of unpaid leave for the birth or care of a child, or the care of the employee, parent, child, or spouse with a serious health condition.⁶⁴ The dramatic increase in women's equality and success in education, the workplace, and politics demonstrates that women are no longer the weaker of the two sexes, eliminating the need for their preferential treatment under the law.⁶⁵ The sections that follow discuss landmark cases regarding the equality of women involving equal rights and discrimination law.

57. *See id.* at 7–8.

58. *See Williams v. Saxbe*, 413 F. Supp. 654, 661 (D.D.C. 1976) (mem.), *rev'd on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978); Julianne Scott, *Pragmatism, Feminist Theory, and the Reconceptualization of Sexual Harassment*, 10 UCLA WOMEN'S L.J. 203, 215 (1999).

59. *See* 29 U.S.C. § 206(d) (2000).

60. *See* Nat'l Org. for Women, *Chronology of the Equal Rights Amendment, 1923–1996*, <http://www.now.org/issues/economic/cea/history.html#1980> (last visited Mar. 29, 2007).

61. *Id.*

62. Clara Cobb, *Celebrating Women and Their Contributions*, DAILY TOREADOR, Mar. 1, 2005.

63. In 1984, women accounted for 49% of all undergraduate and masters degrees and approximately 33% of all doctoral degrees. Women's International Center, *Women's History in America Presented by Women's International Center*, <http://www.wic.org/misc/history.htm> (last visited Mar. 29, 2007). In addition, in the mid-1980s, more women than men were college students. *Id.*

64. 5 U.S.C. § 6382(a)(1)(A)–(D) (2000).

65. *See supra* notes 58–64 and accompanying text.

A. *Equal Protection*

The major equal protection case from the Equality Stage is *Reed v. Reed*.⁶⁶ In 1967, Richard Reed, an adopted minor, died intestate.⁶⁷ Both of his parents, who were separated at the time, sought competing petitions to be appointed as the administrator and administratrix of his estate.⁶⁸ Although both parents were equally entitled to administer their son's estate, a state law enumerated a preference for males over females in the event that both parents shared equal entitlement.⁶⁹ The United States Supreme Court struck down the Idaho statute as violative of the Fourteenth Amendment because "giv[ing] a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."⁷⁰ For the first time ever, the Court "struck down a sex-based [statute] on the ground that it denied a woman equal protection of the laws."⁷¹

Next, *Kirchberg v. Feenstra*⁷² is the leading equal rights case from the Difference Stage. In *Kirchberg*, a husband and wife owned a home together; however, the husband executed a mortgage on the home without his wife's knowledge to pay for legal services after the wife filed a criminal complaint against him.⁷³ The complaint alleged that he molested their minor child.⁷⁴ A Louisiana statute gave husbands "the unilateral right to dispose of [jointly owned community property] without his spouse's consent."⁷⁵ The wife challenged the constitutionality of the Louisiana statute but the District Court upheld the statute's validity.⁷⁶ During the appeal, the Louisiana Legislature revised the statute, but it was not to take effect until the new year.⁷⁷ Therefore, the Court still faced the question of whether the statute violated the United States Constitution.⁷⁸ The Court of Appeals for the Fifth Circuit held that the statute explicitly discriminated against women.⁷⁹ Since the State did

66. 404 U.S. 71 (1971).

67. *Id.* at 71.

68. *Id.* at 71–72.

69. *Id.* at 73.

70. *Id.* at 76.

71. Shanti Hubbard, ACLU's Women's Rights Project: Annual Report 2005, ix, available at <http://www.aclu.org/pdfs/wrannualreport2005.pdf>.

72. 450 U.S. 455 (1981).

73. *Id.* at 456–57.

74. *Id.* at 456.

75. *Id.*

76. *Id.* at 458.

77. *Kirchberg*, 450 U.S. at 458.

78. *Id.*

79. *Id.* at 459.

not show that the regulation furthered any substantial governmental interest, the statute violated the Equal Protection Clause of the Fourteenth Amendment.⁸⁰

Finally, during the Diversity Stage, Justice Ginsburg issued a landmark ruling in *United States v. Virginia (VMI)*.⁸¹ In this case, a female high school student sought admission to the state-funded Virginia Military Institute (VMI), a prestigious all-male school which sought to produce “citizen-soldiers” and prepare men for “leadership in civilian life and in military service.”⁸² Graduates of VMI often became national leaders in the military and in politics.⁸³ However, VMI never responded to the 347 female applications it received within the two years prior to the lawsuit.⁸⁴ VMI claimed that its rigorous training, constant regulation of behavior and living conditions, and adversative methods were unsuitable for women.⁸⁵ The District Court ruled against the United States and in favor of VMI.⁸⁶ The Court of Appeals for the Fourth Circuit disagreed and ordered VMI to either start admitting women into its school, become a private institution, or start a comparable school for women.⁸⁷ VMI chose to institute a parallel program for women on a separate campus, called the Virginia Women’s Institute for Leadership (VWIL).⁸⁸ However, VWIL seriously lacked the prestige and benefits that VMI offered.⁸⁹ When the case reached the United States Supreme Court, Justice Ginsburg noted that the real issue was whether the unique opportunity afforded only to men at VMI violated the Equal Protection Clause.⁹⁰ Justice Ginsburg argued that VWIL’s program was in no position to afford women the same type of opportunities and advantages that men received at VMI.⁹¹ Thus, she held that VMI unconstitutionally denied women equal protection of the laws.⁹²

Notwithstanding the great strides that the women’s movement made between the 1960s and the 1990s with regard to obtaining equal protection of the laws, sex-based discrimination continued to occur in the area of capital

80. *See id.* at 459–61.

81. 518 U.S. 515 (1996).

82. *Id.* at 520, 523.

83. *Id.* at 520.

84. *Id.* at 523.

85. *Id.* at 525.

86. *VMI*, 518 U.S. at 524.

87. *Id.* at 525–26.

88. *Id.* at 526.

89. *Id.* at 526, 529.

90. *Id.* at 530–31.

91. *See VMI*, 518 U.S. at 551–53.

92. *See id.* at 558.

punishment during this time.⁹³ At one point in time, sparing women's lives from execution may have been understandable due to the status of women and society's perception of them.⁹⁴ However, today women and men are, for the most part, regarded as equals.⁹⁵ Therefore, female death row inmates should not be permitted to escape death because of their gender.

In addition, the United States Supreme Court has disapproved of executing the insane⁹⁶ and the mentally retarded,⁹⁷ indicating a shift in the Court's outlook on capital punishment. Back in 1989, Justice O'Connor held in *Penry v. Lynaugh*⁹⁸ that there was a lack of national consensus to ban the executions of mentally retarded death row inmates.⁹⁹ However, after the *Penry* decision, many state legislatures took action and exempted the mentally retarded from execution.¹⁰⁰ In 2002, prompted by the increase in legislative action regarding this issue, the United States Supreme Court found, in *Atkins v. Virginia*,¹⁰¹ that a national consensus against executing the mentally retarded existed.¹⁰² Therefore, the Court provided the mentally retarded with a categorical exemption from the death penalty.¹⁰³ The apparent change in the Court's viewpoint regarding the death penalty warrants a revisited look at the disparate impact of capital punishment on male death row inmates. Because the Court found in *Atkins* yet another flaw with capital punishment,¹⁰⁴ it should also find that the death penalty's effect of disparately and disproportionately impacting males is unconstitutional and therefore should abolish capital punishment.

B. Gender Discrimination

Another area of the law in which the women's movement improved greatly during the three stages of feminist legal theory is sex discrimination. The Equality Stage saw a great victory for the women's movement in the

93. See Shapiro, *supra* note 2, at 440.

94. *Id.* at 462 n.268.

95. See *id.* at 462–63.

96. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

97. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

98. 492 U.S. 302 (1989).

99. *Id.* at 334. However, in 1988, the federal government prohibited the execution of the mentally retarded. *Atkins*, 536 U.S. at 314.

100. *Atkins*, 536 U.S. at 314. States such as Maryland, Tennessee, Kentucky, Georgia, Arkansas, Colorado, Washington, New Mexico, Indiana, New York, and Kansas enacted statutes exempting the mentally retarded from the death penalty. *Id.*

101. *Id.* at 304.

102. *Id.* at 316.

103. *Id.* at 318.

104. *Atkins*, 536 U.S. at 318–19.

decision of *Phillips v. Martin Marietta Corp.*¹⁰⁵ In *Phillips*, a female job applicant filed a sex discrimination suit after the defendant told her that the company did not accept “applications from women with pre-school-aged children.”¹⁰⁶ However, the defendant accepted applications from men with pre-school-aged children.¹⁰⁷ The United States Supreme Court held that having two different hiring policies on the basis of sex violated Section 703(a) of the Civil Rights Act of 1964.¹⁰⁸ In addition, Justice Marshall, in the concurring opinion, expressed his concern that employers could assert that different parenting roles would make one sex more or less qualified for the job than another, under the “bona fide occupational qualification” (BFOQ) exception to the Act.¹⁰⁹ Justice Marshall argued that employers should only consider gender-neutral employment qualifications with respect to performance characteristics.¹¹⁰

Next, the leading gender discrimination case from the Difference Stage is *Meritor Savings Bank, FSB v. Vinson*.¹¹¹ In *Vinson*, a female bank employee brought a sexual harassment suit against the bank and her supervisor after the supervisor “made repeated demands . . . for sexual favors, . . . fondled her in front of other employees, followed her into the women’s restroom, . . . exposed himself to her, and . . . forcibly raped her on several occasions.”¹¹² Because the female employee was afraid that she would lose her job, she consented to sexual relations with her supervisor, but ended it after she entered into a relationship with another man.¹¹³ The District Court found that the female employee’s relations with her supervisor were voluntary and irrelevant of her employment at the bank.¹¹⁴ In contrast, the Court of Appeals for the District of Columbia Circuit found that the female employee had a valid claim for sexual harassment based on a hostile working environment.¹¹⁵ The United States Supreme Court held that the supervisor’s actions were sufficiently severe and pervasive to constitute a hostile working environment.¹¹⁶ As a result of this decision, the Court broadened the definition

105. 400 U.S. 542 (1971).

106. *Id.* at 543.

107. *Id.*

108. *Id.* at 544.

109. *See id.* at 544–47 (Marshall, J., concurring).

110. *Phillip*, 400 U.S. at 547.

111. 477 U.S. 57 (1986).

112. *Id.* at 60.

113. *Id.*

114. *Id.* at 61.

115. *Id.* at 62.

116. *Vinson*, 477 U.S. at 67.

of sexual harassment to include hostile working environment in addition to quid pro quo.¹¹⁷

Finally, the primary gender discrimination case for the Diversity Stage is *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*¹¹⁸ In *Johnson Controls, Inc.*, female employees of a battery manufacturing plant challenged the employer's discriminatory policy of barring all women, except those whose infertility was medically documented, from jobs that involved actual or potential lead exposure exceeding the Occupational Health and Safety Administration standard.¹¹⁹ Occupational lead exposure leads to certain health risks, including harm to a fetus.¹²⁰ The United States Supreme Court held that the employer's policy was "facially discriminatory because it require[d] only a female employee to produce proof that she [was] not capable of reproducing."¹²¹ Additionally, the Court argued that the employer's policy did not fall within the BFOQ exception to Title VII because parents should make decisions regarding the welfare of their children, not employers.¹²²

The women's movement was very successful in the area of gender discrimination during the three stages of feminist legal theory.¹²³ The United States Supreme Court struck down a state statute¹²⁴ and an employer's discriminatory work policy as violative of the Civil Rights Act of 1964.¹²⁵ In addition, the Court recognized that a hostile working environment constitutes sexual harassment.¹²⁶ Nonetheless, discriminatory practices still occurred with regards to capital punishment.¹²⁷ Therefore, the death penalty should be brought to an end because it results in the deaths of many more male capital murderers than female, due to the unequal sentencing and execution practices of judges, jurors, and governors who grant clemency.¹²⁸

117. *See id.* at 65, 67.

118. 499 U.S. 187 (1991).

119. *Id.* at 191–92.

120. *Id.* at 190.

121. *Id.* at 198.

122. *Id.* at 206.

123. *See generally* CHAMALLAS, *supra* note 9.

124. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam).

125. *Johnson Controls, Inc.*, 499 U.S. at 198.

126. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

127. *See Shapiro*, *supra* note 2, at 431.

128. *See id.* at 470.

V. THE REEMERGENCE OF THE EQUALITY STAGE

The new millennium saw a vast increase in the number of female executions.¹²⁹ Since 2000, five states have executed eight women.¹³⁰ The number of female executions in the last six years doubles the total amount of executions that occurred between 1960 and 1990.¹³¹ In 2001, three women were executed—the highest number of female executions in any year since 1953.¹³² Since 2000, twenty-eight female inmates received death sentences.¹³³ In addition, governors are denying clemency to women without any damage to their political reputations.¹³⁴

When applying the feminist legal theories to the recent executions, the eight female executions appear to fall within the confines of the Equality Stage—where men and women should be treated equally.¹³⁵ Although the increase in female executions is not a cause for celebration, it seems to be an improvement in terms of gender equality. However, this may mean that the country has experienced a shift in sentiment towards executing females.¹³⁶ Since it appears as though society is unsettlingly becoming complacent with executing men and women while bias still prevails in the system, the overall increase in executions is a cause for concern.¹³⁷

VI. CONCLUSION

During the three stages of feminist legal theory, women gained tremendous ground in the areas of equal protection and gender discrimination law.¹³⁸ Nevertheless, capital punishment remained permeated with gender bias during that period.¹³⁹ The relatively high number of female executions during recent times suggests that capital punishment's discriminatory effects may be diluting; however, this ultimately means that the United States seems to be at ease with capital punishment.¹⁴⁰

129. See Streib, *Death Penalty*, *supra* note 4, at 9.

130. *Id.*

131. See *id.* at 7–9.

132. Streib, *Rare and Inconsistent*, *supra* note 18, at 623.

133. Streib, *Death Penalty*, *supra* note 4, at 4.

134. See, e.g., Rapaport, *supra* note 2, at 581–82. Governor George Bush denied clemency to Karla Faye Tucker in 1998 without jeopardizing his bid for the 2000 presidential election. *Id.*

135. CHAMALLAS, *supra* note 9, at 16.

136. See Rapaport, *supra* note 2, at 582.

137. See *id.*

138. See generally CHAMALLAS, *supra* note 9.

139. See Streib, *Rare and Inconsistent*, *supra* note 18 at 613–15.

140. See generally Streib, *Death Penalty*, *supra* note 4, at 7–9.

In contrast, more and more countries are finding that the death penalty is cruel and unusual.¹⁴¹ The leaders of many countries are following the trend to put an end to capital punishment.¹⁴² Currently, 129 countries do not exercise capital punishment.¹⁴³ Additionally, Amnesty International abhors capital punishment: “[It] is the ultimate cruel, inhuman and degrading punishment. It violates the right to life. It is irrevocable and can be inflicted on the innocent. It has never been shown to deter crime more effectively than other punishments.”¹⁴⁴ In June 2006, President Gloria Macapagal Arroyo of the Philippines signed a law abolishing capital punishment in her country.¹⁴⁵ Similarly, eighty-eight countries including France, Germany, Italy, Canada, and Ireland have legally abolished the death penalty for any crime.¹⁴⁶ Because sex-based discrimination continues to occur in capital punishment, sentencing and executing a disproportionate amount of males over females, the United States should follow the lead of many other countries and abolish the death penalty.

141. See Amnesty International, *The Death Penalty*, supra note 8.

142. See *id.*

143. *Id.*

144. *Id.*

145. *Legislation Is Enacted Ending Death Penalty*, L.A. TIMES, June 24, 2006, at A16.

146. Amnesty International, *Abolitionist and Retentionist Countries*, <http://web.amnesty.org/pages/deathpenalty-countries-eng> (last visited Mar. 29, 2007).

NOWHERE TO RUN: CUSTODY, RELOCATION, AND DOMESTIC VIOLENCE IN FLORIDA

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I. INTRODUCTION

Prior to October 1, 2006, a primary residential parent¹ in Florida required court approval for the relocation and modification of custody under old section 61.13(2)(d).² Section 61.13001, titled “Parental Relocation with a Child” replaced section 61.13(2)(d) on October 1, 2006.³ A primary residential parent, including domestic violence victims, must follow the requirements of section 61.13001 if they intend to relocate with their children.⁴

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1. According to Florida’s statute titled “Parental Relocation with a Child,” a “primary residential parent . . . [is] a person so designated by court order or by an express written agreement that is subject to court enforcement or . . . the person seeking to relocate with a child.” FLA. STAT. § 61.13001(1)(f) (2006).

2. *Id.* § 61.13(2)(d) (2005) (amended 2006).

3. *Id.* § 61.13001 (2006); Echezarreta v. Echezarreta, 944 So.2d 1169, 1169–70 (Fla. 3d Dist. Ct. App. 2006).

4. FLA. STAT. § 61.13001(2)(a), (3) (2006). “If the primary residential parent and the other parent . . . entitled to visitation with the child agree to the relocation,” or “[u]nless an agreement has been entered as described in subsection (2), a parent who is entitled to primary residence of the child shall notify the other parent . . . of a proposed relocation of the child’s principal residence.” *Id.*

An issue that arises is whether section 61.13001 will provide timely and effective relief to domestic violence victims⁵ seeking to relocate, in order to protect themselves and their children. First, this note highlights national and local domestic violence statistics and the effect of domestic violence on children. Second, this note discusses the evolution of custody determinations and Florida's most recent standards for determining custody on relocation. Third, this note evaluates the language and possible application of Florida's new relocation statute to a hypothetical. Finally, this note recommends a more practical approach for domestic violence victims seeking to relocate with their children.

Domestic violence in the United States is the leading cause of injury to women.⁶ "In 2001, women accounted for 85 percent of the victims of intimate partner violence."⁷ Even if women develop the courage to divorce their spouses to escape these abusive relationships, the abusers stalk and continue to threaten or intimidate them.⁸ One finding suggests that "[80] percent of women who are stalked by former husbands are physically assaulted by that partner and 30 percent are sexually assaulted by that partner."⁹

In 2005, Florida reported 120,386 incidents of domestic violence.¹⁰ Of those reported incidents, approximately 54% were committed by a spouse or co-habitant.¹¹ Simple assaults¹² represented 75% of the total number of incidents, and of those, 57.5% were committed by a spouse or co-habitant.¹³

5. One court defined a domestic violence victim as a person who was physically harmed or was threatened with imminent harm from another person. *Farrell v. Marquez*, 747 So. 2d 413, 414 (Fla. 5th Dist. Ct. App. 1999).

6. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 255 (2003) (citing *United States v. Morrison*, 529 U.S. 598, 631 (2000) (Souter, J., dissenting)).

7. Family Violence Prevention Fund, *The Facts on Domestic Violence*, <http://www.endabuse.org/resources/facts/DomesticViolence.pdf> (last visited May 15, 2007).

8. *See id.*

9. *Id.*

10. *Statewide Domestic Violence, 1992-2005*, http://www.fdle.state.fl.us/fsac/Crime_Trends/download/pdf/dv_offenses_statewide.pdf (last visited May 15, 2007).

11. *See Domestic Violence Victim Totals by Offense, 1992-2005*, http://www.fdle.state.fl.us/fsac/Crime_Trends/download/pdf/1992_2005dv_victim_offense.pdf (last visited May 15, 2007) (of a total of 120,386 reported offenses in 2005, 29,181 were committed by a spouse and 36,000 by a co-habitant).

12. Assault is defined as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." FLA. STAT. § 784.011 (2006). "[S]imple assault is a necessarily lesser included offense of aggravated assault." *Cannon v. State*, 456 So. 2d 513, 514 (Fla. 5th Dist. Ct. App. 1984).

13. *See Domestic Violence Victim Totals by Offense*, *supra* note 11 (citing 90,455 reported simple assaults in 2005, of which 23,166 were committed by a spouse and 28,857 by a co-habitant).

There were 21,676 aggravated assaults¹⁴ reported and 46.4% were committed by a spouse or co-habitant.¹⁵

In addition, there were 254 incidents of aggravated stalking,¹⁶ of which 55.5% were committed by a spouse or co-habitant.¹⁷ A spouse or co-habitant committed 45% of all simple stalking incidents and 48.8% of all incidents of threat or intimidation.¹⁸ There were 176 criminal homicides and 51.7% were committed by a spouse or co-habitant.¹⁹

The effects on children are more devastating. There are children under the age of twelve in more than half of the households where female victims face intimate violence.²⁰ “Between 3.3 and 10 million children witness some form of domestic violence annually.”²¹ “[Fifty] percent of the men who frequently assault[] their wives also frequently abuse their children.”²² Further, “[c]hildren who are exposed to domestic violence are more likely to exhibit behavioral and physical health problems including depression, anxiety, and violence towards peers.”²³

II. BACKGROUND

A. *The Evolution of Custody*

In the 1800s, the single criterion for determining who got custody of a child was the sex of the parent.²⁴ The paternal preference rule was a rebuttable presumption in favor of the father.²⁵ The child was believed to be the

14. Aggravated assault is defined as “assault [w]ith a deadly weapon without intent to kill, or [w]ith an intent to commit a felony.” FLA. STAT. § 784.021(1).

15. See Domestic Violence Victim Totals by Offense, *supra* note 11.

16. For aggravated stalking, the defendant must “knowingly, willfully, maliciously, and repeatedly follow[] [or] harass[] the victim,” and the defendant must do so in violation of either an injunction for protection against repeat violence, an injunction for protection against domestic violence, or any other court imposed prohibition of conduct toward the victim or her property. FLA. STAT. § 784.048(4).

17. See Domestic Violence Victim Totals by Offense, *supra* note 11.

18. *Id.*

19. *Id.*

20. Family Violence Prevention Fund, The Facts on Domestic Violence, *supra* note 7.

21. *Id.*

22. *Id.*

23. Family Violence Prevention Fund, The Facts on Children and Domestic Violence, <http://www.endabuse.org/resources/facts/Children.pdf> (last visited Mar. 25, 2007).

24. Melissa M. Wyer et al., *The Legal Context of Child Custody Evaluations*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE 6-7* (Lois A. Weithorn ed., 1987).

25. *Id.* at 7.

property of the father.²⁶ Therefore, “the father had exclusive rights to the child . . . based on his obligation to protect and financially support the minor.”²⁷

In 1881, Justice Brewer, and then Justice Cardozo in 1925, rejected the right of the parent as primary.²⁸ In *Finlay v. Finlay*,²⁹ Justice Cardozo wrote that the judge “is to put himself in the position of a wise, affectionate, and careful parent and make provision for the child accordingly.”³⁰ Subsequently, the maternal preference rule developed and the burden of proof then rested on the father to prove the mother was unfit.³¹ So long as the mother was fit to be the parent, she was the best provider of attention, devotion, and love during the period of nurture.³² Mothers frequently got children of tender age and minor girls of any age, while fathers got custody of adolescent boys.³³

Today, most jurisdictions have abolished a presumption in favor of either parent in a custody determination.³⁴ Many, including Florida, now use some version of the Uniform Marriage and Divorce Act’s (UMDA) “best interests of the child” factors for custody determinations.³⁵

On making custody determinations, judges are faced with finding the least detrimental alternative, on a case-by-case basis.³⁶ In addition, judges exercise great discretion in custody determinations because of limited evidence and also because the legislature provides little guidance on how to use

26. *Id.*

27. *Id.* at 6–7.

28. *Id.* at 7.

29. 148 N.E. 624 (N.Y. 1925).

30. *Id.* at 626. (citations omitted).

31. Wyer et al., *supra* note 24, at 7.

32. *Id.*

33. *Id.*

34. *See id.* at 8–9.

35. *Id.* at 10. Section 402 of the UMDA states that in determining the best interests of the child:

The court shall consider all relevant factors including:

- (1) the wishes of the child’s parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
- (4) the child’s adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 282 (1998).

36. Wyer et al., *supra* note 24, at 9.

each factor or what weight to give each factor.³⁷ In addition, these decisions may be appealed only on grounds of abuse of discretion.³⁸

B. Custody Determinations in Florida

A child custody determination is a “judgment, decree, or other order of a court providing for the legal custody, physical custody, residential care, or visitation with respect to a child.”³⁹ The court’s jurisdiction is invoked if the child resides in the state for at least six months prior to the filing or proceeding,⁴⁰ if the home state has declined to exercise jurisdiction, or if no other state has jurisdiction.⁴¹ These custody determinations include modifications of custody.⁴²

A modification is a child custody determination⁴³ that changes or replaces the initial custody arrangement.⁴⁴ So long as it concerns the same child it is called a modification.⁴⁵ Florida courts have continuing jurisdiction over the initial determination until the child or the parents have severed their connections with the state, until there is a lack of substantial evidence of “the child’s care, protection, training, and personal relationships” available in Florida, or until the parents and the child are no longer residents of Florida.⁴⁶

A primary residential parent’s relocation may be restricted by statute or by settlement agreement.⁴⁷ Relocation determinations are usually treated as modifications.⁴⁸ “In a relocation case . . . courts are guided by explicit and implicit ideas of the appropriate roles for men and women.”⁴⁹ Usually, these ideals are not reflective of post-divorce reality,⁵⁰ perhaps because the “best

37. *Id.*

38. *Id.* at 10.

39. FLA. STAT. § 61.503(3) (2006).

40. *Id.* § 61.514(1)(a). “‘Child custody proceeding’ means a proceeding in which legal custody, physical custody, residential care, or visitation with respect to a child is an issue. The term includes a proceeding for divorce . . . and protection from domestic violence” *Id.* § 61.503(4).

41. *Id.* § 61.514 (1)(a)-(b).

42. *Id.* § 61.503(3).

43. FLA. STAT. § 61.503(11). “‘Initial determination’ means the first child custody determination concerning a particular child.” *Id.* § 61.503(8).

44. *Id.* § 61.503 (11).

45. *Id.*

46. *Id.* § 61.515(1)(a).

47. Katherine C. Sheehan, Note, *Post-Divorce Child Custody and Family Relocation*, 9 HARV. WOMEN’S L.J. 135, 136–37 (1986).

48. *See id.* at 137.

49. *Id.* at 136.

50. *Id.* at 143.

interests of the child” are also used to determine whether to modify custody.⁵¹

Prior to October 1, 2006, Florida courts made determinations for modification on relocation based on section 61.13(2)(d) of the *Florida Statutes*, which stated in pertinent part: “No presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent.”⁵²

The statute also delineated certain factors that courts must consider before approving relocation.⁵³ These factors were adopted by the Supreme Court of Florida in *Mize v. Mize*.⁵⁴ The Court held that judges should consider and weigh factors such as:

- 1) Whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children;
- 2) Whether the motive for seeking the move is for the express purpose of defeating visitation;
- 3) Whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements;
- 4) Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the noncustodial parent;
- 5) Whether the cost of transportation is financially affordable by one or both of the parents; [and]
- 6) Whether the move is in the best interests of the child.⁵⁵

Additionally, in 2005, the Supreme Court of Florida approved the “substantial change” test.⁵⁶ The party seeking modification of the custody arrangement must show “(1) that the circumstances have substantially and materially changed since the original custody determination, and (2) that the

51. *Id.* at 137.

52. FLA. STAT. § 61.13(2)(d) (2005) (amended 2006).

53. *Id.* § 61.13(2)(d)(1)-(6). In 1993, the Supreme Court of Florida rendered a decision that adopted these same factors from a prior lower court decision. *Mize v. Mize*, 621 So. 2d 417, 420 (Fla. 1993) (per curiam), *superseded by statute*, FLA. STAT. § 61.13(2)(d) (1997).

54. 621 So. 2d at 417.

55. *Id.* at 420 (quoting *Hill v. Hill*, 548 So. 2d 705, 706 (Fla. 3d Dist. Ct. App. 1989)).

56. *Bazan v. Gambone*, 924 So. 2d 952, 955 (Fla. 3d Dist. Ct. App. 2006) (citing *Wade v. Hirschman*, 903 So. 2d 928, 931 (Fla. 2005), *overruled on other grounds*, *Briscoe v. Briscoe*, 927 So. 2d 112 (Fla. 2d Dist. Ct. App. 2006)).

child's best interests justify changing custody."⁵⁷ All requests for modification, whether adopted by a court after agreement or those established during a hearing for custody, were subject to the "substantial change" test.⁵⁸

Domestic violence complicates these determinations.⁵⁹ Even more complicated is that on occasion, custody determinations may be made in a domestic violence proceeding.⁶⁰ As the following case demonstrates, a mechanical application of the law will not be effective with domestic violence cases.

In the case of *O'Neill v. Stone*,⁶¹ custody of the unmarried couple's child was awarded to the mother in a proceeding on "a . . . petition for injunction for protection against domestic violence."⁶² O'Neill, the mother, then relocated to New Jersey.⁶³ In response, Stone, the father, "filed an emergency motion seeking the return and temporary custody of the child."⁶⁴ Stone obtained a pick-up order but O'Neill immediately retained counsel and filed a motion to set aside that order.⁶⁵ During that hearing, the trial court refused to hear testimony regarding domestic violence and ordered the child returned to Florida.⁶⁶ The Second District Court of Appeal held that the trial court abused its discretion by not hearing the testimony on domestic violence.⁶⁷ In addition, the appellate court opined that the trial court should have considered the relocation issue and the factors under old section 61.13(2)(d) at the time O'Neill motioned to set aside the pick-up order.⁶⁸

Florida has a strong public policy against domestic violence.⁶⁹ "It is now widely recognized that domestic violence 'attacks are often repeated

57. *Id.* (citing *Wade*, 903 So. 2d at 931 n.2).

58. *Id.* at 955–56.

59. See *O'Neill v. Stone*, 721 So. 2d 393, 395 (Fla. 2d Dist. Ct. App. 1998).

60. See *id.* at 394 (custody order directed after mother filed "a standardized petition for injunction for protection against domestic violence pursuant to section 741.30").

61. *Id.* at 393.

62. *Id.* at 394.

63. *Id.*

64. *O'Neill*, 721 So. 2d at 394.

65. *Id.*

66. *Id.* at 394–95 (the trial court refused testimony because of insufficient time and did not allow Robin O'Neill's former employer, babysitter, and sister to testify at the hearing).

67. *Id.* at 396. "We hasten to add that our reversal should not be read as approval for a custodial parent to disobey visitation orders." *Id.* The court disapproved of the domestic violence proceeding being used in this manner—only for temporary custody and support orders. See *O'Neill*, 721 So. 2d at 396.

68. *Id.* at 395–96. These factors would include any evidence of domestic violence at which time the trial court would have been compelled to consider the testimony of O'Neill's former employer, babysitter, and sister. See *id.*

69. See *Weiland v. State*, 732 So. 2d 1044, 1052–53 (Fla. 1999), *superseded by statute*, FLA. STAT. § 776.013 (2005).

over time, and escape from the home is rarely possible without the threat of great personal violence or death.”⁷⁰ The executive branch of the government of Florida “established a task force on domestic violence, whose purpose is the issuance of reports and recommendations which document ‘the extent of our awareness, and the responsiveness of our resources to battered women and their families.’”⁷¹ So does that mean the relocation statute incorporates the grave concerns of the state?

III. DISCUSSION

A. “Parental Relocation with a Child”

Florida’s new statute on parental relocation is a very detailed statute. Outfitted with its own list of definitions, this statute makes clear the procedure for relocating with a child. However, domestic violence victims may not find timely or effective relief under this statute.

This new statute is codified under Chapter 61 of the *Florida Statutes*.⁷² The purposes delineated in Chapter 61 include the promotion of “amicable settlement of disputes that arise between parties to a marriage and [t]o mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.”⁷³ How does that apply to someone seeking relief from domestic violence, who seeks to escape violence with their child?

Section 61.13001 defines the primary residential parent of the child as “the person seeking to relocate with a child,” absent a court order or an agreement designating one parent as the primary residential parent.⁷⁴ Under this section, “‘change of residential address’ means the relocation of a child to a principal residence more than [fifty] miles away from his or her principal place of residence at the time of the entry of the last order establishing . . . custody.”⁷⁵ Relocation is defined in this section as a change of residence for sixty consecutive days.⁷⁶

The statute indicates that the first method of relocation is by agreement.⁷⁷ The primary residential parent may relocate if he or she has reached

70. *Id.* at 1053 (quoting *State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1997)).

71. *Id.* at 1055 (quoting Executive Office of the Governor, *The Governor’s Task Force on Domestic Violence, The First Report* (January 31, 1994)).

72. FLA. STAT. §§ 61.001-61.45 (2006).

73. *Id.* § 61.001(2)(b), (c).

74. *Id.* § 61.13001(1)(f).

75. *Id.* § 61.13001(1)(a).

76. *Id.* § 61.13001(1)(h).

77. FLA. STAT. § 61.13001(2)(a).

an agreement with the secondary residential parent.⁷⁸ This agreement must define “the visitation rights [of] the nonrelocating parent,” “any transportation arrangements related to the visitation,” and the nonrelocating parent must have signed the agreement.⁷⁹ The parties must get court approval of the agreement, and a hearing will only be held if requested.⁸⁰

If there is no agreement for relocation between the parents, then the primary residential parent who wants to relocate must give “Notice of Intent to Relocate” to the other parent.⁸¹ The Notice must include a description of the intended new residence, new home telephone number, the intended date of relocation, specific reasons for the relocation, and a proposed revised visitation schedule.⁸² “The mailing address of the parent . . . seeking to relocate” must be included and the contents are not privileged.⁸³ The parent seeking to relocate must also prepare a “Certificate of Filing Notice of Intent to Relocate.”⁸⁴ In addition, the relocating parent must also provide any changes in address, phone numbers, or any other information required.⁸⁵

Furthermore, pursuant to the statute, each Notice must include an “objection clause”.⁸⁶ If no objection is filed within thirty days, the relocation is presumed to be “in the best interest of the child.”⁸⁷ However, if an objection is timely filed, the parent seeking to relocate with the child has the burden of proving the relocation is in the best interests of the child, among other things.⁸⁸ Under this statute, there is no presumption in favor of either parent for modification due to relocation.⁸⁹ The statute then requires that courts

78. *Id.* This statute also requires consent from “every other person entitled to visitation with the child.” *Id.*

79. *Id.* § 61.13001(2)(a)(1)-(3).

80. *Id.* § 61.13001(2)(b).

81. FLA. STAT. §61.13001(3). This section also requires that “every other person entitled to visitation with the child” be informed of the proposed relocation. *Id.*

82. *Id.* § 61.13001(3)(a)(1), (3)-(6).

83. *Id.* § 61.13001(3)(a)(8).

84. *Id.* § 61.13001(3)(c).

85. *See* Fla. STAT. § 61.13001(3)(d).

86. *Id.* § 61.13001(3)(a)(7). This statement must appear in the notice:

AN OBJECTION TO THE PROPOSED RELOCATION MUST BE MADE IN WRITING, FILED WITH THE COURT, AND SERVED ON THE PARENT OR OTHER PERSON SEEKING TO RELOCATE WITHIN 30 DAYS AFTER SERVICE OF THIS NOTICE OF INTENT TO RELOCATE. IF YOU FAIL TO TIMELY OBJECT TO THE RELOCATION, THE RELOCATION WILL BE ALLOWED, UNLESS IT IS NOT IN THE BEST INTERESTS OF THE CHILD, WITHOUT FURTHER NOTICE AND WITHOUT A HEARING.

Id.

87. *Id.* § 61.13001(3)(e).

88. *See id.*

89. FLA. STAT. § 61.13001(7). This section was incorporated from section 61.13(2)(d) of the 2005 version of the *Florida Statutes*.

determine custody based on: 1) the nature and quality of the relationship with the primary residential parent; 2) the age, developmental stage, and needs of the child; 3) the likely impact of relocation; 4) the maintenance of continuing contact with the other parent; 5) the child's preference,⁹⁰ 6) the reasons for and against relocation; 7) career opportunities available to the objecting parent or relocating parent; 8) a history of domestic violence;⁹¹ and 9) "[a]ny other factor affecting the best interest of the [child]."⁹²

If the relocating parent fails to file a Notice before relocating, the relocating parent is subject to contempt and may be compelled to return the child.⁹³ In addition, the court will consider the failure to timely file the Notice, along with the unauthorized removal of the child from the jurisdiction, as factors in determining whether to approve relocation.⁹⁴ The court will also consider the unauthorized removal when it determines whether to change primary residential custody or to modify visitation.⁹⁵ Moreover, the relocating parent may be ordered to "pay reasonable expenses and attorney's fees" for the objecting parent.⁹⁶

B. *Interpretation and Analysis*

There are some critical factors that will affect the interpretation of section 61.13001 of the *Florida Statutes*.⁹⁷ Even though one parent is the primary residential parent, family law seeks to keep the child in contact with both parents as much as possible.⁹⁸ But "when women who are victims of

90. FLA. STAT. § 61.13001(7)(a)-(k) (2006). The courts will take into consideration the child's preference depending on the age and maturity of the child. *Id.* § 61.13001(7)(d).

91. *Id.* As defined in the 2005 version of the *Florida Statutes*, "'Domestic Violence' means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member." *Id.* § 741.28(2) (2005). Subsection 3 defines "'Family or household member' [as] spouses, former spouses, [or] persons related by blood or marriage." *Id.* § 741.28(3).

92. FLA. STAT. § 61.13001(7) (2006).

93. *Id.* § 61.13001(3)(f).

94. *Id.* § 61.13001(3)(e)-(f)(1).

95. *See id.* § 61.13001(3)(f)(2).

96. *Id.* § 61.13001(3)(f)(4).

97. *See Mize v. Mize*, 621 So. 2d 417, 419 (Fla. 1993) (per curiam), *superseded by statute*, FLA. STAT. § 61.13(2)(d) (1997).

98. *Id.* (citing FLA. STAT. § 61.13(2)(b) (1989)).

domestic violence separate from . . . their abusive partners,” they are faced with an unexpected one-sided application of the law.⁹⁹

Domestic violence victims may need welfare assistance and may have to separate from their children for a while.¹⁰⁰ Such circumstances may cost them custody of their children, as domestic violence victims are sometimes labeled “bad mother[s]” and may face criminal charges for failure to protect their children.¹⁰¹ These women may also have to defend themselves in custody proceedings against their abusers.¹⁰² In addition, if a domestic violence victim escapes with her children and flees the jurisdiction, she may have a defense to the criminal charge of custodial interference.¹⁰³

It is [now] a defense that . . . [t]he defendant was the victim of an act of domestic violence or had reasonable cause to believe that he or she was about to become the victim of an act of domestic violence . . . and the defendant [believed] . . . that the action was necessary in order for the defendant to escape from, or protect himself or herself from, the domestic violence or to preserve the minor . . . from exposure to the domestic violence.¹⁰⁴

The legislature intends for Chapter 61, “Dissolution of Marriage; Support; Custody”, to be liberally construed.¹⁰⁵ A liberal interpretation of a statute commands an expansive interpretation of the words.¹⁰⁶ This also indicates that the legislature intended that judges exercise great discretion in determining the meaning of the statute.¹⁰⁷

One recent case states, in a footnote, that under section 61.13001, “the relocation of children is always open to judicial scrutiny.”¹⁰⁸ This case im-

99. Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform”, Family, and Criminal Law*, 83 CORNELL L. REV. 688, 743–44 (1998).

100. *See id.* at 744.

101. *See id.*

102. *See id.* at 745.

103. *See* FLA. STAT. § 787.03(2), (4)(b) (2006).

In the absence of a court order determining rights to custody . . . any parent of the minor . . . who has custody [of the child] and who takes, detains, conceals, or entices away that minor . . . with malicious intent to deprive another person of his or her right to custody of the minor . . . commits a felony of the third degree. . . .

Id. at § 787.03(2).

104. *Id.* § 787.03(4)(b).

105. *Id.* § 61.001(1).

106. *See* RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 55 (2002).

107. *See id.*

108. *Echezarreta v. Echezarreta*, 944 So.2d 1169, 1169–70 (Fla. 3d Dist. Ct. App. 2006). In this case, the Third District Court of Appeals did not decide the relocation issue under

plies that trial courts may exercise great discretion in custody and relocation cases.¹⁰⁹ Another case explains that appellate review of those decisions is subject to an abuse of discretion standard of review.¹¹⁰ Abuse of discretion “means that ‘[i]f reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.’”¹¹¹ Also, “the test of reasonableness requires [a determination of] whether there is ‘logic and justification’ for the” trial court’s finding.¹¹²

Consider the following hypothetical.¹¹³ T.F. wants to relocate with her twenty-month-old daughter, K.F., because of abuse T.F. experienced from her former husband, F.H.¹¹⁴ Prior to their separation, F.H. reportedly had a “history of harassment, physical harm and [an] uncontrollable temper.”¹¹⁵ There were two main reports of violence experienced by T.F.¹¹⁶ The first occurred on Mothers’ Day in 1994.¹¹⁷ Family members arrived at the couple’s house that day and met F.H. running out of the house, saying that they had “better get in the house before he tore off his wife’s head.”¹¹⁸ F.H. later admitted to his sister-in-law that “he hit his wife again.”¹¹⁹ F.H. also participated in the Family Violence Intervention Program, but the violence did not stop.¹²⁰

The second incident occurred in October 1994.¹²¹ This time F.H. threw T.F. on the floor and “kick[ed] her in the chest, ribs and legs.”¹²² T.F. managed to call the police and fled the house out of fear for her safety and the safety of K.F.¹²³ T.F. is now the primary residential parent of her daugh-

section 61.13001 because the settlement agreement incorporated the previous statute section 61.13(2)(d). *Id.* at 1170.

109. *See id.*

110. *See* Hamilton v. Hamilton, 922 So. 2d 263, 266 (Fla. 2d Dist. Ct. App. 2006).

111. *Id.* (quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)).

112. *Id.* at 267 (quoting *Canakaris*, 382 So. 2d at 1203). In this case, the court found that the trial court abused its discretion by placing the child with the mother who was proven to be an alcoholic. *Id.* at 268.

113. This hypothetical is based upon the case of *Ford v. Ford*, 700 So. 2d 191 (Fla. 4th Dist. Ct. App. 1997).

114. *See id.* at 192–93.

115. *Id.* at 192.

116. *Id.* at 193.

117. *Id.*

118. *Ford*, 700 So. 2d at 193.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Ford*, 700 So. 2d at 193.

ter,¹²⁴ but F.H. continues to harass, stalk and attempt to abuse T.F. with every opportunity. T.F. wishes to relocate to a neighboring state to ensure that she and K.F. are safe.

Is section 61.13001 the appropriate statute for analysis of this hypothetical? The title of Section 61.13001 is helpful for determining the legislative intent at the time it was enacted.¹²⁵ This statute is entitled “Parental Relocation with a Child.”¹²⁶ The statute goes on to define relocation and change of residence address.¹²⁷ In addition, the statute’s main focus is on the child.¹²⁸ Each section of the statute concerns the child or holds the child as the subject.¹²⁹ The primary residential parent is the parent seeking to relocate with the child or the one so designated by a court.¹³⁰ It is fair to deduce then, that T.F. must comply with the provisions in section 61.13001, if she intends to relocate with K.F.

Will T.F. find timely and effective relief under section 61.13001? The problem presented above is complicated further because the primary residential parent is also a domestic violence victim. Let’s consider the possibility of agreement, whether there are any issues with the magnitude of disclosure required under the statute, and whether the application of subsection 7(j) is sufficient for timely and effective relief under the statute.

First, T.F. is unlikely to reach an agreement for relocation with F.H. An agreement to relocate may promote amicable settlement between the parties, which is the purpose of Chapter 61. However, even with a liberal construction, and based on a plain reading¹³¹ of the statute, T.F. will only provoke F.H. to heightened physical abuse if she attempts to reach an agreement for relocation.¹³² This section fails for domestic violence victims because

124. *Id.* at 197. The appellate court reversed the trial court decision and made the mother the primary residential parent of the child. *See id.* The mother appealed from the settlement agreement made a part of the final judgment and decree of dissolution on the initial custody determination. *See id.* at 192.

125. *See* BROWN & BROWN, *supra* note 106, at 99. “Courts . . . will generally use an act’s title as an aid in resolving an ambiguity in the act’s text,” but here it is used as a starting point and in conjunction with the text to reveal when this statute is applicable. *Id.*

126. FLA. STAT. § 61.13001 (2006).

127. *Id.* § 61.13001(1)(a), (h).

128. *See id.* §61.13001.

129. *See generally id.*

130. *Id.* § 61.13001(1)(f).

131. Here, “the plain meaning is merely the first consideration in dealing with legislative intent, and it will control unless a convincing argument is made that the legislature intended otherwise based on the other methods of statutory interpretation.” BROWN & BROWN, *supra* note 106, at 42.

132. *See generally* FLA. STAT. § 61.13001(2).

“[d]omestic violence is about power and control.”¹³³ If T.F. moves to a neighboring state, F.H. will have less control over her. The likely effect of an attempted agreement is heightened abuse.¹³⁴ The facts suggest that the abuse in the past has been unprovoked.¹³⁵ Any attempt to reach an agreement for relocation may provoke F.H., which could result in more harm to T.F. and K.F.

T.F. may consider serving a “Notice of Intent to Relocate” on F.H.¹³⁶ However, the Notice requires disclosure of address, phone number, description of the intended new residence, and specific location.¹³⁷ This document must also have the date of intended move and specific reasons for the move.¹³⁸ T.F. seeks to protect herself from harm and to protect the couple’s child from the effects of domestic violence. Service of the Notice in this instance is also likely to result in heightened abuse. In addition, F.H. will know her intended location once he receives the Notice. This is very likely to defeat the purpose of her relocating. F.H. has previously arranged for her vehicle to be repossessed in the middle of the night.¹³⁹ His behavior indicates that he is persistent and determined. F.H. is likely to follow T.F. to her new location and continue harassing and abusing her.

Perhaps the statute provides some relief for T.F. with regard to disclosure of her location. Section 61.13001(4) states, “[i]f the parent . . . is entitled to prevent disclosure of location information under any public records exemption applicable to that person, the court may enter any order necessary to modify the disclosure requirements of this section in compliance with the public records exemption.”¹⁴⁰ In this case, the applicable public records exemption is found in section 741.465, titled “Public Records Exemption for the Address Confidentiality Program for Victims of Domestic Violence.”¹⁴¹ section 741.401 reveals that the legislature recognizes the need for domestic violence victims to “establish new addresses in order to prevent their [abusers] from finding them.”¹⁴² The purpose of the exemption is to enable ad-

133. The National Center for Victims of Crime, Domestic Violence, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32347> (last visited May 15, 2007).

134. *See id.*

135. *See Ford v. Ford*, 700 So. 2d 191, 193 (Fla. 4th Dist. Ct. App. 1997).

136. *See* FLA. STAT. § 61.13001(3)(a).

137. *Id.*

138. *Id.*

139. *See Ford*, 700 So. 2d at 194.

140. FLA. STAT. § 61.13001(4).

141. *Id.* § 741.465.

142. *Id.* § 741.401. It is titled “Legislative Findings; purpose” and is related to *Florida Statutes* sections 741.401-.409. *Id.*

dress confidentiality, and allow state and local law enforcement to work with the attorney general's office to protect the identity and location of participants.¹⁴³

Only on a showing of a valid arrest warrant, court order, or cancellation of certification will the participant's address, telephone number, and social security number be revealed.¹⁴⁴ There are no application fees to become a participant and the attorney general is required to certify the exemption once a properly completed application is filed.¹⁴⁵ The applicant then becomes a participant for four years.¹⁴⁶ The certified address can be a school address, work address, or residential address.¹⁴⁷ However, certification may be cancelled by a change of name or residential address, or if forwarded mail from the attorney general is returned as undeliverable from the certified address.¹⁴⁸

This is a problem for T.F. because if she applies for certification now, it will be for her current address. The statute is unclear, but it seems to suggest that if relocation is granted to her, after she moves, the certification will be cancelled and the new address will then be available to the public, including F.H.¹⁴⁹ That seems to defeat the purpose of keeping the records confidential, so that F.H. is not able to find T.F.

For T.F., the time to get certification and wait for an objection to the relocation notice could be months.¹⁵⁰ The statute on the confidentiality program does not indicate how long it will take a victim to obtain certification.¹⁵¹ However, assuming that T.F. is a program participant, she still has to wait thirty days from the date of filing to see if F.H. will object to the relocation.¹⁵² F.H. could inflict more harm to T.F. during these waiting periods.

Assuming T.F. passes the disclosure hurdle or decides to take her chances, F.H. now files a timely objection to T.F.'s intended move. Section 61.13001 fails again, because once an objection is filed, T.F. must "initiate court proceedings to obtain court permission to relocate."¹⁵³ F.H. is now aware of T.F.'s intentions, which makes it more likely that F.H. will either threaten or try to harm her in an attempt to change her mind. He may even

143. *See id.*

144. FLA. STAT. § 741.465(1).

145. *Id.* § 741.403(2), (3).

146. *Id.* § 741.403(3) (2006).

147. *Id.* § 741.402(1).

148. *Id.* § 741.404(2).

149. *See* FLA. STAT. § 741.404(2).

150. *Id.* §§ 741.401-.409.

151. *Id.* §§ 741.401-.409.

152. *See id.* § 61.13001(5).

153. *Id.* § 61.13001(3)(e).

try a different approach. For example, he may apologize profusely as in the “honeymoon” phase of the cycle of violence.¹⁵⁴

In addition, T.F. may have to defend herself later at the hearing, to determine custody on relocation.¹⁵⁵ Most women end up on the defensive at these hearings, despite the abuse they have experienced because of their “unfit” image due to the abuse.¹⁵⁶ In addition, the statute indicates that T.F. has the burden of proof to show that relocation is in the best interest of the child.¹⁵⁷ F.H. will not want to lose control, so he will fight for custody and is likely to do everything to destroy T.F.’s image before the court, as he tried before when alleging T.F. was withholding visitation privileges.¹⁵⁸

At the hearing, the court is likely to apply the factors delineated in the relocation statute.¹⁵⁹ The court will consider evidence of a “history . . . of domestic violence.”¹⁶⁰ However, this factor raises many questions. It provides hope to parent victims, but is silent as to what types of evidence may be introduced and how much weight will be attributed to this factor in the court’s determination.¹⁶¹ History is defined as a “chronological record of significant events.”¹⁶² So what comes in as support for T.F.’s position? The courts are unpredictable in this area, or in custody determinations, for that matter.¹⁶³

This is not good for T.F., who seeks timely and effective relief from abuse. However, this decision rests in the hands of judges who have so

154. See LENORE E. WALKER, *THE BATTERED WOMAN* 65 (1979). The cycle of violence typically has three phases. See *id.* at 55–70. The first is the tension building phase, where the victim is nervous and needs to watch her moves while the abuser is getting angry and communication breaks down. See *id.* at 56–59. The second stage is the incident. See *id.* at 59–65. This is where the abuser acts out on the victim and commits a crime of domestic violence. *Id.* The third stage is the honeymoon phase. WALKER, *supra* at 65–70. During this phase, the abuser seeks pity or apologizes profusely to pull the victim back into the relationship. *Id.* at 65–66. Next, there is often calm before the tension building phase begins again. See *id.* at 70. Here, the abuser may not act against the victim and may behave like there was no abuse. See *id.*

155. See Murphy, *supra* note 99, at 745.

156. See *id.*

157. See FLA. STAT. § 61.13001(8) (2006).

158. See *Ford v. Ford*, 700 So. 2d 191, 196 (Fla. 4th Dist. Ct. App. 1997).

159. FLA. STAT. § 61.13001(7)-(8). Failure by T.F. to comply with procedures “may be taken into account by the court in any initial or post-judgment action seeking a determination or modification of the designation of the primary residential parent or of the residence, custody, or visitation with the child.” *Id.* § 61.13001(3)(f).

160. See *id.* § 61.13001(7)(j).

161. See *id.*

162. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 573 (1988).

163. See generally PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS, *supra* note 24, at 4–5.

much discretion that they are likely to weigh the factors differently depending on the circuit or county.¹⁶⁴ It is likely that based on the “best interest of the child” language in the statute,¹⁶⁵ and if the statute is to be read with other provisions in Chapter 61,¹⁶⁶ then the abuse from F.H. towards T.F. will be considered and perhaps heavily weighed by the court.

Another issue with the application of the factors included in section 61.13001 is the “substantial change” test.¹⁶⁷ The Supreme Court of Florida adopted the “substantial change” test in addition to the factors codified in section 61.13(2)(d) and now, with minimal revisions, in section 61.13001.¹⁶⁸ This test allows the trial court to modify custody if the party seeking the modification can show “(1) that the circumstances have substantially and materially changed since the original custody determination, and (2) that the child’s best interests justify changing custody.”¹⁶⁹

F.H., in this case, would have to prove that T.F.’s circumstances have “substantially and materially changed” and that her relocation would not be in the best interest of K.F.¹⁷⁰ If the goal is shared parenting, then the presiding judge will be attentive as to how the relocation will affect the child.¹⁷¹ The complication, and perhaps the flaw, lies with the focus of the statute. Since the focus of section 61.13001 is the child,¹⁷² the domestic violence victim runs the risk of being seen as unstable. She may be required to keep moving to get away from her abusive ex-spouse. She may be forced to change jobs often, because the ex-spouse creates problems for her while at work. If the focus is on the victim first, or contemporaneous with the child’s interests, then the analysis will change.

164. *See id.*

165. FLA. STAT. § 61.13001(3)(e).

166. BROWN & BROWN, *supra* note 106, at 89. “[A]ny language in the statute is to be read in light of the whole statute, not just a portion of it.” *Id.*

167. Bazan v. Gambone, 924 So. 2d 952, 955 (Fla. 3d Dist. Ct. App. 2006).

168. *See* FLA. STAT. § 61.13001(7).

169. Bazan, 924 So. 2d at 955 (citing Wade v. Hirschman, 903 So. 2d 928, 931 n.2 (Fla. 2005), *overruled on other grounds*, Briscoe v. Briscoe, 927 So. 2d 112 (Fla. 2d Dist. Ct. App. 2006)).

170. *See id.*

171. *See* FLA. STAT. § 61.13001(7).

172. *See generally id.* § 61.13001.

IV. RECOMMENDATIONS

Florida's "Parental Relocation with a Child" statute focuses on the best interest of the child.¹⁷³ In addition, the statute furthers the purpose of Chapter 61, which promotes amicable resolutions and shared parenting.¹⁷⁴ Section 61.13001(2), when read together with section 61.001(2), for *internal consistency*,¹⁷⁵ reveals that the goal of the agreement section and the thirty-day objection period is to allow for parents to amicably settle their issues outside of court.¹⁷⁶ For most parents, the new relocation statute helps them save on attorney fees and costs, allowing the parents more autonomy in the decisions concerning where their children will live. So long as the parents are able to reach an agreement, whether initially or after a Notice of Intent to Relocate has been served on the other parent, they may be said to have autonomy.

The focus on the parents is misplaced for domestic violence victims, however. The child's best interest remains paramount. However, the parent victim must be considered as a priority either before the child or with the child.¹⁷⁷ One court emphasizes that a child "[w]atching, hearing, or even later learning of a parent being abused by a partner threatens a child's sense of stability and security In order to minimize the risk of long term damage, the safety and security of a child's environment needs to be restored."¹⁷⁸

A survey of jurisdictions in the United States reveals that some states consider the safety and well-being of both the parent and the child in their custody determinations.¹⁷⁹ Alabama and Arkansas have gone so far as to enact a rebuttable presumption that it is detrimental, and not in the best interest of the child, to be placed in sole or joint, legal, or physical custody with the perpetrator of domestic violence.¹⁸⁰ Florida's domestic violence statute, in section 741.2902, explains that the safety of the child and the parent are

173. *See id.*

174. *Id.* § 61.001(2)(b)-(c).

175. BROWN & BROWN, *supra* note 106, at 86. "[A]n interpretation that produces internal consistency in the statute is to be favored over an interpretation that produces internal inconsistencies." *Id.* at 86-87.

176. *See* FLA. STAT. §§ 61.001, .13001(3), (7).

177. *See id.* § 61.13001(7)(j).

178. D.R. v. Dep't. of Child. & Fam. Servs., 898 So. 2d 254, 256 (Fla. 3d Dist. Ct. App. 2005).

179. *See, e.g.*, ALA. CODE § 30-3-132 (LexisNexis 2006); CAL. FAM. CODE § 3011(a) (West 2004) (discussing the health, safety, and welfare of the child); ARK. CODE ANN. § 9-15-215(a)(1) (1987).

180. ALA. CODE § 30-1-131 (LexisNexis 2006) (determination raises rebuttable presumption that custody with perpetrator detrimental to child); ARK. CODE ANN. § 9-15-215(2)(c) (1987).

paramount in domestic violence proceedings.¹⁸¹ These proceedings allow for the determination of temporary custody arrangements.¹⁸² It is unclear whether the courts should have the same focus in a determination concerning relocation.

Further, Florida has a criminal penalty in place for anyone who interferes with custody.¹⁸³ Even though proof of domestic violence is now a defense to this crime,¹⁸⁴ without clear relief in the relocation statute, the victim parent may feel trapped because of the possibility of punishment. Other jurisdictions have enacted a remedy instead, which states that if one parent is absent from the jurisdiction, or relocates because of an act of domestic violence, and that parent was not the perpetrator of the violence, the absence or relocation without court approval shall not be a factor that weighs against the relocating party in determining custody or visitation.¹⁸⁵

A remedy for the loopholes in Florida's relocation statute would be to include the following provisions:

(a) The safety and well-being of each child and each parent is paramount to all other factors.¹⁸⁶

(b) Upon a finding of domestic violence, there is a rebuttable presumption that it is detrimental, and not in the best interest of the child, to be placed in sole, joint, legal or physical custody with the perpetrator of domestic violence.¹⁸⁷ The standard of proof for an act of domestic violence is by a preponderance of the evidence.¹⁸⁸

(c) No presumption applies if both parents have committed an act of domestic violence against each other.¹⁸⁹

(d) A finding of domestic violence constitutes a substantial change in circumstances that warrants a custody determination in favor of the victim or the victim's parent who is not the perpetrator.¹⁹⁰

181. FLA. STAT. § 741.2902(1) (2006).

182. *Id.* § 741.2902(2)(d), (e).

183. *See supra* note 103 and accompanying text.

184. FLA. STAT. § 787.03(4)(b).

185. *E.g.*, ALA. CODE § 30-3-132(b) (LexisNexis 2006); ARIZ. REV. STAT. ANN. § 25-403.03(I) (2000 & Supp. 2006); N.C. GEN. STAT. ANN. § 50-13.2(b) (2005); ARK. CODE ANN. § 9-15-215(2)(b) (1987).

186. *See* ALA. CODE § 30-3-132(a)(1) (LexisNexis 2006); CAL. FAM. CODE § 3011(a) (West 2004) (using the language of the "health, safety, and welfare of the child," which is currently missing from the Florida relocation statute); ARK. CODE ANN. § 9-15-215(a) (1) (1987).

187. ALA. CODE § 30-1-131 (LexisNexis 2006) (stating that determination raises rebuttable presumption that custody with perpetrator detrimental to child); ARK. CODE ANN. § 9-15-215(c) (1987).

188. ARK. CODE ANN. § 9-15-215(c) (1987).

189. ARIZ. REV. STAT. ANN. § 25-403.03(D) (2000 & Supp. 2006).

(e) If one parent is absent from the jurisdiction or relocates because of an act of domestic violence, and that parent was not the perpetrator of the violence, the absence or relocation without court approval shall not be a factor that weighs against the relocating party in determining custody or visitation.¹⁹¹ In addition, because of those acts of violence, the relocating parent may not be subject to the criminal statute for “Interference of Custody” so long as they are able to satisfy the standard of proof.¹⁹²

(f) The court may review evidence from any of the following sources: “1) [f]indings from another court of competent jurisdiction; 2) [p]olice reports; 3) [m]edical reports; 4) [c]hild protective services records; 5) [d]omestic violence shelter records; 6) [s]chool records; [and] 7) [w]itness testimony.”¹⁹³

These provisions should be incorporated into Chapter 61 of the *Florida Statutes*, in particular to section 61.13001, to ensure that parent victims are clear on what they may do to escape violence and protect themselves and their children. The above provisions alone may not provide the absolute remedy. However, if accurately incorporated and applied by the courts, these provisions may provide timely and effective relief to domestic violence victims who are primary residential parents relocating for safety. At the very least, it should be clear to judges what types of evidence parties can consider to prove that domestic violence exists during a custody, modification, or relocation hearing.

190. ALA. CODE §30-3-134 (LexisNexis 2006). “In every proceeding in which there is at issue the modification of an order for custody or visitation of a child, a finding that domestic or family violence has occurred since the last custody determination constitutes a finding of change in circumstances.” *Id.*

191. ALA. CODE § 30-3-132(b) (LexisNexis 2006); ARIZ. REV. STAT. ANN. §25-403.03(I) (2000 & Supp. 2006); N.C. GEN. STAT. ANN. § 50-13.2(b) (2005) (“If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation.”); ARK. CODE ANN. § 9-15-215(b) (1987).

192. See FLA. STAT. § 787.03(4)(b) (2006).

193. See ARIZ. REV. STAT. ANN. § 25-403.03(C)(1)-(7) (2000 & Supp. 2006).

BATTERED WOMAN’S SYNDROME: SETTING A STANDARD IN FLORIDA

SARA M. SANDLER*

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I. INTRODUCTION

Domestic violence is an epidemic that defies classifications of race, ethnicity, age, class, and religion. It spans state lines, oceans, and international boundaries. Unfortunately, the cure for this external disease is unknown and out of reach, as many of those who suffer from it deny or hide their symptoms. In recent years, the legal world has done much to combat domestic violence by enacting statutes and case law to protect those who are victimized by abuse and even those who finally find the courage to turn on their attackers and end the violence forever.

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The federal government has begun to do its part in the battle against domestic violence. As part of the Violence Against Women Act of 1994, Congress enacted sections 2261 and 922 of Title 18 of the *United States Code*.¹ Section 2262(a)(1) makes it illegal for persons with an order of protection against them to cross state lines with the intent to threaten, harass, or commit violence against whomever the order protects.² Section 2262(a)(2) further makes it a crime for persons with an order of protection against them to use force, coercion, or fraud to induce the protected person to cross state lines in order to cause violence against the protected person.³ This statute undoubtedly applies to an intimate partner.⁴ Thus, a battered woman who is able to obtain an order of protection against her batterer would gain further protection through federal law. Section 922(d)(8) prohibits the sale and possession of firearms or ammunition to people with a restraining order against them.⁵ This prevents them from threatening, harassing, stalking, or assaulting an intimate partner⁶ and thus provides further federal protection to a battered woman.

Individual states are also beginning to take a stand on punishing those who commit violence against their spouse or significant other. Currently, “[a]ll [fifty] states now have statutes that make spousal abuse a crime.”⁷ Further, Maryland,⁸ Missouri,⁹ and South Carolina¹⁰ have actually enacted

1. Douglas A. Orr, *Weiand v. State and Battered Spouse Syndrome: The Toothless Tigress Can Now Roar*, 74 FLA. B.J. 14, 16 (June 2000).

2. 18 U.S.C. § 2262(a)(1) (2000).

3. *Id.* § 2262(a)(2).

4. Orr, *supra* note 1, at 16.

5. 18 U.S.C. § 922(d)(8).

6. *Id.* This section of the *United States Code*, however, only applies to restraining orders that have been received following a hearing where actual notice was received, where there was an opportunity to participate, and when either: 1) there has been a finding of a credible threat to the safety of the intimate partner; or 2) the terms of the restraining order “explicitly prohibit[] the use, attempted use, or threatened use of physical force against such intimate partner.” *Id.* § 922(d)(8)(A)-(B).

7. Orr, *supra* note 1, at 16.

8. MD. CODE ANN., CTS. & JUD. PROC. § 10-916(b)(2) (LexisNexis 2006). When the defendant claims that they suffer from Battered Woman’s Syndrome, the Maryland statute permits “[e]xpert testimony on the Battered Spouse Syndrome” in order to explain “the defendant’s motive or state of mind, or both, at the time of the . . . alleged offense.” *Id.*

9. MO. ANN. STAT. § 563.033(2) (West 1999). This statute authorizes Missouri courts to appoint a psychiatrist or psychologist to perform an examination of the accused once the accused files a written notice of his or her intent to introduce evidence of Battered Woman’s Syndrome. *Id.* Though the statute does not explicitly allow for the testimony of the expert witness, Missouri courts have interpreted the statute to mean that as long as there is “a prima facie showing of the elements of self-defense” expert testimony on Battered Woman’s Syndrome is admissible. See *State v. Anderson*, 785 S.W.2d 596, 599–600 (Mo. Ct. App. 1990).

statutes authorizing the use of expert testimony regarding Battered Woman's Syndrome. Florida has enacted tougher laws for abusers, such as section 741.2901(3), which requires that a defendant arrested for domestic violence remain in custody until his or her first appearance, and that when determining bail, the court must take into consideration the safety of the victim.¹¹ Though this may seem minimal, it provides a cooling off period for both the abuser and the victim, which significantly reduces the amount of potential violence after arrest. The Florida judiciary has also reorganized itself so that there are now eight domestic violence courts.¹² Furthermore, over half of the judicial circuits have incorporated a domestic violence task force.¹³ In addition, "Florida judges, both circuit and county, receive education and training that specifically address domestic violence related issues."¹⁴

Thus, it is clear that both state and federal governments are beginning to adopt changes to encourage the awareness and prevention of domestic violence. However, "it is believed that most incidents of physical abuse of women by their mates are never reported to authorities."¹⁵ Unfortunately, there is not much that can be done to encourage women to take legal action against their abusers. Nor is there much that can be done to permanently get rid of this terrible problem faced all over the world due to its inherent nature to remain a private matter. However, there is something that can be done legally to help those victims who are forced to resort to extreme measures to protect their lives. Currently, Florida allows for the use of expert testimony on Battered Woman's Syndrome as part of a self-defense claim to murder.¹⁶ This has helped numerous battered women defendants explain to the jury why they chose to kill their abuser instead of leave him. However, expert testimony, if used to testify specifically regarding the individual defendant, as opposed to Battered Woman's Syndrome in general, is based solely on the testimony of the defendant.¹⁷ Thus, Florida falls short in establishing a stan-

10. S.C. CODE ANN. § 17-23-170(B) (2003). The South Carolina statute explicitly states that expert testimony on Battered Woman's Syndrome should "not be considered a new scientific technique the reliability of which is unproven." *Id.* (emphasis added).

11. FLA. STAT. § 741.2901 (2006).

12. Orr, *supra* note 1, at 16.

13. *Id.*

14. *Id.*

15. Jimmie E. Tinsley, *Criminal Law: The Battered Woman Defense*, 34 AM. JUR. PROOF OF FACTS 2D § 2 (1983).

16. *See* Rogers v. State, 616 So. 2d 1098, 1100 (Fla. 1st Dist. Ct. App. 1993).

17. *See* State v. Hickson, 630 So. 2d 172, 176-77 (Fla. 1993). The Court held that if a defendant chooses to present expert testimony based on the facts of her specific case, then the State may also have its own expert examine the defendant. *Id.* The court does not mention an opportunity for either expert to take into account evidence or testimony other than the defendant's. *Id.* Thus, the experts' determination as to whether the woman suffers from Battered

dard for the jury to relate the actual evidence presented at trial with determining whether the defendant does in fact suffer from Battered Woman's Syndrome and whether she should be allowed to use the syndrome as part of her self-defense claim.

This article will begin by giving a brief overview of Battered Woman's Syndrome as developed by Dr. Lenore E. Walker and its emergence into the courtrooms. It will summarize the psychological theory of learned helplessness¹⁸ and the "cycle theory of violence,"¹⁹ as well as give a general depiction of the battered woman, as described by Dr. Walker.²⁰ The third part of this article will give a history of Battered Woman's Syndrome in the courtroom by explaining its legal use as an impaired mental capacity defense and the more recent use of Battered Woman's Syndrome in conjunction with a self-defense argument. This note will more specifically discuss the definition of "imminent" as it pertains to the legal definition of self-defense and as it pertains to the battered woman. Next, this article will discuss Florida cases that have addressed Battered Woman's Syndrome and their effect on expert testimony as well as their impact on the duty to retreat. The fifth section of this note will suggest what Florida can do to set a standard for the use of Battered Woman's Syndrome in the courtroom by setting up a three-pronged test, based on the length of abuse, the severity of abuse, and the battered woman's opportunity to flee, to be used to determine whether a woman should be allowed to incorporate Battered Woman's Syndrome into her defense. Finally, this article will conclude by discussing the impact the three-pronged test would have on using Battered Woman's Syndrome in conjunction with a self-defense argument, its impact on expert testimony regarding Battered Woman's Syndrome, and the impact the test would have on Florida courts.

Woman's Syndrome is based only on the accused's account of the relationship. This leaves ample room for a defendant to exaggerate, or possibly lie altogether, about the facts of her allegedly abusive relationship.

18. See LENORE E. WALKER, *THE BATTERED WOMAN* 42–54 (1979).

19. See *id.* at 55–70.

20. *Id.* at 31.

II. DEFINING BATTERED WOMAN'S SYNDROME

Despite the reference to a “constellation of medical and psychological conditions,”²¹ Battered Woman's Syndrome is a type of Post-Traumatic Stress Disorder, not a form of mental illness.²² There are four general characteristics of Battered Woman's Syndrome:

- 1) The woman believes that the violence was her fault, 2) The woman has an inability to place the responsibility for the violence elsewhere, 3) The woman fears for her life and/or her children's lives, and 4) The woman has an irrational belief that the abuser is omnipresent and omniscient.²³

Dr. Walker describes nine common characteristics of a battered woman including: low self-esteem; a belief in the “feminine sex-role stereotype;” accepting responsibility for her abuser's actions; suffering from severe stress reactions; and a belief that no one is able to help her get out of her abusive situation.²⁴ Certain characteristics, like low self-esteem and the belief in a stereotypical female role, make it easier to fall into an abusive relationship, while characteristics such as accepting responsibility and a belief that no one can help, make it easy to remain in an abusive relationship. Taken as a whole, such qualities push a battered woman into what Dr. Walker describes as “learned helplessness,” and from there, the battered woman experiences an endless cycle of violence.²⁵

A. *Learned Helplessness*

Learned helplessness stems from the principle of the learning theory, which is based on the way a person reacts to the outcomes of his or her voluntary responses to his or her environment.²⁶ For example, if a voluntary response changes the circumstances of a situation or creates a positive outcome, a person is likely to repeat that response, which is known as reinforcement.²⁷ Once a person expects that a certain response will produce a

21. BLACK'S LAW DICTIONARY 162 (8th ed. 2004).

22. Judge Jay B. Rosman, *The Battered Women Syndrome in Florida: Junk Science or Admissible Evidence?* 15 ST. THOMAS L. REV. 807, 810 (2003).

23. *Id.* (quoting WALKER, *supra* note 18, at 95–96).

24. WALKER, *supra* note 18, at 31.

25. *Id.* at 43.

26. *Id.* at 44.

27. *Id.*

specific outcome and that outcome is in fact achieved, that person feels as though he or she has control over that situation.²⁸ However, when a person expects a certain outcome to occur through a certain response and that outcome does not occur, a person often needs an explanation as to why his or her expected outcome was not achieved.²⁹ If no explanation can be offered, after time, the person assumes he or she has no control over the outcome and learns what types of things he or she does and does not have control over in his or her environment.³⁰ According to the learning theory, once a person realizes that they are not in control of certain situations, they will lose motivation to respond to those situations, even if they are later able to make changes that will affect the outcome.³¹ Applying the learning theory to battered women, learned helplessness is the theory to which some victims of recurring abuse will eventually succumb.³² This is based on the notion that they cannot change their abusive situation and instead become subservient in order to reduce incidents of violence.³³

There are three basic components to the learned helplessness theory: “information about what will happen; thinking or cognitive representation about what will happen, . . . and behavior toward what does happen.”³⁴ It is the second component that leads to emotional disturbances, as this is where a person develops their expectations and beliefs as to what outcomes should occur.³⁵ The key difference between those who react with the learned helplessness response and those who do not stems from the person’s actual beliefs and expectations as to what they have control over.³⁶ If a person does not have control over a situation, but believes that he or she does have control, that person’s behavior will not be affected.³⁷ However, if a person does in fact have control, but believes that he or she does not, they will respond with a learned helplessness reaction.³⁸ Thus, once a battered woman believes she has no control over her abusive situation, she becomes “helpless.”³⁹ She allows what she believes to be out of her control to actually be-

28. *Id.*

29. WALKER, *supra* note 18, at 45.

30. *Id.*

31. *Id.*

32. Erin M. Masson, Annotation, *Admissibility of Expert or Opinion Evidence of Battered-Woman Syndrome on Issue of Self-Defense*, 58 A.L.R.5TH 749, 762 (1998).

33. *Id.* at 762–63.

34. WALKER, *supra* note 18, at 47.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. WALKER, *supra* note 18, at 47.

come out of her control, and learns to expect the abuse as a way of life, over which she has no influence.⁴⁰

B. *Cycle Theory of Violence*

Through her studies, Dr. Walker found that “[b]attered women are not constantly being abused, nor is their abuse inflicted at totally random times.”⁴¹ Instead, she found that there was a “definite battering cycle” consisting of three distinct phases: the tension-building phase, the acute battering incident, and the contrition phase.⁴² The tension building phase is “a gradual escalation of tension during which the batterer displays hostility and dissatisfaction and the woman attempts to placate him.”⁴³ The woman resorts to denial and “rationalizes that perhaps she did deserve the abuse,” and she will begin to minimize the incident because she knows her batterer is capable of doing much worse.⁴⁴ During the acute battering incident, “the batterer explodes into uncontrollable rage [which is] often out of proportion to the situation.”⁴⁵ The trigger for this phase is rarely because of any act by the battered woman; instead, it is usually an outside event or the man’s internal state.⁴⁶ There are times, however, when the woman will provoke this second phase because she knows it is inevitable and cannot tolerate her anxiety and terror in waiting for the explosion to occur.⁴⁷ Further, she knows that once phase two is over, the third phase of peace will occur.⁴⁸ This third phase, the contrition phase, is characterized by remorse and promises by the batterer to end the abuse.⁴⁹ This phase may also be considered the “honeymoon” phase due to the calm, loving respite.⁵⁰ Of course, despite numerous promises that the abuse will never again occur, it is inevitable that the cycle will begin anew.⁵¹ This cycle has helped to explain how battered women become victims, how they succumb to learned helplessness behavior, and, more importantly, why they continue to remain in their abusive relation-

40. WALKER, *supra* note 18, at 47.

41. *Id.* at 55.

42. *Id.*

43. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 368 (2d ed. 2002).

44. WALKER, *supra* note 18, at 56–57.

45. WEISBERG & APPLETON, *supra* note 43, at 368.

46. WALKER, *supra* note 18, at 60.

47. *Id.*

48. *Id.*

49. WEISBERG & APPLETON, *supra* note 43, at 368.

50. Rosman, *supra* note 22, at 809.

51. WEISBERG & APPLETON, *supra* note 43, at 368.

ships.⁵² Before she can be labeled a “battered woman,” a woman must experience at least two complete battering cycles.⁵³ Dr. Walker has been unable to estimate the length of each phase or the amount of time it takes to complete an entire cycle, although she has found that certain events and life stages can have an influence on their timing.⁵⁴

III. A HISTORY OF BATTERED WOMAN’S SYNDROME IN THE COURTS

Murders committed by battered women are often divided into three categories: confrontational homicides, non-confrontational homicides, and solicited homicides.⁵⁵ Most cases fall under the first category, confrontational homicides, in which the battered woman kills her abuser during a battering incident.⁵⁶ The main legal issues in these cases are whether to allow expert testimony on Battered Woman’s Syndrome, and whether the defendant is able to introduce evidence of past abuse.⁵⁷ In non-confrontational homicides, where the victim typically attacks her abuser while he is asleep, the legal issues that arise are whether there is an entitlement to a self-defense argument, and whether Battered Woman’s Syndrome can be used to explain how there was an imminent threat to the woman, despite her victim being asleep.⁵⁸ In the few cases that fall under solicited homicide, the defendant tries to prove that, due to Battered Woman’s Syndrome, responding to the abuse by hiring a person to kill her abuser was reasonable under the circumstances.⁵⁹

It is important to point out that Battered Woman’s Syndrome is not a recognized defense, and simply proving that a woman was abused by her victim is not grounds for an acquittal.⁶⁰ “Rather, proof that a criminal defendant was a battered woman is introduced on the theory that such proof is relevant to some other recognized defense.”⁶¹ In general, there are four different uses for Battered Woman’s Syndrome as evidence to a recognized defense, primarily self-defense, in a murder trial. The first use of Battered Woman’s Syndrome is to give credibility to the defendant by “assist[ing] the jury in objectively analyzing the defendant’s claim of self-defense by dispel-

52. WALKER, *supra* note 18, at 55.

53. Rosman, *supra* note 22, at 809.

54. WALKER, *supra* note 18, at 55.

55. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 240–41 (3d ed. 2001).

56. *Id.* at 240.

57. *Id.*

58. *Id.* at 240–41.

59. *Id.* at 241.

60. Tinsley, *supra* note 15, § 3.

61. *Id.*

ling many of the commonly held misconceptions about battered women."⁶² The second reason Battered Woman's Syndrome is introduced at trial is to prove the defendant honestly believed she was defending herself against imminent death or great bodily harm.⁶³ The third use of Battered Woman's Syndrome at trial is to prove reasonableness in that the killing of the abuser by the woman was necessary.⁶⁴ Finally, Battered Woman's Syndrome is used to explain the real dangers faced by battered women in their abusive relationships.⁶⁵

A. *Impaired Mental Capacity*

Traditionally, a battered woman who killed her abuser relied on an impaired mental capacity defense.⁶⁶ Reliance was usually placed on insanity, diminished capacity, or heat of passion.⁶⁷ Insanity constituted a total defense and diminished capacity and heat of passion both reduced the degree of the crime.⁶⁸ When using these impaired mental capacity defenses, reliance is placed on Battered Woman's Syndrome as evidence to prove the effect this syndrome had on the woman's mental state at the time of the alleged murder.⁶⁹ When insanity is used as a defense, the burden of proof varies based on jurisdiction.⁷⁰ Once evidence of insanity has been presented by the defense, some jurisdictions require the prosecution to prove beyond a reasonable doubt that the defendant does not suffer from this impaired mental capacity, while other jurisdictions only require the defendant to prove insanity by a preponderance of the evidence.⁷¹ Of course, using an impaired mental capacity for such cases has received a great amount of criticism.⁷² Many complain that concluding that a woman must be insane to kill her abuser reflects a sexual bias.⁷³ Others note that the defense is not appropriate since the mental capacity of the woman at the time of the offense is not really impaired.⁷⁴ Still others realize that while this type of defense "may lead to an

62. *Id.* § 1 (quoting *People v. Jaspas*, 119 Cal. Rptr. 2d 470, 475 (Ct. App. 2002)).

63. *Id.* (citing *Jaspas*, 119 Cal. Rptr. 2d at 475).

64. *Id.*

65. Tinsley, *supra* note 15, § 1 (citing *Weiland v. State*, 732 So. 2d 1044, 1054 (Fla. 1999)).

66. *Id.* § 3.

67. *Id.*

68. *Id.*

69. *Id.*

70. Tinsley, *supra* note 15, § 3.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

acquittal or conviction on a lesser charge, it might also result in the woman's confinement in a mental institution."⁷⁵ Needless to say, the impaired mental capacity defenses for women who suffer from Battered Woman's Syndrome are slowly beginning to find their way out of court. In recent years, the trend has been to use self-defense as the defense in cases in which a battered woman kills her batterer.⁷⁶

B. *As Part of a Self-Defense Argument*

The use of expert testimony on Battered Woman's Syndrome appears to be the most necessary part of a self-defense claim.⁷⁷ "[T]he syndrome is used to assist the jury in determining whether the woman acted in self-defense with respect to the elements of imminency and reasonableness."⁷⁸ In other words, evidence of the syndrome is used to show whether it was reasonable that she believed death or serious injury was imminent.⁷⁹ When using a self-defense argument, evidence of the abusive relationship between the defendant and the victim is introduced in order to show that the defendant's decision to resort to deadly force was appropriate, given her circumstances and the history of violence she experienced.⁸⁰

While the courts have not yet accepted the premise that the law of self-defense is any different when the defendant is a battered woman, it is clear that some juries have acquitted battered woman defendants in cases in which traditional self-defense was technically not established It has been suggested that such verdicts are examples of jury nullification, and that such repeated instances of jury nullification indicate that the law as it presently exists is not in accordance with current social views.⁸¹

If this theory is true, juries, through either acquitting or convicting battered women of lesser charges, are expressing their disapproval with the current unavailability of a separate defense for battered women. The foreseeable consequences could be devastating to the justice system. If all a woman would have to do in order to avoid a conviction for murder is prove that she

75. Tinsley, *supra* note 15, § 3.

76. *See id.*

77. *See id.* § 6.

78. Danielle R. Dubin, *A Woman's Cry for Help: Why the United States Should Apply Germany's Model of Self-Defense for the Battered Woman*, 2 ILSA J. INT'L & COMP. L. 235, 239 (1995).

79. *See* Tinsley, *supra* note 15, § 6.

80. *Id.* § 3.

81. *Id.*

suffered from Battered Woman's Syndrome, it would be very difficult to ever convict an abused woman based on the current standards used for the syndrome.

In Florida, deadly force may be used if one "reasonably believes that such force is necessary to prevent *imminent* death or great bodily harm to himself or herself."⁸² One of the main obstacles for women using a Battered Woman's Syndrome claim is proof that they were faced with an imminent danger that required them to resort to deadly force in self-defense.⁸³ "[I]t must be shown why the defendant perceived danger in a situation in which a person other than a battered woman would not have perceived danger."⁸⁴

1. Defining "Imminent"

Imminent danger is "[a]n immediate, real threat to one's safety that justifies the use of force in self-defense."⁸⁵ Case law and legislation make it mandatory that the defendant reasonably believe his or her attacker's unlawful violence is almost immediately impending.⁸⁶ "However, the question of whether there should be an imminence-of-attack requirement and, if so, how it should be characterized, is most dramatically presented in the context of a homicide by a battered [woman]."⁸⁷

The imminent danger . . . requirement[] ha[s] been developed in the context of a single, violent encounter between two men. The rationale is that one man is not justified in using deadly force on another unless necessary to protect the first man from a danger which immediately threatens. This stereotypical model is inappropriate when assessing whether a battered woman reasonably perceived imminent danger and the need to resort to deadly force. It is important that the defense case be presented in such a manner as to focus the jury's attention on the situation as viewed from the woman's perspective.⁸⁸

82. FLA. STAT. § 776.012(1) (2006) (emphasis added).

83. Tinsley, *supra* note 15, § 4.

84. *Id.*

85. BLACK'S LAW DICTIONARY 421 (8th ed. 2004).

86. WAYNE R. LAFAYE, PRINCIPLES OF CRIMINAL LAW 409 (2003).

87. *Id.* at 410.

88. Tinsley, *supra* note 15, § 4 (citations omitted).

2. “Imminent” to the Battered Woman

To the battered woman, “imminent” takes on a different meaning. Once the woman has experienced the tension-growing atmosphere that phase one provides and then suffers through the acute battering of phase two,⁸⁹ “she develops a constant fear of serious bodily harm that she perceives as imminent partially because of the unpredictability of her [partner’s] rage.”⁹⁰ A battered woman becomes sensitive to indications of an impending attack from her abuser, whether it is a trivial comment or action made by the man that might suggest an attack is coming.⁹¹ Though she has experienced violence at the hands of her abuser on numerous prior occasions, *this time* is different.⁹² Dr. Walker notes what, in her experience, makes the battered woman finally take action:

Several factors were common to all these cases. First, each woman stated that she was convinced the batterer was going to kill her. Violent assault had taken place previously in all of these cases. In the final incident, however, something different was noted by these women which convinced them that the batterer really was going to kill them *this time*. In each case, the woman stated that she did not intend to kill her batterer, only to stop him from killing her . . . All reported being terrified of their batterers. To them, the men were omnipotent; the women felt they had no place to hide. No matter where they went, the batterer would follow. In each case, the batterer’s violence was extraordinarily brutal. In the end, these women had to resort to the most extreme kind of force—use of a lethal weapon—in order to prevent the batterers from killing them.⁹³

Thus, to the battered woman, despite having experienced the abuse, perhaps even equal in severity of abuse in the past, something made it different *this time*. Explaining this mindset is vital, especially for those women who kill in a non-confrontational homicide.⁹⁴ It is important “to present the facts to the jury in such a way as to enable it to see the situation as it presented itself to the defendant at the time she . . . killed her husband.”⁹⁵ It is also important to point out to the jury the number of differences between the

89. See *supra* notes 40–53 and accompanying text.

90. WEISBERG & APPLETON, *supra* note 43, at 369.

91. Tinsley, *supra* note 15, § 4.

92. See WALKER, *supra* note 18, at 220.

93. *Id.* (emphasis added).

94. See DRESSLER, *supra* note 55 and accompanying text.

95. Tinsley, *supra* note 15, § 6.

behavior of a battered woman and the behavior of a non-battered woman in order to show how and why a battered woman would perceive an imminent attack, whereas a non-battered woman would not.⁹⁶

IV. FLORIDA COURTS AND BATTERED WOMAN'S SYNDROME

There are few Florida cases that address Battered Woman's Syndrome;⁹⁷ nonetheless, their rulings have opened numerous doors for the defense of battered women who kill their abusers. Most of the cases addressing Battered Woman's Syndrome involve the use of expert testimony at trial.⁹⁸ However, the landmark Florida case in the use of Battered Woman's Syndrome as a defense concerned the duty to retreat.⁹⁹ The duty to retreat has often prevented many battered women from establishing a complete self-defense claim.¹⁰⁰ Taken as a whole, these cases have begun to develop case law regarding Battered Woman's Syndrome as part of a self-defense claim. However, they stop short of giving any real standard as to how such a branch of self-defense should be applied.

A. Florida on Expert Testimony

"Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of whether it will assist the trier of fact."¹⁰¹ If the issue at trial is one that an average layperson "would be capable of forming a correct judgment, expert testimony is not admissible."¹⁰² However, "[i]f the triers of fact have a general knowledge of a matter, but an expert's testimony would aid their understanding of the issue, it would be admissible."¹⁰³ In Florida, the law on expert testimony reads as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill,

96. *Id.*

97. *State v. Hickson*, 630 So. 2d 172 (Fla. 1993); *Gonzalez-Valdes v. State*, 834 So. 2d 933 (Fla. 3d Dist. Ct. App. 2003) (per curiam); *Williams v. State*, 779 So. 2d 314 (Fla. 2d Dist. Ct. App. 1999) (per curiam); *Humble v. State*, 652 So. 2d 1213 (Fla. 1st Dist. Ct. App. 1995); *Rogers v. State*, 616 So. 2d 1098 (Fla. 1st Dist. Ct. App. 1993)

98. *See id.*

99. *See Weiland v. State*, 732 So. 2d 1044 (Fla. 1999).

100. *See State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982) (overruled by *Weiland*, 732 So. 2d at 1044).

101. FLA. STAT. ANN. § 90.702 law revision council's note (West 1999).

102. *Id.*

103. *Id.*

experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.¹⁰⁴

One of the first Florida cases to examine the use of expert testimony on Battered Woman's Syndrome was *Hawthorne v. State (Hawthorne I)*.¹⁰⁵ In this case, the court was to determine if Dr. Lenore Walker was entitled to serve as an expert witness offering testimony as to whether the defendant suffered from Battered Woman's Syndrome in relation to a self-defense claim.¹⁰⁶ The court found "that jurors would not ordinarily understand 'why a person suffering from [B]attered [W]oman's [S]yndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself.'"¹⁰⁷ However, the court held the following:

[T]here has been no determination [in the lower court] as to the adequacy of Dr. Walker's qualifications or the extent to which her methodology is generally accepted indicating that the subject matter can support a reasonable expert opinion. Our determination that this expert testimony would provide the jury with an interpretation of the facts not ordinarily available to them is subject to the trial court determining that Dr. Walker is qualified and that the subject is sufficiently developed and can support an expert opinion.¹⁰⁸

On remand, the lower court concluded that the "depth of study in this field has not yet reached the point where an expert witness can give testimony with any degree of assurance that the state of the art will support an expert opinion."¹⁰⁹ Thus, after determining that the lower court did not abuse its discretion, the First District Court of Appeal held that Dr. Walker's testimony was not admissible.¹¹⁰

The *Hawthorne* decisions were overturned over a decade later in *Rogers v. State*,¹¹¹ where the court, in a landmark decision, held:

104. FLA. STAT. § 90.702 (2006).

105. 408 So. 2d 801 (Fla. 1st Dist. Ct. App. 1982) (per curiam), *abrogated by* *Rogers v. State*, 616 So. 2d 1098 (Fla. 1st Dist. Ct. App. 1993).

106. *Id.* at 805.

107. *Id.* at 806 (quoting *Smith v. State*, 277 S.E.2d 678, 683 (Ga. 1981)).

108. *Id.*

109. *Hawthorne v. State (Hawthorne II)*, 470 So. 2d 770, 773 (Fla. 1st Dist. Ct. App. 1985), *abrogated by* *Rogers*, 616 So. 2d at 1098.

110. *Id.* at 773-74.

111. 616 So. 2d 1098 (Fla. 1st Dist. Ct. App. 1993), *overruled on other ground by* *State v. Hickson*, 630 So. 2d 172 (Fla. 1993).

Because the scientific principles underlying expert testimony relative to the [B]attered [W]oman's [S]yndrome are now firmly established and widely accepted in the psychological community, we conclude that the syndrome has now gained general acceptance in the relevant scientific community *as a matter of law*. . . . We hold that expert testimony regarding [B]attered [W]oman's [S]yndrome is henceforth admissible There will be no further need for a case-by-case determination as to whether the state of the art of scientific knowledge relative to the [B]attered [W]oman's [S]yndrome is sufficiently developed to permit a reasonable opinion by an expert.¹¹²

By taking the discretion away from judges as far as determining whether the scientific knowledge on Battered Woman's Syndrome had been sufficiently developed "to permit a reasonable opinion to be given by an expert,"¹¹³ the *Rogers* court flung open the door for experts like Dr. Walker to explain why battered women kill their abusers despite having remained in the abusive relationship.¹¹⁴ Such testimony is pertinent to aiding in self-defense arguments often used in such cases, in that the testimony helps to explain the reasonableness, in the mind of the battered woman, of killing her batterer.¹¹⁵ The testimony also helps to explain how a woman came to be a battered woman and what the significance of adding such a descriptive term means.

Though extraordinary, the court's decision in *Rogers* seemed to leave the use of expert opinion on Battered Woman's Syndrome extremely broad and set no limits to its use.¹¹⁶ Looking to fix this problem, the Supreme Court of Florida found itself narrowing down the use of such expert opinion in *State v. Hickson*,¹¹⁷ where the court decided to tackle the question: "[w]hat can an expert testify to when a defendant relies on [B]attered [Woman's] [S]yndrome evidence to support a claim of self-defense?"¹¹⁸ The *Hickson* court also addressed whether a defendant claiming Battered Woman's Syndrome should have to submit to an examination by an expert from the adverse side.¹¹⁹ The court found itself trying to reconcile the rights of both parties without sacrificing justice.¹²⁰

112. *Id.* at 1100.

113. *Id.* at 1098.

114. *See id.*

115. DRESSLER, *supra* note 55, at 241 (discussing evidence of Battered Woman's Syndrome used to show that killing the batterer was reasonable).

116. *See Rogers*, 616 So. 2d at 1098.

117. 630 So. 2d 172 (Fla. 1993).

118. *Id.* at 173.

119. *Id.* at 175.

120. *See id.* at 176.

When defendants take the stand, they waive their privilege against compelled self-incrimination.¹²¹ Thus, the court's main concern was that defendants would be able to use expert testimony to relay the facts of the case in lieu of testifying themselves and being subjected to the prosecution's questions and possible self-incrimination.¹²² However, the court also needed to satisfy the use of expert opinion on Battered Woman's Syndrome so that the jury would be able to understand the plight of the battered woman.¹²³ In response to these concerns, the *Hickson* court gave a defendant using Battered Woman's Syndrome to support a claim of self-defense the following two options: "1) having her expert testify directly about her case, in which instance the [S]tate may have her examined by its expert, or 2) both sides may present the testimony of experts who have not examined the defendant and who will not testify about the facts of her case."¹²⁴ The first option allows for an expert to give testimony about the specific facts of the case, relating Battered Woman's Syndrome directly to the defendant and her abusive relationship.¹²⁵ However, it also allows for the State to have the defendant examined by its own expert who would be able to testify to the specifics of the case as well.¹²⁶ The second option allows the expert obtained by the defense to only testify about Battered Woman's Syndrome in general and the characteristics of a battered spouse.¹²⁷ The expert would not be allowed to examine the defendant and thus could not relate such characteristics to the defendant, only allowing for hypothetical situations to be addressed.¹²⁸ The court felt that these options "protect[ed] the rights and interests of both the defendant and the [S]tate."¹²⁹ Thus far, it appears as though the Supreme Court of Florida maintains this solution, as this case has not been overturned or questioned.

The remaining Florida cases addressing Battered Woman's Syndrome do not really add much to the case law regarding its use. They simply follow the precedent established in *Rogers* and *Hickson* while tightening up the nuts and bolts in the use of expert testimony concerning Battered Woman's Syndrome. The First District Court of Appeal helped to specify who could *not*

121. *Id.*

122. *Hickson*, 630 So. 2d at 176.

123. *See id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Hickson*, 630 So. 2d at 175–76.

128. *Id.* at 176–77.

129. *Id.* at 175–76.

testify about Battered Woman's Syndrome in *Humble v. State*.¹³⁰ Here, the court held the following:

[A woman with seventeen] years experience working in the field of domestic violence, operating shelters and domestic-violence programs, and has . . . taught numerous workshops on spouse abuse . . . lack[ed] . . . academic training in the disciplines of psychology or mental health, or clinical experience involving the study, treatment, or diagnosis of [B]attered [Woman's] [S]yndrome render[ing] her unqualified to describe the syndrome to the jury.¹³¹

The *Humble* court made it clear that it would take a lot more than experience to testify about Battered Woman's Syndrome.¹³² One must be academically trained in psychology or mental health or have actual clinical experience involving battered women; operating programs to aid battered women or teaching classes on domestic abuse is not enough to entitle a person to be labeled an "expert" on Battered Woman's Syndrome.¹³³

The Second District Court of Appeal, in *Williams v. State*,¹³⁴ further found a way to limit not only the use of expert testimony pertaining to Battered Woman's Syndrome, but the use of Battered Woman's Syndrome in general.¹³⁵ The defendant had been convicted of sexual battery due to his girlfriend's use of an expert witness to prove that she suffered from Battered Woman's Syndrome.¹³⁶ Therefore, according to the expert, she lacked the ability to give consent to sexual intercourse.¹³⁷ The court reversed the conviction for sexual battery and held that the State would have to prove a scientific basis to support a claim that "[B]attered [Woman's] [S]yndrome robs a person of the ability to consent" and that "[s]uch a conclusion would seem to convert all sexual relations engaged in by a person suffering from this syndrome into criminal acts by their partner."¹³⁸ Thus, the *Williams* court held that testimony regarding Battered Woman's Syndrome cannot be used to prove that a woman lacked the ability to consent in a case based on forced sexual intercourse.¹³⁹

130. 652 So. 2d 1213 (Fla. 1st Dist. Ct. App. 1995).

131. *Id.* at 1213–14.

132. *Id.*

133. *Id.*

134. 779 So. 2d 314 (Fla. 2d Dist. Ct. App. 1999) (per curiam).

135. *See generally id.*

136. *Id.* at 314–15.

137. *Id.* at 315.

138. *Id.* at 316.

139. *Williams*, 779 So. 2d at 316.

The most recent Florida case to address expert testimony on Battered Woman's Syndrome, *Gonzalez-Valdes v. State*,¹⁴⁰ proves exactly why expert testimony can be dangerous and reaffirms the reasoning followed in *Hickson*.¹⁴¹ In this case, the defendant sought the use of a Battered Woman's Syndrome expert to aid in establishing a self-defense claim to murder.¹⁴² The expert testified that the defendant did in fact suffer from Battered Woman's Syndrome.¹⁴³ However, the expert based this opinion solely on meetings with the defendant and her own testimony as to the events surrounding the "abusive" relationship and subsequent shooting.¹⁴⁴ The prosecution introduced the victim's brother who testified that he had never seen the victim hit the defendant.¹⁴⁵ The prosecution also brought as a witness the victim's ex-wife who had been married to the victim for twenty-nine years and testified that during that entire time, the victim had "never raised his hand to her."¹⁴⁶ The appellate court found that the trial court did not abuse its discretion in admitting the testimony of the victim's brother and ex-wife and subsequently upheld the defendant's conviction for second-degree murder.¹⁴⁷

The *Gonzalez-Valdes* case proves just how important it is that expert testimony on Battered Woman's Syndrome is somehow offset, whether through another expert on the syndrome, or a witnesses proving that the party claiming Battered Woman's Syndrome did not in fact suffer from it.¹⁴⁸ This is one of the main problems with allowing Battered Woman's Syndrome to be used—expert opinions are based solely on the testimony of those seeking to be deemed a *battered woman*. In the majority of cases, the *abuser* has been killed and cannot share his side of the story, and therefore, others must be brought in to at least attempt to prove he was not abusive. This seems to be the perfect case to affirm the *Hickson* court's reasoning.

140. 834 So. 2d 933 (Fla. 3d Dist. Ct. App. 2003) (per curiam).

141. *See id.*

142. *See id.* at 935.

143. *Id.*

144. *Id.*

145. *Gonzalez-Valdes*, 834 So. 2d at 935.

146. *Id.*

147. *Id.*

148. *See id.*

B. *Florida on the Duty to Retreat: Weiland v. State*

The duty to retreat stems from the use of force in defending oneself or another person.¹⁴⁹ In Florida, the applicable law is the “Use of Force in Defense of Person” which reads as follows:

A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony¹⁵⁰

In sum, there is no duty to retreat, even when using deadly force, if there is a reasonable belief that deadly force is necessary in order to prevent imminent death or great bodily harm.¹⁵¹ Further, Florida recognizes the “castle doctrine,” which does not impose a duty to retreat when one is in his or her own home.¹⁵² Often, the problem that arose from this statute and the “castle doctrine” involved cases of domestic violence where both the abuser and victim resided in the same residence.¹⁵³ How should the duty to retreat apply to a woman being beaten or in fear of being beaten when she has finally found the courage to defend herself? The case of *Weiland v. State*¹⁵⁴ addressed this exact question.¹⁵⁵ To be more specific, the Court posed the following question: “Should the law impose a duty to retreat from the residence before a defendant may justifiably resort to deadly force in self-defense against a co-occupant, if that force is necessary to prevent death or great bodily harm?”¹⁵⁶

The facts of *Weiland* are typical of any case in which a claim of Battered Woman's Syndrome is alleged.¹⁵⁷ The defendant “shot her husband during a violent argument in the apartment where the two [lived] together with their

149. See FLA. STAT. § 776.012 (2006).

150. *Id.*

151. *See id.*

152. Orr, *supra* note 1, at 14.

153. *See, e.g., Weiland v. State*, 732 So. 2d 1044, 1048 (Fla. 1999).

154. *Id.* at 1044.

155. *See id.* at 1047.

156. *Id.* (emphasis omitted).

157. *See, e.g., State v. Hickson*, 630 So. 2d 172 (Fla. 1993).

seven-week-old daughter.”¹⁵⁸ The defendant presented evidence of Battered Woman’s Syndrome to support her claim of self-defense and presented expert testimony to prove that because she suffered from the syndrome, she truly believed her husband was going to seriously hurt or kill her.¹⁵⁹ Florida case law has established that when deadly force is necessary to prevent death or great bodily harm, a person does not need to retreat when in their own home before resorting to the use of such force.¹⁶⁰ However, the prosecution, in *Weiand*, relied on *State v. Bobbitt*¹⁶¹ which held that:

the privilege not to retreat, premised on the maxim that every man’s home is his castle which he is entitled to protect from invasion, does not apply here where both [the abused] and her husband had equal rights to be in the “castle” and neither had the legal right to eject the other.¹⁶²

The Supreme Court of Florida, however, reversed its decision in *Bobbitt*, noting that it was among the “minority of jurisdictions that refused to extend the privilege of nonretreat . . . [when] the aggressor was a co-occupant.”¹⁶³ The court concluded that “there is no duty to retreat from the residence before resorting to deadly force against a co-occupant or invitee if necessary to prevent death or great bodily harm, although there is a limited duty to retreat within the residence to the extent reasonably possible.”¹⁶⁴

One of the reasons the court decided to overturn *Bobbitt* was because of the recent advancements in understanding “the plight of victims of domestic violence,” and the public “policy reasons for not imposing [the] duty to retreat from [one’s home] when . . . resort[ing] to deadly force in self-defense against a co-occupant.”¹⁶⁵ The court recognized numerous studies which indicated that a time of retreat is often the most dangerous time for a battered woman because the violence during retreat tends to increase dramatically.¹⁶⁶

158. *Weiand*, 732 So. 2d at 1048.

159. *See id.*

160. *See Hedges v. State*, 172 So. 2d 824, 827 (Fla. 1965), *overruled by State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982), and *Weiand*, 732 So. 2d at 1044.

[W]hen one is violently assaulted in his own house or immediately surrounding premises, he is not obliged to retreat but may stand his ground and use such force as prudence and caution would dictate as necessary to avoid death or great bodily harm. When in his home he has “retreated to the wall.”

Hedges, 172 So. 2d at 827 (citing *Pell v. State*, 122 So. 110, 116 (Fla. 1929)).

161. 415 So. 2d 724 (Fla. 1982), *overruled by Weiand*, 732 So. 2d at 1044.

162. *Id.* at 726.

163. *Weiand*, 732 So. 2d at 1051.

164. *Id.* at 1058.

165. *Id.* at 1051.

166. *Id.* at 1053.

In concluding its public policy argument, the court found that “retaining a duty to retreat from the home ‘clearly penalizes spouses, and particularly wives, in defending themselves from an aggressor spouse.’”¹⁶⁷

The *Weiland* court was also concerned that a jury instruction on the duty to retreat would “reinforce, legitimize, and strengthen myths and stereotypes about domestic violence,” particularly that an abused woman can leave an abusive relationship whenever she wants.¹⁶⁸ To allow for “a jury instruction [which] suggested retreat [as] an option . . . would . . . undermine” the Battered Woman’s Syndrome expert’s opinion on a battered woman’s feelings of helplessness and fear of imminent harm.¹⁶⁹ The court did, however, retain “a limited duty to retreat within the residence to the extent reasonably possible,” but still did not require that one flee the residence.¹⁷⁰ Thus, by answering its proposed question in the negative, the *Weiland* court was able to not only settle the confusion in how to apply both the duty to retreat and the castle doctrine simultaneously, but was also able to protect battered women who found themselves without an ability to retreat and who were compelled to use deadly force against a co-occupant in order to prevent a possible deadly attack.

V. HOW TO DETERMINE A BATTERED WOMAN’S DEFENSE: A THREE-PRONGED TEST

The problem in Florida, as well as in many other states, is that although the courts have made significant progress in the use of Battered Woman’s Syndrome at trial, they have failed to aid the fact finders in determining when Battered Woman’s Syndrome should be accepted as part of the defense. There is no legal standard established in Florida to guide a jury in determining whether Battered Woman’s Syndrome can make up for the factors a defendant lacks when she uses self-defense to explain why she killed her batterer.¹⁷¹ As of now, it is all extremely discretionary, meaning that the potential for establishing any precedent in such cases is minimal, at best.¹⁷² This is even more so because battered women cases are all truly unique; each abusive relationship examined will have lasted a different amount of time, the severity in the abuse will range greatly, and each woman’s ability to get

167. *Id.* at 1054 (quoting *State v. Rippie*, 419 So. 2d 1087, 1087 (Fla. 1982) (Overton, J., dissenting)).

168. Orr, *supra* note 1, at 16.

169. *Id.*

170. *Weiland*, 732 So. 2d at 1058.

171. See generally Orr, *supra* note 1, at 14–16 (discussing the legal status of the Battered Woman’s Syndrome in Florida).

172. See *id.* at 15.

herself out of the relationship will vary. Thus, I propose a three-pronged test to assist the fact finder in deciding whether or not Battered Woman's Syndrome can be applied to the defense.

This test would consist of determining the length of abuse, the severity of abuse, and the opportunity to flee. Each element must be substantially met in order for the syndrome to be applicable; however, each element is intentionally vague due to the lack of research available regarding any specific data to indicate the amount of time or severity of abuse necessary to establish a "battered woman." Though expert testimony brought by both the prosecution and the defense does assist the jury in understanding what Battered Woman's Syndrome is and how it may or may not apply to the defendant, the experts are making their decision based strictly on what the battered woman claims to have happened. Thus, they are most likely not taking into account evidence that the other side has to offer, which makes their opinion skewed.¹⁷³ By giving the jury a guideline, they can combine both the expert testimony and the evidence presented at trial to determine whether the defendant is in fact entitled to the use of Battered Woman's Syndrome as a part of a self-defense claim.

A. *Length of Abuse*

Determining what accounts as "long enough" to enable a person to claim she suffers from Battered Woman's Syndrome is difficult. Even Dr. Walker has been unable to determine a specific amount of time that abuse must last in order to conclude that a woman is suffering from Battered Woman's Syndrome.¹⁷⁴ However, according to studies comparing battered women who killed versus battered women who did not resort to killing their abuser, the frequency at which abuse occurs and the severity of the abuse,

173. See *Gonzalez-Valdes v. State*, 834 So. 2d 933, 934–35 (Fla. 3d Dist. Ct. App. 2003) (per curiam). Defendant used a self-defense claim for the shooting of her boyfriend, claiming to have Battered Woman's Syndrome. *Id.* An expert testified that she did in fact suffer from the syndrome. *Id.* at 935. However, the expert's opinion was based solely on meetings with Defendant and Defendant's statements of abuse. *Id.* Later, at trial, testimony from victim's brother and ex-wife proved that the victim never raised a hand to Defendant and that the victim had no history of abusing his ex-wife in any way. *Id.*

174. See WALKER, *supra* note 18, at 55.

Battered women are not constantly being abused, nor is their abuse inflicted at totally random times. . . . So far, I have been unable to estimate how long a couple will remain in any one phase [of the cycle theory of violence], nor can I predict how long a couple will take to complete a cycle.

Id.

both physical and psychological, increase over time.¹⁷⁵ As the abusive relationships progressed, the battered women who killed their batterers reported that they “became convinced that their partners either could or would kill them, based on the severity and frequency of violence, verbal threats to kill, and an apparent diminution of concern by the abusers for the harm they were inflicting.”¹⁷⁶ Thus, when a jury considers whether a woman does in fact suffer from Battered Woman’s Syndrome, the length of the abusive relationship can serve as an indicator of how severe the abuse became before the battered woman fatally ended it. If an abusive relationship lasted only a few months to a year, chances are the abuse did not escalate to that suffered by a woman who experienced a ten- or fifteen-year abusive relationship.¹⁷⁷

B. *Severity of Abuse*

Abuse can come in many ranges. Minor assaults may include “a slap in the face, a smack on the rear end, a pinch on the cheek or arm, a playful punch, and hair pulling.”¹⁷⁸ Though these may seem inconsequential, if received regularly and without respect to the woman’s welfare, Dr. Walker considers these actions battering behavior.¹⁷⁹ Further, these are the exact types of minimal attacks that lead to major physical assaults.¹⁸⁰ For example, hitting or lightly punching a woman the first time, makes the second time easier, the third time even easier, until it eventually escalates to uncontrollable behavior.¹⁸¹ “Major physical [attacks] include[:] slaps and punches to the face and head; kicking, stomping, and punching all over the body; choking to the point of consciousness loss; pushing and throwing across a room, down the stairs, or against objects . . . stabbing and mutilation . . .”¹⁸² It is important to consider, aside from the physical violence, the terror inflicted on the battered woman as well.¹⁸³ “Batterers reportedly would frighten their women with terrorizing descriptions of how they would torture

175. See ANGELA BROWNE, WHEN BATTERED WOMEN KILL 68–69 (1987) (“The frequency with which abusive incidents occurred increased over time, with [forty] percent of women in the homicide group reporting that violent incidents occurred more than once a week by the end of the relationship.”).

176. *Id.* at 68–69.

177. *Id.*

178. WALKER, *supra* note 18, at 79.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. See WALKER, *supra* note 18, at 75.

them. They often backed up these descriptions through the use of guns, knives, and other weapons in their abusiveness.”¹⁸⁴

Thus, when a jury considers the severity of abuse inflicted on women attempting to prove that they suffered from Battered Woman’s Syndrome, it is important that they take into account both the physical and psychological effects of abuse. Though minor versus major physical violence is rather apparent, perhaps a good standard to judge the culmination of severity would be similar to a “shocks the conscience” standard.¹⁸⁵ This would be beneficial since the range of abuse is so great and unique to each individual case. It would be unfair to label specific abuse “severe” and hold more minor abusive incidents to not be severe enough to establish Battered Woman’s Syndrome.

C. *Opportunity to Flee*

It is almost unbelievable that a woman would stay with a man who abused her so severely that she was forced to kill him in order to finally get away. Most women, those who have been fortunate enough to either not experience an abusive relationship or those who saw the warning signs and escaped early, cannot fathom what could possibly encourage these battered women to remain with their batterer. This is precisely why expert testimony regarding Battered Woman’s Syndrome is so vital to the court system.

Studies show that women who retreat from the residence when attacked by their co-occupant spouse or boyfriend may, in fact, increase the danger of harm to themselves due to the possibility of attack after [their] separation. . . . Experts in the field explain that separation or retreat can be the most dangerous time in the relationship for the victims of domestic violence¹⁸⁶

Another main reason many women stay in their abusive relationships is due to the extreme change in circumstances that often occurs after an intense violent episode.¹⁸⁷ This is referred to as phase three of the cycle theory of violence.¹⁸⁸ In this stage, the batterer begins to behave in a loving manner, begs for forgiveness, and promises never to beat his partner again.¹⁸⁹ He will

184. *Id.*

185. *See Rochin v. California*, 342 U.S. 165, 175 (1952) (Black, J., concurring) (compares “shocks the conscience” to running counter to the “decencies of civilized conduct”).

186. *Weiland v. State*, 732 So. 2d 1044, 1053 (Fla. 1999).

187. WALKER, *supra* note 18, at 65.

188. *Id.*

189. *Id.*

recruit others to plead his case, usually his mother, father, and siblings—whoever he can get to work on the woman's guilt—telling her that she is all he has.¹⁹⁰ Although everyone acknowledges that the batterer is at fault, “the battered woman [is] held responsible for the consequences of any punishment he receive[s].”¹⁹¹ What adds to the ability to persuade the woman to remain in the relationship are her traditional values, a very common trait among battered women.¹⁹² She wants to believe that this time he really does mean it, and since she realizes he needs help and believes she is the only one who can help him, she convinces herself that this is what love is.¹⁹³ Moreover, this period further pushes away anyone who may have been willing to assist the battered woman: “Helpers of battered women become exasperated at this point, since the women will usually drop charges, back down on separation or divorce, and generally try to patch things up until the next acute incident.”¹⁹⁴ Thus, phase three only reinforces a battered woman's refusal to leave.¹⁹⁵

Beyond the fear that more violence will result upon leaving, and the phase three period of a misguided hope for change, there are other factors which keep an abused woman in an abusive relationship. Women are more likely “to be the peacekeepers in [a] relationship[];” they feel they are responsible for making the relationship work,¹⁹⁶ and thus they remain with a feeling of obligation to their mate.¹⁹⁷ Further, prior threats that the batterer will kill himself or his children, threats to run away with the children, a lost self-esteem, the adverse economic consequences of leaving, and the loss of “psychological energy to leave,” are more reasons why a battered woman remains in her abusive relationship.¹⁹⁸ It is also important to recognize that an abused woman may have nowhere to go.¹⁹⁹ It is very possible that the abuser may have isolated the woman from her family and friends, forcing her to stay in the relationship since she has no one else to turn to.²⁰⁰

Thus, it is very important that a jury fully understand why a battered woman may not leave. This is perhaps the most important of the three elements, as it best establishes the woman's lack of reasonable ability to retreat.

190. *Id.* at 66–67.

191. *Id.*

192. WALKER, *supra* note 18, at 67.

193. *See id.* at 66–68.

194. *Id.* at 68.

195. *See id.* at 69.

196. Rosman, *supra* note 22, at 809.

197. *See id.*

198. *Id.*

199. *See Weiland v. State*, 732 So. 2d 1044, 1054 (Fla. 1999).

200. *See id.*

If a woman had an opportunity to flee, if she was financially capable or had family or friends who were willing to help her get away from her abuser, it is more likely she could have escaped. Further, when there are no children involved, a woman has a better chance of absconding. The jury should take these factors into account when determining whether the woman had a decent opportunity to flee. Other evidence to consider might be proof that she had attempted to leave on a prior occasion, and was either unable to or had escaped but returned and consequently suffered some sort of physical or emotional abuse from her abuser.

VI. CONCLUSION

Unfortunately, Battered Woman's Syndrome is not going to be cured anytime soon, if at all. Since the concept is relatively new in the psychological field and extremely new to the legal world, there is still a great deal of information still being learned about the syndrome, its causes, and its effects. Until Battered Woman's Syndrome is more developed, it is important that Florida courts come up with a standard to apply to women attempting to use Battered Woman's Syndrome as part of a self-defense claim. Though expert testimony is vital to the jury understanding Battered Woman's Syndrome, it should not be used as the sole determinant when looking to apply the syndrome. By combining the expert opinion with the evidence presented at trial, the jury essentially will be evaluating the testimony of the defendant—the battered woman—along with evidence that will either corroborate her suffering from Battered Woman's Syndrome or prove that she was not. Though the members of the jury do not come close to qualifying as experts on Battered Woman's Syndrome, it is their duty to determine whether a defendant's self-defense claim may be used for justifiable homicide. Since Battered Woman's Syndrome seeks to explain how a battered woman may meet the elements of self-defense, it will essentially be up to the jury to determine whether she does in fact suffer from the syndrome. Thus, it is extremely significant that the jury has a standard to decide this.

By incorporating this three-pronged test into self-defense claims using Battered Woman's Syndrome, the court will be able to begin establishing a precedent for such cases. Further, it will give defense attorneys an indication of when the use of the Battered Woman's Syndrome would be appropriate as part of a self-defense argument. It would also take away from the unreliability of the expert's opinion, which is based solely on the testimony of the defendant.²⁰¹ However, it is important to recognize that the purpose of this

201. See *Gonzalez-Valdes v. State*, 834 So. 2d 933, 935 (Fla. 3d Dist. Ct. App. 2003).

standard is in no way meant to undermine the use of expert testimony regarding Battered Woman's Syndrome. Such testimony is vital to giving the jury an understanding of the syndrome, its effects on the battered woman, and her perception of the situation at the time she chose to murder her abuser. The case law regarding Battered Woman's Syndrome should remain in effect.²⁰² However, the three-pronged standard should be added to the already established precedent in order to give justice to both sets of victims: the defendant and the abuser she murdered.

202. See *Weiand*, 732 So. 2d at 1044 (finding a privilege of non-retreat from one's own residence before resorting to deadly force against a co-occupant if necessary to prevent death or great bodily harm); *State v. Hickson*, 630 So. 2d 172 (Fla. 1993). *Hickson* established two options for a defendant's use of expert testimony regarding Battered Woman's Syndrome when that defendant claims to be suffering from Battered Woman's Syndrome. See *id.* at 176. The defendant can choose to either have the "expert testify directly about [their] case" and thus be subjected to opposing counsel's expert, or have an expert present general information regarding the syndrome, not directly related to the defendant. See *id.*; see also *Rogers v. State*, 616 So. 2d 1098, 1100 (Fla. 1st Dist. Ct. App. 1993) (finding the general acceptance of Battered Woman's Syndrome in the scientific community and thus establishing admissibility of expert testimony without a case-by-case determination).

NOTES AND COMMENTS

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